NO. COA05-1446

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

SHANNON MAE BULLINS,
Plaintiff,

v.

Wilkes County
No. 05 CVS 248

MARK EDWARD WALKER,
BRINKER NORTH CAROLINA,
INC. trading and doing
business as CHILI'S
GRILL & BAR,
Defendants.

Appeal by plaintiff from an order entered 27 June 2005 by Judge Richard L. Doughton in Wilkes County Superior Court. Heard in the Court of Appeals 17 May 2006.

Franklin D. Smith for plaintiff-appellant.

Davis & Hamrick, L.L.P., by Kent L. Hamrick and Ann C. Rowe, for defendant-appellee Mark Edward Walker.

Parker, Poe, Adams & Bernstein L.L.P, by James C. Thornton, for defendant-appellee Brinker North Carolina, Inc.

BRYANT, Judge.

Shannon Mae Bullins (plaintiff) appeals from an order entered 27 June 2005 dismissing her claims against Mark Edward Walker (Walker) and Brinker North Carolina, Inc., trading and doing business as Chili's Grill & Bar (collectively, defendants). We affirm the order of the trial court.

Facts

On 11 September 2004, Walker drove plaintiff and his wife, Susan Walker, to Hanes Mall in Winston-Salem, North Carolina. While plaintiff and Walker's wife shopped at the mall, Walker went to a Chili's Grill & Bar located adjacent to the mall and consumed two Long Island Iced Teas. After shopping, plaintiff and Mrs. Walker joined Walker at Chili's Grill & Bar for dinner. Over the course of the evening, Walker consumed a total of five Long Island Iced Teas, and, as plaintiff alleged in her complaint, "[a]s the evening progressed, [Walker] became increasingly louder, his speech became slurred, his eyes were glassy, he had difficulty standing and stumbled several times going to and from the restroom."

After finishing their meal, Walker retrieved his car and drove to the front of the restaurant, where plaintiff and Mrs. Walker were waiting. Walker then picked up plaintiff and carried her to the rear passenger door. Plaintiff was aware of Walker's impaired condition and repeatedly asked him to let her drive them home. Mrs. Walker also asked Walker to let plaintiff drive them home.

Walker insisted upon driving his car, and the parties drove away from the restaurant, stopping at a gas station and a McDonald's restaurant before heading home. While driving the parties home, Walker lost control of the vehicle, veered into the left lane, ran off of the side of the road, struck an embankment, and overturned. Plaintiff was thrown from the vehicle and suffered severe injuries.

Procedural History

On 21 February 2005, plaintiff filed a complaint against defendants for negligence, seeking both compensatory and punitive damages. On 25 and 29 April 2005, defendants independently filed motions to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Plaintiff subsequently filed a Motion to Amend Complaint.

A hearing on defendants' and plaintiff's motions was held on 9 May 2005, before the Honorable Richard L. Doughton. Plaintiff's motion to amend was allowed without objection. However, defendants' motions to dismiss were granted pursuant to Rule 12(b)(6) after defendants presented arguments that all of the elements of contributory negligence were affirmatively pled in plaintiff's complaint. The trial court entered an order dismissing plaintiff's claims with prejudice on 27 June 2005. Plaintiff appeals.

Plaintiff raises the issue of whether the trial court erred in allowing defendants' motions to dismiss plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff argues the trial court erred in dismissing her claims because she should be allowed to present evidence as to whether she was forced into Walker's car and whether she was restrained from leaving the car.

Standard of Review

In reviewing a trial court's dismissal pursuant to Rule 12(b)(6), this Court must inquire "'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.'" *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)).

> Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. Dismissal is proper, however, when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Newberne, 359 N.C. at 784, 618 S.E.2d at 203-04 (internal citations and quotations omitted). However, "[a] party is bound by his pleadings and, unless withdrawn, amended or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964) (citation omitted).

Contributory Negligence

"[C]ontributory negligence consists of conduct which fails to conform to an *objective* standard of behavior -- the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (citations and quotations

omitted). "A court should dismiss a complaint based on contributory negligence only when the allegations of the complaint taken as true 'show[] negligence on [the plaintiff's] part proximately contributing to his injury, so clearly that no other conclusion can be reasonably drawn therefrom.'" *Sharp v. CSX Transp., Inc.*, 160 N.C. App. 241, 244-5, 584 S.E.2d 888, 890 (2003) (quoting *Ramey v. Southern Ry. Co.*, 262 N.C. 230, 234, 136 S.E.2d 638, 641 (1964)). Nonetheless, our Supreme Court has held that where a passenger "enters an automobile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him, he is guilty of contributory negligence *per se*." *Rigsby*, 261 N.C. at 686-87, 136 S.E.2d at 35.

In the instant case, plaintiff knew Walker was under the influence of alcohol, and there is nothing in her complaint to indicate she did not enter and remain in the car voluntarily. While the complaint does state that Walker picked plaintiff up and carried her to the passenger door, it is only at the hearing on defendants' motions to dismiss and in her brief to this Court that plaintiff asserts she was forced *into* the car. Further, Walker made two stops in Winston-Salem during which plaintiff did not leave the car. Plaintiff remained in the car at each of these stops, and although she states she was carried to the car, there is no indication in plaintiff's complaint that she was forced to enter the car or restrained from leaving the car at any time. Plaintiff's own complaint establishes she voluntarily continued to ride in a car driven by Walker whom she knew to be impaired by

alcohol, and thus is contributorily negligent as a matter of law. *See Watkins v. Hellings*, 321 N.C. 78, 81, 361 S.E.2d 568, 570 (1987) ("when a passenger voluntarily continues to ride with a driver the passenger knows to be impaired by alcohol, the passenger is contributorily negligent as a matter of law"); *Davis v. Rigsby*, 261 N.C. 684, 686-87, 136 S.E.2d 33, 35 (1964) (where a passenger "enters an automobile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him, he is guilty of contributory negligence *per se*"); *Coleman v. Hines*, 133 N.C. App. 147, 151, 515 S.E.2d 57, 60 (1999) (where the evidence establishes willful and wanton negligence on the part of a drunk driver, it also establishes a "similarly high degree of contributory negligence on the part of" a passenger who voluntarily rides with him). This assignment of error is overruled.

Affirmed.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).