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NO. COA03-540

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

JOHN O. CARROLL,
Plaintiff-Appellant,

v.

BENNY STRICKLAND, a/k/a
BENNY STRICTON, WILLIAM
HUNTER and MICHAEL BLACK,
Defendants-Appellees.

Edgecombe County
No. 01 CVS 1482

Appeal by plaintiff from judgment and order entered 29 October 2002 by Judge James R. Vosburgh in Superior Court, Edgecombe County. Heard in the Court of Appeals 18 March 2004.

John O. Carroll, plaintiff-appellant, pro se (Brief filed by attorney of record Cedric R. Perry, whose motion to withdraw as counsel was allowed by this Court on 1 October 2003).

Poyner & Spruill LLP, by J. Nicholas Ellis, for defendant-appellee Benny Strickland.

Ward and Smith, P.A., by W.L. Allen, III and A. Charles Ellis, for defendant-appellee Michael Black.

McGEE, Judge.

John O. Carroll (plaintiff) filed suit on 13 November 2001 against Benny Strickland a/k/a Benny Stricton (Strickland), William Hunter (Hunter), and Michael Black (Black)(collectively defendants) alleging negligent infliction of emotional distress. Although originally designated a jury trial, plaintiff later waived his right to a jury trial and the action proceeded as a bench trial.

In a judgment entered 29 October 2002, the trial court dismissed plaintiff's complaint with prejudice.

The evidence at trial tended to show that plaintiff and defendants were employed in 1997 by Ansell Edmont Industrial, Inc. (Ansell), which manufactured work gloves. The parties regularly ate lunch together in Black's office. While all parties were in Black's office at lunchtime on or about 29 May 1997, Strickland revealed what appeared to be a pipe bomb ("bomb"). He held the "bomb," which contained no gunpowder, in his hand and lit the fuse. Strickland promptly put the fuse out. Plaintiff did not know at the time of the incident that the "bomb" was fake. Plaintiff reported the "bomb" incident to Ansell's human resources department sometime in late 1997.

The "bomb," manufactured by Hunter, consisted of a piece of plastic pipe with two plumbing caps. A hole had been drilled through the "bomb" and a piece of cannon fuse inserted. Strickland had supplied the cannon fuse and the two plumbing caps. Hunter and Strickland had devised the "bomb" as a practical joke, hoping to discourage what they perceived as plaintiff's repeated suicidal remarks suggesting that he would be better off dead. Neither Black, Hunter, nor Strickland intended any harm to come to plaintiff.

Plaintiff alleged that he suffered severe emotional distress as a result of the incident involving the "bomb" and that he required psychiatric treatment. Plaintiff first saw Dr. Kathy Diane Mayo (Dr. Mayo), a psychiatrist, on 13 March 1998. Plaintiff

sought to introduce at trial the deposition of Dr. Mayo. Black and Strickland made motions *in limine* requesting that Dr. Mayo's testimony be excluded. After reviewing the transcript of Dr. Mayo's deposition, the trial court found that Dr. Mayo was unable to render an opinion within a reasonable degree of certainty as to whether the "bomb" incident could have caused plaintiff's psychotic disorder. In an order entered 29 October 2002, the trial court granted Black's and Strickland's motions *in limine*. Plaintiff appeals the judgment and order of the trial court.

We first note that plaintiff has failed to comply with the North Carolina Rules of Appellate Procedure. "The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). Plaintiff's sole assignment of error is insufficient because he neglects to direct "the attention of [this] [C]ourt to the particular error about which the question is made, *with clear and specific record or transcript references*." N.C.R. App. P. 10(c)(1) (emphasis added). Plaintiff also failed to cite to his assignment of error in his brief in violation of N.C.R. App. P. 28(b)(6). Furthermore, plaintiff did not include in his brief a statement of the grounds for appellate review as required by N.C.R. App. P. 28(b)(4). Nonetheless, pursuant to N.C.R. App. P. 2, this Court elects in its discretion to review the merits of plaintiff's argument.

Plaintiff's only contention on appeal is that the trial court committed prejudicial error in granting Black's and Strickland's

motions *in limine* which resulted in the exclusion of Dr. Mayo's deposition. Plaintiff sought to introduce the testimony of Dr. Mayo in order to establish that the "bomb" incident was the proximate cause of plaintiff's severe emotional distress, and plaintiff asserts that as a result of the trial court's decision, he was unable to establish a *prima facie* case of negligent infliction of emotional distress.

In order to state a claim for negligent infliction of emotional distress, a plaintiff must allege that "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). "Proof of 'severe emotional distress' does not necessarily require medical evidence or testimony. However, appellate decisions have consistently upheld dismissal of [negligent infliction of emotional distress] and similar claims, where a plaintiff fails to produce any real evidence of severe emotional distress." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 450, 579 S.E.2d 505, 508 (2003) (internal citations omitted).

As to the admissibility of expert testimony, N.C. Gen. Stat. § 8C-1, Rule 702(a) (2003) provides that

> [i]f 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.

Recently, our Supreme Court stated that regarding expert testimony:

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C.G.S. § 8C-1, Rule 104(a) (2003). When making such determinations, trial courts are not bound by the rules of evidence. *Id.* In this capacity, trial courts are 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).

Howerton v. Arai Helmet, Ltd., ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2004). Thus, our appellate standard of review is whether the trial court's decision as to the admissibility of an expert's opinion or on the qualifications of an expert amounted to an abuse of discretion. *Id.*

Our Supreme Court, citing *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), recently directed the use of a three-step inquiry for ruling on the admissibility of expert testimony under Rule 702:

> (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?

Id. at ___, ___ S.E.2d at ___ (internal citations omitted). The issue before this Court concerns solely the third step of the inquiry. Defendants do not dispute that Dr. Mayo was a qualified expert in the field of psychiatry, nor do they question her methodology. Thus, the issue is whether Dr. Mayo's testimony was

rightly excluded on the basis of its relevancy. *See Id.* at ___. ___ S.E.2d at ___.

The North Carolina Rules of Evidence define relevant evidence as

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

N.C.G.S. § 8C-1, Rule 401. "Further, in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences." *Goode*, 341 N.C. at 529, 461 S.E.2d at 641.

Although an expert witness, depending on the general state of the evidence, may use terms such as "could" or "might" when the expert lacks complete certainty, "an opinion based upon inadequate facts and data should be excluded." Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence*, § 188 (6th ed. 2004); *see Johnson v. Piggly Wiggly of Pinetops*, *Inc.*, 156 N.C. App. 42, 49-50, 575 S.E.2d 797, 803, *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003) (Expert testimony on the issue of causation based on mere speculation or possibility is incompetent.). Typically, those "[c]ases finding 'could' or 'might' expert testimony to be sufficient often share a common theme - additional evidence which tends to support the expert's testimony." *Poole v. Copland, Inc.*, 125 N.C. App. 235, 241, 481 S.E.2d 88, 92 (1997), *reversed on other grounds*, 348 N.C. 260, 498 S.E.2d 602 (1998).

During Dr. Mayo's deposition, she indicated that she tentatively diagnosed plaintiff as suffering from a psychotic disorder, which served as a general diagnosis based on apparent paranoia. She noted that plaintiff, throughout the course of his treatment, repeatedly focused on an incident where a "'cherry bomb' [had been] thrown at him while he was at work" and referred as well to other work-related stresses. Dr. Mayo stated that she was never able to make a more specific diagnosis during her treatment of plaintiff because she "could not verify what happened on his job." Dr. Mayo relied entirely on plaintiff's representations to her regarding past psychological or emotional problems and she made no independent investigation. Furthermore, she was unable to recall at the time of her deposition what plaintiff had told her as to the "cherry bomb" incident. Dr. Mayo was unaware as to whether plaintiff had accounted as to when the incident had occurred, who had been involved, or whether plaintiff had mentioned the "bomb" was not real.

Furthermore, during her deposition, Dr. Mayo was unable to render an opinion as to the cause of plaintiff's emotional distress:

> Q: So is it fair to say at this point in time that you do not have an opinion as to whether or not the cherry bomb incident in and of itself more likely than not was the cause of [plaintiff's] psychotic disorder?
>
> A: I cannot say whether it was the cause or not.

Dr. Mayo was asked later during the deposition:

> Q: [Y]ou were asked to set aside information

> that you've been given today. I'm going to ask you not to do that. I'm going to ask you to deal with the facts as you know them to be. And [plaintiff] is suing these three men not for anything but the cherry bomb joke.
>
> And with you now knowing that there are other things out there that you've never been made aware of before, my question to you is do you have an opinion within a reasonable degree of medical certainty as to whether or not the cherry bomb incident by itself caused the psychotic disorder that you treated [plaintiff] for?
>
> . . .
>
> A: I would not be able to make an opinion because I would need more information.

After reviewing Dr. Mayo's deposition, we conclude that she was unable to form an opinion as to a causal relationship between the "cherry bomb" incident and plaintiff's alleged emotional distress. She admitted that she was unable to opine as to the cause of plaintiff's psychotic disorder. As such, her opinion would not serve to demonstrate whether plaintiff did or did not suffer severe emotional distress as a result of defendants' actions, and as such her testimony would not have assisted the jury in drawing a conclusion. We hold that the trial court did not err in excluding Dr. Mayo's deposition.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).