

NORTH CAROLINA COURT OF APPEALS

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JOHANNA M. JONES, )

Plaintiff-Wife, )

)

v. )

From Cabarrus County

)

CEDRIC L. JONES, )

Defendant-Appellant )

)

\*\*\*\*\*

RESPONSE TO MOTION TO DISMISS APPEAL

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TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS

Defendant-Appellant, Cedric Jones, (Hereafter "Husband")

pursuant to Rules 34 and 37 of the North Carolina Rules of Appellate

Procedure, responds to the motion to dismiss the appeal filed by

Plaintiff-Wife Joanna Jones (Hereafter "Wife") with this court on the

20th day of October 2021.

Husband is an aggrieved party and is appealing from a "final judgment" entered by the trial court. Thus the Motion to Dismiss filed by Wife should be denied.

### BACKGROUND

Wife commenced this action for child custody, child support, and equitable distribution of marital property by the filing of a complaint and issuance of summons on 30 August 2019 (R p 3-4.). Husband appeared early in the proceeding, unrepresented, and did not file an answer or counterclaim; however, he did appear at the mandated mediation with regard to custody and support that resulted in an impasse. Thereafter, Edwin H. Ferguson Jr and the law firm of Ferguson, Hayes, Hawkins & DeMay PLLC made a general appearance on behalf of Husband by filing a Notice of Appearance the 19<sup>th</sup> day of December 2019. (R p 9) No action was taken by Wife at that time objecting or restricting the Husband in any manner. The Wife acknowledged the equitable distribution claim by serving upon Husband the Affidavit required by N.C.G.S. § 50-20. (R p 11). On 4 March 2020 the parties by and through their attorneys consented to the appointment of a financial mediator to conduct an equitable

distribution mediated settlement conference. (R p 32-33) Husband filed his Equitable Distribution Inventory Affidavit on 7 April 2020 (R p 34). On 8 May 2020 the parties agreed on a peremptory setting date to conduct the hearing on custody ("CUST"); child support (CSUP; and Equitable Distribution ("EQUID"). (R p 42). The Wife submitted discovery interrogatories and in Item 29 acknowledged Husband's equitable distribution claim by requesting the following Items:

29. All other discoverable documents in your possession which prove or disprove any matter with respect to identifying, classifying, valuing, or distributing any item of property, liability, or claim that you are making in this equitable distribution action, (R p 50)

The equitable distribution mediation was attended by both parties on 6 October 2020. The equitable distribution mediation was unsuccessful resulting in an impasse. (R p 53). On 23 October 2020 a judgment of Absolute Divorce was entered between the parties (R p 37). An order was entered on 28 October 2020 reflecting pending issues of Child Support, Custody, Equitable Distribution. ( underlining supplied) (R p 55). Husband served upon Wife First Set of Interrogatories and Request for Production of Documents on 7 October 2020 resulting in a

Motion and Order for Extension of Time by Wife indicating as a basis for her motion to extend time to respond the following:

Plaintiff has not had sufficient time to compile all of the necessary documents in order to fully respond to Defendant's request. The time for the Plaintiff to respond has not yet expired. (R p 56)

Simultaneously, while this case was moving forward, Wife filed a proceeding for absolute divorce based on a separation of the parties for one (1) year or more. Husband accepted service and prior to the divorce being granted, Husband received a proposed judgment of divorce. (R p 86). The proposed document in paragraph 5 of the Judgment of Divorce, stated and the court ruled:

"5. There are currently pending claims in Jones v. Jones, Cabarrus County File No. 19 CVD 2923."

In paragraph two(2) of the decretal portion of the Judgment of Divorce the court ruled:

"2. That the Plaintiff's claims contained in Jones v. Jones 19 CVD 2923 for equitable distribution, child support, and child custody shall survive the entry of this order; and"

On 12 November 2020 the Wife filed a Notice of Voluntary Dismissal of "Complaint" in this proceeding. (R p 59). There was no mention of

Husband's equitable distribution claim that had been litigated for almost a year.

Husband filed a motion to set aside the voluntary dismissal; a motion to be permitted to file a formal answer and counterclaim to memorialize his claim for equitable distribution of the marital property. (R p 60, 64). Wife filed a motion seeking to set aside Husband's motions and levy sanctions. (R p 74). The trial court on 31 March 2021 denied all motions filed by the parties. The court concluded that there was no claim for equitable distribution; that it was not legally appropriate to now allow such a claim since a divorce had been granted; and that equitable estoppel does not apply. (R p 109). Husband filed and served notice of appeal on 19 May 2021. (R p. 98).

**REASONS WHY WIFE'S MOTION TO DISMISS  
SHOULD BE DENIED**

**I. The Trial Court's Denial of Husbands motions is a final order.**

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory 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. Pentecostal Pilgrims and Strangers Corporation V. Mark E. Connor, Fonville Morisey Realty, Inc., And Mount Peace Baptist Church 202 N.C.App. 128, 688 S.E.2d 81 (2009)

Wife has cited the case of Troy v Tucker, 126 N.C.App. 213,214-215, 484 S.E. 2d 98,99 (1997) indicating among other things that the order entered by the lower court was interlocutory and no right to appeal in that the dismissal resulted in no action pending. In the present case, there was an action pending for equitable distribution of marital property. The Wife acknowledged the claim by her actions and conduct set forth herein including but not limited to:

- (1) serving upon Husband the Affidavit required by N.C.G.S. § 50-20. (R p 11) ;
- (2) consenting to the appointment of a mediator to conduct a mediated settlement conference (R p 32-33);
- (3) receiving and voicing no objection when Husband filed his claim for equitable distribution of marital property by the filing of his Equitable Distribution Inventory Affidavit on 7 April 2020 (R p 34);

(4) On 8 May 2020 the parties agreed on a peremptory setting date to conduct the hearing on custody ("CUST"); child support (CSUP; and Equitable Distribution ("EQUID"). (R p 42);

(5) Wife submitted discovery interrogatories and in Interrogatory # 29, acknowledging Husband's equitable distribution claim, requested in the following Items:

**29. All other discoverable documents in your possession which prove or disprove any matter with respect to identifying, classifying, valuing, or distributing any item of property, liability, or claim that you are making in this equitable distribution action. (R p 50).**

(6) Husband and Wife attending mediation on October 6, 2020 each claiming equitable distribution of marital property. The mediation was unsuccessful resulting in an impasse. (R p 53).

(7) An order was entered on 28 October 2020 reflecting pending issues of Child Support, Custody, Equitable Distribution ( underlining supplied). (R p 55).

(8) Husband served upon Wife First Set of Interrogatories and Request for Production of Documents on 7 October 2020 resulting in a Motion and Order for Extension of Time by Wife to respond. (R p 56)

(9) On 16 October 2020, after transmitting a proposed divorce judgment, in the divorce case, "*Joanna M. Jones v. Cedric Lee Jones, 20 CVD 2349, Cabarrus County*", reflecting in item two (2) in the decretal part of the Judgment "*That the Plaintiff's claims contained in Jones v Jones, 19 CVD 2923 for equitable distribution, child support, and child custody shall survive the entry of this Order*"; "indicating all claims in the present proceeding, would survive the entry of divorce, and there being no objection by Husband, Wife obtained a divorce. (R p 88).

All the above reflect a claim having been made by Husband and recognition of the claim by Wife. There were claims pending by Husband when the Notice of Voluntary Dismissal was filed.

## **II. DEFENDANT'S EQUITABLE DISTRIBUTION INVENTORY AFFIDAVIT WAS SUFFICIENT TO SUPPORT A CLAIM FOR EQUITABLE DISTRIBUTION OF MARITAL PROPERTY.**

The Wife contends that there was no action pending when the divorce judgment was entered. Rule 8 of the General Rules of Pleading requires: (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be



proved showing that the pleader is entitled to relief. N.C.G.S. §1A-1, Rule 8 (1).

**While there is nothing in N.C. Gen. Stat. § 50-20 (2003) regarding the sufficiency of pleadings to support a claim for equitable distribution, equitable distribution is not automatic, and a party seeking such division of marital property must specifically apply for it. Coleman V. Coleman, 182 N.C. App. 25, 641 SE2d 332 (2006)**

A pleading requesting the court to enter an order distributing the parties' assets in an equitable manner is sufficient to state a claim for equitable distribution. Coleman, 182 N.C. App. 25, 641 SE2d 332 ¶¶1-3.

**N.C.G.S. § 50-11(e) states: An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.**

The actions, conduct, and documents filed with the court clearly reflect a claim by Husband in existence and being litigated by both parties before the Judgment of Divorce was entered, and said claim being joined in and acknowledged by Wife

In the order by the trial court in paragraph 13, (R p 107) the court as part of its order made a finding "that Defendant and his counsel had relied on Plaintiff's claim for equitable distribution, et. al. and had negotiated in good faith with Plaintiff and her counsel." Husband would submit that this ruling by the trial court reflects that that the equitable distribution proceeding was to continue and was being preserved.

Furthermore, notwithstanding the ruling by the trial court, that Husband and his counsel relied upon such representations. In addition, the actions and conduct of litigating the claim of equitable distribution for almost a year. There was a claim filed by Husband.

### **III. Husband is an aggrieved party.**

Husband is an aggrieved party. A party aggrieved within the meaning of G.S, §1-271 is one whose rights are substantially affected by judicial order. *Templeton v Apex Homes Inc.* 164 N.C. App 373, 595 S.E. 2d 769 (2004)

McCarley v McCarley, 24 NC App 373, 1975 holding states: A plaintiff may not dismiss his action by filing a notice of dismissal if to do so would defeat the rights of a defendant who has theretofore

asserted some ground for affirmative relief, even though the plaintiff acts before resting his case.

In Coleman, 182 N.C.App 25, 641 S.E.2d 332 (2007), the Court concluded that . . . a pleading requesting the court to enter an order distributing the parties' assets in an equitable manner is sufficient to state a claim for equitable distribution. *Hunt v Hunt*, 117 N.C. App 280, 450 S.E.2d 558 (1994)

This is not a case where Husband failed to pursue his claim. There is no dispute a formal answer and counterclaim were not filed. However, the record will reflect, Husband's claim for equitable distribution was vigorously pursued in the form of filing and responding to the Equitable Distribution Inventory Affidavit, participation in financial mediation, responding to and engaging in discovery, and ensuring the claims in this proceeding survived the divorce proceeding.

The Wife has suggested that the paragraph 2 in the decretal part of the divorce judgment keeps her claims for equitable distribution, child support, and child custody surviving the entry of the divorce order.

(R p 89) but not Husband's. The Husband did not appear relying on the actions and conduct of Wife.

There was no objection to the divorce, and the court in paragraph 5 in the findings of fact (R p 88) of the divorce judgment ruled there are currently pending claims in this proceeding that is before the Court. The court in the decretal part of the divorce judgment indicated only Wife's claims survive the entry of divorce. ( R p 89) which are inconsistent with the pleadings filed by Wife. The court ordered that the claims were to continue notwithstanding the divorce judgment. This was a court order that was violated, and which the Wife is attempting to use to destroy Husband's share of the marital property. Husband submits the actions and conduct of the Wife cannot be condoned, or in any way justified. There was no problem from December 2020 and up to several days after the divorce judgment was entered and no indication by Wife of her intentions and apparent carefully laid out plan. As found by the trial court, Husband and counsel dealt in good faith and in compliance with the rules.

#### **IV. Wife is equitably estopped from denying Husbands' claim for equitable distribution of marital property**

In *Gilbert v Gilbert*, 111 N.C. App. 233, 431 S.E.2d 805 (1993), the Court defines equitable estoppel as follows:

Equitable Estoppel is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right.

In the *Gilbert* case the trial court affirmed the decision by the lower court that the principle of equitable estoppel applied because of wife relying on assertions by the husband, which she relied upon.

In the present case that was litigated by Husband from December 2019 until the voluntary dismissal and subsequent orders by the trial court indicating no claim had been filed. It is clear that Husband and his counsel had relied on Wife's claim for equitable distribution, et al and had negotiated in good faith with Plaintiff and her counsel. ( R p 107).

In hindsight, Wife and her counsel have sent a message that good faith negotiating and relying on such, is inappropriate. There is no dispute that counsel have a duty to their client to act within the rules of ethics and professionalism and represent their clients vigorously. It does not allow a party or its counsel to make representations about a matter, and then fail to honor such representations. Wife could have filed an entry of default, judgment on the pleadings, or other motions to challenge Husband's litigation of the equitable distribution claim. Months had passed since Husband was served when Husband's attorney entered a notice of appearance. Husband and his counsel dealt fairly and in good faith and relied upon the representations of Wife., Wife should be prohibited under the principle of equitable estoppel from denying Husband's equitable distribution claim in this proceeding, and that this appeal should go forward.

**V. If the court determines that this is an interlocutory appeal, Husband requests that this Court invoke Rule 2 or its certiorari power to create an appeal for Husband.**

Husband contends that there was an equitable distribution claim having been made in this proceeding and that the facts and

circumstances and action and conduct of the Wife should be a matter of concern to this court.

Wife has submitted *State v Ricks*, 2021-NCSC-116, ¶¶ 5-6. An appellate court should resort to Rule 2 and the writ only in “exceptional” and “rare” cases. *Id.* ¶ 5. To invoke these procedures, an appellant must demonstrate (1) manifest injustice or “significant issues of importance in the public interest”, and (2) “merit or that error was probably committed below.” *Id.* ¶¶ 5-6.

Husband would submit the circumstances of this case, if allowed would result in manifest injustice. No other case involving these issues reflect the factual scenario in this case. It is a case where the actions and conduct of the opposing party and Husband and his attorney having relied on such, if in fact an interlocutory appeal and denied, would be manifest injustice. Both Husband and his attorney relied on these actions and conduct and insured the proceeding would be preserved even if a divorce. No reason to suspect any other action by Wife. When Husband’s attorney appeared in the proceeding, the time had expired for filing answer or other responsive pleading. Nonetheless Wife and her attorney proceeded with litigating the issues and even

preserving the issues in the divorce judgment. This kind of conduct was relied upon by Husband and his attorney to their apparent detriment. This should not be condoned.

This conduct, under the facts and circumstances of this case, suggest significant issues of importance in the public interest. In this case, an attorney and his client relied on actions and conduct of a party and representation that the claims in this proceeding would survive the divorce judgment. Then several weeks later, go against such representation and dismisses the proceeding that has been ongoing for a year. The very clear purpose of the actions and conduct of Wife in dismissing this proceeding involving child custody, child support, and equitable distribution, was to defeat Husband's claim for equitable distribution of marital property. The trial court clearly found that Husband and his attorney relied on these representations and actions of the Wife. If the action and conduct of Wife is condoned by whether the order by the trial court is interlocutory or final—then Husband suggests and requests that Rule 2 be invoked. Otherwise the attorneys in this state should be made aware that they should not trust the word and actions and conduct of opposing counsel.



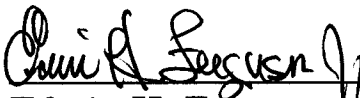
The other requirement that merit exists or that error was committed below—Husband submits his response as set forth above.

### **CONCLUSION**

Husband respectfully requests that the motion to dismiss this appeal be denied; that in the event the court considers the order being appealed from is an interlocutory order, that this court invoke Rule 2 or its certiorari power to create an appeal for Husband.

Respectively submitted this the 12th day of November 2021.

Ferguson, Hayes, & Hawkins PLLC

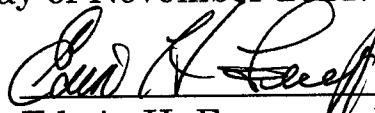
  
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing Response to Motion to Dismiss on counsel for the Plaintiff-Appellee by depositing a copy, contained in a first class postage paid wrapper, into a depository under the exclusive care and custody of the United States Parcel Service, and by email addressed as follows:

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This the 12th day of November 2021.



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