NO. COA 13-605
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

SHERRY STRICKLAND,
Plaintiff

v.

Pitt County
No. 02 CVD 2130

MICHAEL GOETZ, SR.,
Defendant

Appeal by defendant from order entered 1 March 2013 by Judge Joseph A. Blick, Jr. in Pitt County District Court. Heard in the Court of Appeals 23 October 2013.

No brief filed on behalf of plaintiff-appellee.

Michael Lee Goetz Sr., pro se, defendant-appellant.

HUNTER, JR., Robert N., Judge.

Appellant Michael Goetz, Sr. ("Mr. Goetz") appeals from an order entered 1 March 2013 in Pitt County District Court dismissing his motion for summary judgment. Mr. Goetz timely provided notice of appeal. After careful review, we dismiss Mr. Goetz's appeal.

I. Facts & Procedural History

On 7 January 2013, Mr. Goetz filed a motion for summary judgment. The motion was heard and denied by Judge Joseph A. Blick, Jr. in a 1 March 2013 order. On 5 March 2013, Mr. Goetz filed notice of appeal challenging Judge Blick's denial of his motion for summary judgment.

On 19 August 2002, Appellee Sherry Strickland ("Ms. Strickland") filed a complaint against Mr. Goetz seeking custody of their minor child, LouAnn.[1] Ms. Strickland and Mr. Goetz were never married. On 14 October 2002, Ms. Strickland was granted custody of LouAnn in a temporary custody order. The order allowed Mr. Goetz "specific visitation privileges" with LouAnn, although the record does not describe those privileges in detail. LouAnn resided with Ms. Strickland in a stable and secure home, performed well in school, had many friends, was active in church, and the trial court found LouAnn happy and well-adjusted overall.

Between 14 October 2002 and 4 December 2008, neither party sought to modify the temporary custody order, and the order became permanent. At the time of the order, Mr. Goetz was unemployed and did not have a permanent residence. After the order was entered, Mr. Goetz started his own computer business, maintained a

[1] A pseudonym is used to conceal the identity of the juvenile involved in this case.

permanent and stable residence, and consistently took advantage of the visitation allowed in the custody order.

Mr. Goetz filed a motion to modify the custody order on 4 December 2008. On 15 December 2009, Judge Joseph A. Blick, Jr. entered an order finding that "[a] material and substantial change of circumstances affecting the welfare" of LouAnn occurred and warranted modification of the prior custody order ("Modified Order").

The Modified Order awarded Ms. Strickland and Mr. Goetz joint legal custody of LouAnn with Ms. Strickland receiving primary physical custody. The Modified Order also granted Mr. Goetz secondary physical custody with visitation rights. The Modified Order allowed Mr. Goetz custody for every other weekend, for Thanksgiving holidays in odd-numbered years, for Christmas holidays in even-numbered years, for half of LouAnn's spring break vacation, for one week in June, for one week in July, for one week in August, for Father's Day, and to jointly visit LouAnn during her birthday. The Modified Order also allowed each parent to have unrestricted access to "all school, medical, and other records relating to the general health and welfare" of LouAnn. The Modified Order allowed Mr. Goetz to call LouAnn on the telephone once per day. The Modified Order required both parents to advise one another of "all special occasions and events" in LouAnn's life and to "confer with one another and . . . to reach a mutual agreement with regard to all major decisions affecting the best interests and general

welfare" of LouAnn. Lastly, the Modified Order required both parents to be given priority as babysitters when LouAnn's grandparents were unavailable.

On 7 January 2013, Mr. Goetz filed a motion for summary judgment, contending the Modified Order was unconstitutional and "[denied] him his *unalienable* right to be a father to his daughter." Judge Blick dismissed Mr. Goetz's motion for summary judgment, finding that a final custody order of a trial court cannot be dismissed or set aside through a motion for summary judgment.

Mr. Goetz filed written notice of appeal on 5 March 2013 in which he appealed "from the final judgement [sic] of District Court Judge Blick on 8 February 2013 denying Defendant's motion for summary judgement [sic], and finding the current custody order 02cvd2130 as unconstitutional." Mr. Goetz filed a Proposed Record on Appeal on 15 March 2013. The Final Record on Appeal was filed on 21 May 2013. Mr. Goetz proposed three issues on appeal: (i) "Did the trial court err in denying Plaintiff's [sic] motion for summary judgment under N.C. R. Civ. P. 56 and the U.S. Constitution;" (ii) "Should the appellate courts overrule the district court decision as a matter of unalienable rights protected by natural law involving ALL human beings; and set a constitutional precedent;" and (iii) "Does article [sic] 9 of the bill of rights allow for a constitutional amendment to protect parental rights?"

II. Jurisdiction

Mr. Goetz appeals from the dismissal of his motion for summary judgment. Mr. Goetz argues the trial court erred in denying his motion for summary judgment and violated the Fourteenth Amendment of the United States Constitution when it unduly limited his rights as a parent. Mr. Goetz filed the summary judgment motion to modify the three-year-old Modified Order. Mr. Goetz's motion is inappropriate under the law of the case doctrine and North Carolina's prohibition against collateral attacks of previous orders. Therefore, we dismiss for lack of jurisdiction.

The trial court dismissed Mr. Goetz's motion for summary judgment, but laid out the proper procedures he could follow to obtain the relief he seeks, modification of the Modified Order. In its findings of fact, the trial court noted that (i) Mr. Goetz could appeal the custody order directly to this Court; (ii) Mr. Goetz could file a motion to set aside a final order pursuant to N.C. R. Civ. P. 60; and/or (iii) Mr. Goetz could file a motion to set aside an order pursuant to N.C. R. Civ. P. 59.

The Modified Order was issued on 15 December 2009, giving Mr. Goetz 30 days to appeal the decision directly to this Court under N.C. R. App. P. 3(c). The record does not show Mr. Goetz appealed the Modified Order within the 30 days. Mr. Goetz also chose not to file a motion to set aside under Rule 59 or Rule 60 and instead appealed the decision to dismiss his motion for summary judgment to this Court.

Our Court recently decided a similar case in *Wellons v. White*, ___ N.C. App. ___, 748 S.E.2d 709 (2013). In that decision, we issued the following controlling precedent for this situation:

> In North Carolina, permanent child visitation and custody orders resolving all pending issues are generally final and appealable. Temporary custody and visitation orders, on the other hand, are interlocutory and not immediately appealable.
>
> . . . .
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> Once a trial court issues a final appealable child custody or visitation order, it becomes the law of the case. The law of the case doctrine provides that when a party fails to appeal that order, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case. Still, when a tribunal is faced with a question of its subject matter jurisdiction, the goals of the law of the case doctrine are outweighed by the overriding importance and value of a correct ruling on this issue.

Id. at ___, 748 S.E.2d at 720 (quotation marks, citation, and alterations omitted).

North Carolina also prohibits collateral attacks on previous orders. *Id.* "A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969) (quotation marks and citation omitted). North Carolina case law prohibits this type of argument. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) (holding that the

proper route to remedy erroneous orders is appeal, not collateral attack); *In re Wheeler*, 87 N.C. App. 189, 193, 360 S.E.2d 458, 461 (1987) (holding that for parties seeking relief from a prior erroneous order, "the proper avenues [are] 1) appeal . . ., or 2) a motion for relief pursuant to N.C. Gen. Stat. Sec. 1A–1, Rule 60."). For instance, parties may not defend themselves in contempt proceedings by collaterally attacking the underlying judgment or order they allegedly violated. *See Wells v. Wells*, 92 N.C. App. 226, 229, 373 S.E.2d 879, 882 (1988) (holding that a plaintiff held in contempt for failure to pay alimony could not collaterally attack the underlying alimony judgment).

In *Wellons*, the defendant had a right to appeal a permanent custody order. ___ N.C. App. at ___, 748 S.E.2d at 720–21 ("Specifically, since the order provided a permanent custody and visitation schedule and did not state a clear and specific reconvening date within a reasonably brief time, the order was final and appealable."). When the defendant in *Wellons* did not timely appeal the permanent custody order, it became the law of the case and could only be modified by subsequent orders showing a change of circumstances. *Id.*; *see also Gower v. Aetna Ins. Co.*, 281 N.C. 577, 579, 189 S.E.2d 165, 167 (1972) ("Since neither party appealed, the judgment entered . . . became the law of the case and established the respective rights of the parties to that action."); *Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 373–74, 713 S.E.2d 511, 518 (2011).

Here, when Mr. Goetz failed to timely appeal the 15 December 2009 order, it became the law of the case and only subject to modification in subsequent orders showing a change of circumstances or by the procedures properly identified by the trial court. *See Wellons*, ___ N.C. App. at ___, 748 S.E.2d at 720–21. Further, Mr. Goetz's motion for summary judgment is a facial collateral attack on the underlying validity of the Modified Order. Mr. Goetz asserts in his appeal that the Modified Order "has caused him great harm," that the Modified Order "is not in the best interest of the child and should be dismissed as unconstitutional," and that the Modified Order "should be thrown out[.]" As such, we dismiss Mr. Goetz's appeal as an impermissible collateral attack on the underlying custody order, which this Court does not have jurisdiction to consider.

III. Conclusion

Based on the law of the case doctrine and the prohibition on collateral attacks, we dismiss Mr. Goetz's appeal for lack of jurisdiction. We find the remaining arguments without merit. For the foregoing reasons, Mr. Goetz's appeal is

DISMISSED.

Judges HUNTER, Robert C., and CALABRIA concur.

Report per Rule 30(e).