NO. COA01-956

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

LESLIE J. TEAL and
BRIAN K. TEAL,
Plaintiff-appellants,

v. Buncombe County
No. 99 CVS 1116

JAMES P. THEOFRASTOUS, M.D.,
RICKY L. EVANS, M.D., KENT
J. SCHERR, M.D., and
MOUNTAIN AREA HEALTH
EDUCATION CENTER, INC.,
Defendant-appellees.

Appeal by plaintiffs from an order entered 16 October 2000 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 21 May 2002.

Evans & Co., by Robert G. McIver for plaintiff-appellants.

Clark, Bloss & McIver, P.L.L.C., by John F. Bloss, for plaintiff-appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Philip J. Smith and Robert J. Fedder, for defendant-appellees.

BIGGS, Judge.

Plaintiffs (Leslie J. Teal and Brian K. Teal) appeal from the denial of their post-trial motion for a new trial or for judgment notwithstanding the verdict. For the reasons that follow, their appeal is dismissed.

During July, 1996, plaintiff Leslie Teal received medical

treatment leading to an injury to her colon. On 1 September 1998, plaintiffs filed a medical malpractice suit against defendants, seeking damages for negligence and loss of consortium. Following a trial, the jury returned a verdict on 30 May 2000, finding defendants not liable for negligence or damages. Plaintiffs have not appealed the jury's verdict, but on 23 June 2000, plaintiffs moved for judgment notwithstanding the verdict, pursuant to N.C.G.S. § 1A-1, Rule 50, and for a new trial pursuant to N.C.G.S. § 1A-1, Rule 59. Their motion was denied on 16 October 2000. Plaintiffs appealed from the denial of their post-trial motion, and from the trial court's order of 11 October 2000, taxing costs to plaintiffs.

The sole argument presented by plaintiffs on appeal is that the trial court committed reversible error by admitting certain testimony of Dr. Domby, a defense witness. However, we conclude that plaintiffs' violations of the North Carolina Rules of Appellate Procedure have precluded meaningful appellate review, and require dismissal of plaintiffs' appeal.

First, the issue presented by plaintiffs — admissibility of certain testimony — has not been properly raised through plaintiffs' appeal of the denial of their motion under N.C.G.S. § 1A-1, Rule 50 for judgment notwithstanding the verdict (JNOV). A motion for JNOV tests the sufficiency of the evidence and is "essentially a renewal of an earlier motion for directed verdict." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). In the instant case, we find nothing in

the record to suggest that plaintiffs moved for a directed verdict. Moreover, on appeal plaintiffs do not present any argument regarding the sufficiency of the evidence, the issue raised by a motion for directed verdict or JNOV; nor do they address the impact of the exclusion of the challenged testimony upon the sufficiency of the evidence. Thus, plaintiffs failed to show any connection between their motion for JNOV and the issue they attempt to present on appeal.

In addition to moving for JNOV, plaintiffs' motion also asked "in the alternative . . . pursuant to N.C.G.S. § 1A-1, Rule 59, for a new trial[.]" However, plaintiffs' Rule 59 motion does not state the grounds for a new trial, or indicate in any fashion the basis for the motion, and thus fails to comply with N.C.G.S. § 1A-1, Rule 7(b)(1) (2001) (motions "shall be made in writing, [and] shall state the grounds therefor"). The failure to state the basis for a Rule 59 motion renders it invalid. *Clark v. Penland*, 146 N.C. App. 288, 291, 552 S.E.2d 243, 245 (2001) (trial court did not err by denying Rule 59(e) motion where defendant "fail[ed] to state the grounds therefor . . . as required under Rule 7(b)"). In the case *sub judice*, we conclude that plaintiffs' Rule 59 motion fails because it does not include any indication of the grounds for the motion. We conclude that plaintiffs' post-trial motion, for JNOV or a new trial, did not preserve for appellate review the issue of Dr. Domby's testimony.

Another serious, and we believe fatal, defect in plaintiffs' appeal is their failure to include either the complete transcript

of all trial proceedings, or a narrative summary of all relevant evidence. Plaintiffs instead have included only an unidentified portion of the transcript, with no indication of what evidence was omitted. This is a violation of N.C.R. App. P. 9(a)(1)(e), which requires that the record on appeal must include either (1) a statement that the verbatim transcript, or a designated portion of the transcript, has been filed with the record, pursuant to N.C.R. App. P. 9(c)(2); or (2) a narration of the evidence, pursuant to N.C.R. App. P. 9(c)(1). Further, the portion of the transcript that is included on appeal is bound directly into the record, in violation of N.C.R. App. P. Rule 9(b), and N.C.R. App. P. Appendix B, Format and Style ("[t]he transcript should not be inserted into the record on appeal, but . . . separately bound and submitted . . . with the record").

Plaintiffs' failure to file either the complete transcript of proceedings or a narrative of the relevant evidence is not a mere technical violation, but is an omission which cripples this Court's ability to conduct its review. Plaintiffs have argued that the trial court committed reversible prejudicial error by admitting certain testimony; yet due to their violation of Rule 9(a)(1)(e), we are unable to evaluate its possible prejudicial effect in the context of the entire trial proceedings. *See Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988) (Court dismisses appeal that fails to include transcript or narrative summary, holding that "[w]ithout the evidence, a determination as to whether defendant was prejudiced . . . is impossible" and concluding that

appellant's "rule violations effectively preclude . . . review by this Court").

For the reasons discussed above, plaintiffs' appeal is Dismissed.

Judge GREENE concurs with separate opinion

Judge HUDSON concurs.

Report per Rule 30(e).

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Defendants.

GREENE, Judge, concurring in the result.

Plaintiffs appealed from the trial court's denial of their motion for a judgment notwithstanding the verdict and, in the alternative, a motion for a new trial. Neither plaintiffs' assignment of error nor their brief to this Court addresses any asserted error in the trial court's ruling on their motions. Thus, I would not review the denial of those motions. *See* N.C.R. App. P. 10(a), 28(a). The assignment of error and the brief instead address an evidentiary ruling made by the trial court during the course of the trial. As plaintiffs did not appeal from the judgment of the trial court entered consistent with the jury verdict, I would not address this alleged error. *See* N.C.R. App. P. 3. For these reasons, I therefore agree with the majority that plaintiffs' appeal should be dismissed.

I do note plaintiffs have included a portion of the transcript

in the record on appeal. This is in violation of our appellate rules. The record on appeal may include a narrative of the evidence as provided in Rule 9(c)(1). N.C.R. App. P. 9(a)(1)e., 9(c)(1). If the parties elect to use a transcript of the trial, that transcript is not to be included in the record on appeal; instead, it is to be filed as a separate document and will be treated as an exhibit by this Court. N.C.R. App. P. 9(c)(2); *see* N.C.R. App. P. Appendix B. The parties may elect to use a partial transcript, and in the event that they do, the record on appeal must indicate the partial nature of the transcript. N.C.R. App. P. 9(a)(1)e.