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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 24-547

Filed 17 December 2024

Wake County, No. 20 CVS 007603-910

SCOTT CLARK, Plaintiff,

v.

MARLO BALDWIN, D&D DELIVERY, INC., and FEDEX GROUND PACKAGE SYSTEM INC., Defendants.

Appeal by Plaintiff from judgment following a jury trial entered 15 August 2023 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 5 November 2024.

John M. Kirby for Plaintiff-appellant.

McAngus, Goudelock & Courie, PLLC, by Jeffrey B. Kuykendal and Meredith L. Cushing, for Defendants-appellees.

WOOD, Judge.

Scott Clark (“Plaintiff”) appeals from a judgment entered upon a jury verdict finding Plaintiff was not injured by the negligence of Defendant Marlo Baldwin (“Defendant Baldwin”). On appeal, Plaintiff raises two issues: (1) whether the trial court erred in denying the Plaintiff’s motion to present audio and video testimony

without making proper findings; and (2) whether the trial court erred in excluding a 911 phone call of the incident. For the following reasons, we hold the trial court did not err.

I. Factual and Procedural Background

On 11 October 2017, Defendant Baldwin drove his delivery truck onto Plaintiff's property to deliver a package. Plaintiff alleges Defendant Baldwin backed his truck into him thereby striking Plaintiff. Plaintiff confronted Defendant Baldwin and called 911. Defendant Baldwin denies striking Plaintiff with his truck.

On 8 July 2020, Plaintiff filed a complaint alleging claims of negligence, gross negligence, breach of contract, and trespass against Defendant Baldwin, D&D Delivery, Inc. and FedEx Ground Package System, Inc. (collectively "Defendants") and Budget. On 14 September 2020, Defendants Baldwin, D&D, and FedEx filed a motion to dismiss and answer. On 3 October 2022, Budget filed a motion for summary judgment. On 15 February 2023, the trial court entered summary judgment for Budget.

On 16 February 2023, Defendant Baldwin filed a motion for summary judgment as to the claim for punitive damages and gross negligence. On 14 April 2023, the trial court entered an order granting this motion. On 24 April 2023 Defendants filed a motion for partial summary judgment on the claims of breach of contract and trespass. On 13 June 2023, the trial court entered an order granting this motion for partial summary judgment.

A trial was set for 7 August 2023 on the sole remaining claim of negligence. On 3 August 2023, Plaintiff filed a motion for continuance of the trial. Plaintiff contended Deborah LaBrie (“LaBrie”), the only witness and Plaintiff’s partner, was unavailable for trial because her mother was hospitalized after suffering a stroke and LaBrie was her only support. Plaintiff noted LaBrie did not believe video testimony via WebEx would be possible with her mother being seriously ill.

The same day, Defendants filed an objection to the Motion to Continue noting (1) LaBrie was aware of her mother’s illness on or before 18 July 2023; (2) Plaintiff had never sought to depose LaBrie; (3) Defendants had attempted to depose LaBrie but were informed through her counsel that she would not sit for a deposition, would refuse to testify at trial, did not have any observations or information as to Plaintiff’s allegations, and did not know about his alleged injuries or treatment; and (4) Plaintiff did not subpoena LaBrie for trial.

Notwithstanding LaBrie's previous disinclination, Plaintiff filed a motion to allow the video testimony on 4 August 2023.

The trial court denied the motion to continue, and the trial was held during the 7 August 2023 civil session of the Wake County Superior Court. Prior to the start of trial, Plaintiff argued his motion to allow the video testimony of LaBrie, and Defendants opposed the motion. The trial court denied Plaintiff’s motion stating, “the Plaintiff has brought this lawsuit, and the Plaintiff has the burden of proof in this

lawsuit, and there are lots of alternatives that could have been done before this morning.”

During trial, Plaintiff sought to introduce a copy of the 911 call recording of the incident between Plaintiff and Defendant Baldwin. Plaintiff obtained the copy of the 911 call within ten days of the incident. Pursuant to procedures governing 911 calls the audio released to the public is redacted and altered in a way to protect the identity of the speakers. Because 911 call recordings are retained for less than six years, the 911 call center could not produce an unaltered copy of the recording at the time of trial. Defendants objected to the admission of the altered 911 call recording, arguing it could not be authenticated and therefore is inadmissible. The trial court determined it was impossible for anyone to recognize any of the voices on the altered 911 call recording, and thus, it could not be authenticated and was not admissible.

At the conclusion of the trial, the jury determined Plaintiff had not been injured or damaged by the negligence of Defendant Baldwin, and the trial court entered judgment dismissing Plaintiff’s claim of negligence against Defendants. On 14 September 2023, Plaintiff filed a notice of appeal.

II. Analysis

On appeal, Plaintiff argues the trial court erred in denying Plaintiff’s motion to present audio and video testimony without making proper findings, and the trial court erred in excluding a 911 call recording of the incident. For the reasons explained below, we hold Plaintiff received a fair trial free from error.

A. Motion to Present Remote Testimony

N.C. Gen. Stat. § 7A-49.6(c) states, “[i]n a civil proceeding involving a jury, the court may allow a witness to testify by audio and video transmission only upon finding in the record that good cause exists for doing so under the circumstances.” N.C. Gen. Stat. § 7A-49.6(c) (2023). In contrast, N.C. Gen. Stat. § 7A-49.6(d) reads, “[a] party may object to conducting a civil proceeding by audio and video transmission. If the presiding official finds that the party has demonstrated good cause for the objection, the proceeding must not be held by audio and video transmission.” N.C. Gen. Stat. § 7A-49.6(d) (2023).

In the case sub judice, Plaintiff filed a motion to conduct testimony of a witness by WebEx to which Defendant objected. Therefore, it was incumbent upon the trial court to determine whether good cause existed to allow virtual testimony or whether there was good cause for the objection.

The standard of review for "good cause" determinations is an abuse of discretion. An appellate court will not overturn the trial court's decision unless it is shown that the decision was "manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *Aetna Better Health of N.C., Inc. v. N.C. DHHS*, 279 N.C. App. 261, 267, 866 S.E.2d 265, 269 (2021) (cleaned up). Our Supreme Court conducted an analysis of what constitutes “good cause,” examining a variety of cases that require good cause evaluations including employment cases, probation violation determinations, continuance motions and

more. *State v. Geter*, 383 N.C. 484, 492, 881 S.E.2d 209, 215 (2022). The Court determined the cases are fact specific and therefore an abuse of discretion standard should apply stating,

[T]he existence or dearth of good cause is, absent a statutory standard of review, a matter for the factfinder . . . to decide What constitutes good cause shown and stated is a case-by-case, fact-specific determination which requires a trial court to consider the particular circumstances which mandate that good cause be shown The trial court's discretion in this matter must not be exercised absolutely, arbitrarily, or capriciously, but only in accordance with fixed legal principles.

Id. at 492-94, 881 S.E.2d at 215-16 (cleaned up).

In determining what constitutes a showing of good cause, this Court has held trial courts should consider, “(1) was the moving party diligent in pursuit of the matter; (2) did the non-moving party suffer any harm by virtue of the delay; and (3) would the moving party suffer a grave injustice by being unable to defend the action.” *Swan Beach Corolla, L.L.C. v. Cnty of Currituck*, 255 N.C. App. 837, 841-42, 805 S.E.2d 743, 746-47 (2017) (cleaned up).

Prior to trial, the trial court heard arguments on the Motion to Continue, as well as the Motion to Allow Video Testimony. The trial court noted Plaintiff had not been diligent with respect to the witness' testimony. Specifically, Plaintiff had not subpoenaed or deposed his partner as the sole witness to the alleged incident, and the medical condition at issue had been ongoing for at least twenty days yet not raised

until four days before the trial was set to begin.

After weighing the arguments, the trial court determined Defendants would be prejudiced if virtual testimony were allowed. The trial court found,

[i]t is working a prejudice to the Defendant to now say, oh, we're going to make her available for the first time in front of the jury in a video deposition which is, I would say, is very unusual for a jury trial. So, I mean, I've not allowed it before in – for a witness where credibility is going to be an issue.

The trial court also found Plaintiff would not suffer a grave injustice by not being able to present video testimony. The trial court found “Plaintiff has brought this lawsuit, and the Plaintiff has the burden of proof in this lawsuit, and there are lots of alternatives that could have been done before this morning.”

Plaintiff had almost three years from the time of the incident to the filing of the complaint as well as another three years from the filing of the complaint until the scheduled trial to preserve the testimony of the witness through deposition or to secure the witness' testimony at trial by issuing a subpoena. Alternatively, there were twenty days between the witness' mother falling ill and the scheduled trial during which Plaintiff could have made accommodations. Plaintiff also could have chosen to voluntarily dismiss the action and refile the complaint later.

The trial court's findings substantiate the lack of “good cause” to allow LaBrie to testify virtually, as well as “good cause” to find Defendant would be prejudiced if virtual testimony were allowed. While neither attorney nor the trial court used the

term “good cause” during the hearing, it is clear the trial court conducted a “good cause” analysis. The record reflects the trial court’s decision was well-reasoned and was not so arbitrary that it could not have been the result of a reasoned decision. Thus, the trial court did not abuse its discretion in denying the Plaintiff’s motion.

B. The 911 Call Recording

Plaintiff sought to introduce a redacted copy of the 911 call recording of the incident between Plaintiff and Defendant Baldwin at trial that he had obtained within ten days of the incident. Pursuant to procedures governing 911 calls, the audio released to the public is redacted and altered in a way to protect the identity of the speakers. Plaintiff did not seek to preserve the original recording. Because the 911 call center does not retain recordings indefinitely, or for six years as in this case, the call center did not have a copy of the unredacted recording at the time of trial. Defendants objected to the admission of the altered 911 call recording on the grounds that it was inadmissible because it could not be authenticated. The trial court agreed after determining it was impossible to recognize any of the voices on the altered 911 call recording and it could not be properly authenticated, making it inadmissible.

Whether a recording is properly authenticated is reviewed *de novo*. *State v. Jones*, 288 N.C. App. 175, 187, 884 S.E.2d 782, 793 (2023); *State v. Clemons*, 274 N.C. App. 401, 409, 852 S.E.2d 671, 676 (2020); *State v. Crawley*, 217 N.C. App. 509, 515-16, 719 S.E.2d 632, 637 (2011).

Rule 901(a) requires that evidence be authenticated by showing “that the matter in question is what its proponent claims.” N.C. Gen. Stat. § 8C–1, Rule 901(a). Rule 901(b)(5) provides “[i]dentification of a voice [may be authenticated], whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.” N.C. Gen. Stat. § 8C–1, Rule 901(b)(5).

“Under Rule 901, testimony as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and a recording so authenticated is admissible if it was legally obtained and contains otherwise competent evidence.” *State v. Jones*, 358 N.C. 330, 344-45, 595 S.E.2d 124, 134 (2004) (cleaned up). “Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.” *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176, (2016) (cleaned up). This court has previously held that a 911 call recording is legally authenticated when a call center employee listened to both the original and the copy, testified that they were identical and identified the voices on the recording. *State v. Rourke*, 143 N.C. App. 672, 676, 548 S.E.2d 188, 191 (2001).

In this case, Plaintiff did not tender a call center witness to authenticate the recording. Only Plaintiff testified to the validity of the recording. Upon hearing the altered 911 call recording the trial court stated,

I don't know how he can say that he's familiar with any of those voices, quite frankly, because I mean, he may be able to say in the context of it I can tell you that's my wife, but

that's not authenticating the recording. I mean, I doubt he can say I recognize that voice to be Mr. Baldwin's voice, because we've all heard Mr. Baldwin testify in this courtroom and he didn't sound anything at all like that.

In addition, the statement included in the e-mail with the 911 recording stated, "as required by section 132-1.4 and/or section 143-518, information has been redacted from the attached calls and the audio has been altered to disguise the caller's natural voice." Plaintiff did not present any witness to explain the 911 call center's policy of altering voices or explain what portion of the call had been redacted. The trial court determined it "simply does not cut it for a person with the interest in the outcome of this case to say that is how this document – this piece of evidence should be authenticated. It's a relatively simple task to have it authenticated. It's not authenticated as it stands." We agree. The trial court did not err in denying the admission of the audio recording.

III. Conclusion

For the foregoing reasons, we hold the trial court did not abuse its discretion in denying Plaintiff's motion to present witness testimony via video. The trial court did not err in denying the admission of the 911 call recording which Plaintiff could not properly authenticate. Accordingly, Plaintiff received a fair trial free from error.

NO ERROR.

Judges GRIFFIN and STADING concurring.

CLARK V. BALDWIN

Opinion of the Court

Report per Rule 30(e).