NO. COA11-335
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

JOSEPH C. KELLY, III,
Plaintiff,

v.

Brunswick County
No. 08 CVS 2995

NANCY BURTON SHOAF,
Defendant and Third
Party Plaintiff,

v.

PAUL WOOD,
Third Party Defendant.

Appeal by third party plaintiff/defendant from judgment entered 20 August 2010 by Judge Jay D. Hockenbury in Brunswick County Superior Court. Heard in the Court of Appeals 27 September 2011.

Stephen C. Baynard and Ron D. Medlin, Jr., for Ennis & Baynard, P.A., attorneys for third party plaintiff/defendant.

Benton Walton H. III, C. Martin Scott II, for Williamston, Walton & Scott, LLP, attorneys for plaintiff.

ELMORE, Judge.

Nancy Burton Shoaf (defendant) appeals entry of judgment on a jury verdict in favor of Joseph C. Kelly, III (plaintiff). Specifically, defendant argues that: 1) The trial court erred in denying her motion for directed verdict and judgment notwithstanding the verdict (JNOV) on the issue of plaintiff's contributory negligence; 2) the trial court erred in denying her motion for directed verdict and JNOV on the issue of last clear chance; 3) the trial court erred in instructing the jury on the issue of last clear chance. We affirm.

On 24 November 2007 at approximately 5:55 PM, plaintiff and Paul Wood were towing Wood's boat to a car wash. Wood turned right into the car wash off Long Beach Road, but his vehicle and the boat trailer did not successfully complete the turn. Wood had to stop the vehicle with the boat motor protruding approximately two to three feet into the southbound lane of Long Beach Road. Plaintiff then exited the vehicle and walked into Long Beach Road in order to stop traffic so that Wood could straighten the trailer and pull the boat completely into the car wash. While plaintiff was stopping traffic in the northbound lane, he saw the headlights of defendant's car approaching in the southbound lane. Plaintiff waved his hands to signal for defendant to stop in her lane. Defendant's vehicle did not

change speed, so plaintiff jumped up and down in the center turn lane and waived his hands back and forth in an attempt to signal defendant.

At this time, defendant saw the trailer protruding into her lane. Defendant then quickly turned her vehicle into the center turn lane, in order to avoid a collision with the boat. Plaintiff was still standing in the center turn lane, and he ran down the lane away from defendant's car. Defendant's car then struck plaintiff from behind.

On 24 November 2008, plaintiff filed suit against defendant for negligence. On 9 February 2009, defendant filed an answer, denying negligence and alleging contributory negligence against plaintiff and a counterclaim against plaintiff for damage to defendant's car when she struck plaintiff. On 18 March 2009, plaintiff filed a reply, denying contributory negligence and alleging the defense of last clear chance on the part of defendant. On 10 August 2010, a jury trial was held. At the close of plaintiff's evidence, defendant made a motion for directed verdict on the issues of contributory negligence and last clear chance. The trial court denied defendant's motion. Then, at the close of defendant's evidence, defendant renewed her motion for directed verdict. The trial court again denied

that motion. At the close of all evidence, defendant again renewed her motion for directed verdict, and the trial court again denied the motion. Defendant then objected to submission of instructions to the jury on the issue of last clear chance. The trial court overruled that objection.

On 20 August 2010, the jury returned a verdict in favor of plaintiff. The jury found in sum that: 1) Plaintiff was injured or damaged by the negligence of defendant; 2) plaintiff by his own negligence contributed to his injuries or damages; 3) defendant had the last clear chance to avoid plaintiff's injuries or damages; 4) plaintiff is entitled to recover $250,000.00 for his personal injuries or damages. Pursuant to the jury verdict, the trial court ordered that defendant pay plaintiff the sum of $250,000.00 for his personal injuries. Defendant now appeals.

Defendant first argues that the trial court erred in denying her motions for directed verdict and JNOV on the issue of plaintiff's contributory negligence. However, in its judgment the trial court found 1) that plaintiff did, by his own negligence, contribute to his injuries or damage but 2) that defendant had the last clear chance to avoid plaintiff's injury or damage. Therefore, this Court's determination of whether the

trial court erred in denying defendant's motion for directed verdict and JNOV on the issue of contributory negligence will turn upon whether the trial court erred in finding that defendant had the last clear chance to avoid the injury. Therefore, we need not address defendant's first argument, and we will instead focus our attention on defendant's second argument: that the trial court erred in denying defendant's motion for directed verdict and JNOV on the issue of last clear chance.

"The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009), *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009) (citation omitted). This Court must determine "whether, upon examination of all the evidence in the light most favorable to the non-moving party . . . the evidence is sufficient to be submitted to the jury." *Id.* (quotations and citations omitted). "A motion for either a directed verdict or JNOV should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Id.* (quotations and citations omitted). The essential 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) (citations omitted).

Here, at trial evidence was presented showing that: 1) plaintiff was standing in the middle of the center lane when defendant quickly turned her vehicle into the lane to avoid a collision with the boat; 2) plaintiff ran from defendant's vehicle and defendant saw plaintiff's face before striking him with her car; 3) defendant entered the center lane approximately 60 feet in front of plaintiff, but defendant had the ability to stop her car within one car length, less than 60 feet; 4) defendant did not reduce her speed and only applied her brakes after hitting plaintiff; 5) plaintiff suffered a compression fracture to his L-1 and L-5 level vertebrae, a cracked right hip socket, and a sprained ankle as a result of the collision. We conclude that when this evidence is viewed in the light most

favorable to plaintiff, it is sufficient to support each element of plaintiff's claim of last clear chance. Therefore, the trial court did not err in denying defendant's motion for directed verdict and JNOV on the issue of last clear chance. Accordingly, the trial court did not err in denying defendant's motion for directed verdict and JNOV on the issue of contributory negligence.

Defendant's final argument is that the trial court erred in instructing the jury on the issue of last clear chance. We disagree.

This Court has held that "[t]he issue of last clear chance must be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine." *Nealy v. Green*, 139 N.C. App. 500, 504, 534 S.E.2d 240, 243 (2000) (citation omitted).

Here, based on the evidence we have previously discussed, we conclude that sufficient evidence was admitted to support a reasonable inference of each essential element of the doctrine of last clear chance. However, defendant further argues that in *Nealy* this Court held that when a pedestrian on a roadway is facing the approaching defendant, he is not entitled to an

instruction on the issue of last clear chance. We do not agree with defendant's summation of this Court's holding in that case or its application to the facts here.

In *Nealy*, this Court noted that "an instruction on last clear chance was held not warranted when a pedestrian was facing traffic and by the exercise of reasonable care, [could have] extricated herself from the position of peril in which she had negligently placed herself." 139 N.C. App. at 505, 534 S.E.2d at 244 (citation omitted) (alteration in original). Defendant argues that based on this language, plaintiff was not entitled to an instruction on last clear chance, because plaintiff was facing defendant for thirty seconds or more as she approached him with her vehicle. Defendant argues therefore that plaintiff had sufficient time to extricate himself from the position of peril. However, here it is apparent from the record that the position of peril at issue occurred not when defendant was approaching plaintiff in the southbound lane, but rather when defendant quickly turned her vehicle into the center lane approximately 60 feet from plaintiff. Defendant makes no argument that plaintiff could have extricated himself from harm at that point. Therefore, we conclude that the trial court did

not err in instructing the jury on the issue of last clear chance.

Affirmed.

Judges McGEE and HUNTER, JR., Robert N., concur.

Report per Rule 30(e).