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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-20

Filed 05 July 2023

Johnston County, No. 17 CVD 1533

LAURA SUE TUEL, Plaintiff,

v.

ANTHONY RYAN TUEL, Defendant.

Appeal by defendant from order entered 2 August 2022 by Judge Mary H. Wells in Johnston County District Court. Heard in the Court of Appeals 6 June 2023.

*Reece & Reece, by Mary McCullers Reece, and Woodruff & Fortner, by Dionne Loy Fortner, for plaintiff-appellee.*

*Tharrington Smith, LLP, by Jeffrey R. Russell and Evan B. Horwitz, for defendant-appellant.*

ARROWOOD, Judge.

Anthony Ryan Tuel (“defendant”) appeals from the trial court’s order declining to exercise jurisdiction and finding Indiana to be a more convenient forum for his child custody dispute with Laura Sue Tuel (“plaintiff”). On appeal, defendant argues: (1) the trial court erred in failing to follow this Court’s mandates in *Tuel v. Tuel*, 270 N.C. App. 629, 840 S.E.2d 917 (2020) (“*Tuel I*”) and *Tuel v. Tuel*, \_\_ N.C. App. \_\_, 867

S.E.2d 428 (Table) (2022) (unpublished) (“*Tuel II*”); (2) the trial court erred in making certain findings of fact and conclusions of law; and (3) the trial court abused its discretion in transferring the case to Indiana. For the following reasons, we vacate the trial court’s order and remand the matter for a *de novo* trial, consistent with our holding in *Tuel II*.

I. Background

Plaintiff and defendant (collectively, “the parties”) were married on 21 December 2002. Two children were born to the marriage. The parties separated on 17 May 2017.

On 16 May 2017, plaintiff filed the initial complaint for divorce, postseparation support, alimony, child custody, child support, notice of intent to file for equitable distribution, a temporary restraining order, and attorney fees. The next day, plaintiff took the children and left for Indiana. In August 2017, the parties reached an agreement during mediation that provided plaintiff would return to North Carolina with the children, the parties would have joint legal custody, and set out a visitation schedule. *Tuel I*, 270 N.C. App. at 630, 840 S.E.2d at 919. After living in Indiana for three months, plaintiff returned to North Carolina with the children, per the agreement with defendant.

Following a hearing, in an Order for Permanent Child Custody and Temporary Child Support entered 18 March 2018, Judge Addie H. Rawls found that it was in the best interest of the children for the parties to have joint legal and physical custody of

the children, with plaintiff having primary custody, and that the children would be allowed to relocate to Indiana with plaintiff. Defendant appealed from this order on 11 April 2019. On 17 March 2020, this Court filed an opinion vacating the trial court's order and remanding the matter for further proceedings. *Id.*

In *Tuel I*, we found that “[t]he trial court failed to make findings on several *Ramirez-Barker* factors relevant to material issues raised by the evidence at the hearing” and “many of the findings upon which [the trial court] did base its conclusion of law [were] internally inconsistent.” *Id.* at 631, 840 S.E.2d at 920. As a result of the “glaring deficiencies and contradictions in the trial court’s findings of fact[,]” we found its findings of fact were inadequate to support its conclusions and the custody order was vacated and the matter “remand[ed] for entry of a new order not inconsistent with [our] opinion.” *Id.* at 636-37, 840 S.E.2d at 923.

On remand, “the trial court did not receive any additional evidence[,]” and entered a custody order on 1 October 2020, “again granting primary custody to plaintiff and maintaining the same custodial schedule.” *Tuel II*, \_\_ N.C. App. at \_\_, 867 S.E.2d 428 (Table). Furthermore, the new order’s sixty-two findings of fact significantly mirrored the “findings of fact in plaintiff’s proposed order.” *Id.* at \_\_, 867 S.E.2d 428 (Table). Defendant, again, appealed. *Id.* at \_\_, 867 S.E.2d 428 (Table).

This Court, in *Tuel II*, again, remanded the matter, finding:

The trial court and plaintiff have had two opportunities to comply with the well-settled law set forth in *Ramirez-Barker* regarding what needs to be shown to support an

order allowing a parent to relocate children to a foreign jurisdiction, and have failed to do so even in the face of a mandate from this Court. *The trial court's order is reversed without providing a further opportunity to correct the order.* Mindful of the fact this matter involves the ongoing welfare of the two minor children, *we remand this matter to the trial court to re-start the proceedings on the pending claim* for child custody to include taking new evidence at a new trial following which the trial court shall make an award of custody as will best promote the interest and welfare of the minor children based on the then currently existing circumstances and containing findings of fact supported by competent evidence and, in turn, conclusions of law supported by those findings.

*Id.* at \_\_\_, 867 S.E.2d 428 (Table) (emphasis added).

On 15 June 2022, plaintiff filed a motion pursuant to N.C. Gen. Stat. § 50A-207 requesting the trial court decline jurisdiction due to inconvenient forum. Plaintiff contended that she and the children had been living in Indiana since July 2018, despite the custody agreement which permitted her to relocate being vacated, and Indiana would be a more appropriate forum.

Plaintiff's motion came on for hearing on 11 July 2022 in Johnston County District Court, Judge Wells presiding. At the hearing, plaintiff argued that the trial court could decline jurisdiction "at any time[.]" and since we remanded the matter for a *de novo* trial, this was the "perfect time" to decline jurisdiction. Furthermore, plaintiff argued several reasons why Indiana would be a more convenient forum under N.C. Gen. Stat. § 50A-207(b), including: (1) the children have been in Indiana for four years; (2) the distance between the jurisdictions; (3) the "income disparity

between the parties”; (4) the fact that there was “no agreement” regarding jurisdiction; and (5) because “all the witnesses are closer to the Indiana court,” the case “could be handled expeditiously [in Indiana][.]” Lastly, plaintiff argued that North Carolina is no more familiar with the “facts and issues in the pending litigation” than an Indiana court would be, since this Court mandated a *de novo* trial.

By contrast, defendant argued that although the trial court is normally granted discretion in jurisdiction, this Court issued “a very specific mandate” that would not apply to Indiana courts if transferred. Additionally, defendant argued the case was set to be heard in August 2022, so it would be heard sooner in North Carolina, witnesses could testify remotely, and “at one time, there was an agreement” that North Carolina would have jurisdiction and hear the matter.

At the hearing and in an order entered 2 August 2022, the trial court declined jurisdiction, finding Indiana was a more appropriate jurisdiction, and transferred the matter. The trial court specifically stated it “*considered* the mandate of” *Tuel II*, but with its “polar star pursuit of making a determination [in] the best interest of the children[.]” determined “that the purest compliance with the mandate suggests and is consistent with a finding and ruling that North Carolina is not a convenient forum[.]” Defendant filed a notice of appeal on 18 August 2022. This matter is now before us for a third time.

## II. Discussion

On appeal, defendant asserts: (1) the trial court erred in failing to follow this

Court's mandates in *Tuel I* and *Tuel II*; (2) the trial court erred in making certain findings of fact and conclusions of law; and (3) the trial court abused its discretion by transferring the case to Indiana. As we find the trial court erred in failing to follow the mandate from *Tuel II*, we do not reach defendant's additional arguments.

A. The Mandate Rule

"Our Court reviews issues regarding the interpretation of its own mandate *de novo*." *Berens v. Berens*, 284 N.C. App. 595, 601, 876 S.E.2d 680, 685 (2022) (citation omitted). "It is well-established that in discerning a mandate's intent, the plain language of the mandate controls." *State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 283 (2016) (citation, brackets, and internal quotation marks omitted). "'On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be *strictly followed*, without variation and departure from the mandate of the appellate court.'" *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015) (emphasis added) (citing *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962) (Parker, J., concurring in part)). "Otherwise, . . . the supreme tribunal of the state would be shorn of authority over inferior tribunals." *Collins*, 257 N.C. at 11, 125 S.E.2d at 306 (Parker, J., concurring in part) (citations omitted).

Although it is the "general rule [that] when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case," this does not apply to "points arising outside of the case

and not embodied in the determination made by the Court.” *Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956) (citations omitted).

Here, there was no question of fact that was settled by our opinion, rather, this Court specifically issued a mandate that the lower court would conduct a *de novo* trial. *Tuel II*, at \_\_\_, 867 S.E.2d 428 (Table). Despite very clear instructions on remand, the trial court found that it was within its power to merely *consider* our mandate. The trial court is without authority to just “consider” a mandate by a reviewing court, as a mandate is “binding” and “must be strictly followed, without variation and departure from the mandate of the appellate court.” *Bodie*, 239 N.C. App. at 284, 768 S.E.2d at 881 (citation and internal quotation marks omitted). Accordingly, the trial court’s order is vacated, and the matter is, again, remanded to the trial court for a *de novo* trial on the matter, consistent with our opinion in *Tuel II*.

Furthermore, we note plaintiff’s reliance on *Britt v. Allen*, 37 N.C. App. 732, 247 S.E.2d 17 (1978), is misplaced. The issue before us in *Britt* was whether the trial court properly dismissed the plaintiff’s action under the Rules of Civil Procedure, after the matter was remanded for a *de novo* trial. *Id.* at 733, 247 S.E.2d at 18. We held that the trial court properly granted summary judgment in favor of the defendant, as “it was still necessary that [the plaintiff’s] action be sufficient to withstand [the] defendant’s motions for dismissal” and a remand for a *de novo* trial did not make the Rules of Civil Procedure “inapplicable[.]” *Id.* Here, the rules of Civil

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Procedure are not in question.

For the foregoing reasons, we hold the trial court did not comply with our mandate, in violation of well-settled precedent, and its order transferring the case to Indiana is vacated. For the third time, we remand the matter to the trial court with specific instructions. Accordingly, per our holding in *Tuel II*, we remand the matter to the trial court for a *de novo* trial.

III. Conclusion

For the foregoing reasons, we vacate the trial court's order and remand the matter for a *de novo* trial, consistent with our holding in *Tuel II*.

VACATED AND REMANDED.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).