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NO. COA01-1295

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

TERESA M. COONEY,
Plaintiff,

v.

Onslow County
No. 97 CVS 2467

WALTER R. SABISTON, M.D.,
and KINSTON HEAD & NECK
PHYSICIANS & SURGEONS, P.A.,
Defendants.

Appeal by plaintiff from judgment entered 7 December 2000 by Judge Gary E. Trawick in Onslow County Superior Court. Heard in the Court of Appeals 13 June 2002.

Teresa Mathis Cooney, pro se.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by Mark R. Morano, for defendant-appellee.

TYSON, Judge.

Teresa M. Cooney ("plaintiff") appeals from judgment entered after a jury verdict in favor of Walter R. Sabiston, M.D. (individually "Dr. Sabiston") and Kinston Head & Neck Physicians & Surgeons, P.A. (collectively "defendants") and the dismissal of plaintiff's case with prejudice. We find no error.

I. Facts

_____ On 10 January 1995, Dr. Sabiston performed endoscopic sinus surgery and septoplasty on plaintiff. Prior to the surgery plaintiff had normal visual function and acuity in both eyes.

Immediately after the surgery, plaintiff reported that she was blind in her right eye. Dr. Sabiston consulted with Dr. George W. Riddick, an ophthalmologist, who confirmed permanent blindness in plaintiff's right eye. It is undisputed that a palate injection of epinephrine/Xylocaine caused the blindness.

_____Plaintiff filed a complaint on 8 September 1997. Defendants filed an answer on 19 November 1997. On 14 November 2000, defendants moved for summary judgment, which was denied. After a jury trial, the trial court entered judgment in favor of defendants and dismissed plaintiff's case with prejudice. Plaintiff appeals.

II. Issues

_____Plaintiff assigns as error: (1) the trial court's ruling that the case would be tried only on the issue of informed consent despite evidence being presented regarding the "standard of care" Dr. Sabiston used in the procedure, (2) the trial court's disallowance of evidence regarding the standard of care used by Dr. Sabiston, (3) there was insufficient evidence to support the jury's verdict, and (4) plaintiff's counsel was inadequate. Assignments of error set out in the record and not argued are deemed abandoned. N.C.R. App. P. 28(b)(5) (2001).

III. Informed Consent

_____Plaintiff contends that the trial court erred by limiting the triable issue to whether there was informed consent and argues that evidence existed regarding whether defendants violated the proper standard of care.

The record indicates that plaintiff's counsel agreed at the

beginning of the trial that the only issue was whether informed consent was obtained from plaintiff prior to the surgery.

_____At the summary judgment hearing held the morning of the first day of trial, the following exchange occurred between the trial court and plaintiff's attorney:

THE COURT: Let me stop you. Is [Mr. Young, attorney for defendants] correct from your standpoint in saying that the only issue that it's going to come down to is consent?

HOLDFORD: Yes, sir. That is correct.

THE COURT: This is a consent case?

HOLDFORD: Yes, sir. It's a consent case.

THE COURT: When you get past everything else, it comes down to consent?

HOLDFORD: There are other factors, but it is a failure to obtain informed consent.

Further discussion during the hearing on defendants' motion for summary judgment shows that the only triable issue presented was whether defendants had breached their duty to obtain informed consent. This assignment of error is overruled.

IV. Trial Court's Evidentiary Rulings

_____Plaintiff contends that "the jury should have been allowed to hear *all* of the testimony of the witnesses and experts," and argues that certain information revealed during the trial "should have overwhelmed the court's earlier ruling to keep standard of care [negligence on defendants' part regarding the procedure] out." Essentially plaintiff argues that the trial court should have ruled

sua sponte to change the triable issue without a motion or request by plaintiff. The record does not indicate that plaintiff made any motion to add an additional triable issue. “[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record.” *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). See also N.C. Gen. Stat. § 8C-1, Rule 103 (2002); N.C. Gen. Stat. § 15A-1446(a) (2002). “Where evidence is excluded, the record must show ‘the essential content or substance of the witness’s testimony’ before we can determine whether exclusion of the evidence was prejudicial.” *State v. Fullwood*, 323 N.C. 371, 387, 373 S.E.2d 518, 528 (1988), *rev’d on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990) (quoting *State v. Satterfield*, 300 N.C. 621, 628, 268 S.E.2d 510, 515-16 (1980) (“it is impossible on appellate review to determine whether exclusion of this testimony was prejudicial error)).

_____Plaintiff has failed to preserve this issue for appellate review. This assignment of error is overruled.

V. Sufficiency of the Evidence

Plaintiff next argues that “there was more than sufficient evidence for [the jury] to rule favorably for the plaintiff on the issue of informed consent.”

“Contradictions or discrepancies in the evidence even when arising from plaintiff’s evidence must be resolved by the jury

rather than the trial judge." *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976) (citations omitted). Plaintiff fails to identify in the record where she moved for a directed verdict, judgment notwithstanding the verdict, or for a new trial based on the sufficiency of the evidence. In the absence thereof, plaintiff has failed to preserve the issue for our review. This assignment of error is overruled. N.C.R. App. P. 10(b)(2) (2002).

VI. Ineffective Assistance of Counsel

____Plaintiff contends that her trial counsel was ineffective. Plaintiff cites no authority, and we have found no precedent for setting aside a jury verdict in a civil case based on ineffective assistance of counsel. This assignment of error is overruled.

We find no error in the judgment of the trial court on the errors plaintiff assigned and argued.

No error.

Judges MARTIN and THOMAS concur.

Report per Rule 30(e).