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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-1061

Filed 19 August 2026

Davidson County, No. 24CVS001820-280

JENNIFER STEELE and CHAD STEELE, Plaintiffs,

v.

HULL-NORLEX, LLC, Defendant.

Appeal by Plaintiffs from order granting summary judgment entered 5 August 2025 by Judge R. Stuart Albright in Davidson County Superior Court. Heard in the Court of Appeals 21 April 2026.

Biesecker Tripp Sink & Fritts, L.L.P., by Attorney Christopher Alan Raines, for plaintiffs-appellants.

Hedrick Gardner Kincheloe & Garofalo L.L.P., by Attorney M. Duane Jones, C. Rob Wilson III, & Lindsey Ross, for defendant-appellee.

PER CURIAM.

This case concerns a claim of negligence arising out of Jennifer Steele (“Plaintiff Wife”) sustaining injuries on a property owned by Hull-Norlex LLC (“Defendant”). The trial court ordered summary judgment for Defendant. We reverse the trial court’s order.

I. Background

The evidentiary record tends to show that on the morning of 19 October 2021, Plaintiff Wife drove with her eleven-year-old daughter to the Norlex Shopping Center, located in Lexington, North Carolina. Defendant owns, operates, manages, and controls the shopping center, including the parking lot and common areas. Upon arriving, Plaintiff Wife parked her 2013 Chevrolet Suburban near the storefront. Before exiting her vehicle, Plaintiff Wife observed “a lot of activity going on at the pawn shop” adjacent to Times Square Pizza. She attested that she was “nervous” because she believed that the shopping center was located in a “high crime area.” Plaintiff Wife told her daughter: “We’re going to do this really quickly. I’m going to count to [three], we’re going to jump out, and we’re going to run in here and get [the food] and get out of here.”

Plaintiff Wife then opened the driver’s side door and “leapt” from her car. Thereafter, her left leg became trapped in a hole within an adjacent storm drain that was missing a piece of its metal grate. She recounted: “I counted to [three]. I opened the door and jumped out. And I just—I just kept going. I—I never—I never looked down. I—I just—I didn’t see it.” As a result of the fall, Plaintiff Wife sustained physical injuries to her left knee, left leg, right foot, back, arm, neck, and vocal cords.

During her deposition, Plaintiff Wife recounted that she did not look down before exiting the vehicle:

Q: And I think we've established that you did not look down at the grate before you leapt out of your vehicle; is that right?

A: I did not.

Q: Would you agree with me that if you had looked down at the grate—you would have been able to see the hole in the grate if you had looked at it?

A: Yes, sir.

Q: And likewise, if you would have looked down at the grate and if you would have seen the hole, I assume you would have avoided stepping in the hole; is that correct?

A: Yes, sir.

Following Plaintiff Wife's fall, the fire department rescued her and placed a barricade over the defective grate. The Lexington Fire Marshal sent an email to David Holder, an agent of Defendant's management company, stating that "apparently this is the second incident that someone has gotten hurt after falling into [the storm grate]." Mr. Holder testified in a deposition that he and his staff inspected the shopping center weekly, checking for hazards.

Plaintiff Wife and Chad Steele ("Plaintiff Husband") (collectively, "Plaintiffs") filed suit against Defendant and commenced this action on 19 August 2024 in Davidson County Superior Court. Plaintiff Wife sued Defendant in negligence, while Plaintiff Husband presented a claim for loss of consortium. In the lawsuit, Plaintiffs alleged that Defendant negligently allowed a "broken, dangerous, defective, and hazardous storm drain" to remain on the premises. Plaintiffs alleged that Defendant

failed to “properly inspect the storm drain,” failed to “identify and conspicuously mark or warn” of its dangerous condition, and failed to maintain the parking area in a reasonably safe condition. Defendant answered and asserted several affirmative defenses, including contributory negligence. Following discovery, Defendant moved for summary judgment, arguing that Plaintiff Wife’s deposition testimony established her own contributory negligence as a matter of law on the basis that (1) she did not look down before exiting her vehicle and (2) she would have avoided the hole had she looked. The trial court granted Defendant’s motion, finding “no genuine issue as to any material fact in this action as it related to Defendant’s defense of contributory negligence[,]” and dismissed Plaintiffs’ claims with prejudice. Plaintiffs timely filed their notice of appeal.

II. Analysis

Plaintiffs argue that the trial court erred by granting summary judgment in favor of Defendant because genuine issues of material fact remain as to: Whether Plaintiff Wife was contributorily negligent; or whether Defendant’s conduct rose above ordinary negligence. After careful review, we reverse the trial court’s order granting summary judgment.

We review an order granting summary judgment de novo. *Builders Mut. Ins. Co. v. Neibel*, 293 N.C. App. 1, 5, 899 S.E.2d 560, 563 (2024). Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A–1, Rule 56(c) (2025). “[The movant] bears the initial burden of demonstrating the absence of a genuine issue of material fact.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002). Under this burden, the movant must “(1) prov[e] that an essential element of the opposing party’s claim is nonexistent, or show[] through discovery that the opposing party (2) cannot produce evidence to support an essential element of his or her claim, or (3) cannot surmount an affirmative defense which would bar the claim.” *Bernick v. Jurden*, 306 N.C. 435, 440–41, 293 S.E.2d 405, 409 (1982). Upon reviewing summary judgment, we view the evidence in the light most favorable to the nonmoving party. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). In negligence cases, summary judgment is generally disfavored on the grounds that issues of reasonable care, proximate cause, and contributory negligence are ordinarily questions for the jury. *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 440 (1982). While summary judgment may be proper where the plaintiff’s own evidence establishes contributory negligence so clearly that no other conclusion may be drawn, *Cullen v. Logan Developers, Inc.*, 386 N.C. 373, 377, 904 S.E.2d 730, 734 (2024), this is not such a case.

To prove negligence a plaintiff must show: “(1) that the defendant owed a duty of care toward the plaintiff, (2) that the defendant breached that duty, (3) that the defendant’s breach proximately caused harm to the plaintiff, and (4) that the plaintiff

has thereby suffered damages.” *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 482, 843 S.E.2d 72, 76 (2020). “Initially, a plaintiff bears the burden of proving the essential elements of negligence[.]” *Patterson v. Worley*, 265 N.C. App. 626, 629, 828 S.E.2d 744, 747 (2019).

“In North Carolina, a landowner has a duty to warn visitors of any hidden danger on its property of which the landowner should be aware. A landowner does not, however, have a duty to warn anyone of a condition that is open and obvious.” *Draughon*, 374 N.C. at 483, 843 S.E.2d at 74 (citations omitted). “A condition is open and obvious if it would be detected by any ordinarily intelligent person using his [or her] eyes in an ordinary manner.” *Id.* at 486, 843 S.E.2d at 78. “If the condition is open and obvious, a visitor is legally deemed to have equal or superior knowledge to the owner, and thus a warning is unnecessary.” *Id.* However, “[e]ven if evidence of negligence is presented, [a] plaintiff cannot prevail if the evidence reveals plaintiff was contributorily negligent.” *Patterson*, 265 N.C. App. at 629, 828 S.E.2d at 747 (citation omitted). “Contributory negligence is an affirmative defense.” *Clay v. Board of Education*, 285 N.C. 525, 532, 212 S.E.2d 160, 165 (1975). “The defendant has the burden of proving contributory negligence.” *Rash v. Waterway Landing Homeowners Ass’n*, 253 N.C. App. 747, 749, 801 S.E.2d 375, 377 (2017) (citation omitted).

Contributory negligence requires two showings by the defendant: (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.” *Daisy v. Yost*, 250 N.C. App. 530, 532, 794

S.E.2d 364, 366 (2016) (citation omitted). “The standard by which contributory negligence is judged is that of a reasonable person.” *Nelson v. Novant Health Triad Region*, 159 N.C. App. 440, 445, 583 S.E.2d 415, 418 (2003). “Even where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the reasonable person standard.” *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 440–41 (1982).

“Summary judgment is only appropriate based on an open and obvious condition when the plaintiff has a more intimate knowledge of the dangerous condition than the property owner, or the plaintiff would have noticed the dangerous condition if she had exercised proper care.” *Nelson*, 159 N.C. App. at 444, 583 S.E.2d at 418. This is because “[w]hen a plaintiff does not discover and avoid an obvious defect, that plaintiff will usually be considered to have been contributorily negligent as a matter of law.” *Nourse v. Food Lion*, 127 N.C. App. 235, 241, 488 S.E.2d 608, 613 (1997). “This rule is closely related to the principle that a defendant has no duty to warn of an open and obvious condition because a plaintiff is negligent if he fails to reasonably adjust his behavior in light of an obvious risk.” *Draughon*, 374 N.C. at 483, 843 S.E.2d at 76–77.

However, “where there is ‘some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition,’ the general rule does not apply.” *Price v.*

Jack Eckerd Corp., 100 N.C. App. 732, 736, 398 S.E.2d 49, 52 (1990) (quoting *Thomas*, 88 N.C. App. at 341, 363 S.E.2d at 212.). Thus, “[t]he question is not whether a reasonably prudent person would have seen the [hazard] had he or she looked, but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down on the floor.” *Norwood v. Sherwin Williams*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981) (abrogated on other grounds by *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998)).

Here, Defendant alleges that Plaintiff Wife’s deposition testimony establishes contributory negligence as a matter of law. Defendant’s contention rests on three admissions by Plaintiff: (1) that she “never looked down” upon exiting her vehicle; (2) that she would have seen the hole in the damaged storm drain grate had she looked; and (3) that she would have avoided stepping into the hole had she seen it. While these admissions are important evidence from which a jury could find contributory negligence, this alone does not compel such a finding as a matter of law when viewed in context and in the light most favorable to Plaintiffs.

Defendant brings forth two cases in support of its contributory negligence claim: *Draughon*, 374 N.C. 479, 843 S.E.2d 72 and *Cullen v. Logan Developers, Inc.*, 386 N.C. 373, 904 S.E.2d 730.

In *Draughon*, the plaintiff, who was helping carry a casket into the church during a funeral, tripped on a visibly abnormal stair after looking only at the church doorway ahead of him. 374 N.C. at 480–81, 843 S.E.2d at 74–75. The top step was

approximately four inches higher than the other steps and was constructed of visibly different red brick and white wood, while the four lower steps were made of gray concrete. *Id.* at 481–82, 843 S.E.2d at 75–76. Moreover, the plaintiff had descended the same staircase only moments earlier before returning while walking sideways with the casket. *Id.* at 479, 843 S.E.2d 72. On this basis, our Supreme Court held that a dangerous condition is open and obvious when it would be detected by an ordinarily intelligent person using their eyes in an ordinary manner, ultimately concluding that (1) the church had no duty to warn the plaintiff of the condition; and (2) the plaintiff failed to exercise reasonable care for his own safety. *Id.* at 486, 843 S.E.2d at 78.

In *Cullen*, the plaintiff sued the construction company that built her attic. 386 N.C. at 374, 904 S.E.2d at 732. There, the plaintiff—without looking—stepped backwards off a plywood walkway into a scuttle hole, falling through the ceiling and suffering injuries. *Id.* The defendant constructed the scuttle hole and covered it with insulation. *Id.* at 375, 904 S.E.2d at 732–33. The plaintiff, however, testified that (1) she knew it was unsafe to step onto the insulation, (2) she would have seen the insulation covering the scuttle hole if she looked at the scuttle hole, and (3) she would not have stepped into the scuttle hole had she seen it. *Id.* at 376, 904 S.E.2d at 733. The defendant moved for summary judgement, asserting that the plaintiff was contributorily negligent as a matter of law. The trial court granted the motion. *Id.* On appeal, this Court reversed, stating there remained a “genuine issue of material

fact whether [the] [p]laintiff knew the [scuttle hole] area [in the attic] remained unsafe such that she was negligent in failing to look out for her safety while walking.” *Cullen v. Logan Devs., Inc.*, 289 N.C. App. 1, 7, 887 S.E.2d. 455, 462 (2023). The North Carolina Supreme Court reversed the Court of Appeals, holding that the scuttle hole was open and obvious. *Cullen*, 386 N.C. at 374, 904 S.E.2d at 732. The hazard was open and obvious because the plaintiff admitted that had she looked toward the scuttle hole, she would have seen that it was covered by insulation. *Id.* at 380, 904 S.E.2d at 735. Since she knew it was unsafe to step anywhere there was insulation, she knew not to step on the insulation covering the scuttle hole. *Id.* That is, because she stepped backwards without looking in an attic filled with insulation, and since she knew it was dangerous to step on insulation in the attic, the Court reasoned that the plaintiff failed to exercise reasonable care for her own safety. *Id.*

This case materially differs from both *Cullen* and *Draughon*. In *Cullen*, the plaintiff knew before the fall that the only safe path through the attic was provided by the plywood, and that stepping off the plywood onto insulation created a risk of falling through the ceiling. 386 N.C. at 381, 904 S.E.2d at 736. In *Draughon*, the plaintiff had already descended those same stairs moments before falling, and the difference in height, color, and composition of the top step was visible and appreciable to a reasonably prudent person exercising ordinary care. 374 N.C. at 486–87, 843 S.E.2d at 78.

Here, Plaintiff Wife had no prior knowledge that the storm drain grate beside her parking space was broken. She had not recently traversed the area, she had not been warned of the defect, and the record does not show that she had any reason to anticipate that the space immediately outside her vehicle was dangerous. Therefore, the question is not whether Plaintiff Wife would have seen the hole had she looked, but whether an ordinarily prudent person, exiting the vehicle under the same circumstances Plaintiff Wife faced, would have looked down at the grate and noticed the defect before stepping out. *See Norwood*, 303 N.C. at 468, 279 S.E.2d at 563.

On this basis, Plaintiff Wife's deposition testimony that she "never looked down," and that she would have seen the hole had she looked, is evidence from which a jury could find contributory negligence. Notwithstanding this, that testimony is not sufficient to establish contributory negligence as a matter of law. Instead, Plaintiffs forecasted evidence that Plaintiff Wife's attention was drawn away from the ground by circumstances that she perceived as implicating a safety concern to her and her child. Plaintiff testified that she saw "a lot of activity" near the pawn shop, that she was "nervous," and that she believed that the shopping center was located in a "high crime area." She told her daughter, "[w]e're going to do this really quickly. I'm going to count to [three], we're going to jump out, and we're going to run in here and get [the food] and get out of here." Given these circumstances, a jury could find that an ordinarily prudent person exiting a vehicle with her child while perceiving a potential safety concern nearby, would scan the storefront for potential danger rather

than look down at the pavement immediately beside her vehicle. *See e.g., Pulley v. Rex Hosp.*, 326 N.C. 701, 708, 392 S.E.2d 380, 385 (1990) (holding that a plaintiff's duty to look where she is walking does not require her to keep her eyes constantly on her feet); *Alford v. Washington*, 244 N.C. 132, 140, 92 S.E.2d 788, 794 (1956) (citations omitted) ("Ordinarily the law imposes upon a person sui juris the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided.").

A survey of previous decisions shows our Courts have reversed granting summary judgment for contributory negligence in cases where genuine issues of material fact remain to be resolved. *Contrast Rash*, 253 N.C. App. at 753, 801 S.E.2d at 379–80 (reasoning that a pedestrian could be briefly distracted from discovering an obvious condition after navigating around a column); *and Nourse v. Food Lion*, 127 N.C. App. 235, 242, 488 S.E.2d 608, 613 (1997) (finding that a reasonably prudent person's attention could be diverted from discovering an open and obvious condition by advertisements or produce displays), *with Swinson v. Lejeune Motor Co.*, 147 N.C. App. 610, 618–19, 557 S.E.2d 112, 118–19 (2001) (McCULLOUGH, J., dissenting) (upholding directed verdict for the defendant when the plaintiff who tripped over an open and obvious parking lot divot testified that there was nothing preventing her from looking down at the ground), *rev'd per curiam for reasons stated in the dissent*, 356 N.C. 286, 569 S.E.2d 646 (2002); *and Cullen*, 386 N.C. at 382, 904 S.E.2d at 737

(plaintiff did not present any evidence of a circumstance which would divert attention away from an open and obvious condition).

Plaintiff Wife provided evidence of circumstances from which a jury could find her attention was reasonably drawn elsewhere. Plaintiff Wife testified that she saw “a lot of activity” near the pawn shop, that she was “nervous,” and that she believed the shopping center was located in a “high crime area.” In responding to these circumstances, Plaintiff Wife exited her vehicle without looking down. Defendant’s characterization of these concerns as “subjective” does not, standing alone, resolve the issue at summary judgment. Although contributory negligence is measured objectively and does not depend solely on whether Plaintiff Wife personally perceived danger, *Moseley v. Hendricks*, 388 N.C. 128, 136–37, 918 S.E.2d 843, 849–50 (2025), the surrounding circumstances remain relevant to whether an ordinarily prudent person in Plaintiff Wife’s position would have diverted her attention from the ground. *See id.* Whether the activity near the pawn shop objectively justified Plaintiff Wife’s failure to look at the ground when exiting her vehicle remains a factual question best left in the province of the jury.

Our decisions in *Pulley*, *Dowless*, *Rash*, and *Shepard* support that conclusion. In those cases, surrounding circumstances either distracted the plaintiff, affected the plaintiff’s ability to appreciate the danger, or created a factual question as to whether the plaintiff acted reasonably. *See Pulley*, 326 N.C. at 708–09, 392 S.E.2d at 385; *Dowless*, 148 N.C. App. at 172–73, 557 S.E.2d at 610; *Rash v. Waterway Landing*

Homeowners Ass’n, Inc., 253 N.C. App. 747, 758–59, 801 S.E.2d 375, 382 (2017); *Shepard v. Catawba Coll.*, 270 N.C. App. 53, 838 S.E.2d 478 (2020). Likewise, here, Plaintiff Wife’s ability to appreciate the danger, and the factual question as to whether she acted reasonably is one for the jury. For the foregoing reasons, we reverse the trial court’s holding of summary judgment.

Last, although Plaintiffs argue that Defendant was grossly negligent on appeal, we decline to consider this argument since the trial court’s order granting summary judgment makes no mention of findings pertaining to gross negligence. Additionally, Plaintiffs attempt to raise gross negligence as an issue in response to Defendant’s motion for summary judgment did not preserve the issue for our review. *See Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998); *Archie v. Durham Pub. Schs. Bd. of Educ.*, 283 N.C. App. 472, 487, 874 S.E.2d 616, 627 (2022); *Kirkman v. Rowan Reg’l Med. Ctr., Inc.*, 291 N.C. App. 178, 190, 894 S.E.2d 784, 793 (2023); N.C. R. App. P. 10(a)(1). Accordingly, we do not consider whether the forecast of evidence would support gross negligence, though the issue may still be passed on by the trial court. Our holding is limited to Plaintiffs’ ordinary negligence claim and Defendant’s contributory negligence defense.

III. Conclusion

For the foregoing reasons, we reverse the trial court’s order granting summary judgment and remand for further proceedings.

STEELE V. HULL-NORLEX, LLC

Opinion of the Court

REVERSED AND REMANDED.

Panel consisting of Judges ARROWOOD, CARPENTER, and STADING.

Report per Rule 30(e).