NO. COA05-1103

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

IN RE THE ADOPTION OF LMJS,

A minor child.

Wake County
No. 04 SP 2345

Appeal by respondent from order entered 28 January 2005 by Judge Jane P. Gray in Wake County District Court. Heard in the Court of Appeals 28 March 2006.

Law Offices of Paul A. Suhr, P.L.L.C., by Amie Sivon and Paul A. Suhr, for respondent-appellant.

Womble Carlye Sandridge & Rice, by Burley B. Mitchell, Jr. and Robert E. Fields, III, for petitioner-appellees.

ELMORE, Judge.

This appeal arises from a district court's order of summary judgment that respondent's consent is not necessary to the adoption of LMJS by petitioners. Respondent is the putative biological father of LMJS. He claims that LMJS's biological mother's willful misrepresentations that he was not the child's father have kept him from otherwise showing support prior to the filing of the petition, and that the district court erred in determining he had knowledge of paternity yet failed to legitimate his parental rights.

Foremost, we must discuss several issues of appellate procedure that limit the scope of our review. Respondent's notice

of appeal in open court, and again in a written notice of appeal, references the order of the district court mandating that his consent to the adoption is unnecessary. But respondent assigns error to and argues in his brief that the district court's denial of his motion for continuance prior to the hearing was an abuse of discretion. Notably though, the district court denied respondent's motion by a separate written order entered 28 January 2005. Respondent's oral and written notice of appeal do not include or reference the order denying the motion to continue. As such, that order and decision of the district court is beyond the scope of our appellate review. *See* N.C.R. App. P. 3(d) ("The notice of appeal required to be filed and served . . . shall designate the judgment or order from which appeal is taken. . . ."); *Sillery v. Sillery*, 168 N.C. App. 231, 234, 606 S.E.2d 749, 751 (2005) (Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional; noncompliance is subject to dismissal); *see also Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (notice of appeal from denial of a motion to set aside a judgment which did not also specifically appeal the underlying judgment does not properly present the underlying judgment for review).

In addition to the assignment of error dealing with the district court's denial of his motion to continue, respondent brings forth three other assignments of error. One of these, assigning error to the court's denial of respondent's motion for the appointment of a guardian *ad litem*, was not discussed or argued in respondent's brief. Therefore, pursuant to appellate Rule

28(b)(6), that assignment of error is abandoned. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief . . . will be taken as abandoned.").

Respondent's remaining two assignments of error are more than adequate to direct this Court's attention to the potential legal errors complained of; however, one assignment of error references no record or transcript pages. *See* N.C.R. App. P. 10(c) ("An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references*."). Moreover, neither assignment of error is referenced in the argument section of respondent's brief "[i]mmediately following each question . . . identified by their numbers and by the pages at which they appear in the printed record on appeal," as required by Rule 28(b)(6). N.C.R. App. P. 28(b)(6). These errors, although perhaps minor given the ability of this Court to match the two assignments of error with the identically phrased two questions presented, are nonetheless fatal to the appeal. *See Munn v. N.C. State Univ.*, ___ N.C. App. ___, ___, 617 S.E.2d 335, 339 (2005) (Jackson, J. dissenting) (failure to include record or transcript references under Rule 10 warrants dismissal), *rev'd per curiam for the reasons in the dissent*, 360 N.C. 353, 626 S.E.2d 270 (2006); *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005); *In re Foreclosure of a Deed v. Branch Banking & Trust Co.*, ___ N.C. App. ___, ___, 625 S.E.2d 155, 160 (2006) (relying on

Viar, the Court held that questions not corresponding to the correct assignments of error will not be reviewed).

The appellate dead-end associated with the failures in sufficiency and preservation evident in respondent's assignments of error has, in at least one instance, not been so abrupt. In *Hammonds v. Lumbee River Electric Membership Corporation*, this Court cataloged recent decisions on appellate rules violations and recognized that dismissal was not automatic.

> Since the decision of the Supreme Court in *Viar*, this Court has not treated violations of the Rules as grounds for automatic dismissal. Instead, the Court has weighed (1) the impact of the violations on the appellee, (2) the importance of upholding the integrity of the Rules, and (3) the public policy reasons for reaching the merits in a particular case.

Hammonds v. Lumbee River Elec. Mbrshp. Corp., ___ N.C. App. ___, ___, 631 S.E.2d 1, 10 (2006). While an account of our recent decisions may reflect a tri-part analysis on whether violations of the Rules warrant dismissal, the binding precedent from our Supreme Court intimates we dispense with the hesitation.

> The Court of Appeals majority asserted that plaintiff's Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process. . . . It is not the role of the appellate courts, however, to create an appeal for an appellant. As this case illustrates, the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.

Viar, 359 N.C. at 402, 610 S.E.2d at 361 (citations omitted).

Consistent application of the Rules belies a malleable test in favor of a bright-line rule. *See Broderick v. Broderick*, ___ N.C. App. ___, 623 S.E.2d 806 (2006) (dismissing appeal for broadside assignment of error with no reference to record or transcript); *Munn*, ___ N.C. App. at ___ 617 S.E.2d at 339 (Jackson, J. dissenting) ("Plaintiff makes no attempt to direct the attention of this Court to any portion of the record on appeal or to the transcript with any references thereto. As such his appeal must be dismissed for failure to follow our mandatory Rules of Appellate Procedure."). Assignments of error are not a mere formality; much to the contrary, they are the foundation and frame of legal arguments in an appellant's brief, and most importantly their absence or ineffectiveness will leave potential issues of merit beyond the reach of this Court save for the most exceptional instances. *See, e.g., May v. Down East Homes of Beulaville, Inc.*, ___ N.C. App. ___, 623 S.E.2d 345 (2006); *Walker v. Walker*, ___ N.C. App. ___, 624 S.E.2d 639 (2005), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 53P06) (4 May 2006); *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 265-66, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985); *Electric Co. v. Carras*, 29 N.C. App. 105, 107-08, 223 S.E.2d 536, 538 (1976).

This is not that exceptional case. As such, we must dismiss respondent's appeal for several violations of the Rules of Appellate Procedure.

DISMISSED.

Judge WYNN concurs in result only by separate opinion.

Judge LEVINSON concurs.

Report per Rule 30(e).

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WYNN, Judge, concurring in the result.

For the reasons stated in my concurrence in *Broderick v. Broderick*, __ N.C. App. __, 623 S.E.2d 806 (2006) (Wynn, J., concurring), I concur in the result only.