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NO. COA01-50

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

PATRICK ELLIOTT, Guardian
Ad Litem of BRIAN ELLIOTT,
A Minor Child,
Plaintiff,

v.

Lee County
No. 98 CVD 471

SHIRLEY BIRTH,
Defendant.

Appeal by defendant from order entered 16 November 2000 by Judge Albert A. Corbett, Jr. in Lee County District Court. Heard in the Court of Appeals 5 November 2001.

Bain & McRae, by Edgar R. Bain, for plaintiff-appellee.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by Jerry A. Allen, Jr., and Gay Parker Stanley, for defendant-appellants.

BIGGS, Judge.

Defendant appeals the trial court's order, setting aside the jury's verdict and ordering a new trial on damages. This matter arises from an automobile collision that occurred on 27 November 1997 between Maria Elliott (Maria) and Shirley Birth (defendant), in which Brian Elliott (plaintiff) was injured. For the reasons that follow, we reverse.

The facts are as follows: On 27 November 1997, Thanksgiving, plaintiff, a three year-old child, was on his way to his uncle's

house for a family Thanksgiving supper, when the accident occurred. His grandmother, Maria, was driving, while plaintiff rode in a child carrier in the back seat. Maria was driving west on a two-lane road, and defendant was driving towards them on the same road. Defendant was distracted by her pet dog, riding on her front seat; her car swerved across the center line and struck Maria's vehicle in the front passenger area before coming to rest in the roadside ditch. After the accident, plaintiff was driven to West Wake Memorial Hospital and treated for abrasions on his cheek and a small cut near his eye. The cut did not require stitches, and plaintiff was released to his parents' care with instructions to treat the cut with an antibacterial ointment and band aids. Maria was treated for bruises and pain, and released with instructions to take ibuprofen if necessary.

Patrick Elliott (Elliott), plaintiff's father, was appointed as his guardian *ad litem*, on 24 May 1998. Elliott filed suit on plaintiff's behalf on 26 May 1998, seeking damages for injuries sustained in the accident, and attorneys' fees. Although plaintiff's and Maria's actions were consolidated for trial, their appeals are reported in separate opinions. The case was tried before a jury on 4 January 1999. Prior to trial, defendant stipulated that her negligence was the proximate cause of the accident, and that plaintiff had suffered at least minor injuries. Therefore, the only issue at trial was the amount of damages.

The jury awarded plaintiff \$350.00. Plaintiff moved the trial court to set the verdict aside on the grounds that it was

inadequate. The trial court granted plaintiff's oral motion, and subsequently entered a written order setting aside the verdict and granting plaintiff a new trial. Defendant appealed, and on 3 October 2000, this Court issued an unpublished opinion which held that the trial court's findings of fact were inadequate to allow meaningful appellate review. This Court vacated the trial court's order, and remanded for entry of "additional findings of fact and conclusions of law concerning its grant of a new trial."

On remand, the trial court again entered an order, which is the subject of the present appeal, setting aside the jury verdict and awarding plaintiff a new trial. The court's findings of fact included the following:

18. One of the minor Plaintiff's witnesses was his grandmother, who was with the child at the time of the accident. The grandmother is a native of Salzburg, Austria, and spoke with a strong German accent.

19. The Court finds that inadequate damages appear to have been given under the influence of prejudice as it relates to the Plaintiff's grandmother, who was with the child at the time and who testified in the action.

20. The Court finds that the jury acted in manifest disregard of the Court's instructions with regard to the right of the minor Plaintiff to recover in one lump sum all of his injuries, both present and future, which would include pain and suffering and medical expenses. It appears that the jury disregarded the instructions of the Court, or such an inadequate jury verdict would not have been returned.

The trial court's conclusions of law stated that (1) the jury acted in manifest disregard of the instructions of the Court, (2) the jury acted under the influence of prejudice against plaintiff's

grandmother, because she "spoke in broken English," and (3) the verdict was contrary to the evidence and the law.

Based upon its findings of fact and conclusions of law, the trial court ordered the verdict set aside and the "matter set for retrial[.]" Defendant again appeals.

The trial court awarded plaintiff a new trial pursuant to N.C.G.S. § 1A-1, Rule 59 (1999), which authorizes the court to grant a new trial upon, *inter alia*, the following grounds:

5. Manifest disregard by the jury of the instructions of the court;
6. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
7. Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.] . . .

N.C.G.S. § 1A-1, Rule 59(a)(5), (6) and (7). The trial court's decision to set aside a jury's verdict and award a new trial is a discretionary ruling. *Blow v. Shaughnessy*, 88 N.C. App. 484, 364 S.E.2d 444, *disc. review denied*, 311 N.C. 151, 321 S.E.2d 127 (1988). In *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982), the North Carolina Supreme Court held 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. . . . [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 482 and 487, 290 S.E.2d at 602 and 605. The Court in *Worthington* explicitly declined "to formulate a precise test" for abuse of discretion, noting instead that "it has been a sufficiently workable standard of review to say merely that 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 that heavy burden of proof." *Id.* at 484-485, 290 S.E.2d at 604. However, certain principles have generally played a significant role in appellate review of a trial court's decision to grant or deny a motion for a new trial. First, it is the province of the jury to weigh the evidence and find the facts. *Albrecht v. Dorsett*, 131 N.C. App. 502, 508 S.E.2d 319 (1998). Where the evidence is conflicting, it is the jury's role to resolve the conflicts and discrepancies. *Id.* In *Albrecht*, plaintiffs moved for a new trial on the basis that the jury had awarded damages in an amount lower than the medical expenses introduced into evidence. This Court found that the trial court had not abused its discretion in denying plaintiffs' motion under Rule 59 for a new trial, stating that:

. . . as the finder of fact, the jury is 'entitled to draw its own conclusions about the credibility of the witnesses and the weight to accord the evidence.' The jury's function as trier of fact 'must be given the utmost consideration and deference before a jury's decision is to be set aside.'

Id. at 505-06, 508 S.E.2d at 322 (quoting *Smith v. Price*, 315 N.C. 523, 530, 340 S.E.2d 408, 413 (1986)). See also *Smith v. Beasley*, 298 N.C. 798, 259 S.E.2d 907 (1979) (jury's exclusive province to evaluate evidence, weigh credibility, and determine the facts).

However, the jury should not simply ignore or disregard undisputed evidence. *Daum v. Lorick Enterprises*, 105 N.C. App. 428, 432, 413 S.E.2d 559, 561, *disc. review denied*, 331 N.C. 383, 417 S.E.2d 789 (1992) (where jury awarded plaintiff nothing for pain and suffering, in the face of uncontradicted testimony, this Court holds that jury "arbitrarily ignored the evidence of plaintiff's pain and suffering and entered an inconsistent verdict not in accordance with the law"); *Robertson v. Stanley*, 285 N.C. 561, 566, 206 S.E.2d 190, 193 (1974) (new trial required where although "the evidence of pain and suffering [was] clear, convincing and uncontradicted," the jury awarded plaintiff nothing for pain and suffering).

Thus, the trial court's discretionary power to set aside the verdict must be balanced against the jury's discretion to determine the facts of a case, and the trial court "is not free to set aside the verdict merely because the judge might have awarded a different amount of damages[.]" *Vanwyk Textile Systems v. Zimmer Mach. Amer.*, 994 F.Supp. 350, 358 (W.D.N.C. 1997) (citation omitted). This Court, in *Howard v. Mercer*, 36 N.C. App. 67, 70-71, 243 S.E.2d 168, 170 (1978), *rev'd on other grounds*, 305 N.C. 478, 290 S.E.2d 599 (1982), expressed it this way:

[W]here, as here, the jury as primary fact-finder fixes a quantum, and the trial judge

indicates his view that it is [erroneous,] . . . the judge's unique opportunity to consider the evidence . . . must be respected. But against his judgment we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance--the jury-- has evaluated the facts differently.

Finally, the trial court's ruling on a Rule 59 motion must have factual support in the record. *Worthington*, 305 N.C. 478, 290 S.E.2d 599 (trial court's award of new trial upheld where North Carolina Supreme Court concludes that record evidence provides factual support for judge's decision); *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 427 S.E.2d 149 (1993) (trial court's decision to award new trial on damages reversed where court had reduced damage award to an amount that was not supported by the evidence); *Daum* 105 N.C. App. 428, 413 S.E.2d 559, *disc. review denied*, 331 N.C. 383, 417 S.E.2d 789 (1992) (trial court's denial of motion for new trial reversed where evidence showed that verdict was inconsistent and not rendered in accordance with the law).

In the instant case, defendant asserts that the findings upon which the trial court ordered a new trial are not supported by the record, and consequently do not support its conclusions of law. We agree.

The trial court's decision to grant a new trial was based upon the following findings: (1) that the jury's award of damages to plaintiff was inadequate; (2) that damages were "awarded under the influence of prejudice" against plaintiff's grandmother, because she was born in Austria, and still had a German accent, and; (3) that the jury disregarded the trial court's instructions to award

plaintiff "one lump sum [for] all of his injuries, both present and future."

Trial evidence regarding damages included the following: Elliott testified that, although the hospital report described plaintiff as "alert, no distress and happy," that when he arrived at the hospital after the accident, plaintiff was crying. He had dried blood near the corner of his right eye, and was diagnosed with a one centimeter laceration. The cut did not require stitches, although a hospital physician told Elliott that the cut might leave a scar. Photographs taken of plaintiff after the accident were published to the jury, and plaintiff himself was shown to the jury. After the accident, Elliott and his wife treated plaintiff's cut with ointment and small bandages. Plaintiff did not like being bandaged, making the recommended treatment difficult to apply. In addition, plaintiff suffered from nightmares for a month after the accident. After his examination at the emergency room, plaintiff did not require any further medical treatment or counseling related to the accident. Plaintiff submitted evidence that his medical bills from the accident totaled \$216.

Based upon this evidence, the trial court instructed the jury on actual damages proximately resulting from the accident, but denied plaintiff's request for an instruction on permanent injury. On the issue of damages, the court instructed in relevant part as follows:

[A]ll damages are to be awarded in one lump sum[, and] may include medical expenses, pain

and suffering, scars or disfigurement. Medical expenses include all hospital, doctors, drugs reasonably paid or incurred by the plaintiff as a consequence of their injury. Damages for personal injury may also include fair compensation for the actual physical pain and mental suffering experienced by the plaintiff as a consequence of [his] injury. . . . You will determine what is fair compensation by applying logic and common sense to the evidence.

The jury awarded plaintiff \$350, which is \$134 more than his actual expenses. This award does not support a conclusion that the jury completely disregarded plaintiff's uncontroverted evidence of damages. Nor does the evidence establish unequivocally plaintiff's entitlement to a higher award for pain and suffering.

This Court's examination of the record and transcript reveals evidence about plaintiff tending to establish that (1) he did not lose consciousness during the accident, and suffered no broken bones; (2) he had a bruise and a small cut from the accident; (3) the cut did not require stitches, or any treatment beyond Neosporin and butterfly band aids; (4) plaintiff required no further medical treatment after his emergency room visit, and; (5) the jury was able to observe plaintiff first hand, to determine whether the cut left a scar. We conclude that there is ample support for the jury's award, and that the trial court erred in its conclusion that the explanation for the jury's verdict of \$350.00 must be prejudice.

We also conclude that the trial court erred in finding that the jury's verdict was rendered under the influence of prejudice against Maria, based on her national origin. This allegation is

not supported by the record. Although Maria was originally from Salzburg, Austria, we find nothing in the record that suggests the jury found her background to be an issue. The trial court did refer to Maria's "broken English." However, the transcript demonstrates that while Maria occasionally misused verb tenses, she did not require an interpreter, and none of her testimony required clarification due to linguistic difficulties. There was no suggestion that she found it a challenge to speak English, and the jury submitted no questions about her.

Moreover, the record does not support the trial court's finding that the jury acted in manifest disregard of the court's instruction to return a verdict that recompensed plaintiff in one lump sum for "all of his injuries, both present and future[.]" A review of the jury charge reveals that at no time did the court instruct the jury to consider future expenses. In fact, the court's charge on damages employed past tense verbs (paid, incurred, experienced). This is consistent with the trial court's determination that there was no basis upon which to instruct on permanent injury.

A trial court's ruling on a Rule 59(a) motion constitutes an abuse of discretion if it is based upon findings and conclusions not supported by the record. *Munie*, 109 N.C. App. 336, 427 S.E.2d 149; *Daum*, 105 N.C. App. 428, 413 S.E.2d 559, *disc. review denied*, 331 N.C. 383, 417 S.E.2d 789 (1992). In the instant case, we conclude that the record does not support the trial court's conclusions that (1) the jury's verdict was contrary to the

evidence and inadequate as a matter of law, (2) the jury's verdict was given under the influence of prejudice against plaintiff's grandmother, Maria, or that (3) the jury acted in manifest disregard of the court's instructions.

For the reasons discussed above, we reverse the trial court's order which vacated the jury's award and ordered a new trial; the jury's award is hereby reinstated.

Reversed.

Chief Judge EAGLES and MARTIN concur.

Report per Rule 30(e).