IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-754

Filed: 6 March 2018

Johnston County, No. 15 CVS 3612

BETTY JO O'NEAL, Plaintiff,

v.

JEFFREY HUNTER FOX AND LISA POLLEY FOX, Defendants.

Appeal by Plaintiff from judgment entered 9 March 2017 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 11 January 2018.

Brent Adams & Associates, by Gregory A. Posch and Brenton D. Adams, for the Plaintiff.

Hedrick Gardner Kincheloe & Garofalo LLP, by Kristie L. Hedrick and M. Duane Jones, for the Defendants.

DILLON, Judge.

Betty Jo O'Neal ("Plaintiff") appeals from the trial court's judgment entering a jury verdict finding her contributorily negligent. Plaintiff contends that the court erred in instructing the jury on contributory negligence, and, in the alternative, that

the trial court should have instructed the jury on the last clear chance doctrine as well. After careful review of the record on appeal, we affirm.

I. Background

The evidence at trial tended to show as follows:

In September 2013, Plaintiff and Jeffrey Hunter Fox ("Defendant") were involved in a motor vehicle accident at an intersection in Clayton. As Plaintiff approached the intersection traveling north, Defendant approached from Plaintiff's left traveling east. Plaintiff saw Defendant approaching the intersection at a high speed. Although there was a stop sign between Defendant and the intersection, Defendant failed to stop before entering the intersection. Plaintiff entered the intersection and struck Defendant's vehicle along its passenger side in essentially a "T," damaging the front end of Plaintiff's vehicle.

The officer who responded to the accident testified that there were no braking marks on the road along either party's approach. Plaintiff testified that she saw Defendant's vehicle "a little bit before" Defendant reached the intersection and that it did not appear to her that Defendant was going to stop.

Plaintiff moved for a directed verdict on the issue of her contributory negligence, but the trial court denied the motion and presented the issue to the jury. Plaintiff requested that the jury be instructed on the doctrine of last clear chance if

they were to be instructed on contributory negligence, but the trial court denied Plaintiff's request.

The jury returned a verdict in Defendant's favor based on its finding that Plaintiff was contributorily negligent. Plaintiff moved for a judgment notwithstanding the verdict (JNOV), and subsequently for a new trial, but the trial court denied each motion. Plaintiff appeals.

II. Analysis

Plaintiff makes two arguments on appeal, which we address each in turn.

A. Contributory Negligence

Plaintiff first argues that the trial court erred in denying her motions for a directed verdict and motion for JNOV regarding the charge of contributory negligence. When reviewing the denial of such motions, this Court examines "whether the evidence, taken in the light most favorable to the non-moving party, [was] sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013).

Contributory negligence is "negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). It is rightfully characterized as an affirmative defense, pleaded by the defendant in response to a plaintiff's

allegations of negligence. *Clary v. Alexander Cty. Bd. of Ed.*, 286 N.C. 525, 532, 212 S.E.2d 160, 165 (1975). Therefore, contributory negligence requires that the defendant prove the elements of negligence against the plaintiff, *see id.,* namely:

> First that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff . . . and, second that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.

Ward v. Carmona, 368 N.C. 35, 37, 770 S.E.2d 70, 72 (2015) (citation omitted).

Plaintiff argues that contributory negligence is not applicable in this case because prior case law has held that the circumstances herein do not warrant a contributory negligence instruction.[1] Indeed, our Supreme Court has held that a motorist "has a right to assume that any motorist approaching from [her] left on the intersecting street will stop in obedience to the red light [or stop sign] facing [the approaching motorist] unless and until something occurs that is reasonably calculated to put [her] on notice that such [approaching] motorist will unlawfully

[1] Plaintiff cites *Ellis v. Whitaker*, 156 N.C. App. 192, 196, 576 S.E.2d 138, 141 (2003) (holding that a plaintiff's speeding raises conjecture as to her contributory negligence, but does not mean she should have expected a defendant to be negligent); *Maye v. Gottlieb*, 125 N.C. App. 728, 729, 482 S.E.2d 750, 751 (1997) (holding that the existence of a cautionary sign alone was not enough to put a party on notice of another's potential negligence); and *Snead v. Holloman*, 101 N.C. App. 462, 467, 400 S.E.2d 91, 94 (1991) (holding that a plaintiff's failure to apply brakes before an accident alone did not create an issue of fact regarding contributory negligence).

enter the intersection." *Cicogna v. Holder*, 345 N.C. 488, 490, 480 S.E.2d 636, 637 (1997) (citations omitted).

Our Supreme Court, however, has further held that a motorist with the right-of-way still has the duty to keep a proper lookout, and can be found contributorily negligent for an accident if there is *additional* evidence offered that said motorist did not keep a proper lookout; that is, if there is "evidence of negligence in addition to a collision in an intersection." *Id.* For instance, in *Bass v. Lee*, a motorist with the right-of-way was found to be contributorily negligent when there was additional evidence that the motorist's passenger warned the motorist that the other vehicle was not going to stop, but the motorist did not slow down to avoid the collision. *Bass v. Lee*, 255 N.C. 73, 80, 120 S.E.2d 570, 574 (1961). In *Currin v. Williams*, our Supreme Court held, in a case involving a collision at an intersection, that the issue of contributory negligence on the part of the motorist with the right-of-way was an issue for the jury where there was evidence that said motorist was not paying attention to his surroundings when he entered the intersection. *Currin v. Williams*, 248 N.C. 32, 36-7, 102 S.E.2d 455, 458-59 (1958); *see also Hyder v. Asheville Storage Battery Co.*, 242 N.C. 553, 557, 89 S.E.2d 124, 128 (1955); *Marshburn v. Patterson*, 241 N.C. 441, 447-48, 85 S.E.2d 683, 687-88 (1955).

Here, there was additional evidence presented tending to show that Plaintiff acted negligently in causing the accident. Specifically, Plaintiff herself testified that

she noticed Defendant's vehicle as she approached the intersection and understood that he was not going to stop before entering the intersection.[2] Further, Plaintiff entered the intersection without braking. We note that Plaintiff also asserted that she "had no time to react," and could not have contributed to her injuries. However, it is not the purpose of our review to determine whether Plaintiff was, in fact, contributorily negligent. Rather, we review only to determine whether the evidence could possibly support such a finding by the jury.

Considering the evidence in the light most favorable to Defendant, we hold that it was proper for the trial court to deny Plaintiff's motion and submit the issue of contributory negligence to the jury. It is not beyond reason for a rational juror to reflect on the evidence in this case and find that Plaintiff was contributorily negligent. Evidence that Plaintiff failed to brake before "T"-ing into Defendant's vehicle is evidence that Plaintiff failed in her duty to keep a proper lookout. Additionally, Plaintiff's own testimony that she saw Defendant rapidly approaching, believed he would not stop, and then failed to brake also satisfied the burden of proof required to allow the jury to decide the issue of contributory negligence.

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[2] We note Plaintiff's contention that *Defendant* did not satisfy his burden of proof on the issue of contributory negligence because he failed to present any evidence in support thereof. True, the evidence cited in this opinion tending to show that Plaintiff was contributorily negligent was presented by Plaintiff. But our Supreme Court has held that a plaintiff "may relieve the defendant of the burden of showing contributory negligence when it appears from [the plaintiff's] own evidence that [the plaintiff] was contributorily negligent." *Price v. Miller*, 271 N.C. 690, 694, 157 S.E.2d 347, 350 (1967)). We find that Plaintiff's evidence sufficiently met this burden, and no further evidence from Defendant was required.

B. Last Clear Chance

In her second argument, Plaintiff alleges the trial court erred in not instructing the jury on the doctrine of last clear chance alongside its instruction for contributory negligence. In making its decision, the trial court found that Plaintiff did not properly plead last clear chance.

The doctrine of last clear chance allows a plaintiff whose contributory negligence in some part caused her own injury to recover, nonetheless, if she can prove that the defendant had the last clear chance to avoid the accident. Specifically, the plaintiff must prove, in part, "[1] that the [defendant] knew, or by the exercise of reasonable care could have discovered, the [plaintiff]'s perilous position and [her] incapacity to escape from it before the endangered [plaintiff] suffered injury at [her own] hands; [2] that the [defendant] had the time and means to avoid injury to the endangered [plaintiff] by the exercise of reasonable care after [the defendant] discovered, or should have discovered, the [plaintiff]'s perilous position and [her] incapacity to escape from it; and [3] that the [defendant] negligently failed to use the available time and means to avoid injury to the endangered [plaintiff], and for that reason struck and injured [her]." *Vancamp v. Burgner*, 328 N.C. 495, 498, 402 S.E.2d 375, 376-77 (1991).

Current North Carolina jurisprudence categorizes last clear chance as a "plea in avoidance" that must be affirmatively pleaded by the plaintiff. *Proffitt v. Gosnell*,

___ N.C. App. ___, ___, 809 S.E.2d 200, 212 (2017). In order to properly plead the doctrine of last clear chance, the plaintiff must either (1) allege in her complaint facts sufficient to show the doctrine applies, or (2) file a reply to the defendant's answer formally alleging the doctrine. *Vernon v. Crist*, 291 N.C. 646, 652, 231 S.E.2d 591, 594-95 (1977).

We hold that the trial court appropriately refused to instruct the jury on last clear chance because it was not properly pleaded by Plaintiff. After Defendant filed his answer on 24 February 2016, Plaintiff filed no additional documents. If Plaintiff wanted to employ the last clear chance doctrine, the most appropriate way to do so would have been a responsive pleading following Defendant's answer. Without a responsive pleading, Plaintiff relied on the language of her complaint to raise the last clear chance doctrine. We hold that the language of Plaintiff's complaint was insufficient to plead the doctrine of last clear chance.

In her complaint, Plaintiff pleaded:

> 13. At the time of the . . . collision and immediately prior thereto, [Defendant] negligently breached his duty . . . in that [he]:
> a. Failed to keep a proper lookout;
> b. Failed to keep [his] vehicle under proper control;
> c. Made an unsafe movement;
> d. Failed to stop to upcoming traffic;
> e. Failed to yield to the right of way at the intersection . . . .

Plaintiff continued by alleging that Defendant's actions caused Plaintiff to sustain multiple injuries in the vehicle accident. Although the words "last clear chance" are

not required to plead the doctrine, *Vernon,* 291 N.C. at 652, 231 S.E.2d at 595, at no point did Plaintiff allege that Defendant knew Plaintiff was nearing the intersection and would place herself in danger. Plaintiff did not allege any facts beyond Defendant's negligent entry into the intersection that showed Defendant had the time to react *after* Plaintiff placed herself in a perilous position. Indeed, it was Plaintiff who struck Defendant. Therefore, we hold that Plaintiff's pleadings were insufficient to raise the doctrine of last clear chance.

C. Motion for New Trial

Plaintiff also challenges the trial court's denial of her motion for a new trial. "A trial court's discretionary decision to deny or grant a new trial may be reversed on appeal only when the record affirmatively demonstrates a manifest abuse of discretion." *Kummer v. Lowry,* 165 N.C. App. 261, 263, 598 S.E.2d 223, 225 (2004) (internal citation omitted); *see also In re Will of Buck*, 350 N.C. 621, 628, 516 S.E.2d 858, 862-63 (1999) ("[T]he trial court is required, in essence, to determine whether the verdict, because it is against the weight of the credible evidence, will result in an injustice if it is allowed to stand.").

We hold that the evidence was enough that a reasonable jury could determine that Plaintiff was contributorily negligent. Plaintiff admitted that she saw Defendant as he approached the intersection, that it was clear to her that Defendant was not going to stop, and that Plaintiff thereafter failed to brake before entering the

intersection herself. We also hold that Plaintiff failed to properly plead her request for an instruction on last clear chance. Further, the trial court did not abuse its discretion in denying Plaintiff's motion for a new trial because the jury's verdict was in accordance with the weight of the evidence before it, and no injustice arises from its decision.

AFFIRMED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).