NO. COA11-195
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

ANN JAMISON HARMON, and husband,
BOBBY B. HARMON,
Plaintiffs

v. Bertie County
No. 09 CVS 250

EASTERN DERMATOLOGY AND PATHOLOGY,
P.A.,
Defendant

Appeal by defendant from judgment entered 1 September 2010 and order entered 18 October 2010 by Judge Alma L. Hinton in Bertie County Superior Court. Heard in the Court of Appeals 31 August 2011.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr., Lloyd C. (Clif) Smith, III, and Jonathan E. Huddleston, for plaintiffs-appellees.

Herrin & Morano, by Mark R. Morano, for defendant-appellant.

STEELMAN, Judge.

Where no claim for negligent infliction of serve emotional distress was presented by plaintiff at trial and the trial court did not charge the jury upon this theory, the trial court did

not erroneously allow plaintiff to recover such damages. The trial court did not err in denying defendant's motion for a new trial based upon excessive damages.

I. Factual and Procedural History

On 26 July 2005, Ann Jameson Alexander Harmon (plaintiff) underwent a biopsy of a raised spot on the left side of her nose. A dermatologist employed by Eastern Dermatology & Pathology, P.A. (defendant) performed the biopsy. After the biopsy, an employee of the defendant inadvertently switched plaintiff's biopsy specimen with that of another patient. As a result, plaintiff mistakenly received a diagnosis of basal cell carcinoma, a type of skin cancer. A nurse of defendant informed plaintiff of the diagnosis on 4 August 2005.

On 6 September 2005, based upon the erroneous pathology report, Dr. Paul Camnitz excised additional tissue from plaintiff's nose. A pathologist then reviewed this tissue, and found no evidence of cancer. An addendum was then added to the original pathology report indicating that a mistake had been made. On 19 September 2005, Dr. Camnitz informed plaintiff of the mistake.

Plaintiff and Bobby B. Harmon, her husband, filed this action on 15 June 2009 seeking monetary damages for personal

injury and loss of consortium. Defendant did not contest negligence in its answer, and stipulated to its negligence in the pre-trial order. The jury found that plaintiff was entitled to recover $175,000 for personal injury, but that Mr. Harmon did not suffer any loss of consortium. Judgment upon the jury verdict was entered on 1 September 2010. On 13 September 2010, defendant filed motions for judgment notwithstanding the verdict and, in the alternative, for a new trial. On 18 October 2010, the trial court denied all of these motions.

Defendant appeals.

II. Defendant's Motions for Directed Verdict, Judgment Notwithstanding the Verdict, and New Trial

In defendant's first and third arguments it contends that the trial court erred in denying its motions for a directed verdict, judgment notwithstanding the verdict, and for a new trial. We disagree.

A. Standards of Review

The standard of review for the denial of a motion for directed verdict and judgment notwithstanding the verdict is

> whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted

to the jury.

Shelton v. Steelcase, Inc., 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009) (quotation omitted). Standard of review for denial of a motion for a new trial is abuse of discretion. *See Garrison v. Garrison*, 87 N.C. App. 591, 594, 361 S.E.2d 921, 923 (1987).

B. Analysis

Defendant's argument is predicated upon the theory that the trial court erroneously allowed plaintiff to recover damages for negligent infliction of severe emotional distress (NISED). Defendant's brief goes to great lengths discussing the applicable cases, and arguing that plaintiff failed to present evidence that she suffered severe emotional distress as required by *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990). The record and transcript of this trial reveal that plaintiff did not pursue a claim for NISED at trial, and the trial court did not submit such an issue to the jury. On appeal, defendant attempts to erect a non-existent straw man so that defendant can knock it down.

At trial, counsel for plaintiff clearly stated, "[t]his is not an emotional distress case. It's just mental suffering." The trial judge stated, "I'm not going to instruct the jury on

severe emotional distress because [plaintiff is] not claiming it." This issue was discussed between the trial court and counsel on three occasions. In the charge to the jury, the trial court instructed that an element of damages was the plaintiff's past physical pain and mental suffering as a result of the negligence of the defendant. The trial court's instructions tracked the language contained in North Carolina Pattern Jury Instruction, 810.08, Personal Injury Damages—Pain and Suffering.

We hold that the trial court properly instructed the jury regarding the damages proximately caused by defendant's negligence. We further hold that the trial court did not err in denying defendant's motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial.

This argument is without merit.

III. Jury Instruction on Damages

In his second argument, defendant contends that the trial court erred by not instructing the jury to exclude any claim for damages based upon emotional suffering or emotional distress that occurred prior to the date of her surgery, and that the amount of damages awarded was excessive. We disagree.

At trial, defendant "ask[ed] that any evidence of any claim for emotional distress by the plaintiff not be permitted" to reach the jury. Defendant now argues that "[t]he jury's verdict must reasonably be assumed to have included compensation for her 'emotional distress' that occurred between August 4th and September 6th." This argument harkens back to defendant's previous argument, which we have already rejected. The trial court did not err in denying defendant's motion as to a claim that was not submitted to the jury.

This argument is without merit.

IV. Amount of Damages

Defendant also raises the issue of whether the trial court abused its discretion in denying defendant's motion for a new trial based on an award of excessive damages. We disagree.

A trial court may grant a new trial if it determines that the jury award consists of "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice." N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (2009).

In negligence cases, the determination of what is fair compensation is a question of fact for the jury. *See Parks v. Washington and Flowe v. Washington*, 255 N.C. 478, 483, 122 S.E.2d 70, 74 (1961). The jury is "entitled to draw its own

conclusions about the credibility of the witnesses and the weight to accord the evidence." *Smith v. Price*, 315 N.C. 523, 530-31, 340 S.E.3d 408, 413 (1986). Further, our, "[a]ppellate review 'is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.'" *Campbell v. Pitt County Memorial Hosp.*, 321 N.C. 260, 264, 362 S.E.2d 273, 275 (1987) (quoting *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982)). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605. In the instant case, the plaintiff presented evidence that she experienced permanent facial scarring and both mental and physical pain and suffering as a result of an unnecessary surgical procedure. The jury heard this evidence and made its determination of damages. There is no indication that the jury awarded damages as the result of passion or prejudice. An award of $175,000 in damages in this case does not amount a to substantial miscarriage of justice.

This argument is also without merit.

NO ERROR.

Judges HUNTER, ROBERT C., and McCULLOUGH concur.

Report per Rule 30(e).