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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-563

No. COA21-655

Filed 16 August 2022

Vance County, No. 21 CVD 485

DAMAR EMMANUEL ALSTON, Plaintiff,

v.

DANETTE LAVON COOKE, Defendant.

Appeal by Defendant from order entered 20 August 2021 by Judge Amanda E. Stevenson in Vance County District Court. Heard in the Court of Appeals 5 April 2022.

No brief filed for Plaintiff-Appellee.

Tickle Law Office, PLLC, by Lawrence Edward Tickle, Jr., for Defendant-Appellant.

GRIFFIN, Judge.

¶ 1 Defendant Danette Lavon Cooke appeals from an interlocutory order denying her motions to dismiss her custody case or, alternatively, to change venue. Defendant argues that the trial court erred by denying her motion to change venue; erred by not dismissing the action pursuant to N.C. R. Civ. P. 12(b)(3); and lacked jurisdiction because the matter was barred by res judicata. We affirm the trial court's order

denying Defendant's motion to change venue. We dismiss the remainder of Defendant's appeal as interlocutory.

I. Factual and Procedural History

¶ 2 Defendant and Plaintiff are the biological parents of three children: Dana,[1] born in 2014, Diana,[2] born in 2016, and Braxton,[3] born in 2017. The parties already have a custody order in place for Dana in Franklin County from 2014; she is not a subject to this action.

¶ 3 Plaintiff filed a complaint for custody of the two younger children, Diana and Braxton, in Vance County in May 2021. There were no previous custody orders in place for the two younger children when Plaintiff filed the complaint. Defendant answered the complaint with a motion to dismiss, citing the prior pending action doctrine pursuant to this Court's ruling in *Snyder v. Snyder*, 18 N.C. App. 658, 197 S.E.2d 802 (1973), or, in the alternative, a motion to change venue to Franklin County and consolidate the matters into one custody case. The trial court denied both motions. Defendant appeals.

II. Analysis

¶ 4 Defendant argues the trial court erred in denying her motions to dismiss, or

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[1] We use a pseudonym for ease of reading and to protect the anonymity of minors. N.C. R. App. P. 42(b).

[2] A pseudonym. *See* N.C. R. App. P. 42(b).

[3] A pseudonym. *See* N.C. R. App. P. 42(b).

alternatively, to change venue. Defendant further argues the trial court erred by not dismissing the action pursuant to N.C. R. Civ. P. 12(b)(3), and that the matter is barred by res judicata.

¶ 5 Ordinarily, this Court does not review interlocutory orders. *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014). "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). However, any interlocutory order or judgment of a trial court in a civil action that affects a substantial right is directly appealable to this Court. *See Campbell*, 237 N.C. App. at 3, 764 S.E.2d at 632 (quoting *Robinson v. Gardner*, 167 N.C. App. 763, 767, 606 S.E.2d 449, 452 (2005)); *see also* N.C. Gen. Stat. § 7A-27 (b)(3)(a) (2021). A statutory right to venue is a substantial right. *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d. 468, 471 (1980) (citation omitted).

¶ 6 N.C. Gen. Stat. § 1-83(1) addresses change of venue and states a court may change the place of trial "[w]hen the county designated for that purpose is not the proper one." N.C. Gen. Stat. § 1-83(1) (2021). The words "may change" in N.C. Gen. Stat. § 1-83(1) have been interpreted to mean "must change." *Miller v. Miller,* 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) (citation omitted). "[T]he trial court has no discretion in ordering a change of venue if demand is properly made and it appears

that the action has been brought in the wrong county." *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975) (citations omitted).

¶ 7 Here, Defendant properly demanded a change of venue under N.C. Gen. Stat. § 1-83(1) by arguing in her motion to change venue that the action was brought in the wrong county. N.C. Gen. Stat. § 1-83(1) establishes a statutory right to venue which is not subject to trial court discretion where venue is improper. Therefore, the order denying Defendant's motion to change venue affects a substantial right and is properly before this Court.

A. Motion to Change Venue

¶ 8 Defendant argues the trial "court erred in denying [D]efendant's motion to change venue" because "the prior pending action doctrine required the transfer of venue." Defendant argues "[t]he Prior Pending Action Doctrine applies to all the children of the same Parties and not just each child." Because a previous custody order in Franklin County exists for the parties' oldest child, Defendant reasons that the prior pending action doctrine requires that the instant action be transferred to Franklin County.

¶ 9 "A determination of venue under N.C. Gen. Stat § 1-83(1) is . . . a question of law that we review *de novo*." *See Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012); *see also State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878

(2011) ("Conclusions of law are reviewed de novo and are subject to full review." (citations omitted)).

¶ 10 "'[W]here a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action.'" *Johns v. Welker*, 228 N.C. App. 177, 179, 744 S.E.2d 486, 489 (2013) (citation omitted). The "prior pending action doctrine" applies where the two actions "'present a substantial identity as to parties, subject matter, issues involved, and relief demanded.'" *Id.*

¶ 11 Defendant cites *Snyder v. Snyder*, 18 N.C. App. 658, 197 S.E.2d 802 (1973), to support her argument that the prior pending action doctrine requires a transfer of venue. In *Snyder*, this Court stated, "where custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court." *Id.* at 659, 197 S.E.2d at 804 (quoting *In re Holt*, 1 N.C. App. 108, 112, 160 S.E.2d. 90, 93 (1968)). "Of course, if the custody and support has been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support remains in fieri until the children have become emancipated." *Id.* at 659–60, 197 S.E.2d at 804. The facts in *Snyder*, however, are distinguishable from the facts of this case.

¶ 12 In *Snyder*, the mother and father were divorced in Mecklenburg County and had four children. *Id.* at 658, 197 S.E.2d at 802. In the divorce action, the father was awarded custody of the oldest child and the mother was awarded custody of the three younger children. *Id.* The father was also ordered to pay the mother child support pursuant to a separation agreement. *Id.* Later, the father was awarded custody of the three younger children. *Id.* Each order was made in Mecklenburg County. *Id.* After the father was awarded custody of the three minor children, the mother instituted an action in Wake County to seek custody of the three younger children. *Id.*

¶ 13 On appeal, the mother argued that Wake County lacked jurisdiction to enter orders relating to the custody of the three children because Mecklenburg County originally entered the order relating to their custody. *Id.* at 659, 197 S.E.2d at 803. This Court held that Mecklenburg County was the proper venue for the case because the trial court made the original order of support. *Id.* at 660, 197 S.E.2d at 804.

¶ 14 Unlike in *Snyder*, the custody of the minor children in this case has not been brought to issue or determined anywhere else. In fact, when the custody order in Franklin County was made regarding the parties' oldest child, the two children at issue in the current case were not born yet. The two parties were not divorced in Franklin County, nor were they acting pursuant to a separation or custody order from Franklin County.

¶ 15 The prior pending action doctrine, as shown in *Snyder,* applies where the two actions "'present a substantial identity as to parties, subject matter, issues involved, and relief demanded.'" *Johns,* 228 N.C. App. at 179, 744 S.E.2d at 489. The prior pending action doctrine is not applicable to this case because there is not a substantial identity as to parties, subject matter, issues involved, or relief demanded. No case law indicates that a prior custody order for one minor child affects future custody orders for their unborn siblings. Each child should be treated individually, thus the identity of the subject matter from the Franklin County case is not identical to the present case in Vance County. *See id.*; *Snyder*, 18 N.C. App. at 659–60, 197 S.E.2d at 804. Furthermore, the relief being sought is not identical to the previous custody order of the oldest child, who is not a party to this case.

¶ 16 Because children are looked at individually and there are no existing custody orders for the two children at issue, the prior pending action doctrine does not apply.

B. Rule 12(b)(3) Motion to Dismiss and Res Judicata

¶ 17 We decline to review Defendant's remaining arguments for lack of interlocutory jurisdiction. Interlocutory orders are generally not appealable. *Campbell,* 237 N.C. App. at 3, 764 S.E.2d at 632. Although there are exceptions to this rule, "the burden is on the appellant to present appropriate grounds for this Court's acceptance of an interlocutory appeal." *Stevenson v. Joyner*, 148 N.C. App. 261, 262–63, 558 S.E.2d 215, 217 (2002) (citation and quotation marks omitted).

Because Defendant has not proposed a basis for jurisdiction regarding her other arguments, we dismiss the remainder of her appeal as interlocutory.

III. Conclusion

¶ 18 Because there are no previous custody orders for either child in dispute, the prior pending action doctrine does not apply, and change of venue is not proper based on the merits. We therefore affirm the trial court's order.

AFFIRMED.

Judges MURPHY and GORE concur.

Report per Rule 30(e).