

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-374
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

RONALD REALE,
Plaintiff,

v.

Wake County
No. 10-CVD-5477

DEBRA L. REALE,
Defendant.

Appeal by Plaintiff from order entered 13 December 2011 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 11 September 2012.

Ronald R. Reale, for Plaintiff, pro se.

No brief for Defendant.

THIGPEN, Judge.

Ronald R. Reale ("Plaintiff") appeals from an order entered denying his N.C. Gen. Stat. § 1A-1, Rule 60, motion to "set aside . . . as void *ab initio*" the temporary custody order and the voluntary support agreement in this case. Plaintiff did not include either of the aforementioned orders in the record on appeal. Because we believe these orders, and other critical documents Plaintiff also failed to include in the record on

appeal, are necessary to our understanding of the issue presented on appeal, and because Plaintiff violated a number of additional Appellate Rules in his record and brief on appeal, we dismiss Plaintiff's appeal pursuant to Rule 25(b) of the North Carolina Rules of Appellate Procedure.

The evidence of record tends to show the following: Plaintiff and Debra Reale ("Defendant") are citizens and residents of Wake County, North Carolina. Plaintiff and Defendant were married¹ and had seven children together. On 8 March 2010, the parties separated. Defendant then left North Carolina and traveled to California with the children.

On 29 March 2010, the trial court entered an ex-parte emergency custody order granting emergency sole temporary physical and legal custody of the minor children to Plaintiff.² On 5 April 2010, the trial court entered an amended order stating that the minor children were at "substantial risk of

¹Many dates and significant details in this case - including, but not limited to, the parties' date of marriage, the events leading up to and including the parties' separation and/or divorce, and any information concerning the couples' minor children, aside from the number of children they have, which is seven - are not contained in the record on appeal.

²We note that this custody order is not included in the record on appeal, but referenced in a finding of fact by the trial court in a subsequent order. Many of the facts in this section have been gleaned from the trial court's findings of fact in one particular order, as the actual orders were not included in the record on appeal.

being removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts and are in substantial risk to serious physical harm." The 5 April 2010 order granted Plaintiff temporary physical and legal custody of the minor children and directed Defendant to immediately surrender the minor children to Plaintiff. The next hearing was scheduled for 5 April 2010; however, it was continued to 3 May 2010.

On 12 April 2010, the trial court learned that Defendant had filed a motion for an ex-parte domestic violence order in the State of California, the hearing for which was on 15 April 2010, at 8:30 a.m. PST. A California Commissioner issued a temporary restraining order after that hearing; however, there is no dispute that the California court lacked personal jurisdiction over Plaintiff. Subsequent to the hearing, on 15 April 2010, a telephone conference transpired between the California and North Carolina judges. All parties were then directed to return to the State of North Carolina to appear before the trial court on 3 May 2010 for a temporary custody hearing.

Defendant states the following facts in his brief, some of which we are unable to confirm due to Defendant's failure to

include certain orders in the record on appeal: on 3 May 2010, the trial court conducted a hearing with both parties present, and Plaintiff signed a voluntary support agreement, which was filed that day.³ The same day, the trial court entered a domestic violence protective order, on its own motion, against Plaintiff and on behalf of Defendant.⁴ Plaintiff had never filed a motion for a domestic violence protective order.

On 8 June 2010, the trial court also entered a temporary custody order, granting physical and legal custody to Defendant, and prohibiting visitation between Plaintiff and the minor children.⁵

On 28 June 2010, the trial court entered an order administratively closing the case pursuant to N.C. Gen. Stat. § 7B-200(c)(1).

Plaintiff subsequently filed a N.C. Gen. Stat. § 1A-1, Rule 12 and Rule 60 motion to set aside and declare void *ab initio* the three aforementioned orders. On 29 March 2011, the trial court entered an order granting Plaintiff's motion to set aside the domestic violence protective order, because Defendant never

³The voluntary support agreement is not in the record on appeal.

⁴The domestic violence protective order is not in the record on appeal.

⁵The temporary custody order is not in the record on appeal.

filed a motion for a domestic violence protective order, or issued and served summons, as required by N.C. Gen. Stat. § 50B-2(a). The trial court concluded it lacked subject matter and personal jurisdiction over the Defendant to enter a domestic violence protective order.

On 3 October 2011, Plaintiff filed a second N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) motion to set aside the temporary custody order and voluntary support agreement, alleging that the two orders were founded on the void domestic violence protective order, and that, resultantly, they were necessarily also void. The trial court found as fact that the temporary custody order was not a product of the domestic violence protective order" and that Plaintiff abandoned his argument with regard to the voluntary support agreement. The trial court entered an order denying Plaintiff's Rule 60(b)(4) motion to set aside the temporary custody order and voluntary support agreement. From this order, Plaintiff appeals.

In Plaintiff's only argument on appeal, he contends the trial court erroneously declined to vacate its temporary custody order and voluntary support agreement because the foregoing orders were "products of the previously entered, and now void

domestic violence protective order[,]” which was vacated by the trial court for lack of personal and subject matter jurisdiction. We find Plaintiff’s record on appeal in violation of the appellate rules, in that Plaintiff failed to file documents necessary to an understanding of the issue presented on appeal. We believe the proper outcome in this case is dismissal of Plaintiff’s appeal.

In *Blankenship v. Town & Country Ford, Inc.*, this Court stated that the standard of review with regard to a trial court’s ruling on a Rule 60(b) motion is within the trial court’s sound discretion and is reviewable only for abuse of discretion. 155 N.C. App. 161, 165, 574 S.E.2d 132, 134-35 (2002), *appeal dismissed and disc. review denied*, 357 N.C. 61, 579 S.E.2d 384 (2003) (citation omitted). Abuse of discretion is shown only when “the challenged actions are manifestly unsupported by reason.” *Id.* (citation and internal quotation marks omitted). If there is “competent evidence of record on both sides” of the Rule 60(b) motion, it is the duty of the trial court to evaluate such evidence, and the trial court’s findings supported by competent evidence are conclusive on appeal. *Id.* (citation and internal quotation marks omitted).

North Carolina Rule of Appellate Procedure 9(a)(1)(j) requires, as a part of the appellate record, the submission of "copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the verbatim transcript of proceedings[.]" *Id.* "[W]hen a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34[,]⁶ [and] [i]f it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 201, 657 S.E.2d 361, 367 (2008). To determine "whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Id.* at 200, 657 S.E.2d at

⁶Rule 25 of the North Carolina Rules of Appellate Procedure provides penalties for a party's failure to comply with the appellate rules, and Rule 34 of the North Carolina Rules of Appellate Procedure provides sanctions available to the Court when the Court determines an appeal is frivolous.

366-67. "Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal." *Id.* at 201, 657 S.E.2d at 367.

In this case, Plaintiff asks this Court to conclude on appeal that the trial court erred in ruling that the voluntary support agreement and temporary custody order were not "the result of the unlawful" domestic violence protective order. Plaintiff specifically argues "[t]he V[oluntary] S[upport] O[rder] was clearly a product of the VOID D[omestic] V[iolence] P[rotective] O[rder], was the result of the unlawful proceeding that took place on 3 May, 2010, and was docketed as 'Risk for Domestic Violence' with Child Support Collections." Plaintiff reasons that, assuming the temporary custody order and the voluntary support agreement were a "product of the Domestic Violence Protective Order," which was determined by the trial court to be void, the temporary custody order and the voluntary support agreement must also necessarily be void. Plaintiff's argument is based, in large part, on procedural facts, including the following: (1) the orders were entered on the same day at the same time; (2) the issues in these orders were discussed in the same proceeding before the trial court; and (3) the

temporary custody order was attached as an addendum to the domestic violence protective order. Plaintiff specifically emphasizes that the temporary custody order was a Form AOC-CV-306A addendum to a domestic violence protective order. Aside from the foregoing, Plaintiff's argument generally consists of his repeated insistence that both the voluntary support order and the temporary custody order were "clearly a product of the same proceeding and therefore is of no moment, as the entire procedure carried out by [the trial court] was improper" and "a clear violation of [Plaintiff's] Constitutional Rights; specifically violating his rights under the 1st, 2nd, 5th, 6th, 8th, 9th, & 14th Amendments to the United States Constitution."

Our review of whether, based on the evidence contained in the record, the trial court abused its discretion in this case is impaired, because the record on appeal filed by Plaintiff does not contain several crucial documents necessary to our review. Because the record lacks several important orders in this case, we believe it is neither prudent nor necessary to reach the merits of Plaintiff's appeal. Rather, as Plaintiff violated Rule 9(a)(1)(j), and other rules discussed herein, of the North Carolina Rules of Appellate Procedure, we believe Plaintiff's appeal should be dismissed.

The limited nature and the many deficiencies of the record on appeal in this case have impaired this Court's task of review to the extent that we believe Plaintiff's violation has risen to the level of a substantial failure or gross violation. Although Plaintiff has raised a question on appeal regarding the nature of a voluntary support agreement and a temporary custody order, and whether the trial court had jurisdiction to enter the foregoing orders, Plaintiff has failed to include any one of the three pertinent orders in the record on appeal. Plaintiff has also failed to include any transcripts from the District Court hearings, if any were transcribed, to aid in our understanding of the issue presented. The record on appeal only contains the following documents pertaining to the substantive issue presented on appeal: Plaintiff's Rule 60 and Rule 12 motions, including one amended motion, to vacate the three orders of the trial court, and the trial court's orders and amended orders thereon.⁷ The trial court's order denying Defendant's Rule 60 motion to vacate the voluntary support agreement and temporary custody order contains findings of fact, from which we have been

⁷We note that the record on appeal otherwise contains several certificates of service, Plaintiff's notice of appeal, a certificate settling the record on appeal, Plaintiff's proposed issues on appeal, and identification of counsel, and a Conditions of Release and Release Order showing that Plaintiff was in custody until 5:00 p.m. on 3 May 2010.

able to glean and piece together a timeline of the proceedings in this case prior to appeal. Nonetheless, it is impossible to determine on the record presented here whether, for example, the temporary custody order was, in fact, a Form AOC-CV-306A addendum to a domestic violence protective order entered on 3 May 2010, as Plaintiff states in his brief,⁸ or whether the voluntary support agreement was, in fact, entered into during the proceeding docketed as "Risk for Domestic Violence" on 3 May 2010 as Plaintiff posits.⁹

In addition to the foregoing, none of the several temporary custody orders filed in the district court were included in the record on appeal in this case, which means we cannot confirm in any document in the record on appeal that Defendant actually currently has sole legal and physical custody of the children.¹⁰

⁸The only reference to the date of entry of the temporary custody order in the record on appeal, aside from references contained in Plaintiff's arguments in motions to the trial court, states that the trial court entered the order "on or about June 8, 2010," not 3 May 2010. The record neither contains the order itself, nor any document referencing the order as an addendum to the domestic violence protective order.

⁹There is only one reference, aside from Plaintiff's argument in his motions to the trial court, to the date of entry of the voluntary support agreement in the record on appeal, which is contained in the trial court's order denying Plaintiff's Rule 60 motion and states the following: "On or about May 3, 2010, the Plaintiff voluntarily signed a Voluntary Support Agreement and Approval by the Court."

¹⁰The orders of the trial court granting, in part, and

In addition to Plaintiff's failure to include significant documents essential to our review of the question presented in this case, Plaintiff also failed to comply with two other subsections of North Carolina Rule of Appellate Procedure in assembling the record on appeal: Plaintiff failed to include "a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same" in violation of Rule 9(a)(1)(c); and Plaintiff failed to include "copies of the pleadings,¹¹ and of any pretrial order on which the case or any part thereof was tried" in violation of Rule 9(a)(1)(d). Moreover, Plaintiff's failure to compile a record containing the documents necessary to understand his argument on appeal is exacerbated by Plaintiff's brief, in which he violates an additional appellate rule, by failing to state the standard of review for his argument in violation of paragraph two of North Carolina Rule of Appellate Procedure 28(b)(6).

denying, in part, Plaintiff's motions, are silent on this subject, stating only that the trial court entered a temporary custody order.

¹¹Plaintiff refers to his application for an emergency custody order and the trial court's ruling thereon in his motion to set aside the temporary custody order and the voluntary support agreement. The trial court also refers to Plaintiff's verified complaint in its Rule 60 order. However, no such document is included in the record.

Our Supreme Court has said the "Rules of Appellate Procedure[] are mandatory and failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999). In accordance with *Dogwood Dev. & Mgmt. Co.* 362 N.C. 191, 657 S.E.2d 361, we have considered whether suspension of the appellate rules pursuant to Rule 2 would be proper in this case but have determined that the documents Plaintiff failed to include in the record on appeal impairs our review to the extent that an invocation of Rule 2 to rule on the question presented without the documents would not be prudent. We believe Plaintiff's multiple violations of appellate rules in this case warrant the dismissal of his appeal pursuant to Rule 25(b) of the North Carolina Rules of Appellate Procedure.

DISMISSED.

Judges MCGEE and BEASLEY concur.

Report per Rule 30(e).