NO. COA05-1426

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

ROBERT C. MALONE,
Plaintiff,

v. Franklin County
No. 04 CVS 1048

NELLIE M. DEAN,
Defendant.

Appeal by plaintiff from judgment entered 18 April 2005 by Judge Narley L. Cashwell in the Superior Court in Franklin County. Heard in the Court of Appeals 11 May 2006.

Lanier Law Group, by Kevin Ginsberg, for plaintiff-appellant.

Valentine, Adams, Lamar, Murray, Lewis & Daughtry, L.L.P., by Kevin N. Lewis, for defendant-appellee.

HUDSON, Judge.

In September 2004, plaintiff sued defendant for negligence related to a motor vehicle accident. In her answer, defendant asserted contributory negligence by plaintiff. Plaintiff then filed a reply, pleading the doctrine of last clear chance. At trial, the jury found that defendant's negligence injured plaintiff and that plaintiff contributed to his injuries by his own negligence. On 18 April 2005, the trial court entered judgment that plaintiff recover nothing from defendant and dismissed the action with prejudice. Plaintiff appeals. We affirm the trial court.

The evidence tends to show that on 15 May 2002, at approximately 2:45 p.m., plaintiff, an employee of M.E. Shearing, was driving a truck load of logs to Enfield for delivery. Plaintiff was traveling east on Highway 56, near Louisburg, at approximately 50-55 m.p.h. in a 55 m.p.h. zone. Defendant, who was also traveling in an easterly direction, some distance ahead of plaintiff, slowed and braked several times. As plaintiff approached a passing zone, he increased his speed to approximately 55 m.p.h. and positioned his vehicle in the left, westbound lane, in order to pass defendant. Plaintiff testified that he blew his air horn and put on his turn signal as he went to pass defendant. Plaintiff testified that after he was in the passing lane for four or five seconds, he observed defendant's vehicle begin to make a left hand turn, and that defendant's vehicle veered into the right side of his truck, causing plaintiff to run off the left shoulder of the road. Defendant testified that she was at a complete stop for a second or two before she turned and that plaintiff's vehicle struck hers as she began to turn.

Plaintiff argues that the trial court erred in refusing to instruct the jury on last clear chance. We first note that defendant asserts that plaintiff has failed to preserve this issue for appeal. At the jury instruction conference, plaintiff verbally requested that the court instruct the jury on last clear chance and the court denied this request and noted plaintiff's objection. Defendant argues that plaintiff did not request this instruction in writing as required by N.C. Super. Ct. Rule 21 (2004) and that

plaintiff failed to object following the trial court's actual jury charge as required by N.C. R. App. P. 10(b)(2) (2004). Although this Court has held that a party who objects at the charge conference need not renew the objection upon the actual jury charge in order to comply with N.C. R. App. P. 10(b)(2), this Court has held that failure to submit the request in writing, as required by N.C. Gen. Stat. § 1A-1, Rule 51(b) and N.C. Gen. Stat. § 181, waives appellate review. *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 379, 542 S.E.2d 689, 694 (2001). However, we conclude that even if plaintiff had properly preserved this issue for appellate review, the trial court did not err.

The elements of the doctrine of last clear chance are as follows:

> (1) that the plaintiff negligently placed himself in a position of helpless peril; (2) that the defendant knew or, by the exercise of reasonable care, should have discovered the plaintiff's perilous position and his incapacity to escape from it; *(3) that the defendant had the time and ability to avoid the injury by the exercise of reasonable care; (4) that the defendant negligently failed to use available time and means to avoid injury to the plaintiff* and (5) as a result, the plaintiff was injured…

Parker v. Willis, 167 N.C. App. 625, 627, 606 S.E.2d 184, 186 (2004) (emphasis added). Thus, in order for the court to submit last clear chance to the jury, the evidence, viewed in the light most favorable to the plaintiff, must show "an appreciable interval of time between plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should

have avoided the effect of plaintiff's prior negligence." *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 448, 35 S.E.2d 337, 340 (1945). Here, we conclude that the "evidence indicates that the matter occurred within a very few seconds and is a case of negligence and contributory negligence rather than last clear chance." *Pippins v. Garner*, 67 N.C. App. 484, 486, 313 S.E.2d 245, 246 (1984). Even if defendant "may have had the last *possible* chance to avoid the injury, defendant had not the time nor the means to have the last *clear* chance to entitle the submission of the question to the jury." *Id.* (emphasis in original). We overrule this assignment of error.

Affirmed.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).