NO. COA00-1393

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

ROBERT C. MONEY, JR.

v. Forsyth County
No. 99 CVD 4166

AUDREA COBLE,
(formerly Money)

Appeal by defendant-appellant from orders entered by Judge Ronald E. Spivey, and Judge William T. Graham, Jr., in Forsyth County District Court. Heard in the Court of Appeals 28 September 2001.

C.R. "Skip" Long, Jr. for plaintiff-appellee.

Stephen E. Lawing for defendant-appellant.

BIGGS, Judge.

Defendant appeals from orders entered 3 November 1999 and 17 February 2000 by Judge Ronald E. Spivey, and from orders entered 18 August 2000 and 28 September 2000 by Judge William T. Graham, Jr. For the reasons discussed herein we dismissed in part, affirmed in part.

Audrea Coble, formerly Money, (defendant) and Robert C. Money, Jr., (plaintiff) married 29 August 1992, and divorced 8 March 1999. They have one child, Zachery Jackson Money (minor child), born 15

April 1993. This appeal arises from litigation between the parties regarding child custody and child support.

Plaintiff filed a complaint on 1 June 1999, seeking child custody and child support. Defendant's answer included a counterclaim, also asking for child custody and support. On 1 November 1999, the parties and their attorneys appeared in court before Judge Spivey. For most of that day, defendant and plaintiff negotiated through their attorneys, in an attempt to resolve their differences. The trial court met with counsel several times during the day, and reviewed their progress. Eventually, they reached an agreement regarding a schedule for the minor child to divide his time between his parents, and other details of custody. Their agreement was reduced to writing and recorded on an Administrative Office of the Courts (AOC) form, AOC-CV-220, "Memorandum of Judgment/Order." This form was signed by both parties, their respective counsel, and the court, on 1 November 1999, and was filed 3 November 1999.

Several issues were left unresolved by this agreement, including the parties' respective amounts of child support, and which parent would decide upon the child's sports activities. Accordingly, plaintiff and defendant resumed negotiation the following day, when their counsel met in chambers with the trial court. The parties actively pursued their claims over the next three months. Defendant submitted a proposed order to plaintiff, based upon the earlier memorandum; plaintiff responded with a revised order, which defendant in turn amended to include more

changes. Defendant also filed a motion for child support, dated 20 January 2000. Throughout this time, the parties substantially complied with the shared custody terms as set out in the memorandum they signed on 1 November 1999.

Defendant and plaintiff returned to court on 17 February 2000. At that time Judge Spivey entered an order establishing the terms of child custody. This order tracked the earlier memorandum, but added terms that the parties had agreed to since the signing of the memorandum. Several weeks after this order was entered, defendant filed a motion under N.C.G.S. § 1A-1, Rules 59 and 60, alleging for the first time that she had neither understood, nor consented to, the terms of the preliminary memorandum signed by the parties the previous November. Defendant sought to have the 17 February 2000 order set aside, and asked for a new trial on all issues. Defendant's motion was denied by Judge Graham. Defendant then appealed to this Court from the denial of her Rule 59 and 60 motion, and from the earlier memorandum and subsequent order. Defendant filed four notices of appeal with this Court over the following months. In September, 2000, Judge Graham entered an order establishing child support, from which defendant also appealed.

We find the procedural history of this appeal determinative of several of the issues raised. Accordingly, the sequence of orders and filing dates is summarized as follows:

> 1. **Memorandum of Judgment/Order**. Memorandum signed by the parties, their attorneys, and the trial court on 1 November 1999, and

entered on 3 November 1999.

2. **Order Based on Memorandum**. Order based upon the 3 November 1999 memorandum, and establishing child custody, entered on 17 February 2000.

3. **Defendant's Rule 59 and Rule 60 motion.** Motion filed 8 March 2000, pursuant to N.C.G.S. § 1A-1, Rules 59 and 60, asking to set aside the 3 November 1999 memorandum and the 17 February 2000 order, and seeking a new trial on all issues.

4. **Denial of Rule 59 and 60 motion**. Order entered 18 August 2000, dismissing Rule 59 motion because it was not timely filed, and denying relief under Rule 60 in its discretion.

5. **First notice of appeal**. Defendant's first notice of appeal to this Court, filed 3 July 2000, and appealing 3 November memorandum, 17 February order, and 18 August denial of her Rule 59 and 60 motion.

6. **Second notice of appeal**. Filed by defendant 29 August 2000, appealing the same prior orders.

7. **Third notice of appeal**. Filed by defendant 18 September 2000: identical to second notice of appeal.

8. **Child support order**. Entered 28 September 2000, and referencing the 17 February 2000 order.

9. **Fourth notice of appeal**. Filed by defendant 2 October 2000, from 28 September 2000 child support order, and from all prior orders.

10. **Withdrawal of first notice of appeal** filed by defendant 3 July 2000. Withdrawal filed 17 November 2000.

11. **Record on appeal**. Proposed record on appeal served on plaintiff 2 October 2000; record settled by agreement on 15 November 2000.

I.

Preliminarily, we note that assignments of error 2, 4, and 5 are not argued in defendant's brief, nor supported by any cited authority; consequently, these are deemed abandoned. N.C.R. App.

P. 28(b)(5) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

Defendant's first argument groups her first three questions presented, and assignments of error 1 and 3, which address the same legal issue. Defendant argues that the 3 November 1999 memorandum must be vacated, because the trial court failed to review it with the parties in open court before signing the agreement. On the same basis, defendant contends that the 17 February 2000 order must be set aside, because it was based upon the earlier 3 November 1999 memorandum. Plaintiff argues that defendant's failure to comply with the Rules of Appellate Procedure should prevent us from reaching the merits of defendant's argument. We agree with plaintiff.

The time for giving notice of appeal from an order in a civil case is governed by N.C.R. App. P. 3, which provides in part as follows:

> (a) Filing the Notice of Appeal. Any party entitled by law to appeal . . . may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.
> (c) Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry.

N.C.R. App. P. 3(a) and (c). The time for giving notice of appeal may be tolled by the timely filing of a motion filed pursuant to N.C.G.S. § 1A-1, Rule 59. N.C.R. App. P. 3(c)(3) and (4). A Rule

59 motion must be filed "not later than 10 days after entry of the judgment." Rule 59(b).

Compliance with N.C.R. App. P. 3(c) is jurisdictional, and failure to file timely notice of appeal requires dismissal of the appeal. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 402 S.E.2d 407 (1991) (if requirements of Rule 3 are not met, appeal must be dismissed). "In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure. . . . The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citations omitted).

In the present case, defendant appeals from the memorandum entered 3 November 1999, and from the order entered 17 February 2000. Under N.C.R. App. P. Rule 3(c), defendant was required to file and serve notice of appeal from these judgments within 30 days of their respective dates of entry. Defendant, however, did not file notice of appeal until 3 July 2000, several months beyond the statutory deadline. Defendant did not apply to this Court for an extension of time. She instead entered successive notices of appeal, each purporting to appeal from the 3 November 1999 memorandum, and from the 17 February 2000 order. Defendant cites no basis for the proposition that these duplicate notices of appeal serve to extend the time for filing notice of appeal, and we find none.

Defendant's Rule 59 motion sought review of the 3 November 1999 memorandum, and of the 17 February 2000 order. The last date upon which she was entitled to file and serve a motion under Rule 59 was 16 November 1999 (the memorandum), and 1 March 2000 (order based on memorandum). However, defendant did not file her Rule 59 motion until 8 March 2000. Because the Rule 59 motion was not timely filed, it did not serve to toll the time for giving notice of appeal. *Stevens v. Guzman*, 140 N.C. App. 780, 538 S.E.2d 590 (2000), *disc. review improvidently allowed*, 354 N.C. App. 214, 552 S.E.2d 140 (2001) (where Rule 59 motion not timely filed, time for giving notice of appeal not tolled, and appeal must be dismissed).

Absent a right to direct appeal, a litigant may obtain immediate review only by writ of certiorari, issued pursuant to N.C.R. App. P. 21(a)(1). This Court has the discretion to treat defendant's purported appeal as a petition for writ of certiorari. *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner"). However, our review of the record herein reveals no compelling reason to do so, and, accordingly, we decline to exercise our discretion in this manner.

We conclude that defendant's appeals from the 3 November 1999 memorandum, and from the 17 February 2000 order based upon the memorandum, were not timely filed, and must be dismissed. Accordingly, these assignments are overruled.

II.

Defendant's next argument is based upon assignments of error 6 and 7, which contest the trial court's denial of her motion under Rules 59 and 60. We again conclude that appellate review is precluded by defendant's failure to follow the Rules of Appellate Procedure.

On 8 March 2000, defendant filed a motion for a new trial on all issues, and to set aside the 17 February 2000 order based upon the 3 November 1999 memorandum. The court entered an order denying her motion on 18 August 2000. The court concluded that defendant's Rule 59 motion was not timely filed, and thus that she was "not entitled to relief." It denied the Rule 60 motion in its discretion.

N.C.G.S. § 1A-1, Rule 59 provides that a party may seek a new trial by serving a motion for new trial, or a motion to alter or amend the judgment, within ten days after entry of the judgment. In the instant case, defendant's Rule 59 and 60 motion was filed on 8 March 2000. As discussed above, this motion was not timely filed, and, therefore, we conclude that the trial court correctly dismissed defendant's Rule 59 motion on this basis.

In addition, after giving notice of appeal, defendant was required to prepare a proposed record on appeal, which under N.C.R. App. P. 11(b) must be served on opposing counsel within 35 days of giving notice of appeal. In the case *sub judice*, notice of appeal was filed 3 July 2000, and defendant was obligated to serve opposing counsel with the proposed record on appeal no later than

8 August 2000. The parties have stipulated that the proposed record on appeal was served on 2 October 2000. We conclude that, even had defendant filed her Rule 59 motion in a timely fashion, the proposed record on appeal was served almost two months after the deadline.

The trial court's denial of defendant's Rule 60 motion was a discretionary ruling. *Vaughn v. Vaughn*, 99 N.C. App. 574, 393 S.E.2d 567, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). "Appellate review of a trial court's ruling pursuant to Rule 60(b) is limited to determining whether the trial court abused its discretion." *Parris v. Light*, __ N.C. App. __, __, 553 S.E.2d 96, 97 (2001). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In the case *sub judice*, defendant has not argued that there was an abuse of discretion, and we find none.

We conclude that the defendant did not timely file her motion under Rule 59; did not timely file and serve her proposed record on appeal from the denial of her motion under Rule 59 and Rule 60, and that the trial court did not abuse its discretion in denying her Rule 60 motion. Therefore, defendant's appeal from the denial of her Rule 59 and 60 motion is dismissed, and the corresponding assignments of error are overruled.

III.

Lastly, we consider defendant's appeal from the child support order entered by Judge Graham, and challenged by assignments of error 8 and 9.

The trial court entered its child support order on 28 September 2000, and defendant filed a timely notice of appeal on 2 October 2000. Defendant also filed the appellate brief in a timely fashion. However, defendant has failed in several respects to comply with the Rules of Appellate Procedure for preparation of briefs. N.C.R. App. P. 28(b)(4) requires a "full and complete statement of the facts," described as a "non-argumentative summary of all material facts underlying the matter in controversy[.]" Defendant entirely omitted such a summary, and her "Statement of the Case" comprises several pages of argument expressing her contentions regarding the case. Moreover, although defendant appealed from a child support order, she does not ask for relief from this order in the Conclusion to her brief. Nor has defendant indicated in the body of the brief what provision of the child support order she considers unfair or burdensome, or what changes she seeks. Under N.C.R. App. P. 28(b)(6), the brief must contain a "short conclusion stating the precise relief sought." Although defendant's failure to comply with our Rules of Appellate Procedure subjects her appeal to dismissal, we elect to review her appeal from the child support order, pursuant to our discretionary powers under N.C.R. App. P. 2.

Defendant contends first that the child support order is invalid because it contains a reference to the 17 February 2000 order. Defendant argues that the 17 February 2000 order is invalid because it was based upon the earlier memorandum of judgment/order of 3 November 1999. Her objection to the memorandum is that - contrary to the language printed on the AOC form on which the memorandum was written - the trial court did not "read the terms of the above stipulations and agreements to the parties," nor make inquiry as to their understanding of and consent to, the terms of the memorandum. Defendant contends that she neither understood, nor consented to, the terms of the memorandum, notwithstanding the signature of her and her attorney.

Defendant cites *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d 117 (1999), in support of her contention. In *Tevepaugh,* as in the instant case, the parties made use of an AOC form to record a consent agreement. As in the present case, the trial court neglected to conduct an in-court inquiry of the parties. However, significant factual differences separate the two cases. In *Tevepaugh*, the disputed agreement was not replaced or superceded by a later order. After the *Tevepaugh* parties signed their agreement, there was no further activity in the case until plaintiff filed a motion challenging the agreement based on lack of consent to its terms. In contrast, the memorandum in the case *sub judice* was a preliminary document in the parties' negotiations. The day after signing the memorandum, counsel for both plaintiff and defendant met with the trial court to discuss unresolved issues. During the

following weeks, defendant was actively involved in the case; she submitted a typewritten draft of the memorandum to plaintiff, which she subsequently revised to incorporate the results of the ongoing negotiations. Defendant also complied with, and relied upon, the terms of the memorandum for several months prior to the entry of the order, without any suggestion that she did not understand or consent to the terms of the memorandum. Finally, and most significantly, regardless of the trial court's oversight in failing to *voir dire* the parties before signing the memorandum, it is undisputed that both parties were present in court at the signing of the 17 February 2000 order, and that defendant did not challenge the memorandum or order during that hearing.

Defendant has argued that, had the trial court questioned her in court as stated on the printed AOC form, she would have had an opportunity to express her lack of consent and lack of understanding regarding the memorandum. However, defendant participated in the ongoing negotiations after 3 November, and filed several motions in the case, without suggesting at any time between 3 November 1999 and 17 February 2000 that she did not understand or consent to the memorandum that she signed. Moreover, we note that the memorandum is straightforward, listing the times when the minor child would be with each parent, with accompanying details. None of its terms are complex or challenging, and defendant's claim that she did "not understand" the memorandum is not credible.

We conclude that defendant's actions after 3 November 1999 demonstrate both understanding and ratification of the memorandum. We also conclude that the trial court's failure to question the parties in court prior to signing the memorandum does not invalidate the subsequent order of 17 February 2000, entered in court with both parties present, nor require that all subsequent orders be stricken.

Defendant also contends that the child support order should be stricken because the trial court did not follow "N.C. Child Support Guidelines, Worksheet B," as required by the 17 February 2000 order referenced in the child support order.

We note first that "Worksheet B" is not attached to the record, nor included as an appendix, cited in the table of authorities, or otherwise set out. N.C.R. App. P. 9(a)(1)(j) requires that the record include "copies of all other papers filed . . . which are necessary to an understanding of all errors assigned[,]" and N.C.R. App. P. 26(g) and 28(b)(1) require a complete list of authorities cited.

Defendant has argued that the trial court did not follow the worksheet guidelines requiring certain calculations of the relative incomes of the parties as part of the determination of their respective shares of the costs. However, the child support order includes a detailed consideration of the parties' respective incomes, and states that these are based upon the trial court's consideration of the guidelines worksheet B. Although defendant contends that the trial court did not divide costs for the child

based on the parents' respective incomes, she does not state which of the trial court's calculations or conclusions are not based on the parties "respective percentage shares of income." Moreover, the trial court's rulings on child support are discretionary. In *Maney v. Maney*, 126 N.C. App. 429, 485 S.E.2d 351 (1997), this Court stated:

> It is well established that the determination of child support must be done in such a way that reflects fairness and justice for all concerned. The trial court may consider the conduct of the parties, the equities of the given case, and any other relevant facts. The ultimate determination as to the amount of child support is within the discretion of the trial court and will not be disturbed on appeal in the absence of a clear abuse of discretion.

Id. at 430-431, 485 S.E.2d at 352 (citations omitted). Defendant has not argued that the trial court abused its discretion in arriving at its determination of child support, and we find no apparent abuse of discretion. Accordingly, this assignment of error is overruled.

For the reasons discussed above, defendant's appeal from the memorandum of 3 November 1999 and the 17 February 2000 order based the on memorandum are dismissed for failure to file a timely notice of appeal. Defendant's appeal from denial of her motion pursuant to Rules 59 and 60 is dismissed for failure to timely file the Rule 59 motion, and failure to timely serve a proposed record on appeal. The child support order entered 28 September 2000 is affirmed.

Dismissed in part, affirmed in part.

Judges MCGEE and TIMMONS-GOODSON concur.

Report per Rule 30(e).