NO. COA01-1075

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2002

TEENA ANGELA POPE,
Plaintiff,

v.

Wilkes County
No. 99CVS1024

JAMES WALTER FARRINGTON
and RUBY MAE FARRINGTON,
Defendants.

Appeal by plaintiff from judgment entered 5 February 2001 and order entered 12 March 2001 by Judge William Z. Wood, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 15 May 2002.

Franklin Smith for plaintiff appellant.

Willardson & Lipscomb, LLP, by Sigsbee Miller, for defendant appellees.

McCULLOUGH, Judge.

This case arises out of a traffic accident in Wilkes County, North Carolina, the pertinent facts of which are as follows: On 10 June 1996, plaintiff was operating a 1985 Mercedes and defendant James Farrington was driving a 1989 Ford. Mr. Farrington's wife and infant son were in the backseat of the Ford. Defendants were travelling on Congo Road and came to a stop sign at the intersection of Congo Road and Winkler Mill Road. The intersection

was controlled by a blinking red light and a stop sign for traffic on Congo Road; a flashing caution light controlled traffic on Winkler Mill Road. Defendant testified that he stopped, looked to the right and to the left, and proceeded into the intersection at approximately 3-5 miles per hour. While in the intersection, defendant saw plaintiff's vehicle round a curve as it came down the hill. According to defendant, plaintiff was travelling "at a high rate of speed" and her Mercedes was partially across the yellow center line. Defendant testified he panicked and was unable to clear the intersection. Plaintiff's car skidded 44 feet and hit the passenger side of the Ford, knocking it 19 feet and making it spin around several times.

Plaintiff testified she was travelling on Winkler Mill Road, crested the hill, and saw defendant stopped at the intersection below. She stated that she was in third gear and had her foot lightly on the brake as she approached the intersection. When she was approximately 40 to 50 feet away from the intersection, she saw defendant "speed out in front of me and pull across the road." Plaintiff then slammed on her brakes, blew the horn, and braced herself for an impact. Though plaintiff was talking on a cell phone when she got out of her car, she stated she was not talking on the cell phone at the time the accident took place. Plaintiff estimated she was travelling about 30 miles per hour at impact. The speed limit in the area was 35 miles per hour.

Defendants' car was damaged on the front passenger side, behind the front wheel; only the front of plaintiff's car was

damaged. Plaintiff told defendants she was not hurt. When the investigating officer arrived, plaintiff told him she was not injured and declined medical assistance and transport from the emergency medical technicians who responded to the accident scene. However, defendants were taken to the local emergency room by ambulance.

Plaintiff first sought medical treatment for her back on 12 June 1996, when she saw Dr. Michelle Hall, a chiropractor. Plaintiff continued seeing Dr. Hall until 21 August 1996, but did not achieve lasting relief from her pain. Dr. Hall subsequently performed x-rays on plaintiff which revealed Grade II spondylolisthesis (slippage of one vertebrae on another.) Dr. Hall believed plaintiff's condition was congenital and existed prior to the 10 June 1996 accident. However, she also opined that plaintiff sustained "a severe sprain-strain to the lumbar area" during the accident, which "upset something she probably already had."

Plaintiff was also evaluated by Dr. Scott McCloskey on 12 July and 23 August 1996. Dr. McCloskey noted that plaintiff experienced pain in her back, which was exacerbated by the frequent travel demands of her job. Dr. McCloskey concluded plaintiff had Grade II spondylolisthesis, which was likely congenital in nature. After noting that plaintiff had a stable spine, he prescribed anti-inflammatory medication, but concluded surgery was not needed at that time.

Plaintiff continued her normal work schedule and did not seek further medical treatment until 20 January 1999, when she visited

chiropractor Dr. Aaron Tosky. Plaintiff saw Dr. Tosky eight times between January and April 1999 and complained of back pain, right arm pain and numbness, shoulder pain, and right hip and side pain. Dr. Tosky diagnosed plaintiff with Grade III spondylolisthesis, which he believed was unstable. He referred plaintiff back to Dr. McCloskey, who saw plaintiff on 21 June 1999. Dr. McCloskey determined that plaintiff's spondylolisthesis had worsened and recommended surgery. Dr. McCloskey and Dr. Jeffrey Knapp performed the surgery on 7 September 1999.

When deposed, Dr. McCloskey opined that the surgery was done to repair plaintiff's condition, which "was created or aggravated by the automobile accident . . .." He also stated that, while plaintiff recovered appropriately from surgery, she would likely suffer from chronic pain and had suffered "a significant limitation in the use of her back, her general physical activities of daily living, and enjoyment of life as a result of the injuries sustained from the automobile accident."

Dr. Robert Price, a neurosurgeon in Durham, North Carolina, performed a comprehensive review of plaintiff's medical records, the accident report, and photographs of the two vehicles. Dr. Price concluded that plaintiff's treatment from June to August 1996 was related to the 10 June 1996 accident. He further concluded plaintiff's condition stabilized; she did "reasonably well" and was able to work from August 1996 until early 1999. Dr. Price also opined that plaintiff had congenital spondylolisthesis and a PARS defect, neither of which was caused by the accident. He also

stated that "I do not think that the automobile accident caused it [plaintiff's spondylolisthesis], that this was a congenital anomaly, and the patient continued to have progression of her listhesis which caused her to need her surgery later on."

On 10 June 1999, plaintiff filed suit against defendants, alleging negligence. On 6 August 1999, defendants answered, denying negligence on their part and alleging contributory negligence by plaintiff. The case proceeded to a trial by jury at the 3 January 2001 Civil Session of Wilkes County Superior Court. On 5 February 2001, the trial court entered a judgment which reflected the jury's unanimous decision in the case. The jury concluded that plaintiff was injured by defendant's negligence, that plaintiff was not contributorily negligent, that plaintiff was entitled to recover $12,000.00 for personal injury, and that defendant James Farrington was not driving the 1989 Ford for a family purpose of his mother Ruby Mae Farrington (the owner of the car and a named defendant in plaintiff's lawsuit) at the time of the collision. On 12 March 2001, both plaintiff's motion to set aside the verdict and her motion for a new trial were denied. However, the trial court allowed plaintiff's motion for costs, and ordered defendants to pay costs of $4,129.25. Plaintiff appealed.

On appeal, plaintiff argues the trial court committed reversible error by (I) allowing into evidence defendant James Farrington's statement that she was travelling "at a high rate of speed"; (II) submitting the issue of contributory negligence to the jury; and (III) denying her motions to set aside the verdict and

for a new trial. For the reasons stated herein, we disagree with plaintiff's arguments and conclude she received a trial free from prejudicial error.

Defendant's Statement

By her first assignment of error, plaintiff contends the trial court committed reversible error by allowing into evidence defendant James Farrington's statement that she was travelling "at a high rate of speed" just before the collision. Rather than supporting defendant's testimony, plaintiff believes the evidence indicated that the speed limit was 35 miles per hour, that she was proceeding down a hill with her foot on the brake, that she skidded about 44 feet, and that she hit defendant's car while moving approximately 30 miles per hour. Plaintiff contends she acted as an ordinary, reasonable and prudent person under the circumstances, such that she was not contributorily negligent. She argues the trial court erred in denying her motion for a directed verdict against defendant as to her contributory negligence, because "[e]vidence which raises a mere conjecture [on the issue of contributory negligence] is insufficient for the jury." *Tharpe v. Brewer*, 7 N.C. App. 432, 437, 172 S.E.2d 919, 923 (1970).

Defendants, on the other hand, contend the trial court correctly admitted Mr. Farrington's statement regarding plaintiff's speed for a number of reasons. First, defendants correctly point out that the jury answered the question of contributory negligence in plaintiff's favor. It is well settled that

> [i]t is not any and every error committed

> during the course of a trial that should induce an appellate court to set aside a verdict and judgment and award a new trial, as before this is done there should be both error and prejudice to the appellant. If he is not hurt by the ruling to which exception was taken, there is no reasonable ground of complaint.

In re Craven, 169 N.C. 561, 564, 86 S.E. 587, 589 (1915). An appellant cannot complain of an alleged error with respect to an issue answered in his favor. *See* 1 Strong's N.C. Index 4th *Appeal and Error* § 502 (1996); and *Prevette v. Bullis*, 12 N.C. App. 552, 553, 183 S.E.2d 810, 811 (1971). Therefore, even if the trial court erred by allowing into evidence defendant Farrington's statement that plaintiff was traveling "at a high rate of speed," such error was harmless because the jury answered the question of contributory negligence in plaintiff's favor. *See Digsby v. Gregory*, 35 N.C. App. 59, 61-62, 240 S.E.2d 491, 493 (1978), *reversed on other grounds by Insurance Co. v. Dickens*, 41 N.C. App. 184, 254 S.E.2d 197 (1979).

Secondly, plaintiff failed to timely object to the testimony at trial and has therefore failed to preserve this assignment of error for our review. "[I]f it be conceded that the testimony offered is incompetent, objection thereto should have been interposed to the question at the time it was asked as well as to the answer when given. An objection to testimony not taken in apt time is waived." *State v. Hunt*, 223 N.C. 173, 176, 25 S.E.2d 598, 600 (1943). Even if an objection is timely, it is subsequently waived if the same evidence is introduced at other times during the

trial without objection. *Lookabill v. Regan*, 247 N.C. 199, 202, 100 S.E.2d 521, 523 (1957).

In the present case, Mr. Farrington's testimony regarding plaintiff's speed was admitted into evidence at least twice. On direct examination, Mr. Farrington testified as follows:

> [Mr. Farrington:] So then I proceeded, after I looked both ways, proceeded into the intersection, maybe three to five miles per hour, and once I got into the intersection, I noticed a vehicle coming at a high rate of speed down ....
>
> Mr. SMITH [Plaintiff's attorney]: ....well, OBJECTION.
>
> THE COURT: OVERRULED.
>
> [Mr. Farrington:] Down the road. It was like straddling the yellow line coming towards me, and by that time I was trying to switch from first gear to second gear, and got stuck between first and second, and had no other place to go.

Plaintiff objected *after* the testimony regarding speed. Her objection was untimely and failed to meet the requirements of *Hunt*. Furthermore, plaintiff did not note an exception to the testimony.

The information regarding speed was also introduced at a later time during plaintiff's cross-examination of Mr. Farrington:

> Q. You was trying to switch ... when, when you pulled up there and before you started off, tell me exactly what you did by looking to see if the movement could be made in safety?
>
> A. Okay, when I first pulled up, I looked to the left, and I looked to the right, and I looked to the left again, started pulling out slowly. As I started pulling out, I got up to near the intersection, and I looked to the right again, and saw her coming at a high rate

> of speed again down ....
>
> Q. .... high rate of speed?
>
> A. Yes, sir.
>
> Q. Well, you didn't view it very long, did you?
>
> A. Just long enough to know that I had to hurry up and get out of the way....

In this instance, plaintiff did not move to strike Mr. Farrington's statement regarding speed. We agree with defendants that plaintiff failed to effectively object to the testimony. *See Lookabill*.

Lastly, defendants argue, and we agree, that Mr. Farrington's testimony regarding plaintiff's speed was admissible because it was based on his personal observation. "It is a general rule of law, adopted in this State, that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile." *Lookabill*, 247 N.C. at 201, 100 S.E.2d at 522; *State v. Clayton*, 272 N.C. 377, 158 S.E.2d 557 (1968). Any question of credibility goes to the weight, not the admissibility, of the evidence. *Ray v. Membership Corp.*, 252 N.C. 380, 385, 113 S.E.2d 806, 810 (1960); *State v. McCall*, 31 N.C. App. 543, 545, 230 S.E.2d 195, 197 (1976). In the present case, Mr. Farrington first observed plaintiff's Mercedes when it was approximately 75 to 100 feet away from him. Plaintiff testified she was travelling approximately 30 miles per hour at impact and skidded about 44 feet before hitting defendant's car; however, her car carried enough force to knock the Farrington vehicle 19 feet and make it spin several times. Given the sequence

of events recited by both plaintiff and defendant, we believe defendant Farrington had a reasonable opportunity to observe plaintiff's car before the cars collided and was therefore able to testify regarding plaintiff's speed.

Given the closeness of the case on the issue of contributory negligence, inclusion of defendant's statement does not amount to prejudicial error.

> The presumption on appeal to this Court is that there is no error committed in the trial in the court below. The appellant must show error, and then a new trial is granted only where the error is material and prejudicial, amounting to a denial of substantial justice. Appellant must show prejudicial and reversible error.

Carstarphen v. Carstarphen, 193 N.C. 541, 547-48, 137 S.E. 658, 662 (1927). Because we believe plaintiff failed to meet this burden, her first assignment of error is overruled.

Contributory Negligence

By her second assignment of error, plaintiff contends the trial court erred in submitting the issue of contributory negligence to the jury. In addition to her earlier objections to the trial court's instruction on contributory negligence, plaintiff also points to the case of *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974) for the proposition that submission of the issue of contributory negligence to the jury adversely affects the damages award. Plaintiff believes she is entitled to a verdict which represents the amount of personal injuries she suffered as a result of the accident. Here, plaintiff considers the amount of

damages awarded to her as "catastrophically" unfair, given the fact that the jury did not find her contributorily negligent. She maintains the medical evidence of prolonged care is favorable to her and believes the jury compromised on damages because they were confronted with the instruction on contributory negligence.

According to defendants, plaintiff has no ground for appeal on this issue because the jury answered the question of contributory negligence in plaintiff's favor. *See Digsby*, 35 N.C. App. 59, 240 S.E.2d 491. Alternatively, defendants contend any error was harmless, because plaintiff cannot show she was prejudiced by inclusion of the instruction on contributory negligence. "New trials are not granted for error and no more. The burden is on the appellant not only to show error but also to show that he was prejudiced to the extent that the verdict of the jury was thereby probably influenced against him." *Freeman v. Preddy*, 237 N.C. 734, 736, 76 S.E.2d 159, 160 (1953).

"The court has the duty to charge the law on the substantial features of the case arising on the evidence and the failure to do so is prejudicial error." *Redman v. Nance*, 36 N.C. App. 383, 384, 243 S.E.2d 920, 922 (1978). Here, the trial court indicated that "[i]n an abundance of caution, I'm going to submit contrib. I think it's a very close case on it. I'm not sure the defense even wants it in here, but if you ask for it, I'll give it to you. So we'll go from there."

"Contributory negligence, as its name implies, is negligence

on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967).

> A defendant who asserts plaintiff's contributory negligence as a defense has the burden of proving it, and a contention that certain acts or conduct of the plaintiff constituted contributory negligence should not be submitted to the jury unless there is evidence from which such conduct might reasonably be inferred. A defendant, however, is entitled to have any evidence tending to establish contributory negligence considered in the light most favorable to him and, if diverse inferences can reasonably be drawn from it, the evidence must be submitted to the jury with appropriate instructions as to its bearing upon the issue.

Atkins v. Moye, 277 N.C. 179, 184, 176 S.E.2d 789, 793 (1970); *see also Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 365 S.E.2d 198, *disc. review denied*, 322 N.C. 610, 370 S.E.2d 257 (1988). Stated another way, "'"[i]f there is more than a scintilla of evidence, contributory negligence is for the jury."'" *Blankley v. Martin*, 101 N.C. App. 175, 178, 398 S.E.2d 606, 608 (1990) (citations omitted). "The finding against the plaintiff on the latter issue [of contributory negligence] precludes recovery based on negligence." *Boldridge v. Construction Co.*, 250 N.C. 199, 202, 108 S.E.2d 215, 217 (1959). *See also Blue v. Canela*, 139 N.C. App. 191, 193, 532 S.E.2d 830, 832, *disc. review denied*, 352 N.C. 672, 545 S.E.2d 418 (2000).

Our examination of the record leads us to believe there was competent evidence justifying submission of the instruction to the

jury. The evidence at trial showed plaintiff saw defendants' car stopped at the intersection of Congo Road and Winkler Mill Road when she was between 200 and 400 feet away. Plaintiff continued down the hill. Defendant Farrington testified he looked both ways before entering the intersection. Once in the intersection, he saw plaintiff coming toward him "at a high rate of speed" and with her car partially over the yellow center line. Plaintiff testified she applied her brakes, blew her horn, and braced for an impact. It was later determined that her car skidded 44 feet and hit defendants' car with enough force to move it 19 feet and cause it to spin several times. Plaintiff estimated her speed at impact to be approximately 30 miles per hour. The damage to the cars indicated that defendants' car was already in the intersection when it was hit by plaintiff's car. Based on the foregoing, the jury could have concluded plaintiff was contributorily negligent by failing to keep a proper lookout, failing to keep her vehicle under control, and failing to operate her vehicle at a reasonable speed under the circumstances. As there was more than a "scintilla of evidence" supporting the presence of contributory negligence, *see Blankley,* 101 N.C. App. 175, 398 S.E.2d 606, we believe the trial court correctly instructed the jury on the issue of contributory negligence. Plaintiff's second assignment of error is overruled.

Motion to Set Aside the Verdict and Motion for New Trial

By her final assignment of error, plaintiff contends the trial court erred by denying her motion to set aside the verdict and denying her motion for a new trial. Again, we disagree.

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.

Worthington v. Bynum and Cogdell v. Bynum, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982); *see also Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 380-81, 329 S.E.2d 333, 343-44 (1985). The trial court's discretion is "practically unlimited." *Worthington*, 305 N.C. at 482, 290 S.E.2d at 603 (quoting *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915)). Thus, "an 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.

Plaintiff's original motion alleged the timing of the trial affected the jury's deliberations and the eventual outcome. She also argued an issue dealing with *respondeat superior* and the family purpose doctrine. Plaintiff further contended Mr. Farrington's statement that she was travelling "at a high rate of speed" was inadmissible and that the trial court erred in submitting the issue of contributory negligence to the jury.

On appeal, however, plaintiff seems to argue that the amount of damages was inadequate and that she was prejudiced because the jury was confused by the issue of contributory negligence and incorrectly reduced her award. However, plaintiff did not assign

error based on the amount of damages awarded, and our review, therefore, does not extend to that alleged error. *See* N.C.R. App. P. 10(a) (2002); and *Thompson v. Bradley*, 142 N.C. App. 636, 544 S.E.2d 258, *disc. review denied*, 353 N.C. 532, 550 S.E.2d 506 (2001).

In support of her contention that the damages award was inadequate, plaintiff cites *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190. In *Robertson*, a minor plaintiff was hit by a car and it was stipulated that plaintiff's father incurred $1,970.00 in medical expenses for his treatment. *Id.* at 562, 206 S.E.2d at 191. The jury awarded no damages to the plaintiff for his personal injury, though plaintiff's father was awarded the full amount of his son's medical expenses. *Id.* at 563, 206 S.E.2d at 191-92. After concluding that the jury's verdict was "contrary to law, inconsistent, invalid and should have been set aside *ex mero motu*[,]" the Supreme Court reversed and remanded for a new trial on all issues. *Id.* at 564, 206 S.E.2d at 192.

After carefully examining the record below, we believe the present case is distinguishable from *Robertson*. In contrast to the *Robertson* jury, which awarded *no* damages to plaintiff even after finding he was not contributorily negligent, the jury in the present case awarded $12,000.00 to plaintiff, apparently as compensation for the medical expenses, pain and suffering she sustained in the 10 June 1996 accident. The jury also likely concluded the expenses and other damages from 1999 (including plaintiff's surgery) were not causally related to the 10 June 1996

accident.

> The doctrine of proximate cause which determines the existence of liability for negligence is equally applicable to liability for particular items of damage. To hold a defendant responsible for a plaintiff's injuries, defendant's negligence must have been a substantial factor, that is, a proximate cause of the *particular* injuries for which plaintiff seeks recovery.

Gillikin v. Burbage, 263 N.C. 317, 324, 139 S.E.2d 753, 759 (1965). Here, there was a substantial break in time between the accident and plaintiff's later treatment. A mere possibility of a causal relationship in such circumstances is insufficient to compel an award of damages. *Brown v. Neal*, 283 N.C. 604, 611, 197 S.E.2d 505, 510 (1973).

It appears the jury weighed all the evidence, accorded more weight to Dr. Price's testimony, and concluded that plaintiff was entitled to compensation for the medical expenses, pain and suffering she sustained in the 10 June 1996 accident. The jury did not, however, believe the expenses and damages from 1999 were causally related to the 10 June 1996 accident. Based on the foregoing, we believe the trial court properly denied plaintiff's motions to set aside the verdict and for a new trial. Plaintiff's final assignment of error is overruled.

After careful examination of the proceedings below and the arguments of the parties, we conclude plaintiff received a fair trial, free from prejudicial error.

No error.

Judges WALKER and BRYANT concur.

Report per Rule 30(e).