

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-96

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

BLANCA I. MAGARO,

Plaintiff,

v.

Pasquotank County
No. 06 CVD 23

STEVEN A. MAGARO,

Defendant.

Appeal by defendant from order entered 25 November 2009 by Judge Eula E. Reid in Pasquotank County District Court. Heard in the Court of Appeals 7 June 2010.

The Twiford Law Firm, P.C., by T. Taylor Manning, for plaintiff.

Frank P. Hiner, IV, for defendant.

ELMORE, Judge.

Steven Magaro (defendant) appeals the trial court's denial of his motion for relief from a 17 April 2006 consent order that granted Blanca Magaro's (plaintiff) motion for relief and modified the parties' absolute divorce judgment to insert an order requiring defendant to pay alimony. Defendant argues to this Court that the trial court lacked subject matter jurisdiction to grant the modification, and thus the 17 April 2006 consent order should be

vacated. We agree with defendant and accordingly reverse the order of the trial court.

Plaintiff filed a complaint for absolute divorce on 9 January 2006 and a motion for summary judgment on that complaint on 22 February 2006. That motion was granted by Judge J. Carlton Cole of Pasquotank County on 9 March 2006. Plaintiff's assertion in her complaint that "there are no pending claims for alimony or equitable distribution" became the court's finding of fact number 6 in the order.

On 11 April 2006, plaintiff filed a motion for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, asking that the trial court modify the divorce judgment to include a provision concerning alimony. In the motion, plaintiff stated that, at the time the summary judgment motion was made, "[t]he parties were acting under the mistaken belief that it was not necessary for them to incorporate the terms of their agreement in the divorce judgment." Plaintiff also stated in the motion that both parties were "willing to enter into a consent judgment relative to support to be incorporated in the divorce judgment[.]" On 17 April 2006, Judge Amber Davis entered the consent order as a modification to the divorce judgment, stating that the latter "shall be modified to incorporate this support order."

On 6 July 2009, defendant filed a motion for relief from the 17 April 2006 order pursuant to Rule 60(b), arguing that the trial court lacked jurisdiction and authority to modify the divorce judgment and asking that the consent order thus be deemed void.

That motion was denied on 25 November 2009. Defendant appeals the denial of that motion.

A Rule 60(b)(4) motion is only proper where a judgment is "void" as that term is defined by the law. A judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered.

Burton v. Blanton, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992) (citations omitted). Here, the trial court had neither jurisdiction over the subject matter nor authority to render the judgment it did, and, as such, defendant's motion should have been granted.

Per statute, modification is not an available remedy in an absolute divorce judgment when alimony has not been requested prior to the granting of that judgment.

A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation support *pending at the time the judgment for divorce is granted*. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse under any judgment or decree of a court *rendered before or at the time of the judgment of absolute divorce*.

N.C. Gen. Stat. § 50-11(c) (2009) (emphasis added); *see also Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 ("In North Carolina, jurisdiction over the subject matter of actions affecting the marriage relationship is authorized only by statute."). "[W]hen a party has secured an absolute divorce, it is beyond the

power of the court thereafter to enter an order awarding alimony" as the trial court is at that point deprived of subject matter jurisdiction over the matter. *Stark v. Ratashara*, 177 N.C. App. 449, 450, 628 S.E.2d 471, 473 (2006). The fact that both parties apparently agreed to the entry of the consent order does not negate this deprivation; this Court has consistently held that such jurisdiction cannot be granted to a court upon assertion by the parties. See *id.* at 451-52, 628 S.E.2d at 473 ("Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial."); *DeGree v. DeGree*, 72 N.C. App. 668, 670, 325 S.E.2d 36, 37 (1985) ("Although the parties stipulated . . . 'that the court has jurisdiction of the parties and of the subject matter,' we find such to be ineffective in conferring jurisdiction upon the court.")

As to the trial court's authority in this matter, as we have previously stated, "a trial court has 'no authority to enter' an order granting a Rule 60 motion if that order does not '*set aside*' the judgment or '*relieve[] [the moving party] of it.*'" *County of Durham v. Daye*, 195 N.C. App. 527, 534, 673 S.E.2d 683, 688 (2009) (quoting *Kimzay Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 79, 404 S.E.2d 176, 177 (1991)) (emphasis added). This principle has been explicitly applied in the context of divorce, as we have held that "[w]e simply are unwilling to hold that a court may leave intact a judgment of absolute divorce, yet order that one or more of the legal effects of that judgment may somehow be avoided."

Howell v. Howell, 321 N.C. 87, 92, 361 S.E.2d 585, 588 (1987). The trial court's modification of the absolute divorce judgment by entering the consent order was thus an action outside the bounds of its authority.

In conclusion, the trial court had neither subject matter jurisdiction nor authority to modify the divorce judgment, and as such defendant's motion to have it declared void should have been granted. We thus reverse the trial court's ruling and remand the matter for proceedings in light of this holding.

Because we reverse on these grounds, we do not address defendant's other assignments of error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).