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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-729

Filed 15 August 2023

Mecklenburg County, No. 19-CVS-19809

ZACHARY PHILIP TRULL, Plaintiff,

v.

EDWIN JOSUE CHAVEZ, Defendant.

Appeal by plaintiff from judgment entered 18 April 2022 by Judge Tanya Wallace in Superior Court, Mecklenburg County. Heard in the Court of Appeals 7 February 2023.

*CR Legal Team, LLP, by Timothy A. Sheriff and Joseph V. Scibelli, for plaintiff-appellant.*

*McAngus Goudelock & Courie, PLLC, by Heather G. Connor, for defendant-appellee.*

STROUD, Chief Judge.

Plaintiff appeals from the final judgment of the trial court entered upon a jury verdict finding Plaintiff was contributorily negligent, denying him relief, and dismissing his case. Because there was sufficient evidence to submit the issue of Plaintiff's contributory negligence to the jury even without any evidence regarding

Plaintiff's marijuana use, we affirm the trial court's judgment.

## **I. Background**

On 6 September 2017, at approximately 1:00 a.m., Plaintiff and Defendant were driving vehicles approaching an intersection from opposite directions on the same road. It was raining or had recently rained. Both drivers came to the intersection and both had either a green or yellow light; an officer who responded to the accident testified that security camera footage indicated the light on the cross-street was red. As Plaintiff drove straight through the intersection, Defendant turned left in front of Plaintiff and the front ends of their vehicles collided. As a result, Plaintiff suffered a leg fracture and required extensive medical care.

Plaintiff filed a complaint on 1 October 2019, asserting a personal injury claim based upon Defendant's negligence. Defendant served an answer on 18 December 2019 denying the allegations of negligence and raising the affirmative defense of Plaintiff's contributory negligence.<sup>1</sup>

This case was tried before a jury on 28 March through 1 April 2022. On the first day of trial, Plaintiff made several motions *in limine* to preclude the presentation of evidence, including exclusion of any evidence regarding Plaintiff's marijuana use. Plaintiff's counsel argued: there was "no evidence to suggest Plaintiff was impaired at the time of the crash[;]" any evidence of Plaintiff's marijuana use would be unfairly

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<sup>1</sup> Defendant's answer does not have a file stamp. However, neither party contends Defendant's answer was not filed.

prejudicial under Rule of Evidence 403; and that certain deposition testimony as to Plaintiff's marijuana use should also be stricken from the record. Defendant's counsel argued she intended to use evidence Plaintiff tested positive for marijuana in the emergency room after the collision and he told medical personnel he used marijuana daily for impeachment, since Plaintiff had testified in his deposition that he had not used marijuana on the day of the collision. Defendant's counsel also argued the evidence was relevant to the issue of contributory negligence. After additional arguments, the trial court granted Plaintiff's motion *in limine* in part, ruling that Defendant could not present evidence Plaintiff was "high on marijuana" at the time of the collision, but Defendant could impeach Plaintiff's testimony with evidence of Plaintiff's positive test result for marijuana in the emergency room and his admission to medical personnel regarding daily marijuana use.

At trial, the evidence tended to show that Plaintiff was 19 years old at the time of the accident. Plaintiff testified he rarely drove in 2017, approximately one or two times per month, but he drove both day and night. Defense counsel impeached Plaintiff with his deposition testimony that he did not usually drive at night. Plaintiff's father also testified he did not normally give Plaintiff permission to drive at night and he had not given Plaintiff permission to drive the car on the night of the collision.

Plaintiff testified he did not see Defendant's car prior to the collision, although he did see some other cars "that were on that side of the road, that passed [his] car,

prior to the accident, but [Plaintiff] did not physically see the car that hit [him] until [he] woke up.” The collision “happened so fast. It was just said and done.” Plaintiff further testified that he:

didn’t have any realization of like actually when that crash was happening. Like I said, I woke up and it was kind of said and done . . . I didn’t see anything in front of me. There was nothing in front of me, so I don’t -- it was just kind of - - it was so fast. I mean, there was nothing I could tell you that -- you know, it was clear around me.

Plaintiff did not know what direction Defendant’s car came from until he was able to read the police report and saw pictures of the accident after the accident occurred. However, Plaintiff testified that he only used his peripheral vision to observe other vehicles in the opposite lanes, and because Plaintiff was driving straight, he was “just kind of paying attention to” what was in front of him on his side of the road.

On cross-examination, Plaintiff acknowledged that he did not “hit” his brakes or take any evasive action, because “[he] didn’t have any warning.” Plaintiff testified “it was pretty clear outside, except for a little bit of rain[.]” Plaintiff further testified that his light was green as he entered the intersection, but that he could see the light change “from green to go yellow.” The traffic signal from Defendant’s direction would have been the same as Plaintiff’s. The officer who responded to the accident testified Plaintiff had “advised [him] that [Plaintiff] was travelling straight ahead . . . with a steady yellow light[.]” Plaintiff also testified he was driving “46, 47 miles an hour” when the posted speed limit was 45 miles per hour. However, in his deposition,

Plaintiff had stated he was going 47 to 48 miles per hour.

Defense counsel further impeached Plaintiff's testimony by questioning Plaintiff on his conflicting past statements about his marijuana use. Defense counsel asked Plaintiff about his marijuana use, and Plaintiff first testified that he consumed marijuana "about 12 to 24 hours prior to the accident." Defense counsel then had Plaintiff read from the 11 March 2020 deposition where Plaintiff testified that he had not consumed marijuana prior to the accident and he was not a regular smoker of marijuana. However, defense counsel then noted that Plaintiff tested positive for marijuana in the emergency room. Defense counsel also asked Plaintiff whether he remembered telling emergency room staff that he was a daily smoker of marijuana, as indicated on his medical records. Plaintiff disagreed with his medical records indicating he tested positive for marijuana but admitted he would have been the only person providing information to emergency room staff. Plaintiff also acknowledged he still smoked marijuana "[e]very so often" as of the time of trial. Defense counsel also extensively impeached Plaintiff on grounds other than his marijuana use and unrelated to the circumstances of the accident; the substance of this other impeachment is not relevant to this appeal.

At the close of evidence Plaintiff made a motion for directed verdict on the issue of Plaintiff's contributory negligence. Plaintiff argued that insufficient evidence had been admitted to support a finding of contributory negligence and that Plaintiff's marijuana use, which had been introduced during the defense's impeachment of

Plaintiff, would “become the crux of” Defendant’s contributory negligence allegation and “not necessarily [Plaintiff] going over 1 mile an hour over the speed limit[.]” Defense counsel argued that evidence of Plaintiff’s speeding as well as his failure to maintain proper lookout and control, inexperience as a driver, and the early morning hour were all evidence of Plaintiff’s contributory negligence; Plaintiff’s marijuana use was not the only ground on which the jury could find Plaintiff contributorily negligent. The trial court denied Plaintiff’s motion for directed verdict.

After the charge conference, the trial court instructed the jury “[i]f the plaintiff’s negligence joins with the negligence of the defendant in proximately causing plaintiff’s own injury, it is called ‘contributory negligence,’ and the plaintiff cannot recover.” The court instructed the jury that Defendant alleged Plaintiff was negligent by: (1) “failing to keep a reasonable lookout[;]” (2) “failing to keep his vehicle under proper control[;]” (3) “violat[ing] a safety statute by operating his vehicle on a highway at a speed greater than reasonable and prudent under the conditions then existing[;]” (4) “fail[ing] to properly proceed while passing through a yellow light[;]” and (5) “violat[ing] a safety statute by operating his vehicle at a speed greater than the posted speed of 45 miles per hour.” The trial court further instructed the jury that Defendant contended:

Plaintiff’s negligence was a proximate cause of and contributed to plaintiff’s own injury. I instruct you that contributory negligence is not to be presumed from the mere fact of injury. . . . The plaintiff, as well as the defendant, is under a duty to keep a reasonable lookout, to

keep his vehicle under proper control, and obey the laws pertaining to yellow traffic lights. A violation of any one of these duties is negligence. Furthermore, the plaintiff, as well as the defendant, must obey safety statutes which make it unlawful to operate a vehicle at a speed greater than that which is reasonable and prudent under the conditions then existing. A violation of the safety statute is negligence in and of itself. Finally, the motor vehicle law provides that it is unlawful to operate a motor vehicle at a speed greater than the posted speed limit. A violation of this statute is negligence in and of itself.

The trial court did not instruct the jury regarding marijuana use by Plaintiff or impairment as a basis for contributory negligence.

The jury returned a verdict finding Defendant negligent and Plaintiff contributorily negligent. On 18 April 2022, the trial court entered a written judgment finding Plaintiff was injured by Defendant's negligence, that Plaintiff was contributorily negligent, and that as a result Plaintiff was not entitled to any damages. The trial court then dismissed Plaintiff's case. Plaintiff appeals.

## **II. Contributory Negligence**

Plaintiff asserts the trial court erred by denying his motion *in limine* in part and contends the admission of any evidence or cross-examination regarding his marijuana use, for any reason, was improper, and that without defense counsel's impeachment based on his marijuana use, the jury could not have found he was

contributorily negligent.<sup>2</sup> Plaintiff also argues the trial court erred in denying his motion for a directed verdict for similar reasons, that without evidence of Plaintiff's marijuana use Defendant failed to prove Plaintiff was contributorily negligent. We disagree. Even assuming *arguendo* the trial court erred by allowing defense counsel to impeach Plaintiff with his prior deposition testimony and statements to medical personnel regarding his marijuana use as well as his medical records, Plaintiff failed to show he was prejudiced by this evidence, so the trial court's judgment is affirmed.

#### A. Standard of Review

"A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial; its determination will not be reversed absent a showing of an abuse of the trial court's discretion." *Warren v. General Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001) (citation omitted).

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. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-

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<sup>2</sup> Plaintiff also argues on appeal the trial court erred by not setting aside the jury's verdict. But Plaintiff did not make a motion to set aside the verdict or for a new trial, and this issue is unpreserved. See N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]"). The parties also raise an issue regarding the trial court's exclusion of evidence of Plaintiff's lack of a driver's license. But "[e]rror in the exclusion of evidence is harmless when other evidence of the same import is admitted[.]" *Faucette*, 242 N.C. App. at 275, 775 S.E.2d at 323, and we do not need to reach this issue because we affirm the trial court's judgment and any ruling on this issue would not change the outcome of this case.



moving party's favor, or to present a question for the jury.

*Lambert v. Town of Sylva*, 259 N.C. App. 294, 298-99, 816 S.E.2d 187, 192 (2018) (citation omitted).

Additionally, “[a]ppellate courts do not set aside verdicts and judgments for technical or harmless [evidentiary] error[s]. It must appear that the error complained of was material and prejudicial, amounting to a denial of some substantial right.” *Faucette v. 6303 Carmel Road, LLC*, 242 N.C. App. 267, 274, 775 S.E.2d 316, 323 (2015) (citation and quotation marks omitted). “The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different.” *Id.* (citations omitted); *see also Tater Patch Estates Home Owner’s Association v. Sutton*, 251 N.C. App. 686, 693-94, 796 S.E.2d 84, 89 (2017).

## **B. Evidence of Contributory Negligence**

Plaintiff asserts Defendant did not provide any evidence to prove Plaintiff was contributorily negligent and also makes many arguments for various reasons the trial court erred by allowing defense counsel to impeach Plaintiff using Plaintiff’s inconsistent statements about his marijuana use and his positive test for marijuana. Both of Plaintiff’s arguments are premised on the contention that the evidence of impairment by marijuana was the only possible basis for the jury’s finding of contributory negligence. To the contrary, the evidence beyond marijuana use

supports a determination of contributory negligence in several ways. Therefore, Defendant provided sufficient evidence of contributory negligence and any potential error regarding evidence of marijuana use is not prejudicial. *See Faucette*, 242 N.C. App. at 274, 775 S.E.2d at 323.

“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.” *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004) (citation and quotation marks omitted). A defendant must prove two elements, “(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.” *Id.* (citation omitted). “Issues of proximate cause and foreseeability, involving application of standards of conduct, are ordinarily best left for resolution by a jury under appropriate instructions from the court.” *Williams v. O’Charley’s, Inc.*, 221 N.C. App. 390, 395, 728 S.E.2d 19, 22-23 (2012) (citation and quotation marks omitted)). Our analysis here consequently focuses on due care. *See id.*

Evidence that raises a “mere conjecture” of contributory negligence is insufficient to submit to a jury, but “since negligence usually involves issues of due care and reasonableness of actions under the circumstances, . . . in borderline cases, fairness and judicial economy suggest that courts should decide in favor of submitting issues to the jury.” *Whisnant*, 166 N.C. App. at 722-23, 603 S.E.2d at 850 (citations, quotation marks, and brackets omitted). “If there is more than a scintilla of evidence,

contributory negligence is for the jury.” *Seay v. Snyder*, 181 N.C. App. 248, 252, 638 S.E.2d 584, 587 (2007) (citation and quotation marks omitted). And, contrary to Plaintiff’s argument, there is more than a scintilla of evidence of Plaintiff’s contributory negligence here, even without any evidence regarding marijuana.

Here, Defendant argued and the trial court instructed the jury on five grounds for finding Plaintiff contributorily negligent. The jury was instructed that it could find Plaintiff was negligent because he (1) failed to keep a proper lookout, (2) failed to keep his vehicle under control, or (3) failed to safely proceed through a yellow light. The jury was also instructed that it could find Plaintiff was negligent *per se* by (4) “operating his vehicle on a highway at a speed greater than reasonable and prudent under the conditions then existing[,]” or (5) “operating his vehicle at a speed greater than the posted speed of 45 miles per hour” because both acts violated motor vehicle safety statutes. *See Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (“The general rule in North Carolina is that the violation of a public safety statute constitutes negligence *per se*.” (citations, quotation marks and brackets omitted)).

The trial court did not instruct the jury as to impairment by marijuana as a potential basis for Plaintiff’s contributory negligence, nor, as far as we can tell, did Defendant make this argument to the jury.<sup>3</sup> The evidence of Plaintiff’s marijuana

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<sup>3</sup> The transcript included in the record on appeal does not include the parties’ closing arguments.

use was limited to impeachment, since Plaintiff had made inconsistent statements regarding use of marijuana in the emergency department, in his deposition testimony, and in his trial testimony.

Defendant highlights numerous cases from this Court and our Supreme Court to show there was sufficient evidence for the jury to find Plaintiff contributorily negligent for at least one of the reasons above. These cases are instructive. And because evidence of any one of the five grounds the jury was instructed on would be sufficient to submit the issue of Plaintiff's contributory negligence to the jury, we do not discuss all five grounds. As to Plaintiff's failure to keep a proper lookout, for example, in *Kummer v. Lowry* this Court held sufficient evidence was presented to submit the issue of the plaintiff's contributory negligence to the jury because the plaintiff "admitted not looking left or right to see if any traffic was coming" when she was in an accident as she passed through an intersection. *Kummer v. Lowry*, 165 N.C. App. 261, 265, 598 S.E.2d 223, 226 (2004). Road conditions were favorable: "it was a clear and sunny day, the roads were dry, and there was good visibility to the left, right, and front of plaintiff's vehicle. There were no obstructions to plaintiff's view as she approached the intersection, and she testified she was familiar with the intersection." *Id.* "The evidence also showed that [the] plaintiff did not apply her brakes or slow her vehicle's speed. [The] [p]laintiff testified that she did not recall hitting her brakes before impact or seeing any skid marks." *Id.* A police officer "testified that his investigation revealed no evidence that [the] plaintiff took any

action to avoid the collision.” *Id.* This was sufficient evidence “regarding [the] plaintiff’s contributory negligence, which allowed the trial court to submit the issue of contributory negligence to the jury.” *Id.* at 265, 598 S.E.2d at 227. This Court held “[i]t is the duty of the driver of a motor vehicle not merely to *look*, but to *keep an outlook* in the direction of travel; and [the driver] is held to the duty to see what she ought to have seen.” *Id.* at 265, 598 S.E.2d at 226 (emphasis in original) (citation and quotation marks omitted).

In addition, “[e]vidence that a party was exceeding the posted speed limit is sufficient to send the issue of contributory negligence to the jury.” *Hoffman v. Oakley*, 184 N.C. App. 677, 683, 647 S.E.2d 117, 122 (2007) (citation omitted); *see also* N.C. Gen. Stat. § 20-141 (2017) (motor vehicle safety statute setting state-wide speed restrictions).

Here, there was sufficient evidence to support a jury finding of Plaintiff’s contributory negligence even if marijuana use was never mentioned during the trial. *See Faucette*, 242 N.C. App. at 274, 775 S.E.2d at 323. First, as to Plaintiff’s negligence, Plaintiff testified that he was speeding, and driving somewhere between 46 and 48 miles per hour along a roadway with a posted speed limit of 45 miles per hour. This testimony alone was sufficient to submit the issue of contributory negligence to the jury. *See Hoffman*, 184 N.C. App. at 683, 647 S.E.2d at 122. But this case is also similar to *Kummer*; Plaintiff testified: he did not see Defendant’s vehicle; he only used his peripheral vision to observe the opposing lanes and did not

take his eyes away from the cars in front of him; and he did not slow down or take any evasive action to avoid the accident. *See Kummer*, 165 N.C. App. at 265, 598 S.E.2d at 226 (“The duty rests upon the driver to maintain a reasonable and proper lookout for other vehicles in or approaching the intersection.” (citations, quotation marks, and brackets omitted)). The plaintiff in *Kummer* similarly did not see the defendant’s vehicle before the accident, did not look for the defendant’s vehicle, and did not take evasive action. *Id.* Additionally, here, Plaintiff was a very inexperienced driver, driving at approximately 1 a.m. in the morning on a wet road, after it had recently rained or was still raining, when Plaintiff did not normally drive at night, in a vehicle that was not his and that he did not have permission to drive. Based on this evidence, the jury could have found, as instructed, that Plaintiff was driving “at a speed greater than reasonable and prudent under the conditions then existing[.]” *See* N.C. Gen. Stat. § 20-141(a) (2013) (“No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing.”).

The jury was instructed that Plaintiff could be found contributorily negligent for speeding, failure to keep a proper lookout, or for “operating his vehicle on a highway at a speed greater than reasonable and prudent under the conditions then existing.” The evidence, viewed in the light most favorable to Defendant for purposes of review of the denial of directed verdict on the issue of contributory negligence, supports each of these theories of negligence. *See Lambert*, 259 N.C. App. at 298-99,

816 S.E.2d at 192. Additionally, as noted above, the jury was not instructed they could use any evidence of Plaintiff's marijuana use or impairment to find him contributorily negligent. Consistent with the trial court's ruling on Plaintiff's motion *in limine*, there was no substantive evidence admitted regarding Plaintiff's actual impairment by marijuana at the time of the collision, the only evidence of Plaintiff's impairment was during Defendant's impeachment of Plaintiff. We presume the jury followed the trial court's instructions. *See Ridley v. Wendel*, 251 N.C. App. 452, 460, 795 S.E.2d 807, 813-14 (2016) ("A jury is presumed to follow the court's instructions and we must therefore presume that the jury based its verdict on these instructions." (citation, quotation marks, and brackets omitted)). Moreover, Plaintiff has not demonstrated the impeachment evidence of Plaintiff's inconsistent statements regarding his marijuana use had a probable effect upon the jury's verdict. *See Faucette*, 242 N.C. App. at 274, 775 S.E.2d at 323.

There was sufficient evidence for the jury to find "a want of due care on the part of the plaintiff" *and* "a proximate connection between the plaintiff's negligence and the injury[.]" *Whisnant*, 166 N.C. App. at 722, 603 S.E.2d at 850. Assuming *arguendo* the trial court erred by allowing impeachment of Plaintiff with inconsistent statements regarding his marijuana use, there was still sufficient evidence to support a jury finding that Plaintiff was contributorily negligent and that his negligence contributed to the collision. Because "Plaintiff has failed to show a likelihood the jury would have reached a different result without this evidence to establish prejudice[.]"

*Tater Patch Estates Home Owner's Association*, 251 N.C. App. at 694, 796 S.E.2d at 89, Plaintiff's arguments are overruled.

### **III. Conclusion**

We conclude there was sufficient evidence to submit the issue of Plaintiff's contributory negligence to the jury without evidence of Plaintiff's marijuana use. Plaintiff therefore failed to show he was prejudiced by the trial court's ruling allowing impeachment evidence based upon Plaintiff's inconsistent statements regarding his marijuana use. The trial court's judgment is affirmed.

AFFIRMED.

Judges CARPENTER and RIGGS concur.

Report per Rule 30(e).