IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-371

No. COA20-717

Filed 20 July 2021

Anson County, No. 18-CVS-200

DANA PEAY, as Administrator of the Estate of Sammie Pendergrass, Plaintiff,

v.

S. & D. COFFEE, INC. and JAMES FRANKLIN BURGESS, JR., Defendants.

Appeal by Defendants from orders entered 3 February 2020, 12 February 2020, and 20 March 2020, and from judgment entered 27 February 2020 by Judge James M. Webb in Anson County Superior Court. Heard in the Court of Appeals 12 May 2021.

Law Offices of Wade Byrd, P.A., by Wade E. Byrd and Mark Hockman, and Osborne Law Firm, P.C., by Curtis C. Osborne, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Linda Stephens, and McAngus Goudelock & Courie, PLLC, by John P. Barringer and Meredith L. Cushing, for Defendants-Appellants.

DILLON, Judge.

¶ 1 S. & D. Coffee, Inc. ("S. & D. Coffee") and James Franklin Burgess, Jr., ("Burgess") (collectively, "Defendants") appeal from (1) the Order entered on 3 February 2020 denying Defendants' Motion to Bifurcate; (2) the Order entered on 12

February 2020 denying Defendants' Proposed Special Jury Instruction Regarding Worker's Compensation Lien; (3) the Judgment entered on 27 February 2020; and (4) the Order entered on 20 March 2020 denying Defendants' Motion for Judgment Notwithstanding the Verdict and, in the alternative, Motion for New Trial.

I. Background

¶ 2 The evidence at trial tended to show as follows: On the morning of 10 March 2017, Defendant Burgess was driving a commercial truck for his employer, Defendant S. & D. Coffee. As Burgess traveled on Highway 74 West, he began swerving between lanes until he finally crossed over the median into the eastbound lanes of traffic. Burgess collided head-on with a Direct Link Logistics cargo van driven by Sammie Pendergrass ("Decedent").

¶ 3 Workers from a Quikrete located near the accident reported hearing a "very loud noise" and seeing a tire rolling down the road. A worker from the store found Decedent in a ditch about fifty (50) feet from the accident. Decedent was still breathing as emergency personnel were called but he was verbally unresponsive to the Quikrete workers and emergency personnel who arrived on the scene. Decedent was transported to the hospital where he underwent CPR and was pronounced deceased shortly thereafter.

¶ 4 A State Highway Patrolman arrived at the scene of the accident to investigate. He interviewed Burgess and a motorist who had been following behind Burgess for

twelve (12) miles preceding the crash. Burgess stated that he did not remember what happened and reported that he had experienced a coughing fit. He underwent a blood alcohol test which was negative for drugs or alcohol.

¶ 5 After completing required statements and paperwork for his employer, Burgess went to the emergency room to report that he had passed out after having a coughing episode. The emergency room physician diagnosed Burgess with syncope (loss of consciousness) and acute bronchitis. Five days after the accident, Burgess saw his personal physician and reported the coughing incident that he believed had led to the crash. Similarly, his doctor diagnosed the episode as cough-related syncope. At trial, Burgess reported that on the morning of the accident he had called his personal physician to make an appointment. Burgess testified that shortly after the call, he began coughing and "blacked out" until he came to a complete stop.

¶ 6 The administrator of Decedent's estate ("Plaintiff") sued Defendants for negligence. The jury found for the Plaintiff and awarded six million dollars ($6,000,000) in damages.[1] Defendants appeal from the final judgment and from various orders.

II. Analysis

¶ 7 Defendants make several arguments on appeal. We address each in turn.

[1] Plaintiff requested twelve million dollars ($12,000,000) in damages.

A. Motion to Bifurcate the Trial

¶ 8 Defendants argue that the trial court erred in denying their motion to bifurcate the trial as provided for in N.C. Gen. Stat. § 1A-1, Rule 42 (2017). We disagree.

¶ 9 We review the denial of a Rule 42(b)(3) motion to bifurcate for abuse of discretion. *Clarke v. Mikhail*, 243 N.C. App. 677, 694, 779 S.E.2d 150, 163 (2015). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [its decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

¶ 10 In pertinent part, Rule 42 of Civil Procedure provides:

> Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars ($ 150,000), the court shall order separate trials for the issue of liability and the issue of damages, *unless the court for good cause shown orders a single trial*.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(3) (emphasis added).

¶ 11 In this case, Defendants served their Rule 42(b)(3) motion on the first day of trial. After hearing from both parties, the trial judge denied Defendants' motion, stating:

> A decade or more ago the North Carolina Administrative Office of the Courts estimated one day of court costs the taxpayers $6,216. It probably costs a lot more than that now. So, therefore, also in the interest of judicial economy, and as I've stated for good cause, including the preparation

> of trial by both parties, the subpoenaing of witnesses by both parties, it is in the interest of all those things, in good cause, that this motion be denied.

Defendants argue that the judge did not cite good cause in denying their Rule 42 motion to bifurcate, focusing almost exclusively on the "cost to taxpayers" portion of the judge's reasoning. However, the judge also cited the preparation by both parties for one consolidated trial, which included a subpoena schedule for witnesses.

¶ 12 We have previously found no error when a trial court considered these same circumstances to be good cause to deny a Rule 42(b)(3) motion. *See Clarke*, 243 N.C. App. at 695, 779 S.E.2d at 163 (finding no error where the trial court denied the motion to bifurcate and "ruled it would be improper to bifurcate on the eve of trial, after the parties' trial strategy, schedule of subpoenas, and the order of witnesses were dependent on the case proceeding as a consolidated trial.") Similarly, in this case, we are unable to conclude that the trial court's decision to deny Defendants' motion to bifurcate was so arbitrary that it could not have been the result of a reasoned decision. Therefore, we conclude that the trial court did not commit reversible error.

B. Plaintiff's Closing Argument

¶ 13 Defendants also argue that the trial court erred in (1) overruling their objection during Plaintiff's closing argument and (2) failing to intervene *ex mero motu* during other improper portions of Plaintiff's closing argument. We disagree.

¶ 14 "The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). When a party *does not* object to an alleged improper closing argument at trial, "our review is limited to discerning whether the statements were so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu*." *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 315, 511 S.E.2d 313, 319 (1999).

¶ 15 "It is not every minor mistake that *requires* a court to intercede; it is the general rule that a party must make an objection to request curative instructions. It is only when the error and unfair prejudice are extreme that a court *must* intervene." *Hudgins v. Wagoner*, 204 N.C. App. 480, 498, 694 S.E.2d 436, 449 (2010) (emphasis in original). Improper remarks by a lawyer during closing argument include "statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence[.]" *State v. Walters*, 357 N.C. 68, 105, 588 S.E.2d 344, 366 (2003).

¶ 16 We have previously examined closing arguments where counsel used potentially improper language against the opposing party. In *Hayes v. Waltz*, 246 N.C. App. 438, 784 S.E.2d 607 (2016), we determined that counsel's characterization of the defendant as a "con man" was not sufficiently egregious to warrant a new trial because defendant could not show that the result would have been different. *Id.* at

450, 784 S.E.2d at 617. Further, in *State v. Cole*, our Supreme Court concluded that the trial court did not err in failing to intervene *ex mero motu* when the prosecutor warned the jury: "Don't let [defense counsel] fool you." 343 N.C. 399, 418-19, 471 S.E.2d 362, 371-72 (1996).

¶ 17 Here, in addition to terms such as "fool" and "confuse," Plaintiff's trial attorney used the word "bamboozle" at least five times in his closing argument:

> So, now let's talk about the statements of Mr. Burgess, defendant Burgess. We've got two statements. And I'm going to tell you something that's going to happen. I don't want you to be bamboozled.
>
> * * *
>
> Don't be bamboozled. Don't be fooled just because you see two little documents.
>
> * * *
>
> So don't be fooled. Don't be bamboozled by an affidavit[.]
>
> * * *
>
> Confusion and attempts to confuse you are coming. So when you see that affidavit, don't be bamboozled by it.
>
> * * *
>
> It's the affidavits. Don't be bamboozled. Don't be fooled by it.

¶ 18 On appeal, Defendants argue that the trial court erred by (1) overruling the objection during closing argument and (2) not intervening *ex mero motu* during other

alleged improper portions of Plaintiff's closing argument (i.e., when counsel urged the jury not to be fooled or bamboozled). Plaintiff argues that trial counsel's comments all referred to the evidence, *not* opposing counsel. Assuming *arguendo* that counsel's comments did refer to opposing counsel, Plaintiff argues that they were not sufficiently egregious to warrant *ex mero motu* intervention.

¶ 19 The comments by Plaintiff's counsel during closing argument were distasteful, but we must determine whether they were "so grossly improper" as to require intervention from the trial court. *See O'Carroll*, 132 N.C. App. at 315, 511 S.E.2d at 319. Given that high standard, and because remedial measures followed Plaintiff's closing argument, we conclude that they were not.[2]

¶ 20 In addition to *Hayes v. Waltz* and *State v. Cole* leading us to conclude that counsel's language was not egregious enough to warrant *ex mero motu* intervention, Defendants had the opportunity to respond in their own closing argument. Defense counsel immediately addressed Plaintiff's negative characterizations and in addition to addressing the implication by Plaintiff's counsel that GPS video from Burgess'

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[2] Although there are no cases in North Carolina appellate courts on the specific word "bamboozle," other state courts have concluded that the use of the term does not require *ex mero motu* action from the trial court. *See Travelers Ins. Co. v. Pierce*, 358 S.W.2d 947, 949 (Tex. Civ. App. 1962) (no error where plaintiff's attorney remarked that defense counsel was attempting to "bamboozle" the jury and "pull the wool" over their eyes"); *see also State v. Fitzsimmons*, 89 S.W.2d 670, 673-74 (Mo. 1936) (no error where prosecutor remarked that defense counsel "attempted to fool and bamboozle jurors").

truck could have been erased.

¶ 21 Finally, despite overruling Defendants' objection during closing argument, the trial court followed its ruling with a caution to the jury: "Members of the jury, remember the Court's instructions as to final arguments by counsel. Follow those." The trial court's instructions as to final arguments by counsel stated, in relevant part: "It is improper for a lawyer in a final argument . . . to make arguments on the basis of matters outside the record[.]"

¶ 22 Ultimately, we conclude that Defendants were not irreparably harmed. It is notable that the jury only chose to award Plaintiff half the damage award sought, potentially an indication that they were not swayed by counsel's language in closing argument.

¶ 23 We conclude that the trial court did not err by (1) overruling Defendants' objection during Plaintiff's counsel's closing argument or (2) failing to intervene *ex mero motu* during their closing argument.

C. Jury Instructions

¶ 24 Finally, Defendants argue that the trial court erred in its choice of jury instructions by (1) denying Defendants' request for a special jury instruction to modify North Carolina Pattern Jury Instruction ("NCPJI") 106.18 and (2) failing to remind the jury of the defense of sudden incapacitation. We disagree.

¶ 25 A trial court traditionally has "wide discretion in presenting the issues to the

jury and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988) (internal quotation marks and citation omitted). However,

> when a request is made for a *specific* instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error.

Calhoun v. State Highway & Pub. Works Com., 208 N.C. 424, 426, 181 S.E. 271, 272 (1935) (emphasis added).

¶ 26 In this case, two specific portions of N.C. Gen. Stat. § 97-10.2 (2017) were at issue in the jury instruction on workers' compensation:

> (e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court *shall* instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff.
>
> * * *
>
> (j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the

> third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. . . . [T]he judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

N.C. Gen. Stat. §§ 97-10.2(e), (j) (emphasis added).

¶ 27 Defendants submitted a Proposed Special Jury Instruction to follow or modify NCPJI 106.18, which tracks the substance of N.C. Gen. Stat. § 97-10.2(e). The trial court denied Defendants' proposed instruction and gave NCPJI 106.18 after Defendants' renewed request at the charge conference. Defendants' proposed instruction attempted to capture subsection (j) of N.C. Gen. Stat. § 97-10.2 rather than merely subsection (e).

¶ 28 Defendants' position is that subsection (e) is an incomplete picture of the law in that it leads the jury to believe that a victim's workers' compensation benefits will be automatically deducted from their damage award. Subsection (j), however, provides a trial judge with discretion to determine the amount of the employer's

entitlement to repayment. N.C. Gen. Stat. § 97-10.2(j). However, this action does not automatically occur following a damage award; a party must apply to the resident superior court judge of the appropriate county. *Id*.

¶ 29 We reject Defendants' contention that a jury instruction with only the language of N.C. Gen. Stat. § 97-10.2(e) is inaccurate. The language of the statute clearly requires a trial court to inform the jury that a damage award will be automatically reduced by workers' compensation benefits. The results contemplated in subsection (j) do not automatically flow from subsection (e) or a damage award, and they are not necessary for the jury to have a complete understanding of the relevant law. We conclude that it was not error for the trial court to deny Defendants' proposed special instruction.

¶ 30 As to Defendants' second contention, we disagree that the trial court was required to "remind" the jury that the defense of sudden incapacitation was a defense to negligence. Defendants expressly concede that the trial court "enumerated the elements of sudden incapacitation which Defendants had the burden to prove, instructing the jury that if they found all those elements, then it would be their duty to find that Burgess' alleged negligence was not a proximate cause of Decedent's death and to answer the first issue on negligence 'no' in favor of Defendants." Defendants, however, wanted the trial court to reiterate this message again after explaining Plaintiff's theories of negligence in the case and the applicable motor

vehicle laws.

¶ 31 We disagree. It is a longstanding presumption of our courts that "jurors . . . attend closely the particular language of the trial court's instructions . . . and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). The trial court communicated the law accurately during the jury charge, and we do not hold that it is error to fail to repeat the law to serve Defendants' strategic ends.

III. Conclusion

¶ 32 We conclude that the trial court did not err in denying Defendants' motion to bifurcate the trial. Further, the trial court did not err in overruling Defendants' objection during Plaintiff's closing argument or in failing to intervene *ex mero motu* during Plaintiff's closing argument. Finally, the trial court did not err in its choice of jury instructions.

NO ERROR.

Judges GRIFFIN and JACKSON concur.

Report per Rule 30(e).