NO. COA01-33

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

JAN CHRISTOPHER ZAREK, and
SOOSAN ZAREK,
Plaintiffs,

v.

Cumberland County
No. 99 CVS 4878

RICHARD EUGENE STINE, and
CARTS & PARTS, INC.,
Defendants.

Appeal by plaintiffs from judgment entered 5 May 2000 by Judge Robert F. Floyd, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 7 January 2002.

Twiggs, Abrams, Strickland & Rabenau, P.A., by Jerome P. Trehy, Jr., for plaintiff-appellants.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Lee B. Johnson, for defendant-appellees.

EAGLES, Chief Judge.

Jan Christopher Zarek and Soosan Zarek ("plaintiffs") appeal from judgment entered on jury verdict finding Richard Stine negligent and Jan Christopher Zarek contributorily negligent. After careful consideration of the briefs and record, we affirm.

On 20 July 1996, Jan Christopher Zarek, Soosan Zarek, Samatha Zarek, plaintiffs' eighteen-month-old daughter, and Ghasem Ebrahimi, Soosan Zarek's father, were traveling in plaintiffs' 1995

Chrysler van. Jan Christopher Zarek was operating the van while Richard Stine was operating a tractor-trailer truck. Both parties were traveling north on Interstate 95 in Cumberland County when they collided at approximately 10:00 p.m. near Exit 44.

Plaintiffs' evidence tended to show that plaintiffs and defendant Stine were traveling in the left hand northbound lane. Plaintiffs were immediately in front of defendant Stine and for a period of ten minutes, the distance between their vehicles would fluctuate. Defendant Stine would drive his tractor-trailer very close to the rear of plaintiffs' van and then plaintiffs would accelerate to create space. Plaintiffs then approached a motor home in the left hand lane. As an opening in traffic appeared in the right hand lane, plaintiffs signaled a right hand turn and began to move into the right hand lane. At the same time, the motor home signaled a right hand turn and began slowly moving into the right hand lane in front of plaintiffs. The distance between the motor home and plaintiffs was decreasing so plaintiffs turned on their left hand turn signal and "recenter[ed] [themselves] in the left lane." Plaintiffs were then "struck from the rear" by defendant Stine's truck and plaintiffs' "vehicle lunged forward." After the collision, plaintiffs' van flipped and rolled.

Defendant Stine's evidence tended to show that defendant Stine was traveling in the left hand lane behind a motor home when he saw plaintiffs' van approaching in the right hand lane. Plaintiffs passed defendant Stine on the right and "ducked in to [defendant Stine's] lane between [defendant Stine] and [the] camper." The

motor home's brake lights came on followed by plaintiffs' brake lights. Defendant Stine activated his high beam lights and sounded his air horn. Plaintiffs turned on their right hand turn signal and moved into the right hand lane. The lane in front of defendant Stine was clear and defendant Stine accelerated. Plaintiffs then turned on their left hand turn signal and began to move back into the left hand lane. Defendant Stine "grabbed the air horn and hit the brakes" and the "left rear quarterpanel" of plaintiffs' van struck defendant Stine's right front wheel. At the time of the collision, plaintiffs' van was "coming into the left lane . . . ."

The matter proceeded to trial at the 24 April 2000 civil session of Cumberland County Superior Court before Judge Robert F. Floyd, Jr. The jury returned a verdict finding defendant Stine negligent and plaintiff Jan Christopher Zarek contributorily negligent in the collision. The jury awarded Soosan Zarek $25,000.00 for her personal injuries. The trial court found as a matter of law that defendant Stine's negligence was imputed to defendant Carts & Parts, Inc. The trial court also ordered that Soosan Zarek recover from defendant Stine, defendant Carts & Parts, Inc., and Jan Christopher Zarek as joint tort-feasors. Plaintiffs appeal.

Plaintiffs contend that the trial court committed error by (1) excluding plaintiffs' rebuttal evidence of prior driving incidents of defendant Stine which were offered to show that defendant Stine was acting in a conscious and heedless disregard for the laws of the road and for the rights and safety of the traveling public at

the time of the collision; and (2) allowing defendants' expert witness to testify regarding the collision. After careful review, we affirm.

Plaintiffs first contend that the trial court erred in excluding rebuttal evidence related to defendant Stine's prior driving record. Plaintiffs argue that they should have been permitted to introduce rebuttal evidence of defendant Stine's moving violations provided in defendant Stine's responses to interrogatories. These violations included ten speeding convictions. Plaintiffs also argue that they should have been permitted to introduce evidence of a prior reprimand of defendant Stine for tailgating contained in the deposition of Charles Redmond, owner of defendant Carts & Parts, Inc. Plaintiffs contend that this evidence was offered to show whether defendant Stines's acts were willful or wanton in nature. The trial court denied admission of this as rebuttal evidence.

> The general rule is that it is in the discretion of the trial judge whether to allow additional evidence by a party after that party has rested or whether to allow additional evidence after the close of the evidence. The exercise of the trial court's discretion in such cases will not be disturbed on appeal absent an abuse of that discretion.

Gay v. Walter, 58 N.C. App. 360, 363, 283 S.E.2d 797, 799-800 (1981), *modified on other grounds*, 58 N.C. App. 813, 294 S.E.2d 769 (1982) (citations omitted). "Moreover, plaintiff must show that the trial court's denial of plaintiff's request to introduce rebuttal evidence in some way prejudiced plaintiff's case." *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 41, 365 S.E.2d 198, 202, *disc.*

review denied, 322 N.C. 610, 370 S.E.2d 257 (1988). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 570, 551 S.E.2d 852, 855 (2001) (citations and quotations omitted).

Here, at the close of defendants' evidence, plaintiffs sought to introduce this rebuttal evidence. The transcript reveals that the trial court heard argument by both parties with respect to the admission of this rebuttal evidence and considered among other things "the prejudicial weight versus probative value" of this evidence in deciding to deny its admission. We cannot say that the decision of the trial court to deny admission of the rebuttal evidence was unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision to constitute an abuse of its discretion. *But see State v. Goodman*, __ N.C. App. __, __, __ S.E.2d __, __ (March 5, 2002) (No. COA00-1417).

Plaintiffs next contend that the trial court erred by allowing defendant Stine's accident reconstruction expert to testify regarding his opinion about the cause of the collision. We are not persuaded.

David C. McCandless, defendant Stine's expert witness, developed three conclusions with respect to the collision. Plaintiffs object to his second conclusion. At trial, McCandless testified that:

> Q. And your conclusion number two?
>
> A. Both the damages to the exterior and the post-impact travel of the vehicles suggests that the van was changing lanes from the right, or outside, lane of travel to the left, or inside, lane of travel which, when the two vehicles came into contact with one another at the time of impact, it appears that the Stine vehicle was in the left inside lane of Interstate 95.

McCandless prepared a report which was admitted into evidence which contained the following conclusion:

> 2. Both the damage to the vehicles and the post-impact travel of the vehicles suggest that the van was changing lanes from the right (outside) lane of travel to the left (inside) lane of travel when the two vehicles came into contact with one another. At the time of impact, it appears that the Stine vehicle was in the left (inside) lane of I-95.

Plaintiffs contend that the trial court did not properly apply *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995) in determining the admissibility of this evidence.

> [W]hen a trial court is faced with a proffer of expert testimony, it must determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue. As recognized by the United States Supreme Court in [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993)] addressing the admissibility of expert scientific testimony, this requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue.

Id. at 527, 461 S.E.2d at 639. Plaintiffs argue that the trial court should have examined the methodology behind the controverted conclusion and precluded this evidence from being admitted since it would not assist the jury to understand the evidence or to determine a fact in issue. We are not persuaded.

Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony and provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

G.S. § 8C-1, Rule 702(a). The test for admissibility is whether the expert's opinion is of assistance to the trier of fact. *State v. Purdie*, 93 N.C. App. 269, 275, 377 S.E.2d 789, 792 (1989). "Preliminary questions concerning the qualifications of a witness to testify and the admissibility of evidence shall be determined by the trial court." *Goode*, 341 N.C. at 527, 461 S.E.2d at 639; G.S. § 8C-1, Rule 104(a). "[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

"*Daubert* merely requires that the expert testimony be both relevant and reliable . . . ." *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995). Further, *Daubert* requires that "a preliminary assessment of whether the *reasoning or methodology underlying the testimony is sufficiently valid* and whether that

reasoning or methodology can be properly applied to the facts in issue." *Goode*, 341 N.C. at 527, 461 S.E.2d at 639 (emphasis added). Accident reconstruction analysis has been accepted by the courts of this state. *See State v. Purdie*, 93 N.C. App. 269, 377 S.E.2d 789 (1989); *Griffith v. McCall,* 114 N.C. App. 190, 441 S.E.2d 570 (1994). In *Purdie*, the accident reconstruction expert "based his testimony on information he gleaned from the police accident report, an interview with the investigating officer, photographs of the accident scene, an aerial photograph of the area, review of a transcript of a State witness's testimony, and listening to the witnesses at trial." *Purdie*, 93 N.C. App. at 273, 377 S.E.2d at 791. The expert in *Purdie* further stated that his opinion that the accident occurred in a certain lane was based "on the rotation and final resting position of the cars, the location of the debris, the gouge marks in the pavement, and the contact between the cars . . . ." *Id.* In *Griffith*, the accident reconstruction expert "testified that in preparation for his expert testimony he used" the following: the accident report; a photograph of the vehicle; photographs of the accident scene; depositions and statements of witnesses; aerial photographs; and a visit to the accident scene. *Griffith*, 114 N.C. App. at 193, 441 S.E.2d at 572.

McCandless was called as an expert witness in the field of accident reconstruction. We begin by noting that plaintiffs did not object to McCandless's qualifications as an expert in the field of accident reconstruction. McCandless investigated the accident in order to prepare an accident report. McCandless stated that he

investigated the scene of the accident, examined the plaintiffs' van and documents relating to plaintiffs' van, reviewed photographs and documents relating to defendant Stine's tractor-trailer, discussed the accident with defendant Stine and Trooper Hammonds, the investigating officer.

The trial court allowed a *voir dire* of McCandless. During *voir dire*, McCandless was asked how he developed the basis for his opinion in Conclusion #2 of his accident report. He stated that his opinion was based on the type and location of the damage to defendant Stine's tractor-trailer and plaintiffs' van, the statements from Trooper Hammonds, the investigating officer, the police accident report, and defendant Stine's statements regarding the accident.

"We note that '[i]t is the function of cross-examination to expose any weaknesses in [expert opinion testimony.]'" *Griffith*, 114 N.C. App. at 194, 441 S.E.2d at 573 (quoting *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 244, 311 S.E.2d 559, 571 (1984)). The trial court did not abuse its discretion in permitting McCandless to testify.

Finally, plaintiffs contend that the trial court erred by denying plaintiffs the opportunity to call as an expert a witness that defendants had previously designated as an expert. However, plaintiffs expressly abandoned this assignment of error in their brief.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges McCULLOUGH and CAMPBELL concur.

Report per Rule 30(e).