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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-616

Filed: 4 December 2018

Moore County, No. 14 CVD 1022

ANTON ZACHARY ZAK, Plaintiff,

v.

SHANNON DENISE SWEATT, Defendant.

Appeal by defendant from orders entered 2 March 2018 and 15 March 2018 by Judge Stephen A. Bibey in Moore County District Court. Heard in the Court of Appeals 15 November 2018.

Foyles Law Firm, PLLC, by Jody Stuart Foyles, for plaintiff-appellee.

Van Camp & Van O'Linda, PLLC, by William M. Van O'Linda, Jr. and James R. Van Camp, for defendant-appellant.

TYSON, Judge.

Shannon Denise Sweatt ("Defendant") appeals from orders of the trial court sealing certain documents and denying her motions to recuse the trial judge. We dismiss Defendant's interlocutory appeal without prejudice.

I. Background

Defendant and Anton Zachary Zak ("Plaintiff") have never been married to each other, but engaged in a relationship that produced a child. The child is a daughter referred to in this opinion as "M.S." M.S. was born 5 April 2013.

On 21 August 2014, Plaintiff filed a complaint for custody of M.S. Defendant filed an answer and counterclaim for child custody on 10 September 2014. By 29 November 2014, the parties had reached an agreement on custody and the trial court entered a consent order resolving the parties' claims for child custody. The consent order granted the parties joint legal custody of M.S., with Defendant having primary custody and Plaintiff having secondary custody with specific visitation privileges.

On 28 March 2016, Plaintiff filed a motion to modify child custody and alleged a substantial change in circumstances affected the welfare of M.S. Plaintiff later filed a motion for leave to amend his motion to modify custody, which the trial court granted.

On 6 February 2018, the trial court entered an order modifying custody ("the Modification Order") following a two-day hearing on Plaintiff's motion to modify custody held on 30 November 2017 and 24 January 2018. The Modification Order modified custody by granting the parties joint legal and physical custody of M.S., with Plaintiff having primary physical custody and Defendant having secondary physical custody. The Modification Order also granted Defendant a specific visitation schedule with M.S. Defendant has not appealed the Modification Order.

On 14 February 2018, Defendant filed a motion for a new trial pursuant to North Carolina Rules of Civil Procedure 59(a)(7)(9) and (e) and, in the alternative, a motion to amend the Modification Order pursuant to North Carolina Rule of Civil Procedure 52(b). On 14 February, Defendant also filed a motion to stay enforcement of the Modification Order pending resolution of her Rule 52 and Rule 59 motions.

On 15 February 2018, Defendant filed a motion in the cause ("the First Motion in the Cause") for Judge Stephen A. Bibey to recuse himself from the case. The First Motion in the Cause alleged, in part:

> 6. That since the entry of the [Modification Order], counsel for the Defendant determined that Tom Van Camp, a partner in the law firm of Van Camp, Meacham & Newman, PLLC [the firm representing Defendant] is representing Tabitha Speers in a civil dispute regarding her business partner Jaime P. McGill, who is the presiding Judge's . . . niece, since December 2017. Tabitha Speers and Jaime McGill are co-owners of a hair salon . . . where, due to various differences of opinion, they have each sought legal advice, Tabitha Speers from Tom Van Camp and Jaime McGill from her uncle, Judge Bibey. That Tom Van Camp has corresponded with Jamie [*sic*] McGill concerning the business dispute. That Judge Bibey is aware of the dispute having discussed the matter with his niece.

On 26 February 2018, Defendant filed a motion requesting the trial court to refer the motion to recuse Judge Bibey to another judge. On 2 March 2018, Defendant filed an additional motion in the cause ("the Second Motion in the Cause") which contains the same language as the First Motion in the Cause, but to which two exhibits were attached. The first exhibit is a print-out of two emails from Tabitha

Speers to Jaime McGill regarding their business dispute. The second exhibit appears to be a screenshot from Facebook purporting to show Judge Bibey's daughter, sister, nephew and niece listed as Facebook "friends" of Plaintiff's wife, Laurie Zak.

On 2 March 2018, Judge Bibey entered orders denying: (1) Defendant's motion to stay; (2) Defendant's motion for Judge Bibey to recuse himself; and, (3) Defendant's motion to refer the motion to recuse to another judge.

On 5 March 2018, Defendant filed an amended and corrected verified motion in the cause ("the Third Motion in the Cause") requesting Judge Bibey be recused, with the recusal motion to be referred and ruled on by another judge. On 15 March 2018, Judge Bibey entered two orders, one order denied the Second Motion in the Cause, and the other order denied the Third Motion in the Cause. Both orders decreed, in relevant part:

> [P]ending any further review of this Judge's ruling in this Order, all related Motions, Attachments, Subpoenas and Orders concerning the issue of Recusal or Disqualifications are to be placed under seal within the file 14CVD1022, and not to be opened or disclosed as part of the public record in the Cause, without further Orders of this Court.

On 22 March 2018, Defendant filed notice of appeal of the order entered on 2 March, which had denied the First Motion in the Cause filed on 15 February. Defendant's notice of appeal also appealed the two orders entered by Judge Bibey on 15 March which had denied the Second and Third Motions in the Cause.

Included within the record on appeal is a status order entered by Judge Bibey,

which calendared a hearing on Defendant's Rule 59 motion for a new trial. Also calendared for hearing by the status order were motions filed by Plaintiff for attorney's fees and to dismiss Defendant's Third Motion in the Cause for failure to state a claim for which relief can be granted. The status order calendared the three motions for hearing on 20 through 21 September 2018. The status order states, in relevant part:

> • At the call of the calendar counsel for defendant informed the court that he had filed an appeal of the previous order summarily entered by this Court concerning Motion for Recusal and Motion to Remove Judge from hearing recusal motion, and that the attorney believed the court has been divested of jurisdiction pending the appeal.
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> • Opposing counsel argued pending appeal was an Interlocutory Order and therefore does not divest this court from hearing rule 59 and other pending motions.
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> • This court agreed that jurisdiction had not been divested due the appeal of the Interlocutory Order of this Court, and therefore scheduled the hearing on the merits of the Rule 59 and other pending motions and/or the Court of Appeals determination, and the attorney for defendant entered on the record an objection to the court scheduling hearing on the merits of the pending motions.

On 25 June 2018, Plaintiff filed a motion to dismiss Defendant's appeal with this Court, which was referred to this panel for review by order entered 17 July 2018. On 7 November 2018, the trial court entered an order denying Defendant's Rule 52, 59, and 60 motion for a new trial or to amend the order. A copy of this order was requested by this Court and was supplied by the Clerk of Superior Court of Moore

County.

II. Jurisdiction

Based upon Plaintiff's referred motion to dismiss, we first address whether Defendant's appeal is properly before this Court. Defendant concedes her appeal is interlocutory. The trial court did not certify the appealed orders for immediate appellate review pursuant to North Carolina Rule of Civil Procedure 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b) (2017). Defendant contends her appeal affects a substantial right and asserts a statutory right to appeal the trial court's orders to the extent documents were sealed pursuant to N.C. Gen. Stat. § 1-72.1(e) (2017).

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 188 (2011) (citations omitted). "Appeals from interlocutory orders are only available in exceptional circumstances." *Id.* (citation and internal quotation marks omitted).

"The rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts." *Turner v. Norfolk S. Corp.*,

137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (citing *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978)).

We first address Defendant's argument that she can immediately appeal the trial court's orders on the Second and Third Motions in the Cause because the orders sealed documents within the public record. Defendant asserts N.C. Gen. Stat. § 1-72.1 affords her a right to an immediate appeal. N.C. Gen. Stat. § 1-72.1 provides, in relevant part:

> (a) Any person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding may file a motion in the proceeding for the limited purpose of determining the person's right of access . . . .
>
> . . .
>
> (e) A ruling on a motion made pursuant to this section may be the subject of an immediate interlocutory appeal by the movant or any party to the proceeding.

N.C. Gen. Stat. § 1-72.1.

The trial court has not issued a ruling on a motion made pursuant to N.C. Gen. Stat. § 1-72.1 because Defendant has not filed a motion asserting a right of access to any sealed records. The trial court acted without the prompting of either party in ordering "all related Motions, Attachments, Subpoenas and Orders concerning the issue of Recusal or Disqualifications" placed under seal. Defendant did not file any subsequent motion seeking access to those documents pursuant to N.C. Gen. Stat. § 1-72.1, nor does the record show she has been denied access to the sealed documents.

The situation contemplated under N.C. Gen. Stat. § 1-72.1(e) for granting an immediate appeal has not occurred here. *See id*. Defendant's argument is dismissed.

Defendant also argues this Court should hear her appeal because the trial court's orders denying her motions to recuse affect a substantial right. "[N]o appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983).

"No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) (citations and quotation marks omitted). "Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from." *Id.* at 642, 321 S.E.2d at 250.

This Court has previously recognized that "[a] ruling on a motion to recuse a trial judge is an interlocutory order and is not immediately appealable." *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 699, 702, 300 S.E.2d 241, 243, *disc. review denied,* 308 N.C. 387, 302 S.E.2d 250 (1983). Defendant contends her "rights in this matter and the underlying matter would be prejudiced without an immediate appeal as the Rule 59 and 60 motions are pending. Otherwise, the Appellant may have these

important motions determined by a biased or partial judge without immediate appeal."

The parties filed their appellate briefs in this matter several months before Judge Bibey subsequently ruled upon Defendant's motion for a new trial on 7 November 2018. Defendant's argument for why the interlocutory orders denying her motions in the cause merit immediate review is now effectively moot. The record does not indicate there are any other motions pending before Judge Bibey. Defendant is unable to show how the appealed orders would deny her a substantial right absent immediate review.

Defendant also requests this Court exercise our discretion and treat her notice of appeal and appellant brief as a petition for a writ of certiorari and review her appeal on the merits. *See* N.C. R. App. P. 21(a)(1) ("The writ of certiorari may be issued . . . when no right of appeal from an interlocutory order exists . . . ."). Defendant cites this Court's opinion in *Lowder v. All Star Mills* as a basis for treating her appeal as a petition for writ of certiorari.

In *Lowder,* this Court stated:

> A ruling on a motion to recuse a trial judge is an interlocutory order and is not immediately appealable. *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979). However, since an accusation about a judge's partiality goes to the fundamental issue of maintaining confidence in our court system, we have elected to treat the case as though a petition for certiorari had been allowed and to proceed to the merits, as should the parties

henceforth with the case.

Lowder, 60 N.C. App. at 702, 300 S.E.2d at 243. The facts and procedural background in *Lowder* are easily distinguishable from Defendant's appeal. In *Lowder*, the defendants filed a motion to have the trial judge recused from their case *before trial*. *Id.* at 700, 300 S.E.2d at 242. Here, the trial court had already issued its Modification Order before Defendant filed her Motions in the Cause seeking Judge Bibey's recusal. Defendant's filing of her Rule 59 motion tolled the time to appeal the Modification Order until the time the trial court entered its order ruling upon the motion. N.C. R. App. P. 3(c)(3) ("if a timely motion is made by any party for relief under Rule[] . . . 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 . . .").

If this Court grants Plaintiff's motion to dismiss and dismisses Defendant's appeal, Defendant may appeal the Modification Order, the orders denying her Motions in the Cause, and the recent order denying her Rule 59 motion. N.C. Gen. Stat. § 7A-27(b) (2017); *see Stephens v. Stephens*, 213 N.C. App. 495, 498, 715 S.E.2d 168, 171 (2011).

In light of our strong policy of avoiding fragmentary appeals, we decline to treat Defendant's notice of appeal and brief as a petition for writ of certiorari to grant review. *See Turner*, 137 N.C. App. at 141, 526 S.E.2d at 669 ("The rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary

appeals . . .”). Defendant’s appeal is dismissed.

III. Conclusion

Defendant has failed to show the interlocutory orders of the trial court affect a substantial right to warrant immediate appellate review. *See McClure*, 308 N.C. at 400, 302 S.E.2d at 759. Defendant is not entitled to an immediate appeal under N.C. Gen. Stat. § 1-72.1(e).

To avoid fragmentary appeals, we decline to treat Defendant’s notice of appeal and appellate brief as a petition for writ of certiorari. Plaintiff’s motion to dismiss is allowed. Defendant’s appeal is dismissed without prejudice. *It is so ordered*.

DISMISSED.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).