

CONTRIBUTORY NEGLIGENCE

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This article addresses the doctrine of contributory negligence in North Carolina.

North Carolina is one of only a few jurisdictions which still adhere to the strict doctrine of "contributory negligence." Pursuant to this doctrine, if a claimant sues a person under a theory of negligence, the claimant may not recover if his injuries were caused by his own negligence, or "contributory negligence." "[A] plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." Sorrells v. M.Y.B. Hospitality Ventures, 332 N.C. 645, 648 (1992) (where patron became intoxicated at restaurant and drove vehicle, resulting in his death, his estate's claim was barred by his contributory negligence). In North Carolina, there is no apportioning of negligence in this context. Although other jurisdictions, and certain types of causes of action (such as a FELA action) allow for the allocation and apportionment of negligence or fault against the plaintiff, in North Carolina, a plaintiff who is negligent in causing his own injuries cannot recover anything from a tortfeasor.

"A plaintiff is contributorily negligent when he fails to exercise such care as an ordinarily prudent person would exercise under the circumstances in order to avoid injury." Newton v. New Hanover County Bd. of Educ., 342 N.C. 554, 564 (1996). The rule has many applications. It can apply, for example, to a patient's malpractice claim against a physician. Cobo v. Raba, 347 N.C. 541, 546 (1998) (where patient alleged that psychiatrist failed to properly treat his depression, resulting in his engaging in acts resulting in his contracting AIDS, jury should have been instructed on patient's contributory negligence in contracting disease).

Where there is any evidence of contributory negligence, the issue will be submitted to the jury. But see Cicogna v. Holder, 345 N.C. 488, 490 (1997) (where "The only evidence presented was that the plaintiff had the green light and was struck by the defendant, who violated the red light," a jury's finding that the plaintiff was contributorily negligent for entering intersection is reversed).

The doctrine applies only where the plaintiff's contributory negligence causes the accident. Thus, even though a plaintiff was speeding, his negligence did not bar her claim where it was not shown that the speeding caused (or had a causal connection to) the accident. Ellis v. Whitaker, 156 N.C. App. 192;, 576 S.E.2d 138 (2003).

One exception to this rule is the doctrine of "Last Clear Chance." Pursuant to this doctrine, if the plaintiff (or claimant) was in a position of peril and could not avoid the accident following his initial act of negligence, and if the defendant had an opportunity to avoid the accident, then the plaintiff may nevertheless make a full recovery from the defendant. In the context of a pedestrian who is injured by a motorist, our courts have stated that the doctrine applies only if:

(1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Watson v. White, 309 N.C. 498, 504 (1983).

Many of the cases addressing the applicability of this doctrine are very fact specific. Where a sixty-two-year-old plaintiff with limited vision placed herself in a position of helpless peril when she attempted to cross the street without traffic control signals or a marked pedestrian crosswalk, and although defendant-motorist did not actually know of plaintiff's presence in the roadway, he had a duty to maintain a lookout, and

expert testimony indicated that plaintiff could have been seen from 150 feet away, and defendant could have seen plaintiff for five seconds prior to impact, plaintiff was entitled to this issue. VanCamp v. Burgner, 328 N.C. 495, 498-499 (1991).

On the other hand, where a defendant-motorist approached a store, at approximately 40 m.p.h., and she could not have discovered the plaintiff's perilous position until she drove out of the curve, a distance of some 75 feet from the store, even assuming that defendant discovered plaintiff's perilous position immediately upon exiting the curve, the maximum amount of time that defendant had to avoid the injury was approximately 1.28 seconds (the time it took defendant to travel the full 75 feet at a speed of 40 m.p.h.), the plaintiff has failed to establish that defendant had the time and the means to avoid the injury to the plaintiff by the exercise of reasonable care after she discovered or should have discovered plaintiff's perilous position. Watson v. White, 309 N.C. 498, 505-506 (1983).

Another exception to this doctrine is where the defendant's conduct constitutes gross negligence (or intentional or willful or wanton conduct). "Contributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries. Yancey v. Lea, 354 N.C. 48, 51 (2001).

In determining or defining gross negligence, this Court has often used the terms "willful and wanton conduct" and "gross negligence" interchangeably to describe conduct that falls somewhere between ordinary

negligence and intentional conduct. We have defined "gross negligence" as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others."

Yancey v. Lea, 354 N.C. 48, 52 (2001).

In the context of automobile cases, our courts have said:

Our case law as developed to this point reflects that the gross negligence issue has been confined to circumstances where at least one of three rather dynamic factors is present: (1) defendant is intoxicated, (2) defendant is driving at excessive speeds, or (3) defendant is engaged in a racing.

Yancey v. Lea, 354 N.C. 48, 53-54 (2001) (noting that list is not exhaustive; there is no gross negligence where plaintiff basically contends that defendant Lea, rather than slowing and stopping his tractor-trailer behind decedent's vehicle, as defendant Lea acknowledged he could have done, instead elected to pass and thereby chose to ignore the substantial risk of severe injury or death to others).

Even where the defendant is grossly negligent, the plaintiff's gross negligence will bar his claim. Sorrells v. M.Y.B. Hospitality Ventures, 332 N.C. 645, 648 (1992) (even if restaurant was willful in serving patron with alcohol, patron's own negligence and wrongdoing was equal to that of bar, and hence claim by his estate for wrongful death was properly dismissed).

There are a other exceptions to this doctrine. "[A]n infant under 7 years of age is conclusively presumed to be incapable of contributory negligence; . . . between the ages of 7 and 14 there

is a prima facie presumption of such incapacity, which, however, may be overcome by evidence showing capacity" Walston v. Greene, 247 N.C. 693, 695 (1958) (reversing where lower court allowed instruction on minor's negligence, where minor was less than seven). The presumption for children between 7 and 14 "may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances. A child 'must exercise care and prudence equal to his capacity.' If it fails to exercise such care and the failure is one of the proximate causes of the injuries in suit, the child cannot recover." Wooten v. Cagle, 268 N.C. 366, 371-372 (1966).

In the case of a plaintiff with a cognitive impairment, in determining whether he or she was contributorily negligent in causing his or her injuries, that person will be compared to a reasonable person with that particular disorder, such as Alzheimer's. "[O]ne whose mental faculties are diminished, not amounting to total insanity, is capable of contributory negligence, but is not held to the objective reasonable person standard. Rather, such a person should be held only to the exercise of such care as he was capable of exercising, i.e., the standard of care of a person of like mental capacity under similar circumstances." Stacy v. Jedco Constr., 119 N.C. App. 115, 120 (1995) (whether plaintiff with impaired mental capacity

was contributorily negligent in falling at construction site was jury issue).

Also, if the plaintiff can qualify himself as a "rescuer," then he is essentially immune from the contributory negligence doctrine. "[O]ne who sees a person in imminent and serious peril caused by the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, provided the attempt is not recklessly or rashly made." Alford v. Washington, 238 N.C. 694, 78 S.E. 2d 915 (1953) (doctrine applied where plaintiff tried to rescue occupants of a car that was forced into a light pole, and was electrocuted).

This doctrine also essentially applies to warranty and product liability actions. Where the plaintiff sues, for example, a manufacturer alleging a defect in a product, his or her own contributory negligence will bar the claim. This also includes a misuse of the product, and a failure to use the product in accordance with any instructions and warnings. In such a case, our courts and juries again do not apportion liability, but the plaintiff makes no recovery from the defendant. Nicholson v. American Safety Util. Corp., 346 N.C. 767, 768-769 (1997) (Chapter 99B defenses, pertaining misuse of a product, "codifies the common law standard of contributory negligence and does not limit the defense to a plaintiff's misuse of the product."; "all of the circumstances during the

plaintiff's use of the product must be considered, not just plaintiff's conduct with respect to the product itself"; in suit against manufacturer of rubber gloves, by worker injured when his head (not protected by a helmet) came into contact with live wire, and voltage passed through gloves, there was jury issue on worker's contributory negligence in not wearing hat).

Contributory negligence even applies to imputed negligence. In other words, where the claimant's agent is negligent, the claimant may not recover. The claimant's claim may be barred by, for example, the owner-occupant doctrine (under which it is presumed that the driver is acting as the agent of the owner of the vehicle who is a passenger). Forga v. West, 260 N.C. 182; 132 S.E.2d 357 (1963) (employer's claim against a truck owner, to recover for damage to his vehicle sustained in a collision, was barred by reason of the contributory negligence of his employee, who was driving at the time of the accident). Thus, where there is a presumption that the driver has the legal right to control the vehicle, the driver's negligence is imputed to the owner, even if the owner did not have physical control of the vehicle. Hearne v. Smith, 23 N.C. App. 111 (1974) (summary judgment for defendant).

Other cases suggest that the owner must have actual control over the vehicle in order to be contributorily negligent based on the driver's conduct. Where the driver is operating the vehicle under a learner's permit, the owner's claim against the driver is

not necessarily barred when the driver suddenly leaves the roadway, where the departure is sudden and without warning. Stanfield v. Tilghman, 342 N.C. 389, 394-395 (1995) (jury could conclude that "plaintiff in fact had no opportunity to exercise her right to control defendant's manner of driving.").

Where the passenger sues his own driver, however, the driver's negligence is not imputed to the passenger. Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Dosher v. Hunt, 243 N.C. 247, 90 S.E.2d 374 (1955) ("The doctrine of imputed negligence has no application in an action by the master against his servant to recover for injuries suffered by master as a result of servant's actionable negligence."). The driver's negligence is imputed to the passenger (having sufficient control) only where the passenger is suing a third person (i.e. not his own driver).