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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-634

No. COA21-704

Filed 20 September 2022

Guilford County, No. 19CVS1098

HELEN BROWN, Plaintiff,

v.

MACIE LAUREN MCLEOD and TODD EDWARD MCLEOD, Defendants.

Appeal by Plaintiff from judgment entered 29 April 2021 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 8 June 2022.

Levine Law Group, P.A., by Michael J. Levine and Cathy A. Williams for plaintiff-appellant.

Henson & Talley, LLP, by Karen Strom Talley and Nicole R. Scallon for defendant-appellee.

DILLON, Judge.

¶ 1 Plaintiff Helen West Brown appeals from a judgment entered upon a jury's verdict awarding her $20,000 in damages based on injuries she suffered in an automobile accident.

I. Background

¶ 2 On 5 April 2018, Defendant Macie Lauren McLeod was negligently operating a motor vehicle when she rear-ended a vehicle in which Plaintiff was a passenger.

¶ 3 Plaintiff had a history of back pain. In March 2018, a month prior to the accident, she underwent back surgery. During that surgery, hardware (screws, etc.) was installed to fuse bones in her spine. Images of her lower spine taken shortly after the accident revealed that some of the surgical hardware had become displaced. She suffered pain including pain associated with the displacement of her hardware.

¶ 4 Plaintiff filed a complaint for negligence against Defendant. Defendant filed an answer admitting liability but denying that the collision caused Plaintiff's injuries.

¶ 5 The jury returned a verdict for Plaintiff in the amount of $20,000, far less than she was seeking. Plaintiff appealed.

II. Analysis

¶ 6 On appeal, Plaintiff argues that the trial court erred by allowing Defendant's medical expert to testify that the accident did not cause the displacement of Plaintiff's surgical hardware.

¶ 7 Plaintiff only seeks recovery for general damages, specifically for physical/mental pain and suffering, partial loss of use of part of her body, and permanent injury. She offered no evidence concerning special damages for example, medical expenses incurred or lost wages resulting from her injury.

¶ 8 To meet her burden of proof, Plaintiff offered the expert testimony of her treating physician, who testified that the accident was likely a proximate cause of the displacement of her surgical hardware, resulting in much of her general damages.

¶ 9 Defendants called Dr. Robert Lacin, MD, as an expert. Dr. Lacin opined that the automobile accident did not cause Plaintiff's surgical hardware to become displaced. Instead, he believed that the hardware began to move prior to the accident due to the weak nature of her bones.

¶ 10 Plaintiff sought to have Dr. Lacin's testimony excluded. The trial court, however, allowed him to testify.

¶ 11 Rule 702(a) of our Rules of Evidence concerns the admissibility of expert testimony. This rule "incorporates the standard from the *Daubert* line of cases[,]" referring to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016).

¶ 12 In *McGrady*, our Supreme Court instructs that the language of "Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible." *Id.* at 889, 787 S.E.2d at 8. The Court also reminds us that "[w]hether expert testimony is admissible under Rule 702(a) is a preliminary question *that a trial judge decides* pursuant to Rule 104(a)." *Id.* at 892, 787 S.E.2d at 10 (emphasis added).

¶ 13 We are not to reverse a trial court's evidentiary ruling regarding expert testimony "absent a showing of abuse of discretion." *Id.* at 893, 787 S.E.2d at 11. In

McGrady, our Supreme Court, affirming a trial court's ruling, recognized "[u]nder the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, but instead to decide whether the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 899, 787 S.E.2d at 15 (citations and internal marks omitted).

¶ 14 We now assess how the trial court applied the three parts of Rule 702(a). In our review, we do not concern ourselves with whether we would have applied these three parts differently. Instead, we evaluate whether the manner the trial court applied them in was so arbitrary that its determinations regarding Dr. Lacin and his testimony could not have been the result of reasoned decisions.

A. Relevancy

¶ 15 First, we must determine whether the trial court abused its discretion in determining that Dr. Lacin's testimony was "based on 'scientific, technical or other specialized knowledge' that '[would] assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Id.* at 889, 787 S.E.2d at 8 (quoting Rule 702(a)). Our Supreme Court described this first part as "the relevancy inquiry": the testimony "must relate to an issue in the case" and "must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *Id.* (internal quotes and marks omitted).

¶ 16 We conclude that Dr. Lacin's testimony satisfies the first part of Rule 702(a). It was certainly relevant to discuss whether the accident caused the hardware displacement in Plaintiff's back and whether this displacement caused her pain. The answer to these questions involved medical analysis beyond the ordinary experience of a juror. Plaintiff does not argue this point. Indeed, Plaintiff offered the expert opinion from her treating physician on these questions.

B. Competency

¶ 17 The second part of Rule 702(a) "focuses on the [expert] witness's competence to testify in the field of his or her proposed testimony." *Id.* at 889, 787 S.E.2d at 9. Under this part, the trial court's duty was to determine whether Dr. Lacin "qualified as an expert by knowledge, skill, experience, training or education." *Id.* (quoting Rule 702(a)). Our Supreme Court instructs that "[e]xpertise can come from practical as much as from academic training" but that "[w]hatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?" *Id.*

¶ 18 Regarding this second part, the record shows that Dr. Lacin has an impressive educational background, is extensively involved in professional organizations, and has extensive experience as a practicing neurosurgeon in North Carolina. Plaintiff does not seem to argue that Dr. Lacin lacks knowledge, skill, experience, training or education to speak about back surgeries and the conditions of bones. Rather, Plaintiff

argues that Dr. Lacin was not qualified to opine that the displacement of her hardware was not due to a "horizontal force" associated with an automobile accident.

¶ 19 On this point, Dr. Lacin was allowed to opine regarding vertical and horizontal forces Plaintiff experienced in the automobile accident. Plaintiff contends Dr. Lacin is not a biomechanical engineer and, therefore, should not have been allowed to articulate his view that the forces associated with the accident could not have caused the displacement of Plaintiff's hardware. The trial court, however, allowed Dr. Lacin to testify on this matter based on his experience working with trauma units. The trial court reasoned that Dr. Lacin "was part of a trauma crew and worked at a trauma center" and that neurosurgeons "may not have a degree in biomechanical engineering, but they've got a lot of practical experience in dealing with those forces that are created during a traumatic event and the effect it has on the bones of a spine."

¶ 20 It is true that Dr. Lacin was not educated as a biomechanical engineer. But neither was Plaintiff's treating physician, who was allowed opine during Plaintiff's case in chief that "the accident created a force from behind that caused [Plaintiff] to hyperflex . . . causing these screws [to displace]." In any event, our Supreme Court in *McGrady* stated that "[e]xpertise can come from practical experience as much as from academic training." *Id.* at 889, 787 S.E.2d at 9 We recognize that reasonable minds may disagree on this matter. But we cannot say the trial court's determination

that Dr. Lacin was "in a better position than the trier of fact to have an opinion on the subject[,]" *id.*, was "manifestly unsupported by reason and could not have been the result of a reasoned decision," *id.* at 893, 787 S.E.2d at 11.

C. Reliability

¶ 21 The third part of a trial court's Rule 702(a) analysis involves the reliability of the expert's opinion. Specifically, this third part requires the proposed testimony meet the "three-pronged" analysis spelled out in the Rule, that:

> (1) The testimony [must be] based upon sufficient facts or data.
>
> (2) The testimony [must be] the product of reliable principles and methods.
>
> (3) The witness [must have] applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a).

¶ 22 Plaintiff argues that Dr. Lacin's testimony does not meet either of the first two prongs.

¶ 23 Regarding the first prong, Plaintiff argues that Dr. Lacin did not have sufficient facts or data from which he could form an opinion that Plaintiff's hardware began displacing prior to the accident. Plaintiff points out that Dr. Lacin did not review any images of Plaintiff's back taken prior to the accident and, therefore, Dr. Lacin could not opine that her hardware began displacing prior to the accident.

¶ 24 It is true that Dr. Lacin did not review any pre-accident images of Plaintiff's hardware. However, he did review all eight binders of Plaintiff's medical records, including information regarding her x-ray images, CT scans, and physical condition post-accident. From these records, he testified as follows: Plaintiff has weak, brittle, low-density bones. Plaintiff's surgical hardware installed a month prior to the accident was displaced. There was no indication that the hardware displacement occurred from a sudden horizontal force, such as the force that would be associated with a rear-end collision. Dr. Lacin also considered evidence that Plaintiff was able to stand and walk immediately after the accident, and that she developed symptoms of pain over time (rather than suddenly).

¶ 25 Certainly, Plaintiff's treating physician had a greater quantity of information from which he could formulate his opinion. Indeed, her treating physician operated on Plaintiff and saw her weeks later, shortly before the accident. But we conclude the trial court did not abuse its discretion in determining that Plaintiff's medical records and other evidence in the record made available to Dr. Lacin were sufficient to support his resulting findings.

¶ 26 Regarding the second prong, whether Dr. Lacin's testimony was "the product of reliable principles and methods," Plaintiff contends that Dr. Lacin's testimony should have been excluded because he formed his opinion after initially consulting with Defendants' counsel, prior to reviewing Plaintiff's medical records.

¶ 27 It is true that Dr. Lacin formed a *preliminary* opinion regarding the cause of Plaintiffs' injuries based on a conversation he had with defense counsel before reviewing Plaintiff's medical records. However, he reviewed her records prior to testifying at trial and based much of his testimony on his review of these records. It was not an abuse of discretion for the trial court *not* to disqualify Dr. Lacin's testimony based on the preliminary opinion he formed prior to reviewing her records. Rather, this fact was something for the jury to consider when weighing the quality of his testimony.

¶ 28 Plaintiff does not make any argument regarding the third prong.

¶ 29 In sum, Plaintiff essentially contends that her witness – her treating physician – was in a much better position to opine on the accident's impact on the displacement of her surgical hardware. This is certainly true, as her physician installed the hardware and, therefore, was more familiar with Plaintiff's condition prior to the accident. But Defendant's expert had enough information from which to opine that the accident did not cause the displacement of Plaintiff's hardware, that the displacement of Plaintiff's hardware was a slow process rather than a sudden event, that her weak bones were not able to hold the hardware installed in place, and that her hardware began displacing before the accident.

¶ 30 Perhaps the quality of the treating physician's conclusions was better than the quality of Dr. Lacin's conclusions. There were certainly points from which Dr. Lacin's

testimony could be attacked. At the same time, Plaintiff's treating physician had a bias, because it was in his interest to state that the back surgery was appropriate for a woman in Plaintiff's condition and that he performed it properly. Who knows how the jury weighed their testimonies? In any event, the trial court's gatekeeping obligation is "not intended to serve as a replacement for the adversary system." *State v. Gray*, 259 N.C. App. 351, 355, 815 S.E.2d 736, 739-40 (2018). Rather, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" continue as the "traditional and appropriate means of attacking shaky but admissible evidence." *Howerton v. Arai Helmet*, 358 N.C. 440, 461, 597 S.E.2d 674, 688 (2004) (quoting *Daubert*, 509 U.S. at 596). In any event, it is unclear from the record which expert the jury believed. Plaintiff did not ask for special damages, and it may be that the jury valued the pain and suffering due to Plaintiff's hardware displacement at or below $20,000.

D. Other Arguments

¶ 31 Plaintiff makes other arguments concerning Dr. Lacin's testimony. For instance, Plaintiff contends that it was error to allow Dr. Lacin to give an emphatic opinion, rather than using phrasing such as "reasonably probable" or "more likely than not." Our Supreme Court has specifically rejected the requirement that an expert must qualify his opinion by using the words "could" or "might" or similar phraseology. *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1995).

¶ 32 Plaintiff argues that Defendant should not been allowed to ask certain leading questions (Plaintiff's testimony was recorded and then played for the jury during the trial.) For a judgment or verdict to be set aside, appellant bears the burden of showing not only that there was error in the trial but that there was "reasonable probability that the result was materially affected thereby to his hurt." *Burgess v. C.G. Tate Constr. Co.*, 264 N.C. 82, 83, 140 S.E.2d 766, 767 (1965). We have reviewed the record and conclude that there is not a reasonable possibility that any error by the trial court in this regard affected the outcome of the case.

¶ 33 We have reviewed Plaintiff's other arguments and conclude none of them give rise to reversible error.

III. Conclusion

¶ 34 It may be a reasonable position that Dr. Lacin's testimony should have been excluded. But we are not the gatekeeper; the trial court serves that role. Our role is simply to determine whether the trial court abused its discretion in carrying out its responsibility as gatekeeper. Based on the record before us, we conclude that the trial court did not. We have reviewed Plaintiff's arguments and conclude no reversible error occurred at the trial.

NO ERROR

Judges TYSON concurs

Judge JACKSON concurs in result only.

Report per Rule 30(e).