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NO. COA01-1090

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

GILL SMITH,
Plaintiff

v.

Robeson County
No. 99 CVS 1749

THE CAROLINA MANOR
TREATMENT CENTER and
SOUTHEASTERN REGIONAL
MEDICAL CENTER,
Defendants

Appeal by defendants from judgment signed 9 February 2001 and filed 13 March 2001 by Judge B. Craig Ellis in Robeson County Superior Court. Heard in the Court of Appeals 10 June 2002.

Britt and Britt, P.L.L.C., by William S. Britt, for plaintiff-appellee.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., for defendants-appellants.

WALKER, Judge.

In the spring of 1995, Thomas A. Kelly was a chemical dependency counselor at Carolina Manor Treatment Center (Carolina Manor). Mr. Kelly had previously been addicted to alcohol and drugs. After completing treatment and staying clean since 5 December 1985, he decided that he wanted to help others who were also addicted. He started doing volunteer work and then went back to school where he obtained a masters degree in counseling.

Plaintiff helped found Trinity Manufacturing, Inc. (Trinity), a chemical company of which he was the president, the CEO, on the Board of Directors (Board), and owned 22.63% of the outstanding shares of stock. On 25 April 1995, he admitted himself to Carolina Manor for a twenty-eight day inpatient treatment program for cocaine, alcohol, cannabis and polysubstance abuse. Mr. Kelly was assigned as his counselor. Plaintiff testified that he had explicitly told Carolina Manor and Mr. Kelly that he did not want anyone at Trinity to know that he was in treatment for his addiction.

While in treatment, plaintiff was concerned about how his business was being run and managed in his absence. He feared that certain employees were trying to take over his business since he was away in treatment. Because he was focused on business instead of his treatment and recovery, he was given a twelve-hour pass to leave Carolina Manor. During this time, plaintiff went to Trinity in an attempt to deal with his concerns. Plaintiff testified that the twelve-hour pass "let me know that it was worse than what I thought it was."

On 9 May 1995, with plaintiff still focused on business rather than treatment, Mr. Kelly suggested a business meeting at Carolina Manor with key people from Trinity to help relieve plaintiff's concerns. Plaintiff signed a release, which authorized Carolina Manor to disclose plaintiff's treatment dates and to give updates on his progress to Victor Perreault, Chuck Davis, and Rusty Goodwin. Mr. Kelly placed a call to the business manager at

Trinity and set up a meeting for that afternoon with plaintiff's key employees. Plaintiff testified that Mr. Kelly had him sign the release after Mr. Kelly had already contacted Trinity to set up the meeting.

On the afternoon of 9 May 1995, Mr. Perreault, Mr. Davis, Mr. Goodwin, and Preston Allen met with plaintiff, Mr. Kelly, and a family counselor, Ada Jackson Williams. Mr. Allen, a recovering addict, was the person who suggested that plaintiff go to Carolina Manor for his drug abuse treatment. Mr. Davis was the business development manager at Trinity. Mr. Goodwin and Mr. Perreault were both on the Board. Plaintiff testified that, when he entered the meeting, Mr. Kelly was already in conversation with these Trinity employees. Plaintiff was under the impression that Mr. Kelly had already discussed his cocaine addiction with these Trinity employees.

Mr. Davis testified that, during the meeting, he gave plaintiff a letter for the purpose of getting plaintiff to stay in treatment and get well. He testified, "I believe it was Rusty Goodwin that had told me that we needed to go try to see if we could talk [plaintiff] into staying in the treatment center. But it could have been either Gina [plaintiff's wife] or Mr. Kelly." He further testified that he wrote the letter on his own and then showed it to the other Trinity employees before the meeting. After reading the letter, plaintiff became upset and felt that it was an attempt to take over the company.

On the following day, plaintiff left Carolina Manor without completing the program. Within a short period of time, plaintiff was again using drugs and alcohol and went in and out of inpatient treatment for substance abuse. On 12 May 1995, there was a special meeting of the Board by telephone, which was initiated by plaintiff because "he felt apprehensive and undermined by Dean's [the majority stockholder] scheduling a meeting in California during his absence." The Board voted three to two to require plaintiff to take a thirty-day voluntary leave of absence during which time he would remain away from Trinity. They also voted unanimously that no action would be taken during his leave of absence.

On 24 May 1995, the Board held another special meeting by telephone without plaintiff as he could not be located. In that meeting, the Board unanimously recommended and requested that plaintiff admit himself into an inpatient treatment program to be paid for by Trinity and that he continue to receive salary and benefits during the treatment. The Board further determined that it was in the best interest of Trinity for plaintiff to remain off the premises until the next Board meeting, which was to take place either on 12 June 1995 or at the completion of plaintiff's inpatient treatment. Plaintiff went to an inpatient treatment center for twenty-eight days. On 25 September 1995, plaintiff resigned as president of Trinity and also from the Board.

Plaintiff filed suit against Carolina Manor and Southeastern Regional Medical Center alleging negligence on the part of defendants in the following ways:

a. Tom Kelly breached the Plaintiff's confidentiality in communicating ex parte with the staff of Trinity Manufacturing, in direct contradiction of Plaintiff's directives.

b. By breaching Plaintiff's confidentiality, Tom Kelly, upon information and belief, violated state and federal regulations governing patient confidentiality for residents of substance abuse treatment centers.

c. Tom Kelly used an inappropriate method of treatment with Plaintiff, confronting the Plaintiff with his staff members and violating plaintiff's directives.

d. That the actions and/or omissions of Tom Kelly were a breach of the appropriate standards of care for employees of substance abuse centers located in Lumberton or similar communities, with the same knowledge, training and skill as Tom Kelly.

e. Tom Kelly failed to use his best clinical judgment in his care and treatment of the Plaintiff.

f. Tom Kelly failed to use reasonable care and diligence in the application of his knowledge and skill of the Plaintiff's care.

He further alleged that Mr. Kelly's actions, imputed to defendants, were willful, intentional, and wanton such that plaintiff was entitled to punitive damages. However, punitive damages were not an issue in the pre-trial order and were not argued or submitted to the jury at trial.

The trial court's instructions to the jury were based on the pattern jury instruction for medical malpractice. The jury found that plaintiff was injured by the negligence of defendants and that plaintiff was not contributorily negligent. It awarded damages in the amount of \$300,000.

Prior to trial, defendant filed a motion *in limine* to exclude evidence of an incident involving Mr. Kelly in 1997, two years after the events in question. The trial court withheld ruling on the motion until hearing *voir dire* testimony during the trial. Mr. Kelly testified on *voir dire* that he came home from work and found his wife and her two young daughters shaken and upset. His wife also had skinned knees and bruises on her face. He discovered that his wife had been attacked in a parking lot. He learned the name of the attacker from his mother-in-law. Mr. Kelly testified, "I spent the better part of that day and that night looking for this gentleman, and I finally found him. When I found him we got into a physical fistfight. And when I finally knocked him to the ground, I had a pistol and I shot him in the knee. I didn't kill him, I shot him in the heat of the passion of what had happened." Mr. Kelly was never charged with a crime.

Plaintiff argued before the trial court that the evidence was admissible because "[o]ur allegation against Mr. Kelly is that he failed to use good judgment, and it just shows that that pattern of continuing bad judgment was in effect, because the rules say that it can be shown to show motive or pattern." Therefore, plaintiff's argument was that the purpose was to prove Mr. Kelly's character as being confrontational and using bad judgment. After hearing from counsel, the trial court ruled as follows in part:

The motion in limine the defense has raised Rules 401, 403, 404, 607, 608, 609. Reading those I see where we have difficulties with this particular evidence coming in under those rules. But looking at Rule 405B [sic], which deals with specific incidences of conduct in

cases in which character or trait of character of a person is an essential element of a charge or claim of defense, proof may also be made of specific incidences of his conduct. Gentlemen, I believe that this evidence goes to that particular trait of confrontation, poor judgment, and I will permit it under Rule 405.

On appeal, defendants contend the trial court erred to their prejudice in admitting this evidence. Rule 405(b) of the North Carolina Rules of Evidence states: "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." N.C. Gen. Stat. § 8C-1, Rule 405(b) (2001). The general rule is that evidence of character is inadmissible in a civil action unless "the character of the party [was] put directly in issue by the nature of the proceeding." *Holiday v. Cutchin*, 311 N.C. 277, 279, 316 S.E.2d 55, 57 (1984) (quoting *McRae v. Lilly*, 23 N.C. (1 Ire) 118, 120 (1840)).

Here, plaintiff proceeded to trial under a theory of medical malpractice on the part of Mr. Kelly being imputed to defendants. Thus, we must look at whether the character of Mr. Kelly is an essential element of a medical malpractice claim. The essential elements of a medical malpractice claim are: (1) there is a standard of care, (2) there is a breach of that standard of care, and (3) the breach proximately caused damages to plaintiff. *Clark v. Perry*, 114 N.C. App. 297, 305, 442 S.E.2d 57, 61 (1994). Our Supreme Court has held that "[t]he character of a defendant physician in a medical malpractice action is irrelevant to the

ultimate issue of whether the physician acted negligently." *Holiday*, 311 N.C. at 279, 316 S.E.2d at 57.

Plaintiff contends on appeal that the evidence is admissible because it goes to show the willful, wanton, and reckless disregard which is required for punitive damages. Although the complaint sought punitive damages, they were not at issue in the pre-trial order, during the trial, nor were they submitted to the jury. Further, plaintiff did not argue and the trial court did not admit the evidence in support of punitive damages. As the theory of this case was medical malpractice, we find that the trial court erred in admitting the character evidence of Mr. Kelly regarding the shooting incident.

However, plaintiff argues that even if there were error in the admission of the evidence, such error was not prejudicial. In support of his argument, he cites the following: "All erroneous rulings of the trial court with respect to the admissibility of evidence will not result in a new trial. The burden is upon the appellant to show not only error but that such error was prejudicial to him, or that such error probably influenced the jury." *Johnson v. Massengill*, 12 N.C. App. 6, 7, 182 S.E.2d 232, 234 (1971), *aff'd*, 280 N.C. 376, 186 S.E.2d 168 (1972).

Defendants argue that the incident was not only irrelevant but also prejudicial under *Holiday* because it "tempts the jury to base its decision on emotion and to reward good people or punish bad people, rather than to render a verdict based upon the facts before them." *Holiday*, 311 N.C. at 279, 316 S.E.2d at 57. Further,

"[t]he use of character evidence by a party to a civil action 'might move the jury to follow the principles of poetic justice rather than rules of law.'" *Id.* (quoting *Creech v. Creech*, 222 N.C. 656, 664, 24 S.E.2d 642, 648 (1943)). In *Holiday*, evidence of the defendant physician's good character and reputation in the community was admitted over the plaintiff's objection. *Id.* at 281-82, 316 S.E.2d at 58. Our Supreme Court held, "We cannot say, therefore, that the error in admitting this character testimony was harmless. There is here the danger that the jury was unduly tempted to find for [the defendant physician] on the issue of his negligence simply because they [sic] believed the inadmissible [character evidence]." *Id.* at 282, 316 S.E.2d at 59.

Here, the trial court conceded there were difficulties with the evidence being admitted under Rule 401, which deals with relevancy of evidence, and Rule 403, which deals with the prejudicial nature of evidence. Furthermore, the shooting incident occurred two years after the events in question. It dealt with a private matter in which Mr. Kelly, after finding his wife had been attacked by a man, engaged in a confrontation with the attacker. The negligence alleged in the present lawsuit deals only with a breach of a professional standard of care. Thus, we conclude the trial court's admission of the character evidence was sufficiently prejudicial that defendants are entitled to a new trial.

Because we remand the case for a new trial, we need not address defendants' remaining assignment of error. Thus, we reverse and remand for a new trial.

New trial.

Chief Judge EAGLES and Judge BIGGS concur.

Report per Rule 30(e).