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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1143

Filed: 20 June 2017

Wake County, Nos. 10 CVD 17706, 13 CVD 4391

MARK PAGE, Plaintiff,

v.

PATRICIA MCCABE (formerly Page), Defendant.

Appeal by plaintiff from order entered 22 March 2016 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 4 May 2017.

*Rik Lovett & Associates, by S. Thomas Currin, II, for plaintiff-appellant.*

*No brief filed for defendant-appellee.*

DIETZ, Judge.

Plaintiff Mark Page appeals the trial court's order dismissing his motion to modify an existing child custody order. The trial court dismissed Page's motion under Rule 41(b) because Page "failed to *allege* a substantial change in circumstances affecting the welfare of the minor children." As explained below, Page properly alleged a substantial change in circumstances, both in his motion to modify and at the hearing. Because the trial court did not also find that Page failed to *prove* a

substantial change in circumstances, the order is missing essential findings. We therefore vacate the order and remand for further proceedings.

### **Facts and Procedural History**

Mark Page and Patricia McCabe share joint legal and physical custody of their two minor children. Under a court-ordered custody arrangement, Page expected to take custody of the children for four or five days one week and then for one day the next week. At the time the court entered the custody order, Page and McCabe both lived in Wake County.

Page works in the insurance industry and previously had clients throughout central and eastern North Carolina. Shortly before the parties' divorce and resulting child custody arrangement, Page's employer removed him from responsibility over what was then his primary client, located in Wake County. The majority of Page's remaining clients were in southeastern North Carolina, in or near New Hanover County. For a time, Page drove hundreds of miles every day from his home in Wake County to visit clients in New Hanover County. Ultimately, he moved to New Hanover County to reduce his work-related travel.

Since the move from Wake County to New Hanover County, Page has typically taken custody of his children every other weekend, picking the children up on Friday evening and returning them on Sunday evening. The custody order does not specify a location for custodial exchanges but, before the move, Page picked the children up

at McCabe's home. After Page moved to New Hanover County, he asked McCabe to agree to meet somewhere between Wake County and New Hanover County to exchange the children. McCabe refused.

On 27 February 2015, Page moved to modify the custody order based on a substantial change in circumstances. He alleged that "[a] substantial change in circumstances affecting the best interests and welfare of the minor child[ren] has occurred warranting establishment/modification of the custodial exchange practice between the parties" based on his "move to New Hanover County" and the fact that "a large majority of [the children's] time with Dad . . . is spent in the car." Page asked the trial court to establish "a halfway exchange point or other transportation schedule" that would permit Page to spend "more meaningful (i.e., not in the car) time with" his children.

The trial court held a hearing on 11 January 2016. Page testified at the hearing, confirming the facts alleged in his motion to modify custody. At the close of Page's evidence (which consisted solely of his testimony), McCabe moved for summary judgment. The trial court stated that it construed McCabe's summary judgment motion as one for involuntary dismissal under Rule 41(b). The court granted the motion. In its written order, the court found that Page "failed to allege a substantial change in circumstances affecting the welfare of the minor children" and therefore dismissed his motion to modify. Page timely appealed.

### **Analysis**

Page contends that the trial court erred by dismissing his motion under Rule 41(b) on the ground that he “failed to allege a substantial change in circumstances affecting the welfare of the minor children.” We agree. As explained below, Page properly *alleged* a substantial change in circumstances affecting the welfare of his children. Because the court’s order does not contain any findings concerning whether Page presented sufficient evidence to *prove* that allegation, we vacate the trial court’s order and remand for further proceedings.

We begin with the general scope of Rule 41(b) in a case like this one, where the trial court acts as the fact-finder. “A motion for dismissal pursuant to Rule 41(b), made at the close of plaintiff’s evidence in a non-jury trial, not only tests the sufficiency of plaintiff’s proof to show a right to relief, but also provides a procedure whereby the judge may weigh the evidence, determine the facts, and render judgment on the merits against the plaintiff, even though the plaintiff may have made out a *prima facie* case.” *McKnight v. Cagle*, 76 N.C. App. 59, 65, 331 S.E.2d 707, 711 (1985). “[T]he trial judge must find the facts on all issues raised by the pleadings, and state his conclusions of law based thereon.” *Id.*

From the transcript in this case, it appears that the trial court intended to rely on Rule 41(b) to reject Page’s motion on the merits, based on the determination that his evidence, even if accepted as true, did not rise to the level of a substantial change

in circumstances. But the trial court’s written order—what this Court must review on appeal—does not render judgment on the merits under Rule 41(b). *McKnight*, 76 N.C. App. at 65, 331 S.E.2d at 711. Instead, the court’s order dismisses Page’s motion because Page “failed to allege a substantial change in circumstances.”

In a legal setting, alleging something and proving something are quite different. To “allege” ordinarily means to “assert as true” in some initial pleading “though no occasion for definitive proof has yet occurred.” *Allege*, *Black’s Law Dictionary* (10th ed. 2014). Later, the allegations are proven with actual evidence submitted by the parties. *Proof*, *Black’s Law Dictionary* (10th ed. 2014).

Here, Page plainly alleged that a substantial change in circumstances occurred. His motion to modify custody contained the following allegations:

18. Since Plaintiff’s move, Defendant has refused to do the exchanges at a halfway point or to split the driving.

19. It is not in the best interests and welfare of the minor children that a large majority of their time with Dad (Plaintiff) is spent in the car. Establishing a halfway exchange point or other transportation schedule will allow the minor children to spend more meaningful (i.e., not in the car) time with Plaintiff, which is in the minor children’s best interest.

20. A substantial change in circumstances affecting the best interests and welfare of the minor child has occurred warranting establishment/modification of the custodial exchange practice between the parties.

Moreover, throughout his argument at the hearing, Page asserted that his move to New Hanover County because of changes at work (that were not voluntary on his part) resulted in a substantial change in circumstances that warranted modification of the custody arrangement.

Thus, the trial court erred by dismissing Page's motion to modify for failure to allege a substantial change in circumstances. We vacate the order and remand for further proceedings. On remand, the trial court is free to decide, in its discretion, whether additional evidence or a hearing is necessary, or whether the case may be decided based on the existing record. *See Hendricks v. Sanks*, 143 N.C. App. 544, 549, 545 S.E.2d 779, 782 (2001).

### **Conclusion**

We vacate the trial court's order and remand for further proceedings.

VACATED AND REMANDED.

Judges DILLON and TYSON concur.

Report per Rule 30(e).