NO. COA01-514

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

ROY LEE WARD,
Plaintiff

v. Nash County
No. 99 CVS 1464

MILFORD HENRY LAYNE PERRY,
Defendant

Appeal by defendant from judgment entered 29 January 2001 by Judge Cy Grant in Nash County Superior Court. Heard in the Court of Appeals 7 January 2002.

*Cedric R. Perry, for plaintiff-appellee.*

*Robert E. Ruegger, for defendant-appellant.*

CAMPBELL, Judge.

Defendant appeals from a judgment entered upon a jury verdict in favor of plaintiff finding that defendant had the last clear chance to avoid an automobile accident between the two parties. We conclude the trial court did not err in submitting the issue of last clear chance.

On the night of 5 October 1996, defendant was operating his vehicle in the northbound exterior lane of Wesleyan Boulevard (also known as "US 301") in Rocky Mount, North Carolina. A white taxicab, operated by plaintiff, was parked on the right shoulder.

Defendant's vehicle collided with the rear of plaintiff's taxicab, resulting in injuries to plaintiff.

Plaintiff filed a complaint alleging that defendant's negligent operation of his vehicle was the actual and proximate cause of plaintiff's injuries. Defendant answered, generally denying negligence and asserting plaintiff's contributory negligence as a defense. Defendant later amended his answer to include a counterclaim against plaintiff, alleging that he had sustained permanent disabling injuries as a direct result of plaintiff's negligence. Both defendant's defense and counterclaim alleged that plaintiff parked his taxicab on the main-traveled portion of US 301 and that plaintiff's taxicab was not sufficiently lit after sunset. Plaintiff replied, denying defendant's counterclaim and asserting defendant had the last clear chance to avoid the collision.

This action was tried before a jury at the 8 January 2001 session of the Nash County Superior Court. During the trial, plaintiff testified that on the night of the accident, his taxicab was clearly discernible because the light on top of the taxicab was lit, the headlights and four-way flashers were on, and the taxicab had rear reflectors that would be visible from 150 yards away. Plaintiff further testified that he was parked directly under a streetlight, three feet to the right of the white line of the northbound exterior lane, and that several other vehicles had driven past him without difficulty during the ten to fifteen minutes he was parked in that location. Plaintiff's testimony was

corroborated by Tim Whitehead, one of the passengers in plaintiff's taxicab at the time of the accident.

Melanie Thigpen Whaley ("Whaley") was a passenger in the back seat of the vehicle traveling directly in front of defendant's vehicle before the collision. She testified that plaintiff's taxicab had no lights on and was about twelve to eighteen inches into the exterior northbound lane. Whaley further testified that the vehicle in which she was a passenger (the "Whaley vehicle") was also traveling in the exterior northbound lane, but the driver had to quickly move into the interior lane to avoid hitting plaintiff.

Defendant testified that he was two or three car lengths behind the Whaley vehicle, traveling forty to forty-five miles per hour. He struck the plaintiff's taxicab within "two seconds" after the Whaley vehicle swerved into the interior lane of US 301. Additionally, defendant testified that he did not see the taxicab because it had no lights burning and was parked under an overpass, partially in the exterior northbound lane.

After hearing all the evidence, the jury returned a verdict that defendant was negligent, that plaintiff was contributorily negligent, and that defendant had the last clear chance to avoid the accident. The issue of damages was not submitted, having been severed by consent order entered on 22 December 2000. The court's judgment confirming the jury's verdict was entered on 29 January 2001. Defendant appeals this judgment.

The issue on appeal is whether the trial court erred in submitting the issue of last clear chance to the jury. We find there was no error.

"The doctrine of last clear chance presupposes antecedent negligence on the part of the defendant and antecedent contributory negligence on the part of the plaintiff, such as would, but for the application of this doctrine, defeat recovery." *Clodfelter v. Carroll*, 261 N.C. 630, 634, 135 S.E.2d 636, 638 (1964). The plaintiff has the burden of showing facts supporting the essential elements of last clear chance, which are as follows:

> 1) The plaintiff, by her own negligence put herself into a position of helpless peril; 2) Defendant discovered, or should have discovered, the position of the plaintiff; 3) Defendant had the time and ability to avoid the injury; 4) Defendant negligently failed to do so; and 5) Plaintiff was injured as a result of the defendant's failure to avoid the injury.

*Trantham v. Estate of Sorrells*, 121 N.C. App. 611, 613, 468 S.E.2d 401, 402, *disc. review denied*, 343 N.C. 311, 471 S.E.2d 82 (1996). This issue will only be submitted to the jury if "the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine." *Bowden v. Bell*, 116 N.C. App. 64, 68, 446 S.E.2d 816, 819 (1994). If all the necessary elements of last clear chance are not supported, the case is governed by the ordinary rules of negligence and contributory negligence. *See Clodfelter*, 261 N.C. at 634, 135 S.E.2d at 638.

Defendant argues that the evidence presented was insufficient to support the first three elements of the doctrine of last clear chance. For the reasons stated below, we disagree.

I.

Defendant first contends that there was insufficient evidence presented that plaintiff was in a perilous position as a result of his own negligence. In particular, defendant argues that plaintiff did not meet his burden of proving that he was in a position of peril because the only evidence supporting this element came from defendant and Whaley, not plaintiff or plaintiff's witness. However, based on the facts in this case, plaintiff did not have to actually offer testimony that he believed he was in a perilous position before he rested his case.

In cases where pedestrians have raised the issue of last clear chance after being hit by a vehicle, our courts have held that evidence tending to show that an injured pedestrian either not facing oncoming traffic or unable to see an approaching vehicle was sufficient evidence to establish a position of peril. *See Nealy v. Green*, 139 N.C. App. 500, 505-06, 534 S.E.2d 240, 244 (2000) (holding that a pedestrian-plaintiff walking on the shoulder of a road with his back to traffic and not turning around when defendant's vehicle approached had placed himself in a perilous position). Our courts have "reason[ed] that [a] pedestrian who did not apprehend imminent danger 'could not reasonably have been expected to act to avoid injury.'" *Id. at* 506, 534 S.E.2d at 244

(quoting *Watson v. White*, 309 N.C. 498, 505, 308 S.E.2d 268, 272 (1983)). The circumstances surrounding the case *sub judice* are analogous to these pedestrian cases.

Plaintiff testified that the accident took place while he was sitting inside a taxicab located on the shoulder of US 301. Plaintiff further testified that he was not facing the oncoming traffic and did not see or hear defendant's vehicle approaching prior to the collision. When analogizing these facts to those in the pedestrian cases previously mentioned (and when viewing them in the light most favorable to plaintiff), "[e]vidence sufficient to support a reasonable inference was thus presented that plaintiff, by failing to 'pay attention to [his] surroundings and discover his own peril,' thereby placed himself in a dangerous position from which he could not extricate himself." *Id. at* 506, 534 S.E.2d at 244 (citing *Williams v. Odell*, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 557 (1988)) (citation omitted).

Furthermore, plaintiff had the benefit of all the evidence offered at trial to meet his burden of providing sufficient evidence by which a jury could infer that he was in a perilous position. Our courts have held that "[t]he party alleging a material fact, necessary to be proved and which is denied, [has the burden of proving] it by a preponderance of the evidence, or by the greater weight of the evidence." *See Speas v. Bank*, 188 N.C. 524, 529, 125 S.E. 398, 401 (1924). The party with the burden "'must fail if upon the *whole* evidence he does not have a

preponderance[.]'" *Cox v. R. R.*, 149 N.C. 117, 119, 62 S.E. 884, 885 (1908) (quoting 1 Elliott on Evidence, § 139) (emphasis added). Although, neither plaintiff nor his witness offered testimony that plaintiff believed he was in a position of peril, evidence supporting this element was offered through the testimony of defendant and Whaley. Therefore, the evidence as a whole, which includes the testimony of defendant and Whaley, does sufficiently support this element of last clear chance and can also be used by plaintiff to meet his burden of supporting the other elements of the doctrine.

II.

Defendant next contends that there was insufficient evidence presented that he discovered or should have discovered that plaintiff was in a position of peril. It is well established in our State that "a motorist upon the highway . . . owe[s] a duty to all other persons using the highway, *including its shoulders*, to maintain a lookout in the direction in which the motorist is traveling." *Exum v. Boyles*, 272 N.C. 567, 576, 158 S.E.2d 845, 852-53 (1968) (emphasis added). "The duty to keep a proper lookout requires increased vigilance when the danger is increased by conditions obstructing the motorist's view." *Almond v. Bolton*, 272 N.C. 78, 80, 157 S.E.2d 709, 711 (1967) (citation omitted). On cross-examination, defendant testified that he was "probably" unable to see around the Whaley vehicle that was directly in front of him. Plaintiff testified that during the ten to fifteen

minutes he was parked on the shoulder of US 301, a number of vehicles, including the Whaley vehicle, drove past him without hitting the taxicab. When considering this testimony in the light most favorable to plaintiff, there was sufficient evidence for a reasonable jury to infer that defendant would have discovered plaintiff's perilous position if he had maintained a proper lookout and not been following the Whaley vehicle so closely.

III.

Finally, defendant contends that there was insufficient evidence presented that he had the time and ability to avoid injuring plaintiff. The essence of this element is that defendant must have the time and the means to avoid the injury to the plaintiff by the exercise of reasonable care after he discovered or should have discovered plaintiff's perilous position. *See Exum*, 272 N.C. at 575-76, 158 S.E.2d at 852-53. With respect to how much reaction time is required, there is no bright-line standard because "[t]he reasonableness of a defendant's opportunity to avoid doing injury must be determined on the particular facts of each case." *VanCamp v. Burgner*, 328 N.C. 495, 499, 402 S.E.2d 375, 377, *reh'g denied*, 329 N.C. 277, 407 S.E.2d 854 (1991).

There was sufficient evidence for the jury in this case to reasonably infer that defendant had adequate time and ability to avoid the accident. When viewed in the light most favorable to plaintiff, the evidence showed that: (1) plaintiff's taxicab was parked and did not suddenly enter into defendant's line of travel,

(2) plaintiff's taxicab and the area in which he was parked were both well lit, (3) the road on which the accident occurred was straight, (4) defendant neither slowed down before hitting plaintiff nor made an attempt to avoid hitting plaintiff, and (5) defendant saw plaintiff's taxicab approximately two seconds before the collision. With regard to a driver's reaction time, our courts have held that a driver-defendant's failure to see a plaintiff a "split second" prior to impact was sufficient evidence by which a jury could infer that defendant had the time and ability to avoid injuring plaintiff. *See Nealy v. Green*, 139 N.C. App. 500, 534 S.E.2d 240 (2000). Thus, in addition to the particular facts presented in this case, defendant's two-second reaction time was sufficient to support a finding that he had the time and ability to avoid injuring plaintiff.

In conclusion, we find there was sufficient evidence to support a reasonable inference of these three essential elements of the doctrine. Additionally, "[w]e assume the presence of the remainder of the elements of last clear chance, since the parties do not dispute their presence." *Trantham v. Estate of Sorrells*, 121 N.C. App. 611, 615, 468 S.E.2d 401, 404 (citing *Hales v. Thompson*, 111 N.C. App. 350, 356, 432 S.E.2d 388, 392 (1993)), *disc. review denied*, 343 N.C. 311, 471 S.E.2d 82 (1996). Therefore, the trial court did not err in submitting this issue to the jury.

No error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).