NO. COA00-1495

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

MCDOWELL COUNTY DEPARTMENT
OF SOCIAL SERVICES, EX REL.
MELODY A. CLINE,
Plaintiff,

v. McDowell County
No. 98 CVD 729

ARCHIE D. CLINE,
Defendant

Appeal by plaintiff from judgment entered 30 June 2000 by Judge Laura Bridges in McDowell County Superior Court. Heard in the Court of Appeals 10 October 2001.

Lynch & Taylor, P.A., by Anthony Lynch, for plaintiff-appellant.

Wayne O. Clontz for defendant-appellee.

TIMMONS-GOODSON, Judge.

On 28 September 1998, McDowell County Department of Social Services filed a complaint on behalf of Melody A. Cline ("plaintiff") against Archie D. Cline ("defendant") seeking to recoup public assistance to obtain ongoing support, medical support and costs. On 19 October 1998, the defendant filed an answer admitting his child support obligation. Defendant also sought an offset of child support payments based on a verbal agreement he made with plaintiff that suspended his payments until his $20,000

of equity in the marital residence was consumed. The matter which was scheduled for hearing on 17 November 1998, was continued until 15 December 1998. On 15 December 1998, defendant failed to appear and on 7 January 1998, Judge Laura Bridges entered judgment against defendant.

Subsequently on 29 January 1999, defendant filed a motion to terminate or modify his child support obligation. At the hearing on 15 April 1999, the trial court made the following pertinent findings of fact:

> 3. That on December 15, 1998, a hearing was held before this judge with Joyce Cagle, an agent for the McDowell County Department of Social Services, testifying in the absence of Plaintiff.
>
> 4. That Defendant did not answer calender call at the December 15, 1998, hearing, nor did he appear when the case was called for hearing; however, this Court was not advised that Mr. Cline had called on December 15, 1998, requesting a continuance for good cause.
>
> 5. That this Court was not advised during the December 15, 1998, hearing that Defendant had filed an answer to plaintiff's Complaint which contained a meritorious defense to paying child support.
>
> 6. That the order pertaining to child support entered by this Judge on January 7, 1999, based upon the hearing on December 15, 1998, was entered in error.
>
> . . . .
>
> 8. That Plaintiff and Defendant have a verbal agreement in which the Defendant conveyed his equity interest in the marital residence to the Plaintiff on or about October 1, 1998, in lieu of Defendant's obligation to pay child support; that

> Defendant's portion of the equity in the marital residence is $20,000.
>
> 7. That due to Plaintiff and Defendant's verbal agreement Defendant would not pay child support until the $20,000 in equity is consumed at the rate of $282.00 per month beginning January 1, 1999.

Based on these findings, the court made the following pertinent conclusions of law:

> 2. That the order entered as to child support on January 7, 1999, was entered in error on insufficient information and testimony.
>
> 3. That the Plaintiff and Defendant entered into a verbal agreement relieving Defendant of his obligation to pay child support as Defendant has conveyed his $20,000 equity interest in the marital residence to the Plaintiff.

Plaintiff subsequently filed a motion to recuse and a motion pursuant to Rule 59 and Rule 60. By order entered 26 July 2000, the court denied the motions. On 18 August 2000, plaintiff filed a notice of appeal from the 26 July 2000 order.

In her first two assignments of error, plaintiff contends that the trial court committed reversible error by denying her motion for recusal. Specifically, plaintiff contends that the Judge's actions, as evidenced by her personal bias, prejudice and interest, justified grounds for disqualification. Furthermore, plaintiff argues that because of the Judge's actions, the motion should have been referred to another judge. These arguments are without merit.

Canon 3(C)(1) of the Code of Judicial Conduct states that "[a] judge should disqualify himself in a proceeding in which his

impartiality might reasonably be questioned[.]" *McClendon v. Clinard*, 38 N.C. App. 353, 356, 247 S.E.2d 783, 785 (1978). The burden is on the party moving for recusal to "demonstrate objectively that grounds for disqualification actually exist." *In re Nakell*, 104 N.C. App. 638, 647, 411 S.E.2d 159, 164 (1991), *appeal dismissed and disc. review denied and stay dissolved,* 330 N.C. 851, 413 S.E.2d 556 (1992). The moving party may meet this burden by presenting "substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *Id.*

In support of her recusal motion, plaintiff contends that Judge Bridges heard evidence that was not before the court at the hearing on 15 April 1999. However, plaintiff has not presented any facts to cause a reasonable person, knowing all the circumstances, to doubt the ability of Judge Bridges to rule in an impartial manner. The record reflects that during the hearing on 16 June 2000, the Judge acknowledged that she was unaware that defendant called the court on 15 December 1998, requesting a continuance. Additionally, the Judge found that she was also unaware that defendant filed an answer setting forth a meritorious defense involving a verbal agreement between plaintiff and defendant that would give defendant credit for the conveyance of his marital equity against his child support obligation. The Judge therefore found that since "the set of facts which the court based its original decision on, was not in keeping with an agreement between the parties and not in keeping with the real evidence as to

whether or not the [d]efendant had paid child support[,]" the order was entered in error and must be corrected. At the hearing on 15 April 1999, plaintiff acknowledged that she was aware of the agreement she made with defendant. Since the hearing was based on defendant's motion to modify child support, the agreement issue was properly before the court that day and plaintiff should have anticipated that the issue would be addressed. We fail to see how Judge Bridges' partiality could be questioned when the record reveals that her order only reflects the true intentions of the parties and a balance of the equities.

Additionally, the fact that Judge Bridges heard evidence about the verbal agreement does not constitute grounds for referring the motion to another judge. "A trial judge should recuse himself or refer the recusal motion to another judge if there is 'sufficient force in the allegations contained in defendant's motion to proceed to find facts.'" *Koufman v. Koufman*, 97 N.C. App. 227, 234, 388 S.E.2d 207, 211 (1990) (quoting *Bank v. Gillespie,* 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976)), *overruled on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991). There is no evidence in the record to suggest that Judge Bridges possessed any bias or prejudice as a result of her prior involvement in the case. Since there were no facts presented to cause a reasonable person to doubt Judge Bridges' impartiality, there is no error in Judge Bridges' failure to refer the motion to another judge. *See Savani v. Savani,* 102 N.C. App. 496, 501, 403 S.E.2d 900, 903 (1991). These assignments of error are therefore overruled.

In her next assignment of error, plaintiff contends that the trial court committed reversible error by denying her motions pursuant to Rule 59 and Rule 60 of the North Carolina Rules of Civil Procedure. At the outset, we note that plaintiff gave notice of appeal only from the 26 July 2000 order denying her motions pursuant to Rule 59 and Rule 60. The plaintiff's notice of appeal does not appeal the underlying judgment entered by Judge Bridges on 3 June 1999. The appellate rules require that the notice of appeal, "designate the judgment or order from which the appeal is taken[.]" N.C.R. App. P. (3)(d)(2002). The notice of appeal from a denial of a motion to set aside [pursuant to Rule 59 and Rule 60] which "does not also specifically appeal the underlying judgment, does not properly present the underlying judgment for our review." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). As plaintiff has not appealed the underlying judgment entered on 3 June 1999, our review is strictly limited to any argument as it relates to the order entered on 26 July 2000.

We further make note that in her brief, plaintiff has specifically abandoned her arguments pursuant to Rule 59 (a)(2) and (8). Additionally, plaintiff has presented no argument nor cited any authority in support of her Rule 60 motion. This argument is therefore deemed abandoned. *See* N.C.R. App. P. 28 (b)(5)(2002).

In her remaining argument, plaintiff contends that the trial court erred in its denial of her Rule 59(a)(1) motion (irregularity of procedure) and 59(a)(7) motion (insufficiency of the evidence; the verdict is contrary to law). We disagree.

Rule 59 of the North Carolina Rules of Civil Procedure provides in pertinent part that "[a] new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds: (1) [a]ny irregularity by which any party was prevented from having a fair trial; . . .(7) [i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]" N.C. Gen. Stat. § 1A-1, Rule 59 (1999).

Our review of a trial court's denial of a Rule 59 motion is "limited to whether the record demonstrates a manifest abuse of discretion." *Ollo v. Mills,* 136 N.C. App. 618, 624, 525 S.E.2d 213, 217 (2000). The trial court's ruling on a Rule 59 motion should not be disturbed unless the ruling "amounted to a substantial miscarriage of justice." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982).

"It is within the sole discretion of the trial judge to determine whether to grant a Rule 59 motion for a new trial on the grounds of an irregularity." *Edwards v. Hardy,* 126 N.C. App. 69, 71, 483 S.E.2d 724, 726 (1997). Furthermore, a trial court's decision to grant or deny a Rule 59(a)(7) motion based upon insufficiency of the evidence "must be based on the *greater* weight of the evidence as observed firsthand *only* by the trial court." *In Re Buck*, 350 N.C. 621, 629, 516 S.E.2d 858, 863 (1999). "Appellate review of a trial court's ruling on a 59(a)(7) motion raises no question of law, but presents only the question of whether the record affirmatively demonstrates an abuse of discretion[.]"

Whaley v. White Consol. Indus., Inc., 144 N.C. App. 88, 92, 548 S.E.2d 177, 180, *disc. review denied*, 354 N.C. 229, 555 S.E.2d 277 (2001).

Our review of the record reveals no abuse of discretion by the trial court. In the court's order entered on 26 July 2000, Judge Bridges made a specific finding that the judgment entered on 15 December 1998 "was entered in error on insufficient information and testimony." The greater weight of the evidence demonstrated that the court was not advised that defendant called the court on 15 December 1998, requesting a continuance for good cause. Additionally, the court was unaware that defendant had filed an answer setting forth a meritorious defense in paying child support. The court stated that it "only corrected a paramount and material mistake of fact which had been overlooked by the court previously[.]" The court concluded that these "unilateral mistake[s] of facts or factors earlier on in the proceedings which are not the fault of any particular person, mandate this court to correct error which the court previously made" in order to reflect the parties' true intentions and to further balance the equities of the parties. Clearly, the record demonstrates no abuse of discretion in denying plaintiff's Rule 59 motion.

Based on this analysis, we affirm the holding of the trial court.

Affirmed.

Judges MCGEE and BIGGS concur.

Report per Rule 30(e).