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NO. COA11-226

NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

VERNETTA MARTIN,
Plaintiff,

v.

Forsyth County
No. 09 CVS 1319

OSI RESTAURANT PARTNERS, LLC,
OUTBACK STEAKHOUSE OF
FLORIDA, LLC, AND PATRICE SANFORD,
Defendants.

Appeal by plaintiff from order entered 23 June 2010 by Judge James M. Webb in Forsyth County Superior Court. Heard in the Court of Appeals 29 August 2011.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Ellis & Winters LLP, by Thomas D. Blue, Jr., for defendants-appellants.

BRYANT, Judge.

Where the trial court did not abuse its discretion by denying plaintiff's motion for a partial new trial on the issue of damages incurred by defendants' negligence and where the

trial court did not abuse its discretion by denying plaintiff's motion to exclude expert testimony, we affirm. We reverse and remand the award of costs to defendants.

Facts and Procedural History

On 16 February 2009, Vernetta Martin (plaintiff) filed a complaint against OSI Restaurant Partners, LLC (OSI), Outback Steakhouse of Florida, LLC (Outback), and Patrice Sanford (collectively defendants). Plaintiff alleged that on 17 February 2006, she was a customer of Outback Steakhouse restaurant in Winston-Salem, North Carolina. A waitress spilled a tray containing dishes on the back of plaintiff's head, neck, right shoulder and back. Plaintiff lost consciousness and was taken to a hospital by ambulance. Plaintiff alleged that defendant waitress, Patrice Sanford, was negligent and that defendants OSI and Outback were vicariously liable for the acts of Patrice Sanford, their employee and agent. As a result of defendants' negligence, plaintiff alleged the following:

[plaintiff] sustained and will sustain in the future severe personal injuries including but not limited to injuries to her head, neck, right shoulder and back, permanent injuries, loss of enjoyment of life, past and future medical expenses, past and future pain and suffering, past and future loss of earnings and loss of earning capacity, all to her damage for a sum in excess of Ten Thousand Dollars (\$10,000.00)

Thereafter, plaintiff voluntarily dismissed without prejudice her action against OSI.

Following a jury trial, defendants were found negligent and plaintiff was awarded \$5,500.00 in damages. Plaintiff then made a motion for a partial new trial on damages only. Plaintiff also made a motion for judgment notwithstanding the verdict. After a hearing held on 14 June 2010, both motions were denied in an order filed 23 June 2010. The trial court granted defendants' motion for costs in the amount of \$11,090.07. Plaintiff appeals.

Plaintiff advances the following issues on appeal: whether the trial court erred by (I) denying plaintiff's motion for a partial new trial; (II) by denying plaintiff's motion to exclude the testimony of defendants' medical expert; and (III) by granting defendants' motion for costs.

I

Plaintiff first argues that because the trial court erred in denying her motion for a partial new trial, the judgment should be vacated and the case remanded for re-trial on the issue of damages. Plaintiff contends that the jury ignored the stipulation of the parties regarding past medical expenses, as

well as, the trial court's instruction on this issue, rendering an inconsistent verdict that was not in accordance with law.

"A trial court's ruling on a motion for a new trial under Rule 59 is usually subject to an abuse of discretion standard. A trial court may be reversed . . . only upon a showing that its actions are 'manifestly unsupported by reason.'" *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citations omitted).

On 27 April 2010, the parties in the instant case made the following stipulation to plaintiff's medical expenses: "It is hereby agreed and stipulated by the parties, through counsel, that the past medical expenses of Plaintiff in this case total \$110,000.00."

A stipulation is a judicial admission. Such agreements and admissions are of frequent occurrence and of great value, as they dispense with proof and save time in the trial of causes. The courts recognize and enforce [stipulations] as substitutes for legal proof, and there is no good reason why they should not.

Quesinberry v. Quesinberry, __ N.C. App. __, __, 709 S.E.2d 367, 371 (2011) (citations omitted).

Plaintiff presented evidence that when she was discharged from the hospital on 17 February 2006, she had an "acute cervical strain[, a] right shoulder contusion" and a "herniated

disc with S-1 nerve root compression." The jury returned a verdict of negligence against defendants and awarded plaintiff \$5,500.00 in damages for personal injury. Plaintiff's post-trial motions were denied.

Plaintiff argues that our Supreme Court's holding in *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974), is controlling in the case *sub judice*. "The law is well settled in this jurisdiction that in cases of personal injuries resulting from defendant's negligence, the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from defendant's tort." *Id.* at 565, 206 S.E.2d at 193. Plaintiff urges that if she was entitled to a verdict against defendants by reason of personal injuries suffered as a result of defendants' negligence, then she was "entitled to all damages that the law provides in such case." *Id.* at 566, 206 S.E.2d at 194.

Plaintiff correctly states the general rule for compensatory damages when there is injury to the person. However, we believe the effect of the stipulation is the main issue in contention and that issue is controlled by *Coletrane v. Lamb*, 42 N.C. App. 654, 257 S.E.2d 445 (1979). In *Coletrane*, the parties stipulated that the plaintiff incurred medical bills

in the amount of \$8,716.79 as a result of an auto accident, yet the jury returned a verdict of \$3,215.59 in damages. *Id.* at 656, 257 S.E.2d at 447. The plaintiff argued that the trial court erred in denying her motion to vacate and set aside the verdict of the jury as to damages. *Id.* Our Court held there was no abuse of discretion as to the trial court's denial of the plaintiff's motions to set aside the verdict because:

The parties stipulated plaintiff incurred medical bills in the sum total of \$8,617.79. However, this stipulation did not state that such medical bills were incurred by plaintiff in the treatment of injuries *resulting from defendant's negligence*. There was evidence of illness of nature other than the type that defendant's negligence could have caused.

Id. at 657, 257 S.E.2d at 447 (emphasis added).

Similar to *Coletrane*, the stipulation in the instant case failed to specifically state that plaintiff's medical bills were incurred for the treatment of injuries resulting from defendant's negligence. Plaintiff's expert witness, Doctor Charles Goodno (Goodno), a physician specializing in occupational and environmental medicine, testified as follows:

[Defendant:] Is it your opinion that the impairment to [plaintiff's] cervical spine is a direct result of the incident at Outback Steakhouse?

[Goodno:] Yes, it is.

[Defendant:] Is it your opinion that the impairment of [plaintiff's] lumbar spine is a direct result of the incident at Outback Steakhouse?

[Goodno:] To a reasonable degree of medical certainty, no.

[Defendant:] Is it your opinion that the impairment to [plaintiff's] shoulder is the direct result of the incident at Outback Steakhouse?

[Goodno:] To a reason[able] degree of medical certainty, yes.

. . .

[Defendant:] Is it your opinion that the incident at Outback Steakhouse caused an immediate herniation and disc extrusion . . . that caused it that night?

[Goodno:] I don't know.

Goodno testified that none of the records he reviewed predated the 17 February 2006 incident at Outback.

Defendant's expert witness, Dr. Tally Edward Lassiter, Jr. (Dr. Lassiter), testified "[t]hat the injury at Outback did not cause her back problem or necessitate back surgery," "[t]hat at most, [the incident at Outback] caused a transient cervical strain/sprain, stretching of the ligaments and muscles in the neck," that "[t]here was no rotator cuff tear", and that "[plaintiff] had preexisting degenerative changes in her

shoulder[.]” Therefore, there was significant evidence before the jury as to the causes, nature, and extent of plaintiff’s injuries.

Plaintiff argues that the jury ignored the stipulation of the parties regarding past medical expenses and returned a verdict that was inconsistent and not in accordance with the law. However, plaintiff fails to acknowledge that it was up to the jury to determine what amount of plaintiff’s medical expenses were proven as damages. Here, based on the medical testimony before the jury, there was evidence that plaintiff’s injuries were not solely caused by the incident at Outback. There was significant evidence of plaintiff’s past medical history consisting of degenerative disk disease in her back and pain in her shoulders.

“It is the province of the jury to weigh the evidence and determine questions of fact.” *Id.* at 657, 257 S.E.2d at 447 (citation omitted). Unlike in *Robertson*, the jury in the instant case did not arbitrarily ignore evidence of plaintiff’s injuries; instead it appears the jury determined that plaintiff was injured as a result of defendant’s negligent act at the amount of \$5,500.00, and, thus, that the amount of her damages

was much less than the stipulated amount of past medical expenses.

Therefore, we hold, consistent with *Coletrane*, that "[e]ven though, upon plaintiff's evidence, reasonable minds might well differ as to the amount of damages to which she is entitled, . . . an abuse of discretion is not manifest." *Id.* at 658, 257 S.E.2d at 447-48 (citation omitted). The trial court did not err by denying plaintiff's motion for a partial new trial on the issues of damages. Plaintiff's argument is overruled.

II

Plaintiff next argues that the trial court erred by denying her motion to exclude the testimony of defendants' medical expert, Dr. Lassiter. Plaintiff asserts it was an abuse of discretion for the trial court to deny her motion because she was denied an opportunity to depose Dr. Lassiter prior to trial due to insufficient notice. In the alternative, plaintiff asserts she should have been allowed to conduct a voir dire of Dr. Lassiter outside the presence of the jury, prior to trial.

"[T]rial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony." *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 792, 654 S.E.2d 708, 710

(2007). "The trial court has wide discretion in making [a motion *in limine* seeking pretrial determination of the admissibility of evidence] and will not be reversed absent an abuse of discretion." *Id.* (citation omitted).

Discovery responses pursuant to N.C. Gen. Stat. § 1A-1, Rule 26(b)(4) provides the following:

Discovery of facts known and opinions held by experts . . . may be obtained only as follows: (A)(1) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

N.C.G.S. § 1A-1, Rule 26(b)(4) (2009). "The goal of the discovery rules is to facilitate the disclosure, prior to trial, of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of basic issues and facts to go to trial." *Coffman v. Roberson*, 153 N.C. App. 618, 626, 571 S.E.2d 255, 260 (2002) (citation omitted).

Plaintiff filed this action for negligence on 16 February 2009. Almost a year later, on 11 February 2010, plaintiff filed her first set of interrogatories requesting information on

witnesses defendants were expecting to call at trial. On 9 April 2010 defendants filed responses to plaintiff's first set of interrogatories, listing Dr. Lassiter as an expert witness who was expected to testify as to issues of causation and damages. Plaintiff did not depose Dr. Lassiter prior to trial. Trial commenced on 19 April 2010. On 20 April 2010 plaintiff filed a motion in limine

[r]equest[ing] that Defendants' expert, Talley E. Lassiter, Jr., M.D. be precluded from testifying at the trial of this case because of the late disclosure of this expert. The trial in this case is set for April 19, 2010. Defendants did not disclose Dr. Lassiter as their expert until April 9, 2010. This did not give Plaintiff's counsel an opportunity to take the deposition of Dr. Lassiter.

On 26 April 2010, the trial court denied plaintiff's motion to exclude Dr. Lassiter's testimony but allowed plaintiff to voir dire Dr. Lassiter prior to his testimony. Because defendants timely entered their answers to plaintiff's first set of interrogatories and the purpose of the discovery rules was achieved, we do not believe the trial court abused its discretion by denying plaintiff's motion in limine.

Further, even assuming *arguendo* it was an abuse of discretion to deny plaintiff's motion to exclude Dr. Lassiter's testimony, where plaintiff was unable to depose Dr. Lassiter

prior to trial, we find plaintiff's alternative argument dispositive.

Here, despite plaintiff's argument, plaintiff was allowed to conduct a voir dire of Dr. Lassiter prior to his testimony before the jury. Plaintiff cannot show an abuse of discretion. Therefore, we affirm the trial court's ruling.

III

In her last argument, plaintiff contends the trial court erred in granting defendants' motion for costs. Specifically, plaintiff contends that expert witness fees are not recoverable where the expert witness is not under subpoena and that the costs of enlarging and mounting documents are not allowable.

Defendants filed a motion for costs pursuant to N.C. Gen. Stat. § 1A-1, Rule 68(a) on 7 June 2010 for a total of \$11,090.07. The motion for costs alleged that defendants had incurred witness fees in the amount of \$9,083.00 which included the time the experts spent outside trial and time spent reviewing medical records. Defendants also claimed their deposition expenses as taxable including the following: court-reporting fees, expert witness appearance fees, travel expenses. The two separate depositions defendants conducted and attended

amounted to \$1,408.15. Defendants also incurred \$568.92 in trial exhibit preparation costs and \$30.00 for service fees.

In its 20 June 2010 order on plaintiff's post-trial motions, the trial court granted defendants' motion for costs in the amount of \$11,090.07.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

N.C.G.S. § 1A-1, Rule 68(a) (2009). On 5 April 2010, defendants filed an offer of judgment, offering to allow judgment to be taken against them in the action, "jointly and severally, in the lump sum of Eighty-Seven Thousand Five Hundred and 00/100 Dollars (\$87,500.00)" which plaintiff did not accept. Because the jury only returned \$5,500.00 in damages, the trial court's granting of defendants' motion for costs was proper pursuant to Rule 68(a).

Plaintiff asserts that the trial court "has long held that expert witness fees are not recoverable where the expert witness is not under subpoena." Plaintiff also contends that the costs of enlarging and mounting documents are not permitted pursuant to N.C. Gen. Stat. § 7A-305 which governs the costs that are assessable in civil actions.

In regards to expert witness fees, N.C. Gen. Stat. § 7A-305(d) states that a court may award "[w]itness fees, as provided by law." N.C. Gen. Stat. § 7A-305(d)(1) (2009). "If a cost is set forth in N.C. Gen. Stat. § 7A-305(d), 'the trial court is required to assess the item as costs.'" *Springs v. City of Charlotte*, __ N.C. App. __, __, 704 S.E.2d 319, 328 (2011) (citation omitted). "N.C. Gen. Stat. § 7A-305(d) may not, however, be read alone, but rather must be 'read in conjunction with' N.C. Gen. Stat. § 7A-314 (2009), which governs fees for witnesses." *Id.* at __, 704 S.E.2d at 327. Pursuant to N.C.G.S. § 7A-314 "the cost of an expert witness cannot be taxed unless the witness has been subpoenaed." *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, __ N.C. App. __, __, 698 S.E.2d 190, 194 (2010) (citation omitted). "We believe that N.C. Gen. Stat. § 7A-305(d)(11) and N.C. Gen. Stat. § 7A-314 can both be given effect." *Springs*, __ N.C. App. at __, 704 S.E.2d at 328.

In the present case, when Dr. Lassiter was asked by plaintiff whether he was subpoenaed to come to court, he replied, "I don't know that I've seen a subpoena, to be honest with you." "Where the record fails to show that the expert witnesses were testifying pursuant to a subpoena, costs should not be awarded." *Coffman*, 153 N.C. App. at 628, 571 S.E.2d at 261 (citation omitted). Here, because the record does not show Dr. Lassiter was testifying pursuant to a subpoena, the trial court erred by awarding costs for defendants' expert witness.

Plaintiff contends that under N.C.G.S. § 7A-305(d), trial exhibit preparation costs are not enumerated.

In North Carolina costs are taxed on the basis of statutory authority. [N.C.G.S. § 6-20] G.S. § 7A-305 sets forth certain costs which may be assessed in a civil action. . . . Since the enumerated costs sought by [defendants] are not expressly provided for by law, it was within the discretion of the trial court whether to award them. Plaintiff[] has shown no abuse of discretion.

Smith v. Underwood, 127 N.C. App. 1, 12-13, 487 S.E.2d 807, 815 (1997). However, here, as in *Smith*, plaintiff fails to show an abuse of discretion by the trial court in allowing recovery of these costs.

In light of the foregoing, we reverse the award of costs for defendant's expert witness only and remand for reconsideration in light of the controlling statutes.

Affirmed in part; reversed and remanded in part.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per rule 30(e).