IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-140

No. COA20-205

Filed 20 April 2021

Johnston County, No. 18 CVD 1144

MINA ISAK,
Plaintiff,
v.

KEITH LAWRENCE WILLIAMS,
Defendant.

Appeal by Plaintiff from the judgment dismissing the plaintiff's claims entered October 4, 2019 by Judge O. Henry Willis, Jr. in Johnston County District Court. Heard in the Court of Appeals 26 January 2021.

The Paynter Law Firm, P.L.L.C., by David D. Larson, Jr., for plaintiff-appellant.

Teague, Rotenstreich, Stanaland, Fox & Holt, P.L.L.C., by Joshua C. Rotenstreich, for defendant-appellee.

GORE, Judge.

¶ 1 On 4 January 2018, a two-car automobile accident occurred at the intersection of NC Highway 96 and NC Highway 42 in Clayton, Johnston County, North Carolina. At the intersection, there is yellow flashing caution light for drivers traveling east and west on NC 42 and stop signs with red flashing lights for drivers traveling north

and south on NC 96. The morning of the accident there was snow visible on unpaved surfaces. Mina Isak ("Plaintiff") lived in Clayton and traveled east on NC 42 to Wilson for work. Mr. Isak approached the flashing yellow caution light at the intersection, looked left and right but did not see anything. As he proceeded through the intersection, he heard a horn at the second of impact to the driver side of his vehicle. Defendant Keith Williams's vehicle ("Defendant") entered the intersection on NC 96 where the stop sign and flashing red light required a complete stop. He applied his brakes and realized his vehicle was not stopping. Defendant hit an icy patch on the road and his vehicle continued past the stop sign and collided with the Plaintiff's vehicle.

¶ 2 Plaintiff filed a Small Claims complaint for damages for loss of his car and towing and storage fees on 26 February 2018, and the cause proceeded to trial before a Magistrate on 4 April 2018. The Magistrate dismissed the Plaintiff's claims and on 11 April 2018, Plaintiff gave notice of appeal to the District Court. On 19 April 2018, Defendant filed an answer to the complaint, denying the allegation of liability and alleging affirmative defenses of plaintiff's contributory negligence and sudden emergency. In September 2019, the trial court held a jury trial and submitted to the jury two issues regarding liability: whether plaintiff was damaged by the negligence of defendant and if so, whether plaintiff contributed to his damage by his own negligence. The trial court, over the plaintiff's objection, also instructed the jury on

the doctrine of sudden emergency. Thereafter, the jury returned a verdict in favor of the Defendant, finding no negligence on the part of the Defendant. Because the evidence did not support an instruction of sudden emergency, we reverse and remand for a new trial

Discussion

¶ 3 The Plaintiff alleges that the trial court erred in instructing the jury on the doctrine of sudden emergency. Plaintiff argued at trial that the defendant was negligent based upon his failure to come to a complete stop and yield the right of way in the intersection**.** Defendant raised the defense of sudden emergency and asserted that he was not negligent in driving over an icy patch, running the stop sign, and colliding with the Plaintiff. The trial court concurred with the Defendant's asserted defense and over the Plaintiff's objection instructed the jury on the doctrine of sudden emergency.

¶ 4 Plaintiff contested the trial court's ruling as erroneous because the emergency experienced by Defendant was created in part by his failure to control his vehicle. We agree.

> We review challenges regarding the appropriateness of jury instructions to determine, first, whether the trial court abused its discretion, see Murrow v. Daniels, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988), and, second, whether such error was likely to have misled the jury. Union Cty. Bd. of Educ. v. Union Cty. Bd. of Comm'rs, 240 N.C. App. 274, 290-91, 771 S.E.2d 590, 601

> (2015). "[W]e consider whether the instruction [challenged] is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence." Minor v. Minor, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013).

Goins v. Time Warner Cable Se., LLC, 258 N.C. App. 234, 237, 812 S.E.2d 723, 726 (2018).

¶ 5 The standard of review requires two factors being present before the doctrine of sudden emergency can be applied: "(1) 'an emergency situation must exist requiring immediate action to avoid injury . . .,' and (2) 'the emergency must not have been created by the negligence of the party seeking the protection of the doctrine.'" *Allen v. Efird*, 123 N.C. App. 701, 703, 474 S.E.2d 141, 143 (1996) (citing *Conner v. Continental Industrial Chemicals, Inc*., 123 N.C. App. 70, 472 S.E.2d 176, 179 (1996)). "A sudden emergency instruction is improper absent evidence of a sudden and unforeseeable change in conditions to which the driver must respond to avoid injury." *Id.*

¶ 6 In *Allen,* the defendant had been driving on wet roads for some time prior to his car hydroplaning and causing the accident. *Id.* at 704, 474 S.E.2d at 143. The *Allen* court ruled that, in the absence of evidence showing a "sudden change of driving conditions" or of "any road condition . . . arising that he could not have avoided through the exercise of due care," "[t]he mere fact that defendant lost control under

static conditions does not merit a sudden emergency instruction." *Id.* (citations omitted).

¶ 7 At trial in the present case Defendant acknowledged that it had snowed the night before the accident, there was snow on the ground that morning, and that there was ice in some places on the road. Further, the Defendant acknowledged that he was driving slower as a result of the snowy and icy conditions. Defendant's argument is very similar to that of the defendant in *Sobczak v. Vorholt*, where this Court held the sudden emergency instruction was not supported by the evidence. *See Sobczak v. Vorholt*, 181 N.C. App. 629, 639, 640 S.E.2d 805, 812 (2007) ("These admissions of Defendant establish that he was on notice of a potential encounter with ice on the road, and that hitting ice as he drove was foreseeable. For this reason, the evidence does not sustain Defendant's contention that he was confronted with a sudden and unforeseeable change in road conditions, and that he was thereby called upon to respond to a sudden emergency.")

¶ 8 Therefore, the patch of black ice Defendant hit was not a sudden and unforeseeable change because, as in *Allen* and *Sobczak*, Defendant had been driving on static conditions. As a result, the sudden emergency instruction was improper.

¶ 9 The erroneous jury instruction constituted an error affecting a substantial right. The jury instruction given allowed the jury to find for the defendant if they found a sudden emergency, even if defendant's conduct otherwise might have been

negligent. In the present case, the jury's verdict was based on a finding that Defendant was not negligent and not upon contributory negligence of plaintiff. . Therefore, we are unable to say as a matter of law whether the erroneous jury instruction affected the jury's finding. As a result, we must find a substantial right was affected. *See Word v. Jones ex rel. Moore*, 350 N.C. 557, 565, 516 S.E.2d 144, 149 (finding that when we are unable to say as a matter of law that plaintiff was not prejudiced by an erroneous jury instruction plaintiff is entitled to a new trial).

Conclusion

¶ 10 For the foregoing reasons we reverse and remand for a new trial.

REVERSED AND REMANDED.

Chief Judge STROUD and Judge ZACHARY concur.

Report per Rule 30(e).