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NO. COA13-441
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

TERRY GARMON,
Plaintiff,

v.

Rowan County
No. 11 CVS 2287

TODD CLAYTON HAGANS,
Defendant.

Appeal by plaintiff from judgment entered 19 October 2012
by Judge W. Erwin Spainhour in Rowan County Superior Court.
Heard in the Court of Appeals 24 September 2013.

*Doran, Shelby, Pethel and Hudson, P.A., by Michael Doran,
for plaintiff.*

*Vernis & Bowling of Charlotte, PLLC, by R. Gregory Lewis,
for defendant.*

McCULLOUGH, Judge.

Terry Garmon ("plaintiff") appeals from a judgment finding
him contributorily negligent and denying him any relief. For
the following reasons, we find no error.

I. Background

Plaintiff initiated this action on 12 August 2011 with the filing of a complaint in Rowan County Superior Court. In the complaint, plaintiff sought damages from Todd Clayton Hagans ("defendant") for injuries he sustained as a passenger in a single vehicle accident in the early morning hours of 28 November 2010, alleging the accident was caused by defendant's negligent operation of said vehicle. Defendant's answer to the complaint was filed on 20 December 2011. In the answer, defendant "admitted that [he] was negligent in failing to keep his vehicle under proper control[]" and "that such negligence was the proximate cause of the accident." Defendant, however, denied all further allegations of negligence and asserted affirmative defenses of contributory negligence, imputed negligence, and credit for payment by agent.

The case was called for jury trial in Rowan County Superior Court before the Honorable W. Erwin Spainhour on 17 October 2012. As noted in the pretrial order, there were three contested issues at trial: (1) whether plaintiff was injured by the negligence of the defendant; (2) whether plaintiff, by his own negligence, contributed to his injuries; and (3) the amount plaintiff was entitled to recover for his injuries.

Following the presentation of evidence, but before the case was submitted to the jury, defendant stipulated that plaintiff was injured by his negligence and made a notation on the pretrial order that the first issue was admitted. Accordingly, only the issues of plaintiff's contributory negligence and damages were submitted to the jury.

On 18 October 2012, the jury returned a unanimous verdict finding that plaintiff, by his own negligence, contributed to his injury. Judgment in favor of defendant was then entered on the jury verdict on 19 October 2012, barring plaintiff from any recovery. Plaintiff filed notice of appeal on 16 November 2012.

II. Discussion

Amendment of Answer

In the first issue on appeal, plaintiff contends the trial court erred in allowing defendant to amend his answer during trial to include plaintiff's knowledge of impaired driving as a ground for contributory negligence.

Amendment of pleadings is governed by N.C. Gen. Stat. § 1A-1, Rule 15 and is a matter within the sound discretion of the trial court. See N.C. Gen. Stat. § 1A-1, Rule 15 (2011); *Massey v. Hoffman*, 184 N.C. App. 731, 733, 647 S.E.2d 457, 459 (2007). "[W]here matters are left to the discretion of the trial court,

appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

In addressing this first issue on appeal, we find it important to understand the context of the purported amendment. In this case, defendant did not specifically plead impaired driving when raising contributory negligence as an affirmative defense, but pled plaintiff was negligent in that he:

- a. Failed to take reasonable steps for his own safety;
- b. Failed to remonstrate the Defendant as driver of the vehicle in which he was a passenger, after having the time and opportunity to observe what Plaintiff alleges in his complaint were negligent acts in the operation of a motor vehicle;
- c. Knew or should have known, prior to entering the vehicle which Defendant was driving and at a time when Plaintiff was in a safe haven, that the potential for injury or harm to Plaintiff was reasonably foreseeable;
- d. Knowingly, willingly, wantonly and/or negligently allowed Defendant to operate a motor vehicle and rode with the Defendant,

who he knew or in the exercise of reasonable care should have known was likely to operate the vehicle in an imprudent and negligent manner;

e. Acted willfully and wantonly, and in a manner so as to make it reasonably foreseeable that Plaintiff and others could be injured; and

f. Was otherwise careless and negligent.

Yet, when plaintiff asked defendant during direct examination at trial whether there was any reason that plaintiff would have been on notice not to get in the car with defendant, defendant responded, "I mean, we had all been drinking together all day. I mean, if he was not wanting to be with a drunken driver or a drinking driver, then he probably shouldn't have rode with me because he'd have been with me all day that day drinking." Immediately following defendant's response, plaintiff directly inquired whether defendant was driving drunk. Defendant responded, "No. I plead the Fifth. I had been drinking that day."

When defendant plead the Fifth, plaintiff moved "to strike the affirmative defense of any type of alcohol impairment being evidence of his being contributory negligent." Citing *Lovendahl v. Wicker*, 208 N.C. App. 193, 702 S.E.2d 529 (2010), plaintiff argued when defendant pleads the Fifth in a civil case, he loses

his contributory negligence defense. This is because "the privilege against self-incrimination is intended to be a shield and not a sword. . . . [I]f a plaintiff seeks affirmative relief or a defendant pleads an affirmative defense, he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense." *Id.* at 202, 702 S.E.2d at 535 (quotation marks, citations, and alterations omitted).

Upon review of *Lovendahl*, the trial court stated, "I'm going to have to allow [plaintiff's] motion." The court reasoned that, although defendant was willing to testify he had been drinking prior to the accident, the real issue was how much defendant had been drinking because drinking and driving itself is not against the law in North Carolina.

Defendant then sought clarification, stating he would testify concerning how much he had to drink. Defendant did not, however, want to testify that he was driving drunk because Officer Richard Tester, the officer who responded to the accident scene, was present at trial and could recharge him with DWI if he were to incriminate himself. After a back and forth concerning the DWI charges, the trial court stated:

Okay. Well, you can ask him any questions you wish to but I think as to -- I think

it's a material question. He knows whether he was impaired. That's the issue: was he impaired or not? So he knows that, so you're just going to have to deal with it. I mean, I think I've got to -- I think that case law compels the Court to -- unless he wants to admit driving while impaired. The fact is, though, I will inform the defendant that a mere confession standing alone is insufficient to convict someone. You can advise him of that, but that's the law. I don't know what -- I don't know what the facts are underlying. I don't know what the officer would say about how he looked or, you know, of alcohol about his person or any of the facts about that. The fact is a confession standing alone is insufficient. . . .

Defendant's counsel then asked to speak with his client and the court took a recess. Upon reconvening, defendant withdrew his assertion of the Fifth.

Plaintiff then argued that alcohol, which defendant was now going to testify about, was not part of the negligence or contributory negligence claims in the pleadings. The trial court responded, "[w]ell, it's long been the law that counsel for a party that moved after the evidence is even in to amend his pleadings to conform with the evidence, I take it that could be done here[.]" Defendant then objected to the evidence and the objection was overruled.

Defendant subsequently testified before the jury that he didn't think he was drunk, but he had drunk enough to affect his driving.

Plaintiff now argues the trial court abused its discretion in allowing defendant to amend the pleadings to assert impairment *ex meru moto* in response to an issue concerning defendant's Fifth Amendment privilege. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 15(b) governs amendments to conform to the evidence.

When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.*

N.C. Gen. Stat. § 1A-1, Rule 15(b) (emphasis added). Yet, as this court has noted, "[a] formal amendment to the pleadings is

needed only when evidence is objected to at trial as not within the scope of the pleadings.'" *Dep't of Transportation v. Bollinger*, 121 N.C. App. 606, 609, 468 S.E.2d 796, 798 (1996) (quoting *Taylor v. Gillespie*, 66 N.C. App. 302, 305, 311 S.E.2d 362, 364 (1984)).

In this case, we find amendment of the pleadings was unnecessary where the evidence of impairment falls within the scope of defendant's contributory negligence pleadings. See N.C. Gen. Stat. § 1A-1, Rule 8(c) (2011) (In pleading an affirmative defense, "[s]uch pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved.") Moreover, we find plaintiff has failed to show prejudice where the record demonstrates plaintiff knew of the possible DWI charges against defendant throughout the course of this action and was not surprised to learn that defendant had been drinking prior to the accident.

Contributory Negligence

In the second issue on appeal, plaintiff contends the trial court erred in submitting the issue of contributory negligence

to the jury. This issue arises in the context of the trial court's denial of plaintiff's motions pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 for directed verdict at the close of the evidence and for judgment notwithstanding the verdict following the rendering of the jury's verdict.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). As this Court has explained,

[i]f there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied. Thus, where a defendant pleads an affirmative defense such as contributory negligence, a motion for directed verdict is properly granted against the defendant where the defendant fails to present more than a scintilla of evidence in support of each element of his defense.

Whisnant v. Herrera, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004) (quotation marks and citations omitted).

If the evidence raises only a mere conjecture of contributory negligence, the issue should not be submitted to the jury. However, since negligence usually involves issues of due care and reasonableness of actions under the circumstances, it is especially appropriate for determination by

the jury. In borderline cases, fairness and judicial economy suggest that courts should decide in favor of submitting issues to the jury.

Brown v. Wilkins, 102 N.C. App. 555, 557, 402 S.E.2d 883, 884 (1991) (quotation marks and citations omitted). The same standard applies to a review of the trial court's ruling on judgment notwithstanding the verdict. See *Tomika Investments, Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000) ("On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury.").

In asserting the trial court erred in submitting the issue of contributory negligence to the jury, plaintiff contends there was insufficient evidence defendant was impaired or the accident was a consequence of defendant's impairment. Plaintiff claims the only evidence supporting the contributory negligence claim was defendant's own conclusory statements to the effect, "I was drinking and it affected my driving."

To bolster his argument that the evidence was insufficient, plaintiff cites *Efird v. Hubbard*, 151 N.C. App. 577, 565 S.E.2d 713 (2002), and argues "not even plaintiff would have been

entitled to a jury instruction on negligence based upon impaired driving." In *Efird*, this Court reiterated that,

"[m]ere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal connection between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was the proximate cause of the collision."

Id. at 580, 565 S.E.2d at 716 (quoting *Atkins v. Moye*, 277 N.C. 179, 186, 176 S.E.2d 789, 794 (1970)). Applying the above statement of the law, this Court then upheld the trial court's order of summary judgment in favor of the alleged negligent defendant in *Efird*, reasoning that "although [the] plaintiff presented proof that [the] defendant had a blood alcohol content of 0.068 at the time of the accident, [the] plaintiff failed to present any evidence that would establish a causal relationship between [the] defendant's blood alcohol content and the accident." *Id.*

Upon review of the record in the present case, we find this case to be one of those borderline cases where submission of the issue of contributory negligence to the jury was proper.

Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant ... to produce the injury of which the plaintiff complains.

Our Supreme Court has previously stated that two elements, at least, are necessary to constitute contributory negligence. The defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury. There must be not only negligence on the part of the plaintiff, but contributory negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action.

Whisnant, 166 N.C. App. at 722, 603 S.E.2d at 850 (quotation marks, citations, and emphasis omitted).

Viewing the evidence at trial in the light most favorable to the defendant, the non-moving party, the evidence tended to show the following: Defendant, plaintiff, and a mutual friend began drinking alcohol at plaintiff's mother's house shortly after noon on 27 November 2010. Plaintiff supplied the alcohol. Thereafter, defendant, plaintiff, and their mutual friend spent much of the afternoon driving around in defendant's mother's vehicle. During this time, they consumed a twelve-pack of beer that plaintiff purchased at a convenience store. Later that evening, in the hours prior to the accident, defendant continued to drink beer purchased for him by plaintiff and their mutual friend at a bar. Defendant, plaintiff, and their mutual friend were on their way home when the accident occurred in the early morning hours of 28 November 2010. Defendant was driving.

When questioned about the accident, defendant testified that he was familiar with the road, but was going too fast. Although defendant refused to admit he was drunk, defendant acknowledged he had drunk enough to affect his driving and he was not paying attention to how fast he was going. When the trial court sought clarification whether alcohol affected defendant's driving, defendant definitively stated, "[i]t affected my driving." Moreover, Officer Tester testified that he detected a strong odor of alcohol on defendant as he attempted to free him from the vehicle.

We hold the above evidence is sufficient to allow the jury to determine whether defendant's consumption of alcohol caused or contributed to the accident and whether plaintiff knew or should have known that defendant was impaired. Accordingly, the trial court did not err in submitting the issue of contributory negligence to the jury.

Proximate Cause Instruction

In plaintiff's final issue on appeal, plaintiff contends the trial court erred by failing to instruct the jury on proximate cause as he requested during the charge conference.

On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such

manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006) (citations and quotation marks omitted).

A specific jury instruction should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury."

Outlaw v. Johnson, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002)).

During the charge conference in this case, the trial court informed the parties that it would instruct the jury that the parties stipulated plaintiff was injured by defendant's negligence and would then provide instructions on the issues of contributory negligence and damages. The contributory

negligence instructions proposed by the trial court included N.C.P.I.-Civil 104.10, 104.20, 104.21, and 104.35.

Concerned there was no proximate cause instruction in N.C.P.I.-Civil 104.21 and the instructions "[did] not tie the fact of a collision to the fact of impairment," plaintiff, citing *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970), requested the following special instruction be added to N.C.P.I.-Civil 104.21.

Such conduct, however, will not constitute contributory negligence unless - like any other negligence - it is causally related to the accident. Mere proof that the plaintiff knew or reasonably should have known that defendant was impaired by alcohol at the time he got in the vehicle, does not establish a causal relation between the defendant's impaired condition and the collision. Defendant's impaired condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision.

In requesting the instruction, plaintiff argued that "if [his] negligence in getting in [the] car was because [defendant] had been drinking and couldn't correctly drive a car, then [defendant must] show that his drinking caused this accident, not his speed, not the way he . . . tried to manage the roadway." In the alternative, defendant asked the trial court

to include the "little proximate cause sentence" in N.C.P.I.-Civil 104.20 in N.C.P.I.-Civil 104.21.

After reviewing the instructions, the trial court refused plaintiff's request for the special instruction and instead agreed to add the phrase, "if it proximately causes or contributes to the passenger's injury[,]" to the end of the first paragraph of N.C.P.I.-Civil 104.21.

The trial court then instructed the jury on contributory negligence as proposed, including the definitions of negligence and proximate cause found in N.C.P.I.-Civil 102.11 and N.C.P.I.-Civil 102.19. Specifically concerning the contributory negligence of a gratuitous passenger who voluntarily and knowingly rides with an impaired driver, the trial court instructed the jury pursuant to the following altered version of N.C.P.I.-Civil 104.21:

Ordinarily, a guest passenger must exercise that degree of care for his own safety which a reasonably careful and prudent person would exercise under all the circumstances then existing. However, when a guest passenger voluntarily rides with an operator who is impaired by alcohol and the guest passenger knew or should have known that the operator was impaired, the conduct of the guest passenger would be negligence within itself *if it proximately causes or contributes to the passenger's injury.*¹

¹ The italicized portion signifies the statement on proximate

The mere fact that a person operates a vehicle after consuming alcohol is not sufficient by itself to establish that such person was driving while impaired. A person is impaired when he is under the influence of an impairing substance when he has consumed a sufficient quantity of that impairing substance to cause him to lose the normal control of his physical or mental faculties or both to such an extent that there is an appreciable impairment of either both -- of either or both of those faculties.

Alcohol is an impairing substance. Now, the mere fact that a person rides with an operator who is impaired is not sufficient by itself to establish that he knew or had reason to know that the operator was impaired. A person knows of a thing when he has actual knowledge of it. A person has reason to know of a thing when in the exercise of ordinary care he should have acquired knowledge of it under all the circumstances existing at the time.

Plaintiff now argues it was reversible error for the trial court not to provide instructions concerning proximate cause on the issue of whether the accident was a result of defendant's impairment. We are not persuaded by plaintiff's argument.

Although we recognize the special instruction requested by plaintiff is an accurate statement of the law, we find the jury instruction given by the trial court sufficient to explain the law to be applied in this case; particularly in light of the

cause added to the pattern instruction by the trial court.

fact the trial court added the proximate cause provision as requested by plaintiff in the alternative. Thus, where "[t]he preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions[,]” *In re Will of Leonard*, 71 N.C. App. 714, 717, 323 S.E.2d 377, 379 (1984), we hold the trial court did not err in refusing to add the special jury instruction.

III. Conclusion

For the reasons set forth above, we hold the trial court did not err in allowing the evidence of impairment at trial, submitting the issue of contributory negligence to the jury, or denying plaintiff’s request for a special jury instruction on proximate cause.

No error.

Judges McGEE and DILLON concur.

Report per Rule 30(e).