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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-724

No. COA22-211

Filed 1 November 2022

New Hanover County, No. 16 CVD 4038

CYNTHIA MONROE KOONCE, Plaintiff,

v.

SIMON ALEXANDER BELLAMY KOONCE, Defendant.

Appeal by Plaintiff from orders entered 31 August 2020 by Judge Jeffrey E. Noecker in New Hanover County District Court. Heard in the Court of Appeals 5 October 2022.

Shipman & Wright, L.L.P., by Gary K. Shipman, for Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

GRIFFIN, Judge.

¶ 1 Plaintiff Cynthia Monroe Koonce appeals from the trial court's orders modifying child support and post separation support, and denying to grant Plaintiff alimony or to hold Defendant Simon Alexander Bellamy Koonce in contempt. Plaintiff argues the trial court erred (1) by considering Defendant's deficient motions seeking modification; (2) by finding and concluding that a substantial and material change in circumstances was present; and (3) by denying Plaintiff alimony. We find

no error.

I. Factual and Procedural Background

¶ 2 Plaintiff and Defendant were married on 18 April 1998 and had one child. Plaintiff and Defendant separated on 14 January 2016 and divorced on 6 March 2020.

¶ 3 On 15 November 2016, Plaintiff filed a complaint in New Hanover County District Court seeking child custody, child support, post separation support, alimony, and attorney's fees. On 25 and 26 April 2018, the trial court heard the issues of child support, post separation support, attorney's fees, expert witness fees and moving expenses. Evidence at the hearing established that Defendant was a realtor whose income came primarily from regular distributions from the sale of a family-owned development, as well as routine access to funds in a trust created by his mother. At the hearing Defendant testified that his mother's money was being depleted, but the court did not find that testimony to be credible. In determining Defendant's income, the court found that the best way to do so was to look at Defendant's spending during his marriage to Plaintiff and since the date of their separation. The court determined Defendant's income to be approximately $47,285 per month.

¶ 4 On 24 May 2018, the trial court entered an order requiring Defendant to pay monthly child support and post separation support, as well as additional one-time payments for court fees, moving expenses, and the divorce financial analyst's fees. Additionally, if Defendant did not maintain health, dental, and vision insurance

policies for the child, Defendant would be required to pay an increased amount of post separation support per month.

¶ 5 On 29 May 2018, Plaintiff filed a contempt motion, alleging that, since the entry of the 24 May 2018 order, Defendant had failed to pay post separation support and child support. Following a 20 July 2018 hearing on the matter, the trial court found that Defendant's total arrears amounted to approximately $36,431, Defendant had the means to comply with the 24 May 2018 order, Defendant was in contempt for his failure to comply, and Defendant had to pay his total arrears to purge his contempt.

¶ 6 On 4 June 2018, Defendant filed a motion for a new trial pursuant to Rule 59. Defendant argued that the distributions he had received from his mother's trust would not continue due to her current needs and financial situation, and, therefore, the court should not have considered them in determining Defendant's income. On 9 August 2018, the trial court entered an order denying Defendant's motion for a new trial.

¶ 7 On 26 September 2018, Plaintiff filed another motion for order to show cause as to contempt, alleging that Defendant was again behind on his obligations. Following a hearing, the trial court did not hold Defendant in contempt because, though he owed approximately $17,824 in arrears at the time of hearing, Defendant paid off those arrears by borrowing money and wiring it to Plaintiff's attorney's trust

account.

¶ 8 Between December 2018 and January 2019, the parties filed multiple motions for modification of child support, post separation support, and contempt. On 18 January 2019, Defendant filed a motion to modify child support arguing that since the original 24 May 2018 order, Defendant's mother has "suffered additional medical issues" and that he "no longer has access to funds to support his previous level of spending." The basis of Defendant's motion asserted that this constituted a "substantial and material change in circumstances" warranting modification. On 29 March 2019, Defendant filed a motion to modify post separation support, presenting the same reasoning. On 2 October 2019, Plaintiff responded with another motion to hold Defendant in civil and criminal contempt for failure to pay child support and post separation support.

¶ 9 The trial court held multiple hearings on these motions between March 2019 and March 2020. On 31 August 2020, the trial court entered the following orders: an order denying Plaintiff alimony, an order modifying both child support and post separation support, and an order denying Plaintiff's motions for contempt.

¶ 10 The trial court granted Defendant's motions to modify child support and post separation support upon a finding that Defendant had experienced a "substantial and material change in circumstances" based upon his mother's depleted trust funds, Plaintiff having obtained employment, and an improper inflation of Defendant's

income at the initial post separation and child support hearing, among other reasons. Plaintiff's request for alimony was denied upon a finding that Plaintiff was not a dependent spouse and Defendant was not a supporting spouse pursuant to N.C. Gen. Stat. § 50-16.A(2) and (5). The trial court denied Plaintiff's motion to hold Defendant in civil and criminal contempt upon finding that Defendant was unable to comply with the original support obligations.

¶ 11 Plaintiff filed a motion pursuant to Rules 52 and 59 of the North Carolina Rules of Civil Procedure on 9 September 2020, and then filed a supplemental motion on 23 April 2021 to amend or modify the trial court's three 31 August 2020 orders or, in the alternative, to grant Plaintiff a new trial. On 3 August 2021, the trial court entered an order denying these motions. Plaintiff timely appeals from the three 31 August 2020 orders.

II. Analysis

¶ 12 Plaintiff challenges the trial court's orders denying alimony, denying to hold Defendant in contempt, and modifying the 24 May 2018 order. Plaintiff argues that (1) "Defendant's motions seeking modification of the 24 May 2018 order were deficient" as a matter of law; (2) "the trial court erred in finding and concluding that a substantial and material change in circumstances" had occurred; and (3) the trial court erred in denying Plaintiff alimony. Each argument fails.

A. Sufficiency of Defendant's Motions

¶ 13 Plaintiff first argues that Defendant's motions seeking modification of the 24 May 2018 order were deficient because they failed to allege with particularity the grounds of each motion as required by Rule 7(b)(1) of the North Carolina Rules of Civil Procedure. Our review "of a motion to modify child support which is based on the insufficiency of its allegations . . . is subject to *de novo* review." *Devaney v. Miller*, 191 N.C. App. 208, 213, 662 S.E.2d 672, 676 (2008) (citations omitted). "The allegations in the motion to modify are taken as true and reasonable inferences from the allegations are drawn in favor of the party seeking to modify child support." *Id.* "When applying de novo review, we 'consider the case anew and may freely substitute' our own ruling for the lower court's decision." *High Point Bank & Trust Co. v. Highmark Props., LLC,* 368 N.C. 301, 304, 776 S.E.2d 838, 841 (2015).

¶ 14 Rule 7(b)(1) states:

> An application to the court for an order shall be by motion which, . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

N.C. R. Civ. P. 7(b)(1) (2021).

¶ 15 The particularity requirement found in Rule 7(b)(1) of the North Carolina Rules of Civil Procedure was adopted to conform to Rule 7(b) of the Federal Rules of Civil Procedure. Act of July 14, 2000, sec. 4, official comment, N.C. Sess. Law 2000-127 . The official commentary to North Carolina's Rule explains that "federal courts do not apply the particularity requirement as a procedural technicality to deny

otherwise meritorious claims. Rather, the federal courts apply the rule to protect parties from prejudice, to assure that opposing parties can comprehend the basis for the motion and have a fair opportunity to respond." *Id.*

¶ 16 In *Lane v. Winn-Dixie Charlotte, Inc.*, the plaintiffs sued the defendant after one of the plaintiffs sustained injuries on the defendant's premises. *Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 181, 609 S.E.2d 456, 457 (2005). The defendant filed a motion to dismiss, stating:

> Now comes the Defendant, pursuant to Rule 12(b)(5) of the North Carolina Rules of Civil Procedure to dismiss the Plaintiff[s'] Complaint on the grounds of insufficiency of service of process and shows unto the Court that the Plaintff[s have] failed to properly serve the Defendant, and the Plaintiff[s'] Complaint should be dismissed.

Id. at 183, 609 S.E.2d at 458. The trial court granted the defendant's motion. *Id.* at 182, 609 S.E.2d at 457.

¶ 17 On appeal, the plaintiffs argued that the trial court erred in granting the motion to dismiss, claiming the defendant failed to state with particularity the grounds for dismissal. *Id.* This Court determined that the defendant had satisfied Rule 7(b)(1)'s particularity requirement because the defendant's motion cited Rules 12(b)(4) and 12(b)(5), and specified that the grounds for the motion were based on the plaintiffs' failure to properly service the defendant. *Id.* at 183, 609 S.E.2d at 458. Additionally, the defendant's motion clearly specified the relief sought: that the

plaintiff's complaint be dismissed. *Id.*

¶ 18 Plaintiff's brief cites *Dusenberry v. Dusenberry* for the proposition that, "where court and adverse party cannot comprehend the basis of a motion, they are rendered powerless to respond to it." *Dusenberry v. Dusenberry*, 87 N.C. App. 490, 492, 361 S.E.2d 605, 606 (1987). *Dusenberry*, however, concerned a motion to amend that stated only: "Now comes the [d]efendant, by and through [c]ounsel, who moves this Honorable Court pursuant to Rule 59(e) to alter or amend its judgment entered by this Court in its order dated May 7, 1986." *Id.* at 491, 361 S.E.2d at 606. This Court then determined that the motion to amend did not meet the particularity requirement of 7(b)(1). *Id.* at 492, 361 S.E.2d at 606.

¶ 19 In *Dusenberry*, the motion stated only the relevant rule and asked the court to amend its judgment, without expressing how or why the judgment should be amended. *See id.* Conversely, in *Lane*, the defendant's motion to dismiss stated the relevant rules, specifically stated why the defendant sought dismissal, and requested a form of relief. *Lane,* 169 N.C. App. at 183, 609 S.E.2d at 458. Comparing Defendant's motion to the motions presented in *Lane* and *Dusenberry*, neither of Defendant's motions mirror the level of insufficiency seen in *Dusenberry*. Rather, Defendant cited Rule 60(b)(6) and N.C. Gen. Stat. § 50-13.7 as grounds for his motion to modify child support and post separation support and argued that a substantial and material change in circumstances existed. Defendant also referenced the relief

sought: modification of the 24 May 2018 order regarding child support and post separation support. Defendant's motions are similar to the defendant's motion in *Lane*, and we therefore reach the same result here. Additionally, apart from citing *Dusenberry*, Plaintiff offers no explanation in her brief as to why Defendant's motions would be insufficient based on a lack of particularity. We hold that Defendant's motions sufficiently complied with Rule 7(b)(1)'s particularity requirement.

B. Substantial and Material Change in Circumstances

¶ 20 Plaintiff argues that the trial court erred in determining that a substantial and material change in circumstances had occurred. Specifically, Plaintiff contends that the trial court should not have considered matters never raised in Defendant's motion, that Defendant did not meet the burden of proving a substantial and material change in circumstances since the entry of the 24 May 2018 order, and that Defendant has the ability to earn.

¶ 21 "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary,* 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). "[A]n abuse of discretion occurs when a determination 'is so arbitrary that it could not have been the result of a reasoned decision.'" *Etheridge v. County of Currituck*, 235 N.C. App. 469, 479, 762 S.E.2d 289, 296 (2014) (alteration in original) (quoting *Bishop v. Ingles Mkts., Inc.*, 233 N.C. App. 431, 439, 756 S.E.2d

115, 121 (2014)).

1. Scope of Considerations

¶ 22 Plaintiff claims that specific matters the trial court considered in finding a substantial and material change in circumstances for Defendant were never raised in Defendant's motions. These matters include Defendant's battle with depression and Plaintiff's employment.

¶ 23 Plaintiff cites *Guilford Cty. ex rel. St. Peter v. Lyon* to support her claim that the trial court should not consider evidence not specifically stated in Defendant's motion, but Plaintiff's reliance on this case is misplaced. *Guilford Cty. ex rel. St. Peter v. Lyon*, 247 N.C. App. 74, 785 S.E.2d 131 (2016). In *Guilford*, the defendant filed a motion to modify child support based solely on a change in his financial circumstances and then the court, *sua sponte*, changed the defendant's motion to modify into a Rule 60 motion based on the issue of fraud by the plaintiff. *Id.* at 81, 785 S.E.2d at 136. This Court concluded that changing the defendant's motion *sua sponte* constituted "judgment by ambush" because the plaintiff could not have reasonably expected to argue an issue based on fraud under Rule 60. *Id.* (citation omitted).

¶ 24 The current case is distinct from *Guilford* because the trial judge did not revise Defendant's motion to modify or otherwise cause matters to be discussed that Plaintiff would not reasonably have expected. This Court in *Guilford* stated that because the defendant's motion referenced a substantial and material change in

financial circumstances, the "plaintiff could expect that the trial court would be considering only the financial circumstances *of the parties*. . . ." *Id.* (emphasis added). In this case, Plaintiff could expect the trial court to consider evidence of Plaintiff's and Defendant's current finances, as well as the effect that Defendant's depression could have on his earning potential because Defendant's motions to modify child and post separation support were based on a change in his financial circumstances. Additionally, no objection was made on the introduction of the evidence regarding Plaintiff's employment nor Defendant's depression because the evidence was introduced through Plaintiff's own testimony. Therefore, it was not error for the trial court to consider this evidence.

2. Change in Circumstances

¶ 25 Plaintiff also contends that it was error for the trial court to find that Defendant experienced a substantial and material change in circumstances since the entry of the 24 May 2018 order based on Defendant's mother's trust funds being depleted because that evidence existed prior to 24 May 2018. Plaintiff claims "[t]he only thing that changed in the period after 24 May 2018 and the hearing of the Defendant's Motions was his presentation of evidence that Defendant could have presented, but chose not to do so prior to the entry of the 24 May 2018 Order."

¶ 26 A substantial and material change in circumstances can constitute grounds for modification of child support or custody. N.C. Gen. Stat. § 50-13.7 (2021). N.C. Gen.

Stat. § 50-13.7, entitled "Modification of order for child support or custody" states:

> An order of a court of this State for support of a minor child 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 G.S. 50-13.10. [A]n order of a court of this State for custody of a minor child 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.

N.C. Gen. Stat. § 50-13.7 (2021). In a motion to modify child support, "[t]he burden of demonstrating changed circumstances rests upon the moving party." *McGee v. McGee,* 118 N.C. App. 19, 26, 453 S.E.2d 531, 535 (1995).

¶ 27 Plaintiff asserts that Defendant cannot meet this burden because his claim rests upon the fact that his mother's trust fund, on which he relied to support their lifestyle, was depleted. Plaintiff asserts that Defendant knew about the depletion of his mother's trust funds at the time of the 24 May 2018 order but did not disclose them to the court. Therefore, Plaintiff argues, they are not an event creating changed circumstances after the entry of the original order. We disagree.

¶ 28 "The reason behind the often stated requirement that there must be a change in circumstances . . . is to prevent *[r]elitigation* of conduct and circumstances that antedate the prior [] order." *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979) (emphasis added). When "facts pertinent to the custody issue were not disclosed to the court at the time the original custody decree was rendered, courts

have held that a prior decree is not res judicata as to those facts not before the court." *Id.* Put simply, in determining whether a change in circumstances has occurred for a modification, the trial court is allowed to consider evidence that existed before entry of the prior order but was not disclosed at that time.

¶ 29 Although this Court in *Newsome* applied this rule in the child custody context, we find it applicable in the modification of child support orders as well. In *Newsome*, this Court's reasoning focused on preventing relitigation of facts previously presented to the courts, rather than the exact context of the particular case. Additionally, N.C. Gen. Stat. § 50-13.7(a) applies the same standard of changed circumstances to "[m]odification of order[s] for child support *or* custody." (Emphasis added). Ultimately, if evidence of Defendant's mother's trust funds being fully depleted existed prior to the hearing for the 24 May 2018 order, but was undisclosed at that time, we cannot say that the trial court abused its discretion in considering the evidence in its determination to modify Defendant's child support and post separation support.

¶ 30 We note Defendant did mention his mother's trust funds during the hearing before the 24 May 2018 order, and argued thereafter in a motion for a new trial that his mother's trust funds were being depleted. However, our review of Defendant's argument, that a substantial and material change in circumstances existed, reveals a material difference in what he previously presented to the trial court and what he

argues in his modification motions. Defendant previously mentioned that his mother's funds were *depleting* due to their use funding her medical needs, and those funds were therefore not available to him. The trial court did not find this argument to be credible. In Defendant's modification motions, and the following hearings, Defendant claimed a substantial and material change in circumstances existed because his mother's funds were then "virtually exhausted." The trial court did not abuse its discretion in finding a substantial and material change in circumstances in awarding a modification of Defendant's support obligations.

C. Denial of Alimony and Modification of Post-Separation Support

¶ 31 Plaintiff's final argument asserts that the trial court erred in denying Plaintiff's request for alimony. During our review, "[w]hether a spouse is entitled to an award of alimony or post-separation support is a question of law." *Kabasan v. Kabasan*, 257 N.C. App. 436, 441, 810 S.E.2d 691, 696 (2018). This Court considers questions of law *de novo*. *Id.*

¶ 32 A court may award alimony "to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors." N.C. Gen. Stat. § 50-16.3A(a) (2021). A dependent spouse is defined as "a spouse . . . who is actually substantially dependent upon the other spouse for [their] maintenance and support or is substantially in need of maintenance and support from the other

spouse." N.C. Gen. Stat. § 50-16.1A(2) (2021). A supporting spouse is "a spouse . . . upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support." *Id.* at § 50-16.1A(5). "'Actually substantially dependent requires that the party seeking alimony would be actually unable to maintain the accustomed standard of living [established before separation] from his or her own means' and 'substantially in need of maintenance' means that the 'dependent spouse will be unable to meet future needs even if current needs are met.'" *Collins*, 243 N.C. App. at 701, 778 S.E.2d at 857 (alteration in original) (citation omitted).

¶ 33 "This Court has long recognized that '[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves.'" *Burger v. Burger*, 249 N.C. App. 1, 5-6, 790 S.E.26 683, 687 (2016) (citation omitted). Additionally, a trial court "is not bound by the financial assertions of the parties and may resort to common sense and every-day experiences" to determine what the parties' reasonable expenses are. *Bookholt v. Bookholt*, 136 N.C App. 247, 251, 523 S.E.2d 729, 732 (1999).

¶ 34 In analyzing the reasonable expenses of the parties in this case, the trial court determined that the "lifestyle that the parties created during their marriage was artificially maintained and was funded primarily by an infusion of debt or funds

received from Defendant's mother." This led the court to conclude that their lifestyle during marriage was "not sustainable." Likewise, the trial court found that Defendant had continuously borrowed funds in order to maintain this artificial lifestyle and he no longer had access to funds to meet his child support obligations while also providing Plaintiff support. The trial court also found that Plaintiff was unable to offer any evidence that Defendant has the ability to provide her with additional funds, nor that Plaintiff's request for $15,041.45 per month in alimony was reasonable in light of the parties' actual income and current financial circumstances.

¶ 35 As a result, the trial court, while complying with both N.C. Gen. Stat. § 50-16.1A and 50.16.3A, properly concluded that Plaintiff was not a dependent spouse, Defendant was not a supporting spouse, and an award of alimony would not be equitable under the circumstances. Additionally, N.C. Gen. Stat. § 50-16.1A provides that payments of post separation support will end upon "[t]he entry of an order awarding or denying alimony." Therefore, the trial court properly concluded that Defendant's post separation support obligation should be modified to $0.00.

D. Contempt Order

¶ 36 Plaintiff passingly contends that the trial court committed error in its 31 August 2020 contempt order. However, Plaintiff offers no argument in her brief explaining why the trial court committed error in the 31 August 2020 contempt order. "Rule 28 of the Rules of Appellate Procedure provides that questions not presented

and discussed in a party's brief are deemed abandoned." *Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 237, 371 S.E.2d 302, 303 (1988); see also N.C. R. App. P. 28(a) (2021). Because Plaintiff did not include an argument regarding the 31 August 2020 contempt order, she has abandoned that argument and it will not be considered by this Court.

III. Conclusion

¶ 37 We hold that Defendant's motions sufficiently stated their grounds with particularity, and that the trial court did not err by modifying child support and post separation support, and by denying to grant Plaintiff further alimony. The trial court's orders are affirmed.

AFFIRMED.

Judges WOOD and JACKSON concur.

Report per Rule 30(e).