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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-643

No. COA21-780

Filed 20 September 2022

Cumberland County, No. 19 CVS 4462

KEGAN O. MCDONALD, Plaintiff,

v.

SEVERINO JOSE RAMIREZ and C AND H SITE CLEANUP, LLC, Defendants.

Appeal by defendants from order entered 8 April 2021 by Judge Claire V. Hill and judgment entered 28 April 2021 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 24 August 2022.

Anderson, Johnson, Lawrence & Butler, L.L.P., by Lee B. Johnson, Jr., for defendants-appellants.

Britton Law, by C. Jordan Godwin and Rebecca J. Britton, for plaintiff-appellee.

ARROWOOD, Judge.

¶ 1 Severino Jose Ramirez ("defendant-Ramirez") and his employer C and H Site Cleanup, LLC, ("defendant-Cleanup") (collectively, "defendants") appeal from a final judgment and a preceding order. The order granted partial summary judgment in

favor of Kegan O. McDonald ("plaintiff") on his claim of negligence for defendants' failure to yield the right of way, on defendants' affirmative defense of contributory negligence, and on defendants' defense of failure to mitigate. Defendants argue the trial court erred in granting plaintiff's motion. For the following reasons, we affirm the trial court's order.

I. Background

¶ 2 On 10 January 2019 at approximately 6:45 a.m., plaintiff was driving west on NC Highway 24 ("NC 24"), a two-lane highway in Cumberland County. Around that same time, defendant-Ramirez was operating a truck with an attached trailer owned by defendant-Cleanup. Defendant-Ramirez traveled north on Blake Street toward an intersection with NC 24. The intersection was equipped with a stop sign, giving the right of way to vehicles driving west on NC 24. When defendant-Ramirez made a right turn onto NC 24, he entered the same lane as plaintiff, who had been approaching the intersection. Plaintiff then collided his vehicle into the rear left corner of defendants' trailer.

¶ 3 Plaintiff filed a complaint against defendants on 26 July 2019, alleging negligence. Plaintiff claimed that, when defendant-Ramirez made the right turn onto NC 24, plaintiff "had no opportunity to avoid the collision" because defendant-Ramirez had, among other things, "failed to stop in violation of N.C. Gen. Stat. § 20-158(b)(1)[,]" "failed to reduce speed as necessary to avoid a collision and injury or

damage . . . in violation of G.S. § 20-141[,]" and "failed to keep a proper lookout in violation of N.C. Gen. Stat. § 20-154[.]"

¶ 4 Defendants filed an answer on 19 September 2019, in which they denied the allegations of negligence and raised the affirmative defenses of contributory negligence and "failure to mitigate (medical expenses)[.]" As to the defense of contributory negligence, defendants argued, among other things, that plaintiff had "[f]ailed to reduce speed necessary to avoid a collision" and "[f]ailed to yield the right of way[.]" As to the defense of failure to mitigate medical expenses, defendants argued that, if plaintiff "had submitted the claimed post-accident medical expenses to the health insurance company," he could have "obtained contractual rates for medical services with contractual write-offs, discounts, and/or adjustments that would have substantially reduced the amount necessary to satisfy the claimed medical expenses."

¶ 5 Plaintiff filed a response on 17 October 2019, denying the allegation of contributory negligence and raising as an additional argument that defendant-Ramirez "had the last clear chance to avoid the collision and prevent the injuries to [p]laintiff in that . . . [p]laintiff was in a position of helpless peril[,]" defendant-Ramirez "knew or should have known that [p]laintiff was in a position of peril[,]" and defendant-Ramirez "could have stopped at the duly erected stop sign and waited until traffic was clear before pull[ing] onto" NC 24.

¶ 6 Between November 2019 and March 2020, plaintiff and defendant-Ramirez, among others, provided depositions. At his deposition, plaintiff stated that, on the morning of the accident, he was driving with his headlights on and without distractions. As he drove west on NC 24, he noticed defendant-Ramirez "coming towards the stop sign" at the intersection; "since [defendants' truck] was going to stop, because it had to stop at the stop sign, [plaintiff] just didn't really pay attention to it and focused on driving forward." Then, "the truck . . . pulled out in front of [plaintiff]." It was plaintiff's belief that defendant-Ramirez did not stop at the stop sign.

¶ 7 Plaintiff "processed" the situation, thinking he could "either slam on the brakes or jerk the wheel[,]" as he did not have time to merge into the other lane. Plaintiff decided to "jerk the wheel" rather than braking; he reasoned:

> I was heading straight at it. It's a dump truck, it sits taller than me so if I hit it head on I hit it head on [sic] and it comes into the windshield, in my opinion, so I just decided that I had a better survival rate of turning left.

Plaintiff then "downshifted, trying to gain traction, and then jerked [his] wheel to the left." In that moment, plaintiff "saw the back of [defendants'] vehicle and said, 'I'm dead[.]' " "Next thing [plaintiff] remember[ed] [wa]s coming to, stepping out of [his] vehicle and then getting assistance from drivers that were there."

¶ 8 Defendant-Ramirez's deposition regarding the accident proceeded, in pertinent part, as follows:

> Q. How did you know that . . . the trailer had been hit?
>
> A. Well, I saw -- when I turned into the lane and I was going straight I saw the other car didn't turn, it was going straight.
>
> Q. "The other car" meaning the other car that hit you?
>
> A. Yes.
>
> Q. Had you been expecting the other car to turn somewhere?
>
> A. No, no, no, I thought that he was going to change lanes because it's two lanes.
>
> Q. Okay. So when you pulled out, did you assume that he would just change over to the other lane?
>
> . . . .
>
> A. No, but he was far away, a long distance so that he could move.
>
> Q. Let me ask you this: If it had been a one-lane road in that direction coming from your left, would you have still pulled out?
>
> A. I would not.
>
> Q. Why is that?
>
> A. Because the distance that he was coming from, it wouldn't have given you enough time to move. Can I give you an example of what I am talking about?

Q. Yes, sir.

A. I have been driving before and a truck will -- somebody will enter my -- to almost hit my truck but I don't keep on going straight, I have to go around it or stop.

Q. The car you saw when you saw the headlights, did that car have the right of way?

A. Yes.

. . . .

Q. . . . . You saw the car down the road?

A. Yes.

Q. You thought you had enough time and you pulled out?

A. Yes.

Q. Then next thing you knew there was an impact?

. . . .

A. Well, I was going straight and how was I supposed to know that I was going to be hit? There was room to be passed on the road.

Q. . . . . Before you felt the impact, did you look in your side mirror and see anything behind you or see anything coming?

A. When I went into the roadway?

Q. Yes.

A. Well, obviously because -- well, it's obvious that you have to look, but by the time that I -- that I was in the road I saw the vehicle, I didn't know that he was going to be going straight.

. . . .

Q. Was there anything preventing the vehicle behind you from seeing your truck or trailer?

A. Yes.

Q. What would prevent them from seeing you?

A. Well, from the distance that he was coming from he should have been able to change lanes because the lights of the trailer were on.

Q. So he could have seen you?

A. Oh, yes.

Q. He should have seen you?

A. He should have seen me because he was coming from far away.

. . . .

Q. When you turned on to [NC] 24, did you think you had enough time?

A. I did. The car had plenty of time to turn -- to go into the other lane, that's why I pulled in.

. . . .

Q. When you saw the car -- the car's headlights, was it far enough away for you to turn even if there was one lane?

> A. Well, if it was a single -- a single lane I would not have turned in because I wouldn't know if he was going to stop or not.

¶ 9 On 26 March 2021, plaintiff filed a motion for partial summary judgment on his claim of negligence for, specifically, defendants' failure to yield the right of way, and on defendants' defenses of contributory negligence and failure to mitigate. In the brief in support of his motion, plaintiff claimed defendants' "negligent failure to yield is the undisputed proximate cause of [plaintiff]'s injury[,]" that defendants never provided "more than the speculations in their Answer" as to their affirmative defense of failure to mitigate, and that plaintiff was not contributorily negligent under the "Sudden Emergency Doctrine." Particularly, plaintiff argued that, under the sudden emergency doctrine, he "was entitled to wait until the very last second to act" in the emergency circumstances that defendants had created.

¶ 10 Following a hearing held on 5 April 2021, the trial court returned an order on 8 April 2021, granting plaintiff's motion for partial summary judgment. The trial court found there was "no genuine issue of fact as to . . . defendants['] negligence in failing to yield the right of way[,]" and that defendants had failed to produce substantial evidence of plaintiff's failure to mitigate and contributory negligence. On 20 April 2021, the trial court held a jury trial, resulting in a verdict of $38,000.00 for plaintiff, plus costs. On 28 April 2021, the trial court entered a final judgment on the

matter reflecting the verdict. Defendants appealed from the 8 April order and the 28 April judgment on 25 May 2021.

II. Discussion

¶ 11 Defendants argue that the trial court erred in granting plaintiff's motion for partial summary judgment on the issue of their negligent failure to yield the right of way, on the issue of plaintiff's contributory negligence, and on the issue of plaintiff's failure to mitigate damages.

¶ 12 "We review appeals from summary judgment orders *de novo*[.]" *Grooms Prop. Mgmt., Inc. v. Muirfield Condo. Ass'n*, 2022-NCCOA-488, ¶ 10 (citation omitted). "The moving party bears the burden of showing it was entitled to summary judgment as a matter of law and that there is no genuine dispute as to any material fact." *Id.* (citations omitted). "We view the evidence in the light most favorable to the non-moving party, giving them the benefit of all reasonable inferences." *Id.* (citation omitted). "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *Sims v. Graystone Ophthalmology Assocs., P.A.*, 234 N.C. App. 65, 67, 757 S.E.2d 925, 926 (2014) (citation and quotation marks omitted).

A. Negligence for Failure to Yield

¶ 13 Defendants argue the trial court erred in granting plaintiff's motion for summary judgment because there is a genuine issue of material fact as to whether defendant-Ramirez breached a duty to yield the right of way, because the question of whether plaintiff was far enough away for defendant-Ramirez to enter NC 24 safely was for the jury, and because there is a genuine issue of material fact as to whether defendant-Ramirez had a duty to yield. We disagree.

¶ 14 "Negligence claims . . . should rarely be disposed of by summary judgment." *DeHaven v. Hoskins*, 95 N.C. App. 397, 402, 382 S.E.2d 856, 859 (1989) (citation omitted). "[I]n order to prevail in a negligence action, plaintiff . . . must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages." *Sims*, 234 N.C. App. at 68, 757 S.E.2d at 927 (citation and quotation marks omitted).

¶ 15 Here, the applicable statute reads as follows:

> When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.

N.C. Gen. Stat. § 20-158(b)(1) (2021).

¶ 16 Defendant-Ramirez's own deposition testimony establishes defendants' negligence and defeats defendants' contributory negligence defense. Defendant-Ramirez stated that plaintiff had the right of way. Defendant-Ramirez also stated that he had made the right turn on NC 24 on the assumption that plaintiff would switch lanes. In other words, defendant-Ramirez admitted that, by turning onto NC 24 in the manner that he did, he created a scenario in which plaintiff was likely to collide with defendants' truck unless plaintiff was able to avoid him. In fact, defendant-Ramirez further admits that, had NC 24 been a one-lane highway, he would not have made the same turn, because plaintiff would have been too close to defendants' truck to avoid colliding with it.

¶ 17 All the elements of negligence have been met here. It is uncontested that plaintiff suffered damages as a result of the collision, and that defendant-Ramirez's right turn onto NC 24 was the proximate cause of this collision. From the record and the applicable law, it is apparent that defendants owed plaintiff a duty of care, as illustrated by N.C. Gen. Stat. § 20-158(b)(1), when defendant Ramirez approached the intersection to make a right turn onto NC 24. And finally, defendant-Ramirez's deposition testimony shows defendants breached this duty.

¶ 18 Accordingly, the trial court did not err in granting plaintiff's motion for summary judgment as to defendants' negligence for failure to yield.

B. Contributory Negligence

¶ 19 Defendants argue the trial court erred in granting plaintiff's motion for summary judgment on their defense of contributory negligence because there is a genuine issue of material fact as to whether plaintiff was negligent in the operation of his vehicle. We disagree.

¶ 20 Contributory negligence "is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 278-79, 536 S.E.2d 349, 354 (2000) (citation and quotation marks omitted). "Contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant." *Id.* at 279, 536 S.E.2d at 354 (citation and quotation marks omitted).

¶ 21 Here, plaintiff raised the doctrine of sudden emergency in his response to defendants' answer. "The doctrine of sudden emergency creates a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others." *Fulmore v. Howell*, 227 N.C. App. 31, 33, 741 S.E.2d 494, 496 (2013) (citation and quotation marks omitted). "Our courts have defined an emergency situation as that which compels one to act instantly to avoid a collision or injury." *Est. of Johnson by & through Johnson v. Guilford Cnty. Bd. of Educ.*, 2022-NCCOA-553, ¶ 14 (citation and quotation marks omitted). "Two elements must be satisfied before the sudden

emergency doctrine applies: (1) an emergency situation must exist requiring immediate action to avoid injury, and (2) the emergency must not have been created by the negligence of the party seeking the protection of the doctrine." *Fulmore*, 227 N.C. App. at 33, 741 S.E.2d at 496 (citation omitted).

¶ 22 Again, defendant-Ramirez's deposition testimony paints a clear picture. When defendant-Ramirez turned right onto NC 24 and entered plaintiff's lane, defendant-Ramirez knew, per his own admission, that he created a scenario in which plaintiff would have collided with defendants' truck unless plaintiff was able to move onto a different lane. Indeed, defendant-Ramirez expressly stated that he would not have made the same turn had NC 24 been a one-lane highway, because plaintiff was too close to the intersection to avoid colliding with defendants' truck. This testimony, in addition to plaintiff's testimony about his quick determination that "jerk[ing] the wheel" would result in a higher likelihood of survival for him, established that plaintiff was faced with an emergency when defendants' truck pulled onto his lane on NC 24. Accordingly, plaintiff met his burden under the sudden emergency doctrine.

¶ 23 Plaintiff thought he was going to die and "had to react instantaneously" here. *See id.* at 35, 741 S.E.2d at 497 (citation and quotation marks omitted). Furthermore, plaintiff, as "the driver of a vehicle having the right of way at an intersection[,]" was "entitled to assume and to act, until the last moment, on the assumption that [defendants'] vehicle, approaching the intersection, [would] recognize his right of way

and [would] stop or reduce his speed sufficiently to permit [plaintiff] to pass through the intersection in safety." *See Dawson v. Jennette*, 278 N.C. 438, 445, 180 S.E.2d 121, 126 (1971) (citations omitted). Thus, defendants' arguments that plaintiff "disregarded" defendants' truck when he noticed it approaching the intersection or that plaintiff "failed to properly and timely apply the brakes" are of no moment and do not create a genuine issue of material fact as to plaintiff's contributory negligence under the sudden emergency doctrine. *See Fulmore*, 227 N.C. App. at 35, 741 S.E.2d at 497-98 ("[W]hile defendant Howell could have had other reactions to the sudden emergency which may have resulted in a different outcome, this does not create a genuine issue of material fact[.]" (citation and quotation marks omitted) (second alteration in original)).

¶ 24 Accordingly, the trial court did not err in granting plaintiff's motion for summary judgment on defendants' defense of contributory negligence.

C. Failure to Mitigate

¶ 25 Defendants "acknowledge[ ] that no evidence was presented as to the failure of [p]laintiff . . . to mitigate his medical expenses"; however, they contend the trial court's order "went beyond the affirmative defense asserted" in their answer "by granting summary judgment on the issue of mitigation as a whole." This argument is incongruent with the record on appeal for multiple reasons.

¶ 26 First, it is undisputed that, in their answer, defendants expressly raised the affirmative defense of "failure to mitigate (medical expenses)[.]" Defendants then concede that they presented no evidence as to this specific defense, which renders their argument on appeal moot.

¶ 27 Defendants also argue that the trial court's summary judgment order was too broad, because there were other things, other than medical expenses, that plaintiff failed to mitigate. However, as we have just established, defendants' answer limited their defense of failure to mitigate to plaintiff's medical expenses. Thus, the argument defendants now purport to make was unpreserved for appeal.

¶ 28 Accordingly, the trial court did not err in granting plaintiff's motion for summary judgment on defendants' affirmative defense of failure to mitigate.

III. Conclusion

¶ 29 For the foregoing reasons, we conclude that the trial court did not err in granting plaintiff's motion for partial summary judgment on his claim of negligence for defendants' failure to yield, on defendants' affirmative defense of contributory negligence, and on defendants' affirmative defense of failure to mitigate. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).