NO. COA01-1189

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

JOYCE FAYE MINTON,
Plaintiff

v.

Wilkes County
No. 00 CVS 566

DAVID NEAL BOWMAN and
JAMES THOMAS BOWMAN,
Defendants

Appeal by plaintiff from judgment entered 15 March 2001 and order entered 11 April 2001 by Judge William Z. Wood, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 5 June 2002.

Franklin Smith for plaintiff-appellant.

Willardson Lipscomb & Miller, L.L.P, by William F. Lipscomb, for defendants-appellees.

WALKER, Judge.

Plaintiff initiated this action on 13 April 2000 seeking damages for injuries she sustained as a result of an automobile accident involving her and David Neal Bowman (David) on 1 September 1999. At the time, David was driving an automobile owned by his father, James Thomas Bowman. Defendants answered admitting David's negligence. Thereafter, on 5 March 2001, a trial commenced with the sole issue being the amount in damages, if any, plaintiff was entitled to recover from defendants.

The jury determined that plaintiff was entitled to $4,000.00 in damages, and the trial court entered judgment in this amount on 15 March 2001. On 19 March 2001, plaintiff moved the trial court to set aside the jury's verdict and order a new trial on grounds that the jury had awarded inadequate damages. Plaintiff also argued that the trial court improperly admitted evidence of her prior medical history. Plaintiff's motions were denied.

Plaintiff first contends the trial court erred in permitting defendants to introduce evidence regarding medical treatment and a disability rating she received more than ten years prior to the accident. She asserts the admission of such evidence was unduly prejudicial in violation of Rule 403 of the Rules of Evidence.

The record reveals plaintiff moved *in limine* that the trial court prohibit defendants from introducing or asking questions pertaining to any of her medical records dated more than ten years prior to the trial date. However, the trial court reserved ruling on plaintiff's motion until such time that it heard "what the [trial] testimony would be" and could place her request into a "proper context."

Thereafter, during plaintiff's presentation of evidence, she testified that since the accident she suffers pain "from [her] head down to [her] feet" and that she is "taking shots for [her] shoulder, the upper neck and points of [her] . . . lower back area." She also testified that in 1994 she had received medical treatment for a lower back injury which resulted from a fall at her workplace. Plaintiff's physician, Dr. Jerry Watson (Dr. Watson),

then testified that he treated plaintiff in September 1999 for pain in her "neck, shoulder and left arm and low[er] back." He further testified that plaintiff complained of pain in her lower back area on several subsequent visits. Additionally, in response to plaintiff's counsel's question, Dr. Watson stated his examination of plaintiff revealed tenderness around a lumbar laminectomy scar. Dr. Watson ultimately opined that plaintiff suffers from fibromyalgia which is attributable to the injuries she suffered as a result of the 1 September 1999 automobile accident.

During cross-examination, defendant questioned Dr. Watson concerning his treatment of plaintiff and the basis of his opinion regarding the cause of her fibromyalgia. Dr. Watson stated that his opinion was based on his review of plaintiff's "whole [medical] history" and a physical examination he had performed following the accident. Over plaintiff's objection, the trial court ruled that, in view of his testimony, defendant would be permitted to question Dr. Watson concerning whether he knew that plaintiff underwent a lumbar laminectomy in 1986 and received a twenty percent permanent partial disability rating for her lower back in 1987. In response, Dr. Watson stated he was unaware of these facts but he could not, without more detail, form an opinion as to whether plaintiff had developed fibromyalgia prior to 1 September 1999.

Plaintiff contends the admission of her prior surgery and disability rating violates Rule 403 of the Rules of Evidence which states in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice. . . .” N.C. Gen. Stat. § 8C-1, Rule 403 (2001). The decision of whether to exclude evidence under this rule is in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *See Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 524 S.E.2d 591 (2000).

In support of her position, plaintiff relies on this Court’s holding in *Sitton v. Cole*, 135 N.C. App. 625, 521 S.E.2d 739 (1999). Like the case before us, *Sitton* involved a negligence action which arose out of an automobile accident. Plaintiff testified that, as a result of the accident, she suffered injury to her neck, shoulder and thoracic spine and that, prior to the accident, she had never experienced problems in these areas. The defendant then sought to introduce the plaintiff’s medical record, compiled ten years prior to the accident, which contained a notation stating that plaintiff had complained of “longstanding mid-thoracic pain” and “paraspinal muscle pain.” However, the plaintiff’s physician testified that, at the time the medical record was made, he did not know who made the notation and he had no personal knowledge of how it came to be included in the plaintiff’s medical record. This Court held: “Because the medical record was remote in time and [the plaintiff’s treating physician] could not specify who made this vague notation . . . the trial court properly exercised its discretion in excluding the evidence under Rule 403.” *Id.* at 626, 521 S.E.2d at 740-41.

Unlike the medical evidence in *Sitton*, there is no dispute here that plaintiff underwent surgery on her lower back in 1986 and received a rating of twenty percent permanent partial disability in 1987. Moreover, the record is devoid of any evidence indicating that, prior to 1 September 1999, plaintiff's disability rating had been upgraded or removed. Furthermore, plaintiff and her physician both testified that, following the automobile accident, she complained of pain in her lower back area. Dr. Watson also testified that his opinion as to the cause of plaintiff's fibromyalgia was based on plaintiff's "whole [medical] history." As such, we cannot conclude the probative value of plaintiff's prior lower back surgery and disability rating was substantially outweighed by the danger of unfair prejudice to plaintiff. Hence, the trial court did not abuse its discretion by admitting this evidence.

Next, plaintiff contends the trial court erred in its instructions to the jury on the "thin skull" doctrine. She maintains the instruction "was not of sufficient clarity to enable the jury to evaluate [her] injuries in light of any preexisting injuries that she had." We disagree.

The record shows that the trial court, with respect to the "thin skull" doctrine, instructed the jury as follows:

> In deciding whether . . . the injury to the Plaintiff was a reasonably foreseeable consequence of the Defendant's negligence, you should determine whether such negligent conduct under the same . . . or similar circumstances could reasonably have been expected to injure a person of ordinary physical condition.

> If so, the harmful consequences resulting from the Defendant's negligence would be reasonably . . . foreseeable, and therefore would be a proximate cause of the Plaintiff's injury.
>
> If not, then the harmful consequences resulting from the Defendant's negligence would not be . . . reasonably foreseeable, and therefore would not be a proximate cause of the Plaintiff's injury.
>
> Now, under such circumstances, the Defendant would be liable for all harmful consequences which occurred, even though those . . . harmful consequences may be unusually extensive, because of a peculiar, abnormal physical condition, which happened to be present in the Plaintiff.

Plaintiff concedes this instruction tracks the model instruction for "peculiar susceptibility" provided in the North Carolina Pattern Jury Instructions. *See* N.C.P.I.--Civ. 102.20 (gen. civ. vol. 1994). Nevertheless, she asserts the trial court erred by failing to "tailor" the instruction to the facts of the case.

This Court has previously held that where the trial court has sufficiently instructed the jury on the law governing the case, a party desiring greater elaboration must tender a request for a special instruction. *See Prevette v. Bullis*, 12 N.C. App. 552, 554, 183 S.E.2d 810, 811-12 (1971); *and Hendrix v. All American Life and Cas. Co.*, 44 N.C. App. 464, 467, 261 S.E.2d 270, 272 (1980); *see also* N.C. Gen. Stat. § 1A-1, Rule 51(b)(2001)(outlining the procedures for requesting a special instruction). Here, plaintiff objected to the instruction as given, but neither tendered to the trial court a written request for a special instruction nor provided it with any specifics as to how the

instruction should be "tailored" to the facts of the case. Accordingly, we overrule this assignment of error.

Lastly, plaintiff argues the trial court erred in failing to grant her motion to set aside the jury verdict and order a new trial. However, plaintiff's argument on this issue is based on her contentions that the trial court had erroneously admitted evidence of her past medical treatment and had improperly instructed the jury on the "thin skull" doctrine. Having determined the trial court did not err with respect to these matters, we likewise conclude the trial court did not err in denying plaintiff's request to set aside the jury's verdict and order a new trial.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).