IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1148

Filed: 6 August 2019

Guilford County, No. 17-CvS-6104

DANA LEAH PUCKETT HUTTON, as Executrix of the Estate of ROBERT JAMES HUTTON, JR., Plaintiff,

v.

THE DAVEY TREE EXPERT COMPANY, Employer, HYCO INTERNATIONAL, INC., n/k/a WEBER-HYDRAULIK, INC., HYCO CANADA ULC, n/k/a WEBER HYDRAULIK HYCO CANADA, HYCO ALABAMA, LLC, OLD REPUBLIC INSURANCE, Carrier, and RECOVERY SERVICES INTERNATIONAL, INC., Administrator, Defendants.

Appeal by Defendants from order entered 31 July 2018 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 21 May 2019.

Rossabi Reardon Klein Spivey PLLC, by Amiel J. Rossabi and Gavin J. Reardon, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Paul C. Lawrence, and Linda Stephens for Defendants-Appellants.

INMAN, Judge.

Defendants The Davey Tree Expert Company ("Davey Tree"), Hyco International, Inc. (n/k/a) Weber-Hydraulik, Inc., Hyco Canada ULC (n/k/a) Weber Hydraulik Hyco Canada, Hyco Alabama, LLC, Old Republic Insurance, and Recovery

Services International, Inc. (collectively with Davey Tree and Old Republic Insurance as "Defendants") appeal from an order granting Plaintiff Dana Leah Puckett Hutton's ("Plaintiff") motion to extinguish a workers' compensation lien. After careful review, we dismiss their appeal in part and affirm in part.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following:

Plaintiff was married to Robert James Hutton, Jr., who was employed by Davey Tree as a tree removal specialist. On 13 May 2013, Mr. Hutton was operating an extendable boom platform in the course of his employment when the boom catastrophically failed, causing him to fall thirty-five feet. Mr. Hutton suffered extensive injuries and lost his life as a result of the fall. Plaintiff filed a workers' compensation claim following the accident, and Davey Tree and its insurance carrier, Old Republic Insurance Company, accepted the claim under the North Carolina Workers Compensation Act.

Plaintiff filed a lawsuit against multiple defendants in the United States District Court for the Middle District of North Carolina on behalf of her husband's estate in connection with his death. Plaintiff settled her claims with some, but not all, of the defendants in the federal action in April of 2017. On 21 June 2017, Plaintiff filed a complaint and motion in Guilford County Superior Court to extinguish Defendants' workers' compensation lien pursuant to Subsection 97-10.2(j) of our

General Statutes. The trial court placed Plaintiff's case on inactive status pending resolution of her remaining claims in federal court. All of Plaintiff's remaining claims against the defendants in the federal action were dismissed on 15 March 2018.

Plaintiff's motion to extinguish the workers' compensation lien came on for hearing during the 16 July 2018 session of Civil Superior Court in Guilford County. The record contains no narrative or transcript of that hearing; however, the order and a narrative of subsequent events in the record reveal that during the hearing, Plaintiff introduced an expert report into evidence without objection from Defendants. In the report, Plaintiff's expert opined that her compensatory damages totaled $2,546,879.56, a sum significantly greater than her recovery in the federal action and a factor the trial court believed just and reasonable in determining whether extinguishment of the workers' compensation lien was equitable pursuant to Subsection 97-10.2(j). Following the introduction of evidence and the argument of counsel, the trial court informed the parties that he would extinguish the workers' compensation lien and requested a proposed order.

Plaintiff's counsel notified Defendants' counsel that he would present a draft proposed order to the trial court on 31 July 2018. When that day came, counsel for the parties met with the trial court judge in a hallway of the Guilford County Courthouse. When the judge asked why counsel were present, Plaintiff's attorney offered his proposed order to the judge and noted that Defendants objected to a

specific finding referencing the expert report. Defendants' counsel then informed the trial court that the expert report was a surprise, and that he was deprived of an opportunity to review the report prior to the hearing. Defendants' counsel asked the trial court to re-open the hearing to allow Defendants an opportunity to substantively address the report and conduct a deposition of the expert.

The trial court responded to Defendants' request to reopen the matter by "indicat[ing] he would not allow that to be done." The judge followed up this statement by asking Defendants' counsel if he had objected to the introduction of the expert report at the hearing. When Defendants' counsel stated that he had not objected, the trial judge "indicated he was going to sign the proposed [o]rder." The order was entered later that day. Defendants thereafter filed timely notice of appeal.

II. ANALYSIS

Defendants present four arguments on appeal, contending the trial court erred in: (1) admitting the report without providing Defendants an opportunity to rebut the report; (2) admitting the report without *sua sponte* performing a reliability evaluation under *State v. McGrady*, 368 N.C. 880, 890, 787 S.E.2d 1, 9 (2016); (3) denying Defendants' request to reopen the matter, characterizing that request on appeal as a motion pursuant to Rule 59 of the North Carolina Rules of Civil Procedure; and (4) making a finding of fact and related conclusion of law that relied on the expert report.

We hold that Defendants have failed to preserve the first three arguments and are unpersuaded by the fourth argument.

Rule 10 of the North Carolina Rules of Appellate Procedure provides:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2019). Our case law makes it clear that this rule applies to appeals challenging the admissibility of evidence. *See, e.g.*, *State v. Campbell*, 359 N.C. 644, 670, 617 S.E.2d 1, 17 (2005) (holding a defendant failed to preserve the admissibility of expert testimony for appellate review when no objection to the testimony was raised on admission at trial). An objection is timely under the rule if it is interjected when the evidence in question "is actually introduced at trial." *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) (citations and quotation marks omitted). Because the record affirmatively discloses that Defendants failed to timely object to the admission of the expert report, their first and second arguments are not properly before this Court and are dismissed.[1]

[1] Defendants argue that their objection was lodged in "apt time," citing *Holmes Elec. Co. v. Carolina Power & Light Co.*, 197 N.C. 766, 770, 150 S.E.2d 621, 623 (1929). *Holmes*, however, does not relate to preservation of error under our appellate rules, nor does it concern when an objection to evidence must be raised; instead, it stands for the simple proposition that a party who sees a bench trial through to an unfavorable disposition cannot thereafter request a "do-over" through a motion for

We dismiss Defendants' third argument for a related, but slightly different, reason. Rule 7 of the North Carolina Rules of Civil Procedure provides:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

N.C. R. Civ. P. 7(b)(1) (2017). Thus, under this rule, a motion must be made in writing unless it is raised orally during a hearing, trial, or session where a cause is on the calendar. Based on the record below, it does not appear that Defendants' purported oral "Rule 59 motion" was a motion at all, as it was neither in writing nor made during a hearing, trial, or session with the matter on the calendar. We also note that it does not seem a formal ruling on that purported motion was ever made, as the narrative simply discloses that the judge "indicated he would not allow [the reopening of the matter] to be done," rather than a conclusive denial. Thus, Defendants failed to present a Rule 59 motion to the court for consideration and failed to obtain a ruling thereon pursuant to Rule 10 of our Rules of Appellate Procedure. Defendants' third argument that the trial court erred in declining to reopen the matter, too, is dismissed.

---

a jury trial on the merits. *Id.* Indeed, Defendants' position seems more analogous to that of the losing party in *Holmes*, who failed to request a jury trial in apt time when the motion "was not made until the judge had intimated his opinion and judgment in accordance therewith had been tendered by the [prevailing party]." *Id.*

With their first three arguments dismissed, Defendants' final argument fails. The expert report was before the trial court without a timely objection by Defendants. That report supports the trial court's factual finding that Plaintiff's recovery in the federal action was well below the amount of her damages. That finding, in turn, supports the trial court's conclusion of law that the extinguishment of the workers' compensation lien is equitable.[2]

III. CONCLUSION

For the foregoing reasons, we dismiss Defendants' appeal in part and affirm in part.

DISMISSED IN PART, AFFIRMED IN PART

Chief Judge MCGEE and Judge ARROWOOD cocur.

Report per Rule 30(e).

[2] Throughout his brief, Plaintiff's counsel levies accusations, direct and indirect, of deceptive and misleading conduct on the part of Defendants' trial and appellate counsel. To the extent Plaintiff's counsel's brief requests sanctions for these purported transgressions, they are denied.