

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-508
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

BRANDON LEE THORNTON,
Plaintiff-Appellant,

v.

Johnston County
No. 09 CVS 1636

JONATHAN STUCKEY,
Defendant-Appellee.

Appeal by Plaintiff from judgment entered 9 July 2010 by
Judge James Gregory Bell in Superior Court, Johnston County.
Heard in the Court of Appeals 8 November 2011.

*Timothy C. Morris, PA, by Christopher J. Autry, for
Plaintiff-Appellant.*

*Bailey & Dixon, L.L.P., by David S. Coats and J.T. Crook,
for Defendant-Appellee.*

McGEE, Judge.

The testimony at trial tended to show the following.
Plaintiff attended a gathering at a residence in Princeton,
North Carolina [the residence] on 24 November 2007 for an
evening of card-playing and socializing. Defendant arrived at
the residence around 10:00 a.m. and began drinking alcoholic
beverages at around 1:00 p.m. Defendant continued drinking at a

rate of about one beer an hour. Defendant testified that Plaintiff arrived at the residence around 8:00 p.m. and, shortly after Plaintiff arrived, someone suggested a trip to the liquor store. Defendant drove his truck to the store, and Plaintiff, along with two other people, rode with Defendant. Defendant drove, and Plaintiff rode in the front passenger seat. On the way to the liquor store, Defendant crashed his truck. Plaintiff was ejected from Defendant's truck during the crash, and sustained serious injuries.

Trooper Larry Robinson (Trooper Robinson) of the N.C. Highway Patrol investigated the wreck. Trooper Robinson testified that he received the call concerning the wreck at 10:17 p.m. Trooper Robinson testified that he spoke with all four persons involved in the wreck, and that all four, including Plaintiff and Defendant, stated that Defendant had been drinking. Trooper Robinson overheard Defendant tell paramedics that he had "drank too much and he had about a case of beer." Trooper Robinson further testified that Defendant had "[r]ed glassy eyes, extremely strong odor of alcohol about his breath, his person." Trooper Robinson questioned Defendant later that evening at Duke Hospital and testified that Defendant still smelled of alcohol. When Trooper Robinson was asked: "Was it obvious that [Defendant] was impaired [when you questioned

Defendant,]" Trooper Robinson replied: "Oh, absolutely yes."

Plaintiff filed this action against Defendant on 27 April 2009, alleging, *inter alia*, that Plaintiff was injured due to Defendant's negligence. Defendant filed his answer on 1 June 2009, including the affirmative defense that Plaintiff was contributorily negligent in voluntarily riding with Defendant when Plaintiff knew, or should have known, that Defendant was intoxicated.

During the trial, Defendant was allowed, over Plaintiff's objection, to cross-examine Plaintiff concerning cocaine metabolites found in Plaintiff's blood immediately following the wreck. Plaintiff also objected to the deposition testimony of Dr. Michael Beuhler, which was admitted as expert testimony relating to Defendant's level of intoxication at the time of the wreck. Following the presentation of all the evidence, the jury found that Plaintiff's own negligence contributed to his injuries, and Plaintiff was not entitled to any recovery from Defendant. Plaintiff appeals.

I. Admissibility of Plaintiff's prior cocaine use

In Plaintiff's first argument, he contends the trial court erred in denying his motion to exclude evidence of Plaintiff's having used cocaine at some time prior to the wreck. We disagree.

Plaintiff moved to exclude evidence that, prior to getting into Defendant's truck, Plaintiff used cocaine at some point in time such that cocaine metabolites were still present in Plaintiff's system at the time of the wreck. Plaintiff argues that the admission of this evidence was violative of Rules 404(b) and 608(b) of the North Carolina Rules of Evidence. Though Plaintiff may be correct in his assertion

regarding Rule 608(b), that rule does not govern this case. Instead, Rule 611(b) governs. It states: "A witness may be cross-examined on any matter relevant to any issue in the case, *including credibility*." N.C.G.S. § 8C-1, Rule 611(b) (1988) (emphasis added). While the language of the rule alone does not clearly illuminate the issue here, the case law and treatises interpreting it establish that evidence of [a witness's] drug use . . . is proper and admissible for purposes of impeachment. "There is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case."

State v. Williams, 330 N.C. 711, 719, 412 S.E.2d 359, 364 (1992) (citation omitted). Similarly, evidence not admissible pursuant to Rule 404(b) may be admitted at trial if it is admissible under Rule 611(b), which states: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility[,]" N.C. Gen. Stat. § 8C-1, Rule 611(b)

(2011). See *Pelzer v. United Parcel Service*, 126 N.C. App. 305, 310, 484 S.E.2d 849, 852 (1997).

"The trial court is vested with broad discretion in controlling the scope of cross-examination and a ruling by the trial court should not be disturbed absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision."

Williams v. CSX Transp., Inc., 176 N.C. App. 330, 336, 626 S.E.2d 716, 723 (2006) (citation omitted). We note that Plaintiff attempts to argue that this Court makes a distinction between criminal and civil cases when considering the admissibility of prior instances of drug use. Plaintiff cites *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 537-38, 463 S.E.2d 397, 402-03 (1995), in support of this position. In *Johnson*, this Court cited criminal cases in support of its analysis. We find nothing in *Johnson* to suggest this Court has adopted a different standard in civil cases.

In the present case, Plaintiff's ability to observe, recollect, and recount his impression of Defendant's condition at the time Plaintiff agreed to accompany Defendant in Defendant's truck was an issue central to both Plaintiff's case and Defendant's defense. If Plaintiff knew, or should have known, that Defendant was intoxicated at the time Plaintiff agreed to ride with Defendant, then Plaintiff was contributorily

negligent. See *Goodman v. Connor*, 117 N.C. App. 113, 117-18, 450 S.E.2d 5, 7-8 (1994). In the present case, Plaintiff testified that, when he agreed to accompany Defendant to the liquor store, he did not know Defendant was intoxicated. We find that the trial court did not abuse its discretion by allowing Defendant to cross-examine Plaintiff concerning Plaintiff's cocaine use in the period leading up to the wreck, as Defendant's cross-examination of Plaintiff was relevant to Plaintiff's ability to make a determination concerning Defendant's intoxication. It was the province of the jury to determine whether to believe Plaintiff's testimony concerning his cocaine use, and whether that cocaine use might have impaired Plaintiff's ability to recognize that Defendant was intoxicated. Plaintiff's argument is without merit.

II. Expert witness testimony

In Plaintiff's second argument, he contends that the trial court erred in denying his motion to exclude one of Defendant's witnesses as an expert witness. We disagree.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (2009)¹. "Whether a witness is qualified as an expert is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." *State v. Hill*, 116 N.C. App. 573, 581, 449 S.E.2d 573, 577 (1994) (citation omitted).

Pursuant to North Carolina General Statutes, section 8C-1, Rule 702, a witness may be qualified "as an expert by knowledge, skill, experience, training, or education. . . ." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009). "North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand, with the testimony being 'helpful' to the jury." "It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing N.C.G.S. § 8C-1, Rule 104(a) (2003)). In *Howerton*, our Supreme Court set out a three step inquiry governing the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?

State v. Green, __ N.C. App. __, __, 707 S.E.2d 715, 718 (2011) (citations omitted).

¹ The General Assembly recently amended Rule 702(a). 2011 N.C. Sess. Law ch. 283, § 1.3 (effective Oct. 1, 2011). The amended statute only applies to actions commenced on or after 1 October 2011, and, consequently, the amended version is not applicable to this case.

Plaintiff only argues the second prong of the *Howerton* test. Plaintiff contends that Dr. Beuhler was not sufficiently qualified in the area of toxicology, being retrograde extrapolation, for which he gave expert testimony.

"It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.'"

"Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court."

Howerton, 358 N.C. at 461-62, 597 S.E.2d at 688 (citations omitted). Dr. Beuhler testified that he was the Medical Director of the Carolinas Poison Center, and had served as a medical toxicologist for approximately eight years. He had a bachelor of science degree in chemistry, biochemistry, and physics, and an M.D. Dr. Beuhler also served a two-year medical fellowship in medical toxicology after completing his residency work. He was a board certified physician in the areas of emergency medicine and medical toxicology, and was a member of the American College of Medical Toxicology. Dr. Beuhler testified that he had been qualified as an expert in legal

actions in the past, including both testifying and providing reports.

In light of the standards set forth above in *Green* and *Howerton*, we cannot say that the trial court abused its discretion by admitting the testimony of Dr. Beuhler as an expert witness in the present case. Plaintiff's argument is without merit.

No error.

Judges HUNTER, Robert C. and CALABRIA concur.

Report per Rule 30(e).