An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-1341

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

MICHELLE L. SOUTHER

v. New Hanover County
No. 07 CVD 1263

DAVID M. SOUTHER

Appeal by defendant from order entered 27 March 2008 by Judge J.H. Corpening, II, in New Hanover County Superior Court. Heard in the Court of Appeals 17 June 2009.

No brief filed by plaintiff-appellee.

Brian J. Moore & Associates, by Brian J. Moore, for defendant-appellant.

ELMORE, Judge.

Defendant David M. Souther appeals from an order entered 27 March 2008 denying his Rule 60(b) motion seeking to vacate a 29 March 2007 Domestic Violence Protection Consent Order. Based upon our review of the record, we affirm.

The pertinent facts of this case are as follows: On 21 March 2007, plaintiff Michelle Souther filed a complaint and motion for a domestic violence protection order against her husband, defendant. Plaintiff alleged that on 20 March 2007, defendant choked her, punched her in the right eye, and interfered with her 911 call. The trial court entered an *ex parte* domestic violence

protection order against defendant and set a hearing for 29 March 2007. Defendant was also charged criminally as a result of plaintiff's allegations.

At the 29 March 2007 hearing, the parties entered into a consent order of protection, to be effective for one year. Contemporaneously with the consent order, plaintiff executed a "Statement of Recommendation" which stated:

> Michelle Lynn Souther, by and through her undersigned attorney, does agree that Defendant, David Morris Souther's pending criminal charges be dismissed with leave by the District Attorney's office on the condition that he not violate any of the provisions of the domestic violence orders entered in 07 CVD 1263. Michelle Lynn Souther recognizes that she is only able to make the following as a recommendation to the District Attorney's office and that the decision to dismiss lies with the District Attorney's office solely.

In January 2008, before the consent order expired, defendant filed a "Motion for Appropriate Relief" pursuant to N.C.R. Civ. P. 60(b)(3) and (6) seeking to have the consent order of protection set aside. Defendant alleged plaintiff had fraudulently caused him to consent to the domestic violence protection order when she agreed to recommend a dismissal of the criminal action against him, but failed to do so. Defendant asserted that he was found not guilty of the criminal charges "despite plaintiff's unwillingness to dismiss the same." Plaintiff subsequently filed a motion to renew the protection order, a response to defendant's Rule 60(b) motion, and a motion for Rule 11 sanctions.

The court scheduled a hearing on all unresolved issues for 3 March 2008. The trial court heard testimony from plaintiff, defendant, defendant’s attorney who represented him in the domestic violence protection action, and the District Attorney’s Office. By order filed on 27 March 2008, the trial court found in pertinent part:

> 4. Contemporaneously with Domestic Violence Order of Protection Consent Order filed on March 29, 2007, the parties entered into a Statement of Recommendation, wherein the Court finds the language was clear to indicate that the Plaintiffs duty thereunder was to recommend to the Office of the District Attorney that a dismissal of criminal charges against the Defendant be had and that the Plaintiff did, in fact, so recommend [the] same to Assistant District Attorneys Joy Alford and Joe Bowman and that same was shown to the Honorable R. Russell Davis, at his request, from the bench.
>
> 5. The language in the Statement of Recommendation also clearly evidenced that both parties and their attorneys recognized and acknowledged that the ultimate decision on whether to dismiss the Defendant's criminal charges rested with the Office of the District Attorney.
>
> 6. The Court finds that, pursuant to the testimony of Assistant District Attorney Joseph Bowman, neither he nor Assistant District Attorney Joy Alford were going to dismiss the charges regardless of the Plaintiff’s recommendation.
>
> 7. The Defendant has not suffered any irreparable harm because of the actions or inactions of the Plaintiff.
>
> 8. The Plaintiff has, at all times, abided by the terms of the Domestic Violence Order of Protection Consent Order entered herein on March 29,2007.

Based upon its findings, the trial court concluded defendant "ha[d] not carried his burden in proving that any grounds exist which would entitle him to relief pursuant to Rule 60 of the North Carolina Rules of Civil Procedure and his Motion should be denied." The trial court also allowed plaintiff's motion to renew the domestic violence protection order and denied plaintiff's request for sanctions. In a separate order filed on 5 February 2008, the trial court renewed the domestic violence protection order for an additional two years. Defendant appeals.

In defendant's first assignment of error, defendant argues that the trial court erred in entering its 5 February 2008 order renewing the domestic violence protection order. Appellate review of this argument is unavailable.

Rule 3 of the North Carolina Rules of Appellate Procedure "requires that a notice of appeal designate the judgment or order from which appeal is taken; this Court is not vested with jurisdiction unless the requirements of this rule are satisfied." *Boger v. Gatton*, 123 N.C. App. 635, 637, 473 S.E.2d 672, 675 (1996) (citing *Smith v. Insurance Co.*, 43 N.C. App. 269, 272, 258 S.E.2d 864, 866 (1979)). Defendant's notice of appeal states in its entirety:

> Appellant/Defendant DAVID M. SOUTHER, hereby gives notice of appeal to the Court of Appeals of North Carolina, from the order of the Honorable Julius H. Corpening, II, District Court Judge, entered on March 26, 2008, in the District Court of New Hanover County, denying Appellant/Defendant's Motion for Appropriate Relief.

Here, defendant designated only the order denying his motion for appropriate relief. Accordingly, this Court does not have jurisdiction to address the propriety of the trial court's actions regarding the renewal of the domestic violence protection order. We therefore dismiss defendant's first assignment of error.

In his second and third assignments of error, defendant contends the trial court erred in denying his Rule 60(b) motion. Defendant's argument before the trial court and on appeal focuses upon his reliance on plaintiff's "Statement of Recommendation" when he entered into the consent order. Defendant asserts that his consent to the domestic violence protection order was obtained under fraudulent circumstance because plaintiff did not recommend dismissal of the criminal charges.

This Court recently explained,

> Rule 60(b) of the North Carolina Rules of Civil Procedure provides that a court may relieve a party from a judgment or order because: (1) of mistake, surprise, or excusable neglect; (2) of newly discovered evidence that could not have been timely discovered by due diligence; (3) of fraud, misrepresentation, or other misconduct; (4) the judgment or order is void; (5) the judgment or order has been satisfied or discharged, or a prior judgment or order upon which it is based has been reversed or vacated; or (6) any other equitable justification for relief from the judgment or order.

Williams v. Walker, 185 N.C. App. 393, 397-98, 648 S.E.2d 536, 540 (2007) (citing N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005)). "To obtain relief under Rule 60(b)(3), the moving party must 1) have a meritorious defense, 2) that he was prevented from presenting prior

to judgment, 3) because of fraud, misrepresentation or misconduct by the adverse party." 2 G. Gray Wilson, North Carolina Civil Procedure § 60-8, at 60-22 (3d ed. 2007). Relief under Rule 60(b)(6) is only appropriate if (1) extraordinary circumstances exist, (2) there is a showing that justice demands it, and (3) the movant shows a meritorious defense. *Royal v. Hartle*, 145 N.C. App. 181, 184, 551 S.E.2d 168, 171 (2001).

The standard of review for the denial of a Rule 60(b) motion is abuse of discretion. *See Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. . . . And will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). The findings of fact by the trial court are binding on appeal if supported by competent evidence. *Gentry v. Hill*, 57 N.C. App. 151, 154, 290 S.E.2d 777, 779 (1982).

Here, the trial court found that "Plaintiff's duty [under the Statement of Recommendation] was to recommend that a dismissal of criminal charges against defendant be had and that the plaintiff did, in fact, so recommend to Assistant District Attorneys Joy Alford and Joe Bowman and that [the] same was shown to the Honorable R. Russell Davis, at his request, from the bench." This finding is binding on appeal, as it is supported by the "Statement of Recommendation" and testimony from plaintiff and assistant district attorney Joseph Bowman. Defendant makes no effort to

argue abuse of discretion of the trial court nor does he allege "extraordinary circumstances." We conclude defendant has failed to show that the order of the trial court is unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision. Accordingly, we affirm the trial court's order denying defendant's motion to set aside the domestic violence protection consent order.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).