

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA04-105

NORTH CAROLINA COURT OF APPEALS

Filed: 07 December 2004

CAROL BENNETT,  
Plaintiff,

v.

Wake County  
No. 03 CVS 10195

NEWS AND OBSERVER  
PUBLISHING COMPANY, INC.  
d/b/a *THE NEWS & OBSERVER*,  
Defendant.

Appeal by plaintiff from judgment entered 20 August 2003 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 1 November 2004.

*Carol Bennett, Pro se plaintiff-appellant.*

*Everett, Gaskins, Hancock & Stevens by Hugh Stevens and C. Amanda Martin for defendant-appellee.*

*No brief filed for defendant-appellee.*

STEELMAN, Judge.

Plaintiff, Carol Bennett, appeals the trial court's order denying her Motion for Relief from an order entered 27 June 2001 by Judge Narley L. Cashwell in Wake County Superior Court.

#### I. Procedural History

On 29 July 2003, plaintiff filed an application for order extending time to file a complaint against defendant pursuant to Rule 3(a)(1) of the Rules of Civil Procedure. That same day, the

Assistant Clerk of Superior Court of Wake County entered an order granting plaintiff until 18 August 2003 to file a complaint. On 6 August 2003, defendant filed a motion to strike plaintiff's application and a motion for sanctions under Rule 11 of the Rules of Civil Procedure. These motions were based upon an earlier order of the Superior Court of Wake County in which Judge Cashwell prohibited plaintiff from filing documents with the Clerk of Superior Court of Wake County unless accompanied by a certification, signed by a licensed attorney, that the document complied with Rule 11. This order was entered in the case of *Dalenko v. Wake Cty. Dep't of Human Services* (2000 CVS 5994).

Plaintiff filed a motion on 8 August 2003, seeking relief from Judge Cashwell's order. On 20 August 2003, Judge Hight entered an order finding that plaintiff had failed to file a complaint within the time limit specified and thus, plaintiff's action had abated. As a result, plaintiff's action was dismissed and defendant's motion to strike was deemed to be moot. This same order denied plaintiff's motion for relief from Judge Cashwell's order.

On 15 September 2003, plaintiff gave notice of appeal from Judge Hight's order. Subsequently, defendant noticed plaintiff for a hearing on its Rule 11 motion. On 20 November 2003, Judge Hight entered a consent order, bearing the signatures of plaintiff and counsel for defendant. By the terms of this consent order, plaintiff agreed to file a notice with the clerk of court "irrevocably withdrawing and dismissing her appeal of this court's August 20, 2003 order[,]. . . ." and upon such filing defendant

agreed that its motion for sanctions "shall be deemed irrevocably withdrawn and dismissed[.]"

On 20 November 2003, plaintiff filed a notice of dismissal, which dismissed with prejudice her appeal of Judge Hight's order of 20 August 2003. However, plaintiff stated in her dismissal that she did not dismiss her appeal of Judge Hight's denial of her motion for relief from Judge Cashwell's order. It is upon this issue alone, that plaintiff brings forward her appeal.

## II. Discussion of Applicable Legal Principles

"[A]s a general rule[,] this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist.'" *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (quoting *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968)). "Whenever in the course of litigation it becomes apparent that there is an absence of a genuine adversary issue between the parties, the court should withhold the exercise of jurisdiction and dismiss the action." *Bizzell v. Insurance Co.*, 248 N.C. 294, 296, 103 S.E.2d 348, 350 (1958).

In this matter, plaintiff's action against defendant was one based in libel. The issues concerning Judge Cashwell's order were injected into this matter by defendant's motion to strike and its motion for imposition of Rule 11 sanctions. When plaintiff dismissed her action against defendant and defendant dismissed its Rule 11 motion, there was no longer an adversarial issue between the parties pending before the Wake County Superior Court. Thus,

there is no controversy pending before this Court, and plaintiff's appeal must be dismissed.

Further, plaintiff's motion for relief from injunction attempts to mount a collateral attack upon Judge Cashwell's order that was entered in an entirely different lawsuit. Judge Cashwell's order in *Dalenko* was appealed by plaintiff to this Court and her appeal was dismissed. See *Dalenko v. Wake Cty. Dep't of Human Servs.*, 157 N.C. App. 49, 578 S.E.2d 599, *disc. review denied and cert. denied*, 357 N.C. 458, 585 S.E.2d 386 (2003), *cert. denied*, \_\_\_ U.S. \_\_\_, 158 L. Ed. 2d 79 (2004). It has long been established that "an erroneous judgment, which is one 'rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles,' may be remedied by appeal, but may not be collaterally attacked." *Seely v. Borum & Assoc., Inc.*, 127 N.C. App. 193, 196, 488 S.E.2d 282, 284 (1997). As plaintiff has exhausted all avenues of appeal, including to the United States Supreme Court, and since the Wake County Superior Court had jurisdiction over the subject matter in the earlier action, Judge Cashwell's order is not subject to collateral attack.

For the reasons discussed herein, plaintiff's appeal is dismissed.

DISMISSED.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).