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NO. COA01-62

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

CHARLES MICHAEL WADDELL,
Plaintiff,

v.

Alamance County
No. 97 CVS 1306

J. MICHAEL WILLIAMS,
Defendant.

Appeal by plaintiff from order entered 15 September 2000 by Judge D. Jack Hooks, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 26 November 2001.

Walker & Bullard, by Daniel S. Bullard and James F. Walker, for plaintiff-appellant.

Law Offices of Wade E. Byrd, by Sally A. Lawing, for defendant-appellee.

BIGGS, Judge.

This appeal arises from an altercation between Charles Waddell (plaintiff) and Michael Williams (defendant), occurring on 6 January 1997. Plaintiff appeals from the trial court's order setting aside the jury's verdict and ordering a new trial. For the reasons that follow, we reverse.

The facts are as follows: Prior to their fight, plaintiff and defendant were lifelong friends. Plaintiff was both an employee and a part-owner of defendant's business, Alamance Machine. The

two men socialized outside of work, were joint owners of a beach house, and had vacationed together.

In the fall of 1996, a conflict developed between them, based on plaintiff's belief that his share of work at Alamance Machine was excessive. This disagreement was not resolved, and, in December, 1996, defendant gave plaintiff a formal termination notice from Alamance Machine. As a result, the two had several financial matters to wind down. On 6 January 1997, plaintiff and defendant met at a bank to settle some of their joint business affairs, and then went to the plant to retrieve documents that plaintiff needed. While plaintiff and defendant were alone, an altercation arose in which the parties engaged in physical fighting. As a result, plaintiff filed suit against defendant in June, 1997, seeking compensatory and punitive damages for civil assault and battery, and conversion of property. In addition, plaintiff sought attorneys' fees. Defendant's answer, filed in September 1997, denied all charges, and raised the issue of self defense. Defendant also filed a counterclaim against plaintiff for civil assault and battery, and for malicious prosecution.

The case was tried on 31 March 1999. At trial, defendant and plaintiff presented very different accounts of the fight. Plaintiff contended that defendant was angry, became verbally abusive, and then physically attacked plaintiff; and that defendant cut plaintiff's lip and threw him to the floor while choking him and demanding an apology. Defendant also inflicted a deep bite on plaintiff's wrist, leaving a scar. Defendant, on the other hand,

asserted that the fight was not an attack, but a voluntary affray, which plaintiff started. Defendant acknowledged threatening, hitting, and choking plaintiff, and admitted that he "bit into [plaintiff's] arm like a snapping turtle." However, defendant contended that his actions towards plaintiff were in self defense.

During trial, plaintiff presented evidence, to which defendant objected, of prior instances of violence and intimidation by defendant, including: (1) defendant's attacking a woman on an airplane, throwing her glasses on the ground, and stomping them; (2) defendant's threatening to assault a man who complained when defendant hit his vehicle with gravel while mowing the lawn; and (3) defendant's attacking a stranger while on vacation at the beach. After a *voir dire*, the trial court admitted such evidence pursuant to North Carolina Rules of Evidence 404(b), "Other Crimes, Wrongs, or Acts."

On 5 April 1999, the jury returned a verdict finding defendant liable on all claims and awarding plaintiff \$30,000.00 in compensatory damages for assault and battery, \$3,500.00 for conversion, and \$50,000.00 in punitive damages. The jury rejected defendant's claim of self defense, and all of defendant's counterclaims. On 28 June 1999, judgment was entered in accord with the verdict.

Defendant has never appealed from the judgment in this case. However, on 7 July 1999, defendant filed a motion for judgment notwithstanding the verdict, pursuant to N.C.G.S. § 1A-1, Rule 50, and sought a new trial under Rule 59. On the same date, defendant

filed a motion for stay of proceedings to enforce judgment. On 30 May 2000, plaintiff filed a motion to strike defendant's motions. Plaintiff argued that, despite the entry of judgment a year earlier, defendant had neither complied with the judgment, nor made any effort to obtain a ruling on his motions. Plaintiff moved that defendant's motions be dismissed for failure to prosecute, pursuant to N.C.G.S. § 1A-1, Rule 41(b). In addition, he argued that the defendant's motion to stay judgment should be dismissed on the grounds that defendant had not provided security, as required under Rule 62(b).

On 29 June 2000 defendant filed two motions for relief from judgment under N.C.G.S. § 1A-1, Rule 60(b)(2), (3), and (6), which authorize the court to grant relief upon evidence of newly discovered evidence, fraud, or for "[a]ny other reason justifying relief from the operation of the judgment." In one motion, defendant argued that "recent decisions of our Court of Appeals make it clear that the admission, during the liability phase of the trial, of evidence of prior bad acts by the defendant was reversible error." Defendant claimed that "[t]hese new decisions . . . were not available to the Court when this case was tried," and urged the trial court to "save the parties the expense of an appeal by setting aside the judgment and granting the defendant the new trial to which he is entitled under these recent decisions." In the other motion, not before this Court, defendant argued that newly discovered evidence deprived him of a fair trial.

On 3 July 2000, plaintiff's motion to dismiss was denied, and on 5 July 2000, defendant's motions for judgment notwithstanding the verdict, new trial, and relief from judgment were heard. The trial court concluded that "errors of law occurred in the admission of evidence under Rule 404, and in the Court's instructions to the jury regarding that evidence, . . . [that] prejudiced the defendant and deprived him of a fair trial[.]" On this basis, the trial court ruled as follows:

- (1) The Motion for Judgment Notwithstanding the Verdict [was] DENIED.
- (2) The Motion for New Trial [was] ALLOWED in the Court's discretion, and there shall be a new trial on all issues. The judgment entered in this matter on June 29, 1999, is hereby SET ASIDE, and the Clerk shall strike it from the judgment book.
- (3) The Motion for Relief from Judgment pursuant to Rule 60 is moot.
- (4) The order taxing costs against the defendant is hereby STRIKEN. Costs will be determined following the new trial.

Plaintiff appeals from this order.

The trial court granted defendant a new trial under N.C.G.S. § 1A-1, Rule 59. A motion made under Rule 59 must comply with N.C.G.S. § 1A-1, Rule 7(b)(1), which requires the following:

- (1) An application to the court for an order shall be by motion which, . . . shall be made in writing, *shall state the grounds therefor*, and shall set forth the relief or order sought. (emphasis added)

In order to satisfy Rule 7(b)(1), a motion must "supply information revealing the basis of the motion." *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 554 (1997). Mere technical defects do not offend

Rule 7(b)(1). *McGinnis v. Robinson*, 43 N.C. App. 1, 9, 258 S.E.2d 84, 89 (1979) (where motion provides details of alleged perjury, this Court holds that, because the "substantive grounds and relief desired [are] manifest on the face of the motion[]," failure to state rule number is "not fatal"). However, a Rule 59 motion must inform the court and the non-movant of the specific factual or legal issue being raised, and mere recitation of the statutory language of Rule 59(a) is insufficient to accomplish this. *Smith*, 125 N.C. App. 603, 481 S.E.2d 415. In *Smith*, the defendants stated that their motion was based upon Rule 59(a)(2) and (7), but provided no further details. This Court held that the motion did not comply with Rule 7(b)(1):

The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1). The motion, . . . must supply information revealing the basis of the motion. . . . There are, however, no allegations in the motion revealing any [factual or legal basis].

Id. at 606, 481 S.E.2d at 417. See also *Meehan v. Cable*, 135 N.C. App. 715, 721, 523 S.E.2d 419, 423 (1999) (where motion states that defendants entitled to new trial under Rule 59(a)(7) and (8), but does not "state any specific basis for granting a new trial," the motion is invalid); *Dusenberry v. Dusenberry*, 87 N.C. App. 490, 492, 361 S.E.2d 605, 606 (1987) ("where court and adverse party cannot comprehend the basis of a motion, they are rendered powerless to respond to it").

Moreover, a motion that fails to inform the non-movant of its specific basis does not preserve the alleged error for appellate

review. *Meehan*, 135 N.C. App. at 721, 523 S.E.2d at 423 (where Rule 59 motion does not comply with Rule 7(b)(1), the alleged "issue is not properly before this Court", and Court does not address it).

In the instant case, defendant's motion simply quoted from the statutory list of grounds for a new trial under Rule 59, including 59(a)(8), "[e]rror in law occurring at the trial and objected to by the Defendant." However, the motion states no specific factual or legal issue, or any basis for a new trial. There is no way to discern from the motion what aspect of the trial, or which of the trial court's rulings, defendant was challenging. Defendant's Rule 59 motion does not refer to North Carolina Rules of Evidence 404(b); nor does it identify or describe the contested evidence. We conclude that defendant's motion provided no basis upon which plaintiff might be informed that defendant was attempting to argue the admissibility of Rule 404(b) evidence, and that, because defendant did not state the legal basis of his Rule 59(a)(8) motion, he failed to comply with Rule 7(b)(1). We further conclude, therefore, that defendant did not preserve his Rule 404(b) claim for review by filing this motion, and that defendant's Rule 59 motion should have been dismissed.

Nor can this Court construe the trial court's ruling as an order entered pursuant to defendant's Rule 60(b)(6) motion. It is settled law that Rule 60(b)(6) may not be used as a vehicle to raise legal issues. *Jenkins v. Middleton*, 114 N.C. App. 799, 801, 443 S.E.2d 110, 112 (1994) (Greene, J. concurring with separate

opinion) ("the broad general language of Rule 60(b)(6) does not include relief for errors of law"). In the instant case, the legal issue that defendant attempted to raise under Rule 60(b)(6) could properly be presented only by means of a timely appeal or a valid Rule 59(a)(8) motion.

As stated above, defendant did not appeal from the judgment entered in this case. The time for giving notice of appeal from the entry of judgment expired 28 July 2000. N.C. Rule of Appellate Procedure 3(c) provides that "[t]he running of the time for filing and serving a notice of appeal in a civil action . . . is tolled . . . by a timely [Rule 59] motion" for a new trial. However, a Rule 59 motion that fails to state the specific grounds for relief does not "qualify as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure," and thus does not toll the time for filing notice of appeal. *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. Defendant's Rule 59 motion, because it did not state a specific factual or legal basis for the relief sought, failed to toll the time for giving notice of appeal.

For the reasons discussed above, we conclude that the defendant did not preserve the issue of the admissibility of Rule 404(b) evidence under Rule 59(a)(8), and was not entitled to raise the issue through Rule 60(b)(6) motion. Consequently, we reverse the trial court's order, and remand for reinstatement of the judgment and order entered at trial.

Reversed and Remanded.

Chief Judge EAGLES and Judge MARTIN concur.

Report per Rule 30(e).