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NO. COA07-1411

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2009

DOUGLAS DALE JOHNS,  
Plaintiff,

v.

New Hanover County  
Nos. 06 CVD 597  
06 CVD 4299

JANICE MARIE JOHNS,  
Defendant,

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JESSICA JOHNS  
Plaintiff,

# Court of Appeals

v.

DOUGLAS DALE JOHNS,  
Defendant

# Slip Opinion

Appeal by Douglas Dale Johns from orders entered 20 April 2007, 30 April 2007, and 7 May 2007 by Judge Phyllis M. Gorham in New Hanover County District Court. Heard in the Court of Appeals 11 June 2008.

*Lisa Skinner Lefler for Douglas Dale Johns, appellant.*

*No brief filed on behalf of Janice Marie Johns, appellee.*

GEER, Judge.

Douglas Dale Johns filed notices of appeal from (1) an order entered 20 April 2007 dismissing motions filed by Mr. Johns and imposing Rule 11 sanctions on the law firm representing him, (2) a second order entered on 20 April 2007 finding him in contempt and

ordering him to pay attorneys' fees in the amount of \$4,916.32, (3) a 30 April 2007 order for arrest, and (4) an order entered 7 May 2007 requiring Mr. Johns to pay attorneys' fees in the amount of \$3,600.00. Because the record on appeal does not include either the 20 April 2007 contempt/attorneys' fee order or the 7 May 2007 order, we dismiss the appeal as to those two orders.

With respect to the 20 April 2007 order relating to Mr. Johns' motions, Mr. Johns primarily argues that the trial court erred in failing to hold an evidentiary hearing prior to dismissing his motions. Mr. Johns has not, however, on appeal, explained why an evidentiary hearing was necessary to decide his motions or what evidence he would have presented at such a hearing. Consequently, we affirm the trial court's order as to those motions.

Mr. Johns' sole argument as to the order of arrest is that the trial court lacked jurisdiction to enter the order because of his appeal from the 20 April 2007 order regarding his motions. Since, however, Mr. Johns had not appealed from the order requiring him to pay the attorneys' fees that led to the arrest and since Mr. Johns did not seek a stay of enforcement of the order for payment of attorneys' fees, we hold that the notice of appeal did not divest the trial court of jurisdiction.

#### Facts

Mr. Johns and Ms. Johns were married on 12 June 1999, separated on 5 November 2005, and ultimately divorced in February 2007. They have one child, and Ms. Johns also has another daughter, Jessica Johns, from a prior marriage. During their

separation, Ms. Johns filed a complaint and a motion for a domestic violence protective order ("DVPO") against Mr. Johns on 8 February 2006. Two days later, on 10 February 2006, Mr. Johns filed an action seeking custody of their child. On 17 March 2006, Mr. and Ms. Johns filed a stipulated dismissal of the DVPO action with prejudice and a consent order providing for temporary custody of their child and restraining Mr. Johns from approaching Ms. Johns or Jessica Johns.

On 30 March 2006, Ms. Johns filed an answer to Mr. Johns' complaint for custody together with counterclaims seeking permanent custody of their child, child support, post-separation support, alimony, equitable distribution, sequestration, and attorneys' fees. Mr. Johns filed a reply on 6 June 2006.

On 6 October 2006, Jessica Johns filed a complaint and motion for a DVPO against Mr. Johns, alleging that he had violated the agreed-upon restraining order. Because Jessica Johns was 17 at the time, her mother, Ms. Johns, was appointed as her guardian ad litem ("GAL") by the clerk of court. On 12 October 2006, Mr. Johns filed a motion to dismiss Jessica Johns' action pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, an answer, a document entitled "Objection to Appointment of Guardian Ad Litem Janice Marie Johns and Motion to Dismiss Plaintiff's Complaint and Motion for Domestic Violence Protective Order" (referred to hereafter as "Objection to GAL"), and a motion for Rule 11 sanctions.

The trial court conducted a hearing on 13 October 2006 on Mr. Johns' motion to dismiss. The court, from the bench, allowed

Jessica Johns' oral motion to amend her complaint and denied Mr. Johns' motion to dismiss under Rule 12(b)(6). The written order reflecting those rulings was not entered until 19 October 2006. On 16 October 2006, before entry of the order and prior to Jessica Johns' filing her amended complaint, Mr. Johns filed a motion to strike any amended or supplemental complaint as being "untimely" filed. The next day, 17 October 2006, Jessica Johns filed her amended complaint, as well as a motion for Rule 11 sanctions against Mr. Johns and the law firm representing him.

On 2 November 2006, Mr. Johns filed an "Amended Objection to Appointment of Guardian Ad Litem Janice Marie Johns and Motion to Dismiss Plaintiff's Complaint and Motion for Domestic Violence Protective Order" (hereafter "Amended Objection to GAL") together with a memorandum of law. In addition, on 8 November 2006, Mr. Johns moved to amend the trial court's 19 October 2006 order, again arguing that the amended complaint was untimely filed. On 18 December 2006, Mr. Johns also filed an answer to the amended complaint. The trial court entered an amended order consolidating Mr. Johns' and Jessica Johns' actions on 8 February 2007.

On 16 March 2007, Mr. Johns filed a "Motion to Consider Potential Conflicts of Interest Arising from Dual Representation of Plaintiff and GAL and If Found, to Remove Counsel of Record," requesting the trial court to remove Linda B. Sayed as counsel for both Ms. Johns and Jessica Johns. In this motion, Mr. Johns repeated various allegations contained in the Objection to GAL and Amended Objection to GAL, added some new allegations, and contended

that if the GAL appointment was found improper, Linda B. Sayed, who had been both Ms. Johns' counsel and counsel in Jessica Johns' action, should be removed as counsel for both Jessica Johns and Ms. Johns "in all pending matters before the New Hanover County District Court." On 23 March 2007, Jessica Johns filed a motion to strike, dismiss, or deny the motion to remove Ms. Sayed and a motion for Rule 11 sanctions on the ground that Mr. Johns' motion was filed for an improper purpose.

On 26 March 2007, during a pre-trial conference, the parties agreed to convert the terms of the temporary custody order into a permanent custody order in exchange for Jessica Johns' dismissing her action for a DVPO against Mr. Johns. Despite the agreement to dismiss the DVPO action, Jessica Johns, through Ms. Johns as her GAL, refused to withdraw her motion for sanctions against Mr. Johns, and Mr. Johns refused to withdraw his pending motions and objections to Ms. Johns' serving as Jessica Johns' GAL.

The trial court held a hearing the next day to rule on all outstanding issues, including: (1) Mr. Johns' motion to modify child and spousal support, (2) his motion to strike Jessica Johns' DVPO amended complaint, (3) his motion to amend the 19 October 2006 order, (4) his Amended Objection to GAL, (5) his motion to consider potential conflicts of interest, (6) his motion for Rule 11 sanctions, and (7) Jessica Johns' motion for Rule 11 sanctions. The trial court first heard the motion to modify child and spousal support and related motions to hold Mr. Johns in contempt. During that hearing, both Mr. Johns and Ms. Johns called witnesses to

testify in support of their positions. The trial court granted Mr. Johns' motion to reduce child support, found that Mr. Johns was in willful contempt for failure to pay post-separation support and attorneys' fees, and denied Mr. Johns' motion to reduce post-separation support.

After the trial court ruled on the motions related to support, the court indicated that it would consider the remaining motions. Mr. Johns' counsel objected to the trial court's hearing any of those motions that day since, according to Mr. Johns' counsel, the motions required the presentation of evidence and Mr. Johns' witnesses had been released from their subpoenas the day before based on the agreement to dismiss the DVPO action. The trial court overruled the objection and subsequently dismissed or denied all of Mr. Johns' motions and objections. With respect to Jessica Johns' motion for Rule 11 sanctions, the trial court heard oral argument and orally granted that motion and imposed Rule 11 sanctions on Mr. Johns' counsel.

The trial court entered an order on 20 April 2007 setting out its rulings on Mr. Johns' motions and Jessica Johns' motion for Rule 11 sanctions. With respect to the Rule 11 motion, the trial court concluded that "[t]he Amended Objection to GAL is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Further, according to the order, "[t]he Amended Objection to GAL and supporting Memorandum of Law were filed for an improper purpose, that is, to harass and humiliate Janice Marie Johns, to cause

unnecessary delay in this matter, and to needlessly increase the cost of litigation." The trial court found that Jessica Johns and her mother, as GAL, had jointly incurred \$4,000.00 to \$5,000.00 in attorneys' fees. The court then imposed a sanction of \$1,000.00 on Mr. Johns' counsel, Rice Law, PLLC. With respect to the other pending motions, the trial court "summarily dismissed" Mr. Johns' Motion for Sanctions, his Motion to Amend Order, his Motion to Strike Amended Complaint and Motion for Domestic Violence Protective Order, and his Motion to Consider Conflicts of Interest. The court "denied" Mr. Johns' Amended Objection to GAL and accompanying motion to dismiss.

On 26 April 2007, a notice of appeal was filed from this order on behalf of both Rice Law, PLLC and Mr. Johns.<sup>1</sup> On 30 April 2007, the trial court entered an order for Mr. Johns' arrest, finding that Mr. Johns had previously been determined to be in contempt for failure to pay child support, post-separation support, and attorneys' fees and that Mr. Johns had "not complied with the condition set for [him] to purge his contempt, that is, to pay attorneys' fees of \$4,916.32 to Block, Crouch, Keeter, Behm & Sayed, LLP, by April 26, 2007, as set forth in the Order entered on April 20, 2007." On 18 May 2007, Mr. Johns filed a second notice of appeal from a 20 April 2007 order finding him in contempt and ordering the payment of \$4,916.32 in attorneys' fees, the 30 April

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<sup>1</sup>Rice Law, PLLC has proceeded with a separate appeal (COA07-1259). This opinion addresses only Mr. Johns' appeal.

2007 order for arrest, and a 7 May 2007 order requiring Mr. Johns to pay \$3,600.00 in attorneys' fees.

I

We first address Mr. Johns' 18 May 2007 notice of appeal. That notice of appeal states that he is appealing from:

[T]he Honorable Phyllis M. Gorham's: Order finding Douglas Johns in contempt of court and ordering him to pay attorney fees in the amount of \$4,916.32 to Block, Crouch, Keeter, Behm & Sayed, LLP, entered on 20 April 2007 (signed 18 April but filed 20 April 2007, entitled "Modification of PSS and Child Support And Contempt in 06 CVD 597"); the Order that Douglas Johns pay attorney fees to Block, Crouch, Keeter, Behm & Sayed, LLP, in the amount of \$3600.00 entered on 7 May 2007 (signed 3 May but filed 7 May 2007, entitled "Attorneys' Fees - 06 CVD 597"); and the Honorable Phyllis M. Gorham's Order for Arrest for contempt against Douglas Johns entered 30 April 2007.

Neither the 20 April 2007 nor the 7 May 2007 orders identified in this notice of appeal are included in the record on appeal.

Rule 9 of the North Carolina Rules of Appellate Procedure provides that the record on appeal shall contain "a copy of the judgment, order, or other determination from which appeal is taken." N.C.R. App. P. 9(a)(1)(h). It is well established that "failure to include [the judgment] in the record on appeal subjects the appeal to dismissal." *Searles v. Searles*, 100 N.C. App. 723, 724, 398 S.E.2d 55, 56 (1990). See also *Abels v. Renfro Corp.*, 126 N.C. App. 800, 804, 486 S.E.2d 735, 738 (recognizing that "this Court will dismiss an appeal if the judgment or order does not



appear in the record on appeal"), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

It is not entirely clear from Mr. Johns' brief on appeal whether he intended to pursue his appeal of these two attorneys' fees orders. Nevertheless, to the extent his first question presented - "Whether the trial court committed reversible error when it sanctioned Douglas and ordered him to pay attorney's fees for Janice" - can be viewed as challenging those two orders, that part of his appeal is dismissed.

We next note that 13 pages of Mr. Johns' brief, addressing that first question presented, argue that the trial court erred in imposing sanctions on him under Rule 11 of the North Carolina Rules of Civil Procedure. In the 20 April 2007 order addressing Jessica Johns' motion for Rule 11 sanctions, the trial court found:

[Mr. Johns'] law firm, Rice Law, PLLC, should be sanctioned for its attorney signing the Amended Objection to GAL and the Memorandum of Law when the members of the law firm knew, or should have known, that it is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that on its face, these documents were filed for an improper purpose, that is, to harass and humiliate Janice Marie Johns, to cause unnecessary delay in this matter, and to needlessly increase the cost of litigation.

The trial court concluded that "[Jessica Johns'] Motion for Sanctions should be allowed against [Mr. Johns'] attorneys" and ordered that "Rice Law, PLLC, shall pay \$1,000.00 to Plaintiff's attorneys, Block, Crouch, Keeter, Behm & Sayed, LLP, within 30 days of today, that is March 27, 2007." The order contains no

determination that Mr. Johns violated Rule 11 and imposes no Rule 11 sanctions on him. We, therefore, need not address Mr. Johns' arguments regarding Rule 11.

## II

Mr. Johns next contends that the trial court erred in dismissing five of his motions without first conducting evidentiary hearings on those motions. Mr. Johns' brief on appeal does not include any argument addressing the merits of his motions. We, therefore, limit our review solely to the question whether the trial court should have conducted an evidentiary hearing.

When the trial court indicated that it would hear Mr. Johns' pending motions and Jessica Johns' Rule 11 motion, Mr. Johns objected to the court's proceeding when the motions required the presentation of evidence, and Mr. Johns had released his witnesses for the DVPO action from their subpoenas the day before based on his understanding that Jessica Johns would be dismissing the DVPO action. Mr. Johns' counsel did not, at the hearing, identify which of the motions – other than Jessica Johns' Rule 11 motion – required evidence, made no showing as to what evidence the released witnesses would present that was relevant to the pending motions, and did not explain how an evidentiary hearing would aid the trial court in its resolution of his motions. Mr. Johns has not provided any further explanation on appeal. We nonetheless specifically address each motion.

*Motion to Strike Amended Complaint:* In this motion, Mr. Johns argued that the trial court should have struck the amended DVPO complaint as untimely because it was not filed within the time frame orally specified by Judge Criner when granting the motion to amend. Since Jessica Johns had agreed to voluntarily dismiss the amended complaint and that dismissal occurred prior to the entry of the 20 April 2007 order, this motion was rendered moot. Accordingly, the trial court did not err in summarily dismissing the motion without holding an evidentiary hearing. See *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) ("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."), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297, 99 S. Ct. 2859 (1979).

*Amended Objection to GAL and Motion to Dismiss:* In Mr. Johns' Amended Objection to GAL, he objected to the appointment of Ms. Johns as Jessica Johns' GAL pursuant to Rule 17 of the Rules of Civil Procedure. He also moved the court to dismiss Jessica's complaint pursuant to Rule 12(b)(2) "for lack of jurisdiction as a result of the improvident appointment of the guardian ad litem who is neither fit nor proper to appear before the Court. . . ." The trial court denied the Amended Objection to GAL and dismissed the motion to dismiss on the grounds that Mr. Johns lacked standing to challenge the appointment of a GAL for Jessica. Mr. Johns has

offered no explanation why this objection and motion still needed to be heard in light of the voluntary dismissal of the amended complaint. Further, "[w]hether [a party] has standing is a question of law. . . ." *Indian Rock Ass'n v. Ball*, 167 N.C. App. 648, 650, 606 S.E.2d 179, 180 (2004). Mr. Johns has presented no reason – and we know of none – why evidence was necessary to determine this question of law.

*Motion to Consider Potential Conflict of Interests:* This motion was, by its terms, contingent on the trial court's allowing his Amended Objection to GAL. Again, Mr. Johns suggests no reason why he needed to present evidence on this motion once the trial court concluded that his Amended Objection to GAL should be denied based on standing and after Jessica Johns voluntarily dismissed her DVPO action and Mr. and Ms. Johns resolved their custody dispute.

*Mr. Johns' Motion for Rule 11 Sanctions:* Mr. Johns contends, citing *Brown v. Hurley*, 124 N.C. App. 377, 477 S.E.2d 234 (1996), that every motion for Rule 11 sanctions requires an evidentiary hearing. Nothing in *Brown* supports this proposition. Indeed, the opinion suggests that the "evidence" considered in connection with the Rule 11 motion in that case was the evidence developed in discovery conducted in order to litigate the underlying action. *Id.* at 382, 477 S.E.2d at 239.

As we have pointed out in the appeal by Rice Law, PLLC, *Johns v. Johns*, COA07-1259, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (Feb. 3, 2009), filed this same date, this Court held in *Taylor v. Taylor Prods., Inc.*, 105 N.C. App. 620, 629, 414 S.E.2d 568, 575 (1992),

*overruled on other grounds by Brooks v. Giesey*, 334 N.C. 303, 432 S.E.2d 339 (1993), that an evidentiary hearing is required on a Rule 11 motion only when necessary to resolve issues of fact or issues of credibility. In any event, such a hearing does not necessarily require the presentation of live witnesses, but may be conducted based on affidavits and other documentary evidence. *Id.*; see also N.C.R. Civ. P. 43(e) ("When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."). Thus, "a trial court is required to give *the non-moving party* an opportunity to present evidence, but whether that evidence includes oral testimony or depositions is in the discretion of the court." *Johns*, \_\_ N.C. App. at \_\_, \_\_ S.E.2d at \_\_ (emphasis added) (internal citations and quotation marks omitted). See also *McClerin v. R-M Indus., Inc.*, 118 N.C. App. 640, 643, 456 S.E.2d 352, 355 (1995) (affirming trial court's denial of motion for Rule 11 sanctions after considering "verified complaint, the contract incorporated therein, and the depositions and affidavits submitted by the parties").

Although Mr. Johns makes no specific argument as to why an evidentiary hearing was required in this case, we also note that Mr. Johns' Motion for Rule 11 Sanctions was verified and, therefore, constituted an affidavit to the extent the verification was based on personal knowledge. See *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("A verified complaint may be

treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein."). Mr. Johns chose not to submit any other affidavits or documentary material to support his Rule 11 motion. The trial court's order, however, reflects that the court reviewed the court file, which included many verified filings. Mr. Johns offers no reason why oral testimony was needed in addition to this evidence. Accordingly, the trial court also did not err in deciding Mr. Johns' Rule 11 motion without allowing Mr. Johns to call witnesses.

### III

Finally, Mr. Johns contends that, after he filed his notice of appeal, the trial court lacked jurisdiction to issue an order for his arrest. On 26 April 2007, Mr. Johns appealed from the 20 April 2007 order imposing Rule 11 sanctions and dismissing his motions. Mr. Johns contends that N.C. Gen. Stat. § 1-294 (2007) then divested the trial court of jurisdiction to enter its 30 April 2007 order for his arrest based on his failure to comply with a prior order requiring him to pay attorneys' fees within 30 days from 27 March 2007.

N.C. Gen. Stat. § 1-294 provides:

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.

As a result of this statute, "an appeal removes a case from the jurisdiction of the trial court and, pending the appeal, the trial judge is *functus officio*." *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977).

We note first that N.C. Gen. Stat. § 1-294 stays *only* "further proceedings in the court below upon the judgment appealed from." The statute expressly allows the trial court to proceed "upon any other matter included in the action and not affected by the judgment appealed from." *Id.* Here, on 26 April 2007, Mr. Johns only appealed the 20 April 2007 order on Rule 11 sanctions and dismissal of his motions. Until 18 May 2007, he had not appealed the 20 April 2007 order that found him in contempt and ordered him to pay the attorneys' fees to purge the contempt. As a result, as of 30 April 2007, when the order of arrest was entered, no stay had occurred under N.C. Gen. Stat. § 1-294 with respect to the 20 April 2007 order that Mr. Johns pay attorneys' fees. Compare *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 726-27 (1962) (holding that trial court could not punish husband for violating order to pay alimony while husband's appeal of that order was pending); *Lawrence v. Lawrence*, 226 N.C. 221, 222, 37 S.E.2d 496, 497 (1946) (holding that court could not hold party in contempt for failure to comply with order while appeal of the order was pending); *Upton v. Upton*, 14 N.C. App. 107, 108-09, 187 S.E.2d 387, 388-89 (1972) (holding that trial court could not hold plaintiff in contempt for failure to pay child support while appeal of that order was pending).

Moreover, Mr. Johns has overlooked N.C. Gen. Stat. § 1-289(a) (2007), which provides:

If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal, except as provided in subsection (b) of this section.

In *Cox v. Cox*, 133 N.C. App. 221, 233, 515 S.E.2d 61, 69 (1999), this Court specifically held that "G.S. 1-289 applies to awards of attorneys' fees." This Court, in *Cox*, held that an appeal of an order directing a party to pay attorneys' fees did not preclude a trial court from holding that party in contempt for not paying those fees because the party had not obtained "a written undertaking executed by a surety" as required by N.C. Gen. Stat. § 1-289(a). *Cox*, 133 N.C. App. at 233, 515 S.E.2d at 69.

We find no meaningful basis on which to distinguish *Cox*. The record in this case contains a Motion to Stay the 20 April 2007 order imposing Rule 11 sanctions filed on behalf of both Rice Law, PLLC and Mr. Johns on 26 April 2007. Nothing in that motion purports to seek a stay of the separate order directing Mr. Johns to pay attorneys' fees in order to purge his contempt. Subsequently, on 30 May 2007, Mr. Johns filed a motion to stay enforcement of the 7 May 2007 order that he pay \$3,600.00 in



attorneys' fees. The record, however, contains no indication that Mr. Johns ever sought to stay, in accordance with N.C. Gen. Stat. § 1-289(a), enforcement of the 20 April 2007 order requiring him to pay attorneys' fees. We, therefore, affirm the trial court's order of arrest.

Dismissed in part and affirmed in part.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).