IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 18-1013

Filed: 3 September 2019

Mecklenburg County, No. 17 CVS 148

LAURA STEWART, Plaintiff,

v.

TASSEW ASFAW MESHESHA, Defendant.

Appeal by Plaintiff from judgment entered 12 February 2018 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 March 2019.

Osborne Law Firm, P.C., by Curtis C. Osborne, for Plaintiff-Appellant.

Teague Rotenstreich Stanaland Fox & Holt, P.L.L.C., by Kenneth B. Rotenstreich and Kara V. Bordman, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff Laura Stewart appeals from judgment entered upon a jury verdict awarding Plaintiff nominal damages on her negligence cause of action, which arose from an automobile collision in which Plaintiff's vehicle was struck by Defendant Tassew Asfaw Meshesha's vehicle. Plaintiff contends that the judgment's damage award is inadequate and that she is entitled to a new trial. Plaintiff failed to properly

preserve the issues she presents for our review, and we accordingly dismiss Plaintiff's appeal.

I. Background

At trial, the evidence tended to show the following: On 18 January 2012, Plaintiff was driving through an intersection when her vehicle was struck by Defendant's vehicle. Plaintiff initially declined treatment, but agreed to be taken to the hospital by ambulance. Before being transported to the hospital, Plaintiff reported pain in her right wrist and left knee. At the hospital, Plaintiff was diagnosed with visible blood in her urine, a bruised knee, shoulder pain, and painful respiration.

Over a period of four years following the accident, Plaintiff received care from her primary care physician, Dr. Wanda Robinson, as well as several specialists, including (1) orthopedic surgeons Dr. Joseph Estwanik and Dr. Dana Piasecki and (2) urologist Dr. Michael Kenelley. Over the same time period, Plaintiff also underwent physical therapy to treat neck and knee pain.

On 3 January 2017, Plaintiff filed a complaint bringing a cause of action for negligence, in which she sought compensatory and punitive damages from Defendant for injuries, pain, and suffering allegedly resulting from the accident. Defendant responded on 1 March 2017 (1) admitting negligence in failing to yield the right-of-way, (2) denying proximate causation, (3) moving to sever compensatory and punitive

damages, and (4) raising several affirmative defenses. Plaintiff subsequently voluntarily dismissed her claim for punitive damages.

During jury selection, counsel for Defendant mentioned that Defendant was a naturalized immigrant from Ethiopia and had suffered a stroke. Plaintiff did not object to either of these statements, despite making other objections during jury selection.

A trial was held from 22-26 January 2018. The bulk of the trial was devoted to the testimony of the four physicians who treated Plaintiff, presented via video deposition. These physicians generally testified that while some of Plaintiff's conditions were likely caused by the accident, they could also be exacerbations of pre-existing conditions, and some testimony was given that Plaintiff's ailments were treated as having an unknown cause. After Plaintiff rested her case, Defendant did not introduce any exhibits or call any witnesses.

The trial court instructed the jury that it had to weigh the credibility of the witnesses, including the experts, and that it also had to determine the relative weight of the evidence presented. The trial court explained Plaintiff's burden of proof on the issues of proximate causation and damages, and specifically instructed the jury that if they found that Defendant's negligence was a proximate cause of an injury to Plaintiff, but failed to find an "amount of actual damages proxima[te]ly caused by the

negligence of the Defendant[,]" it would be their duty to award Plaintiff nominal damages.

On 26 January 2018, the jury returned a verdict finding that (1) Defendant's negligence had injured Plaintiff, and (2) Plaintiff was entitled to $1 in damages from Defendant. On 12 February 2018, the trial court entered a judgment awarding Plaintiff $1 from Defendant. Neither party filed any motions with or raised any objections to the trial court regarding either the verdict or the judgment. Plaintiff timely appealed to this Court.

II. Discussion

Plaintiff argues that she is entitled to a new trial for a number of reasons, all of which essentially comprise a single argument that the damages awarded by the jury are inadequate and that the trial court erred by entering judgment on the verdict. Specifically, Plaintiff argues that the trial court erred by failing to grant her a new trial under N.C. Gen. Stat. § 1A-1, Rule 59 (2018) ("Rule 59"), because (1) the verdict is contrary to the law and the evidence, (2) the jury manifestly disregarded the instructions of the trial court, (3) the evidence is insufficient to justify the verdict, and (4) inadequate damages were given under the influence of passion or prejudice.

Rule 59 sets forth a number of grounds upon which a trial court may order a new trial including, as relevant in this case: (1) that the "verdict is contrary to law[,]" Rule 59(a)(7); (2) "[m]anifest disregard by the jury of the instructions of the court[,]"

Rule 59(a)(5); (3) "[i]nsufficiency of the evidence to justify the verdict[,]" Rule 59(a)(7); and (4) that "inadequate damages appear[] to have been given under the influence of passion or prejudice[,]" Rule 59(a)(6). Upon finding that one of such grounds exists "not later than 10 days after entry of the judgment[,]" the trial court may order a new trial, either *sua sponte* or upon motion of any party. Rule 59(b) and (d).

Rule 59 thus allows the trial court to consider, during an extremely brief period following the conclusion of a trial, whether justice has been served by, *inter alia*, a jury's verdict. The proper course for a litigant such as Plaintiff who seeks to attack a jury verdict pursuant to Rule 59 is to make a Rule 59 motion to the trial court, which has intimate knowledge of the proceedings and the evidence presented to the jury that an appellate court reviewing a cold record does not have. *See Worthington v. Bynum*, 305 N.C. 478, 498, 290 S.E.2d 599, 605 (1982) ("Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.").

Our Supreme Court has said that there are "several sound reasons for leaving the discretionary power to set aside a verdict almost exclusively in the hands and supervision of the judge presiding over the trial." *Worthington*, 305 N.C. at 482-83, 290 S.E.2d at 602-03 (noting "the inherent and traditional authority of the trial

judges of our state to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned"). And in the cases we have seen where our appellate courts have considered the sufficiency of a jury's verdict, it has been in the context of reviewing the presiding trial judge's discretionary decision to grant or deny a Rule 59 motion. *See*, *e.g.*, *Justus v. Rosner*, 371 N.C. 818, 821 S.E.2d 765 (2018).

In order to preserve an issue for appellate review, a party must generally have presented a timely request, objection, or motion to the trial court, along with specific grounds for the desired ruling, and must have obtained a ruling on that motion. N.C. R. App. P. 10(a)(1) (2018). When a party fails to make the requisite request, objection, or motion, the issue is not properly preserved and is waived for purposes of appellate review. *Clark v. Bichsel*, 239 N.C. App. 13, 17, 767 S.E.2d 145, 147 (2015) ("[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." (quotation marks and citation omitted)). Plaintiff did not file a Rule 59 motion for a new trial with the trial court, and the record reflects no requests, objections, or motions preserving the underlying issues that Plaintiff argues entitle her to a new trial, since Plaintiff made no motions attacking the jury's verdict nor objected to Defendant's trial counsel's comments during jury selection that Plaintiff now argues influenced the jury to passion or prejudice in rendering its verdict. By failing to make a Rule 59 motion or

raise the issues Plaintiff argues entitle her to a new trial before the trial court, Plaintiff failed to preserve these issues, and we accordingly dismiss her appeal. *See Pender v. North State Life Ins. Co.*, 163 N.C. 98, 101, 79 S.E. 293, 294 (1913) ("There was sufficient evidence, in law, to support the finding of the jury, and when this is the case and it is claimed that the jury have given a verdict against the weight of all the evidence, the only remedy is an application to the trial judge to set aside the verdict for that reason.").

But even assuming *arguendo* that the issues Plaintiff raises were properly before us, Plaintiff's arguments would fail. At trial, Plaintiff had the burden of proving to the jury by the greater weight of the evidence that Defendant's negligence was a proximate cause of the actual damages Plaintiff claims to have suffered. N.C.P.I. -- Civil 106.00 (Motor Vehicle vol. 2004) ("The plaintiff may also be entitled to recover actual damages. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages proximately caused by the negligence of the defendant."). And it is axiomatic that the jury is the sole arbiter of the credibility of the witnesses and the weight of the evidence presented in a jury trial. *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979) ("It is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove.").

Plaintiff's own evidence included several experts' testimony that the cause of Plaintiff's injuries was less than certain. As the arbiter of the credibility of the witnesses and the weight of the evidence, the jury was free to conclude that Plaintiff had not sufficiently proven by the greater weight of the evidence that Defendant's negligence was a proximate cause of Plaintiff's injuries. *See id.* ("The testimony of plaintiff's witnesses remained mere evidence in this case to be considered by the jury. . . . In weighing the credibility of the testimony, the jury has the right to believe any part or none of it." (internal citations omitted)).

The trial court properly instructed the jury that, if the jury concluded that Defendant's negligence was a proximate cause of injury to Plaintiff, but that Plaintiff had not proven actual damages, the jury should grant Plaintiff nominal damages. *See* N.C.P.I. -- Civil 106.00 (Motor Vehicle vol. 2004) ("If you have answered the [question of whether the defendant's negligence was a proximate cause of injury to the plaintiff] 'Yes' . . . the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of a technical injury to the plaintiff."); *see Lexington Homes, Inc. v. W.E. Tyson Builders, Inc.*, 75 N.C. App. 404, 412, 331 S.E.2d 318, 323 (1985) ("[W]here a legal wrong is shown, the one wronged is entitled to nominal damages, though no substantial loss or damage has been proved."). By awarding only nominal damages, the jury evidently concluded that Plaintiff had not proven by the greater weight of

the evidence that Defendant's negligence was a proximate cause of the actual damages Plaintiff claimed, and we will not disturb the jury's findings where they are supported by evidence as described above. *See West v. Atl. Coast Line R.R. Co.*, 174 N.C. 125, 130, 93 S.E. 479, 481 (1917) ("We cannot interfere with the jury in finding facts upon evidence sufficient to warrant their verdict."); *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 806, 323 S.E.2d 368, 369 (1984) ("It is not for us, as an appellate court, to determine the weight and credibility to be given evidence in the record.").

III. Conclusion

Because Plaintiff did not preserve the issues she presents for our review, we dismiss Plaintiff's appeal.

DISMISSED.

Judges BERGER and MURPHY concur.

Report per Rule 30(e).