

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1300

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

ANTHONY SUSI,  
Plaintiff-Appellant,

v.

Davidson County  
No. 01 CVS 2234

LOIS AUBIN,  
Defendant-Appellee.

Appeal by plaintiff from order entered 24 June 2005 by Judge Wayne L. Michael in District Court, Davidson County. Heard in the Court of Appeals 20 March 2006.

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips and Andrew J. Haile, for plaintiff-appellant.*

*Brinkley Walser, by G. Thompson Miller, for defendant-appellee.*

McGEE, Judge.

Anthony Susi (plaintiff) seeks review of the trial court's order of 24 June 2005, which denied his motion for relief from an order entered 1 December 2003. The trial court lacked jurisdiction to rule upon plaintiff's motion, however, because an appeal from the earlier order was pending before this Court at that time. We must therefore vacate the 24 June 2005 order.

The trial court entered an order on 1 December 2003, in which it approved exemptions claimed pursuant to N.C. Gen. Stat. § 1C-

1603(e) (2005) by Lois Aubin (defendant). Plaintiff and North Country Development of Jefferson County, Inc. (North Country) gave notice of appeal from that order on 3 December 2003. Plaintiff and North Country filed a joint record on appeal with this Court in that matter on 26 March 2004.

After filing a "motion for relief from order" with the trial court on 7 October 2004, plaintiff filed a "notice of filing of Rule 60(b) motion with trial court" with this Court on 12 October 2004. Plaintiff's and North Country's appeal from the 1 December 2003 order was heard by this Court on 18 November 2004. While plaintiff's appeal was still pending, the trial court heard his Rule 60(b) motion. In an order entered 24 June 2005, the trial court denied plaintiff's Rule 60(b) motion. Plaintiff gave notice of appeal from the order on 19 July 2005 and filed the present record on appeal with this Court on 29 September 2005. This Court subsequently filed its opinion in the parties' earlier appeal on 4 October 2005 and issued its mandate on 24 October 2005. *Susi v. Aubin*, \_\_\_ N.C. App. \_\_\_, 620 S.E.2d 682 (2005). From the trial court's order of 24 June 2005, plaintiff appeals.

In his first argument, plaintiff contends the trial court lacked jurisdiction to enter its order of 24 June 2005 during the pendency of the parties' earlier appeal. Defendant agrees in her brief that the trial court's authority to address the Rule 60(b) motion was limited to indicating how it would be inclined to rule on the motion were the appeal not pending.

Generally, "an appeal removes a case from the jurisdiction of

the trial court and, pending the appeal, the trial judge is *functus officio*." *Bowen v. Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977). This general rule has two exceptions and one qualification. *Id.* "[N]otwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal." *Id.* "The qualification to the general rule is that 'the trial [court], after notice and on proper showing, may adjudge the appeal has been abandoned' and thereby regain jurisdiction of the cause." *Id.* (quoting *Machine Co. v. Dixon*, 260 N.C. 732, 735-36, 133 S.E.2d 659, 662 (1963)). Because the trial court was addressing a Rule 60(b) motion, neither the two exceptions nor the qualification of the general rule was applicable.

"A trial court may consider a Rule 60(b) motion which is filed though an appeal is pending in order to indicate how it would rule on the motion were the appeal not pending." *Pheasant v. McKibben*, 100 N.C. App. 379, 385, 396 S.E.2d 333, 337 (1990), *disc. review denied*, 328 N.C. 92, 402 S.E.2d 417 (1991); *see also Bell v. Martin*, 43 N.C. App. 134, 258 S.E.2d 403 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980). The trial court in this case did not just indicate how it would have been inclined to rule were the appeal not pending, but actually denied plaintiff's Rule 60(b) motion during the pendency of the earlier appeal. Because the trial court lacked jurisdiction to rule upon the motion, *see Bruggeman v. Meditrust Co., LLC*, 165 N.C. App. 790,

793-95, 600 S.E.2d 507, 510-11, *appeal dismissed*, 359 N.C. 67, 604 S.E.2d 308 (2004), its order of 24 June 2005 is vacated.

Vacated.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).