NO. COA04-1044

NORTH CAROLINA COURT OF APPEALS

Filed: 07 March 2006

STACY BATTS, JAYQUAN BATTS, and SHAYQUAN BATTS, by and through their Guardian Ad Litem, WILLIAM LEWIS KING,
Plaintiffs,

v. Wilson County
No. 01 CVS 1375

SHAWAN L. BATTS,
Defendant-Third-Party Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,
Third-Party Defendant.

Appeal by plaintiffs from judgment entered 24 May 2004 by Judge Dennis J. Winner in Wilson County Superior Court. Heard in the Court of Appeals 23 March 2005.

Taylor Law Office, by W. Earl Taylor, Jr., for plaintiff-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for third-party defendant-appellee.

STEELMAN, Judge.

Plaintiffs appeals the trial court's order granting the motion of the third party defendant for judgment not withstanding the verdict and setting aside the jury verdict in favor of the plaintiffs. For the reasons set forth herein, we affirm.

On 13 May 2001, defendant Shawan Batts (Batts) was operating a motor vehicle in Elm City, Wilson County, North Carolina, in a westerly direction on West Nash Street. At the intersection of West Nash Street with North Parker Street, there are stop signs directing traffic on West Nash Street to stop. Facing Batts' direction of travel, there were two stop signs, one on the right and the other on the left of the intersection. The stop sign on the right was at least partially obscured by the limbs of a tree. Evidence at trial was conflicting as to the extent that the stop sign was obscured. Batts approached the intersection with North Parker Street at a speed of 35 miles per hour, at no time slowed her vehicle, and proceeded into the intersection. In the intersection the Batts vehicle was struck by a vehicle proceeding on North Parker Street, the dominant thoroughfare.

Plaintiffs were passengers in the Batts vehicle. On 16 July 2002, plaintiffs filed this action against Batts seeking monetary damages for personal injuries based upon Batts' negligence. Batts filed a third party complaint seeking indemnity and contribution from the North Carolina Department of Transportation (DOT) based upon the alleged negligence of DOT in failing to keep the stop sign on the right side of the intersection free from obstructions. Plaintiffs subsequently amended their complaint to assert a direct claim against DOT based upon this same theory. DOT moved to dismiss these claims based upon sovereign immunity. This motion was denied by the trial court, and this ruling was affirmed by this

Court. *Batts v. Batts*, 160 N.C. App. 554, 586 S.E.2d 550 (2003), *disc. rev. denied*, 358 N.C. 153, 592 S.E.2d 553 (2004).

This case came for trial at the 1 March 2004 session of Civil Superior Court for Wilson County. At the close of plaintiffs' evidence, Batts and third-party defendant moved for a directed verdict. The trial court denied Batts' motion, granted DOT's motion as to Batts' third-party claim for indemnity, and held the remainder of DOT's motion in abeyance.

Following the presentation of evidence by DOT, the trial court submitted to the jury issues of the negligence of Batts and DOT, and damages as to each of the plaintiffs. The jury found both Batts and DOT to be negligent and awarded damages to each plaintiff. DOT filed a motion for entry of judgment notwithstanding the verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. On 1 May 2004, Judge Winner granted this motion, holding that:

> there was no evidence in this trial from which the jury could find that the alleged negligence of the N.C. Department of Transportation was a proximate cause of the injuries to the plaintiff, and there was no evidence from which the jury could find that there was constructive notice or actual notice to the N.C. Department of Transportation of the condition of the stop sign herein.

From this order plaintiffs appeal.

In their sole assignment of error, plaintiffs contend that the trial court erred in granting DOT's motion for judgment notwithstanding the verdict. We disagree.

> A motion for judgment notwithstanding the verdict pursuant to Rule 50 of the North

> Carolina Rules of Civil Procedure is essentially a renewal of an earlier motion for a directed verdict. By making such a motion, the moving party asks that judgment be entered in accordance with his previous motion for directed verdict, notwithstanding the contrary verdict actually rendered by the jury.

Taylor v. Walker, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987)(internal citations omitted). "On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

> The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law. Both motions ask whether the evidence presented at trial is legally sufficient to take the case to the jury. In ruling on the motion, the trial court must consider the evidence in the light most favorable to the nonmoving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor. Ordinarily, such a judgment is not proper unless it appears as a matter of law that a recovery simply cannot be had by plaintiff upon any view of the facts which the evidence reasonably tends to establish.

Taylor at 733-34, 360 S.E.2d at 799 (internal citations omitted).

We first consider the question of notice. In order for the issue of DOT's negligence to have been submitted to the jury, there must have been evidence that DOT had notice of the obstruction of the stop sign on the right side of the intersection at a time prior to the accident. *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 788 (1967). Notice may be either actual or

constructive. Actual notice brings the knowledge of a fact directly home to a party, i.e. the party actually knew about the condition. Constructive notice is information or knowledge of a fact imputed by law to a person because he or she could have discovered the condition by proper diligence, and under the law the person had a duty to make an inquiry. *State v. Poteat*, 163 N.C. App. 741, 746, 594 S.E.2d 253, 255-56 (2004), citing *Black's Law Dictionary* 1061-62 (6th ed. 1990). Inherent in the concept of constructive notice is that the condition must have existed for a period of time such that the person, in the exercise of reasonable care, would have discovered it. *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960); *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000); *Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 275, 488 S.E.2d 617, 620 (1997).

We first direct our attention to any evidence of constructive notice. In support of their argument, plaintiffs direct this Court to the testimony of Wade Winstead. They argue that: "His answer in the light most favorable to the plaintiffs clearly can be interpreted that the big oak tree sitting almost behind the stop sign with long limbs covered that stop sign for a long time."

We do not reach the question of whether the language "a long time" is sufficient to support constructive notice, because plaintiffs have mischaracterized Mr. Winstead's testimony. The only place in Mr. Winstead's testimony where the phrase "a long time" is used is as follows:

> Q. Did you notice whether or not you could see the stop sign on the right hand side of that road?
>
> A. Well, for a long time - - if you think about it, if - - I've stayed in Elm City for 35 years, and it's just a natural thing. You know where to stop. But that stop sign itself is sitting high up on the curb on the right-hand side. And if you'll notice, it's one on the left-hand side also. But at that certain time, you know, there was a lot of - - it's a big oak tree sitting almost behind that stop sign, and there was long limbs that covered that stop sign.

Mr. Winstead was behind the Batts vehicle, proceeding in a westerly direction on West Nash Street. Prior to the above testimony, he stated that as the vehicles approached the intersection with North Parker Street, he exclaimed to his wife, "Lord, they're not going to stop at that stop sign." He then testified that the Batts vehicle did not brake prior to entering the intersection.

The question directed to Mr. Winstead was whether he could see the stop sign on the right side of the road. The question was not whether he knew how long the stop sign on the right had been obscured. Mr. Winstead's answer was that he had lived in Elm City for a long time and knew where the stop sign was located. Even viewing this testimony in the light most favorable to the plaintiffs it gives no indication of how long the obstruction of the stop sign on the right had existed prior to the accident.

There were two stop signs facing traffic westbound on West Nash Street; the right one, which plaintiffs contend was obstructed at the time of the accident, and the left one, which all the

evidence showed was unobstructed. Deputy Roy Sherrod, Jr. of the Wilson County Sheriff's Department testified that the left sign was up for two or three years or more prior to the accident. Ernie Mallard, a former DOT employee, testified for plaintiffs as an expert witness in traffic engineering. He testified that he could not think of any reason why a stop sign would be erected on the left side of the intersection except to be in the place of the stop sign on the right.

Plaintiffs argue from this testimony that it "could be interpreted to mean that there are many reasons for the stop sign on the left, but the only one that Mr. Mallard could think of was because of an obstruction to the stop sign on the right." From this, and Deputy Sherrod's testimony, plaintiffs then extrapolate that the obstruction existed for two to three years prior to the accident.

Plaintiffs' attempts to spin the testimony of Mr. Mallard cannot create evidence that is not there. At no time did Mallard testify that in his opinion the sign on the left was erected by DOT because the sign on the right was obstructed. Mallard testified as follows:

> Q. But you have no information to show that the stop sign on the left was to be used in place of the stop sign on the right, do you?
>
> A. I can't think of any other reason it would have been there, myself.

Plaintiffs were required to present to the jury evidence that DOT had constructive notice of the obstruction. It is not sufficient to present speculation, innuendo and spin. *Roumillat v.*

Simplistic Enters., 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992); *see also Curtis v. North Carolina DOT*, 140 N.C. App. 475, 482, 537 S.E.2d 498, 503 (2000).

Plaintiffs also contend that the erection of the stop sign on the left side of the road demonstrates that DOT had actual knowledge of the obstruction of the stop sign on the right. In support of this argument, plaintiffs direct this Court to the identical testimony of Mr. Mallard discussed above. This testimony does not support plaintiffs' assertion that DOT had actual knowledge of the obstruction of the sign.

Plaintiffs called at least eight witnesses who had lived or worked in Elm City for substantial periods of time and were familiar with the thoroughfares of the town: Gill Wheeler (Elm City resident for 45 years); John Wilson (Elm City resident for approximately 33 years); Danny Baker (Elm City resident for approximately 20 years); Wade Winstead (Elm City resident for 35 years); Tonya Clayton (Elm City resident for 18 years); Wilson County Sheriff's Deputy Roy Sherrod (worked area for 5 years); Wilson County Sheriff's Detective Dennis Bissette (worked area for 18 years); and North Carolina Highway Patrolman Charles Gould (worked area for 7 years). Plaintiffs failed to elicit testimony from any of these witnesses concerning the length of time the stop sign on the right may have been obstructed.

We hold that the trial court correctly determined that plaintiffs did not present evidence of constructive notice and properly granted DOT's motion for judgment notwithstanding the

verdict. Because of this holding, we need not address the issue of whether plaintiffs presented evidence that any negligence of DOT proximately caused the plaintiffs' injuries.

AFFIRMED.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).