NO. COA01-1059

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

CELESTE McNEELY,
Plaintiff,

v. Catawba County
No. 00CVS44

WILLIAM B. BOLLINGER,
Defendant.

Appeal by plaintiff from judgment entered 26 April 2001 by Judge L. Oliver Noble, Jr. in Catawba County Superior Court. Heard in the Court of Appeals 4 June 2002.

Starnes and Killian, PLLC, Wesley E. Starnes and Blair E. Cody, III, for plaintiff-appellant.

Robinson & Elliott, by William C. Robinson and Stephanie D. Gacek, for defendant-appellee William B. Bollinger.

No brief filed for unnamed defendant State Farm Mutual Automobile Insurance.

BIGGS, Judge.

Plaintiff Celeste McNeely appeals from a judgment entered upon a jury verdict finding her contributorily negligent. As detailed herein, we find no error in the judgment of the trial court.

Plaintiff filed this negligence action against defendant William B. Bollinger, seeking damages for injuries she sustained when her vehicle collided with defendant's vehicle. Defendant timely answered denying the material allegations of the complaint.

State Farm Mutual Automobile Insurance Company, as an unnamed defendant, also timely answered, denying the material allegations of the automobile collision involving plaintiff and asserting the defense of contributory negligence against plaintiff. This action was tried before Judge Noble and a duly empaneled jury during the 9 April 2001 civil session of Catawba County Superior Court.

The evidence of record tends to show that at approximately 5:15 p.m. on 24 July 1997, plaintiff was traveling eastbound on Springs Road in Hickory, North Carolina. Defendant was traveling on 18th Avenue, a roadway which intersected with Springs Road. He subsequently came to a stop at the intersection of 18th Avenue and Springs Road. Springs Road is a five-lane road, consisting of two eastbound lanes, two westbound lanes and a turning lane in the center. As plaintiff approached the intersection of Springs Road and 18th Avenue, she moved from the eastbound inside lane of travel, into the center turning lane, and proceeded into the intersection. Plaintiff testified at trial that it was her intention to turn left at Springs Road and 29th Street-- some ten blocks away.

Simultaneously, defendant was waiting to enter Springs Road. Since traffic was heavy, he waited until the cars traveling in the two eastbound lanes of Springs Road slowed down to enter the roadway. According to defendant, he was slowly entering the roadway in an attempt to turn into one of the westbound lanes of Springs Road when his vehicle was struck on the front, left fender by plaintiff's vehicle. According to plaintiff, however,

defendant's car struck her vehicle on the right, front side as she was traveling.

After hearing all of the evidence and the arguments of counsel, the jury returned a verdict in defendant's favor, finding that plaintiff was contributorily negligent. From the judgment entered upon this verdict, plaintiff appeals.

By her first assignment of error on appeal, plaintiff argues that the trial court erred by submitting the issue of contributory negligence to the jury. We cannot agree.

Contributory negligence has been defined as "the breach of duty on of a plaintiff to exercise due care for his or her own safety, such that the plaintiff's failure to exercise due care is the proximate cause of his or her injury." *Prior v. Pruett*, 143 N.C. App. 612, 622, 550 S.E.2d 166, 173 (2001). In North Carolina, contributory negligence acts as a complete bar to plaintiff's recovery of injuries resulting from defendant's negligence. *Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 401, 549 S.E.2d 867, 869 (2001) (citing *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998). A defendant bears the "burden of proving contributory negligence . . . and is entitled to have the issue submitted to the jury if all the evidence and reasonable inference drawn therefrom and viewed in the light most favorable to the defendant tend to establish [] contributory negligence." *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 38, 365 S.E.2d 198, 201, *disc. review denied*, 322 N.C. 610, 370 S.E.2d 257 (1988).

In the case *sub judice*, defendant alleged that plaintiff was

contributorily negligent in that she breached the following statutory duties of care: (1) failure to use ordinary care by failing to keep a reasonable lookout pursuant to G.S. § 20-174; (2) failure to use ordinary care by failing to keep her vehicle under proper control pursuant to G.S. § 20-154(a)-(b); (3) failure to decrease speed in order to avoid the collision pursuant to G.S. § 20-141(m); (4) operating a vehicle on a highway at a speed greater than reasonable and prudent under the conditions then existing pursuant to G.S. § 20-141(a); and (5) moving from a direct line without first seeing that her movement could be made in safety pursuant to G.S. § 20-154(a). Breach of any one of the above statutory provisions is sufficient to bar plaintiff's recovery for negligence. *See generally, Hinnant v. Holland*, 92 N.C. App. 142, 147, 374 S.E.2d 152, 155 (1988)("[w]hen a statute sets a standard of care for the protection of others, violation of that statute is negligence *per se*"), *disc. review denied*, 324 N.C. 335, 378 S.E.2d 792 (1989); *Powell v. Doe*, 123 N.C. App. 392, 398, 473 S.E.2d 407, 412 (1996)("It is generally recognized that violation of a § 20-166-style statute is negligence *per se* if new injuries, or an aggravation of original injuries, occurs after the hit and run driver leaves the scene of an accident without rendering needed aid to the injured person finding[.]")

In *Lewis v. Brunston*, this Court stated,

> The automobile driver on a dominant highway approaching an intersecting servient highway is not under a duty to anticipate that the automobile driver on the servient highway "will fail to stop as required by . . . statute, and, in the absence of anything which

> gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment," that the automobile driver on the servient intersecting highway will obey the law and stop before entering the dominant highway.

78 N.C. App. 678, 683, 338 S.E.2d 595, 599 (1986). Notwithstanding,

> the automobile driver on the servient intersecting highway, is not under a duty to anticipate that the automobile driver on the dominant highway, "approaching the intersection of the two highways, will fail to observe the speed regulations, and the rules of the road, and, in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption" that the automobile driver on the dominant highway will obey "such regulations and the rules of the road."

Id.

In the light most favorable to defendant, the evidence tends to show plaintiff admitted that, despite the heavy traffic conditions, she was looking at the traffic light ahead and not at the surrounding traffic; two other drivers stopped far enough away from defendant's vehicle to allow defendant to get through traffic to negotiate a turn onto Springs Road; defendant drove slowly as he proceeded out onto Springs Road; defendant saw plaintiff only seconds before they collided; once defendant saw plaintiff's vehicle, he stopped his vehicle completely in order to avoid hitting her; defendant's vehicle was protruding into the center lane on Springs Road; and plaintiff testified that she was accelerating at the time the collision occurred, and that she saw defendant for a split second before the accident. Significantly,

at the point of the accident, plaintiff was traveling down the center lane of Springs Road at the intersection of Springs Road and 18th Street, although she was not going to turn until some ten blocks ahead at 29th Street. Plaintiff testified that she traveled in the center lane to "whip" around the cars backed up at the light at 29th Street, so that she could make the green light.

We conclude that this evidence is sufficient to permit the reasonable fact-finder to infer that plaintiff was negligent in the operation of her motor vehicle, pursuant to one or more of the statutory provisions as alleged by defendant. The trial court, therefore, did not err in submitting the issue of contributory negligence to the jury. This assignment of error is overruled.

By her second assignment of error, plaintiff argues that the trial court erred when it gave an erroneous instruction regarding her claim of negligence and then followed it with a curative instruction. Plaintiff contends that the conflicting instructions entitle her to a new trial. We disagree.

It is well settled that a correct charge is a fundamental right of every litigant. *Van Gelder Yarn Co. v. Mauney*, 228 N.C. 99, 102, 44 S.E.2d 601, 603 (1947)(citing *State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 505 (1916)); *see State v. Jennings*, 333 N.C. 579, 612, 430 S.E.2d 188, 205 (1993). Therefore, it must appear with reasonable certainty that the court's error was corrected, its harmful effect entirely removed, and the correct rule clearly fixed in the minds of the jury in order for the verdict to stand. *See Jennings*, 333 N.C. at 612, 430 S.E.2d at 205. While conflicting

instructions on a material point generally require a new trial, "where the court inadvertently makes an error and expressly corrects it before the jury retires, the error is rendered harmless." *Goble v. Helms*, 64 N.C. App. 439, 450, 307 S.E.2d 807, 815 (1983), *disc. review denied*, 310 N.C. 625, 315 S.E.2d 690 (1984). Finally, in considering the propriety of a jury charge, this Court must consider the charge contextually and in its entirety. *Kewaunee Scientific Corp. v. Pegram*, 130 N.C. App. 576, 582, 503 S.E.2d 417, 421 (1998).

In its initial charge, and in response to plaintiff's attorney's request during the charge conference, the trial court read a portion of N.C.P.I. 203.25. The court, however, immediately recognized that N.C.P.I. 203.25 was not the applicable instruction, and asked trial counsel for the correct pattern instruction. At that time, plaintiff's attorney admitted that he had given the court the "wrong" instruction during the trial conference and offered the "right" instruction, which was N.C.P.I. 203.15. The trial court then made the following statement to the jury:

> Members of the jury, I had explained to you the contentions of negligence, which are failure to keep a reasonable lookout, failure to keep the defendant's vehicle under proper control. And mistakenly I had started to give you the wrong instructions about what's normally called a stop sign violation or proceeding into the highway without -- without yielding the right-of-way to vehicles on the street. I had given you the wrong law. I had given you the law for the vehicle that's already on the street. Now I'm going to give you the law for the vehicle that was in the position that the defendant's vehicle was in. That's what we're talking about is the defendant's negligence. So please ignore that

> part that I just said about the vehicle on the highway. And this is the law about failing to yield the right-of-way to vehicles on the street.

The court went on to give the correct pattern instruction with regards to plaintiff's contentions of defendant's negligence. Once more, before the jury retired for deliberations, the trial court spoke to his earlier misstatement:

> Members of the jury, I apologize. . . . . I did make a mistake in the jury instructions to you. And I've tried the best I can while in the middle of the instructions to straighten it out and explain the error I made and the difference. Now, I'm going to try one more time. The other error I made was in explaining to you the contentions of negligence that the plaintiff contends about the defendant's negligence.

The court proceeded to set forth the contentions of plaintiff as to defendant's negligence along with the applicable jury instructions.

While the initial instruction here was clearly misplaced in regards to plaintiff's contentions of defendant's negligence, we note that plaintiff's counsel contributed to this error by giving the court the wrong pattern jury instruction during the charge conference. *See Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) (providing that "a party may not complain of action which he induced[]"). In addition, the record reveals that the trial court immediately discovered its error, promptly and expressly retracted it, and twice recharged the jury on the point in question. Viewing the instructions as a whole, we believe that the correct rule of law as to plaintiff's contentions of defendant's negligence was before the jury. In light of these

facts, we conclude that plaintiff cannot show prejudicial error in the trial court's erroneous instruction. *See id.*

By her third assignment of error, defendant argues that the trial court erred in regards to defendant's contentions as to plaintiff's negligence by instructing the jury on N.C.P.I. 203.25. Again, we disagree.

"It is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence." *Millis Constructions Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 509, 358 S.E.2d 566, 568 (1987). Further, "[u]pon request for a special instruction '"correct in law and supported by the evidence, the trial court must give the requested instruction, at least in substance."'" *Barnard v. Rowland*, 132 N.C. App. 416, 427, 512 S.E.2d 458, 466 (1999)(quoting *State v. Thompson*, 118 N.C. App. 33, 36, 454 S.E.2d 271, 273 (1993), *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995)(citations omitted)). Finally, the statute requiring a judge upon giving the charge to state the evidence and explain the law arising therefrom, does not require contentions of litigants to be stated; however, when the judge states the contentions of one of the parties, he must fairly charge also as to the contentions of the adversary litigant. *Daniels v. Jones*, 42 N.C. App. 555, 558, 257 S.E.2d 120, 122 (1979), *disc. review denied*, 298 N.C. 567, 261 S.E.2d 120 (1979)(citing N.C.G.S. § 1-180).

In the instant case, the trial court charged the jury as to

plaintiff's contentions regarding defendant's negligence, using N.C.P.I. 203.15. The court also instructed the jury as to defendant's contentions regarding plaintiff's negligence, using N.C.P.I. 203.25, which is entitled "Right of Way of Operator on Servient Street When Entering Intersection After Stopping."

While plaintiff contends otherwise, we conclude that the evidence in this case supported the N.C.P.I. 203.15 instruction as to defendant's contentions concerning plaintiff's negligence. Defendant was operating his vehicle on 18th Street, the servient street; he came to a complete stop before proceeding into the intersection of Springs Road, the dominant street; upon observing plaintiff's vehicle, defendant immediately stopped his vehicle before completely entering the turning lane on Springs Road; defendant's vehicle was struck by plaintiff's vehicle as he entered that turning lane; while traveling in the turning lane, plaintiff was accelerating just seconds before the collision; plaintiff did not see defendant's vehicle until a split second before the collision; and plaintiff admitted that she was looking at the green light ahead rather than at the oncoming traffic. As this instruction was correct in law and supported by the evidence, this assignment of error is also overruled.

Having concluded that the trial court properly instructed the jury, we overrule plaintiff's fourth assignment of error by which she argues that the trial court erred in denying her motion for mistrial based upon alleged erroneous jury instructions.

No error.

Judges GREENE and HUDSON concur.

Report per Rule 30(e).