NO. COA02-63

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

BOBBY G. ABRAMS, Guardian ad litem
for NORA LEE WILLIAMS And RONALD L.
WILLIAMS,
Plaintiffs-Appellants,

v. Wilson County
No. 00 CVS 313

JOHN C. FEAGANS,
Defendant-Appellee.

Appeal by plaintiffs from judgment dated 9 July 2001 by Judge Jerry R. Tillett in Wilson County Superior Court. Heard in the Court of Appeals 26 August 2002.

Connor, Bunn, Rogerson, & Woodard, P.L.L.C., by James F. Rogerson; and Thomas & Farris, P.A., by Kurt D. Schmidt, for plaintiff-appellants.

Baker, Jenkins & Jones, P.A., by Roger A. Askew and Kevin N. Lewis, for defendant-appellee.

McGEE, Judge.

Plaintiff Nora Lee Williams filed a negligence action against defendant for damages sustained in an automobile collision on 11 January 1998 at the intersection of Carter Road and London Church Road near Rocky Mount, North Carolina. The jury found plaintiff's contributory negligence to be a proximate cause of her injuries, barring recovery. The trial court entered judgment reflecting the

jury's verdict.

The parties' evidence tended to show that at the time of the accident, approximately 7:15 p.m., the sky was dark and the intersection was illuminated by a streetlight. Defendant stopped his truck at the stop sign on Carter Road. Defendant's parents were behind defendant in another vehicle. Plaintiff was driving down London Church Road toward the intersection, approaching from defendant's right. Plaintiff's mother was also in the vehicle. Defendant pulled his truck into the road as plaintiff was passing through the intersection and collided with her vehicle.

Defendant stipulated that he was negligent in causing the accident but argued that plaintiff was contributorily negligent in failing to use her vehicle's headlights as required by N.C. Gen. Stat. § 20-129 (1999). Defendant testified that he looked both ways before proceeding into the intersection but saw no vehicle headlights. Defendant's parents, who were in a vehicle fifty to one hundred feet behind defendant's truck, also testified that they saw no lights from another vehicle before defendant's truck jerked sharply to the left as a result of the collision. Following the accident, the parking lights of plaintiff's vehicle were on but her headlights were not. Plaintiff acknowledged that at the time of the accident "it was dark enough to have [her] headlights on[.]" However, both plaintiff and her mother testified that the vehicle's headlights were on.

On appeal, plaintiff argues the trial court erred in instructing the jury on contributory negligence. We disagree.

A defendant is entitled to an instruction on contributory negligence "if all the evidence and reasonable inferences drawn therefrom and viewed in the light most favorable to defendant tend to establish or suggest contributory negligence." *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 38, 365 S.E.2d 198, 201, *disc. rev. denied*, 322 N.C. 610, 370 S.E.2d 257 (1988). "'If there is more than a scintilla of evidence, contributory negligence is for the jury.'" *Tatum v. Tatum*, 79 N.C. App. 605, 607, 339 S.E.2d 817, 818, *modified and aff'd*, 318 N.C. 407, 348 S.E.2d 813 (1986) (quoting *Pearson v. Luther*, 212 N.C. 412, 421, 193 S.E.2d 739, 745 (1937)).

The case before us is governed by our prior holding in *McLean v. Henderson*, 45 N.C. App. 707, 707-08, 264 S.E.2d 120, 120 (1980). In *McLean*, the plaintiff sought to recover for injuries sustained in an automobile collision with the defendant. The accident occurred at an intersection at a time of night when headlights were required under N.C. Gen. Stat. § 20-129. The plaintiff testified that she had looked both ways before entering the intersection but did not see any approaching headlights. The trial court entered a directed verdict in favor of the defendant, finding the plaintiff had failed to introduce evidence of defendant's negligence. Our Court reversed the directed verdict, finding the plaintiff's testimony created a jury question on the issue of defendant's negligence:

> If the testimony of the plaintiff, that she did not see lights coming from either direction, is evidence from which the jury could conclude that defendant . . . approached the intersection without lights, the jury could conclude that defendant['s] violation of

> G.S. 20-129 was a proximate cause of the accident. . . . We hold the plaintiff's testimony, that she did not see any lights approaching the intersection, is evidence from which the jury could conclude that defendant[']s headlights were not on.

McLean, 45 N.C. App. at 707-08, 264 S.E.2d at 120. The *McLean* Court rejected the defendant's argument that plaintiff had adduced only "negative evidence" of what she did not see, noting that "the plaintiff had adequate opportunity to observe whether headlights were on. She testified she looked both ways and did not see any headlights. This is evidence from which the jury could conclude the [defendant's] headlights were not on." *Id.* at 708, 264 S.E.2d at 121.

In this case, defendant testified that his own headlights were on and gave the following account of the circumstances leading up to the accident:

> A. As I approached the intersection I stopped, I looked. You had to kind of look forward and look back to see down the intersection. And I looked back and I didn't see anything coming, so I moved into the intersection, and that's when I was, I turned left real hard. There was a collision and my truck went left.
>
> . . .
>
> Q. Now, when you looked right did you see anything?
>
> A. No, sir, I did not.
>
> Q. Could you see, you had a plant in the front seat?
>
> A. Yes, sir.
>
> Q. Could you see through the window beyond the plant?

A. Yes, sir.

Consistent with *McLean*, defendant's testimony was sufficient to take the issue of plaintiff's contributory negligence to the jury.

In seeking to distinguish *McLean*, plaintiff avers that defendant had a fichus tree on the floor of his front passenger area obstructing his view of the right side of the intersection. However, defendant described the tree as "a spindly tree, a little plant with little leaves on it." As quoted above, defendant claimed he was able to see around the plant. When asked on a second occasion if he could see out of his passenger's side window with the plant in the truck, defendant responded, "Yes, sir, I could." Plaintiff points to the conflicting testimony of the state highway patrol officer who responded to the scene of the accident and described the plant as "big enough to cover the entire passenger window, to where you couldn't see out of it." However, the resolution of such evidentiary disputes is the jury's responsibility. *See Chandler v. U-Line Corp.*, 91 N.C. App. 315, 320, 371 S.E.2d 717, 720, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 583 (1988).

We find no merit to plaintiff's argument that defendant's stipulation of negligence forecloses a finding that she was contributorily negligent. The doctrine of contributory negligence necessarily contemplates that a defendant's negligence does not preclude a finding of contributory negligence on the part of the plaintiff. *See Blankley v. Martin*, 101 N.C. App. 175, 398 S.E.2d 606 (1990). The trial court properly instructed the jury that

contributory negligence was a bar to recovery only if plaintiff was negligent and "such negligence was a proximate cause of [her] own injury[.]" *See Culler v. Hamlett*, 148 N.C. App. 372, 378, 559 S.E.2d 195, 200 (2002).

Because defendant's evidence warranted a jury instruction on contributory negligence, we affirm the trial court's judgment.

Affirmed.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).