NO. COA01-1316

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

CLAYTON GOSNELL,
Plaintiff-Appellee,

v.

Buncombe County
No. 00 CvS 3187

ALEX HUTCHINS ROBERTSON,
Defendant-Appellant.

Appeal by defendant from judgment entered 12 April 2001 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 12 June 2002.

Adam W. Bull for plaintiff appellee.

Frank J. Contrivo, P.A., by Andrew J. Santaniello, for defendant appellant.

McCULLOUGH, Judge.

This appeal follows a jury trial held during the 5 April 2000 Civil Session of Buncombe County Superior Court. The pertinent facts are as follows: Plaintiff Clayton Gosnell and defendant Alex Robertson were involved in a motor vehicle accident on 22 October 1998 in Cabarrus County, North Carolina. Plaintiff was travelling west on Davidson Highway, and defendant was travelling east. As defendant approached the intersection of Davidson Highway and Chadbourne Avenue, he attempted to make a left-hand turn, but crossed the yellow line into plaintiff's lane of traffic.

Defendant hit the side of plaintiff's vehicle, which was then struck head-on by a third vehicle. Plaintiff suffered several substantial visible injuries and complained of a loss of his sense of taste, as well as injuries to his neck, left shoulder, and left arm. Immediately after the accident, plaintiff was taken by ambulance to the emergency room. He was released the following day and was instructed to seek follow-up care with his regular doctor. As part of his course of treatment, plaintiff visited five different doctors.

Plaintiff's family physician, Dr. Christina McQuiston, first examined plaintiff on 28 November 1998. At that time, Dr. McQuiston noted plaintiff had been involved in a motor vehicle accident and complained of a head injury and obvious lacerations to his jaw and lower lip. Dr. McQuiston was concerned plaintiff had suffered significant damage to his temporomandibular joint and referred plaintiff to Dr. James Scully, an oral surgeon. On 8 February 1999, Dr. McQuiston saw plaintiff and noted he was experiencing numbness and tingling in his left arm. Upon examination, Dr. McQuiston found a significant decrease in the range of motion of plaintiff's neck.

Because of plaintiff's continued complaints of neck pain and numbness in his left arm, Dr. McQuiston referred him to Dr. Richard Weiss, a local neurosurgeon. Dr. McQuiston continued to see plaintiff over the next ten months. Dr. McQuiston's last examination of plaintiff on 13 March 2000 revealed continued numbness, tingling and loss of strength in the left arm, despite

treatment from Dr. Weiss. Dr. McQuiston opined that plaintiff's persistent neck and arm pain and numbness were the result of the motor vehicle accident on 22 October 1998.

Dr. Weiss' initial exam revealed plaintiff had neck and left arm pain, as well as numbness and tingling in his left arm. His physical exam noted a decrease in the range of motion of plaintiff's neck and a lack of sensation over plaintiff's neck and shoulder. Dr. Weiss diagnosed plaintiff with a flexion/extension injury (whiplash) to his neck stemming from the accident. Dr. Weiss testified the pain in plaintiff's left shoulder was related to the pressure of the shoulder harness on his shoulder. Dr. Weiss also testified that a person who suffers a blunt trauma to his head could lose his sense of taste. Dr. Weiss recommended physical therapy for plaintiff's injuries.

Plaintiff was also seen by Dr. James Hoski, an orthopedic spine surgeon. Dr. Hoski began treating plaintiff on 2 May 2000, less than two months after Dr. McQuiston last saw him. Plaintiff continued to report left arm and neck pain and numbness. Dr. Hoski's physical examination of plaintiff corroborated the findings of Dr. McQuiston and Dr. Weiss and noted a limited range of motion in plaintiff's neck, left side tenderness, and numbness in the left arm. Dr. Hoski did an up-to-date imaging study to further assess plaintiff's condition. After receiving the results, Dr. Hoski noted the presence of a bone spur impingement at the C6/7 level and recommended surgery to enlarge the opening at that location. Dr. Hoski believed plaintiff's arm pain and numbness were consistent

with an impingement at this level. Dr. Hoski performed surgery on plaintiff on 25 May 2000. Plaintiff was seen for several follow-up appointments and was released to return to work on 18 August 2000 with certain restrictions.

On 20 June 2000, plaintiff filed a complaint against defendant seeking personal injury damages from the motor vehicle accident. On 24 July 2000, defendant admitted he caused the accident, but denied that his negligence proximately caused plaintiff's alleged injuries. All five doctors who treated plaintiff following the motor vehicle accident testified at trial. After deliberating, the jury found for plaintiff in the amount of $135,000.00. The trial court entered a judgment in that amount, and defendant appealed.

On appeal, defendant argues the trial court erred by (I) allowing Dr. Hoski to testify without sufficient prior notice to him, constituting unfair surprise and severe prejudice; and (II) allowing the jury to consider Dr. Hoski's medical treatment of plaintiff without expert medical testimony as to its causation, reasonableness, or necessity. For the reasons set forth herein, we disagree with defendant's arguments and conclude the parties received a fair trial, free from error.

Unfair Surprise

By his first assignment of error, defendant contends the trial court erred in allowing Dr. Hoski to testify without sufficient prior notice to him. Defendant argues the revelation of Dr. Hoski and his treatment substantially affected and altered the character and nature of the case because defendant was denied an opportunity

to examine and conduct any discovery of Dr. Hoski or his conclusions and opinions. After reviewing the proceedings below, we disagree with defendant's contentions.

Defendant did not learn that Dr. Hoski performed surgery on plaintiff until the eve of trial, despite the fact that discovery requests and a motion to compel were made. The next day, defendant made no objection on record to the introduction of Dr. Hoski as a witness. The only objection to Dr. Hoski's testimony came during a court recess. It was then, out of the presence of the jury, that defendant objected to the testimony of Dr. Hoski on the grounds of unfair surprise:

> MR. SANTANIELLO [Defendant's Attorney]: Your Honor, I'd like to state an objection on the record to the testimony of Dr. Hoski. The first I learned of Dr. Hoski was when I was asked if I would stipulate to his records going into evidence without his testimony. I since learned Wednesday afternoon that he had performed surgery on this patient. I did receive from Mr. Bull the records of Dr. Hoski Wednesday evening, and I have read them, but I would like to render an objection based on undue surprise of Dr. Hoski's record.
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> COURT: The record will so reflect.
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> MR. BULL [Plaintiff's Attorney]: May I respond?
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> COURT: You may.
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> MR. BULL: In regards to that -- and I don't dispute the factual statement that Mr. Santaniello made. There was a general, broad request of Discovery made back in August, discovery of documents. We responded with some of those records. That was not brought back to our attention about records missing until we received a motion to compel Wednesday afternoon from Mr. Santaniello which spurred us to call Mr. Santaniello and say, "These are

> the records we have got." We provided those records immediately to Mr. Santaniello.
>
> COURT: This being Wednesday afternoon?
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> MR. BULL: That's correct.

We further note that defendant raised no objection during either Dr. Hoski's direct testimony or his brief redirect testimony. Additionally, when Dr. Hoski's medical records were moved to be admitted after Dr. Hoski's testimony, the trial court asked defendant if he had anything further, to which defendant replied, "No."

"[T]he failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent is not a proper basis for appeal." *State v. Hunter*, 297 N.C. 272, 278-79, 254 S.E.2d 521, 525 (1979) (quoting 4 Strong's N.C. Index 3d, Criminal Law § 162, p. 825). *See also* N.C.R. App. P. 10(b)(1) (2002); and *Jones v. Patience*, 121 N.C. App. 434, 442, 466 S.E.2d 720, 724, *appeal dismissed*, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996). As this Court stated in *Denton v. Peacock*, 97 N.C. App. 97, 100, 387 S.E.2d 75, 77, *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990):

> Whether an expert witness is allowed to testify where the plaintiff has failed in response to an interrogatory to provide the names of witnesses who might testify at trial rests in the discretion of the trial judge, and his ruling thereon allowing the witness to testify will not be found reversible error absent a showing of an abuse of discretion on the part of the judge.

"A discretionary ruling by the trial judge should not be disturbed on appeal unless the appellate court is convinced by the cold record that the ruling probably amounted to a substantial miscarriage of justice[,]" *Boyd v. L. G. DeWitt Trucking Co.*, 103 N.C. App. 396, 406, 405 S.E.2d 914, 921, *disc. review denied*, 330 N.C. 193, 412 S.E.2d 53 (1991), or that such a decision was so arbitrary that it could not be based on reason, *Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 177, 552 S.E.2d 674, 677 (2001).

After careful examination of the record, we are unable to say there was a substantial miscarriage of justice in this case. Defendant received Dr. Hoski's records well in advance of trial and had time to prepare a cross-examination of plaintiff's witness. Indeed, defendant's cross-examination of Dr. Hoski was longer than his cross-examination of Dr. McQuiston, a witness defendant concedes he was aware of before trial. Defendant came to trial with no objections to the introduction of Dr. Hoski and utilized his opportunity to cross-examine Dr. Hoski. Defendant's only objection to Dr. Hoski's testimony came *after* Dr. Hoski testified. We note that defendant should have moved to strike Dr. Hoski's testimony, but failed to do so. *See State v. Beam*, 45 N.C. App. 82, 84, 262 S.E.2d 350, 352 (1980). Dr. Hoski's testimony was corroborative of the other witnesses of whom defendant was fully informed in advance of trial. On these facts, we perceive no prejudice to defendant by the trial court's decision to allow Dr.

Hoski to testify. Defendant's first assignment of error is overruled.

Medical Testimony

By his second assignment of error, defendant contends the trial court erred in allowing the jury to consider Dr. Hoski's testimony because there was no evidence that his treatment was caused by or necessitated from the motor vehicle accident. Defendant argues Dr. Hoski's testimony related only a factual recitation of his treatment without any opinion testimony regarding the causation and necessity of his treatment of plaintiff. He further argues that, even if there was an adequate foundation for Dr. Hoski's testimony concerning his treatment of plaintiff, there was no competent evidence of the reasonableness of Dr. Hoski's medical fees. Defendant contends inclusion of Dr. Hoski's testimony may have led the jury to wrongfully conclude that plaintiff suffered injuries in the motor vehicle accident that eventually resulted in surgery. The net result, argues defendant, was that plaintiff's claim for damages changed drastically. We disagree.

We again note that defendant failed to object or make a timely objection to the introduction of Dr. Hoski's testimony. *See Jones*, 121 N.C. App. 434, 466 S.E.2d 720. The record is devoid of any objection being made at any time before Dr. Hoski's testimony;

defendant objected only after the jury returned a verdict for plaintiff and left the courtroom:

> COURT: All right. Anything further at this time?
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> MR. BULL [Plaintiff's Attorney]: Not from the plaintiff, your Honor.
>
> MR. SANTANIELLO [Defendant's Attorney]: Your Honor, I believe I will make a motion for a judgment notwithstanding the verdict, or in the alternative, of a new trial. Dr. Hoski's testimony caused undue prejudice, and basically the same grounds I enumerated. The causation questions were never asked of Dr. Hoski and he was not qualified as an expert, and his records should not have gone to the jury.
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> COURT: The record will so reflect. The motion is denied.

We also note defendant failed to assert plain error in his assignments of error and has therefore waived even plain error review. *See State v. Moore*, 132 N.C. App. 197, 201, 511 S.E.2d 22, 25, *appeal dismissed*, 350 N.C. 103, 525 S.E.2d 469 (1999). As defendant failed to preserve this issue for appeal by timely objection, we need not address the issue on the merits; however, we will do so briefly. *See* N.C.R. App. P. 10(b)(1) and N.C.R. App. P. 2 (2002).

A plaintiff attempting to recover costs for medical treatment "must show that the damages claimed were the natural and probable result of the negligence complained of[]" and there must be facts in evidence "from which a layman of average intelligence would know what caused the necessity for the [medical treatment.]" *Graves v. Harrington*, 6 N.C. App. 717, 721, 171 S.E.2d 218, 221 (1969).

Here, the evidence indicated plaintiff was involved in a motor vehicle accident on 22 October 1998 and suffered head injuries and some lacerations. After visiting the emergency room immediately after the accident, plaintiff was instructed to follow up with his family doctor and comply with her suggestions. Throughout her dealings with plaintiff, Dr. McQuiston opined plaintiff's injuries were the direct result of the automobile accident on 22 October 1998. Within a few weeks of his final visit with Dr. McQuiston, plaintiff scheduled an appointment with Dr. Hoski.

Dr. Hoski's testimony was corroborative of the testimony of the other examining physicians. Dr. Hoski testified plaintiff came to him complaining of arm pain, numbness and weakness. As to causation, Dr. Hoski testified as follows:

> Q And, Doctor, I think you've identified that on the radiographs or the imaging done on Mr. Gosnell there was a spur at the C6/7 level?
>
> A Yes.
>
> Q And can people have spurs that never impinge upon a nerve?
>
> A Yes.
>
> Q And if somebody has a spur that is involved in a trauma, can that cause it to be, all of a sudden, impinging on a nerve?

A If I could clarify a little bit. You can have a spur impinging on a nerve that does not cause symptoms.

> Q Okay.
>
> A That nerve can then become symptomatic, meaning you develop arm pain, numbness or weakness.

> Q Can that be brought out by being involved in a trauma?
>
> A Yes.

This testimony, taken together with Dr. McQuiston's opinion of causation, provided the requisite connection for the jury to conclude that Dr. Hoski's treatment of plaintiff was part of the overall uninterrupted course of treatment necessitated by plaintiff's motor vehicle accident.

Lastly, with regard to the reasonableness of Dr. Hoski's charges for his medical services, we note that, under N.C. Gen. Stat. § 8-58.1 (2001),

> [w]henever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party . . . is competent to give evidence regarding the amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges.

Defendant objected only to plaintiff's testimony regarding the amount of the bill. Defendant offered no testimony that Dr. Hoski's charges were unreasonable, and he did not cross-examine Dr. Hoski regarding the reasonableness of the charges when presented with the opportunity. Based on the foregoing, the trial court did not err in allowing Dr. Hoski to testify, and this assignment of error is overruled.

After careful review of the proceedings below, we conclude the parties received a fair trial, free from error.

No error.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).