IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-224

Filed: 15 October 2019

Transsylvania County, No. 11 CVD 577

TAMMY L. MORRIS, Plaintiff

v.

MATTHEW MORRIS, Defendant

Appeal by Defendant from Order entered 16 October 2018 by Judge Mack Brittain in Transylvania County District Court. Heard in the Court of Appeals 21 August 2019.

Christopher S. Stepp, attorney for plaintiff-appellee.

Donald H. Barton, attorney for defendant-appellant.

HAMPSON, Judge.

Our review of this case has been hampered by what could be classified as substantial and gross violations of our Rules of Appellate Procedure through noncompliance with nonjurisdictional requirements subjecting this case to potential dismissal or other sanctions under N.C.R. App. P. 34(b). *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 201, 657 S.E.2d 361, 367 (2008).

What saves this appeal from dismissal or the imposition of other sanctions is the fact that both parties have disregarded appellate rules and failed to clearly articulate their arguments. As such, it seems the only just and fair thing to do is to try and discern the merits of the case and attempt to look past what we generously term "inartful appellate advocacy." *See id.* at 198, 657 S.E.2d at 365. In so doing, we are mindful of our Supreme Court's directives in *Dogwood*:

> At the outset we observe that "rules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y]" of resolving disputes. It necessarily follows that failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice.

Id. at 193, 657 S.E.2d at 362 (citations omitted). "Compliance with the rules, therefore, is mandatory. As a natural corollary, parties who default under the rules ordinarily forfeit their right to review on the merits." *Id.* at 194, 657 S.E.2d at 362-63 (citations omitted). "But '[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them.' " *Id.* (citation omitted). Our Supreme Court has, therefore, stressed "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198, 657 S.E.2d at 365. "This systemic preference not only accords fundamental fairness to litigants but also serves to promote public confidence in the administration of justice in our appellate courts." *Id.* at 200, 657 S.E.2d at 366.

The key inquiry becomes: "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 366-67. Here, the violations range from formatting errors to more substantive violations. For example, both parties have violated North Carolina Rule of Appellate Procedure 26 by using a Courier font, which is no longer approved for use in our Courts. N.C.R. App. P. 26. The Appellee's brief compounds this violation by the use of single-spaced lines in block quote format for the entirety of every section of the brief. Rule 26(g) states: "The body of text shall be presented *with double spacing between each line of text*." N.C.R. App. P. 26(g) (emphasis added). This requirement has been a part of the Rules since 1988. *See Dafford. v. JP Steakhouse LLC*, 210 N.C. App. 678, 684, 709 S.E.2d 402, 407 (2011) (sanctioning defendant by requiring payment of printing costs of the appeal when defendant submitted a single-spaced brief to the court). More substantively, the Appellant's brief lists eight different, albeit related, Issues Presented but argues only one. "Under Rule 28(b)(6), an issue 'not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.' " *Wiley v. L3 Commc'ns Vertex Aerospace, LLC*, 251 N.C. App. 354, 365, 795 S.E.2d 580, 589 (2016) (citing N.C.R. App. P. 28(b)(6)). Therefore, we conclude any arguments not presented in the Appellant's brief are abandoned. The Appellee's

brief offers no argument whatsoever on the merits, instead only asserting the appeal is interlocutory.

Nevertheless, these nonjurisdictional rules violations notwithstanding, we are able to discern the basic premise of this case and decline to dismiss the appeal in favor of reaching the merits. We also, in our discretion, decline to impose lesser sanctions on either party or their counsel in hope that in the future greater care will be taken in the presentation of cases to this Court.

Ultimately, this case is about a trial court, within the context of a civil contempt proceeding and at the behest of the parties, interpreting an allegedly ambiguous term in a Consent Order resolving the parties' Equitable Distribution Claims. We first conclude the trial court has the authority, at the request of the parties, to construe the Consent Order pursuant to its contempt powers. *Holden v. Holden*, 214 N.C. App. 100, 110, 715 S.E.2d 201, 208 (2011) ("[T]he trial court has the authority in a contempt proceeding in a divorce action to construe or interpret an ambiguous consent judgment." (citations, quotation marks, and alterations omitted)). We further conclude the trial court's Findings of Fact are supported in the Record and support the trial court's Conclusions of Law construing the parties' Consent Order. *See id*. at 112, 715 S.E.2d at 209. Consequently, we affirm the trial court's Orders at issue in this case.

Factual and Procedural Background

Our review of the Record reflects the following: On 20 January 2015, Plaintiff and Defendant entered into a Consent Equitable Distribution Judgment (Consent Order)[1] in Transylvania County. The Consent Order stated in relevant part:

> Defendant, MATTHEW MORRIS, is the owner of an interest in the Arvin Meritor, Inc. Savings Plan as a benefit of his employment. The parties agree and consent that the Plaintiff is awarded a lump sum distribution of $137,500.00 of the said account in after tax money. The parties shall expeditiously execute any and all documents necessary to effectuate such transfer in a tax free manner to the Plaintiff. The parties each waive any other and further claims toward any pension, IRA, or 401K owned by either party and the parties shall be sole and separate owners of any intangible assets or accounts remaining in their possession.

On 17 March 2015, the parties entered a Qualified Domestic Relations Order (QDRO). The QDRO established Plaintiff's right to receive the $137,500.00 as established in the Consent Order.

On 1 December 2016, Plaintiff filed a Motion for an Order to Show Cause/Motion for Civil Contempt (Show-Cause Motion). Plaintiff alleged Defendant violated the Consent Order by refusing to distribute the $137,500.00 in after-tax money. Plaintiff's Show-Cause Motion alleged Plaintiff paid taxes in the amount of $39,531.00 on the $137,500.00 distribution and thus that Defendant owes Plaintiff

[1] The parties and trial court refer to the Consent Equitable Distribution Judgment entered on 20 January 2015 as a Consent Order enforceable by contempt. For ease of reading and consistency, we will also refer to the Consent Equitable Distribution Judgment as a Consent Order even though it is quite clearly captioned as a judgment and leave for another day any discussion of the differences between orders and judgments.

$39,531.00 in after-tax money. That same day, the trial court issued an Order to Appear and Show Cause concluding "Plaintiff is entitled to an Order requiring Defendant to appear and show cause why the Defendant should not be held in Civil Contempt for failing to comply with an Order of this Court." On 26 January 2017, Defendant moved for relief from the Consent Order under N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). Defendant contended that portions of the Consent Order were void because of vagueness and were the result of a mutual mistake.

On 14 August 2017, the trial court held a hearing on the Plaintiff's Show-Cause Motion. Plaintiff and Defendant were both present and represented by counsel. The trial court received arguments in chambers, and the parties requested "that the Court make a determination of what the parties intended in the consent order previously entered." On 29 August 2017, the trial court entered an Order (2017 Order) for Defendant to comply with the Consent Order and pay $39,531.00 to Plaintiff. The 2017 Order included the trial court's Findings of Fact and Conclusions of Law. The Findings of Fact are, in relevant part, as follows:

> 2.
> Both Paragraph 4 of the Findings and Paragraph 1 of the Order make clear that the parties intended that wife be granted the lump sum of $137,500.00 in a manner so that there would not be any tax liability to wife.
>
> 3.
> The parties agree that husband transferred $137,500.00 to wife but that wife incurred tax liability of $39,531.00 as a result of the transfer.

4.

The fact that wife had to pay tax on the transfer violates the clear intention of the parties in the Consent Order.

From the Findings of Fact, the trial court made the following Conclusion of Law: "The husband breached the terms of the January 20, 2015 Consent Order and is liable to wife in the amount of $39,531.00."

Defendant filed Notice of Appeal from the 2017 Order on 28 September 2017. Plaintiff filed a Motion in this Court seeking dismissal of the appeal on the grounds it was interlocutory and arguing the trial court had not ruled on the underlying civil contempt issue. On 23 August 2018, the Court of Appeals dismissed Defendant's appeal. On 16 October 2018, Defendant returned before the trial court. That afternoon, the trial court entered an Order (2018 Order) clarifying "Defendant not guilty of contempt prior to 8/29/2017. . . . No pending contempt motion since dismissal of appeal on 8/23/2018." On 14 November 2018, Defendant filed Notice of Appeal from the 2018 Order clarifying he was not in contempt. Plaintiff has again moved to dismiss the appeal arguing it is interlocutory. Plaintiff has also moved for sanctions under N.C.R. App. P. 34.

Issues

There are four issues before this Court: (I) whether this Court has jurisdiction to review the 2017 Order where Defendant's current Notice of Appeal fails to identify the 2017 Order as an order being appealed; (II) whether this Court should grant

Plaintiff's Motion to Dismiss on the grounds that the appeal is interlocutory; (III) whether this Court should grant Plaintiff's Motion for Sanctions; and (IV) whether the Findings of Fact in the trial court's 2017 Order are supported by the Record and if the Findings of Fact support the Conclusions of Law.

Analysis

I. Appellate Jurisdiction

An initial problem, not addressed by either party, crops up in this case in simply attempting to decipher what Order Defendant is actually appealing. Taken at face value, Defendant's Notice of Appeal in the present case states only that he is appealing from the 2018 Order, which is the Order clarifying Defendant is *not* in civil contempt. In actuality, of course, Defendant is attempting to again appeal from the 2017 Order construing the Consent Order following entry of the 2018 Order acting as a final judgment.

The Rules of Appellate Procedure expressly provide the Notice of Appeal "shall designate the judgment or order from which appeal is taken[.]" N.C.R. App. P. 3(d). "An appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347, 666 S.E.2d 127, 133 (2008). However, "where the intent to appeal an intermediate interlocutory order 'is quite clear from the record,' such order may be reviewed upon appeal of a final judgment

notwithstanding failure of said order to be 'specifically mentioned in the notice of appeal[.]' " *Wells v. Wells*, 132 N.C. App. 401, 405-06, 512 S.E.2d 468, 471 (1999) (citations omitted). Here, Defendant's intent is clear, and we conclude his appeal from the 2017 Order is properly preserved and before us.

II. Motion to Dismiss the Appeal

Plaintiff has again moved to dismiss Defendant's appeal, this time on the grounds the 2018 Order is interlocutory. Plaintiff's Motion simply argues in a conclusory fashion that the 2018 Order is not a final order and does not affect a substantial right. We conclude the 2018 Order, from which Defendant now appeals, constitutes a final judgment. "A final judgment disposes of the cause as to all the parties, leaving nothing to be determined between them in trial court." *Beam v. Morrow, Sec. of Human Resources*, 77 N.C. App. 800, 802, 336 S.E.2d 106, 107 (1985). This Court previously dismissed Defendant's prior appeal from the 2017 Order on Plaintiff's Motion that contended the appeal was interlocutory because there had yet to be a determination of Defendant's contempt.

After this Court's dismissal, Defendant returned to the trial court in October 2018. In the 2018 Order the trial court specifically ruled Defendant was not in contempt. Upon this final clarification in the 2018 Order that Defendant was not in contempt, there were no further proceedings pending before the trial court. Thus, Defendant's appeal is now properly before this Court under N.C. Gen. Stat. § 7A-

27(b)(2). N.C. Gen. Stat. § 7A-27(b)(2) (2017). Accordingly, Plaintiff's Motion to Dismiss is denied.

III. Motion for Sanctions

Plaintiff, in addition to the Motion to Dismiss the Appeal, filed a Motion for Sanctions against Defendant under Rule 34 of the North Carolina Rules of Appellate Procedure arguing Defendant's appeal is "not well-grounded in fact and is not warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law" and is undertaken for an improper purpose. *See* N.C.R. App. P. 34. Again, Plaintiff offers little but conclusory statements to support her Motion. We deny Plaintiff's Motion for Sanctions.

IV. The 2017 Order

A. Standard of Review

Defendant argues the trial court erred in entering the 2017 Order that concluded he was liable to Plaintiff for $39,531.00 under the terms of the Consent Order. We review the 2017 Order's Findings of Fact to ensure they are supported by competent evidence and its Conclusions of Law de novo. *Holden*, 214 N.C. App. at 112-13, 715 S.E.2d at 209 ("[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." (citation and quotation marks omitted)).

B. Construction of the Consent Order

Before we address the 2017 Order's Findings of Fact and Conclusions of Law, we reiterate that the trial court was acting within its authority to interpret the Consent Order at the request of Plaintiff and Defendant. *See id.* at 110, 715 S.E.2d at 208 ("[T]he trial court has the authority in a contempt proceeding in a divorce action to construe or interpret an ambiguous consent judgment." (citations, quotation marks, and alterations omitted)). Defendant contends that the 2017 Order is invalid because it does not comply with the requirements of N.C. Gen. Stat. § 5A-11 or N.C. Gen. Stat. § 5A-21. *See* N.C. Gen. Stat. § 5A-11 (2017) (criminal contempt); N.C. Gen. Stat. § 5A-21 (2017) (civil contempt). We conclude, as did this Court in *Holden*, "[i]t is clear from the record why the trial court did not enter an order holding [Defendant] in contempt[.]" 214 N.C. App. at 110-11, 715 S.E.2d at 208.

In *Holden*, plaintiff and defendant "stipulated that, as an alternative to a determination of Plaintiff's contempt, they would abide by the determination of the trial court concerning the disputed terms of the consent order." *Id.* at 111, 715 S.E.2d at 208. Similarly, in the present case, the Record shows the trial court did not enter an order finding Defendant in contempt because the parties requested the court "make a determination of what the parties intended in the consent order previously entered." As such, the trial court in the case *sub judice*, similar to the trial court in *Holden*, was acting within its authority in construing the Consent Order at the

request of Plaintiff and Defendant and did not need to enter an order on Defendant's contempt. *Id.*

C. Findings of Fact

Despite presenting a list of nine headings in his brief, consisting of eight issues and a Standard of Review section, Defendant challenges but one Finding of Fact from the 2017 Order. Defendant contends, in heading IX of his brief, that Finding of Fact 3 is not supported by competent evidence. Finding of Fact 3 states: "The parties agree that husband transferred $137,500.00 to wife but that wife incurred tax liability as a result of the transfer." Although we review findings of fact for support from competent evidence, our review necessarily requires relevant evidence in the Record to review.

In the present case, the Record before us lacks sufficient evidence for us to review whether competent evidence in the Record supports Finding of Fact 3, which Defendant challenges on appeal. "Without evidence in the record of error by a trial judge, neither are we required to nor should we assume error on the part of the trial judge." *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 431, 610 S.E.2d 237, 239 (2005). As the Record before us is insufficient for proper review, we cannot assume error on behalf of the trial judge; we are therefore not persuaded by Defendant's contention that Finding of Fact 3 is not supported by competent evidence.

In any event, Plaintiff's verified Motion stated she incurred $39,531.00 in taxes on the distributed sum. Additionally, Defendant's Motion for Relief from the Order states "[Plaintiff's] withdrawal generated a tax penalty of 10% of the amount withdrawn and additional income taxes of $39,531.00 to Plaintiff." On the face of the Record before us, there appears no dispute that Plaintiff did in fact incur the tax liability. Consequently, we reject Defendant's argument.

D. Conclusions of Law

Without specifying which of the trial court's Conclusions of Law is not supported by the Findings of Fact, Defendant contends that the Findings of Fact do not support the Conclusions of Law. Fundamentally, Defendant asserts the trial court erred in its construction of the Consent Order. Defendant relies on the language of the QDRO, which states: "The participant and the Alternate Payee shall each be responsible for his/her own federal, state, and local income taxes and/or other taxes attributable to distributions from the Plan which are received by the Participant and Alternate Payee, respectively." The plain language of the Consent Order, however, provides "[t]he parties agree and consent that the Plaintiff is awarded a lump sum distribution of $137,500.00 of the said account in *after tax money*." (emphasis added).

The parties, both represented by counsel, requested the trial court "make a determination of what the parties intended in the consent order previously entered." The trial court heard arguments from the parties in chambers and provided the

parties an opportunity to brief the issue. The trial court had authority to "construe or interpret [the] ambiguous consent judgment." *Holden*, 214 N.C. App. at 110, 715 S.E.2d at 208 (citation and quotation marks omitted); s*ee Myers v. Myers*, 213 N.C. App. 171, 175, 714 S.E.2d 194, 198 (2011) ("[A]s a consent order is merely a court-approved contract, . . . when a question arises regarding contract interpretation, whether the language of a contract is ambiguous or unambiguous is a question for the court to determine." (alterations, citations, and quotation marks omitted)).

The trial court then concluded, pursuant to the request of the parties, "husband breached the terms of the January 20, 2015 Consent Order and is liable to wife in the amount of $39,531.00." The trial court found, in a Finding of Fact unchallenged on appeal, "from the evidence presented, arguments of counsel, and review of the Court file[,]" that "[t]he fact that wife had to pay tax on the transfer violates the *clear intention* of the parties in the Consent Order." The trial court's findings support its Conclusion of Law, and we therefore affirm the 2017 Order.

Conclusion

Accordingly, based on the foregoing reasons, we deny Plaintiff's Motion to Dismiss the Appeal, deny Plaintiff's Motion for Sanctions, and affirm the trial court's 2017 Order.

AFFIRMED.

Judges INMAN and BROOK concur.

Report per Rule 30(e).