NO. COA05-1592

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

JANE W. DUFFIELD, EXECUTOR
OF THE ESTATE OF VIRL A. WALDROP,

Plaintiff,

v. Rutherford County
No. 05 CVS 1249

SARAH A. DAVIS,

Defendant.

Appeal by defendant from order entered 24 October 2005 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 16 August 2006.

Brady, Nordgren, Klym, & Morton, PLLC, by Travis K. Morton, for plaintiff-appellee.

Robert W. Wolf, for defendant-appellant.

ELMORE, Judge.

Sarah A. Davis (defendant) appeals from an order Judge Abraham Penn Jones entered 24 October 2005, granting reconsideration of his previous order entered 16 September 2005 transferring venue of a civil case from Wake County to Rutherford County. After a careful review of the record, we hold that the trial court's reconsideration of the motion was in error. Accordingly, the case will be returned to Rutherford County.

Jane W. Duffield (plaintiff) is the daughter and executrix of the estate of Virl A. Waldrop (decedent). Defendant is plaintiff's aunt and the younger sister of decedent. Decedent died at the age of 89 from Alzheimer's disease. In the years leading up to her demise, defendant controlled decedent's financial affairs and held power of attorney for decedent.

On 20 April 2005, acting in her capacity as executrix of her mother's estate, plaintiff filed a complaint against defendant. In the complaint, plaintiff alleged that defendant had received improper payments, had committed constructive fraud, had breached a fiduciary duty, had exercised undue influence, had been unjustly enriched, had converted property properly belonging to the estate, and was in possession of property held in a constructive trust. Plaintiff demanded judgment against defendant in excess of $10,000.00, punitive damages in excess of $10,000.00, costs including attorneys' fees, and interest thereon. At all times throughout these proceedings, plaintiff was a resident of Wake County and defendant a resident of Cleveland County. Decedent had been domiciled in Rutherford County, which is also where plaintiff was qualified as executrix and the location of the estate. On 19 May 2005, defendant filed a motion for change of venue, requesting that the trial be held in "Rutherford and/or Cleveland County," but arguing nearly exclusively for venue in Rutherford County. The motion was filed by defendant's then-attorney, James Bowen. On 27 May 2005, plaintiff filed a motion to disqualify Bowen as defense counsel based on a conflict of interest arising from his previous

representation of decedent and her estate. A hearing was held on 4 August 2005 to consider both motions. Bowen argued the change of venue motion, over plaintiff's objection, prior to the hearing on his disqualification. The change of venue motion was granted, and Bowen was subsequently disqualified from representing defendant. Though the trial court ruled on the motions 4 August 2005, the decisions were not filed until 16 September 2005. Before that time, plaintiff had already filed a motion to reconsider pursuant to Rules 60(b)(1) and 60(b)(6) of the North Carolina Rules of Civil Procedure. That motion, filed 19 August 2005, alleged that the court had erred by allowing Bowen to argue the change of venue motion prior to his own disqualification motion. Plaintiff requested a new hearing on the venue motion after the appearance of substitute counsel.

A hearing on the motion for reconsideration was held 11 October 2005. The motion was granted, and it was filed 24 October 2005. As a result, the trial was transferred back to Wake County. It is worth noting that the 24 October 2005 order does not irrevocably place the trial in Wake County; the order merely dictates that defendant's motion to transfer venue will be reheard and reargued without the presence of the disqualified counsel. It is from this order that defendant now appeals. Plaintiff cross-assigns error to the original 16 September 2005 order transferring venue to Rutherford County.

Defendant contends that the trial court erred on the grounds that plaintiff's Rule 60 motion was an erroneous substitute for

appeal. Defendant is correct in her contention, and the 24 October 2005 order is therefore overruled.

Rule 60(b) of the North Carolina Rules of Civil Procedure reads, in pertinent part, "[T]he court may relieve a party or his legal representative from a *final* judgment, order, or proceeding . . . ." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005) (emphasis added). "By its express terms, Rule 60(b) only applies to final judgments, orders, or proceedings; it has no application to interlocutory orders." *Pratt v. Staton*, 147 N.C. App. 771, 775, 556 S.E.2d 621, 624 (2001) (citing *Sink v. Easter*, 288 N.C. 183, 193, 217 S.E.2d 532, 540 (1975); *O'Neill v. Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 234 (1979)). "[A]n order denying change of venue is interlocutory as it does not dispose of the case." *Hawley v. Hobgood*, ___ N.C. App. ___, ___, 622 S.E.2d 117, 118 (2005) (citing *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950); *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002)). Accordingly, the trial court erred in its consideration of plaintiff's Rule 60 motion.

Plaintiff cross-assigns error to the original transfer of venue entered 16 September 2005. However, plaintiff's proper course of action was a cross-appeal, rather than cross-assignment of error. As a result, we will not rule upon the merits of her contentions.

"[A]n appellee may cross-assign as error any action or omission of the trial court which . . . deprived the appellee of an *alternative basis in law* for supporting the judgment, order, or

other determination from which appeal has been taken." N.C.R. App. P. 10(d) (emphasis added). In the present case, plaintiff failed to present an "alternative basis" for supporting the order. Plaintiff instead presents arguments as to the error in the underlying order originally transferring venue to Rutherford County. These contentions, whether correct or not, do not provide an alternative basis whereby the trial court could consider the procedurally incorrect Rule 60 motion. As such, "[t]he correct method to raise these questions on appeal would have been a cross-appeal." *Williams v. N.C. Dep't of Env't & Natural Res.*, 166 N.C. App. 86, 95, 601 S.E.2d 231, 236 (2004) (citing *Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc.*, 134 N.C. App. 468, 473, 518 S.E.2d 28, 32 (1999); *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 588, 397 S.E.2d 358, 361 (1990)). Plaintiff's inappropriate use of a cross-assignment of error, rather than a cross-appeal, "waives our consideration of the matter on appeal." *Williams*, 166 N.C. App. at 95, 601 S.E.2d at 236 (citing *Lewis v. Edwards*, 147 N.C. App. 39, 52, 554 S.E.2d 17, 24-25 (2001)). Thus, we will not address the merits of the contentions set out in plaintiff's cross-assignments of error.

For the foregoing reasons, the trial court's grant of plaintiff's Rule 60 motion to reconsider is reversed.

Reversed.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).