An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-666

Filed: 5 June 2018

Wake County, No. 16 CVD 246

LESLIE LAURENE BELLAMY, Plaintiff

v.

STARSKY SHANE BRANSON, Defendant

Appeal by plaintiff from order entered 13 April 2017 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 15 May 2018.

Young Law Offices, by Rhonda G. Young, and Tiffanie C. Meyers, for plaintiff-appellant.

Jackson Family Law, by Jill Schnabel Jackson, for defendant-appellee.

CALABRIA, Judge.

Leslie Laurene Bellamy ("plaintiff") appeals from the trial court's order dismissing her equitable distribution claim with prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017) due to plaintiff's failure to prosecute the claim. After careful review, we conclude that the trial court's order fails to include the findings of fact that are required for a Rule 41(b) involuntary dismissal. Accordingly, we vacate the order and remand to the trial court for further proceedings.

I. Factual and Procedural Background

Plaintiff and Starsky Shane Branson ("defendant") were married on 8 April 2005 and separated on 1 September 2015. On 12 January 2016, plaintiff filed a verified complaint against defendant in Wake County District Court asserting claims for (1) post-separation support and alimony; (2) attorney's fees; and (3) equitable distribution. After the parties reached an agreement resolving alimony, on 5 April 2016, the trial court entered a Consent Order awarding plaintiff alimony and dismissing her claim for post-separation support. The trial court ordered that "[t]he parties shall each be responsible for their attorney fees related to support."

On 15 April 2016, the trial court entered a Scheduling and Discovery Order setting dates for discovery and pretrial conferences prior to the equitable distribution trial. However, the parties missed several discovery deadlines, and their mediated settlement conference on 4 August 2016 ended in an impasse. Accordingly, on 1 September 2016, the trial court entered an order directing the parties to comply with the following amended timeline:

Item/Action	**S&D date/deadline**	**New date/deadline**
Appraisals of property	May 20, 2016	October 15, 2016
Final Pretrial Conference	October 24, 2016	February 21, 2017
Trial (equitable distribution)	November 30, 2016	March 28, 2017

The trial court further ordered that the Final Pretrial Order be completed and served upon both parties no later than 3 February 2017.

After plaintiff was "unable to proceed" with the Final Pretrial Conference on 21 February 2017, the trial court continued the proceeding until 9 March 2017. However, plaintiff was still unprepared for the Final Pretrial Conference when she appeared *pro se* on 9 March 2017. Plaintiff not only failed to timely send her proposed pretrial order to defendant's counsel, but she also was disrespectful when the trial court attempted to instruct her regarding mandatory rules and procedures. On 13 April 2017, the trial court entered an order dismissing plaintiff's equitable distribution claim with prejudice "pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure due to her failure to prosecute this claim." Plaintiff appeals.

II. Rule 60 Motion to Set Aside

On 24 May 2017, plaintiff filed with the trial court a Rule 60 Motion to Set Aside the dismissal order. However, the trial court dismissed plaintiff's motion, concluding that her pending appeal divested the trial court of jurisdiction over the action. Plaintiff filed a second Rule 60 Motion to Set Aside on 2 August 2017. That same day, plaintiff filed with this Court a Motion to Remand File 60(b)(6), asserting that her Rule 60 motion impacted the pending appeal, and that the trial court retained jurisdiction to consider its merits. *See Bell v. Martin*, 43 N.C. App. 134, 142,

258 S.E.2d 403, 409 (1979) (explaining that "the better practice is to allow the trial court to consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending"), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980).

On 18 August 2017, we granted plaintiff's motion and remanded the matter to the trial court with instructions

> to conduct an evidentiary hearing on the Rule 60 motion pending before it. Following the taking of evidence, the trial court shall reduce its findings of fact and conclusions of law to writing and shall indicate what action it would be inclined to take were an appeal not pending before this Court.

On 2 January 2018, the trial court entered an order denying plaintiff's Rule 60 motion. In addition, the trial court amended the order dismissing plaintiff's equitable distribution claim to reflect that the dismissal for failure to prosecute "shall be pursuant to Rule 41(b)[,]" rather than Rule 41(a)(2).

III. Rule 41(b) Dismissal

On appeal, plaintiff contends that the trial court erred in dismissing her equitable distribution claim with prejudice pursuant to Rule 41(b), because the court failed to make findings of fact required to support a dismissal for failure to prosecute. We agree.

Rule 41(b) provides, *inter alia*, that a plaintiff's claim or action may be involuntarily dismissed "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court . . . ." N.C. Gen. Stat. § 1A-1, Rule 41(b). "Thus, under Rule 41(b), a claim may be dismissed for one of three reasons: failure to prosecute the claim, failure to comply with the rules of civil procedure, or failure to comply with a court order." *McKoy v. McKoy*, 214 N.C. App. 551, 552-53, 714 S.E.2d 832, 833 (2011).

However, "involuntary dismissal of a claim is one of the harshest sanctions at a trial court's disposal, effectively extinguishing the party's cause of action and denying the party his or her day in court[.]" *Id.* at 553, 714 S.E.2d at 833 (citation and internal quotation marks omitted). Furthermore, "[a]n underlying purpose of the judicial system is to decide cases on their merits, not dismiss parties' causes of action for mere procedural violations." *Wilder v. Wilder*, 146 N.C. App. 574, 576, 553 S.E.2d 425, 427 (2001). Accordingly, "claims should be involuntarily dismissed only when lesser sanctions are not appropriate to remedy the procedural violation." *Id.*; *see also McKoy*, 214 N.C. App. at 553, 714 S.E.2d at 833 (noting that other sanctions available to the trial court might include "assessments of fines, costs, or damages against the plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings" (citation and internal quotation marks omitted)).

Before dismissing a claim for failure to prosecute pursuant to Rule 41(b), the trial court must make findings of fact and conclusions of law which demonstrate that the court considered less drastic sanctions than dismissal with prejudice. *McKoy*, 214 N.C. App. at 553, 714 S.E.2d at 833. The trial court is required to address the following factors: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428. "If the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion." *Id.* at 577, 553 S.E.2d at 427.

On appeal, defendant concedes that the trial court's dismissal order "is not sufficiently detailed for this Court to determine whether the trial court undertook the 3-pronged analysis required by *Wilder*." We agree. The order states, in pertinent part:

> **IT APPEARING TO THE COURT** that Plaintiff did appear for the hearing and failed to pursue her claim for Equitable Distribution. The Defendant was present through Counsel. and
>
> **IT APPEARING TO THE COURT,** that the matter having been continued two times previously at the request of the Plaintiff; and
>
> **IT APPEARING TO THE COURT** at the call of the calendar the Plaintiff had not provided a proposed pretrial order to Defendant and was unable to do so at

> calendar call; and
>
> **IT APPEARING TO THE COURT,** that Plaintiff was resistant, if not obstinate, to following or even listening to the direction of the Court regarding provision of the proposed order to Defendant's counsel.
>
> Based upon the foregoing, the Court **CONCLUDES AS A MATTER OF LAW** that Plaintiff's claim for Equitable Distribution should be dismissed pursuant to Rule 41[(b)] of the North Carolina Rules of Civil Procedure due to her failure to prosecute this claim.

Pursuant to *Wilder*, the trial court's findings are insufficient to support a Rule 41(b) involuntary dismissal for failure to prosecute. Although the trial court found that the hearing was continued twice at plaintiff's request, the court made no findings regarding whether she had "deliberately or unreasonably delayed the matter," or whether her actions prejudiced defendant. *Id.* at 578, 553 S.E.2d at 428. Most significantly, there is no indication that the trial court considered lesser sanctions but nevertheless determined "that sanctions short of dismissal would not suffice." *Id.* "Without findings and conclusions demonstrating that the trial court has undertaken this analysis, we are compelled to conclude that the trial court erred in dismissing defendant's claim." *McKoy*, 214 N.C. App. at 554, 714 S.E.2d at 834 (citations and internal quotation marks omitted).

As defendant concedes, this action must be remanded to the trial court for full consideration of the *Wilder* factors. *See id.* (vacating the order dismissing the defendant's equitable distribution claim and remanding to the trial court "for

consideration of whether lesser sanctions are appropriate"). On remand, "the trial judge must address the three factors previously enumerated before deciding whether to dismiss the plaintiff's claim with prejudice under Rule 41(b), for failure to prosecute." *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428. Accordingly, we vacate the order dismissing plaintiff's equitable distribution claim for failure to prosecute pursuant to Rule 41(b) and remand to the trial court for further proceedings.

VACATED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).