An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-380

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

ADA BALDWIN, as Administratrix
of The Estate of HATTIE MAE ROSE,
Plaintiff-Appellant,

v. Columbus County
No. 04 CVS 1031

CENTURY CARE CENTER, INC.,
A North Carolina Corporation,
d/b/a CENTURY CARE CENTER,
Defendant-Appellee.

Appeal by plaintiff from orders entered 28 September 2005, 13 October 2005, and 29 November 2005 by Judge E. Lynn Johnson in Columbus County Superior Court. Heard in the Court of Appeals 19 October 2006.

Eastman Law Office, P.S.C., by Martha Marie Eastman, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Colleen N. Shea and Meredith T. Black, for defendant-appellee.

JACKSON, Judge.

Ada Baldwin ("plaintiff"), as administratix of the estate of Hattie Mae Rose, filed suit against Century Care Center, Inc. ("defendant") on 23 August 2004. On 14 February 2005, the trial court signed a consent Discovery Scheduling Order ("DSO") requiring plaintiff to designate expert witnesses on or before 1 July 2005 and to make such witnesses available to defendant for depositions

as soon as possible but no later than 1 August 2005. The DSO expressly provided that as a sanction for failure to comply, "[w]itnesses not so designated shall not be permitted to testify at trial."

On 1 July 2005, plaintiff's counsel faxed and mailed Plaintiff's Designation of Experts, which designated four expert witnesses. As of the close of business, however, defense counsel had not received the fax or any other document designating plaintiff's expert witnesses. That same day, plaintiff's counsel provided by email an available deposition date — 5 July 2005 — for one of the experts. Because the weekend was a holiday weekend, however, this email was not received by defense counsel until 4 July 2005, at which point it was too late to schedule the deposition. Defense counsel emailed plaintiff's counsel on 4 July 2005 requesting additional available dates for the deposition of that particular witness. Plaintiff's counsel, however, failed to respond to this request.

On 5 July 2005, plaintiff's counsel provided by email three possible deposition dates — 20 July, 29 July, and 1 August 2005 — for another expert. Defense counsel responded the following morning and accepted 1 August 2005. In the same email, defense counsel requested plaintiff's counsel to provide a time and location for the deposition so that a Notice of Deposition could be prepared. Plaintiff's counsel did not respond to this email, and defense counsel sent follow-up emails on 11 July, 13 July, and 14 July 2005 requesting the information. On 14 July 2005, plaintiff's

counsel emailed defense counsel and stated that that particular expert could no longer be deposed on 1 August 2005, and the deposition would need to take place on either 19 August, 24 August, or 26 August 2005 — outside of the time frame provided by the DSO. Minutes later, plaintiff's counsel emailed again and stated that 26 August 2005 was no longer available but 30 August 2005 was available.

On 21 July 2005, defendant filed a Motion to Strike Plaintiff's Experts as a result of plaintiff's counsel's violations of the DSO and her pattern of conduct.[1] On 28 September 2005, the trial court entered an order allowing defendant's motion, and on 13 October 2005, the court entered an order allowing defendant's attorneys' fees, expenses, and costs. On appeal, plaintiff's counsel contends on several grounds that the trial court erred both in striking plaintiff's experts and in ordering plaintiff's counsel to pay attorneys' fees, expenses, and costs.

By statute, "[i]f a party fails to identify an expert witness as ordered, the court shall, upon motion by the moving party, impose an appropriate sanction, which may include dismissal of the action, entry of default against the defendant, or exclusion of the

---

[1]Defendant provides numerous examples of plaintiff's counsel's conduct and notes in its brief that plaintiff's counsel (1) provided incorrect mailing addresses for several witnesses, (2) failed to respond in a timely fashion, if at all, to defendant's counsel's correspondence, (3) filed a motion to compel production of certain documents that the trial court had already ruled protected, and (4) refused to provide information requested by defendant in a motion to compel and only provided the information after defendant filed the Motion to Strike Plaintiff's Experts.

testimony of the expert witness at trial." N.C. Gen. Stat. § 1A-1, Rule 26(f1) (2005). As this Court has held, "sanctions may not be imposed mechanically . . . [and] the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience." *Patterson v. Sweatt*, 146 N.C. App. 351, 357, 553 S.E.2d 404, 409 (2001), *aff'd* 355 N.C. 346, 560 S.E.2d 792 (2002) (per curiam). The imposition of sanctions and the choice of sanctions is left to the sound discretion of the trial court and cannot be overturned absent an abuse of discretion. *See In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 246, 618 S.E.2d 819, 826 (2005), *disc. rev. denied*, 360 N.C. 290, 628 S.E.2d 382 (2006). In the case *sub judice*, the actions and attitude of plaintiff's counsel, both before the trial court as well as on appeal, demonstrate a complete lack of professionalism, and her pattern of behavior is anathema to preserving the integrity of the legal community in this state. Nevertheless, before imposing the ultimate sanction of dismissal, the trial court must consider lesser sanctions. *See Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 158 (1993).

In the instant case, whether or not preclusion of plaintiff's expert witnesses amounts to a dismissal, plaintiff, by failing to include the transcript, cannot show that the trial court failed to consider lesser sanctions. In its order, the court stated that it based its discovery sanctions on "careful consideration of the record proper, arguments of counsel, citations of authority, the outlined history of this lawsuit and the only documentation

appearing of record as to the timeliness of events being [the] outlined history by counsel for Defendant which essentially remains unrebutted." However, the transcript of those "arguments of counsel," on which the court expressly based its decision in part, was not included by plaintiff as part of the record on appeal. In *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995), this Court examined the transcript and determined that lesser sanctions were considered. Here, less severe sanctions were available to the trial court, but without the transcript, this Court is unable to determine whether or not the trial court considered such alternatives.

Pursuant to Rule 9 of the North Carolina Rules of Appellate Procedure, this Court's "review is solely upon the record on appeal[] [and] the verbatim transcript of proceedings, if one is designated." N.C. R. App. P. 9(a) (2006). In addition to an index, a statement of the case, a copy of the summons with return or any other paper showing the trial court had jurisdiction, and copies of the pleadings, the record on appeal is specifically required to contain "so much of the evidence . . . as is necessary for an understanding of all errors assigned." N.C. R. App. P. 9(a)(1)(e) (2006). Furthermore, it is well-established that the appellant bears "the burden of ensuring that all necessary information [is] included in the record on appeal as required by Rule 9." *Tucker v. City of Kannapolis*, 159 N.C. App. 174, 176, 582 S.E.2d 697, 698 (2003); *see also Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988) ("It is the appellant's responsibility to

make sure that the record on appeal is complete and in proper form.”).

In the present case, “[n]o transcript of the hearing below was included in the . . . record, and we find no refutation in the record as compiled of [plaintiff’s] assertion.” *Williams v. Williams*, 120 N.C. App. 707, 714, 463 S.E.2d 815, 820 (1995), *aff’d*, 343 N.C. 299, 469 S.E.2d 553 (1996) (per curiam); *accord Tucker*, 159 N.C. App. at 177, 582 S.E.2d at 698–99 (“Because plaintiffs did not file a transcript, our review is limited to the record on appeal. . . . Since plaintiffs have failed to include in the record the evidence or other documentation necessary for an understanding of the issue on appeal, this assignment of error is overruled.”). Furthermore, “[w]here the record is silent upon a particular point, it will be presumed that the trial court acted correctly in performing his judicial acts and duties.” *State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982). We therefore presume that the trial court properly considered lesser sanctions, and accordingly, the orders of the trial court are hereby affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).