

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 19th day of October, 2017.*

April R. Hunter, Appellant,

against Record No. 161647  
Circuit Court No. CL15-727

David H. Thomas, II, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Williamsburg and James City County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the judgment below should be reversed.

The plaintiff, April R. Hunter, sued David H. Thomas, II, to recover from injuries she sustained in an automobile accident. A first trial resulted in a mistrial during the jury selection phase of the trial. Before this first trial, Hunter had circulated jury instructions on gross and simple negligence. In response, defense counsel argued in a pretrial motion that the jury should not be instructed on simple negligence because the plaintiff had pled gross negligence only. The court responded as follows: “I deny that motion. The instructions will be given to the jury on what the cause of action will be determined after I hear the evidence.”

At the second trial, it became clear that both parties had misunderstood the court’s ruling on the pretrial motion. Both parties believed the court had ruled that the plaintiff could go forward on both simple negligence and gross negligence. The court disagreed, explaining that it had merely ruled that it would “wait to see what the evidence showed as to how we instructed the jury.”

Defense counsel again took the position that Hunter had pled gross negligence only and that the complaint did not plead simple negligence. The court stated that its ruling would be made at the time of the instruction, based on the evidence presented.

Before the trial commenced, defense counsel stated that “we are not disputing simple negligence” and “we would certainly acknowledge simple negligence.” Counsel for the

defendant stated that “when you are instructing the jury at the outset, or advising them of the case, we are not denying simple negligence. It’s just a matter of gross and punitive damages which we cannot admit to.”

At the close of the evidence, Hunter proffered instructions on both gross and simple negligence. The court refused to instruct the jury on simple negligence and ruled that the jury would be instructed on gross negligence only. Hunter then moved to amend her complaint to add a claim of negligence. The court denied the motion.

The jury returned a defense verdict. Hunter filed a motion to set aside the jury’s verdict, which the trial court denied.

On appeal, Hunter assigns the following error:

1. The Trial Court committed reversible error when it found that Appellant could not recover for ordinary negligence or simple negligence against defendant because gross negligence was the only cause of action alleged by plaintiff.
2. The Trial Court committed legal reversible error by not giving the jury instructions that plaintiff submitted and proposed on simple or ordinary negligence.
3. The Trial Court committed reversible error by its failure to instruct the jury on ordinary negligence in order to return a verdict for appellant.
4. The Trial Court committed prejudicial reversible error by denying plaintiff’s motion to amend her complaint to include a claim for damages based upon simple or ordinary negligence before the case was given to the jury for deliberations for consideration of returning a verdict in her favor for ordinary or simple negligence.

Hunter proceeds on two alternative paths. She first argues that her complaint alleged negligence, or, failing that, she contends that an allegation of simple negligence is subsumed within a claim for gross negligence. Alternatively, she asserts that the trial court should have granted her leave to amend her complaint and instructed the jury on simple negligence. Either way, she argues, the court erred in refusing to instruct the jury on simple negligence.

For purposes of this order, we will assume without deciding that Hunter’s complaint did not allege simple negligence and, further, that allegations of gross negligence do not subsume a claim for simple negligence. On these particular facts, however, we conclude that the trial court erred in denying Hunter’s motion to amend and, concomitantly, erred in refusing to instruct the jury on simple negligence.

Rule 1:8 provides in pertinent part that “[n]o amendments shall be made to any pleading after it is filed save by leave of court. Leave to amend [pleadings] shall be liberally granted in furtherance of the ends of justice.” “[T]he decision to permit amendments of pleadings rests in the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion.” *Adkins v. Dixon*, 253 Va. 275, 279, 482 S.E.2d 797, 800 (1997). That discretion is cabined by the settled principle that leave to amend must be liberally granted.

In applying Rule 1:8, we have focused our review on whether a party was prejudiced by an amendment. See *Whitaker v. Heinrich Schepers GMBH & Co. KG*, 276 Va. 332, 336-38, 661 S.E.2d 828, 829-31 (2008) (reversing trial court’s refusal to permit plaintiff to amend his *ad damnum* clause because the defendant failed to demonstrate any prejudice); *Peterson v. Castano*, 260 Va. 299, 303-04, 534 S.E.2d 736, 738-39 (2000) (same); *Mortarino v. Consultant Eng’g Servs.*, 251 Va. 289, 296, 467 S.E.2d 778, 782-83 (1996) (abuse of discretion to deny leave to amend because “nothing in the record suggests that the defendants would have been prejudiced by allowing an amended motion for judgment”); *Kole v. City of Chesapeake*, 247 Va. 51, 57, 439 S.E.2d 405, 409 (1994) (“In the present case, nothing in the record suggests that the City would have been prejudiced by allowance of the amended bill of complaint. We conclude, therefore, that the trial court abused its discretion in failing to allow the filing of the amended bill.”).

Another relevant consideration to the “ends of justice” calculus when considering leave to amend is “the plaintiff’s right to be compensated fully for any damages caused by the defendant’s acts or omissions.” *Peterson*, 260 Va. at 303, 534 S.E.2d at 738.

In this instance, before Hunter requested leave to amend her complaint and before the trial court had determined which jury instructions it would provide, the defendant conceded simple negligence. Furthermore, prior to the commencement of the second trial, both parties labored under the mistaken impression that the trial court’s previous ruling meant that the court would instruct the jury on simple negligence. On the morning of trial, the court deferred ruling on the question of whether it would instruct the jury on simple negligence. Against this backdrop, Hunter’s delay in seeking amendment is, if not prudent, at least understandable. The defense makes vague assertions of prejudice, but in light of the concession made on simple negligence, made before the court’s ruling on jury instructions, we are unable to see how the defense would be prejudiced by allowing Hunter to amend.

Accordingly, we conclude that the trial court erred in denying Hunter leave to amend and in declining to instruct the jury on simple negligence. Although the defendant conceded negligence, he also pled contributory negligence and other defenses. Therefore, we remand the case for a new trial.

This order shall be certified to the said circuit court.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "Pat L. Hamish". The signature is written in a cursive, slightly slanted style.

Clerk