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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-858

Filed: 3 July 2018

Mecklenburg County, No. 01-CvD-22905

VIVIAN BAUCOM, Plaintiff,

v.

GEORGE VLAHOS, Defendant.

Appeal by Plaintiff from order entered 3 June 2015 and order entered 21 February 2017 by Judge Jena P. Culler in District Court, Mecklenburg County. Heard in the Court of Appeals 22 January 2018.

Plumides, Romano, Johnson & Cacheris, PC, by Richard B. Johnson, for Plaintiff-Appellant.

Myers Law Firm, PLLC, by Matthew R. Myers, for Defendant-Appellee.

McGEE, Chief Judge.

Vivian Baucom ("Plaintiff") appeals the trial court's denial of her claim for uninsured medical expenses from George Vlahos ("Defendant") for medical treatment of their minor children. While the parties' initial consent order for child support contained a provision for the division of uninsured medical expenses of the children, a subsequent order modifying the child support obligations contained no such

provision. The trial court found that the subsequent order modifying the child support obligations superseded all provisions of the initial child support order, including the provision relating to uninsured medical expenses. We disagree and reverse.

I. Factual and Procedural History

Plaintiff and Defendant were married on 23 September 1990 and separated on 17 October 2000. Plaintiff and Defendant had two children. They entered into a Consent Order for Temporary Child Support on 21 May 2002 ("2002 order"). Under the 2002 order, Defendant was required to pay $574.00 a month in child support. Defendant was also responsible for forty-six percent of any uninsured medical, dental, orthodontic or therapeutic expenses incurred on behalf of the children.

Defendant filed a motion and notice of hearing for modification of the 2002 order on 28 March 2005 ("motion to modify"). In his motion to modify, Defendant alleged his child support obligation should be decreased because he had lost his job. Defendant's motion to modify did not describe his change in circumstances other than to state: "NO JOB," and it did not specify the decrease beyond marking a box stating "Decreased," despite there being a section labeled "Other," where Defendant had the ability to specify further areas for modification. In the section of Defendant's motion to modify where Defendant was asked to state his current child support obligation, Defendant wrote only "$600.00."

After a hearing determined there had been a substantial and material change in circumstances, the trial court entered an Order Modifying Child Support on 5 July 2005 ("2005 order"). The 2005 order decreased Defendant's child support obligation to $312.00 a month. The 2005 order contained no provisions related to uninsured medical expenses or any clauses stating that the provisions of the 2002 order were superseded.

The parties maintained the child support amounts in the 2005 order until Plaintiff filed a motion and order for show cause for medical expenses on 29 April 2015 ("motion for medical expenses"). Plaintiff alleged in her motion for medical expenses that she had paid $25,864.11 for uninsured medical expenses for the minor children and that, under the 2005 order, Defendant was required to pay forty-six percent of that amount. Defendant filed a response to the motion for medical expenses that included a motion to dismiss for failure to state a claim.

After a hearing on Plaintiff's motion for medical expenses, the trial court entered an order on 3 June 2015 ("2015 order") denying Plaintiff's motion as the 2005 order "did not address uninsured medical expenses." In response, Plaintiff filed a Rule 59 motion for a new trial ("Rule 59 motion") on 15 June 2015. The trial court held a hearing on Plaintiff's Rule 59 motion on 17 October 2016 and entered an order denying Plaintiff's motion on 21 February 2017 ("2017 order"), after finding that the 2005 order modified the 2002 order and "did not keep any of the prior order provisions

in effect." The trial court's order stated that "if there was no authority to modify the uninsured medical expenses portion of the [2002] order, then an appeal or Rule 59 motion should have been raised at the time. The 2005 [o]rder on its face is an Order Modifying the prior child support order." Plaintiff filed her notice of appeal of both the 2015 order and the 2017 order on 21 March 2017.

II. Analysis

Plaintiff argues (1) the trial court erred in determining that the uninsured medical expenses provision of the 2002 order was superseded and extinguished by the 2005 order, and (2) the trial court abused its discretion by failing to make any findings of fact in its 2015 order.

A. *Defendant's Motion to Dismiss*

Before addressing the merits of Plaintiff's appeal, we must determine whether this appeal is properly before us. Defendant moved to dismiss Plaintiff's appeal under N.C. R. App. P. 37 on the grounds that "the appeal is untimely and should be dismissed, and that the motion which was denied was not a proper motion and therefore no relief could have been granted by the trial court." We disagree.

The trial court entered the 2015 order on 3 June 2015 and Plaintiff filed her Rule 59 motion on 15 June 2015. The trial court ruled on Plaintiff's motion in its 21 February 2017 order, but Plaintiff was not served with a copy of that order until 27 February 2017. Plaintiff filed her notice of appeal from the 2015 order and the 2017

order on 21 March 2017. Defendant argues that (1) Rule 59 applies only to post-trial motions; therefore, "the Rule 59 Motion filed by [Plaintiff] was not a proper motion to have been filed after the hearing on the [2015 order]," and (2) under N.C. R. App. P. 3(c), "[s]ince Rule 59 does not apply, the time for filing a Notice of Appeal was not extended beyond 30 days after the entry of the [2015 order]."

N.C. R. App. P. 3(c) states:

> In civil actions and special proceedings, a party must file and serve a notice of appeal:
>
> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that
>
> (3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

In his motion to dismiss, Defendant cites *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, ___ N.C. App. ___, ___, 794 S.E.2d 535, 536 (2016) to show that "Rule 59 of the Rules of Civil Procedure, which governs motions to alter or amend a judgment, only applies to post-trial motions, and that holding is confirmed by the

plain text of Rule 59." In *Tetra Tech*, this Court held that a Rule 59 motion was not a proper motion to modify a preliminary injunction and, therefore, did not toll the period for appeal. *Id.* at ___, 794 S.E.2d at 538-540 ("Rule 59 only applies to 'post-trial motions' and cannot be used to alter an interlocutory order made before a trial on the merits.").

In the present case, Plaintiff's Rule 59 motion was in response to a final order. "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 622 (2006) (citing *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). After the entry of the 2015 order on 3 June 2015, there was "nothing to be judicially determined." Therefore Plaintiff's Rule 59 motion, filed on 15 June 2015, was proper and the thirty-day period for filing notice of appeal was tolled until thirty days after the service of the order denying Plaintiff's Rule 59 motion, that was entered on 21 February 2017 and served on Plaintiff on 27 February 2017. N.C. R. App. P. 3(c)(3). Plaintiff filed her notice of appeal on 21 March 2017; therefore, Plaintiff's appeal is timely. Even assuming, *arguendo*, that the time for appeal was not tolled by Plaintiff's Rule 59 motion, we exercise our discretion under N.C. R. App. P. 21 to consider the record and briefs as a petition for writ of certiorari and grant certiorari to review the merits. *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997).

B. *Uninsured Medical Expenses Provision*

Plaintiff first argues that the trial court erred in determining that the uninsured medical expenses provision in the 2002 order was extinguished in the 2005 order, where both the 2005 order and Defendant's motion to modify were silent as to that provision. "Our review of a child support order is limited to determining whether the trial court abused its discretion." *Brind'Amour v. Brind'Amour*, 196 N.C. App. 322, 327, 674 S.E.2d 448, 452 (2009). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 778, 324 S.E.2d 829, 833 (1985).

An order for child support "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of [N.C.]G.S. 50-13.10." N.C. Gen. Stat. § 50-13.7(a) (2005). *See Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 579-80 (1995) ("A court is without authority to *sua sponte* modify an existing support order."). The scope of the trial court's modifications is limited to the specific issues raised in the motion in the cause. *See Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999). In *Moore v. Moore*, 237 N.C. App. 455, 768 S.E.2d 4 (2014), this Court found that the trial court exceeded its authority in modifying the provision of a child support order related to uninsured medical expenses, holding:

> [D]espite the fact that [d]efendant sought reimbursement for out-of-pocket medical expenses not paid for by [p]laintiff, [d]efendant never sought in his motion to modify the percentages paid with respect to this issue. Because neither party requested a modification of the existing uninsured medical expense obligation, the trial court was without authority to act as it did in making a modification to the previously agreed upon provision on its own motion. Therefore, we reverse this portion of the trial court's order and remand this case for reinstatement of the previous provisions regarding uninsured medical expenses.

Moore, 237 N.C. App. at 460, 768 S.E.2d at 7–8.

Our Supreme Court addressed the ability of a trial court to modify provisions of a child support agreement *sua sponte* in *Catawba County v. Loggins*, ___ N.C. ___, 804 S.E.2d 474 (2017). The majority in *Catawba County v. Loggins* held that a trial court maintains continuing jurisdiction to modify an initial child support order and that the parties' failure to file a motion does not divest the trial court of that jurisdiction. *Id.* at ___, 804 S.E. at 476. The Court continued that the provision of N.C.G.S. § 50-13.7(a) "requiring a motion to be filed for a child support order to be modified is directory, not mandatory, in nature. The provision concerns a matter of form, rather than a matter of substance as defendant contends, and merely addresses the procedural aspects of modifying a child support order." *Id.* at ___, 804 S.E.2d at 483. In a concurring opinion, Chief Justice Martin cautioned that:

> [T]he majority seems to allow a district court to modify a child support order—and thus to alter the legal rights and duties of the parties involved—sua sponte, without any party invoking the court's power. This rule, if the majority

> is indeed establishing it, ignores the plain language of the very statutory provision that gives district courts the power to modify these kinds of orders. It also potentially subverts the customary role that courts play in our adversarial system: to rule on the issues actually raised and argued by the parties. This seems imprudent at best, and may raise serious jurisdictional concerns as well. I therefore write separately to express my opinion that the majority's reasoning should be read narrowly. . . . . [I]f the majority ruling is read to permit even sua sponte modifications, it would disturb several decades of Court of Appeals precedent that domestic relations parties and social services agencies throughout North Carolina have presumably come to rely on.

Id. at ___, 804 S.E.2d at 484-85 (Martin, C.J. joined by Ervin, J., concurring in result only).

The concurring opinion in *Catawba County v. Loggins* pointed out that the majority opinion focused on whether the trial court maintained continuing jurisdiction, rather than whether the trial court had the power to modify a child support order *sua sponte*. *Id.* at ___, 804 S.E.2d at 485.

> [A] court's authority to act pursuant to a statute, although related, is different from its subject matter jurisdiction. Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . . This power of a court to hear and determine (subject matter jurisdiction) is not to be confused with the way in which that power may be exercised in order to comply with the terms of a statute (authority to act).

Haker-Volkening v. Haker, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001) (internal citation omitted).

This Court recently addressed reconciling our Supreme Court's decision in *Catawba County v. Loggins* with this Court's established precedent, first in an unpublished opinion, *Mills v. Davis*, ___ N.C. App. ___, 808 S.E.2d 519, 2018 N.C. App. LEXIS 1047 (2017) (unpublished), and subsequently in *Summerville v. Summerville*, ___ N.C. App. ___, ___ S.E.2d ___, (17 April 2018) (No. COA17-690). In *Mills*, a mother filed a motion to show cause and modify a previous custody order, asserting the father had waived his right to child custody by failing to participate in the child's life. *Mills*, at *3. The trial court entered a custody order, that also modified a child support order from a separate action that allowed the father to claim the child as a dependent and divided the uninsured medical expenses between the parties. *Id.* at *5. Neither party had moved to modify the child support order. On appeal, this Court held that:

> While we recognize, following *Catawba County* [*v. Loggins*] that the trial court had jurisdiction to modify the Custody Order, we hold that it did not have the power and authority to *sua sponte* modify a child support order entered in a separate civil action. Because the majority in *Catawba County* [*v. Loggins*] did not dispose of the necessity that a party satisfy the requirements of N.C. Gen. Stat. § 50-13.7(a), and in light of the concurring justices' cautioned approach, we will not extend the Supreme Court's decision to give the trial court unfettered authority to modify custody orders *sua sponte*. To hold otherwise would disturb several decades of precedent on which domestic relations parties and social service agencies throughout North Carolina have presumably come to rely.

Mills, at *6 (internal citations omitted).

This Court further addressed the effect of *Catawba County v. Loggins* in *Summerville v. Summerville*, ___ N.C. App. ___, ___ S.E.2d ___, (17 April 2018) (No. COA17-690), holding:

> Unpublished opinions of this Court lack precedential authority. *See* N.C. R. App. P. 30(e)(3) (providing that "an unpublished decision . . . does not constitute controlling legal authority"). Nevertheless, we believe *Mills* was correctly decided and reach a similar conclusion here.
> . . . .
> Had the Supreme Court in [*Catawba County v.] Loggins* intended to express its disapproval of this Court's longstanding prohibition of the *sua sponte* modification of child support obligations, we believe it would have said so overtly. Therefore, we read [*Catawba County v.] Loggins* as continuing to require *some* action by the parties in order to satisfy the underlying purpose of N.C. Gen. Stat. § 50-13.7(a).

Summerville, ___ N.C. App.at ___, ___ S.E.2d at ___. Like *Summerville*, we read *Catawba County v. Loggins* narrowly – addressing only the jurisdiction of trial courts – as encouraged by the concurring opinion.

Defendant argues that the facts in the present case are distinguishable from those in *Moore*. We disagree. Defendant contends the request in the present case "was for the modification of the child support order, and not just to 'recalculate child support'" as was the motion in *Moore*. In the present case, Defendant's 2005 motion to modify simply requested that the order for child support be "Decreased." This request was not broad enough to include a reduction in his obligation to pay uninsured medical expenses. Defendant is correct that "[t]he [o]rder did not conclude

that it was modifying only a portion or part of a prior order[;]" however, the 2005 order also did not state that it was superseding or replacing the 2002 order.

Defendant cites *Ticconi v. Ticconi*, 161 N.C. App. 730, 733, 589 S.E.2d 371, 373 (2003) in support of his argument that "where a party requests a recalculation of child support, that request directs the court to apply the entirety of the North Carolina Child Support Guidelines, including not only the worksheets but also the commentary." We find *Ticconi* to be distinguishable from the present case. In *Ticconi*, this Court held that the initial agreement was a separation agreement that was not incorporated into an order and the parties voluntarily "submitted the issue of child support to the trial court to be determined in accordance with the Guidelines." *Id.* at 732, 589 S.E.2d at 372-73. This Court concluded that

> where the parties waive the enforcement of their separation agreement by asking the court to determine child support in accordance with North Carolina law, the court shall apply the Guidelines in their entirety. . . . We reverse the order of the trial court and remand for application of the Guidelines in their entirety *in accordance with the requests of the parties*.

Id. at 733-34, 589 S.E.2d at 373 (emphasis added).

In the present case, the parties did not ask the trial court to apply the entirety of the Guidelines. Instead, Defendant's motion to modify was limited to a reduction of his monthly child support obligation. The trial court's 2005 order did not address the uninsured medical expenses provision, nor would it have had the power to do so

without a request from Defendant under N.C.G.S. § 50-13.7(a). *See Moore*, 237 N.C. App. at 459-60, 768 S.E.2d at 7-8. For this reason, the trial court abused its discretion by concluding that the 2005 order extinguished the uninsured medical expenses provision of the 2002 order. We therefore reverse the trial court's 2015 order and remand for the entry of an order consistent with this opinion. Accordingly, it is not necessary to address Plaintiff's remaining argument.

REVERSED AND REMANDED.

Judge TYSON concurs.

Judge DAVIS concurs in result only.

Report per Rule 30(e).