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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1381

Filed: 7 August 2018

Mecklenburg County, No. 99 CVD 6562

ERIC WADE CARUTHERS, Plaintiff,

v.

DENISE MARLENE HANN, Defendant.

Appeals by plaintiff and defendant from order entered 13 June 2017 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 2 May 2018.

Arnold & Smith, PLLC, by Matthew R. Arnold, for plaintiff-appellee and cross-appellant.

Dozier Miller Law Group, by Allison Pauls Holstein, for defendant-appellant and cross-appellee.

DIETZ, Judge.

Defendant Denise Hann appeals the trial court's termination of alimony based on cohabitation. She argues that the trial court erred by admitting a video deposition over her hearsay objection.

As explained below, Plaintiff Eric Caruthers argues that key determinations justifying the court's hearsay ruling occurred at a pretrial conference between the parties and the trial court. Neither party included a transcript or narrative of that conference in the record on appeal and the parties' briefs take inconsistent positions on how the events at that conference impacted the court's hearsay ruling at trial.

As a result, this Court cannot engage in meaningful review of the trial court's ruling. We therefore vacate and remand the court's order. As explained below, we do not hold that the trial court erred—after all, it is not the court's duty to ensure that the parties make an appropriate record for appeal. On remand, the trial court, in its discretion, may enter a new order on the existing record, or may conduct any further proceedings it deems necessary.

Facts and Procedural History

Eric Caruthers and Denise Hann married in February 1989 and separated in February 1998. In March 1999, the parties entered into a Separation Agreement. The Separation Agreement required Caruthers to pay monthly alimony to Hann.

In 2014, Caruthers moved to modify or terminate alimony on several grounds, including cohabitation. The trial court, after a trial, determined that Hann cohabitated beginning in 2006 and terminated Caruthers's alimony obligations, ordering that Hann be "divested of all Alimony paid to her since May 21, 2014, the

date on which Plaintiff filed his Motion to Terminate Alimony." Both parties timely appealed.

Analysis

Hann first challenges the trial court's admission of a video deposition of Matthew Reeps, the man with whom she allegedly cohabitated. Hann contends that the video deposition was inadmissible hearsay.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). Deposition testimony is hearsay when that testimony is admitted as substantive evidence. *Suarez v. Wotring*, 155 N.C. App. 20, 25, 573 S.E.2d 746, 750 (2002). But Rule 32 of the Rules of Civil Procedure permits the use of deposition testimony at trial in circumstances where the Rules of Evidence otherwise might preclude it. *Id.* at 26–27, 573 S.E.2d at 750–51. Thus, the dispositive question in this appeal is whether the video deposition was admissible under Rule 32 of the Rules of Civil Procedure.

Caruthers does not dispute that the video deposition was hearsay. But he contends that Hann failed to preserve this issue for appellate review because she did not object on hearsay grounds at trial. He also contends that the trial court ruled at an off-the-record conference with the parties that Reeps did not need to attend the trial—a ruling that Caruthers implies (but does not expressly assert) rendered Reeps

unavailable as a witness. Caruthers asserts that, because Hann failed to include a transcript or narrative of that off-the-record conference, her hearsay objection is waived.

We begin with the error preservation issue. To preserve her hearsay objection, Hann "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). When Caruthers sought to introduce the video deposition, Hann objected, stating:

> Well, Your Honor, I have an objection for the record that – to playing a video deposition that we understood to be a discovery deposition. There were multiple leading questions. And, yes, we did have someone present, but my client didn't – wasn't able to show up until the very end. And so, I think that hindered our ability to cross-examine the witness. But it was taken because we were in the process of discovery and it was not indicated that it was supposed to be in lieu of testimony. *And so I always understood [Reeps] to have to come to court in order to be able to testify. And so I am objecting for the record to the entry of the deposition in lieu of [Reeps's] testimony*. And any objection that was made on the record in the deposition, I would like to preserve those objections, particularly with leading questions and the inappropriate – any kind of irrelevant or any other objection material that might be in the deposition."

(Emphasis added).

Caruthers contends that "this objection was not on the basis of hearsay and failed to specify the authority for such an objection." He argues that the objection was

only to the use of a "discovery deposition" during the trial, and not an argument that the deposition was inadmissible as hearsay.

We disagree. Although the better practice when making a hearsay objection is to use the word "hearsay" (particularly in a bench trial where speaking objections are more appropriate), a litigant may preserve a hearsay objection without using the word "hearsay" if the basis for the objection and the context make clear that it involves hearsay. *See State v. Cook*, 246 N.C. App. 266, 277, 782 S.E.2d 569, 577, (2016).

As the emphasized portion of the above-quoted objection indicates, Hann stated that she was "objecting for the record to the entry of the deposition in lieu of [Reeps's] testimony." This is an objection based on hearsay. After all, but for the hearsay rule, there would be no basis to object to the admission of a deposition "in lieu of" live testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 801. Thus, Hann's objection to the use of a deposition in lieu of live testimony was sufficient to preserve her hearsay challenge for appellate review.

We next turn to Caruthers's waiver argument. The parties concede that, during an off-the-record conference before trial, the court ruled that Reeps was not required to be present at trial. But neither party explains the context for that ruling. Was it made as part of a discussion of whether the video deposition could be used at trial? Did the trial court determine that Reeps was "unavailable" under Rule 32 of

the Rules of Civil Procedure? This Court has no way to know and thus no way to engage in meaningful appellate review of that off-the-record ruling.

Caruthers argues that it was solely Hann's burden to ensure that a transcript or narrative of that off-the-record conference was included in the appellate record. Again, we disagree. As explained above, Hann properly objected to the admission of the video deposition on hearsay grounds at trial and obtained a ruling from the trial court on that objection. N.C. R. App. P. 10(a)(1). If the trial court, at this earlier, unrecorded meeting, ruled that Reeps was unavailable (thus making the deposition admissible under Rule 32), Caruthers, as the party defending that ruling, shared the duty to include it in the appellate record to demonstrate for this Court that the trial court's on-the-record ruling was correct. *See Fleming Produce Corp. v. Covington Diesel, Inc.*, 21 N.C. App. 313, 315, 204 S.E.2d 232, 234 (1974) ("While an appellant has the primary responsibility for the preparation of a record on appeal, an appellee has the responsibility of ascertaining that the record clearly sets forth things favorable to him that the appellate court is called upon to review.").

Likewise, if Hann agreed during that off-the-record meeting that Reeps need not attend the trial (knowing that Caruthers intended to introduce the deposition) Hann's hearsay objection might be waived. But again, Caruthers, as the appellee, has the burden of including evidence in the appellate record to establish this waiver. *Id.*

Simply put, we agree with Caruthers that the record on appeal is insufficient to permit meaningful review of Hann's hearsay argument. But we reject his argument that Hann alone is responsible for the missing pieces of the record. Both parties share that responsibility.

Finally, Caruthers argues that, even if the video deposition was inadmissible, its admission was harmless. Yet again, we disagree. When a litigant challenges the admission of evidence at trial, she "bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different." *Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 274, 775 S.E.2d 316, 323 (2015). Hann contends that the issue of cohabitation turned largely on her own credibility. She testified that she and Reeps "were not a couple"; that Reeps slept on her couch because he was homeless; that she did not even give him a key to her home; and that Reeps did not contribute to Hann's household in any way. Reeps's deposition testimony, by contrast, was equivocal and arguably inconsistent on these issues. We agree with Hann that there was a reasonable possibility that Reeps's testimony influenced the trial court's assessment of Hann's own credibility. The admission of that testimony therefore cannot be deemed harmless error. *Faucette*, 242 N.C. App. at 275, 775 S.E.2d at 323.

In sum, this Court lacks a sufficient appellate record to engage in meaningful review of Hann's hearsay challenge, because we do not know what occurred at the off-the-record conference in which the trial court ruled that Reeps need not attend the trial. We therefore vacate the trial court's order.

We emphasize that our ruling is not that the trial court erred in any way. Trial courts are under no obligation to make a record for appeal; that is the duty of the litigants. On remand, the trial court, in its discretion, may enter a new order on the existing record or may conduct any further proceedings it deems necessary. Because we vacate and remand on this ground, we need not address the parties' remaining arguments, which may be mooted by the trial court's determination on remand.

Conclusion

The trial court's order is vacated and this matter is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).