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NO. COA05-672

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

MEBANE PARKS GRIFFIN,

Plaintiff,

v.

Halifax County  
No. 01 CVS 207

RAFEAL LOPEZ and  
GREYHOUND LINES, INC.,

Defendants.

Appeal by plaintiff from order entered 15 September 2004 by Judge D. Jack Hooks, Jr. in Halifax County Superior Court. Heard in the Court of Appeals 25 January 2006.

*Marcari, Russotto & Spencer, P.C., by Frank D. Lawrence, III, for plaintiff-appellant.*

*Young Moore and Henderson P.A., by Brian O. Beverly and Nathan J. Taylor, for defendants-appellees.*

ELMORE, Judge.

Mebane Parks Griffin (plaintiff) commenced the instant action by filing a complaint on 8 February 2001. Plaintiff alleged that Rafeal Lopez (Mr. Lopez) was negligent in operating a bus owned by Greyhound Lines, Inc. (Greyhound) while acting in the scope of his employment with Greyhound. Greyhound filed an answer on 15 October 2001 and pled as an affirmative defense the contributory negligence of plaintiff.

At trial, plaintiff's evidence showed that on 17 February 1998 plaintiff was driving in the right lane of Interstate 95 northbound near Roanoke Rapids, North Carolina. At approximately 8:15 a.m., plaintiff approached a construction site. Plaintiff reduced her speed to about forty miles per hour as she drove towards the construction area. Plaintiff observed a construction sign lying in the road ahead of her. The cars in front of her were driving over it, and she was preparing to drive over it also. Plaintiff took her foot off the gas pedal to reduce her speed a little as she approached the sign. Plaintiff testified that the two lanes merged into one lane, with the left lane merging into the right lane. When the bus attempted to merge over, it struck plaintiff's vehicle from behind. Plaintiff's head hit the steering wheel, and the force of the collision caused plaintiff's seat to break.

Trooper Brandon Gardner of the North Carolina Highway Patrol investigated the accident. Trooper Gardner determined that plaintiff's speed at the time of the collision was 20 miles per hour and that the bus was traveling at 40 miles per hour. In the accident report, Trooper Gardner stated that he was unable to determine whether plaintiff's vehicle had completely stopped in the road. He stated that it was also unclear if plaintiff drove into the adjacent lane to avoid the sign or if the bus was changing lanes at the time and was not completely in the outside lane. Due to the wet road, Trooper Gardner could not find skid marks on the highway. One of the passengers on the bus, Paul Popke, also provided information concerning the accident.

Mr. Drew Shearin testified that he was driving in the right lane on Interstate 95 northbound and approached the beginning of the construction area around 8:30 or 9:00 a.m. He stated that the highway was wet. In his rearview mirror, Mr. Shearin observed a Greyhound bus that was traveling at a high rate of speed. Mr. Shearin testified that the bus was two and a half feet in his lane and would have hit him if he had not moved to the right quickly. Mr. Shearin did not see the accident happen, but he came upon the accident three miles down the road.

Defendants' evidence showed Mr. Lopez was traveling northbound on Interstate 95 and that he reduced his speed to about forty miles per hour as he approached the construction zone. Mr. Lopez observed a stop sign leaning toward the highway and a speed sign laying flat on the highway in the right lane. He testified that he moved to the left lane in order to avoid these signs. Suddenly, a blue car came almost to a complete stop in front of the bus. The car swerved a little to the left, and the right corner of the bus hit the left corner of the car. He stated that he could not move over to avoid the car because there was a concrete barrier to his left. Mr. Lopez was about four or five seconds behind the car and traveling at forty miles per hour at the time that the car swerved over.

On cross-examination by defense counsel, Trooper Gardner testified that the lanes did not merge into one at any point on the highway near the scene of the collision. Defendants presented a video deposition of Mr. Popke, a passenger on the bus, over the

objection of plaintiff. Mr. Popke testified that a blue car coming from the right-hand side of the bus got in front of the bus. He stated that there was a truck passing on the left-hand side of the bus and that the driver could not move to the left without hitting the truck. The bus bumped the car from behind. Mr. Popke stated that there were two lanes going northbound and an access lane and on-ramp. The blue car had entered from the on-ramp.

The case was tried during the 26 April 2004 session of Halifax County Superior Court. On 29 April 2004 the jury returned a verdict in favor of defendants. On 21 May 2004 plaintiff filed a motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial. Plaintiff's motions were heard on 30 August 2004. In an order entered 15 September 2004, the trial court denied plaintiff's post-trial motions. Plaintiff appeals.

Plaintiff's first assignment of error on appeal asserts that the trial court erred in overruling her motion to strike the opinion testimony of Mr. Popke presented in the videotaped deposition. However, plaintiff did not file notice of appeal from the underlying judgment entered as a result of the jury verdict in defendants' favor. Plaintiff's failure to specify the underlying judgment in the notice of appeal prevents this Court from reviewing her assignment of error relating to an evidentiary ruling of the trial court. See *Brewer v. Spivey*, 108 N.C. App. 174, 176, 423 S.E.2d 95, 96 (1992) ("Defendant Acura assigns several errors to the trial court. However, as Acura's notice of appeal is only from

the order . . . denying Acura's motion for judgment notwithstanding the verdict, we do not address any issue raised with regard to the underlying judgment . . . . See N.C.R. App. P. 3(d); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422 (1990).").

In *Von Ramm*, this Court stated that "[n]otice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review." *Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 425 (1990). The Court there held that it had jurisdiction to consider only the appeal from the trial court's order denying the defendant's Rule 59 motion because the face of the defendant's notice of appeal did not specify any other judgment or order. Here, as in *Von Ramm*, the Court has jurisdiction to review only the appeal from the order denying plaintiff's post-trial motion. See *id.*; see also *Fenz v. Davis*, 128 N.C. App. 621, 623, 495 S.E.2d 748, 750 (1998) (no jurisdiction to review assignments of error concerning trial proceedings where notice of appeal specifies only the order denying motion for a new trial).

Plaintiff contends that the trial court erred in denying her motion for a judgment notwithstanding the verdict. The standard of appellate review applied to a trial court's denial of a motion for a judgment notwithstanding the verdict is the same as for review of a denial of a motion for a directed verdict: whether there is sufficient evidence to sustain a jury verdict in the non-movant's favor or to present a jury question. See *Davis v. Dennis Lilly*

Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991); *Horner v. Byrnett*, 132 N.C. App. 323, 325, 511 S.E.2d 342, 344 (1999). In ruling upon a motion for a directed verdict, the court should consider the evidence in the light most favorable to the non-moving party. *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). If the non-movant establishes more than a scintilla of evidence to support each element of his case, then the court should deny the motion for a directed verdict. *Id.* The grant of a directed verdict in a negligence case is rare because application of the prudent man test is ordinarily for the jury. *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990).

Plaintiff challenges the sufficiency of defendants' evidence establishing that Mr. Lopez was not negligent in operating the Greyhound bus. In particular, plaintiff argues that there was a conflict between the testimony of Mr. Popke and Mr. Lopez, defendants' witnesses. Mr. Popke testified that the bus could not move to the left lane because a truck was there; Mr. Lopez stated that he moved into the left lane to avoid the leaning traffic sign ahead in the right lane. Plaintiff contends that such a conflict in defendants' evidence renders this evidence incredible. However, any conflicts or discrepancies in the evidence must be resolved in favor of defendants on plaintiff's motion for a directed verdict. *McFetters*, 98 N.C. App. at 191, 390 S.E.2d at 350 ("In deciding the motion [for a directed verdict], the trial court must treat non-movant's evidence as true, considering the evidence in the light

most favorable to non-movant, and resolving inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence.”). The trial court properly denied plaintiff’s motion for a directed verdict.

Finally, as another basis for a new trial, plaintiff argues that the jury manifestly disregarded the instruction given by the trial court on “Following Too Closely.” However, plaintiff did not raise this issue in her Assignments of Error stated in the Record. Plaintiff’s failure to assign error in the Record precludes the Court from considering this assertion on appeal. See N.C.R. App. P. 10(a).

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).