FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2121

ERNEST BALOGH,

Appellant,

v.

ABC LIQUORS, INC., d/b/a ABC
Fine Wine & Spirits, and PAUL
MATTHEW MULLINS,

Appellees.

On appeal from the Circuit Court for Levy County.
Donna M. Keim, Judge.

December 16, 2020

B.L. THOMAS, J.

This is an appeal from a final judgment concerning a collision between Mr. Balogh and an ABC Liquors van driven by Paul Mullins. Mr. Balogh challenges the admission of the investigative officer's second deposition testimony and the admission of intoxication evidence. We decline to address the first issue because Mr. Balogh was not prejudiced by the admission of the investigative officer's testimony, and even if he was, it was harmless error. *See Special v. West Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). We briefly address the second issue involving the introduction of intoxication evidence.

The accident occurred on a clear summer day at approximately 7:15 p.m. on the two-lane road of rural U.S. Highway 21 in Williston, Florida. Mr. Balogh was walking along the side of the highway on his way home from the BP gas station, where he consumed two Four Lokos, an alcoholic beverage. He admitted that he "had a buzz on" while he was walking back from the gas station, was unfamiliar with the area, and phoned a friend for directions. While he was on the phone, he was struck by the van.

Mr. Mullins stated that he was not tired, was not under the influence of alcohol or any medications, and was not distracted at the time the accident occurred. He remembered seeing a pedestrian in the road, so he moved into the southbound lane to give the pedestrian more room. Feeling comfortable that he was a safe distance from the pedestrian, he briefly looked away as he continued to drive northbound in the southbound lane. The next thing he knew, he heard a "pow."

Appellees introduced evidence from a forensic toxicologist that Mr. Balogh's blood-alcohol content at the time of the accident was approximately 0.18. The expert concluded that Mr. Balogh was impaired at the time of the accident, which could have compromised his ability to judge speed and distance, perception of danger, cognition, general fine motor skills, and reaction times.

"Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion." *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Shaw v. Jain*, 914 So. 2d 458, 460 (Fla. 1st DCA 2005). However, a trial court's discretion is limited by the rules of evidence when ruling on evidentiary matters. *Shaw*, 914 So. 2d at 460.

Relevant evidence tends to prove or disprove a material fact. *See* § 90.401, Fla. Stat. (2014); *Nichols v. Benton*, 718 So. 2d 925, 925 (Fla. 1st DCA 1998). Where comparative negligence is alleged, the trier of fact must hear the "totality of fault" of each side, i.e., the specific acts of negligence of each party. *Lenhart v. Basora*, 100 So. 3d 1177, 1179 (Fla. 4th DCA 2012). "Whether or not a person is under the influence of intoxicating liquor to the extent that his or her normal faculties are impaired is a question of fact and should be determined by the jury when there is substantial

evidence submitted on that question." *Stewart v. Draleaus*, 226 So. 3d 990, 996 (Fla. 4th DCA 2017) (quoting *Seltzer v. Grine*, 79 So. 2d 688, 689 (Fla. 1955)). Substantial evidence is evidence that is not uncertain, speculative, or conjecture. *See Russell v. Beddow*, 82 So. 3d 996, 999 (Fla. 1st DCA 2011).

Mr. Balogh relies on this Court's decision in *Inmon v. Convergence Emp. Leasing III, Inc.*, 243 So. 3d 1046 (Fla. 1st DCA 2018), to support his position that Appellees relied on impermissible inference stacking to prove that Mr. Balogh's intoxication proximately caused his damages. However, *Inmon* is a worker's compensation case concerning whether the employee's injury was *primarily occasioned* by his intoxication. *Id.* at 1047.

Here, Appellees were not required to prove that the accident was "primarily occasioned" by Mr. Balogh's intoxication; but only whether alcohol consumption was a contributing factor to the accident. *See Stewart*, 226 So. 3d at 997. Appellees provided substantial evidence that Mr. Balogh's intoxication was a contributing factor to the accident through Mr. Balogh's own admission that his normal faculties were impaired and the forensic toxicologist's testimony that alcohol causes substantial impairment which can contribute to a motor vehicle accident. *See id.* (holding substantial evidence supported the introduction of intoxication evidence where two plaintiffs admitted they drank before the accident, a witness testified that she smelled alcohol on one of the plaintiffs, an officer smelled alcohol on one of the plaintiffs, and an expert witness testified that small quantities of alcohol could impair a motorcycle operator's perception and reaction). "Moreover, the weight of the evidence tending to prove the plaintiffs were not impaired against the weight of the evidence of their alcohol consumption is a factual determination to be reserved for the jury." *Id.* at 997 (citing *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981). Thus, the evidence was relevant and properly admitted for consideration by the jury. *See* § 90.401, Fla. Stat. (2014).

AFFIRMED.

ROBERTS and WINOKUR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Beth M. Coleman of Beth M. Coleman, P.A., St. Petersburg; and Robert A. Rush of Robert A. Rush, P.A., Gainesville, for Appellant.

Jack R. Reiter and Sydney Feldman of Gray Robinson, P.A., Miami; and Eric Neiberger and John Jopling of Dell Graham, P.A., Gainesville, for Appellees.