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NO. COA05-495

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

CLARENCE DEW

v.

Wilson County  
No. 02 CVS 2222

PAUL HRONJAK

Appeal by defendant from judgment entered 12 October 2004 and order entered 29 October 2004 by Judge Franklin R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 16 November 2005.

*Newton, Lee & Boyd, by Eldon S. Newton, III and Cyrus F. Lee, for plaintiff-appellee.*

*Wallace, Morris, Barwick, Landis, Braswell & Stroud, P.A., by Edwin M. Braswell, Jr. and Kimberly A. Connor, for defendant-appellant.*

JACKSON, Judge.

Clarence Dew ("plaintiff") was involved in an automobile accident in which Paul Hronjak ("defendant") collided with the rear of the vehicle that plaintiff was driving. Plaintiff filed a complaint 25 November 2002 alleging that defendant had negligently caused the collision and that defendant's negligence proximately caused him personal injuries and damages in excess of \$10,000.00. Defendant filed an answer 10 January 2003 in which he admitted that

the collision was proximately caused by his negligence, but denied that his negligence proximately caused plaintiff's injuries.

At trial the evidence tended to show that plaintiff had stopped at a stop sign and defendant stopped behind plaintiff in the same lane of travel. Plaintiff began to proceed forward and defendant also began moving forward at about "walking speed." Plaintiff testified that he observed a vehicle approaching the intersection at a high rate of speed from his right. To yield the right of way to the oncoming vehicle, plaintiff stopped again before fully entering the roadway. Defendant, who was looking to his left for oncoming traffic, did not see plaintiff's vehicle stop and bumped the back bumper of plaintiff's vehicle with the front bumper of his vehicle. Plaintiff testified that before the collision he did not know defendant's vehicle was behind him as he had not looked in his rearview mirror upon stopping at the stop sign.

Plaintiff further testified that he was wearing his seatbelt and that the collision caused his body to be propelled forward and to the right. Plaintiff immediately felt a sharp pain and vomited after getting out of his vehicle. Plaintiff was transported to the hospital by ambulance complaining of neck and back pain. The physician at the hospital gave plaintiff Motrin, and sent plaintiff home.

The damage to the vehicles was described by defendant and the investigating officer as minor. The rear bumper of plaintiff's vehicle was bent under slightly. The only damage suffered by

defendant's vehicle was that the plastic front license plate bracket was knocked off.

Plaintiff presented evidence of his subsequent medical treatment by a chiropractor for approximately six weeks and by a physical therapist for approximately four weeks through 3 August 2000. One year later, plaintiff presented to Dr. Kushner at Wilson Orthopedic Surgery and Neurology Center. Plaintiff testified that he did not seek additional treatment during that one year because payment was required before treatment was rendered and he did not have the money to pay the fees up-front. When plaintiff resumed treatment he underwent three back surgeries in October 2001, December 2002 and May 2003. Dr. Kushner testified that it was his opinion that plaintiff was injured in the vehicle accident in question. However, Dr. Kushner also testified that plaintiff had degenerative disk disease, and that plaintiff's injuries could have resulted from other causes such as sneezing or bending the wrong way.

At the close of all evidence defendant made a motion to amend his answer to conform to the evidence by including the defense of contributory negligence. Defendant's motion was denied by the trial court. Plaintiff then moved for directed verdict on the issue of whether plaintiff was injured as a result of defendant's negligence. The trial court granted plaintiff's motion for directed verdict on the grounds that defendant had admitted his negligence and that his negligence was the proximate cause of the accident in his answer. The court also pointed out that defendant

had denied that his negligence had proximately caused plaintiff's injuries, however, and, accordingly, only the issue of how much plaintiff was entitled to recover for personal injury would be submitted to the jury. Defendant objected to the issue of causation not being submitted to the jury, but the trial court maintained its position on the issue.

Consequently, the sole issue submitted to the jury was what amount plaintiff was entitled to recover from defendant for his personal injuries. The jury was instructed that plaintiff was entitled to recover nominal damages even without proof of actual damages. The jury was further instructed that to recover actual damages plaintiff had to prove by the greater weight of the evidence that defendant's negligence proximately caused his injuries and actual damages. Defendant objected to the jury instructions.

The jury returned a verdict in favor of plaintiff for damages in the amount of \$450,000.00. Defendant filed a motion for new trial which was denied. Defendant timely appealed the verdict and award.

Defendant makes thirteen assignments of error in the record on appeal, but presents argument in support of only six. Assignments of error for which no reason or argument is stated in appellant's brief are taken as abandoned. N.C. R. App. P. 28(b)(6) (2006). Accordingly, defendant's seven assignments of error not argued in his brief are deemed abandoned and are not considered on appeal.

Defendant's remaining assignments of error are: (1) the trial court's grant of plaintiff's motion for directed verdict on the issue of whether plaintiff's injuries were caused by defendant's negligence; (2) the trial court's failure to submit the issue of causation to the jury; (3) the trial court's grant of directed verdict in favor of plaintiff on the causation issue, as it denied defendant his right to trial by jury; (4) the trial court's instructions to the jury, as they constituted an expression of the court's opinion as to a material issue in the case; (5) the denial of defendant's motion to amend his answer to conform to the evidence at the close of all evidence; and (6) the denial of admission of evidence of plaintiff's health insurance coverage.

Defendant's initial argument incorporates the first three assignments of error listed above. Defendant contends that the trial court erred by granting plaintiff's motion for directed verdict as to all issues except damages as there were issues of material fact regarding whether defendant's admitted negligence proximately caused plaintiff's injuries. Defendant further argues that this error caused the trial court to fail to submit the issue of causation to the jury which deprived him of his right to a trial by jury.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Di Frega v. Pugliese*, 164 N.C. App. 499, 505, 596 S.E.2d 456, 461 (2004). "If there is more than a scintilla of evidence

supporting each element of the nonmovant's case, the motion for directed verdict should be denied.'" *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004) (quoting *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991)). An appellate court reviews a trial court's ruling on a motion for directed verdict *de novo*. *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 762 (2004).

In the case *sub judice*, plaintiff's complaint alleged the following facts:

8. The Defendant was negligent in that he:
  - a. negligently drove a vehicle on a highway or a public vehicular area at a speed greater than was reasonable and prudent under the conditions then existing, in violation of N.C.G.S. § 20-141(a);
  - b. negligently operating a motor vehicle upon a public street or highway without keeping a proper lookout, without paying proper attention and without keeping the vehicle under proper control;
  - c. negligently drove the vehicle upon a highway or public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger persons or property, in violation of N.C.G.S. § 20-140(b);
  - d. negligently drove from a stopped position without first seeing such movement could be made in safety, in violation of N.C.G.S. § 20-154(a); and

- e. negligently operated the vehicle in other ways which will be developed during Discovery and proven at trial.
- 9. The negligence of the Defendant was the proximate cause of the collision.
- . . . .
- 12. The negligence of the Defendant was the sole proximate cause of the Plaintiff's injuries.

To wit, defendant filed the following responses in his answer:

- 8. Denied. Without admitting, and while denying, the allegations of paragraph 8 including each and every subparagraph, defendant admits that the contact between the front of the vehicle he was driving and the rear of the vehicle driven by Clarence Dew was caused by Defendant's negligence.
- 9. The contact between the two vehicles was no more than a bump and certainly was not a collision; however, defendant admits that the contact between the two vehicles was proximately caused by his negligence.
- . . . .
- 12. Denied.

Thus, defendant admitted in his answer that there had been a collision between his vehicle and the vehicle driven by plaintiff, and that the collision itself was proximately caused by defendant's negligence. Defendant denied that his negligence had proximately caused plaintiff's injuries.

At trial, plaintiff moved for a directed verdict on the issue of whether or not plaintiff was injured because of defendant's negligence. The trial court partially granted plaintiff's motion for directed verdict. The trial court reasoned that defendant

admitted the accident was caused by the negligence of defendant, not that plaintiff's injuries were.

The trial court instructed the jury that, because defendant admitted negligence, then plaintiff was entitled to recover nominal damages without proof of actual damages. "[N]ominal damages are allowed where a legal right has been invaded but there has been no substantial loss or injury to be compensated." *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 9-10, 545 S.E.2d 745, 750 (citing *Potts v. Howser*, 274 N.C. 49, 61, 161 S.E.2d 737, 747 (1968)), *aff'd*, 354 N.C. 565, 556 S.E.2d 293 (2001). "Nominal damages are awarded in recognition of the right and of the technical injury resulting from its violation." *Potts*, 274 N.C. at 61, 161 S.E.2d at 747. Thus, as the proximate cause of the collision had been established as a result of defendant's admission, the trial court acted properly in not submitting this issue to the jury. Further, the trial court's instruction with regards to nominal damages also was proper.

The trial court further instructed the jury as follows:

Proximate cause is a cause which in a natural and continuous sequence produces a person's injury and is a cause which a reasonable and prudent person could have foreseen would probably produce such injury or some similar injurious result.

The court instructs you that even though the issue of who was at fault or who was negligent in causing the accident has been determined in the plaintiff's favor, the plaintiff must still prove to you by the greater weight of the evidence the extent of any injury and the amount of actual damages suffered by him proximately caused by the negligence of the defendant.



In other words, the plaintiff must prove to you, by the greater weight of the evidence, what injuries, if any, were suffered by him by the proximate cause by the negligence of the defendant and what damages, if any, he has sustained.

Although defendant admitted that his negligence caused the contact between the front of his vehicle and the rear of plaintiff's vehicle, defendant did not admit that his negligence caused the injuries to plaintiff's person. Thus, defendant admitted causation with regards to injury to property - not injury to person. In plaintiff's complaint, he seeks damages to "recover judgment against the Defendant for Plaintiff's personal injuries and damages in an amount in excess of \$10,000.00." Plaintiff bears the burden of proving all elements of negligence, including causation. See *McNeill v. R.R.*, 167 N.C. 390, 83 S.E. 704 (1914). As defendant did not admit to the causation of plaintiff's personal injuries, the trial court properly submitted to the jury the issues of "what injuries, if any" and "what damages, if any" defendant's negligence proximately caused.

Defendant was not deprived of his right to a trial by jury on the issue of causation of plaintiff's personal injuries, as his admissions established plaintiff's right to recover, at a minimum, nominal damages. In addition, the trial court partially granted plaintiff's motion for directed verdict, only on the issue of causation of the collision, not on the issues of causation of plaintiff's injuries and actual damages. Defendant does not contend the trial court incorrectly instructed the jury on plaintiff's burden of proof on the issue of actual damages. The

jury, after being properly instructed, determined that plaintiff had established that defendant's negligence had proximately caused personal injuries resulting in actual damages, and defendant's right to a jury trial was, therefore, afforded to him. These assignments of error are overruled.

Defendant's next argument is that the trial court's jury instruction, that if the jurors did not find plaintiff had established that his actual injuries were proximately caused by defendant's negligence then they should award plaintiff a nominal amount of damages, was an impermissible expression of opinion. However, as we have already held that defendant's admissions established plaintiff's right to nominal damages, the trial court's instructions on the issue were a correct statement of the law and did not constitute an impermissible opinion. Accordingly, this assignment of error is overruled.

Defendant next argues that the trial court abused its discretion by denying his motion to amend his answer at the close of all evidence. We review a trial court's denial of a motion to amend pleadings for an abuse of discretion. *Bass v. Johnson*, 149 N.C. App. 152, 157, 560 S.E.2d 841, 845 (2002). "'An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.'" *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001) (quoting *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998)).

When a trial court does not state its reasons for a ruling on a motion to amend pleadings, an appellate court "may examine any apparent reasons for the ruling." *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 166, 510 S.E.2d 690, 694, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999). Proper reasons to deny a motion to amend pleadings include, *inter alia*, undue delay by the moving party, unfair prejudice to the non-moving party, bad faith, and futility of the amendment. *Id.* The existence of several of these grounds is evident in the record. Most persuasive is the futility of the amendment. There was no evidence presented at trial that demonstrated plaintiff was negligent and contributed to the accident. Defendant asserts plaintiff was contributorily negligent in failing to check his mirrors. However, even had plaintiff been aware of defendant's presence behind him, as a practical matter he could not have prevented defendant from rear-ending him. Apparently defendant would have had plaintiff continue on into traffic rather than stopping to yield the right of way before determining that he could stop without being rear-ended. Undue delay is an additional basis apparent from the record as defendant waited until the close of all evidence before seeking leave to amend his answer.

As it is apparent from the record that the trial court had proper reason to deny defendant's motion to amend his answer we hold that the trial court did not abuse its discretion in denying defendant's motion. Accordingly, this assignment of error is overruled.

Finally, defendant argues that the trial court erred in denying the admissibility of evidence of plaintiff's health insurance. A plaintiff's receipt of benefits for injuries from sources other than defendant, or sources connected to defendant, generally is not admissible pursuant to the collateral source rule. The collateral source rule is premised on the principle that a tort-feasor's liability should not be reduced by compensation received from an independent source by the plaintiff. *White v. Lowery*, 84 N.C. App. 433, 436, 352 S.E.2d 866, 868, *disc. review denied*, 319 N.C. 678, 356 S.E.2d 786 (1987).

Defendant argues that evidence of plaintiff's health insurance was not sought to reduce any liability on his part, but rather to impeach plaintiff's testimony that he did not seek medical treatment for his injuries for a year-long period because he did not have the money to pay for the treatment. Introduction of evidence of plaintiff's health insurance for this purpose is not precluded by the collateral source rule. The showing of an erroneous evidentiary ruling alone, however, is not sufficient to warrant a new trial. See *Bowers v. Olf*, 122 N.C. App. 421, 427, 470 S.E.2d 346, 350 (1996) (citing *Board of Education v. Lamm*, 276 N.C. 487, 492, 173 S.E.2d 281, 285 (1970)). The party asserting error also must show that but for the error a different result likely would have occurred. *Id.*

In the case *sub judice*, plaintiff testified on *voir dire* that he could not afford to pay for treatment because his healthcare provider did not accept his insurance - not because he did not have

health insurance. Consequently, admission of evidence that plaintiff had health insurance would not have served to impeach his testimony regarding the reasons he did not seek treatment during that time period. It is unlikely, therefore, that admission of the disputed evidence would have resulted in a different outcome. Accordingly, this assignment of error is overruled.

No error.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).