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NO. COA11-1566  
NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2012

VICTOR LEE CARRINGTON,  
Plaintiff,

v.

Wake County  
No. 09 CVS 12130

JANET THERESA DEPAOLI and  
CHRISTOPHER FREDERICK DUNN,  
Defendants.<sup>1</sup>

Appeal by Plaintiff from judgment entered 16 August 2010 and orders filed 5 October 2010 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 15 August 2012.

*Ingram Law Office, by John Randolph Ingram II, for Plaintiff.*

*Hall, Rodgers, Gaylord & Millikan, PLLC, by Jonathan E. Hall and Kathleen M. Millikan, for Defendant.*

STEPHENS, Judge.

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<sup>1</sup>The captions of the appealed-from judgment and orders list only Janet Theresa Depaoli as a defendant. However, the complaint was filed against both Janet Theresa Depaoli and Christopher Frederick Dunn and, along with various other documents in the record on appeal, including post-trial documents, has a caption reflecting such. Because there is no indication in the record before this Court that Christopher Frederick Dunn is no longer a party to the action, we include his name in the caption.

Plaintiff Victor Lee Carrington commenced the present action by filing a complaint against Defendants Janet Theresa Depaoli and Christopher Frederick Dunn, alleging Depaoli was negligent in her operation of a vehicle owned by Dunn when she "rear-ended" Carrington's stopped vehicle. At trial, Depaoli stipulated that she was negligent in her operation of the vehicle, but denied that her negligence was a proximate cause of Carrington's injury. The case was tried before a jury on 27 and 28 July 2010 in Wake County Superior Court, the Honorable Paul G. Gessner presiding.

The evidence presented at trial tended to show that on 19 April 2008, Carrington was stopped at a stoplight when Depaoli, operating Dunn's vehicle, rear-ended Carrington's vehicle. Shortly after, Carrington, complaining of lower back and left leg pain, went to the emergency room, where he was diagnosed with "[b]ack [p]ain, [m]otor [v]ehicle [c]rash" and prescribed medication for pain.

On 21 April 2008, Carrington, complaining of neck and back pain and tingling and soreness in his left thigh, visited a chiropractor and was diagnosed with lower back spasm and tenderness. Symptoms unimproved, Carrington began visiting his personal physician in June 2008 and continued until August 2008,

at which time an MRI revealed a herniated disc. Carrington was then referred to Dr. Joseph Minchew, an orthopedic surgeon, for evaluation. According to Dr. Minchew, Carrington's August MRI revealed some spinal canal narrowing conditions that were both congenital and degenerative in nature. Carrington underwent surgery on 18 December 2008 for his herniated disc.

Following surgery, Carrington experienced lower back pain, which became progressively worse. An MRI performed on 17 March 2009 revealed a cyst at the surgery site. Upon referral by Dr. Minchew, Dr. Michael Haglund evaluated Carrington's cyst and performed removal surgery on 10 August 2009. As of 20 January 2010, Carrington was experiencing a significant improvement in symptoms and a return to moderate physical activity.

The evidence further showed that, prior to the accident at bar, Carrington was involved in a rear-end collision in April 2002, after which he experienced back and neck pain. Carrington testified that he fully recovered from that collision by September 2002 and participated in several physical activities including running, tennis, and softball, symptom-free, in the approximately six years between recovery and the 2008 accident. Additionally, on 10 March 2008, Carrington fell down the stairs and hit his head on the sidewalk at his residence. Carrington

testified to no back or leg injuries as a result, but did receive stitches on his forehead.

Of primary interest on appeal is the testimony of Dr. Minchew, which tended to show that Carrington had certain pre-existing back conditions at the time of the accident at issue. Carrington's counsel attempted to show that, despite these back conditions, Carrington was in ordinary physical condition before the 2008 accident, showing no signs or symptoms of back pain. Conversely, Defendants' counsel contested the issue of proximate cause, attempting to show that Carrington's pre-existing conditions, even in the absence of the accident, could have caused his injury.

Following presentation of the evidence, the jury returned a verdict in favor of Defendants, finding Depaoli's negligence was not a proximate cause of Carrington's injury.

On 18 August 2010, Carrington filed a motion for a new trial, contending, *inter alia*, that the trial court improperly instructed the jury on Carrington's "peculiar susceptibility" on the issue of proximate cause. Thereafter, Defendants filed a motion for costs. In separate orders filed 5 October 2010, the trial court denied Carrington's motion for a new trial and granted Defendants' motion for costs. Carrington appeals from

those orders, as well as the trial court's judgment entered upon the jury's verdict.<sup>2</sup>

On appeal, Carrington first argues that the trial court erred by instructing the jury on peculiar susceptibility. The pertinent portion of the challenged instruction is as follows:

In deciding [whether] the injury to [Carrington] was a reasonably foreseeable consequence of [Depaoli's] negligence you must determine whether such negligent conduct under the same or similar circumstances could reasonably have been expected to injure a person of ordinary physical condition.

If so, the harmful consequences resulting from [Depaoli's] negligence would be reasonably foreseeable, and therefore would be a proximate cause of [Carrington's] injury.

If not, the harmful consequences resulting from [Depoali's] negligence would not be reasonably foreseeable, and therefore would not be a proximate cause of [Carrington's] injury.

Carrington contends that this instruction was erroneous because it was not supported by the evidence. We disagree.

A trial court's instruction on the issue of peculiar susceptibility is not erroneous if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of the existence of peculiar susceptibility. *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994).

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<sup>2</sup>Dunn did not file a brief on appeal.

Further, this Court has held that a "jury instruction on peculiar susceptibility is warranted where a pre-existing condition aggravates an injury suffered by the plaintiff." *Hughes v. Webster*, 175 N.C. App. 726, 730, 625 S.E.2d 177, 181 (citation omitted), *disc. review denied*, 360 N.C. 533, 633 S.E.2d 816 (2006). "[W]here a pre-existing [] physical condition is aggravated or enhanced by a defendant's negligence, the defendant is liable only to the extent that the underlying condition is enhanced and not for damages attributable to the original condition." *Holtman v. Reese*, 119 N.C. App. 747, 749-50, 460 S.E.2d 338, 341 (1995) (citation omitted).

In this case, regarding Carrington's pre-existing back conditions - stenosis, facet athrosis, and canal narrowing - Dr. Minchew testified, in pertinent part:

[Defendants' counsel:] And all these conditions were present prior to this motor vehicle accident in April of 2008?

[Dr. Minchew:] Almost assuredly, yes.

[Defendants' counsel:] They're all either age-related or congenital?

[Dr. Minchew:] Correct.

[Defendants' counsel:] And each of them taken alone can lead to pain symptoms similar to those [] Carrington experienced?

[Dr. Minchew:] Correct.

[Defendants' counsel:] And certainly a combination of them could, as well?

[Dr. Minchew:] Correct.

[Defendants' counsel:] And according to

your prior testimony in this case, it would not surprise you, would it, if someone with the same combination of underlying congenital and age-related issues experienced pain symptoms similar to those [] Carrington complained of regardless of whether or not they ever had a motor vehicle accident?

[Dr. Minchew:] Correct.

[Defendants' counsel:] And in [] Carrington's case in particular, putting aside any motor vehicle accidents or falls that he may have had, and just looking at his underlying age-related and congenital issues, . . . you can't predict one way or the other if he would have ultimately have had the exact same complaints . . . or ultimately w[ound] up having the same type of surgery; is that correct?

[Dr. Minchew:] [Y]ou're absolutely--you're absolute correct.

As Carrington's back conditions pre-existed the accident, and raised an issue regarding the proximate cause of Carrington's injury, the instruction on peculiar susceptibility was warranted. Dr. Minchew stated that Carrington's injury could occur acutely after his prior collision in 2002 or his fall in 2008. Additionally, even if those prior incidents did not cause the injury, either or both could contribute to an acute injury years later.

Similar to the case at bar, in *Taylor v. Ellerby*, 146 N.C. App. 56, 552 S.E.2d 667 (2001), an instruction on peculiar susceptibility was warranted after the presentation of evidence

contesting proximate cause of the plaintiff's knee injury following an automobile collision. *Id.* at 66, 552 S.E.2d at 673. The plaintiff's physician testified that (1) an injury of her sort would typically cause immediate pain, (2) the wear and tear to her knee was somewhat greater than average, and (3) she was born with a pre-existing knee condition which could, on its own, cause the pain reported. *Taylor*, 146 N.C. App. at 61, 522 S.E.2d at 670-71.

In this case, Dr. Minchew noted that disc herniation – the actual tearing of the disc fibers – is an acute and severely painful event in most cases, but age-related changes occurring over many years can lead to an acute herniation. As such, Dr. Minchew was not certain whether the herniation occurred abruptly due to trauma or due to years of age-related changes that slowly weakened the disc fibers. Dr. Minchew also stated that Carrington's back suffered wear and tear pre-existing the accident which could be categorized as unhealthy, and Carrington's pre-existing back conditions, absent trauma, could have caused Carrington's injury.

Nevertheless, Carrington contends the instruction was not warranted because (1) Carrington's condition was not "peculiar" or "abnormal" and (2) Carrington did not suffer any pain or



injury related to his pre-existing conditions prior to the accident. However, neither of these circumstances is required to warrant the instruction given.

First, Carrington's argument incorrectly interprets the use of peculiar susceptibility as indicating a plaintiff has a "peculiar" condition rather than merely a "pre-existing" condition. Carrington tried to demonstrate that his conditions were not abnormal or peculiar, but never contested their pre-existing nature. As stated, the requirement is only that a plaintiff have a *pre-existing* condition, not necessarily an abnormal or peculiar one. See *Hughes*, 175 N.C. App. at 730, 625 S.E.2d at 181.

Second, Carrington incorrectly contends that to warrant the peculiar susceptibility instruction, he must have suffered some pain or injury related to the pre-existing condition prior to the 2008 accident. However, in footnote 1 to the instruction for "Proximate Cause-Peculiar Susceptibility," the North Carolina Pattern Jury Instructions for Civil Cases defines injury as including "all legally recognized forms of personal harm, including *activation* or *reactivation* of a disease or *aggravation* of an existing condition." N.C.P.I.—Civ. 102.20 (gen. civ. vol. 1998) (emphasis added). Thus, to warrant the

instruction, the plaintiff need not have a condition that was re-activated or aggravated. Instead, that condition could simply have been activated for the first time. Thus, there was no need for evidence showing that Carrington's pre-existing condition had caused him pain prior to the 2008 accident.

In sum, the evidence, viewed in the light most favorable to Defendants, sufficiently shows that Carrington's injury could have been caused by a pre-existing physical condition and, therefore, the jury instruction was warranted. The trial court did not err, and Carrington's argument is overruled.

Carrington next argues that the trial court erred in denying his motion for a new trial on grounds that the jury manifestly disregarded the instructions of the trial court and the jury's award of no damages was a manifest injustice. A motion for a new trial is addressed to the sound discretion of the trial judge, whose ruling, absent abuse of discretion, shall not be disturbed on appeal. *Yeargin v. Spurr*, 78 N.C. App. 243, 246, 336 S.E.2d 680, 681 (1985).

For each argument, Carrington similarly contends that because (1) Depaoli stipulated she was negligent, (2) Carrington was not contributorily negligent, and (3) Carrington was of

ordinary physical condition, the jury's award of no damages and the trial court's denial of a new trial was error. We disagree.

As discussed *supra*, given the evidence of Carrington's pre-existing physical condition, which contested the issue of proximate cause, the jury instruction on peculiar susceptibility was warranted. As such, the jury was justified in finding that Depaoli's negligence was not a proximate cause despite her stipulation that she was negligent and absent evidence of any negligence on Carrington's part. See *Smith v. Price*, 315 N.C. 523, 530-31, 340 S.E.2d 408, 413 (1986) (holding that a jury is free to "draw its own conclusions about the credibility of the witnesses and the weight to accord the evidence"); see also *Taylor*, 146 N.C. App. at 61-62, 552 S.E.2d at 671 (upholding the trial court's ruling in favor of the jury's verdict for the defendant "[d]ue to the conflicting nature of the evidence on causation").

Nevertheless, Carrington argues that because he suffered injury and incurred medical expenses, the jury's verdict and the trial court's denial of his motion for a new trial were contrary to all evidence. Carrington incorrectly contends that the jury's verdict said "no injury." The jury did not return a verdict finding "no injury." Rather, the jury found that

Carrington was not injured *as a result* of Depaoli's negligence. *Cf. Taylor*, 146 N.C. App. at 58, 552 S.E.2d at 669 (noting that the jury's verdict did not find "no injury," only that the plaintiff was not injured by the defendant's negligence). Due to the contested nature of proximate cause, the evidence did support the jury's verdict and award of no damages. As such, the trial court did not abuse its discretion in denying Carrington's motion for a new trial.

Carrington also argues that the trial court erred in denying his motion for a new trial on the ground that Defendants' counsel improperly told the jury in closing argument that it could consider Carrington's "alternative lifestyle," which Carrington contends meant his homosexual lifestyle, in their deliberations. Carrington argues that this statement, combined with previous arguments on Carrington's ordinary physical condition, shows the jury's award of no damages was actuated by bias or prejudice against homosexuals.

The alleged improper statements, if true, are certainly irrelevant to the issues raised by this case and are highly inappropriate. However, because the closing arguments were not transcribed and included in the record, this Court is precluded from addressing Carrington's contention. *Heatherly v. Indus.*

*Health Council*, 130 N.C. App. 616, 624, 504 S.E.2d 102, 108 (1998); *see also* N.C. R. App. P. 9(a) ("In appeals . . . review is solely upon the record on appeal, the verbatim transcript of the proceedings . . . and any other items filed . . ."). This Court "cannot assume or speculate that there was prejudicial error when none appears on the record before it." *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 (1985), *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985). Carrington's argument is overruled.

Finally, Carrington contends that, because the jury was improperly instructed, acted in disregard of the trial court's instructions, and returned a verdict that reflected a bias against homosexuality, the trial court's award of costs to Defendants was improper. This Court reviews the reasonableness and necessity of costs for abuse of discretion. *Peters v. Pennington*, \_\_ N.C. App. \_\_, \_\_, 707 S.E.2d 724, 741 (2011).

Section 6-1 of the North Carolina General Statutes states that "[t]o the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter." N.C. Gen. Stat. § 6-1 (2011). The following, among others, are recoverable costs: witness fees, counsel fees, expense of service of process, mediator fees, deposition fees, and fees

covering the time of expert witnesses. N.C. Gen. Stat. § 7A-305(d) (2011). Defendants submitted a verified motion documenting recoverable costs incurred.

Nothing in the record indicates the trial court abused its discretion in granting Defendants' motion for costs. This is supported by the foregoing conclusion that the trial court properly instructed the jury on peculiar susceptibility due to Carrington's pre-existing back conditions and the contested proximate cause of Carrington's injury. Therefore, the jury was free to decide Depaoli's negligence was not a proximate cause of Carrington's injury. Because the verdict in favor of Defendants was permissible, so too was the award of costs to Defendants pursuant to N.C. Gen. Stat. § 6-1. Carrington's argument is overruled.

Based on the foregoing, we find no error at trial or in the trial court's orders denying Carrington's motion for a new trial and awarding costs to Defendants.

NO ERROR at trial; post trial orders AFFIRMED.

Judges BRYANT and THIGPEN concur.

Report per Rule 30(e).