IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-406

Filed 19 December 2023

Wayne County, No. 20 CVS 592

SAMUEL JEFFERSON HONEYCUTT, Plaintiff,

v.

A. DAVID VELASQUEZ-MORALES and EDUARDO VELASQUEZ ROBLERO, Defendants.

Appeal by plaintiff from judgment entered 26 July 2022 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 18 October 2023.

*Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellant.*

*Donald E. Clark, Jr., Attorney at Law, PPLC, by Donald E. Clark, Jr., for the unnamed defendant North Carolina Farm Bureau Mutual Insurance Company.*

*Wallace, Morris, Barwick, Landis & Stroud, P.A., by Stuart L. Stroud, for the unnamed defendant United Services Automobile Association.*

DILLON, Judge.

The issue on appeal concerns whether the trial court erred when it instructed the jury on the affirmative defense of failure to mitigate damages, despite the

defendant-appellee's failure to raise the defense in their pleadings.

## I. Background

In May 2019, Defendant Velasquez-Morales ran a stop sign while driving a vehicle owned by Defendant Eduardo Velasquez Roblero on SR 2017 through its intersection with SR 1915 and collided with a vehicle traveling on SR 2015 in which Plaintiff Samuel Jefferson Honeycutt was a passenger. Plaintiff suffered injuries to his head, neck, and back as a result.

Plaintiff commenced this action seeking damages arising from his injuries.

Neither Defendant alleged any failure by Plaintiff to mitigate his damages as an affirmative defense. At trial, though, Defendants offered evidence tending to show that Plaintiff had failed to mitigate his damages. Accordingly, despite Defendants' failure to plead the affirmative defense of failure to mitigate damages, the trial court upon Defendants' request submitted failure to mitigate to the jury, stating:

> [There was] a lot of evidence that recommendations were made that were not followed. Now whether the jury would consider that a failure to mitigate is a jury question, not my question, but there's certainly evidence…

The jury returned a verdict determining that Plaintiff was entitled to recover $75,000.00 for his injuries caused by Defendant's negligence, but that Plaintiff's award should be reduced to $13,500.00 due to his failure to mitigate his damages.

Plaintiff moved for a new trial, in part, based on the trial court's submission of

the issue of failure to mitigate damages to the jury without being asserted as an affirmative defense. The trial court denied Plaintiff's motion. Plaintiff appealed.

## II. Analysis

### A. Failure to Mitigate Damages

First, Plaintiff argues that the trial court erred when it instructed the jury on the affirmative defense of failure to mitigate damages, where Defendant did not raise this defense in his pleadings.

Under our Rules of Civil Procedure, "failure to raise an affirmative defense in the pleadings generally results in the waiver thereof." N.C. Gen. Stat. § 1A-1, R. 8(c) (2021); *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998). However, the parties may still try the issue by express or implied consent. N.C. Gen. Stat. § 1A-1, Rule 15(b) (2021) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."); *Keith v. Health-Pro*, 381 N.C. 442, 445 n. 4, 873 S.E.2d 567, 577 (2022) (applying Rule 15(b) to reach an issue supported by the evidence not otherwise raised in the pleadings).

Express consent occurs when the trial court allows a party to formally amend its complaint to include the affirmative defense. N.C. Gen. Stat. § 1A-1, R. 15(b). Implied consent occurs when a non-objecting party allows evidence to be presented at trial outside the scope of the pleadings, in which case the pleadings are deemed

amended to conform to the evidence and no formal amendment is required. *Roberts v. Reynolds Park*, 281 N.C. 48, 59, 187 S.E.2d 721, 727 (1972) (stating that "formal amendment is needed only when evidence is objected to at trial as not within the scope of the pleadings.").

Here, although counsel for Plaintiff objected to the trial court's submission of the affirmative defense to the jury, counsel *did not* object (or failed to object on specific grounds) when defense counsel elicited a significant amount of evidence relevant to this issue. *Roberts*, 281 N.C. at 58, 187 S.E.2d at 726 (recognizing that "[u]nder 15(b) the rule of 'litigation by consent' is applied when no objection is made on the specific ground that the evidence offered is not within the issues raised by the pleadings.").

Below are just a few excerpts of testimony—pertaining to the issue of Plaintiff's alleged failure to mitigate damages—that defense counsel elicited from Plaintiff:

> [Defense counsel]: The point is both of the orthopaedists that saw you told you to go get physical therapy, and you didn't go get physical therapy.
>
> [Plaintiff counsel]: Objection… to the form of the question.
>
> [Plaintiff]: Not at a business, no, sir.
>
> ***
>
> [Defense counsel]: Let's talk about following doctor's orders now. You didn't always follow your doctor's recommendations. You would agree with that, wouldn't you?
>
> [Plaintiff]: To some extent, yes, sir.
>
> ***

> [Defense counsel]: So to this day it's true that you've not seen a licensed physical therapist, someone licensed by the State of North Carolina and trained to give you physical therapy that was recommended for you.
>
> [Plaintiff]: No, sir.
>
> ***
>
> [Defense counsel]: And then Dr. Hage recommended surgery, and you've not done that either. Correct?
>
> [Plaintiff]: No, sir, not unless I get to where I can't function. And I still don't want to do his surgery. Why do I want to mess my arm up to help my shoulder? It weren't going to fix all the problems with my shoulder, sir.

Further, during trial, counsel for Plaintiff introduced into evidence both a transcript and video recording (which was played for the jury) of the depositions of two of Plaintiff's treating physicians, Dr. Hage and Dr. Martin.

Dr. Hage testified that despite his recommendation, Plaintiff refused to visit an orthopedist to obtain an MRI of his neck. Dr. Hage also explained that Plaintiff was not interested in surgery, and that as a result, he recommended a "conservative approach" which included having platelet-rich plasma ("PRP") injected into the site of the injury. Dr. Hage testified that Plaintiff did not appear interested in trying PRP injections.

Similarly, Dr. Martin testified that while Plaintiff was only interested in pursuing a conservative approach (including PRP) instead of surgery, he believed that "the surgery certainly could have helped him[.]" And, during direct-examination, counsel for Plaintiff asked Dr. Martin if Plaintiff would "continue to have pain and

discomfort in his right shoulder for the remainder of his life", to which Dr. Martin responded, "I think if nothing is done, more than likely yes[.]"

Additionally, in his opening and closing statements, counsel for the Defendants specifically referenced and argued there were "several things [Plaintiff] could have done to mitigate his damages, that he didn't do", including Plaintiff's failure to receive: (1) physical therapy, (2) chiropractic appointments, (3) PRP, (4) surgery, and (5) an MRI for his neck. There was no ambiguity regarding the intention of Defendant's counsel to assert a failure to mitigate argument.

We also note that the above-referenced evidence was *only* relevant to the affirmative defense of Plaintiff's alleged failure to mitigate his damages. There was no other issue at trial that the above evidence was relevant to prove, and, accordingly, any evidence pertaining to Plaintiff's failure to follow medical recommendations was outside the scope of the pleadings. Thus, "[c]ounsel cannot in prudence under this rule fail to object to any evidence which seems even remotely to be opening up issues not raised by the pleadings." *Mangum v. Surles*, 281 N.C. 91, 97, 187 S.E.2d 697, 701 (1972).

Because the foregoing evidence was admitted without objection, we conclude that the trial court did not err when it instructed the jury on Plaintiff's failure to mitigate damages. *Surles*, 281 N.C. at 98, 187 S.E.2d at 701-02 ("[W]here no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, the issue raised by the evidence is nevertheless before the trial court for

determination.").

Accordingly, we conclude that the trial court did not err in submitting the issue of Plaintiff's failure to mitigate his damages to the jury.

B. Monetary Relief

In his second argument on appeal, Plaintiff argues that the trial court erred when it denied his request for a new trial on the grounds that defense counsel improperly revealed to the jury the amount Plaintiff initially requested in damages.

In his opening statement, defense counsel stated the following to the jury:

> And you're also going to hear why we're here, he's seeking a tremendous amount of money, 600,000 dollars, and I believe that dropped from 1.5 million to 600,000, and that's why you're here.

Defense counsel repeated this statement in his closing statement. On appeal, Plaintiff argues that these statements were so grossly improper that the trial court erred in failing to intervene *ex mero motu*.

Generally, a trial court's duty to intervene *ex mero motu* applies specifically to circumstances of "extreme impropriety on the part of the prosecutor", which occurs most commonly during closing arguments made to the jury. *State v. Cummings*, 353 N.C. 281, 297, 543 S.E.2d 849, 859 (2001). In considering this argument, we must consider "whether the remarks were so grossly improper that the trial court committed reversible error" by failing to intervene. *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). "Only when it finds both an improper argument and

prejudice will this Court conclude that the error merits appropriate relief." *State v. Goins*, 377 N.C. 474, 478, 858 S.E.2d 590, 593 (2021).

Here, we conclude that, even if the trial court had a duty to intervene on its own regarding these statements, Plaintiff failed to meet his burden on appeal of showing prejudice. We find no prejudicial error in the jury's verdict or in the judgment entered thereon.

NO ERROR.

Judge TYSON and GRIFFIN concur.

Report per Rule 30(e).