NO. COA01-1279

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

JAMES HARRIS,
Plaintiff-Appellee,

v. Transylvania County
No. 99 CVS 219

ENMARK STATION, INC.,
Defendant-Appellant.

Appeal by defendant from order entered 10 April 2001 by Judge Beverly T. Beal in Transylvania County Superior Court. Heard in the Court of Appeals 14 August 2002.

James M. Kimzey and Katherine E. Jean, for plaintiff-appellee.

Smith, Helms, Mulliss & Moore, LLP, by Alan W. Duncan and Allison O. Van Laningham and Van Winkle, Buck, Wall, Starnes & Davis, PA, by Allan R. Tarleton, for defendant-appellant.

BRYANT, Judge.

Defendant appeals from the trial court's order granting plaintiff's motion for a new trial. On 3 August 1998, plaintiff sustained a severe injury to his knee when he slipped and fell at the Enmark Service Station. Consequently, plaintiff underwent arthroscopic and reconstructive surgery to repair torn cartilage and a torn anterior cruciate ligament (ACL) in his knee. The evidence showed that plaintiff drove up to the gas station with his eleven-month-old son in the car, and that as plaintiff exited his car he slipped and fell on a "moist mud, slippery substance" later

determined to be an absorbent material which had been spread over a gasoline spill.

Plaintiff filed a complaint seeking damages from defendant, Enmark Stations, Inc., for a slip and fall at defendant's gas station. The case was tried before a jury at the 16 January 2001 Session of Transylvania County Superior Court. At the close of plaintiff's evidence, defendant moved for a directed verdict of no negligence as a matter of law. The motion was denied. Defendant did not present any evidence and renewed its motion for a directed verdict. Plaintiff moved for a directed verdict on the issue of contributory negligence. The trial court denied both motions. The jury returned a verdict of no negligence. After the verdict was read, plaintiff motioned for a judgment notwithstanding the verdict. The trial court also denied this motion. On 24 January 2001, plaintiff filed a motion for a new trial primarily based on N.C.G.S. § 1A-1, Rule 59(a)(7), insufficiency of the evidence to justify the verdict. The trial court granted plaintiff's motion. Defendant requested findings of fact pursuant to N.C.G.S. § 1A-1, Rule 52. The order granting the new trial was entered on 10 April 2001. Defendant appealed.

Defendant argues that the trial court erred: 1) as a matter of law by improperly invading the province of the jury when it granted plaintiff's motion for a new trial; and 2) because the granting of a new trial is unsupported by the evidence and the trial court's own factual findings.

Before reaching this issue, we first determine whether this appeal is from an interlocutory order, and, as such, improperly before this Court.

> Generally, there is no right to appeal from an interlocutory order. "'An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.'"

Darroch v. Lea, ___ N.C. App. ___, ___, 563 S.E.2d 219, 221 (2002) (citations omitted). However, a party may appeal an interlocutory order under two circumstances. *Murphy v. Coastal Physician Group*, 139 N.C. App. 290, 293, 533 S.E.2d 817, 819 (2000), *appeal withdrawn*, 353 N.C. 378, 547 S.E.2d 814 (2001) (citing *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490 (1989)).

> The first requires certification by the trial judge that there is not just reason to delay the appeal. N.C.R. Civ. P. 54(b). The second is where the order appealed from (1) affects a substantial right, (2) in effect determines the action and prevents a judgment from which appeal might be taken, (3) discontinues the action, or (4) grants or denies a new trial. N.C. Gen. Stat. §§ 1-277 (1996) and 7A-27(d) (1995).

Id. at 293-94, 533 S.E.2d at 819-20. Here, defendant appeals from an order granting plaintiff's motion for a new trial. Therefore, we hold that this appeal is properly before this Court.

Standard of Review

"An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or

involving a matter of law or legal inference, whether made in or out of session, which . . . grants or refuses a new trial." N.C.G.S. § 1-277(a) (2001). When reviewing an appeal from an order granting a new trial for insufficiency of the evidence, our standard of review is limited to "'whether the record affirmatively demonstrates an abuse of discretion by the [trial] judge.'" *In re Will of Buck*, 350 N.C. 621, 625, 516 S.E.2d 858, 861 (1999) (alteration in original) (quoting *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982)). "[T]he term 'insufficiency of the evidence' means that the verdict 'was against the greater weight of the evidence.'" *Id.* at 624, 516 S.E.2d at 860 (quoting *Nationwide Mut. Ins. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979)). A trial court's order granting a new trial due to insufficiency of the evidence is not reversible on appeal absent an abuse of discretion. *Id.*

I.

Defendant first argues that the trial court's decision to grant a new trial amounts to a judgment as a matter of law, rather than a discretionary ruling. We disagree.

"The trial judge is 'vested with the discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony.'" *Burgess v. Vestal*, 99 N.C. App. 545, 549, 393 S.E.2d 324, 326 (1990) (quoting *Britt v. Allen*, 291 N.C. 630, 634, 231 S.E.2d 607, 611 (1977)). "Like any other ruling left to the discretion of a trial court, the trial court's appraisal of the

evidence and its ruling on whether a new trial is warranted due to the insufficiency of evidence is *not* to be reviewed on appeal as presenting a question of law." *In re Will of Buck*, 350 N.C. at 625, 516 S.E.2d at 860-61 (citing *Britt v. Allen*, 291 N.C. 630, 635, 231 S.E.2d 607, 611 (1977)); *accord*, *Whaley v. White Consol. Indus.*, 144 N.C. App. 88, 92, 548 S.E.2d 177, 180 ("Appellate review of a trial court's ruling on a Rule 59(a)(7) motion raises no question of law, but presents only the question of whether the record affirmatively demonstrates an abuse of discretion . . . ."), *review denied*, 354 N.C. 229, 555 S.E.2d 277 (2001); *Kinsey v. Spann*, 139 N.C. App. 370, 372-73, 533 S.E.2d 487, 490 (2000) (stating that motion for new trial based on insufficiency of evidence does not involve question of law; therefore, abuse of discretion standard is appropriate).

In this case, the judge made it clear that his decision to grant plaintiff's motion was discretionary. In his 16 February 2001 oral ruling, the judge stated,

> I have never granted this motion in ten years and one month and sixteen days that I have been on the bench that I can recall. If I am to grant it now, it must be because I find, in my discretion, that justice demands that this matter be put to a fact finder again. I do not take that lightly. I grant this motion because it is discretionary and that I will be doing so in my considered discretion.

Further, in his written order the judge stated that "the ruling of the Court is made in the Court's discretion, not as a matter of law." We do not find that the judge granted a new trial as a matter of law. In his verbal ruling, the judge states, "It's very

difficult for me to conclude or to find any evidence in the evidence, sufficient evidence that would justify the jury finding no negligence." In both the oral ruling and the written order, the judge expressed a fear that the jury misunderstood the jury instructions. Therefore, in his discretion, the judge concluded that in order to prevent a miscarriage of justice the matter needed to be put before a fact finder again. We find that the judge's oral ruling and written order clearly show that the new trial was granted based on the discretionary ground set forth in Rule 59(a)(7) of the North Carolina Rules of Evidence. There is no question of law, and as such the trial court's ruling is "'irreviewable in the absence of manifest abuse of discretion.'" *Burgess*, 99 N.C. App. at 549, 393 S.E.2d at 326 (quoting *Britt v. Allen*, 291 N.C. 630, 635, 231 S.E.2d 607, 611 (1977)). Therefore, we turn to the question of whether the trial court abused its discretion.

II.

Defendant next argues that the trial court's ruling was a manifest abuse of discretion. We disagree.

"'[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing the heavy burden of proof.'" *In re Will of Buck*, 350 N.C. at 629, 516 S.E.2d at 863. "'[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.'" *Id.* at 625,

516 S.E.2d at 861 (alteration in original) (quoting *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997)).

The defendant has not referenced any instances which amounted to abuse of discretion on the trial court's part, thus failing to meet its heavy burden. We do not find that the trial judge's ruling amounts to a substantial miscarriage of justice. "During review, we accord 'great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial.'" *Burgess*, 99 N.C. App. at 550, 393 S.E.2d at 327. The reasons offered by the trial court demonstrate that its decision was made fairly and impartially. As previously stated, the judge expressed concern that the jury had misunderstood his instructions and felt justice demanded that the issues in the case be put before a fact finder again. We therefore hold that the trial court did not abuse its discretion. For the reasons stated above, we affirm the trial court's order granting a new trial.

AFFIRMED.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).