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Pleadings -- Last Clear Chance -- North Carolina Requirements

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of a formal nature or so significant that it is essential to the ends of justice.

(2) If the testimony is determined by the trial judge to fit either of these two categories, then the attorney should be allowed to testify for his client without withdrawing from the case.

(3) If the testimony is determined by the trial judge not to fit either of these categories, then the attorney should not be permitted to testify for his client unless he withdraws completely as counsel.

(4) If, however, a trial judge should allow an attorney to testify for his client without first determining the nature of the proposed testimony, and it is found on appeal that the testimony fits neither of the permitted categories and should not have been admitted without the withdrawal of the testifying attorney, then the appellate court should not reverse at the expense of the client.

(5) Rather, in such a situation, a stated and suitable punishment for the offending attorney should be incorporated into the rules and regulations of the state bar association, the enforcement procedure being handled by the regular enforcement machinery for such regulations.

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Pleadings—Last Clear Chance—North Carolina Requirements

Last clear chance in North Carolina, as a substantive doctrine, can be defined in terms which have been consistently repeated and approved since the introduction of the concept late in the last century.[1] A typical definition would be that the "contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so."[2] Our inquiry here is to determine what allegations, if any, are required in the plaintiff's pleadings before a trial court in North Carolina should submit to the jury the issue of last clear chance.

The most recent declaration by the North Carolina Supreme Court concerning methods by which a plaintiff may avail himself of the doctrine of last clear chance was *Collas v. Regan*,[3] which held that he was

[1] Gunter v. Wicker, 85 N. C. 310 (1881).
[2] Ingram v. Smoky Mt. Stages, Inc., 225 N. C. 444, 447, 35 S. E. 2d 337, 339 (1945).
[3] 240 N. C. 472, 82 S. E. 2d 215 (1954).

not entitled to have the jury consider the doctrine because his pleadings had not sufficiently raised the issue. The court said of the appellant's contention that the trial judge erred in refusing to submit the issue that it could not now overrule past decisions holding that last clear chance must be pleaded, and added that, in any event, the evidence on the point was insufficient to support the submission of the issue.[4] As precedent for its position, the court cited two cases which it characterized as "practical applications of the basic rule that a plaintiff can recover only on the case made by his pleadings."[5]

The earlier of the two cited cases, *Hudson v. Norfolk Southern Railroad Co.*,[6] held that a judgment on the verdict for the plaintiff must be reversed because of the trial judge's error in instructing the jury that the burden of proof on the issue of last clear chance was on the defendant. Then, the court quoted from 11 *Corpus Juris* 282 in reference to the burden of *both* pleading and proof, and stated: "In order to invoke the 'last clear chance' doctrine, plaintiff must plead and prove that the defendant, after perceiving the danger, and in time to avoid it, negligently refused to do so."[7]

On this near-dictum was built the second cited case, *Bailey and King v. North Carolina Railroad.*[8] The facts there were as follows: the plaintiffs' intestates, while riding in a truck in the City of Durham, approached the defendant's track where the view was unobstructed for several hundred yards, and then attempted to cross in front of an oncoming passenger train, which was approximately 400 yards from the crossing, traveling at a rate in excess of the speed limit and sounding neither bell nor whistle. When on the track, the truck stalled, and as the plaintiffs' witness described it, "the truck looked like it was trying to get off, kinder moved back and forth and settled down at the time the train hit it,"[9] killing both occupants. In affirming a judgment of non-suit, granted on defendant's motion at the close of the plaintiffs' evidence, the court held that the testimony introduced by the plaintiffs conclusively proved their intestates' own negligence, and then stated: "Furthermore, the plaintiffs do not plead the last clear chance, which is required before such doctrine is available, paragraph 8(f) of the complaint not being susceptible of such construction."[10] At that

[4] *Ibid.* The evidence showed that the plaintiff was struck by the defendant's automobile as he was crossing the street at night, while carrying a bag of groceries. *The only allegation of negligence appearing in the plaintiff's complaint was that the defendant failed to maintain a proper lookout.* See Transcript of Record.

[5] *Id.* at 473, 82 S. E. 2d at 216.

[6] 190 N. C. 116, 129 S. E. 146 (1925).

[7] *Id.* at 119, 129 S. E. at 147.

[8] 223 N. C. 244, 25 S. E. 2d 833 (1943).

[9] *Id.* at 246, 25 S. E. 2d at 835.

[10] *Id.* at 248, 25 S. E. 2d at 835.

point the court again quoted the above-mentioned passage from *Corpus Juris* and cited *Hudson v. Norfolk Southern Railroad* as authority for its conclusion.

A look at the appeal record reveals that the plaintiffs, in paragraphs 8(a) through 8(e) of their complaint, alleged specific acts of negligence, *i.e.*, excessive speed, failure to keep a proper lookout, unsafe condition of the crossing; and then in paragraph 8(f) alleged that "had the operators of said passenger train been operating said train at a reasonable rate of speed, used due care and kept a proper lookout that it would have discovered the said Chevrolet truck and its two occupants upon said crossing as they had a clear view of at least 350 to 400 yards and recognized their position of peril and could have stopped said train in ample time to have avoided the collision and the death of the plaintiff's intestate."[11]

It seems fairly apparent, to this writer at least, that while the plaintiffs' actual allegations do not explicitly parrot the *Corpus Juris* phraseology suggested by the court as an acceptable standard for pleading last clear chance, the allegations do attempt to emphasize the intestates' position of peril or danger, which seems to be a key substantive element, and one which was missing from the *Collas* pleadings.[12] If, as suggested in the *Collas* case, *Bailey and King v. North Carolina Railroad* stands as a definitive expression of the North Carolina view on pleading last clear chance, what is its full significance and what procedural lessons can be learned from it? A review of some general pleading problems and an inspection of the North Carolina judicial history on pleading last clear chance will be of some help.

The effect of procedural law on the application of the doctrine of last clear chance varies considerably among the states.[13] Some states consider the doctrine to be essentially one of evidence and not of pleading.[14] McIntosh apparently conceived North Carolina to be in a somewhat comparable position, as he briefly stated that when "the defendant pleads contributory negligence, it is deemed to be denied without reply, and the plaintiff may also take advantage of the last clear chance or plead it especially in reply."[15] For his authority he cited *Nathan v. Charlotte St. Ry.*[16] where, in response to the defend-

[11] Transcript of Record, p. 7, Bailey and King v. North Carolina Railroad, 223 N. C. 244, 25 S. E. 2d 833 (1943).

[12] See note 4 *supra*.

[13] See annotation, 25 A. L. R. 2d 257 (1952).

[14] Pfisterer v. Key, 218 Ind. 521, 33 N. E. 2d 330 (1941); Nielson v. Richman, 68 S. D. 104, 299 N. W. 74 (1941); Masso v. E. H. Stanton Co., 75 Wash. 220, 134 Pac. 941 (1913).

[15] McIntosh, North Carolina Practice and Procedure § 478 (1929).

[16] 118 N. C. 1066, 24 S. E. 511 (1896). The allegations in the complaint were that the plaintiff paid his fare to ride the defendant's streetcar. While being conveyed to his destination, he was thrown to the tracks and struck by

ant's objection that the issue of last clear chance was improperly submitted to the jury because it was not raised in the complaint, the court stated: "In contemplation of law, the injury is not attributed to the wrongful act unless it is shown to be the immediate and proximate cause. So that, the allegation by the plaintiff that the injury was due to the defendant's carelessness, and the denial of that, coupled with the averment by the defendant that the contributory negligence of the plaintiff was the cause, *necessarily* involves the question of whether the defendant negligently omitted to avail itself of the last clear chance to avoid the accident by the performance of a legal duty" (italics added).[17] The court then affirmed its position in an earlier case[18] and held that if by refusing to submit the issue of last clear chance the trial court had prevented the plaintiff from presenting to the jury the law applicable to the evidence, "then it would be no longer discretionary with the judge whether he would permit it to be passed upon, but would become the right of the plaintiff to demand that it should be."[19]

This idea was reinforced in a later case where a similar objection was raised by the defendant that the trial court erred in submitting the issue of last clear chance and in refusing a request for binding instructions in his favor should the jury find the plaintiff guilty of negligence. The court answered defendant's exception by pointing out that the trial court may not properly instruct the jury that the proximate cause of the injury was the plaintiff's negligence when the evidence indicates that the "negligence may have been concurrent, or the last negligence may have been the plaintiff's, or notwithstanding the negligence of the plaintiff, the defendant could, with the exercise of ordinary care have prevented his horse striking, and his conveyance running over, the plaintiff. The jury and jury alone were competent to determine the fact, for there was evidence for their consideration."[20]

In contrasting the *Bailey* with the *Nathan* case, the impression is received that the North Carolina requirements for pleading facts which permit recovery on the theory of last clear chance have been stiffened in favor of the defendant. Yet it is difficult to determine from the language of the *Bailey* decision whether, in fact, its apparent conflict

another of the defendant's cars, all of which was caused by the negligent, careless and wrongful operation of its streetcars by the defendant. See Transcript of Record.

[17] *Id.* at 1069, 24 S. E. at 511.

[18] Baker v. Wilmington and Weldon R. R., 118 N. C. 1015, 1023, 24 S. E. 415, 417 (1896).

[19] Nathan v. Charlotte St. Ry., 118 N. C. 1066, 1069, 24 S. E. 511 (1896).

[20] Wheeler v. Gibbon, 126 N. C. 811, 36 S. E. 277 (1900).

with the *Nathan* case may not largely be due to a substantive rather than a procedural difference.

Since the adoption of the Code of Civil Procedure, North Carolina has not required explicit characterization or labeling of the theory under which the plaintiff expects to recover,[21] but, quite the contrary, asks only for a clear, concise statement of the facts which show a cause of action under any theory.[22] Although it is true that the plaintiff's pleadings must properly apprise the defendant of the alleged cause of action so that he may prepare his defense,[23] the court has stated that the complaint should not anticipate a possible defense in the answer.[24] Therefore, in spite of the fact that the doctrine of last clear chance does not begin to operate unless the plaintiff is guilty of negligence,[25] it is unlikely that the *Bailey* case means to impose upon plaintiffs the burden of initially confessing their own negligence.

In the scope of this note, it would be impossible even to attempt to span the substantive law of last clear chance in North Carolina with its endless shadings and distinctions;[26] nevertheless, some mention of it is necessary at this point. The court has held that the doctrine of last clear chance does not apply to situations where the defendant's train has struck a pedestrian plaintiff, who as a licensee or trespasser, was on the defendant's track and apparently in full command of his faculties. Railroads, in such instances, have been absolved on the theory that the engineer is entitled to expect up to the moment of impact that the pedestrian will remove himself;[27] therefore, any negligent failure by the defendant to keep a proper lookout or to give warning of its approach would merge with the concurring negligence of the plaintiff and bar recovery. An essential substantive element here seems to be the "condition" of the plaintiff, *i.e.*, whether his position was such that the defendant was put on notice of the plaintiff's inability to escape.[28] Unless such notice of disability appears, the defendant has no later chance to avoid the collision than does the plaintiff.

The *Bailey* case, although clearly distinguishable on its facts from the pedestrian cases, follows their reasoning rather closely by holding,

[21] Thomas v. Atlantic and North Carolina R. R., 218 N. C. 292, 10 S. E. 2d 722 (1940).

[22] N. C. GEN. STAT. § 1-122 (1953); Hill v. Buxton, 88 N. C. 27 (1883).

[23] Hussey v. Norfolk Southern R. R., 98 N. C. 34, 3 S. E. 923 (1887).

[24] Joyner v. P. L. Woodward & Co., 201 N. C. 315, 160 S. E. 288 (1931). By way of dictum the court added that if a defense is anticipated and not negatived in the complaint it is subject to demurrer.

[25] Redmon v. Southern Ry., 195 N. C. 762, 143 S. E. 829 (1928).

[26] For an interesting discussion of the substantive aspect, see Note, 33 N. C. L. REV. 138 (1954).

[27] Beach v. Southern Ry., 148 N. C. 153, 61 S. E. 664 (1908).

[28] Neal v. Carolina Central R. R., 126 N. C. 634, 36 S. E. 117 (1900).

in effect, that the intestates themselves had the last clear chance to avoid the collision, in spite of the obvious differences in maneuverability between pedestrians and occupants of stalled vehicles. If such is the substantive law of last clear chance as applied to vehicle-train collisions, allegations based on similar facts will not permit consideration of last clear chance because the proof could not satisfy the legal definition which the court has placed on the words "peril" or "danger."[29] Therefore, the fault would lie not with the pleading form, but with a failure of plaintiff's proof to avoid a finding that his negligence was concurrent, or "contributory" as a matter of law. The *Bailey* case might easily have been decided without reference to the pleading form, thereby preventing some of the precedural mystery of its holding.

Regardless of whether the court considers the doctrine of last clear chance to be a theory alternate to and distinct from ordinary negligence, or as merely a facet of the over-all inquiry into the proximate cause of the injury, the results are the same. A plaintiff hoping to take advantage of the doctrine is evidently no longer permitted to rely on the ordinary allegations of negligence with the privilege of getting special instructions to the jury on the issue should the evidence produce a case where the last clear chance doctrine would be applicable. The recent North Carolina decisions seem to mean that specific facts which would give rise to the operation of the doctrine should be pleaded in the complaint on an alternative basis in a separate count, or included by way of reply[30] to an answer which sets up a defense of contributory negligence.

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Taxation—Ad Valorem Tax on Flight Equipment of Interstate Airlines

Interstate business must pay its way[1] and its "way" may properly be regarded as the protection, services, and other benefits afforded by those authorities through whose jurisdictions such business operates.[2] By daily use of airports, the aircraft of interstate carriers directly receive a major part of the services and other benefits furnished by the taxpayers of the jurisdiction in which the airports are located. It would seem to follow that such aircraft properly may be the subject of ad valorem property taxes.

[29] Dowdy and Burns v. Southern Ry., 237 N. C. 519, 75 S. E. 2d 639 (1953).
[30] See Redwine v. Bass, 215 N. C. 467, 2 S. E. 2d 362 (1939).

[1] Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252, 259 (1919).
[2] *Ibid.* Braniff Airways, Inc. v. Nebraska State Board, 347 U. S. 590, 606 (1954); Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 174 (1949); Curry v. McCanless, 307 U. S. 357, 364 (1939).