

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1605

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2007

TIMOTHY B. MCKYER,  
Plaintiff,

v.

Mecklenburg County  
No. 00 CVD 9237

FONTELLA D. MCKYER,  
Defendant.

# Court of Appeals

Appeal by plaintiff from order entered 17 June 2006 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 4 June 2007.

*Marnite Shuford, for plaintiff-appellant.*

*Billie R. Ellerbe, for defendant-appellee.*

TYSON, Judge.

# Slip Opinion

Timothy B. McKyer ("plaintiff") appeals from order entered holding him in contempt of a previous order to pay Fontella D. McKyer's ("defendant") attorney's fees and order entered denying his motion to stay previous orders pending his appeal. We vacate in part and dismiss in part.

## I. Background

This is the fifth appeal to this Court regarding the parties' divorce and actions related thereto. *See McKyer v. McKyer*, \_\_\_ N.C. App. \_\_\_, 642 S.E.2d 527 (2007); *McKyer v. McKyer*, \_\_\_ N.C. App. \_\_\_, 632 S.E.2d 828 (2006), *disc. rev. denied*, \_\_\_ N.C. \_\_\_,

\_\_\_ S.E.2d \_\_\_ (3 May 2007) (No. 514P06); *McKyer v. McKyer*, 159 N.C. App. 466, 583 S.E.2d 427 (2003) (Unpublished), *disc. rev. denied*, 358 N.C. 235, 593 S.E.2d 781 (2004); *McKyer v. McKyer*, 152 N.C. App. 477, 567 S.E.2d 840 (Unpublished), *disc. rev. denied*, 356 N.C. 438, 572 S.E.2d 785 (2002).

On 26 April 2005, the trial court granted defendant's motions to dismiss plaintiff's notices of appeal from previous equitable distribution and child custody orders. The trial court also ordered defendant's "request for Attorney Fees and costs . . . reserved for later disposition during the May 25th, term of Court[.]"

After a hearing on 26 May 2005, the trial court found defendant was entitled to recover attorney's fees due to the court's dismissal of plaintiff's notices of appeal on 26 April 2005. The trial court entered an order awarding defendant \$3,700.00 in attorney's fees on 5 July 2005.

On 12 August 2005, defendant alleged plaintiff had failed to pay attorney's fees as ordered by the trial court on 5 July 2005 and moved for the court to hold plaintiff in contempt. Defendant requested the trial court: (1) "issue a notice to Show Cause requiring the Plaintiff to appear and show cause as to why he should not be held in contempt;" (2) find plaintiff in willful contempt of the 5 July 2005 order; and (3) order plaintiff "to reimburse the Defendant her costs, including a reasonable Attorney's fee, incurred as a result of having to defend this

action." On 12 August 2005, the Assistant Clerk of Superior Court issued a show cause order to plaintiff.

On 20 October 2005, plaintiff moved pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) and (6), to vacate the 26 April 2005 order to dismiss his notices of appeal in the child custody and equitable distribution cases. Plaintiff also moved to vacate the 5 July 2005 order that awarded defendant her attorney's fees as costs. On 9 February 2006, the trial court denied plaintiff's motions for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) and (6).

On 8 March 2006, plaintiff timely noticed appeal from the 9 February 2006 order denying his motions for Rule 60 relief.

On 20 March 2006, plaintiff moved for injunctive relief and to stay execution of the 26 April 2005, 5 July 2005, and 9 February 2006 orders "until such time that the appellant courts have ruled on Plaintiff's appeals of the February 9, 2006 order[] denying relief under Rule 60."

On 3 April 2007, this Court determined plaintiff's prior appeal was properly before us and affirmed the order. *McKyer*, \_\_\_ N.C. App. at \_\_\_, 642 S.E.2d at 529-31. This Court stated plaintiff had "failed to show the trial court's reference in its 9 February 2006 order to its prior award of attorney's fees as cost was an abuse of discretion." *Id.* at \_\_\_, 642 S.E.2d at 531.

After a hearing on 23 May 2006, the trial court issued a contempt order on 27 June 2006 that concluded plaintiff: (1) "is in direct willful contempt of the Court['s] July 5 2005 Order

requiring him to pay attorney fees to [defense] Counsel;" (2) may purge his contempt by paying defense counsel \$3,700.00 "on or before 5:00 p.m. May 23, 2006;" and (3) "shall pay to Counsel for Defendant the sum of seven hundred fifty (\$750.00) dollars within thirty (30) days of the entry of this Order." In a separate order entered 27 June 2006, the trial court denied plaintiff's motion for a stay of execution of the 26 April 2005, 5 July 2005, and 9 February 2006 orders. Plaintiff appeals from the two 27 June 2006 orders.

## II. Issues

Plaintiff argues the trial court erred by: (1) finding him in contempt of the 5 July 2005 order to pay \$3,700.00 in attorney's fees; (2) ordering him to pay an additional \$750.00 in attorney's fees as cost to defendant for the contempt hearing; and (3) denying his motion to stay.

## III. Contempt

Plaintiff argues the trial court lacked jurisdiction to find him in contempt for failure to pay defendant \$3,700.00 in attorney's fees. Plaintiff asserts he had properly noticed appeal to this Court on 8 March 2006 from the 9 February 2006 order denying his motion for Rule 60 relief from the trial court's award of attorney's fees, which divested the trial court of jurisdiction to hold the contempt hearing on 23 May 2006 and to find him in contempt. We agree.

N.C. Gen. Stat. § 1-294 (2005) states:

When an appeal is perfected as provided by this Article *it stays all further proceedings*

*in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.*

(Emphasis supplied).

The general rule holds an appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court that are related to the issues included in the appeal until the matters are determined in the appellate courts. See *Pruett v. Charlotte Power Co.*, 167 N.C. 598, 600, 83 S.E. 830, 831 (1914) (“[A]n appeal, docketed within the time and regularly prosecuted, relates back to the time of trial; that it operates as a stay of proceedings within the meaning of the statute, and . . . the court below is without power to hear and determine questions involved in an appeal pending in the [appellate court].”); see *Webb v. Webb*, 50 N.C. App. 677, 678, 274 S.E.2d 888, 889 (1981) (The trial court does not have jurisdiction to conduct contempt proceedings while an appeal is pending.); see also *Collins v. Collins*, 18 N.C. App. 45, 52, 196 S.E.2d 282, 287 (1973) (The trial court does not have jurisdiction to conduct contempt proceedings while an appeal is pending.).

However, our Supreme Court has cautioned:

The appeal stays contempt proceedings until the validity of the judgment is determined. But taking an appeal does not authorize a violation of the order. One who wilfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the [trial] court.

*Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962).

Our Supreme Court has also stated, "While an appeal is not perfected until it is actually docketed in the appellate division, a proper perfection relates back to the time of the giving of the notice of appeal, rendering any later orders or proceedings upon the judgment appealed from void for want of jurisdiction." *Swilling v. Swilling*, 329 N.C. 219, 225, 404 S.E.2d 837, 841 (1991) (emphasis supplied) (citing *Lowder v. Mills, Inc.*, 301 N.C. 561, 581, 273 S.E.2d 247, 259 (1981) (vacating orders approving fees and expenses which orders were entered after notice of appeal was given)).

Here, plaintiff moved pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (5) and (6) to vacate the 5 July 2005 award of attorney's fees on 20 October 2005. On 9 February 2006, the trial court denied plaintiff's motion. On 8 March 2006, plaintiff timely noticed appeal from the 9 February 2006 order denying his motion for Rule 60 relief. Plaintiff's appeal to this Court included an argument to set aside the trial court's award of attorney's fees on 5 July 2005 pursuant to Rule 60. On 7 March 2007, this Court heard plaintiff's appeal. *McKyer*, \_\_\_ N.C. App. at \_\_\_, 642 S.E.2d at 527.

The trial court found plaintiff in contempt on 27 June 2006. At that time, plaintiff's appeal was pending before this Court and the trial court was without jurisdiction to find him in contempt. Plaintiff had noticed appeal to this Court and his arguments addressed the trial court's award of attorney's fees to defendant. On 3 April 2007, this Court determined plaintiff's appeal was

properly before us and affirmed the trial court's order. *McKyer*, \_\_\_ N.C. App. at \_\_\_, 642 S.E.2d at 529-31. As this Court stated in *Webb*, "In our opinion, all proceedings in the matter were stayed by plaintiff's appeal[.]" 50 N.C. App. at 679, 274 S.E.2d at 889. The trial court's order finding plaintiff in contempt during the pendency of his appeal to this Court is vacated. In light of our holding, it is unnecessary to address plaintiff's assignment of error regarding the additional attorney's fees awarded in the trial court's contempt order.

#### IV. Motion to Stay

Plaintiff also argues the trial court erred by denying his motion to stay execution of the 26 April 2005, 5 July 2005, and 9 February 2006 orders. We dismiss this assignment of error.

"The denial of a motion to stay is an interlocutory order with no absolute right to an immediate appeal." *Nello L. Teer Co. v. Jones Bros.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 641 S.E.2d 832, 835 (2007) (citation omitted). "As a result, [plaintiff] must demonstrate that the trial court's decision deprived it of a substantial right which will be lost absent immediate review." *Id.* at \_\_\_, 641 S.E.2d at 836 (citation omitted). Plaintiff failed to state in his brief the grounds for appellate review of an interlocutory appeal or discuss the substantial rights that will be affected if the trial court's order is not reviewed at this time.

This Court has stated:

It is well established that the appellant bears the burden of showing to this Court that the appeal is proper. First, when an appeal is interlocutory, the appellant must include

in its statement of grounds for appellate review "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right."

*Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005). The appellant also bears "the burden of showing why the appeal affects a substantial right." *Id.* "Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Id.*

Plaintiff's brief contains no statement of the grounds for appellate review of an interlocutory order. Plaintiff failed to comply with Appellate Rule 28(b)(4). *Id.* at 519, 608 S.E.2d at 338. Plaintiff's brief contains "no discussion of any substantial right that will be affected if we do not review this order at this time." *Id.* Plaintiff "has failed to carry the burden of showing why the appeal affects a substantial right." *Id.* at 518, 608 S.E.2d at 338. Plaintiff's interlocutory appeal is dismissed.

Additionally, plaintiff's appeal from the denial of his motion to stay is also moot. Our Supreme Court has long held that:

"Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law . . . .

Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. *If the issues before a court or administrative body become*



*moot at any time during the course of the proceedings, the usual response should be to dismiss the action."*

*Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 497 (1987) (emphasis supplied) (quoting *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979)).

Here, plaintiff moved to stay execution of the orders "until such time that the appellant courts have ruled on Plaintiff's appeals of the February 9, 2006 order[] denying relief under Rule 60." On 7 March 2007, this Court heard plaintiff's appeal regarding the trial court's order denying him Rule 60 relief. *McKyer*, \_\_\_ N.C. App. at \_\_\_, 642 S.E.2d at 527. On 3 April 2007, this Court determined plaintiff's appeal was properly before us and we affirmed the trial court's order. *McKyer*, \_\_\_ N.C. App. at \_\_\_, 642 S.E.2d at 529-31.

Were we to reverse the order denying plaintiff's motion to stay, our mandate would have no effect. This Court has previously ruled on plaintiff's appeal of the 9 February 2006 order denying relief under Rule 60. *Id.*; see *In re J.A.G.*, 172 N.C. App. 708, 712, 617 S.E.2d 325, 329 (2005) ("'[a] case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.'" (quoting *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996))). Plaintiff's appeal is also dismissed as moot.

#### V. Conclusion

Plaintiff timely noticed appeal to this Court, his appeal was pending, and his arguments on appeal addressed the trial court's award of attorney's fees to defendant. The trial court was without jurisdiction to find plaintiff in contempt while his appeal was pending. *Pruett*, 167 N.C. at 600, 83 S.E. at 831; *Webb*, 50 N.C. App. at 678, 274 S.E.2d at 889. The trial court's order holding plaintiff in contempt is vacated. It is unnecessary to address plaintiff's assignment of error regarding additional attorney's fees awarded in the trial court's contempt order.

Plaintiff's appeal from the trial court's denial of his motion to stay is interlocutory. Plaintiff failed to demonstrate a substantial right to warrant immediate review of his appeal. *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338. Additionally, plaintiff's appeal from the trial court's denial of his motion to stay is dismissed as moot. This Court affirmed the 9 February 2006 order. *McKyer*, \_\_\_ N.C. App. at \_\_\_, 642 S.E.2d at 529-31. Plaintiff's assignment of error to the trial court's denial of his motion to stay is dismissed.

Vacated in Part and Dismissed in Part.

Chief Judge MARTIN and Judge MCCULLOUGH concur.

Report per Rule 30(e).