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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-199

Filed: 7 April 2020

Guilford County, No. 17 CVS 9271

DAVID BRIAN HUTCHERSON, Plaintiff,

v.

FREDERICK DURAN CANNON and THE ARC OF NORTH CAROLINA, INC.,
Defendants.

Appeal by plaintiff from order entered 4 September 2018 by Judge John O. Craig in Superior Court, Guilford County. Heard in the Court of Appeals 20 August 2019.

Crumley Roberts, LLP, by Karonnie Rashone Truzy, for plaintiff-appellant.

Fox Rothschild, LLP, by Patrick M. Kane and Ellis W. Martin, for defendant-appellees.

STROUD, Judge.

Plaintiff appeals from an order granting summary judgment for Defendants on a negligence claim arising out of a two-car accident on the morning of 16 January 2015. Because there are no genuine issues of material fact and Plaintiff failed to forecast evidence establishing negligence by Defendants, we affirm.

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I. Background

On the morning of 16 January 2015, David Hutcherson (“Plaintiff”) was traveling westward on I-40 while Frederick Cannon (“Defendant Cannon”) was using the entrance ramp to merge westward onto I-40. Defendant Cannon’s vehicle began to slide out of the lane; Plaintiff steered his vehicle into the left lane, but Defendant Cannon’s vehicle struck Plaintiff’s vehicle. Defendant Cannon claimed he hit a patch of black ice and lost control of his vehicle. Police responded to the accident but did not issue a citation to either party.

Plaintiff filed his complaint on 22 November 2017 alleging personal injury and property damages as a result of negligence by Defendant Cannon and his employer, the Arc of North Carolina, Inc, under a theory of respondeat superior (“Defendants”). Defendants filed their answer on 22 January 2018, denying Plaintiff’s allegations of negligence and proximate cause of plaintiff’s injuries and raising defenses of sudden emergency due to black ice on the road and any applicable statute of limitations as a bar to Plaintiff’s claims. Defendants also moved to dismiss Plaintiff’s complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

The parties conducted discovery and both parties were deposed.¹ Defendants filed a motion for summary judgment, and a hearing was held on 4 September 2018.

¹ Only portions of both parties’ depositions are in our record. Based on the transcript of the summary judgment hearing and trial court’s order, it appears that the trial court only reviewed these portions as well and not the entire depositions.

After hearing arguments and reviewing portions of depositions submitted by the parties, the trial court concluded “there exists no genuine issue as to any material fact,” that “Defendants are entitled to judgment as a matter of law,” and granted Defendants’ motion for summary judgment. Plaintiff timely appealed.

II. Motions to Strike and Dismiss

We first address Defendants motions to strike Plaintiff’s reply brief and to dismiss plaintiff’s appeal. Defendants correctly point out that Plaintiff is attempting to “swap horses” by presenting arguments on appeal not raised at trial or in his primary brief in his reply brief. *See State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (“This Court has long held that where a theory argued on appeal was not raised before the trial court, ‘the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.’” (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934))). Defendants filed a motion to strike the portions of Plaintiff’s reply brief that violate the Rules of Appellate Procedure. We will not consider any new arguments Plaintiff raised in his reply brief but decline to sanction Plaintiff further.

Defendants also filed a motion to dismiss Plaintiff’s appeal for violations of “Rules 25, 34, and 37 of the North Carolina Rules of Appellate Procedure.” We agree Plaintiff has committed some relatively minor violations of the Rules of Appellate Procedure, but none of these violations are jurisdictional, and our Supreme Court has

reiterated that “a party’s failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal.” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). The rule violations do not substantially impair our ability to review Plaintiff’s arguments, and we do not find this to be a case where failure to comply with nonjurisdictional rule requirements should lead to dismissal of the appeal. *See id.* We will therefore address plaintiff’s arguments as raised before the trial court and in his principal brief.

III. Standard of Review

The standard of review for a summary judgment motion is well established:

“A trial court appropriately grants a motion for summary judgment when the information contained in any depositions, answers to interrogatories, admissions, and affidavits presented for the trial court’s consideration, viewed in the light most favorable to the non-movant, demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.” As a result, in order to properly resolve the issues that have been presented for our review in this case, we are required to “determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.” “Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the nonmoving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party.” “When there are factual issues to be determined that relate to the defendant’s duty, or when there are issues relating to whether a party exercised reasonable care, summary judgment is inappropriate.” We review orders granting or denying summary judgment using a *de novo* standard of

review, under which “this Court ‘considers the matter anew and freely substitutes its own judgment for that of the [trial court].”

Trillium Ridge Condo. Ass’n v. Trillium Links & Vill., LLC, 236 N.C. App. 478, 487-88, 764 S.E.2d 203, 210-11 (2014) (citations omitted) (alteration in original).

IV. Motion for Summary Judgment

“The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact.” However, “[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.”

“A genuine issue of material fact arises when ‘the facts alleged . . . are of such nature as to affect the result of the action.’” “On a motion for summary judgment the court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial.”

Austin Maint. & Const., Inc. v. Crowder Const. Co., 224 N.C. App. 401, 407-08, 742 S.E.2d 535, 540-41 (2012) (citations omitted) (alterations in original).

Summary judgment is “rarely appropriate in a negligence action because ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person.” To survive a motion for summary judgment, plaintiff must have established a *prima facie* case of negligence by showing: “(1) defendant failed to exercise proper care in the performance of a duty owed to plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff’s injury; and (3) a person of ordinary prudence

should have foreseen that plaintiff's injury was probable under the circumstances as they existed."

Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 739, 594 S.E.2d 227, 230 (2004) (citation omitted).

A. Accident Report

We first address whether the trial court erred by considering the accident report which Defendants attached as an exhibit to their motion for summary judgment. Plaintiff argues, "the lower court committed reversible error in its consideration of a Greensboro Police Department DMV-349 accident report because the report was not properly authenticated and contained hearsay." (Original in all caps.)

Plaintiff's brief cites to cases that are no longer valid on this issue because North Carolina had not yet adopted its Rules of Evidence when these cases were decided:

This Court has specifically stated that "the unsworn accident report of an investigating officer is hearsay, and as such could not be considered by the trial court on motion for summary judgment. N.C.G.S. 1A-1, Rule 56(e); Peace v. Broadcasting Corp., 22 N.C. App. 631, 207 S.E. 2d 288 (1974); Lineberger v. Insurance Co., 12 N.C. App. 135, 182 S.E. 2d 643 (1971)," Smith v. Indep. Life Ins. Co., 43 N.C. App. 269, 276, 258 S.E.2d 864, 868 (1979).

North Carolina's Rules of Evidence were adopted in 1983. N.C. Gen. Stat. § 8C-1, Rule 803 (history). An accident report is not excluded by the hearsay rule under

North Carolina General Statute § 8C-1, Rule 803(6). *See Joines v. Moffitt*, 226 N.C. App. 61, 63, 739 S.E.2d 177, 180 (2013) (“This Court has held that highway accident reports may be admitted under Rule 803(6) if properly authenticated. Proper authentication requires a showing that the report was (1) ‘prepared at or near the time of the act(s) reported’; (2) prepared ‘by or from information transmitted by a person with knowledge of the act(s)’; and (3) ‘kept in the course of a regularly conducted business activity, with such being a regular practice of that business activity.’ If a document meets these criteria, it is admissible unless the circumstances surrounding the preparation of the report ‘indicate a lack of trustworthiness.’” (citations omitted)). And even assuming some portions of the accident report may not be admissible, all of the information in the report was also in either the deposition testimony of Plaintiff or Defendant Cannon which the trial court also considered, so Plaintiff cannot show prejudice from consideration of the report. *See id.* at 66, 739 S.E.2d at 182 (“[A]ssuming arguendo that the accident report should have been redacted in the manner advocated by plaintiff, plaintiff cannot establish that he was actually prejudiced by the admission of the narrative or diagram because the same evidence was introduced at trial through other sources. Blackwelder and Jackson, the two eyewitnesses who provided the information upon which the narrative and diagram were based, both testified at trial.”). Accordingly, this argument is overruled.

B. Genuine Issues of Material Fact

Plaintiff argues, “the depositions of David Hutcherson and Frederick Cannon create genuine issues of material fact such that the defend[a]nts-appellees were not entitled to a judgment as a matter of law.” (Original in all caps.) Plaintiff alleges the evidence presents issues of fact regarding whether there was black ice on the road and whether Defendant Cannon’s speed was “in excess of what a reasonable person would have traveled entering the loop on a ramp.”

Plaintiff’s deposition testimony was based upon his understanding that Defendant Cannon’s vehicle hit black ice, and he lost control. Plaintiff explained in his deposition how the accident occurred:

A So he was in a curve as he was trying to accelerate to get up to speed. And it’s in that curve, *I guess he hit that ice. So when he hit that ice*, ice he turned the wheels to the left to catch it. And as he got off the ice where the wheels were turned to the left when he hit dry pavement, it automatically shot left onto the interstate. So you got a loop ramp getting on and I’m coming down the interstate and he’s getting on the loop ramp, you see. And as he lost control, I’m coming. So he’s sliding this way with his wheels turned to the left. When he hit dry pavement with his wheels turned left, it automatically shot straight out into the interstate and that’s when he struck me in the passenger side door.

(Emphasis added.) Plaintiff was also asked repeatedly about what Defendant Cannon did wrong or what he could have done differently to avoid an accident:

Q So was he turning his wheels back into the slide?

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A He was catching himself in the slide, you know, he was trying to come out of the slide. You know, if you start sliding to the left, you're going to turn your wheels to the left to try to, you know. You're not going to turn right because then you're just going to keep spinning like this. So he was trying to catch his slide. But when he caught dry pavement, it automatically turned left and just shot him right back out on the interstate. Me being a racer, I guess I understand all that.

Q So was he doing the proper thing by --

A He was trying to catch his, control his car but, you know, he wasn't going to catch that control. It ain't no catching that at 65 miles an hour. You ain't going to -- you just along for the ride.

Q So as you as a racer, was he doing the proper thing to try to catch, get the car back under control?

A I would think so. But I mean, I don't know exactly what all he was doing. By me looking at the car, you know, he was just holding on for dear life to be honest with you.

Q Do you think there was anything he could really do?

A Well, yeah. It probably was some things he could have done different. I mean, I probably wouldn't -- that morning with a kid in the car knowing that I done seen, you know, the weather, I don't think I'd been accelerating that fast on the ramp trying get on in a curve. Now a straight acceleration ramp would've been different. But a loop ramp when you get on -- I wouldn't have been doing that at excessive speed.

Q You thought, you think he was going at an excessive speed?

A I mean, evidently.

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Q I'm asking --

A I mean, it's an acceleration ramp. I understand that. You know, you got to accelerate to get on the interstate but in a curve with the weather we had that night, I don't think it's something I would've been, you know, I would've been more cautious maybe. I don't know. I don't know. I wasn't in his shoes so I can't tell you. I know I was driving a truck and a trailer and I didn't have any problems with me sliding around. Of course, I didn't see any ice anywhere the way I came, but I don't know. Maybe it's something you can ask him.

....

Q Did you think he could have done anything once he did hit that slide?

A Yeah. If he would've just kept sliding where he was going to slide, he would've been fine. But when he started turning the wheels to counteract, that was not the right thing to do in my opinion, but that's just my opinion.

Q Well I thought you just said a few minutes ago that as a racer, you thought he was doing the right thing?

A I don't recall.

Q Are you changing your testimony?

A I'm not changing my testimony. You trying to turn things around on me is what you trying to do. It ain't gonna happen. It ain't gonna happen, bud.

....

Q What do you think he did wrong or do you think he did anything wrong?

A I don't know if he did anything wrong, sir.

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Q Your testimony though two minutes ago was that he did do something wrong?

A Yeah, he did something wrong. He wrecked and hit me. That's what he did wrong.

Q I'm asking you when he hit that patch of ice, what would you have done differently?

A I'd got the hell away as far as I could have if I could have, sir.

Q How would he have don't that?

A I would've got away from him. I was trying to get away from him.

Q I'm asking what he should have done?

A Ask him. I don't know what he should've done. Ask him what he should've done.

....

Q How fast do you estimate he was going?

A I have no idea. I – waste of time.

Q I'm sorry?

A I don't know. What kind of question is that? How am I going to know what, how fast he was running?

Q I'm asking you what your opinion of his speed was.

A. Jesus.

....

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Q And is it still your testimony that you're going to refuse to answer about how you think or whatever actions you think Mr. Cannon took that were negligent?

A Actions he took?

Q Earlier we had a conversation that you said you weren't going to talk about what you think he should have done different.

A Yeah. Because I wasn't in his shoes so I wouldn't know. I don't , I don't even know why you would ask me that kind of question.

Q Well, I'm asking you that kind of question because you sued Mr. Cannon.

A That's right.

Q You thought he had done something wrong. So again, I'm asking what do you think he did wrong?

A I don't recall. Let's leave it at that.

Q Well, no. I'm not leaving it at that.

A Okay. Well, we'll figure it out later, huh?

Q No, I'm asking you right now

A All right. Ask me again.

Q What do you think he did wrong?

A I don't recall.

In summary, Plaintiff stated he did not personally see ice on the road, but he also testified that he saw Defendant Cannon slide on ice: "So he was trying to catch

his slide. But when he caught dry pavement, it automatically turned left and just shot him right back out on the interstate.” Defendant Cannon testified in his deposition that he slid on black ice and he was unable to regain control of his vehicle. Although Plaintiff argues there was no ice on the road, Defendants’ evidence (and arguably even Plaintiff’s own deposition) shows Defendant Cannon slid on black ice; Plaintiff has failed to refute this evidence. Because Defendants presented evidence that black ice caused Defendant Cannon to slide and lose control of his vehicle, the “burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Austin*, 224 N.C. App. at 407, 742 S.E.2d at 540. Plaintiff did not present any evidence, such as information regarding weather conditions or the temperature that day, to refute Defendant Cannon’s claim that he hit black ice. Plaintiff testified it was a colder day and it might have rained some the night before.

But the presence or absence of black ice does not necessarily demonstrate Defendant Cannon was not negligent; even if there was no ice on the road, Defendant Cannon still had a duty to use reasonable care under the existing conditions. Plaintiff argues Defendant Cannon was driving too fast for the conditions, despite his contention the “conditions”—ice on the roadway—did not exist. Despite his comment about how a vehicle would not be able to regain control after hitting black ice at 65

miles per hour (“It ain’t no catching that at 65 miles an hour”), there is no evidence Defendant was driving that fast. Plaintiff testified he had “no idea” of Defendant Cannon’s speed. The speed limit on the road was 65 miles per hour; Plaintiff testified he was driving 65 miles per hour. Defendant Cannon testified he was going approximately 40 miles per hour. Plaintiff testified he did not know what, if anything, Defendant Cannon did wrong and he did not know how Defendant Cannon could have avoided the collision.

Plaintiff did not forecast any evidence which would establish negligence by Defendants. *See Farmer v. Chaney*, 29 N.C. App. 544, 546, 225 S.E.2d 159, 161 (1976) (“An inference of driver negligence cannot be made from an accident when the plaintiff’s own testimony is that there was nothing wrong with defendant’s driving.” (quoting *Lewis v. Piggott*, 16 N.C. App. 395, 397, 192 S.E.2d 128, 131 (1972))), *aff’d*, 292 N.C. 451, 233 S.E.2d 582 (1977). Viewing the evidence in the light most favorable to Plaintiff, the evidence does not establish that Defendant Cannon could have reasonably anticipated the ice which would cause him to slide and lose control of his vehicle or that Defendant Cannon failed to use reasonable care to maintain control of the vehicle after hitting ice. We affirm the trial court’s order granting summary judgment for Defendants.

V. Conclusion

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Because there were no genuine issues of material fact, and Plaintiff failed to forecast evidence establishing negligence by Defendant Cannon, we affirm the trial court's order granting summary judgment for Defendants.

AFFIRMED.

Chief Judge McGEE and Judge MURPHY concur.

Report per Rule 30(e).