NO. COA07-656

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

MINNIE L. HALL

v. Johnston County
No. 05 CVS 3418

JOSUE MAURICIO

Appeal by plaintiff from judgment entered 9 January 2007 by Judge Gary E. Trawick in Johnston County Superior Court. Heard in the Court of Appeals 28 November 2007.

Anderson Law Firm, by Michael J. Anderson, for plaintiff-appellant.

Walker, Allen, Grice, Ammons & Foy, LLP, by Jeffrey T. Ammons and Ron D. Medlin, Jr., for defendant-appellee.

STEELMAN, Judge.

Where there were material issues of fact presented to the trial court on cross-motions for summary judgment arising out of an automobile accident, the trial court correctly denied plaintiff's motion for summary judgment but erred in granting defendant's motion for summary judgment.

I. Factual and Procedural Background

On the evening of 28 October 2003 Josue Mauricio ("defendant") was driving westbound on Rural Paved Road 2153 in Johnston County. On that same night, Minnie Hall ("plaintiff") had parked her car in the westbound lane of the road facing east in order to check the

mail in her daughter's mailbox, which was located approximately two feet from the road. Three quarters of plaintiff's car was in the road, and plaintiff's bright lights were shining in the direction of oncoming traffic in the westbound lane. After parking her car, plaintiff exited the vehicle to check the mail. It was dark and raining.

Defendant testified in his deposition that he was traveling 50-55 miles per hour. In an affidavit, defendant asserted that "[d]ue to the glare from the rain, and the headlights, it was not clear that this vehicle was in my lane." Upon realizing plaintiff's car was in his lane, defendant applied his brakes and swerved to the right to avoid colliding with plaintiff's vehicle. Defendant's vehicle collided with the mailbox, which in turn struck plaintiff, resulting in injury to plaintiff. Defendant was issued a citation by the investigating officer for failure to reduce speed. Defendant pled responsible and paid the ticket.

On 23 November 2005, plaintiff filed a complaint in Johnston County Superior Court alleging that her injuries were caused by the negligence of defendant. On 3 January 2006, defendant filed an answer denying negligence and asserting the defenses of contributory negligence and sudden emergency. Plaintiff filed a reply on 20 December 2005, admitting her contributory negligence and asserting that defendant had the last clear chance to avoid the accident. Both parties filed motions for summary judgment. On 31 January 2007, Judge Trawick entered an order denying plaintiff's

motion for summary judgment and granting defendant's motion for summary judgment. Plaintiff appeals.

II. Granting Defendant's Motion for Summary Judgment

In her first argument, plaintiff contends that the trial court erred in granting defendant's motion for summary judgment. We agree.

> The standard of review on appeal from a summary judgment ruling is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. The moving party bears the burden of showing the lack of [a] triable issue of fact.

Allstate Ins. Co. v. Lahoud, 167 N.C. App. 205, 207, 605 S.E.2d 180, 182 (2004) (internal citations and quotations omitted). "[A] fact is material if it would constitute or would irrevocably establish any material element of a claim or defense." *McCullough v. Amoco Oil Co.*, 310 N.C. 452, 458, 312 S.E.2d 417, 420 (1984) (citation omitted).

The elements of the doctrine of last clear chance are:

> (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) (citing *Kenan v. Bass*, 132 N.C. App. 30, 32-33, 511 S.E.2d 6, 7-8 (1999)).

The doctrine of last clear chance may be invoked

> "only in the event it is made to appear that there was an appreciable interval of time between the 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." Where there is no evidence that a person exercising a proper lookout would have been able, in the exercise of reasonable care, to avoid the collision, the doctrine of last clear chance does not apply.

Watson v. White, 309 N.C. 498, 506, 308 S.E.2d 268, 273 (1983) (quoting *Mathis v. Marlow*, 261 N.C. 636, 639, 135 S.E.2d 633, 635 (1964)).

Plaintiff contends that there were genuine issues of fact presented to the trial court, and that summary judgment was not appropriate. The road leading east from the mailbox ran straight for some distance, and then curved. Defendant would not have been able to see plaintiff's vehicle until he came out of the curve. Defendant testified that the road was straight for only about thirty feet from the mailbox. Plaintiff's witnesses testified that the road was straight for a quarter to four-tenths of a mile. Plaintiff further testified that her vehicle hazard lights were on.

Clearly if the road was only straight for thirty feet, given the darkness and the rain and the speed of defendant's vehicle, there would not have been sufficient time for the defendant to have, in the exercise of ordinary care, recognized the danger and

taken action to have avoided the collision. However, if the distance was one-quarter mile (1,320 feet) or four-tenths of a mile (2,112 feet) then at a speed of 55 miles per hour, plaintiff's vehicle would have been visible to defendant for between sixteen and twenty-six seconds. We hold that such an interval constitutes "an appreciable interval of time" as discussed in *Watson*.

We further hold that the sharply conflicting evidence as to the distance involved created a material issue of fact. It was for the jury to decide whether defendant should have discovered plaintiff's peril, whether he had the time and ability to avoid the collision, and whether he negligently failed to use available time and means to avoid injury. The trial court erred in granting summary judgment for defendant.

III. Denying Plaintiff's Motion for Summary Judgment

In her second argument, plaintiff contends that the trial court erred in denying plaintiff's motion for summary judgment. We disagree.

As noted above, there are material issues of fact to be determined by the jury. The trial court correctly denied plaintiff's motion for summary judgment.

We reverse the trial court's granting of defendant's motion for summary judgment but affirm the denial of plaintiff's motion for summary judgment.

AFFIRMED in part; REVERSED in part.

Judges McCULLOUGH and GEER concur.

Report per Rule 30(e).