

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-288  
NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

HELENA MARJORIE SAFRON,  
Plaintiff

v.

Orange County  
No. 12 CVD 593

MARY ELAINE COUNCIL,  
Defendant

Appeal by plaintiff from order entered 23 October 2013 by Judge James T. Bryan, III in Orange County District Court. Heard in the Court of Appeals 27 August 2014.

*The Law Offices of Andrew J. Kisala, PLLC, by Andrew J. Kisala, for plaintiff-appellant.*

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

CALABRIA, Judge.

Helena Marjorie Safron ("plaintiff") appeals from an order denying her motions for judgment notwithstanding the verdict ("JNOV") and for a new trial. We find no error.

On the afternoon of 17 April 2009, plaintiff, a graduate student at the University of North Carolina ("UNC"), was riding a bicycle on Dairyland Road in Orange County, North Carolina.

At the same time, defendant was traveling in her automobile on Dairyland Road. When defendant saw plaintiff on her bicycle, she slowed down and moved into the left lane. As defendant attempted to pass plaintiff on the left, she heard her vehicle's passenger side mirror drop. Defendant stopped her vehicle, but plaintiff pedaled for a few moments before stopping. When defendant approached plaintiff to give plaintiff her name and phone number, plaintiff was standing next to her bicycle. Defendant offered plaintiff a ride home, but plaintiff declined because she had called a friend to pick her up. Plaintiff told defendant to go on her way.

Plaintiff did not seek medical treatment for a bruise she sustained to her lower back. Instead, she treated the bruise at home with compresses and over-the-counter pain reliever. A few days later, she visited the UNC student medical center, where she was advised to continue her home treatment. Subsequently, plaintiff suffered from a "lingering soreness" on her left side. Two months later, plaintiff began experiencing "flare-ups" of pain that ran up and down her back and into her legs. Plaintiff moved back to her home in Florida, and between late September 2009 and May 2010 sought treatment from doctors and a physical therapist.

On 12 April 2012, plaintiff filed a complaint against

defendant, alleging, *inter alia*, that defendant carelessly and recklessly failed to safely maneuver in her lane of traffic while passing plaintiff's bicycle. Plaintiff requested, *inter alia*, a trial by jury as well as damages for past and future medical expenses, damage to her property, lost wages, and pain and suffering. In the final pretrial order, both plaintiff and defendant contended that damages were contested, but only defendant contended that there was a contested issue regarding whether plaintiff was injured by defendant's negligence.

At trial, plaintiff testified on direct and cross-examination regarding her injury and the treatments she received as well as other instances of back pain and back injuries that she had sustained prior to the encounter with defendant on 17 April 2009. Defendant testified that when she saw plaintiff riding her bicycle, she "slowed down to about 30 miles an hour and . . . went over the center line into the left lane[,] " and that she was within "two feet, maybe three feet" of plaintiff when she passed her on the road. At the close of all the evidence, plaintiff made a motion for a directed verdict on the issue of defendant's negligence. The court denied the motion, and submitted the matter to the jury. The jury returned a verdict finding that plaintiff had not been injured by defendant's negligence.

On 8 August 2013, the trial court entered judgment in favor of defendant based upon the jury's verdict, that plaintiff "shall have and recover nothing[.]" Plaintiff filed a motion for JNOV as well as a motion for a new trial. According to plaintiff's motion for JNOV, "[t]here was agreement among all parties' testimony that the impact on Plaintiff caused some injury[.]" In the motion, plaintiff's attorney repeated the same issue that was in the pretrial order, asserting that the only discrepancy was the amount of damages due plaintiff. The trial court denied both of plaintiff's motions on 23 October 2013. Plaintiff appeals.

On appeal, plaintiff argues that pursuant to N.C. Gen. Stat. § 20-149(a), defendant's actions in overtaking and passing plaintiff's bicycle were negligence *per se*, and therefore the trial court erred in denying her motions for directed verdict and JNOV. Specifically, plaintiff contends that "the facts and evidence presented at trial established that Plaintiff was injured by the negligence of Defendant so clearly that no other inference could be drawn." 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." *King v. Brooks*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 736 S.E.2d 788, 791 (2012) (citation omitted).

Pursuant to Rule 50, in ruling on a party's motion for directed verdict, "the trial court must consider the evidence in the light most favorable to the nonmoving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (quoting *Taylor v. Walker*, 320 N.C. 729, 733-34, 360 S.E.2d 796, 799 (1987)). "The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *Id.* (quoting *Taylor*, 320 N.C. at 733, 360 S.E.2d at 799). "Directed verdict in a negligence case is rarely proper because it is the duty of the jury to apply the test of a person using ordinary care." *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 138, 539 S.E.2d 331, 333 (2000). "When more than one interpretation of the facts is possible, the issues of negligence . . . are matters to be decided by a jury." *Id.* "A verdict may never be directed when there is conflicting evidence on contested issues of fact." *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350 (1990) (citation omitted).

N.C. Gen. Stat. § 20-149(a) provides, in pertinent part, that the driver of a vehicle "overtaking another vehicle proceeding in the same direction shall pass at least two feet to

the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle." N.C. Gen. Stat. § 20-149(a) (2013). Bicycles are included in the statutory definition of "vehicle." See N.C. Gen. Stat. § 20-4.01(49) (2013). A violation of N.C. Gen. Stat. § 20-149(a) in overtaking and passing a vehicle is negligence. *Clark v. Emerson*, 245 N.C. 387, 390, 95 S.E.2d 880, 883 (1957) (citation omitted). "If the jury should conclude that defendant . . . was negligent in any or all of these respects, it could find that [her] negligence was the proximate cause of plaintiff's damage. It [is] for the jury to find the facts and draw the conclusions." *Id.*

In the instant case, the issue for the trial court was whether defendant's negligence was so clearly the proximate cause of plaintiff's damage that no other inference to the contrary could be drawn. Plaintiff essentially contends that a motorist is negligent as a matter of law whenever the driver of an automobile overtakes and passes a bicyclist and an injury occurs. Plaintiff cites to N.C. Gen. Stat. § 20-149(a) to support such a conclusion.

Plaintiff had a heavy burden, since a directed verdict is rarely proper in negligence cases. See *Stallings*, 141 N.C. App. at 138, 539 S.E.2d at 333. According to plaintiff's evidence,

she sustained lingering soreness after the encounter, then experienced "flare-ups" of intense shooting pain through her back and legs. On cross-examination, plaintiff testified that she did not call law enforcement or emergency services after the encounter. Furthermore, plaintiff testified that beginning in December 2006, she had sought treatment for back pain, and also that she had previously experienced back trouble "throughout [her] childhood."

Defendant presented several evidentiary conflicts. The main evidentiary conflicts were whether defendant slowed her vehicle and moved across the center line in order to safely pass plaintiff's bicycle, and whether defendant's car mirror could have caused plaintiff's injury if plaintiff continued to pedal after being struck. According to defendant's testimony, when she saw plaintiff, she slowed down to about thirty miles an hour and subsequently drove over the center line into the left lane to make sure that she missed plaintiff's bicycle. However, when defendant heard the mirror drop from her vehicle, she drove back into the right lane, stopped her car, activated the flashers, and "went to check on [plaintiff]." Defendant also testified that when she asked plaintiff if she was all right, plaintiff indicated some discomfort in a spot above her left hip, but stated that she did not think she needed medical treatment. On

cross-examination, defendant testified that as she passed plaintiff's bicycle, the distance between them was "two feet, maybe three feet[.]"

The trial court considered the evidence in the light most favorable to defendant as the nonmoving party, and gave her the benefit of all reasonable inferences by resolving all evidentiary conflicts in her favor. See *Martishius*, 355 N.C. at 473, 562 S.E.2d at 892. The trial court submitted the case to the jury to determine whether defendant could have injured plaintiff at a distance of approximately two to three feet between them as she attempted to pass plaintiff. Although plaintiff asserts that the only issue to decide in the instant case is the amount of damages, the nature of her injury is not as clear as she contends. According to plaintiff's evidence, she had a history of back pain and had sought treatment for another back injury prior to her encounter with defendant.

Although plaintiff relies upon *N. Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979), *Burnette* is not a negligence case. Rather, it concerns an action involving a promissory note. Plaintiff also cites a case that involves a motor vehicle collision, *Porter v. Leneave*, 119 N.C. App. 343, 458 S.E.2d 513 (1995). However, the plaintiff in *Porter* did not make a motion for directed verdict or a JNOV. The issue in



*Porter* concerned nominal damages in a wrongful death action. *Id.* at 345, 458 S.E.2d at 514.

Because "there is conflicting evidence on contested issues of fact[,]" specifically whether the defendant safely or negligently passed and overtook plaintiff, a directed verdict would be improper. *McFetters*, 98 N.C. App. at 191, 390 S.E.2d at 350. Since "it is the duty of the jury to apply the test of a person using ordinary care[,]" *Stallings*, 141 N.C. App. at 138, 539 S.E.2d at 333, and decide which interpretation of the facts to accept, the trial court correctly denied plaintiff's contention that defendant's violation of N.C. Gen. Stat. § 20-149(a) was negligence *per se*, and submitted the matter to the jury. Therefore, the trial court did not err in denying plaintiff's motions for directed verdict and JNOV.

No error.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).