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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-856

Filed 7 May 2025

Rockingham County, No. 22CVD001235

EMARIE GONZALEZ ORTIZ, Plaintiff,

v.

ERIDIEL GONZALEZ RIVERA, Defendant.

Appeal by defendant from order entered 24 April 2024 by Judge Erica S. Brandon in Rockingham County District Court. Heard in the Court of Appeals 8 April 2025.

*Ross and Perkins, PLLC, by James Perkins, Jr., for defendant-appellant.*

*No brief filed for plaintiff-appellee.*

FLOOD, Judge.

Defendant Eridiel Gonzalez Rivera appeals from the trial court's order granting Plaintiff Emarie Gonzalez Ortiz's motion to dismiss Defendant's motion to modify child custody. On appeal, Defendant argues: first, the trial court erred in granting Plaintiff's motion to dismiss Defendant's motion, because Defendant has demonstrated changed circumstances since entry of a consent order between the

parties; second, the trial court abused its discretion in denying Defendant's motion "without establishing facts that existed at the time the consent order was entered"; and third, the trial court abused its discretion in concluding Defendant's motion "failed to sufficiently plead facts to support a substantial change in circumstances affecting the welfare of the minor children" without "allowing evidence to support the pleadings." Upon review, we conclude the trial court erred in granting Plaintiff's motion to dismiss Defendant's motion to modify child custody because, pursuant to our standard of review for a motion brought under Rule 12(b)(6), taking Defendant's allegations as true, Defendant has pleaded sufficient facts to demonstrate a substantial change in circumstances that affects the welfare of the minor children. We therefore reverse and remand the trial court's order, and do not reach Defendant's additional arguments.

### **I. Factual and Procedural Background**

Defendant and Plaintiff are the biological parents of two minor children. Custody of the minor children was originally governed by an order entered 12 July 2019 by the Forsyth County trial court. On 2 July 2021, Plaintiff filed a motion to modify child custody and motion to transfer venue. On 24 May 2022, Forsyth County transferred venue to Rockingham County. On 9 February 2023, the parties entered into a consent order for child custody, wherein Plaintiff was granted sole physical and legal custody of the minor children, and Defendant was granted visitation pursuant to a graduated schedule. The consent order provided, in relevant part, that by 9

August 2023, following the first six months of entry of the consent order, and prior to Defendant's exercising visitation with the minor children: the minor children "shall attend therapy with a therapist of Plaintiff's choice"; "Defendant shall attend solo therapy with the therapist chosen for the minor children"; Defendant shall, upon the therapist's recommendation, "attend therapy jointly with the minor children"; and "Defendant shall [complete] an anger management class and a parenting class[.]" The consent order further provided that, upon completion of these conditions, Defendant would be granted supervised visitation with the minor children "every other Saturday[.]" and upon the therapist's recommendation, Defendant would thereafter be granted unsupervised visitation with the minor children on a regular visitation schedule.

On 5 December 2023, Defendant filed a motion to modify child custody. Defendant's motion included, in pertinent part, the following allegations:

5. Since the entry of the [c]onsent [o]rder, there has been a substantial change of circumstances affecting the welfare of the minor children that now warrants a modification of the previous [consent o]rder in the following manner:
  - a. . . . That contrary to statutory and case law, [] Defendant has been denied visitation with his minor children;
  - b. That since the entry of the [consent o]rder, [] Defendant has not been able [to] exercise minimal visitation with the minor children;
  - c. [] Defendant[] has substantially complied with the terms and conditions of the [c]onsent [o]rder. [] Defendant

completed individual therapy, but [has been] unable to complete group therapy because of lack of contact with Plaintiff;

. . . .

- e. [] Defendant believes visitation time would increase his bond between him and the minor children. Furthermore, allowing visitation would positively affect the welfare of the minor children[.]

On 1 February 2024, Plaintiff filed, pursuant to Rule 12(b)(6), a motion to dismiss Defendant’s motion to modify child custody, alleging Defendant “failed to allege or show any changed circumstances[,] or even if there are changed circumstances, how such allegations have affected the welfare of the minor children[.]” The matter came on for hearing on 12 March 2024. On 24 April 2024, the trial court entered an order granting Plaintiff’s motion to dismiss Defendant’s motion to modify child custody, wherein the trial court concluded:

In taking the allegations as alleged in Defendant’s [motion to modify child custody] as true, Defendant’s [motion] failed to sufficiently plead facts to support a substantial change in circumstances affecting the welfare of the minor children.

Defendant timely appealed.

## **II. Jurisdiction**

This Court has jurisdiction to review this appeal from a final judgment of a district court, pursuant to N.C.G.S. § 7A-27(b) (2023).

## **III. Standard of Review**

“When considering a motion to dismiss under Rule 12(b)(6) . . . the question for th[is C]ourt is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400 (2003) (citation omitted) (cleaned up); *see also* N.C.R. Civ. P. 12(b)(6). “The facts and permissible inferences set forth in the complaint are to be treated in a light most favorable to the nonmoving party.” *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 265–66 (2019). “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary*, 157 N.C. App. at 400.

“A Rule 12(b)(6) motion should be granted when the complaint, on its face, reveals (a) that no law supports the [complainant]’s claim, (b) the absence of facts sufficient to form a viable claim, or (c) some fact which necessarily defeats the [complainant]’s claim.” *Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 266. The well-pleaded allegations are to be construed liberally, and “a complaint should not be dismissed for insufficiency unless it appears to a certainty that [the complainant] is entitled to no relief under any state of facts which could be proved in support of the claim.” *Id.* at 266 (citation omitted); *see also Leary*, 157 N.C. App. at 400; *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481 (1985) (“The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss. This rule generally precludes dismissal except in those instances

where the face of the complaint discloses some insurmountable bar to recovery.” (citation and internal quotation marks omitted)).

#### **IV. Analysis**

On appeal, Defendant first argues the trial court erred in granting Plaintiff’s motion to dismiss Defendant’s motion to modify child custody, because Defendant has demonstrated changed circumstances since entry of a consent order between the parties. Because we agree with Defendant’s first argument, as discussed below, we do not reach Defendant’s other arguments.

Pursuant to N.C.G.S. § 50-13.7, “an 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.G.S. § 50-13.7(a) (2023). “It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody.” *Shipman v. Shipman*, 357 N.C. 471, 473 (2003) (citation and internal quotation marks omitted).

The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. . . . [A] showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.

*Id.* at 473–74 (citation and internal quotation marks omitted).

This Court has concluded that “interference with visitation of the non-custodial parent which has a negative impact on the welfare of the child can constitute a substantial change of circumstances sufficient to warrant a change of custody.” *Woncik v. Woncik*, 82 N.C. App. 244, 249 (1986); *see also Shipman*, 357 N.C. at 479 (concluding that a custodial parent’s “deceitful” denial of the non-custodial parent’s visitation that harms the child’s relationship with the non-custodial parent “show[s] a disregard for the best interests of the child, warranting a change of custody”). This Court has also concluded that “a parent’s unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child’s needs may adversely affect the child,” and that problems in communication between the parents can constitute a “substantial change of circumstances justifying modification of custody.” *Laprade v. Barry*, 253 N.C. App. 296, 303–04 (2017); *see also Trivette v. Trivette*, 162 N.C. App. 55, 61 (2004) (concluding that where the defendant “became angry and enraged when communicating with the plaintiff even when the children were present[,]” this factor, among other factors, constituted “a substantial change of circumstances affecting the welfare of the minor children”); *Conroy v. Conroy*, 291 N.C. App. 145, 164 (2023) (“The trial court did not err by determining [the m]other’s and [the f]ather’s continued communication problems and their failure or inability to cooperate and co-parent constituted a substantial change.”).

Here, Plaintiff’s motion to dismiss Defendant’s motion to modify child custody was based solely on Rule 12(b)(6), and the trial court did not—at this stage of the

proceedings—consider or hear any evidence by the parties. Taking Defendant’s allegations as true, we conclude Defendant has, on the face of his motion, pleaded sufficient facts that constitute a substantial change of circumstances.<sup>1</sup> See *Leary*, 157 N.C. App. at 400; *Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 265–66.

Defendant has pleaded that he “has been denied visitation with his minor children[,]” and that “since the entry of the [consent o]rder, [] Defendant has not been able [to] exercise minimal visitation with the minor children[.]” Defendant filed his motion on 5 December 2023, several months after the initial six-month period ended on 9 August 2023; thus, he would be entitled to supervised visitation assuming all the requirements of the consent order were met. Defendant has also pleaded that he “has substantially complied with the terms and conditions of the [c]onsent [o]rder[.]” and that he “has completed individual therapy, but [has been] unable to complete group therapy because of lack of contact with Plaintiff[.]” Taking Defendant’s allegations as true, on the face of his motion, he has been unable to fully comply with all the terms of the consent order specifically due to his “lack of contact with

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<sup>1</sup> We find only one published case in which a motion to dismiss was filed to dismiss a motion to modify child custody. See *Stern v. Stern*, 264 N.C. App. 585, 587–89 (2019) (treating the mother’s “motion to deny” the father’s motion to modify child custody as a Rule 12(b)(6) motion to dismiss). We do find the unpublished case *Lamont v. Larsen* instructive, however, as an example of an instance where this Court addressed the allegations in a motion to modify child custody solely for purposes of a Rule 12(b)(6) motion to dismiss. 268 N.C. App. 152 (2019) (unpublished); see *Inland Harbor Homeowners Ass’n. v. St. Josephs Marina, LLC*, 219 N.C. App. 348, 352 (2012) (“[C]itation to unpublished opinions is intended solely in those instances where the persuasive value of a case is manifestly superior to any published opinion.”).



Plaintiff[.]” *See Leary*, 157 N.C. App. at 400; *Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 265–66.

Treating all “permissible inferences . . . in a light most favorable to” Defendant, Defendant’s lack of contact with Plaintiff—the root cause of which is not revealed on the face of Defendant’s motion—indicates a communication problem between the parties, and such a communication problem is, by itself, sufficient to show a “substantial change of circumstances justifying modification of custody.” *See Laprade* 253 N.C. App. at 303–04; *Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 265–66; *see also Trivette*, 162 N.C. App. at 61; *Conroy* 291 N.C. App. at 164. Evidence regarding Defendant’s lack of contact with Plaintiff could be presented more fully at a hearing on Defendant’s motion to modify child custody; Defendant was not required to allege all pertinent facts in his motion, and only at the Rule 12(b)(6) stage is the trial court to treat all permissible inferences in a light most favorable to Defendant. *See Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 265–66; *see, e.g., Shipman*, 357 N.C. at 473–76 (reviewing the trial court’s findings of fact for “substantial evidence in the record” where the trial court held a hearing, heard evidence, and entered an order to modify child custody based on a substantial change of circumstances affecting the welfare of the minor child); *Stern*, 264 N.C. App. at 596 (providing that the trial court may weigh the credibility of the evidence at a full hearing, but may not do so when deciding on a motion to dismiss under Rule 12(b)(6)).

Although the Record demonstrates communication between Defendant and Plaintiff was to occur through a third-party individual due to a “pending 50B Domestic Violence Protective Order [(“DVPO”)] against Defendant[,]” Defendant’s pleading does not rule out that a change to the DVPO has occurred, or that there were communication problems with Plaintiff despite use of the third-party individual for communication. Because we must treat the “permissible inferences . . . in a light most favorable to” Defendant, Defendant has not pleaded insufficient facts or pleaded any facts that would necessarily defeat this claim. *See Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 265–66.

In addition, taking Defendant’s allegations as true and considering the permissible inferences in a light most favorable to Defendant, denial of Defendant’s visitation with the minor children could have been caused by Plaintiff’s interference—such interference having a negative impact on the well-being of the children—thus constituting a substantial change of circumstances warranting modification of child custody. *See Woncik*, 82 N.C. App. at 249; *see also Shipman*, 357 N.C. at 479; *Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 265–66. Finally, Defendant has pleaded that visitation with the minor children “would positively affect the welfare of the minor children[,]” and a change in circumstances that would benefit the minor child may warrant modification of custody. *See Shipman*, 357 N.C. at 473–74.

Construing Defendant’s motion liberally, on the face of his motion, Defendant has pleaded sufficient facts to demonstrate a substantial change in circumstances

that affects the welfare of the minor children. *See Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 266. Again, we are reviewing Defendant's allegations for purposes of a motion to dismiss under Rule 12(b)(6), and we express no opinion on whether Defendant would ultimately prevail in his motion to modify child custody. *See Leary*, 157 N.C. App. at 400. Accordingly, pursuant to our standard of review for a motion brought under Rule 12(b)(6), because "a complaint should not be dismissed for insufficiency unless it appears to a certainty that [the complainant] is entitled to no relief under any state of facts which could be proved in support of the claim[.]" the trial court erred in granting Plaintiff's motion to dismiss Defendant's motion to modify child custody. *See id.* at 400; *see also Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 266. We therefore reverse and remand the trial court's order, and do not reach Defendant's additional arguments.

### **V. Conclusion**

Upon review, we conclude the trial court erred in granting Plaintiff's motion to dismiss Defendant's motion to modify child custody because, pursuant to our standard of review for a motion brought under Rule 12(b)(6), taking Defendant's allegations as true, Defendant has pleaded sufficient facts to demonstrate a substantial change in circumstances that affects the welfare of the minor children. We therefore reverse and remand the trial court's order.

REVERSED AND REMANDED.

ORTIZ V. RIVERA

*Opinion of the Court*

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).