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NO. COA11-222  
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

JOHN FLETCHER CHURCH,  
Plaintiff

v.

Caldwell County  
No. 01 CvD 1391

JEAN MARIE CHURCH (now DECKER),  
Defendant

Appeal by plaintiff from an order entered 17 September 2010 by Judge J. Gary Dellinger in Caldwell County District Court. Heard in the Court of Appeals 31 August 2010.

*John Fletcher Church, pro se.*

*Respess & Jud, by Wallace Respess, Jr., and Marshall Hurley, PLLC, by Marshall Hurley, for Defendant.*

ERVIN, Judge.

Plaintiff John Fletcher Church appeals from an order entered 17 September 2010 awarding attorney's fees to Defendant Jean Marie Decker (formerly Church). On appeal, Plaintiff contends that the trial court erroneously ordered him to pay attorney's fees to counsel for Defendant. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude

that the trial court's order should be reversed and that this case should be remanded to the Caldwell County District Court for further proceedings not inconsistent with this opinion.

### I. Factual Background

Plaintiff and Defendant were married on 23 December 1992, separated on 31 August 2001, and divorced on 22 November 2002. Two children were born of the parties' marriage. Since separating, the parties have appeared before the trial and appellate courts of this State on numerous occasions for the purpose of litigating multiple issues relating to the custody and support of their children. Having provided a detailed recitation of the facts underlying this appeal in our prior opinions, we limit the factual statement contained in this opinion to those substantive and procedural facts which are specifically relevant to the issues before us at this time.<sup>1</sup>

#### A. 9 July 2010 Hearing

In May 2010, Plaintiff filed a series of motions relating to prior orders entered by the trial court. Plaintiff's motions were scheduled for hearing in the Caldwell County District Court on 9 July 2010. Prior to the scheduled hearing date, Plaintiff prepared a motion to continue in which he informed the trial

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<sup>1</sup> A more detailed history of the controversy between the parties is contained in our decisions in *Church v. Decker*, 2011 N.C. App. LEXIS 1219 (2011) and *Church v. Church*, 2011 N.C. App. LEXIS 1315 (2011).

court that he had injured his hand in an accident and that he would be "unable to appear on Friday, July 9, 2010" because of his "physical condition" and because he had an "out of town doctor's appointment with a hand specialist." As a result, Plaintiff requested that the 9 July 2010 hearing be continued until he was "released by his doctor." Plaintiff claimed to have served this continuance motion on the Chief District Court Judge, the trial court, the Clerk of Superior Court, the trial court administrator, and counsel for Defendant on 7 July 2010.

Plaintiff did not appear in the Caldwell County District Court for the purpose of prosecuting his pending motions on 9 July 2010. After the trial court inquired if anyone had heard from Plaintiff, those present reported that, although they were aware of Plaintiff's continuance motion, "no messages whatsoever had been received." After a thirty-eight minute recess, Defendant requested that "all pending motions filed by the Plaintiff" be dismissed. After orally granting Defendant's motion in open court, the trial court entered a written order on 9 July 2010 dismissing the motions filed by Plaintiff on "10 May 2010, 12 May 2010, and 27 May 2010" with prejudice for failure to prosecute pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b). In addition, Defendant requested that the trial court "issue a criminal show cause order, having [Plaintiff] brought before [the trial court] at some future date offering him the

opportunity to present any evidence he may wish as to why he should not be held in willful, criminal contempt of this Court." After orally granting Defendant's request in open court, the trial court entered a written order on 9 July 2010 requiring Plaintiff to appear in the Caldwell County District Court on 21 July 2010 for the purpose of "show[ing] cause if any there be why he should not be found in indirect criminal contempt of Court and punished for criminal contempt." Finally, the trial court entered a written order on 9 July 2010, which was amended on 12 July 2010, finding that Plaintiff was in willful contempt of court for failing to make payments to Defendant's counsel as required by a 28 April 2010 order awarding attorney's fees. In the same order, the trial court reserved "hearing an award of attorney['s fees] incurred in the prosecution of [Defendant's] Motion for Contempt."

B. 21 July 2010 Hearing

The criminal contempt citation issued by the trial court came on for hearing at the 21 July 2010 session of Caldwell County District Court. At the conclusion of the 21 July 2010 hearing, the trial court found that Plaintiff was in "willful contempt of court for failing to comply with the schedules and practices of the court resulting in substantial interference with the business of the court." On 17 September 2010, the trial court entered a written order finding Plaintiff in

criminal contempt of court. Plaintiff noted an appeal from the trial court's ruling to the Caldwell County Superior Court, which invalidated the trial court's contempt order on the grounds that the "District Court trial of [the] matter was prosecuted by someone not with the [District Attorney's] office [and without] a determination that the [District Attorney's] office had a conflict."

At the same hearing, Defendant requested to be heard concerning "an award of attorney[']s fees] incurred in the prosecution of [Defendant's] Motion for Contempt" in the trial court's civil contempt order. The attorney's fees award requested by Defendant reflected "what's been incurred since April with all of these filings, including those motions which [the trial court] dismissed on [9 July 2010]." On the same date, Defendant filed an affidavit tending to show that Defendant had incurred \$4,160.99 in attorney's fees relating to legal services performed on her behalf in connection with the 9 July 2010 hearing, the 9 July 2010 show cause order, the 9 July 2010 and 12 July 2010 civil contempt orders, and the 21 July 2010 criminal contempt hearing. Although Plaintiff requested the trial court to continue any hearing concerning Defendant's request for attorney's fees on the grounds that he had not received sufficient notice that such issues would be addressed at the 21 July 2010 hearing, the trial court denied Plaintiff's

continuance motion and granted Defendant's motion for attorney's fees by means of a written order entered on 17 September 2010. Plaintiff noted an appeal from the 17 September 2010 order to this Court on 25 October 2010.

## II. Legal Analysis

### A. Appealability

On 7 April 2011, Defendant filed a motion seeking the dismissal of Plaintiff's appeal from the 17 September 2010 order and the imposition of sanctions. In her dismissal motion, Defendant argued that Plaintiff filed his notice of appeal more than thirty days after the entry of the trial court's attorney's fees order, subjecting his appeal to dismissal pursuant to N.C. R. App. P. 3(c)(1). As a result, the first issue that we must address is the extent, if any, to which Plaintiff noted his appeal from the 17 September 2010 order in a timely manner.

According to N.C. R. App. P. 3(c)(1), a party to a civil action must:

file and serve a notice of appeal . . . within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or . . . within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period[.]

N.C. R. App. P. 3(c)(1). N.C. Gen. Stat. § 1A-1, Rule 58 provides, in pertinent part, that:

The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5 [of the North Carolina Rules of Civil Procedure.]

N.C. Gen. Stat. § 1A-1, Rule 58 (emphasis added). Finally, N.C.

Gen. Stat. § 1A-1, Rule 5 provides, in pertinent part, that:

A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4. The certificate shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served.

N.C. Gen. Stat. § 1a-1, Rule 5(b) (emphasis added). The time within which a notice of appeal must be filed is tolled in the event that the party responsible for serving a copy of a trial court's order fails to file a certificate of service. *Rice v. Coholan*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 695 S.E.2d 484, 489-90, *disc. review denied*, 364 N.C. 435, 210 N.C. LEXIS 785 (2010).

As we have already noted, the order requiring the payment of attorney's fees was filed on 17 September 2010. Plaintiff noted his appeal from the 17 September 2010 order on 25 October 2010, some thirty-eight days later. However, as the record clearly shows and as Defendant candidly concedes, Defendant failed to file a certificate of service showing that she served

Plaintiff with the 17 September 2010 order. Although Defendant's counsel has submitted an affidavit indicating that he did, in fact, serve Plaintiff with a copy of the 17 September 2010 order in a timely manner, nothing in the relevant legal authorities in any way establishes that such an affidavit is a valid substitute for the required certificate of service. Thus, the time within which Plaintiff was required to file his notice of appeal was tolled and had not begun to run prior to the filing of Plaintiff's notice of appeal. *Rice*, \_\_\_ N.C. App. at \_\_\_, 695 S.E.2d at 489-90; *Davis v. Kelly*, 147 N.C. App. 102, 105, 554 S.E.2d 402, 404 (2001). As a result, Plaintiff's notice of appeal was filed in a timely manner, giving this Court jurisdiction to hear Plaintiff's appeal. For that reason, Defendant's dismissal motion should be, and hereby is, denied.

B. Validity of 17 September 2010 Order

On appeal, Plaintiff argues that (1) the trial court's decision to grant Defendant's request for attorney's fees violated his rights to notice and an adequate opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and (2) the trial court erred by granting Defendant's request for attorney's fees given the facts and circumstances present in this case. We need not address the merits of Plaintiff's arguments, however, since we are required to reverse the trial court's order on the basis



of the same reasoning that led to our recent decision in *Church v. Decker*, 2011 N.C. App. LEXIS 1665, \*13-15 (2011), in which we reversed an order entered by the trial court on 9 July 2010 finding Plaintiff in civil contempt for failing to make required attorney's fees payments given that the underlying order requiring the payment of attorney's fees had been overturned in *Church v. Decker*, 2011 N.C. App. LEXIS 1219, \*28-29 (2011). As a result of the fact that the 17 September 2010 order awarded Defendant attorney's fees based upon the involvement of her counsel in the criminal contempt proceedings that were ultimately overturned in the Caldwell County Superior Court and in efforts to enforce the same order invalidated in our decision in *Church v. Decker*, 2011 N.C. App. LEXIS 1219 (2011), we are required to overturn the order at issue in this case as well. *Holden v. Holden*, 245 N.C. 1, 9, 95 S.E.2d 118, 124 (1956) (holding that, since an underlying trial court judgment was ineffective, an order finding the plaintiff in contempt for failing to comply with such judgment and "*taxing him with the costs and counsel fees in such hearing*" was "likewise ineffectual [and should be] reversed and set aside") (emphasis added). As a result, for the reasons set forth above, we conclude that the trial court's 17 September 2010 order awarding Defendant attorney's fees should be, and hereby is, reversed and that this case should be, and hereby is, remanded to the

Caldwell County District Court for further proceedings not inconsistent with this opinion.<sup>2</sup>

REVERSED AND REMANDED.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).

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<sup>2</sup> As a result of the fact that the attorney's fees amount awarded to Defendant in the 17 September 2010 order involved costs associated with Defendant's participation in a number of proceedings in addition to the criminal contempt proceeding and the enforcement of the earlier attorney's fees order, we express no opinion concerning the extent, if any, to which Defendant might be entitled to some amount of attorney's fees associated with her involvement in other aspects of this protracted litigation.