

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-1045

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2003

RONNIE EUGENE MEEKS,

Plaintiff,

v .

JOHN A. CRAWFORD and
HINSON PULPWOOD LIMITED,

Defendants.

Lenoir County No. 96 CVS 629

Appeal by plaintiff from directed verdict for defendant Hinson Pulpwood Limited entered 26 June 2001, judgment for the defendant John A. Crawford entered 26 June 2001, and order entered 31 October 2001 denying plaintiff's motion for Judgment Notwithstanding the Verdict, by Judge Benjamin G. Alford in Lenoir County Superior Court. Heard in the Court of Appeals 20 May 2003.

Law Offices of Frank A. Cassiano, Jr., by Frank A. Cassiano, Jr. for the plaintiff-appellant.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Scott C. Hart for defendant-appellee John A. Crawford.

Parker, Poe, Adams & Bernstein, L.L.P., by Harvey L. Cosper, Jr. and Adam C. Shearer for defendant-appellee Hinson Pulpwood Limited.

ELMORE, Judge.

Plaintiff was driving on a road through the Croatan National Forest on 8 January 1994 when his truck was hit by a tree which had been knocked down by a tree felled by defendant Crawford who was cutting "bug timber." Crawford thereafter sold the wood on behalf of defendant Hinson Pulpwood Limited (Hinson Pulpwood). Plaintiff sustained

injuries and brought this suit for compensatory and punitive damages based on negligence. The jury returned a verdict for the defendants. Plaintiff now brings this appeal.

I.

Plaintiff first assigns error to the trial court's denial of his motion to find defendant Crawford's logging activity to be inherently dangerous or ultrahazardous as a matter of law, or in the alternative to include jury instructions on inherently dangerous or ultrahazardous activities. We affirm the trial court's decision on the motion.

The case of *Kinsey v. Spann*, 139 N.C. App. 370, 533 S.E.2d 487 (2000), recently summarized the law concerning ultrahazardous and inherently dangerous activities in the context of tree cutting. In that case, the defendant was cutting a limb which fell, fatally injuring the husband of the plaintiff. The *Kinsey* Court noted:

“Ultrahazardous” activities are those that are so dangerous that even the exercise of reasonable care cannot eliminate the risk of serious harm. In such cases, the employer is *strictly* liable for any harm that proximately results. In other words, he is liable even if due care was exercised in the performance of the activity. In North Carolina, only blasting operations are considered ultrahazardous.

Kinsey at 374, 533 S.E.2d at 491 (citations omitted).

Regarding inherently dangerous activity, *Kinsey* noted:

“Inherently dangerous” activities are those dangerous activities (like ultrahazardous ones) that carry with them certain attendant risks, but whose risks (unlike ultrahazardous ones) can be eliminated by taking certain special precautions. When inherently dangerous activities are involved, any liability by the employer is governed by principles of *negligence*, as opposed to strict liability. . . .

A given activity is inherently dangerous if it carries with it some substantial danger inherent in the work itself. Any collateral dangers created by how the work is actually performed are immaterial and have no effect on whether the activity is inherently dangerous. Although the question as to whether a given activity is or is not inherently dangerous can be decided as a matter of law, this determination often must be left for the jury to consider in light of the particular conditions and circumstances of each case.

Id. at 374-76, 533 S.E.2d at 491-92 (citations omitted).

In *Kinsey*, no inherently dangerous claim was given to the jury because the evidence would not support the elements of that claim. For our purposes, however, we are merely concerned with whether the tree felling in this case was inherently dangerous as a matter of law. We hold that the trial court did not err in finding that it was not.

In this case defendant Crawford, at the time of trial, had been working in the tree harvesting business for more than fifty years. At the time of the accident he was sixty to seventy feet from the dirt road through the Croatan National Forest on which the plaintiff was driving. The tree Crawford was cutting was no more than forty feet tall. When the tree fell it hit another tree. A portion of the second tree broke off and fell, landing on the plaintiff's truck. Crawford was taking the precautions of cutting trees far removed from the road, and the only nearby road was a dirt road through a national forest. There is no indication that this was a high-traffic area or that Crawford was in any way unreasonable

or negligent in the precautions he took. We therefore conclude that the trial court acted within its discretion to deny the plaintiff's motion.

As for the alternative assignment of error concerning the trial court's denial of an "inherently dangerous" jury instruction, because defense counsel did not object to the jury instruction at trial, this assignment of error is barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. *State v. Neal*, 346 N.C. 608, 620, 487 S.E.2d 734, 742 (1997), *cert. denied*, 522 U.S. 1125, 140 L. Ed. 2d 131, 118 S. Ct. 1072 (1998). "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict" N.C.R. App. P. 10(b)(2). Because defendant failed to properly preserve this issue on appeal, we may review it only for plain error. *See* N.C.R. App. P. 10(c)(4); *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56, 122 S. Ct. 96 (2001). In this case, the trial court noted plaintiff's exception to his ruling on the motion concerning inherently dangerous status. At that time the trial court expressed unwillingness to present the issue to the jury. During the later hearing on jury instructions, plaintiff presented several objections, none of which concerned the inherently dangerous issue. The issue was therefore not properly preserved for appellate review by this court. We therefore review this issue under a plain error standard, under which reversal is justified when the claimed error is so basic, prejudicial, and lacking in its elements that justice was not done. *State v. Prevatte*, 356 N.C. 178, 570 S.E.2d 440 (2002); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). For the reasons set out above, we discern no such error. We thus affirm the trial court.

II.

Plaintiff also assigns error to the trial court's ruling granting defendant Hinson Pulpwood directed verdict on the issue of agency. We affirm the trial court.

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971). When determining the correctness of the denial of directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, *Smith v. VonCannon*, 283 N.C. 656, 197 S.E.2d 524 (1973), or to present a question for the jury. *In re Housing Authority*, 235 N.C. 463, 70 S.E.2d 500 (1952).

The case of *Young v. Lumber Co.*, 147 N.C. 20, 60 S.E. 654 (1908) is instructive on the matter of agency. In that case a hired hand for a tree limb-cutting business cut a limb which fell on the plaintiff child. The defendant was a lumber company who had contracted with the limb-cutting business which employed the hiredhand. The trial court had submitted the issue of agency to the jury, but our Supreme Court determined that the business was an independent contractor as a matter of law, and granted a new trial. The *Young* Court stated:

An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified. *Mr. Justice Walker*, in *Craft v. Timber Co.*, 132 N.C. 151, says: "When the contract is for something that may be lawfully done, and it is proper in its terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved, either in

respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master.”

Young at 24, 60 S.E. at 656 (citations omitted).

Likewise, in the case now before us, there was no agency relationship between Hinson and Crawford. The evidence showed that defendant Crawford owned his own equipment, hired his own help, and ran his own operation. He had personally acquired the rights to the timber he was harvesting, and did not share that ownership with Hinson. Hinson facilitated the sale of the timber but otherwise had no control over the work done in the forest. *See Bryson v. Lumber Co.*, 204 N.C. 664, 169 S.E. 276 (1933) (defendant, who hauled lumber for the lumber company and owned and operated his own equipment, deemed an independent contractor by the Court). The directed verdict was therefore appropriate. We thus affirm the trial court.

III.

Plaintiff next assigns error to the trial court's refusal to include plaintiff's contentions of negligence in its jury instruction. Plaintiff contends that the trial court agreed to include specific instructions which were not given.

Our Supreme Court has sated:

The trial judge is required to declare and explain the law arising on the evidence given in the case. G.S. 1A-1, Rule 51(a). This rule is a continuation of the requirement contained in former G.S. 1-180. As such, it creates a substantial legal right in the parties, and vests in trial courts the duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case. A failure to do so constitutes prejudicial error for which the aggrieved party is entitled to a new trial.

The requirement that the trial court charge on a party's contentions, however, is not accorded the same substantive weight. Indeed, the trial court is not required to state the contentions of the parties at all.

Board of Transportation v. Rand, 299 N.C. 476, 483, 263 S.E.2d 565, 570 (1980) (citations omitted).

In making our determination, we are bound by the record. The transcript shows that after lengthy arguments concerning the proposed jury instructions, at the conclusion of the charge conference, the trial court agreed to take the requests of counsel under advisement and give them a copy of the intended instructions in advance of the jury charge. The trial court recessed for the day. When the trial court reconvened, both attorneys had copies of the jury instructions and were asked for objections. At that time, the plaintiff did not object to the instruction on acts of negligence.

The jury instruction on negligence given by the trial court explained the law thus:

Negligence refers to a person's failure to follow a duty of conduct imposed by law. Every person is under a duty to use ordinary care to protect himself and others from injury. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from injury. A person's failure to use ordinary care is negligence.

The trial court went on to explain the burden of proof and the contentions of the parties. Plaintiff contends that the instructions given did not reflect those agreed to by the trial court. The instruction given, as reflected in the record, is an appropriate instruction on negligence. There appears no conflict in the record between what the trial court proposed and what it instructed. We therefore hold that the trial court acted within its discretion in charging the jury on negligence.

IV.

Plaintiff next assigns error to the trial court's denial of his motion for judgment notwithstanding the verdict.

The standard of review for a judgment notwithstanding the verdict has recently been articulated by this Court:

A motion for judgment notwithstanding the verdict is a motion for judgment to be "entered in accordance with an earlier directed verdict motion." As such, the same standards are used in the review of both motions. In ruling on these motions, "the trial court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor." Motions for directed verdict and judgment notwithstanding the verdict should be denied where there is more than a scintilla of evidence to support each element of a plaintiff's case.

Hummer v. Pulley, Watson, King & Lischer, __ N.C. App. __, __, 577 S.E.2d 918, 923 (2003) (citations omitted).

The Supreme Court also notes that:

Only in exceptional cases is it proper to enter a directed verdict or a judgment notwithstanding the verdict against a plaintiff in a negligence case. Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury.

Taylor v. Walker, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987) (citations omitted).

In this case, there existed at least a scintilla of evidence against the movant such that a reasonable person could find that there was no negligence on the part of defendant Crawford. For example, he was felling the tree so that it would not fall on the roadway. The plaintiff continually argues the assertion that felling a tree is an inherently dangerous activity, and we recognize that his other assignments of error would be strengthened were that the case. Since he has not established that to be the case, and without comment on whether the outcome would be different had he done so, we overrule this assignment of error.

V.

Plaintiff next assigns error to the trial court's granting of defendant Crawford's directed verdict motion on the issue of punitive damages. The standard of review for a directed verdict is essentially the same as the one we have employed above for the judgment notwithstanding the verdict.

At the close of plaintiff's evidence, defendant Crawford moved for a directed verdict on the issue of punitive damages. In order to be awarded punitive damages, the plaintiff

would have to show willfulness, wantonness, or reckless disregard for the plaintiff's rights. *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818 (1985), *overruled on other grounds*, *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997), *reh'g denied*, 347 N.C. 586, 502 S.E.2d 594 (1998). The evidence is construed in a light most favorable to the non-movant, and indeed the plaintiff was the only one who had put on evidence so far in the case at the time of defendant's motion.

Although it is true that Chapter 1D, which provides for punitive damages for egregious conduct and was cited by the defendant in his argument before the trial court, does not apply to incidents that occurred before it was enacted, *Connelly v. Family Inns of Am., Inc.*, 141 N.C. App. 583, 540 S.E.2d 38 (2000), the trial court did not rely on that section in his order and judgment. Punitive damages are not awarded merely because of a personal injury inflicted, nor are they measured by the extent of the injury. They are awarded because of the outrageous nature of the wrongdoer's conduct. Punitive damages are awarded solely as punishment to be inflicted on the wrongdoer and as a deterrent to prevent others from engaging in similar wrongful conduct. Compensatory damages, which are awarded to compensate and make whole the injured party and which are therefore to be measured by the extent of the injury, are the only damages which are payable "because of personal injury." *Cavin's, Inc. v. Insurance Co.*, 27 N.C. App. 698, 701, 220 S.E.2d 403, 406 (1975).

"Wilful and wanton" negligence is conduct which shows either a deliberate intention to harm, or an utter indifference to, or conscious disregard for, the rights or safety of others. "Carelessness and recklessness," though more than ordinary negligence, is less than wilfulness or wantonness. *Yates v. J. W. Campbell Electrical Corp.*, 95 N.C. App. 354, 361, 382 S.E.2d 860, 864 (1989) (citation omitted).

Here, plaintiff's evidence had shown that a tree had fallen on the plaintiff's truck, and that the plaintiff sustained injury, and there was evidence as to the extent of the injury. The defendant was not called to testify in the plaintiff's case in chief. There was thus no evidence at that point in the record of defendant's mindset, intentions, or even his actions at the time of the tree being felled. Plaintiff relies on evidence that the plaintiff saw no signs or warnings, and from that infers the defendant's omission of a warning. Plaintiff alleges wanton and willful misconduct based on that inferred omission. Taken in a light most favorable to the plaintiff, because there was at that point in the trial no evidence of the defendant's conduct or mindset, the evidence was insufficient to find willful, wanton, or reckless conduct.

We therefore affirm the order of the trial court granting directed verdict on the issue of punitive damages.

VI.

Lastly, plaintiff assigns error to the trial court's refusal to take judicial notice of certain OSHA regulations and refusing to give jury instructions on negligence *per se*.

Under Rule 201 (b) of the North Carolina Rules of Evidence, "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2001). *Davis v. McMillian*, 152 N.C. App. 53, 56, 567 S.E.2d 159, 161 (2002), *disc. review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003). However, Rule 201(b) also states that the judge must take judicial notice of an

adjudicatory fact if requested by the parties and provided with the necessary information.

The standard for reviewing a judicial notice determination is abuse of discretion. *Vandervoort v. McKenzie*, 117 N.C. App. 152, 450 S.E.2d 491 (1994). Pursuant to the regulatory adoption procedure in section 95-131(a) of our General Statutes, all federal occupational safety and health standards constitute the regulatory standard in North Carolina, unless alternative regulations are promulgated by the North Carolina Commissioner of Labor. "A statute or ordinance designed for the protection of the public is a 'safety' enactment and its violation constitutes negligence *per se* . . ." *Sloan v. Miller Bldg. Corp.*, 119 N.C. App. 162, 166, 458 S.E.2d 30, 32 (1995) (citing *Jackson v. Housing Authority of High Point*, 73 N.C. App. 363, 368, 326 S.E.2d 295, 298 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986)) (the Court reversed summary judgment for the defendant employer where the plaintiff construction worker fell three stories when employer violated OSHA regulations by failing to provide a railing).

This Court has noted that N.C. Gen. Stat. § 95-131 puts forth the purpose of the regulations as providing safety for employees, not for the general public, and that a violation of the regulations is not always negligence *per se*, although it is some evidence:

The Occupational Safety and Health Act of 1970 (OSHA) was enacted to assure safe working conditions for employees. 29 U.S.C. §§ 651-678. It authorizes the Secretary of Labor to set mandatory safety standards. 29 U.S.C. § 651. In G.S. 95-131(a), the General Assembly of North Carolina has adopted the Secretary's occupational safety and health standards as the rules and regulations of the North Carolina Commissioner of Labor. Plaintiff contends that the adopted regulations establish a standard of care and are enforceable by criminal sanctions. When noncompliance with an administrative safety regulation is criminal, the rule in North Carolina is that the violation is negligence *per se* in a civil trial.

According to G.S. 95-139, however, a willful violation of an OSHA rule constitutes a misdemeanor only if said violation causes the death of an employee. For all other violations, the sanction is a possible *civil* penalty assessed [sic] by the Commissioner. G.S. 95-138. We conclude that the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence *per se*.

OSHA regulations are, however, some evidence of the custom in the construction industry. *See generally* Annot., 79 A.L.R. 3d 962 (1977) (violation of OSHA regulation as affecting tort liability). Custom is admissible to establish the standard of care required of reasonable men in the same circumstances. 1 Stansbury, N.C. Evidence § 95 (Brandis rev. 1973). Therefore, by presenting evidence that defendant had violated certain OSHA regulations, plaintiff presented some evidence on the issue of defendant's negligence. *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 324-25, 291 S.E.2d 287, 289-90 (1982) (citations omitted) (In a personal injury suit for damages, where employee of a construction subcontractor was injured when he fell from an access ramp running across a trench to the door of a building, evidence of violation of OSHA regulation requiring guardrails and toeboards on similar ramps was not negligence *per se*, and the trial court erred in directing verdict for the defendant).

In every case where OSHA regulations are relevant, they are used as evidence of the standard of care owed to employees by the employer, or as evidence of industry custom.

OSHA regulations do not constitute negligence *per se* when the injured party is a non-employee. We note that the relevant regulation cited by the plaintiff requires two tree lengths between *workers*, not between a work cite and the road. 29 C.F.R. 1910.266(e) (1993). The plaintiff was not an employee of the defendant. It is therefore within the court's discretion to refuse to take judicial notice of the regulations.

Plaintiff withdrew his last assignment of error.

No error.

Judges WYNN and McCULLOUGH concur.

Report per Rule 30(e).