IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-777

No. COA22-204

Filed 15 November 2022

Franklin County, No. 19 CVD 381

RONNIE CHRIS STRICKLAND, Plaintiff,

v.

DIMA NASER LUTFI AHMED, Defendant.

Appeal by Plaintiff from judgment entered 20 October 2021 by Judge J. Hoyte Stultz, III, in Franklin County District Court. Heard in the Court of Appeals 7 September 2022.

Knott & Boyle, PLLC, by Ben Van Steinburgh, for Plaintiff-Appellant.

Teague, Rotenstreich, Stanaland, Fox & Holt, P.L.L.C., by Kara V. Bordman and Michael D. Holt, for Defendant-Appellee.

GRIFFIN, Judge.

¶ 1 Plaintiff Ronnie Chris Strickland appeals from a judgment entered in favor of Defendant Dima Naser Lutfi Ahmed. Plaintiff argues that the trial court erred by (1) denying Plaintiff's motion for directed verdict and instructing the jury on contributory negligence; (2) denying Plaintiff's request to instruct the jury on the last clear chance defense; and (3) allowing Defendant's counsel to cross-examine Plaintiff regarding an unadmitted photograph and then discuss the testimony concerning the

photograph in closing arguments. We hold that Plaintiff received a fair trial, free from prejudicial error.

I. Factual and Procedural Background

¶ 2 On 5 December 2018, Defendant collided into the back of Plaintiff's vehicle on the interstate. On 9 May 2019, Plaintiff filed a negligence claim against Defendant.

¶ 3 On 12 October 2021, the case was heard in Franklin County District Court. At trial, Plaintiff testified that he had been in Defendant's lane since entering the highway, stopped due to traffic in front of him, and Defendant collided into the back of his vehicle while he was at a complete stop. Defendant, however, testified that Plaintiff suddenly and without warning merged into her lane, and that was when she collided with Plaintiff's vehicle. Defendant also testified that she collided with Plaintiff's vehicle before it was fully in her lane and that she did not have time to brake completely when Plaintiff merged in front of her.

¶ 4 Defendant attempted to introduce a photograph marked as Defendant's Exhibit 3 for identification. Plaintiff testified that Exhibit 3 depicted Defendant's vehicle under the back right side of Plaintiff's vehicle at the scene of the accident. The photograph was never admitted into evidence, but Plaintiff was asked about it on cross-examination over objections from Plaintiff's counsel, and Plaintiff's counsel clarified information concerning the photograph on redirect. Defendant then referenced Plaintiff's testimony about the photograph in closing arguments.

¶ 5 The jury found in favor for Defendant on 13 October 2021. The trial court entered a judgment upon the jury's verdict on 20 October 2021. Plaintiff timely appeals.

II. Analysis

¶ 6 Plaintiff argues that the trial court erred by (1) denying Plaintiff's motion for directed verdict and instructing the jury on contributory negligence; (2) denying Plaintiff's request to instruct the jury on the last clear chance defense; and (3) allowing Defendant's counsel to cross-examine Plaintiff about a photograph that was neither properly authenticated nor entered into evidence and to argue the contents of that unadmitted photograph as substantive evidence during Defendant's closing argument.

A. Contributory Negligence

¶ 7 Plaintiff argues there was no evidence to support the claim of contributory negligence. Specifically, Plaintiff contends he never changed lanes and, at one point during trial, Defendant testified she never saw Plaintiff in any lane until she crashed into his vehicle. We disagree.

¶ 8 When considering the appropriateness of a directed verdict for a plaintiff, we consider the evidence in light most favorable to the defendant. *Hawley v. Cash*, 155 N.C. App. 580, 582–83, 574 S.E.2d 684, 686 (2002). A trial court is required to deny a plaintiff's motion for directed verdict "if there is more than a scintilla of evidence

supporting each element of the [defendant's] claim." *Id.* at 582, 574 S.E.2d at 686 (citations omitted). We have considered a scintilla of evidence to be "very slight evidence." *Hayes v. Waltz*, 246 N.C. App. 438, 442–43, 784 S.E.2d 607, 613 (2016).

¶ 9 Here, Plaintiff contends that Defendant's admission that the only time she saw Plaintiff's vehicle was before she crashed into it bars a contributory negligence defense. However, there was other evidence presented at trial that indicated Plaintiff may have acted negligently. For instance, Defendant testified that Plaintiff suddenly moved in front of her without flashing his turn signals. Defendant also testified that she crashed into Plaintiff's vehicle from the side, and this testimony is corroborated by Plaintiff's Exhibit 5 depicting Plaintiff's car with damage on the back right side. Further, Defendant testified that Plaintiff's vehicle was not totally in her lane when she hit it.

¶ 10 Given there was testimony at trial that could support Plaintiff's contributory negligence–that he moved into Defendant's lane suddenly and without warning–the issue was properly submitted to the jury. Although Plaintiff testified that he had always been in Defendant's lane and Defendant admitted she did not know whether Plaintiff was in another lane, Defendant still testified that Plaintiff merged into her lane without warning. There was a genuine question of fact as to whether Plaintiff had always been in Defendant's lane, and the jury could have reasonably believed Defendant. Plaintiff's argument is without merit.

B. Last Clear Chance

¶ 11 Plaintiff argues there was sufficient evidence to support the instruction on the defense of last clear chance. Specifically, Plaintiff contends Defendant had both the time and ability to prevent the crash had she been exercising reasonable care. We disagree.

¶ 12 Our Supreme Court has clearly articulated the five elements necessary to support the last clear chance defense. Last clear chance requires: (1) that the plaintiff created a risk of injury for himself from which he cannot escape through the exercise of reasonable care; (2) that the defendant knew or should have known of the plaintiff's situation and the plaintiff's inability to remove himself from that situation; (3) that the defendant had both the time and ability to avoid injury to the plaintiff by the exercise of reasonable care; (4) that the defendant negligently failed to use his or her available time and means to avoid injury to the plaintiff; and (5) that the defendant's failure resulted in injury to the plaintiff. *Vancamp v. Burgner*, 328 N.C. 495, 498, 402 S.E.2d 375, 376–77 (1991).

¶ 13 Here, we need only analyze Plaintiff's argument regarding the third element. Plaintiff did not present any evidence that Defendant had time and ability to react and avoid Plaintiff's negligent act had Defendant acted with reasonable care. Conversely, Defendant testified that Plaintiff suddenly moved into her lane without warning, and she immediately crashed into him. Defendant testified to the

suddenness of the merge. It happened nearly instantly. At one moment Plaintiff's car was not there. In the next moment it was. Without anything more, there is no evidence that Defendant had the time and ability to avoid the accident. Therefore, the trial court correctly denied the instruction on the defense of last clear chance because, assuming Plaintiff negligently entered Defendant's lane, there was no evidence indicating Defendant had the time and ability to prevent the crash.

C. Photograph

¶ 14 Plaintiff argues the trial court erred by allowing Defendant to cross-examine Plaintiff concerning Defendant's Exhibit 3 and to then discuss the testimony concerning the exhibit in closing arguments. We disagree.

¶ 15 To grant a new trial or set aside a verdict, we have held that the appellant bears not only the burden of showing error in admitting evidence, but also the burden of showing that the admission of evidence was prejudicial such that a different outcome likely would have resulted at trial had the evidence been excluded. *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002); *see also* N.C. R. Civ. P. 61 ("No error in either the admission or exclusion of evidence and no error or defect in any ruling . . . is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action amounts to the denial of a substantial right.").

¶ 16 Here, Plaintiff's argument that testimony concerning Defendant's Exhibit 3 was the only evidence tendered to support Defendant's theory of the case fails. There

was sufficient evidence besides Defendant's Exhibit 3 that the jury could have relied on wholly in its decision. The chief example is Defendant's own testimony that Plaintiff suddenly merged without warning. Another example is Plaintiff's Exhibit 5 that depicts the dent on the back right side of Plaintiff's vehicle. Therefore, even assuming the trial court erred by allowing the testimony concerning Defendant's Exhibit 3 to be used in Defendant's closing argument, Plaintiff still fails to demonstrate prejudicial error. The jury could have evaluated and reached the same conclusion without Defendant's Exhibit 3.

III. Conclusion

¶ 17 For the reasons stated herein, we conclude that Plaintiff received a fair trial, free from prejudicial error.

NO ERROR.

Judges HAMPSON and WOOD concur.

Report per Rule 30(e).