An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-581
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

SANDRA P. GENTRY,
Plaintiff,

v.

Durham County
No. 11 CVS 4437

CHERYL S. MILLER,
Defendant.

Appeal by defendant from judgment entered 24 September 2012 and order entered 3 December 2012 by Judge Abraham P. Jones in Durham County Superior Court. Heard in the Court of Appeals 9 October 2013.

LAW OFFICES OF JAMES SCOTT FARRIN, by Elizabeth H. Overmann and Marie D. Lang, for plaintiff.

Haywood, Denny & Miller, L.L.P., by John R. Kincaid, for defendant.

ELMORE, Judge.

This action arises out of a rear-end automobile collision that occurred on 5 February 2011 in Durham County. Sandra P. Gentry (plaintiff) initiated an action against Cheryl S. Miller (defendant) and Rickey G. Ingle, alleging that the collision

occurred as a direct and proximate result of their negligence. On 10 January 2012, plaintiff filed a voluntary dismissal of her action against Rickey G. Ingle. The case was tried in Durham County Superior Court and submitted to the jury on issues of negligence, contributory negligence, last clear chance and damages. On 6 September 2012, the jury returned a verdict in favor of plaintiff, finding defendant negligent and plaintiff not contributorially negligent. Plaintiff was awarded $13,500.00 in damages. Defendant moved for a new trial or, in the alternative, for a judgment notwithstanding the verdict (JNOV). On 3 December 2012, the trial court denied both motions. Defendant now appeals. After careful consideration, we find no error.

I. Background

The evidence at trial showed that plaintiff and defendant were traveling southbound on Guess Road when defendant rear-ended plaintiff's vehicle. Plaintiff testified that she was driving about 35 mph immediately preceding the accident. As she approached her driveway, plaintiff slowed and signaled to make a left turn. Plaintiff had just started turning when she "got a big old hit" on the rear passenger-side of her Buick. Defendant testified that she was following plaintiff and was "aggravated"

by plaintiff’s slow speed. Then “all of the sudden, [plaintiff’s car] came to a full stop, and there was no turn signal.” Defendant “hit the brakes” and “turned the wheel to the right” in an effort to avoid the collision. However, the defendant’s left front bumper “nicked” plaintiff’s rear bumper. Defendant alleged that plaintiff had not yet started turning.

Following the collision, plaintiff’s vehicle veered to the right of her driveway and traveled approximately 175 feet through her yard before colliding with two trees and a deck and landing on its side. The impact with the trees and deck caused the airbags to deploy and the glass in the windshield to shatter. When the airbags deployed, plaintiff’s torso was pushed back while her head was jerked forward. Plaintiff was removed from the vehicle by firefighters.

Plaintiff sustained back and neck injuries as a result of the accident. She was treated by Dr. Edward Washington, Jr., a chiropractor, who testified that plaintiff’s injuries and treatment were consistent with someone who had been involved in a rear-end collision. Plaintiff incurred medical bills totaling approximately $12,500. At the time of the accident, plaintiff’s driver’s license had been revoked and she was not licensed to operate a motor vehicle.

II. Analysis

A. Driving While License Revoked

Defendant first argues that the trial court erred in sustaining objections to evidence offered by defendant that plaintiff did not hold a valid driver's license on the date of the rear-end collision. Defendant contends that this evidence is negligence per se as a violation of a safety statute and relevant in showing plaintiff was contributorially negligent as a matter of law. Because defendant failed to preserve this issue for appeal, we dismiss it.

"Generally, . . . issues occurring during trial must be preserved if they are to be reviewed on grounds other than plain error." *Reep v. Beck*, 360 N.C. 34, 36-37, 619 S.E.2d 497, 499 (2005). To preserve an issue for appellate review under Rule 10(a)(1), "a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make." *Id.* at 37, 619 S.E.2d at 499 (citation and quotation omitted). "[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount[.]" *State v.*

Sharpe, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation and quotation omitted).

In the instant case, defendant argues for the first time on appeal the theory that plaintiff's failure to comply with a safety statute constituted negligence per se: "It is a violation of the law for a person to operate a motor vehicle without having a valid driver's license. N.C. Gen. Stat. § 20-7. Therefore, the failure of the Plaintiff to [not] have a valid driver's license was negligence per se."

At trial, defendant never gave any indication that the basis for her request to admit the evidence that plaintiff was driving without a license was based on the theory of negligence per se. Defendant has impermissibly attempted to "swap horses" by raising this theory on appeal. Furthermore, the trial court did not exclude the evidence as not being relevant; it excluded it pursuant to Rule 403, finding that it was more prejudicial than probative. On appeal, plaintiff does not argue that the trial court's ruling was error. Defendant's argument as to relevancy is immaterial. This issue is dismissed.

B. <u>Jury Instructions</u>

Defendant next argues that the trial court erred in failing to instruct the jury on her contentions of contributory

negligence. Again, this issue was not properly preserved at trial, and we dismiss it.

Appellate Rule 10(a)(2) provides: "A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection[.]"[1] N.C.R. App. P. 10(a)(2)(2011). Making such objection "is mandatory and not merely directory." *Zubaidi v. Earl L. Pickett Enters.*, 164 N.C. App. 107, 116, 595 S.E.2d 190, 195 (2004) (quotations and citations omitted). "[W]here a party fails to object to jury instructions, it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error." *Madden v. Carolina Door Controls, Inc.*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994)(quotation and citation omitted).

At trial, defendant requested that the jury be instructed on Failure to Reduce Speed, pattern jury instruction 202.20a. However, when the trial court declined to instruct the jury accordingly, defendant raised no objection. Defendant also

[1] As of 1 October 2009, the portion of Rule 10 entitled "jury instructions" is now codified in Rule 10(a)(2), not Rule 10(b)(2). Prior case law referencing Rule 10(b)(2) is instructive in the instant case.

sought a modified instruction on Proper Control, pattern jury instruction 201.30. When the trial court did not omit the words "on a highway" from its instruction, per defendant's request, defendant did not object. Because defendant failed to object to the jury instructions before the jury retired to deliberate, her right to appellate review of this issue is waived. *See id.*

C. JNOV

Defendant argues that the trial court erred in denying her motion for a JNOV because there was sufficient evidence presented that plaintiff's negligence contributed to her injuries as a matter of law. We disagree.

"On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000). On motion for directed verdict, "the [non-moving] party is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence, and all conflicts must be resolved in her favor." *Pemberton v. Reliance Ins. Co.*, 83 N.C. App. 289, 291, 350 S.E.2d 103, 106 (1986) (citation omitted).

> A directed verdict for defendant on the ground that plaintiff was contributorially

> negligent is proper only if the evidence establishes the contributory negligence of the plaintiff as a matter of law. In determining whether plaintiff is contributorially negligent as a matter of law, the question is whether the evidence establishes plaintiff's negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. A directed verdict based on plaintiff's contributory negligence is not proper when other reasonable inferences may be drawn or when there are material conflicts in the evidence.

Cobb v. Reitter, 105 N.C. App. 218, 221-22, 412 S.E.2d 110, 112 (1992).

Defendant asserts that plaintiff was contributorially negligent because there was no evidence that the impact from being rear-ended caused plaintiff to veer into the yard and collide with two oak trees and a deck. Thus, it was plaintiff's own conduct that caused her additional injury and damages, not the accident. Given that plaintiff did not maintain proper control of her vehicle and failed to reduce her speed to avoid a collision, defendant avers that the trial court should have found that plaintiff was contributorially negligent as a matter of law.

Here, "the evidence of plaintiff's contributory negligence, while strong, is not so overpowering as to preclude all

reasonable inferences to the contrary[.]" *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E.2d 788, 789 (1978). Plaintiff testified that she signaled before turning left into her driveway, when she "got a big old hit" from behind. Plaintiff alleged that her foot remained on the brake after the collision and she did not accelerate. Trooper Michael Holmes' testimony corroborated plaintiff's in that he believed plaintiff had begun to turn prior to being rear-ended. Defendant testified that plaintiff did not signal before turning and had not yet started to turn. With these facts, there exist material conflicts in the evidence. Moreover, a jury could reasonably infer that defendant's negligence caused plaintiff's injuries because, but for being rear-ended, plaintiff would not have plowed into her yard and further injured herself. Viewing the evidence in the light most favorable to plaintiff, and resolving all inconsistencies in her favor, the trial court did not err in submitting the issue of plaintiff's contributory negligence to the jury.

III. Conclusion

In sum, defendant failed to preserve her first two issues for our review. Defendant raises a fourth issue, which we also dismiss as she makes no argument that the trial court abused its

discretion in denying her motion for a new trial. Instead, she merely reiterates her factual argument in a light most favorable to her. We conclude that the trial court did not err in denying defendant's motion for a JNOV.

No error.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).