IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 14-1195

Filed: 5 May 2015

Lincoln County, No. 12 CVS 1518

DAVID KEITH GEORGE, Plaintiff,

v.

DERRICK DALE COOPER, JR. and DEBORAH BROWN COOPER, Defendants.

Appeal by Plaintiff from order and judgment filed 6 March 2014 by Judge C. Thomas Edwards in Lincoln County Superior Court. Heard in the Court of Appeals 8 April 2015.

Gilpin Law Offices, PLLC, by David W. Gilpin, for the plaintiff-appellant.

Burton, Sue & Anderson, L.L.P., by Stephanie W. Anderson and Walter K. Burton, for the defendants-appellees.

STEELMAN, Judge.

Where there is no record of defense counsel's statements during closing argument, plaintiff's argument that the trial court erred in denying his motion for a new trial is dismissed. Where evidence supported the jury's verdict, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial. Plaintiff's counsel is sanctioned for a gross violation of the North Carolina Rules of Appellate Procedure.

I. Factual and Procedural Background

On 9 July 2007, a collision occurred in Lincoln County between a motor vehicle operated by David Keith George (plaintiff) and one operated by Derrick Dale Cooper, Jr. (defendant) and owned by Deborah Brown Cooper (collectively defendants). After taking a voluntary dismissal without prejudice of a suit filed in 2010, plaintiff filed a second lawsuit on 30 November 2012 seeking damages for personal injuries allegedly caused by the collision. Pursuant to N.C. Gen. Stat. § 20-279.21(b)(4), plaintiff gave notice of the suit to his underinsured motorist carrier, which appeared as an unnamed defendant in the action.

Prior to trial, the trial court granted plaintiff's motion *in limine* to prohibit defendants from making statements or references to plaintiff being motivated by financial gain or greed in bringing the lawsuit. Defendants stipulated that defendant had been negligent, but did not stipulate that plaintiff's alleged injuries were proximately caused by that negligence. After the case was submitted to the jury, but prior to the return of a verdict, the parties placed in the record their agreement that the maximum amount that plaintiff could recover was $250,000, and the minimum recovery would be $30,000, regardless of the jury verdict.

The jury answered the first issue, "Was the Plaintiff David George injured as a result of the stipulated negligence of Defendant Derrick Cooper?" in the negative. The trial court entered judgment in favor of plaintiff in the amount of $30,000, found

that this sum had previously been paid to plaintiff, and directed the Clerk of Court to mark the judgment satisfied. Plaintiff moved for judgment notwithstanding the verdict and for a new trial. Both motions were denied.

Plaintiff appeals the denial of his motion for a new trial.

II. Standard of Review

"[A]n 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." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "[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 487, 290 S.E.2d at 605.

III. Motion for a New Trial

Plaintiff contends that the trial court erred in denying his motion for a new trial because defense counsel purportedly made improper statements during closing argument, and because evidence was presented to suggest that plaintiff's injuries were proximately caused by defendant's negligence. We disagree.

A. Statements of Defense Counsel During Closing Argument

An appeal is reviewed "solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9." N.C. R. App. P. 9(a). "An appellate 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) (citations omitted). In *Moore*, the defendant complained of improper closing argument by the prosecutor. *Id.* at 547, 331 S.E.2d at 254. The closing argument was not recorded, and defendant declined the offer of the trial court to reconstruct for the record what occurred during closing argument. *Id.* at 547–48, 331 S.E.2d at 254. We held that without a record of the closing argument, "we are precluded from reviewing that argument on appeal." *Id.* at 548, 331 S.E.2d at 254–55.

In the instant case, plaintiff argues that defense counsel made certain arguments in violation of the trial court's order granting plaintiff's motion *in limine*. However, the closing arguments of counsel to the jury were not recorded, nor has plaintiff attempted to reconstruct on the record the arguments of counsel. Without a record upon which to review plaintiff's contentions, we must dismiss this argument.

B. Insufficient Evidence

It is the role of the jury to "weigh the evidence, determine the credibility of the witnesses, the probative force to be given their testimony and determine what the evidence proved or did not prove." *Daniels v. Hetrick*, 164 N.C. App. 197, 204, 595

S.E.2d 700, 704–05 (2004) (citing *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979)). The jury is entitled to "draw its own conclusions about the credibility of the witnesses and the weight to accord the evidence." *Smith v. Price*, 315 N.C. 523, 530, 340 S.E.2d 408, 413 (1986). "[A] jury can believe all, part, or none of what an expert says." *Powell v. Shull*, 58 N.C. App. 68, 75, 293 S.E.2d 259, 263 (1982).

Plaintiff argues that the jury's verdict was contrary to the weight of the evidence. The first issue to be decided by the jury was whether plaintiff's injuries were proximately caused by the admitted negligence of defendant. Plaintiff relies upon the testimony of his treating physicians, Dr. Hillsgrove and Dr. Adamson in support of his argument. Dr. Hillsgrove testified that the accident "contributed to the diagnosis of herniated nucleus pulposus in Mr. George." Dr. Adamson testified that plaintiff's injuries were related to the accident based upon the "fact that his symptoms had onset at the time of his motor vehicle accident[.]"

However, at trial, plaintiff testified that he had three other low back injuries prior to the accident. At one point, surgery was recommended for plaintiff's back condition, which he elected to not have performed. Plaintiff admitted that his prior complaints as to his back were "virtually the exact same complaint" as he made after the accident. On cross-examination, Dr. Hillsgrove testified that plaintiff had similar ongoing back problems for more than a year prior to the accident and that plaintiff had failed to include a 2001 auto accident in his medical history. Dr. Adamson

testified that his opinion was based upon the temporal relationship of the accident and the onset of plaintiff's symptoms.

Based upon the uncontradicted evidence of plaintiff's prior back injuries, his failure to disclose his entire medical history to his treating physicians, and the similarity of plaintiff's complaints concerning the condition of his back prior to and subsequent to the accident, we cannot say that the trial court abused its discretion in denying plaintiff's motion for a new trial.

This argument is without merit.

IV. Sanction of Plaintiff's Counsel

Rule 28(j)(2)(A) of the Rules of Appellate Procedure provides the following with respect to the spacing on pages of a party's brief: "A page shall contain no more than twenty-seven lines of double-spaced text of no more than sixty-five characters per line." N.C. R. App. P. 28(j)(2)(A). The brief submitted by plaintiff's counsel is single-spaced in its entirety. The requirement that a brief be double-spaced is not a recent change to the Rules of Appellate Procedure. Rather than striking plaintiff's brief or dismissing his appeal, in our discretion we impose the lesser sanction of imposing the costs of the appeal upon plaintiff's counsel for gross violation of the appellate court rules. N.C. R. App. P. 34.

DISMISSED IN PART, NO ERROR IN PART.

Judges STEPHENS and MCCULLOUGH concur.

Report per Rule 30(e).