

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-579
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

REINALDO OLAVARRIA,
Plaintiff

v.

Wake County
No. 13 CVS 3778

ROBERT L. MARRIOTT,
Defendant.

Appeal by plaintiff from judgment entered on or about 4 April 2014 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 23 October 2014.

Reinaldo Olavarria, plaintiff-appellant pro-se.

No appellee brief filed.

STROUD, Judge.

Plaintiff appeals judgment dismissing all the claims in his complaint and cross-complaint. For the following reasons, we affirm.

I. Background

On 19 March 2013, plaintiff filed a complaint against defendant for alienation of affections, criminal conversation, negligence per se, intentional interference with custodial

rights, and slander; plaintiff also requested punitive damages on two of his claims. On 21 May 2013, defendant responded to plaintiff's complaint and counterclaimed for defamation, intentional infliction of emotional distress, and intrusion. On 10 June 2013, plaintiff responded to defendant's counterclaims and "cross-claimed"¹ for trespass to land and intentional infliction of emotional distress. On 4 November 2013, plaintiff filed a motion entitled "Motion for Injunctive Relief Temporary Restraining Order" and in the body of the motion requested a "50 C Civil No Contact Order[.]" On 3 December 2013, plaintiff filed for summary judgment.

On or about 31 January 2014, the trial court denied plaintiff's motion for summary judgment and dismissed his request for a no contact order. On 6 March 2014, plaintiff filed a motion to continue, and on 11 March 2014, the trial court denied that motion. On or about 4 April 2014, the trial court filed a judgment dismissing all of plaintiff's claims, defendant's counterclaims, and plaintiff's cross-claims determining that neither party had met their "burden of proof

¹ Although plaintiff's additional claims against defendant are not technically "crossclaims" as defined by North Carolina General Statute § 1A-1, Rule 13(g), this is the title plaintiff used, and we will refer to them as such. See N.C. Gen. Stat. § 1A-1, Rule 13(g) (2013).

with respect to any of the claims[.]” On 11 April 2014, plaintiff appealed the judgment.

II. Notice of Appeal

Plaintiff first claims “the court erred in the denial of the Motion for Summary Judgment and the Motion for Injunctive relief[.]” However, plaintiff failed to file a notice of appeal concerning these orders, and therefore, his arguments regarding them will not be considered on appeal. *See generally State v. Robinson*, ___ N.C. App. ___, ___, 763 S.E.2d 178, 179 (2014) (“By failing to give timely notice of appeal, Defendant has lost his right to appeal.”)

III. Evidence Presented

Plaintiff next contends that the trial court erred in not allowing him “to present evidence to show the defendant witness” committed perjury. Instead of providing a transcript of the trial, plaintiff prepared a narration of the evidence, which it appears that plaintiff himself prepared. Although a narration of evidence is permissible under North Carolina Rule of Appellate Procedure Rule 9, the narration still must meet certain requirements:

(1) *When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated -- How Set Out in*

Record. When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants.

N.C.R. App. P. 9(c) (1) (2014).

Plaintiff's narration is not in question and answer format. See *id.* In addition, plaintiff presented no offer of proof, so we are unable to discern what evidence plaintiff wished to present, and we are unable to consider this argument. See generally *State v. Dew*, ___ N.C. App. ___, ___, 738 S.E.2d 215, 221 ("It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify. For that reason, in 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. In the absence of an adequate offer of proof, we can only speculate as to what the witness' answer would have been. . . . As a result, Defendant is not entitled to relief from the trial court's judgments on the basis of this contention." (citations, quotation marks, and brackets omitted), *disc. review denied*, 366 N.C. 595, 743 S.E.2d 187 (2013)).

IV. Plaintiff's "CrossClaims"

As noted above, plaintiff filed claims he entitled as "crossclaims" for trespass to land and intentional infliction of emotional distress. Plaintiff argues that the trial court should have granted relief on these "crossclaims" because

the denial of the cross claim, by plaintiff, was in error, because, it was naturally occurring from the actions of defendant, and because, jurisprudence does dictate that all causes of action should be combined, as outlined in general statutes, to ensure duplicate matters are not before the courts, and court calendars are not filled with claims on the same action, cause of action, involving plaintiff and defendants.

This is not a legally cognizable argument, nor has plaintiff cited any authority to support it, and thus this argument is overruled. See generally *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role

of the appellate courts . . . to create an appeal for an appellant.”).

V. Continuance Order

While the heading of plaintiff’s fourth argument appears to be regarding discovery and grounds for a mistrial, the body of the argument is regarding the trial court’s order denying his motion to continue. Again, plaintiff failed to file a notice of appeal regarding that order, and we will not consider it on appeal. See *Robinson*, ___ N.C. App. at ___, 763 S.E.2d at 179. To the extent that plaintiff was attempting to make an argument regarding discovery issues or why he should be granted a “mistrial,” we again can find no cognizable legal argument or relevant legal authority and will not address these issues. See generally *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

VI. Standard of Proof

As best we can tell, plaintiff is contending that the trial court used the wrong standard of proof for his negligence per se claim. To the contrary, we note that the portions of the trial which are included in the narration prepared by plaintiff show that the trial court conducted this bench trial with commendable patience and correctly addressed each of plaintiff’s claims and contentions. Furthermore, once again, we cannot discern a legal

argument to address regarding this issue from plaintiff's brief, and thus we will not consider it. *See generally id.*

VII. Mistrial

Plaintiff next contends that the trial court should have granted a mistrial "because defendant did not provide notice of witness, did not participate in discovery, and presented evidence and witnesses that caused unfair surprise, against which plaintiff-appellant did not have time to prepare. The failure to disclose by defendant-appellee are grounds for a mistrial." Plaintiff cites no law for his argument regarding a mistrial and our review of his narration has not provided any insight into plaintiff's argument. As such, this argument will not be considered. *See generally id.*

VIII. Evidence of Stalking

Plaintiff argues that the trial court "erred in not considering stalking activities by defense to be probative and material with reference to IIED claim." It appears that plaintiff is claiming that he himself made an evidentiary showing sufficient to find defendant guilty of the criminal offense of stalking, and thus the trial court should have used stalking in considering plaintiff's intentional infliction of emotional distress claim. Again plaintiff cites no law, and to

the extent that plaintiff makes an argument that defendant committed a crime, we agree that the trial court cannot consider a criminal conviction that did not actually occur, even if plaintiff believes he has sufficiently proven it. This argument will not be considered. *See generally id.*

IX. Default Judgment

Plaintiff's last argument is one sentence which cites no law and requests "default judgment" be entered against defendant. This sentence requests a form of relief which is clearly not available, since defendant did answer plaintiff's complaint and denied the material allegations. *See N.C. Gen. Stat. § 1A-1, Rule 55 (2013).* This argument is dismissed.

X. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges GEER and BELL concur.

Report per Rule 30(e).