NO. COA01-1522

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

TERRY THOMAS

v. Lee County
No. 00 CVS 447

DONNELL EVANS

Appeal by plaintiff from order entered 12 July 2001 by Judge Knox V. Jenkins, Jr. in Lee County Superior Court. Heard in the Court of Appeals 21 October 2002.

Staton, Perkinson, Doster, Post & Silverman, P.A., by Norman C. Post, Jr., P.A., for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, by Kenneth B. Rotenstreich and Paul A. Daniels, for defendant-appellee.

CAMPBELL, Judge.

On 28 April 2000, plaintiff filed a complaint in which he alleged defendant negligently drove his vehicle into the rear of plaintiff's vehicle on 30 November 1998 and caused him to suffer personal injuries. At the start of trial, defendant amended his answer to admit failure to reduce speed to the extent necessary to avoid colliding with the rear of plaintiff's vehicle and that such

failure was negligence.

Plaintiff described defendant's vehicle as approaching at a "high rate of speed" and that defendant made no attempts to slow down before the front of defendant's vehicle hit the rear of his vehicle. He indicated he was wearing his seat belt at the time of the accident. Plaintiff asserted he had not been having problems with his neck or lower back aside from "little aches and pains" before the accident, but that "right after the accident I felt pain in my neck and lower back." EMS transported plaintiff to the emergency room, where he was x-rayed, given medicine and released.

Dr. John Mangum, plaintiff's personal physician since 1985, examined plaintiff on 2 December 1998 and diagnosed him as having low back strain and a contusion of the left fourth digit. He prescribed alternating heat and ice to the lower back area and Tylenol with codeine for pain. Dr. Mangum directed plaintiff to continue taking an anti-inflammatory medication (Lodine), which plaintiff was currently taking for arthritis in his right ankle. On 18 December 1998, plaintiff reported to Dr. Mangum that his neck was doing fine and his finger was not giving him trouble, but he was continuing to have pain in the left hip area which went down his left leg. On 6 January 1999, plaintiff again reported to Dr. Mangum that his neck was doing all right, but he was still having dull pain in the left lower back area. Dr. Mangum then referred plaintiff for physical therapy for his lower back.

During cross-examination, Dr. Mangum testified that plaintiff on 27 January 1999 had normal range of motion with his neck and

lower back with no tenderness over the neck and only mild tenderness in the lower back. Plaintiff's straight-leg lift test for lower back pain was also negative. Dr. Mangum was unaware plaintiff had claimed to have had no prior low back pain, and he did not refer plaintiff for chiropractic treatment. He neither forwarded any records to nor spoke with Dr. Donald Austin, plaintiff's chiropractor. Dr. Austin, the husband of plaintiff's first cousin, subsequently treated plaintiff during forty office visits.

After Dr. Mangum's testimony, plaintiff admitted having slight back pain following a vehicle accident in 1996. He testified to having total medical bills of $5,931.10 and total prescription bills of $764.90. During cross-examination, plaintiff conceded that approximately $700.00 of those prescription bills were for Lodine which he had been taking for his right ankle. When asked why he had not disclosed in two interrogatories either a fall in 1995 or a vehicle accident in 1996 for which he had sought chiropractic treatment, plaintiff stated he forgot to report those incidents.

Despite his earlier assertion that he was wearing his seat belt, plaintiff subsequently admitted he was not wearing it at the time of the accident. Upon examining his accident report, plaintiff conceded he had made no mention of defendant's vehicle approaching at a "high rate of speed," and he noted the report stated plaintiff's vehicle had left 130 feet of skid marks. Plaintiff admitted Dr. Mangum's referral for physical therapy was

for only his back and that he had made no mention of any neck pain in the intake paperwork which he completed to begin physical therapy.

Dr. Austin testified his diagnosis was based on his examination of plaintiff and on plaintiff's x-rays, but it was made without the benefit of either the hospital's records or Dr. Mangum's records. He was unaware of the specifics of plaintiff's prior medical treatment, but indicated the information was unimportant because the treatment had been unsuccessful. Although both Dr. Mangum and the radiologist had concluded plaintiff's x-rays showed normal alignment of the cervical spine, Dr. Austin stated he was more qualified than either individual to interpret plaintiff's spinal x-rays. He found multiple levels of misalignment. Plaintiff testified his chiropractor's bill was $2,800.00. Plaintiff's father testified that plaintiff was having an ongoing problem with pain since the accident. Defendant presented no evidence, but did cross-examine plaintiff and his witnesses.

The trial court submitted the following issue to the jury - "What amount is the plaintiff, Terry Thomas, entitled to recover for personal injuries?" The trial court then instructed the jury as to proximate cause and damages. After deliberating, the jury awarded damages in the amount of $1.00 to plaintiff. On 27 March 2001, plaintiff filed a motion for new trial pursuant to N.C.R. Civ. P. 59. In an order entered 12 July 2001, the trial court denied plaintiff's motion. From the trial court's order, plaintiff

appeals.

Plaintiff contends the trial court erred in denying his motion for a new trial. He argues the jury award of $1.00 was woefully inadequate, was apparently given under the influence of passion or prejudice, and was clearly against the greater weight of the evidence. We are not persuaded by plaintiff's argument.

Pursuant to Rule 59 of the North Carolina Rules of Civil Procedure, a new trial may be granted on the grounds of "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]" N.C.R. Civ. P. 59(a)(6) (2001). Whether to grant such a motion is within the trial court's sound discretion, and appellate review "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). Plaintiff, as the party alleging such an abuse of discretion, bears the burden of proving that it appears from the record as a whole. *Id.* at 484-85, 290 S.E.2d at 604.

Both the proximate cause and the extent of plaintiff's injuries were contested at trial. There were inconsistencies in plaintiff's evidence as to what injuries he suffered in the accident and also in his complaints to Dr. Mangum and Dr. Austin. Although plaintiff introduced evidence of medical bills of $5,931.10 and prescription bills of $764.90, there was also evidence that plaintiff's injuries could have occurred on two prior occasions. "[I]t was for the jury to weigh this evidence and to

determine what damages, if any, the plaintiff was entitled to recover." *McFarland v. Cromer*, 117 N.C. App. 678, 682, 453 S.E.2d 527, 529 (1995). Nothing in the record indicates the jury award was influenced by passion or prejudice. As such, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Affirmed.

Judges WYNN and McGEE concur.

Report per Rule 30(e).