NO. COA01-1336

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

DONNA M. MOORE,
Plaintiff

v. Wake County
No. 99 CVD 10613

FARIDA F. SHAIKH,
Defendant

Appeal by plaintiff from order entered 19 March 2001 by Judge James R. Fullwood in Wake County District Court. Heard in the Court of Appeals 21 August 2002.

E. Gregory Stott, for plaintiff-appellant.

Haywood, Denny & Miller, L.L.P., by George W. Miller, III, for defendant-appellee.

CAMPBELL, Judge.

Plaintiff appeals from an order denying her motion for judgment notwithstanding the verdict ("JNOV") and motion for new trial. For the reasons stated herein, we reverse.

Plaintiff's first assignment of error to the trial court's denial of her motion for JNOV will not be considered. As plaintiff did not argue that point in her appellate brief, it is deemed abandoned under the North Carolina Rules of Appellate Procedure, which state, "Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a

party's brief, are deemed abandoned." N.C. R. App. P., Rule 28(a) (2001).

Plaintiff secondly assigns error to the trial court's instructing the jury on the doctrine of sudden emergency. Plaintiff believes she is entitled to a new trial with proper jury instructions. We agree.

On the evening of 9 August 1997, plaintiff's minor son, Christopher Moore, was riding as a passenger in a car driven by Laura C. Squiciarino ("Squiciarino") southbound on US Highway 1 ("US-1") between the Interstate 40 ("I-40") overpass and the exit for Walnut Street. Defendant, Farida F. Shaikh ("Shaikh"), was driving in her car behind Squiciarino. Squiciarino stopped her car on the highway in response to seeing a "line of cars . . . all . . . in the right lane" where she was traveling. The line of cars was due to a traffic stop being conducted by the Cary Police Department in the lane of US-1 going towards Walnut Street. Squiciarino testified, "when I saw that there was . . . a long line of cars, I stopped. . . . I think there was at least two or three minutes before my car was hit at that point in time." When asked to describe the impact, Squiciarino said, "[A]ll I know is that I heard a lot of noise and the next thing I knew, the front of my car was in the bushes on the left and we had hit the lady in front of us and pushed her a couple of feet."

Shaikh, who testified that she had been following behind Squiciarino's vehicle, drove her vehicle into the rear end of Squiciarino's vehicle. Shaikh testified, "[T]his girl stopped

suddenly . . . and I couldn't avoid hitting her. She stopped suddenly, so – I just hit her."

The collision caused plaintiff's son "to push forward" and suffer injuries, including cuts, bruises, neck and back pain. Officer Robert E. Hauck, who investigated the accident, testified that the DWI roadblock "was on the off ramp" to Walnut Street. The investigative report he prepared that night indicates that the weather conditions were "clear" and that "it was dark[.]" Officer Hauck testified that if one was standing on the I-40 overpass facing north in the direction the vehicles involved in the accident were traveling, one could see all the way "down to the next exit ramp . . . about a mile." Squiciarino testified that she first observed the police lights when she came under the I-40 overpass, which she agreed with Officer Hauck is about a mile from where the traffic stop was taking place.

Plaintiff filed a complaint requesting reimbursement from the defendant for medical expenses incurred by her minor son for personal injuries he sustained in the automobile accident. Defendant's answer denied negligence and alleged the defense of "sudden emergency." Over plaintiff's objections, the trial court instructed the jury on the doctrine of sudden emergency. On the issue of whether or not plaintiff's minor child was injured due to defendant's negligence, the jury answered no, thus returning a verdict in defendant's favor.

We hold that instructing the jury on the doctrine of sudden emergency constituted error prejudicial to the plaintiff. Therefore, the plaintiff is entitled to a new trial.

As stated by this Court:

> [T]he [d]octrine of sudden emergency provides a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others.

Holbrook v. Henley, 118 N.C. App. 151, 153, 454 S.E.2d 676, 677-78 (1995). "Two requirements must be met before this doctrine applies. First, an emergency situation must exist requiring immediate action to avoid injury. Second, the emergency must not have been created by the negligence of the party seeking the protection of the doctrine." *Conner v. Continental Industrial Chemicals*, 123 N.C. App. 70, 73, 472 S.E.2d 176, 179 (1996) (citations omitted). "A sudden emergency jury instruction is properly rendered if substantial evidence on each of the two essential elements of the doctrine has been presented." *Long v. Harris* 137 N.C. App. 461, 467, 528 S.E.2d 633, 637 (2000) (citing *Banks v. McGee*, 124 N.C. App. 32, 34, 475 S.E.2d 733, 734 (1996)). To determine whether substantial evidence of the elements exists, the trial court must consider the evidence in the light most favorable to the party requesting the sudden emergency jury instruction. *Holbrook* at 153, 454 S.E.2d at 678.

First, "[a]n "emergency situation" has been defined by our courts as that which "'compels [defendant] to act instantly to avoid a collision or injury . . . .'" *Keith v. Polier*, 109 N.C.

App. 94, 98-99, 425 S.E.2d 723, 726 (1993) (quoting *Schaefer v. Wickstead*, 88 N.C. App. 468, 471, 363 S.E.2d 653, 655 (1988)). Defendant was in a situation that required immediate action to avoid injury because defendant had to immediately stop or swerve her vehicle to avoid colliding with Squiciarino's vehicle. Assuming without deciding that defendant presents an argument for the first part of the emergency doctrine test, defendant is not entitled to the protection of the instruction because evidence of the second element does not exist.

For the doctrine of sudden emergency to apply, if an emergency situation existed, it must not have been created by the defendant. Here, defendant contributed to the situation requiring her immediate action to avoid injury by following too closely to the vehicle preceding her and/or not keeping a proper lookout as a motorist on the highway. This Court stated in *Keith*:

> As a general rule, every motorist driving upon the highways of this state is bound to a minimal duty of care to keep a reasonable and proper lookout in the direction of travel and see what he ought to see. (citation omitted). Within this duty is a requirement that the motorist drive and anticipate dangers in a manner consistent with the circumstances and exigencies of traffic . . . Drivers are therefore required in the exercise of ordinary care to expect sudden stops when driving in heavy traffic. In accord, such stops do not constitute an unexpected or emergency situation.

Keith at 99, 425 S.E.2d at 726. In the case at bar, the evidence showed that defendant failed to exercise the "minimal duty of care to keep a reasonable and proper lookout in the direction of travel and see what [s]he ought to [have seen]." *Id.* The *Keith* court

found that the evidence viewed in the light most favorable to the defendant indicated that defendant "had reason to anticipate, due to the circumstances, that the plaintiff could start moving her vehicle and then suddenly stop again." *Id.* at 99, 425 S.E.2d at 727. Similarly, Shaikh had reason to anticipate that the car in front of her would, at a minimum, slow down, if not stop, due to the police lights where the roadblock was taking place. N.C. Gen. Stat. § 20-152 provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." N.C. Gen. Stat. § 20-152(a) (2001). Defendant should have been exercising due care by keeping a proper lookout and following far enough behind the car driven by Squiciarino to have avoided striking the car.

As our state Supreme Court has stated, "Constant vigilance is an indispensable requisite for survival on today's highways[.]" *Beanblossom v. Thomas*, 266 N.C. 181, 266 N.C. 181, 187, 146 S.E.2d 36, 41 (1966). Defendant failed to exercise the requisite vigilance to prevent the accident which occurred and therefore, defendant is not entitled to the protection of the sudden emergency instruction.

New trial.

Judges WYNN and HUDSON concur.

Report per Rule 30(e).