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NO. COA09-1059

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

BECKY D. PHILLIPS,

Plaintiff,

v.

Rowan County
No. 04 CVD 1355

JAMES A. PHILLIPS, JR.,

Defendant.

Appeal by defendant from an order entered 12 March 2009 by Judge Beth S. Dixon in Rowan County District Court. Heard in the Court of Appeals 9 February 2010.

Robert L. Inge, for plaintiff-appellee.

James A. Phillips, Jr., Pro se, defendant-appellant.

JACKSON, Judge.

James A. Phillips, Jr. ("defendant") appeals the trial court's order entered 3 June 2008 after remand, awarding alimony to Becky D. Phillips ("plaintiff") in the amount of \$700.00 per month for 136 months. Defendant also appeals the trial court's order entered 12 March 2009 awarding plaintiff \$10,400.00 in attorneys' fees for the time expended during the appellate process. For the reasons set forth below, we vacate both orders and remand.

The facts in the case *sub judice* have been established in the parties' prior appeal, *Phillips v. Phillips*, 185 N.C. App. 238, 243, 647 S.E.2d 481, 485 (2007), *aff'd*, 362 N.C. 171, 655 S.E.2d 350 (per curiam) ("*Phillips I*"). The material facts are as follows: plaintiff and defendant were married on 6 December 1980 and separated on 2 January 2003. At the 1 May and 3 May 2006 alimony hearing, the trial court determined that plaintiff was a dependent spouse and was substantially in need of maintenance and support. On 16 June 2006, the trial court entered an order awarding alimony to plaintiff in the amount of \$700.00 per month for eleven years.

On appeal, this Court held, *inter alia*, that the trial court failed to make specific findings as to plaintiff's income when there was evidence on the record of "plaintiff's medical benefits or potential income from her IRA." *Phillips I*, 185 N.C. App. at 243, 657 S.E.2d at 485. Accordingly, we vacated the award of alimony and remanded "for additional findings on all income, including medical benefits and any other benefits that function as income, of which evidence was presented at the hearing." *Id.*

On remand, the trial court reiterated its findings from its prior order with the addition of the following three findings:

19. Plaintiff has a Wachovia IRA with a balance of \$2,308.23[.]

. . . .

25. Plaintiff has health insurance paid by her employer.

. . . .

41. The court has considered Plaintiff's age, work history, expected pension income, and current assets in setting both the amount and duration of alimony payments.

Based upon the court's findings of fact, the trial court awarded alimony to plaintiff, again in the amount of \$700.00 per month for eleven years. The order was served on defendant on 15 December 2008. On 12 January 2009, defendant filed notice of appeal of the order on remand. Upon plaintiff's motion for attorneys' fees filed 21 October 2008, the trial court held a hearing on the motion on 15 December 2008. On 12 March 2009, the trial court entered an order awarding attorneys' fees to plaintiff. Defendant appeals from both the 3 June 2008 order after remand awarding alimony and the 12 March 2009 order awarding attorneys' fees to plaintiff.

First, defendant contends that the trial court's order after remand awarding alimony to plaintiff is fatally defective because it is contrary to the laws governing alimony and to the mandate of this Court in *Phillips I*. We agree.

North Carolina General Statutes, section 50-16.3A(b) provides: "a [trial] court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony." See N.C. Gen. Stat. § 50-16.3A(b) (2005). Furthermore, North Carolina General Statutes, section 50-16.3A(c) provides: "the [trial] court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor." See N.C. Gen. Stat. § 50-16.3A(c) (2005). One such factor is "[t]he amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings,

dividends, and benefits such as *medical, retirement, insurance, social security, or others.*" See N.C. Gen. Stat. § 50-16.3A(b) (4) (2005) (emphasis added).

In *Phillips I*, we held that the trial court's findings as to each party's estates; plaintiff's ownership of the condominium; and each party's assets, liabilities, and debt requirements were sufficient for purposes of the alimony order. *Phillips I* at 241-43, 647 S.E.2d at 484-85. However, because there was evidence in the record that plaintiff had additional sources of income contemplated by section 50-16.3A(b) (4) that was not noted in the findings, "we [could not] be sure 'that the trial judge properly considered . . . the factor [in determining plaintiff's alimony award].'" *Id.* at 243, 647 S.E.2d at 485 (quoting *Lamb v. Lamb*, 103 N.C. App. 541, 545, 406 S.E.2d 622, 624 (1991)). It was because of this deficiency that we vacated the award of alimony and remanded "for additional findings on all income, including medical benefits and any other benefits that function as income, of which evidence was presented at the hearing." *Id.*

Initially, we note that defendant seeks to revisit the trial court's findings of fact numbered 5, 6, 15, 17, 18, 26, 35 through 37, and 39. Defendant further argues that the trial court erred by not providing defendant any means of credit for the thirteen alimony payments he paid to the plaintiff pursuant to the trial court's first order. Contrary to defendant's argument, the trial court was not "free to modify or find anew any findings of fact." Our instruction in *Phillips I* provides: "we . . . remand for

additional findings on all income . . . of which evidence was presented at the [1 May and 3 May 2006] hearing," indicating that the only matter to be resolved on remand was the lack of findings as to plaintiff's income. We did not state that "[o]n remand, the court in its discretion may receive additional evidence" *Rhew v. Rhew*, 138 N.C. App. 467, 472, 531 S.E.2d 471, 475 (2000) (citing N.C. Gen. Stat. § 50-16.9 (1999); *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994), and *superseded by statute on other grounds as stated in Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E.2d 684 (2000)). "Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case." *N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) (citations omitted). Therefore, we only review whether the trial court made sufficient additional findings on plaintiff's income based upon evidence that was present at the first alimony hearing.

"On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667, 554 S.E.2d 356, 363 (2001) (citations and quotation marks omitted), *disc. rev. denied and appeal dismissed*, 355 N.C. 348, 563 S.E.2d 562 (2002).

We are unable to determine from the record whether the trial court properly considered findings on all income of which evidence

was presented at the first hearing. During the first alimony hearing, plaintiff testified as to having an IRA account that is "invested two different ways" yet the trial court made only one finding of fact regarding a Wachovia IRA account. Because the record suggests that there may be another IRA account which is not the subject of any of the trial court's findings, we cannot hold that the trial court properly followed our mandate in *Phillips I* to make findings "on all income" *Phillips I* at 243, 647 S.E.2d at 485.

Moreover, the trial court's second order still fails to satisfy the statutory requirements set forth in North Carolina General Statutes, section 50-16.3A(b)(4). The trial court's finding of fact number 25 states that "[p]laintiff has health insurance paid by her employer." Because this finding does not state an amount as North Carolina General Statutes, section 50-16.3A(b)(4) requires, it still is insufficient and again, "we cannot be sure 'that the trial judge properly considered . . . the factor[.]'" *Id.* (quoting *Lamb*, at 545, 406 S.E.2d at 624). Accordingly, we remand for more specific findings as to the value of plaintiff's health insurance and the total value of plaintiff's potential IRA income.

Second, defendant contends that the trial court erred in ordering attorneys' fees because the trial court had been divested of jurisdiction when defendant filed notice of appeal two months prior to the award. We agree.

In *McClure v. County of Jackson*, 185 N.C. App. 462, 469-72, 648 S.E.2d 546, 550-52 (2007), we discussed this issue and held that, after a party has filed notice of appeal, the trial court lacks jurisdiction to enter an order awarding attorneys' fees to the prevailing party with respect to the court's judgment. See *id.* (citations omitted)¹. It is well-established that "[o]ne panel of the Court of Appeals cannot overrule another panel that has previously decided the identical issue." *Id.* at 471, 648 S.E.2d at 551 (citing *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

In the case *sub judice*, defendant filed notice of appeal from the court's alimony order after remand on 12 January 2009. The trial court's order awarding attorneys' fees to plaintiff was filed on 12 March 2009. Because the 12 January 2009 notice of appeal operated as a stay of all proceedings in the trial court, the trial court's order awarding attorneys' fees two months later is void for want of jurisdiction.

We also note that, on 28 January 2009, the trial judge entered an order recusing herself. Once a trial judge has been disqualified or has recused herself, that judge may not enter an order or judgment in the case in which she was presiding. See *Motors Corp. v. Hagwood*, 233 N.C. 57, 58-61, 62 S.E.2d 518, 518-20

¹ *But see In re Will of Dunn*, 129 N.C. App. 321, 329-30, 500 S.E.2d 99, 104-05 (allowing costs and attorneys' fees in will caveat proceedings post-appeal), *disc. rev. denied*, 348 N.C. 693, 511 S.E.2d 645 (1998). See also *McClure*, 185 N.C. App. at 470, 648 S.E.2d at 551 (noting that the holding set forth in *In re Will of Dunn*, 129 N.C. App. at 329-30, 500 S.E.2d at 104-05, was limited to will caveat proceedings).

(1950) (explaining that a hearing conducted by a trial court who already had retired, but was attempting to serve as an emergency judge, was *coram non judice*, and the judgment entered was vacated). Accord *Bolt v. Smith*, 594 So.2d 864, 864 (Fla. Dist. Ct. App. 1992) (“[O]nce a trial judge has recused himself, further orders of the recused judge are void and have no effect.”); *Byrd v. Brown*, 613 S.W.2d, 695, 699-700 (Mo. Ct. App. 1981) (holding that the trial judge lacked “authority” over the case once the judge was disqualified and, therefore, the judge’s subsequent orders were “void”). Therefore, in addition to the stay pending appeal, the trial judge’s recusal also operated to divest her of authority to enter the subsequent order awarding attorneys’ fees.

Accordingly, both orders awarding alimony and attorneys’ fees are vacated. We remand the matter again for entry of findings of fact regarding plaintiff’s sources of income, including plaintiff’s medical insurance and additional retirement account, if any. As with *Phillips I*, the trial court’s review shall be limited to the evidence already contained in the record.

Vacated and Remanded.

Judges HUNTER, Robert C. and HUNTER, Jr., Robert N. concur.

Report per Rule 30(e).