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NO. COA05-1321-2

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

XAVIER MONTEZ BOONE, a
Minor by and through his
Guardian Ad Litem,
MONIQUE SKINNER and
ANGELA HARDGRAVE,

Plaintiffs,

v.

Halifax County
No. 02 CVS 657

BENNIE BURTON MOORE,

Defendant.

Request for Rehearing granted by North Carolina Court of Appeals 24 August 2006 regarding original appeal by plaintiffs to this Court. Original appeal heard in this Court 11 May 2006 from judgment entered on 14 April 2005 by Judge W. Russell Duke, Jr. in the Superior Court of Halifax County. The first opinion of this Court, filed 1 August 2006, dismissed the appeal for violation of our Rules of Appellate Procedure.

Perry, Anthony & Sosna, by Cedric R. Perry, for plaintiffs-appellants.

Baker, Jones, Daly & Carter, P.A., by W. Hugh Jones, Jr., for defendant-appellee.

ELMORE, Judge.

Plaintiffs appealed an order of the trial court granting defendant's motion for a directed verdict and dismissing

plaintiffs' complaint with prejudice. Originally, this Court affirmed the trial judge's ruling on the grounds that plaintiffs' brief lacked assignments of error, as required by Rule 10 of the North Carolina Rules of Appellate Procedure. See N.C.R. App. P. 10(c)(1). However, on 24 August 2006 this Court granted plaintiffs' Request for Rehearing because plaintiffs' brief contained an assignment of error couched in the brief. Thus, we must reach the merits of this case. After careful consideration of the record, we affirm the judgment of the trial court.

The facts underlying the appeal are as follows: ten-year-old Xavier Montez Boone (the minor plaintiff) attempted to cross Jackson Street at a place other than in a crosswalk. Prior to crossing the street, the minor plaintiff looked for oncoming traffic in one direction, but not in the other. When the minor plaintiff ran into the street, a pickup truck driven by defendant struck the minor plaintiff's left hip. The pickup truck came from the direction in which the minor plaintiff had not looked. The minor plaintiff sustained injuries to his legs, arms, head and hips.

Defendant's testimony remains largely uncontroverted by plaintiffs; additionally, defendant's testimony is largely supported by the testimony of an independent eyewitness. Defendant testified that just prior to the accident, he was traveling at approximately ten miles per hour. He testified that he had seen three older boys cross the street about thirty or forty yards ahead of his truck. Defendant further testified that the minor plaintiff

jumped into the street when defendant's truck was only two or three feet from the minor plaintiff and that although he attempted to avoid hitting the minor plaintiff, he was unable to do so. An independent eyewitness testified that when the minor plaintiff neared the street, the minor plaintiff looked only in the direction opposite defendant's truck before darting into the street. The eyewitness stated that when the minor plaintiff first entered the street, defendant's truck was a couple of feet from the minor plaintiff.

After plaintiffs rested their case at trial, defendant moved for a directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. The trial court denied the motion, at which point defendant presented evidence. Plaintiffs then presented rebuttal evidence. At the close of all the evidence, defendant renewed his motion for a directed verdict. After considering the arguments of counsel, the trial court granted defendant's motion.

The issue before this Court is whether the trial court erred in granting defendant's motion for a directed verdict. The standard of review for such a case is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to a jury. *Floyd v. McGill*, 156 N.C. 29, 35, 575 S.E.2d 789, 793 (2003).

After carefully considering the facts of this case, we hold that the evidence presented at trial revealed no actionable negligence on the part of defendant. Our Supreme Court has said:

The well-settled rule in this state is that a driver who otherwise exercises reasonable care has no duty to foresee the sudden appearance of a child who darts out into a street. [T]he rule is that the driver is not the insurer of the safety of children in the street, and that under ordinary circumstances he is not bound to anticipate children in his pathway; a driver has to have enough time to stop or to avoid a collision before his failure to do so can be actionable negligence. It should be noted that the darting children cases affirming a defendant driver's motion for a directed verdict appear to share a common theme. Generally, the plaintiff in those cases failed to present sufficient evidence on the defendant's ability to avoid the accident.

Manley v. Parker, 123 N.C. App. 540, 542, 473 S.E.2d 36, 37 (1996) (internal quotations and citations omitted). In the case at hand, defendant drove his truck under the speed limit and kept a look-out for pedestrians, as exhibited by the fact that he saw three other boys cross the street in front of his truck. Both the testimony of defendant and the testimony of the occurrence witness confirm that the minor plaintiff stepped into the street when defendant's truck was just several feet away. Under such circumstances, defendant tried to avoid the accident, but was unable to do so through no fault of his own.

The evidence in this case, when viewed in the light most favorable to plaintiffs, fails to show that defendant committed any negligent actions that caused the accident with the minor plaintiff. For this reason:

We affirm.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).