

No. COA07-1089

FIFTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

_____)
 WILLIAM MOODY, JR.,)
 on behalf of Himself and all)
 others similarly situated,)
)
 Plaintiff,)
)
 vs.)
)
 SEARS ROEBUCK AND CO.,)
)
 Defendant)
 _____)

FROM NEW HANOVER COUNTY
02-CVS-4892

BRIEF OF PLAINTIFF-CROSS-APPELLEE

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 OF NORTH CAROLINA

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ARGUMENT

There is no disagreement between the Parties that the trial court's jurisdiction terminated once the Illinois Judgment was entered in Wrobel and the parties filed the stipulation of voluntary dismissal with prejudice. See Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000) ("It is well settled that 'a Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d).'"); Russ v. Hedgecock, 161 N.C. App 334, 337, 588 S.E.2d 69, 71 (2003) ("An order is void *ab initio* only when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored."); Renner v. Hawk, 125 N.C. App. 483, 481 S.E.2d 370 (1997) (effect of a voluntary dismissal is to terminate an action, and no suit is pending thereafter on which Court can enter a valid order).

Similarly, the Parties agree that North Carolina Rule 23 should not be construed to require court approval of a voluntary dismissal of a putative class action when no motion to certify a class was made and no class was ever certified. See Fed.R.Civ.P. 23, 2003 Advisory Comm. Note (The amended rule "requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal or compromise."); Crow v. Citicorp Accept. Co., 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1986)("Rule 23 should receive a liberal

construction, and it should not be loaded down with arbitrary and technical restrictions. . . . The rule has as its objectives 'the efficient resolution of the claims or liabilities of many individuals in a single action' and 'the elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief.'" (quoting English, 41 N.C. App. at 9, 254 S.E.2d at 230-31)(citations omitted)).

Additionally, the Parties agree the Illinois judgment in Wrobel was entitled Full Faith and Credit. See Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 373 (1996)("[t]he Full Faith and Credit Act mandates that the 'judicial proceedings' of any State 'shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.'" (quoting 28 U.S.C. § 1738); accord Freeman v. Pacific Life Ins. Co., 156 N.C. App. 583, 586, 577 S.E.2d 184 (2003).

The Parties, therefore, agree that the trial court violated the Full Faith and Credit Clause in continuing to enter Orders and in undertaking the collateral review of the of the Illinois judgment in Wrobel after Judge Nowicki undertook her extensive analysis of the notice plan, the settlement terms, and the fairness and adequacy of the same. See Underwriters Nat'l Ins. Co. v. North Carolina Life and Accident and Health Ins. Guaranty Assoc., 455 U.S. 691, 706 (1982) ("a judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the

second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.”)(quoting Durfee v. Duke, 375 U.S. 106, 111 (1963)); *see also* Matsushita, 516 U.S. at 375; 5 Newberg on Class Actions § 17.23 (4th ed. 2007); Freeman, 156 N.C. App. at 588, 586, 577 S.E.2d at 187 (holding Kentucky judgment was entitled to full faith and credit, even if plaintiffs did not receive actual notice of the proposed class action settlement, given that certifying Kentucky court found the “best notice practicable” was provided). This is because collateral review of a Judgment certifying a class action settlement is strictly limited to ensuring that the certifying court followed procedures for determining the rights of absent class members were adequately protected. *See* Epstein v. MCA, Inc., 179 F.3d 641, 649 (9th Cir.) (holding broad collateral review is not permissible but instead is “limited” to determining if the certifying court that approved the settlement determined that due process requirements had been met), *cert. denied*, 528 U.S. 1004 (1999); *accord* Hospitality Management Associates, Inc. v. Shell Oil Co., 591 S.E.2d 611, 619-20 (S.C. 2004)(holding in pertinent part: “[a]s for collateral review, . . . due process does not afford any ‘second-guessing of [certifying court’s] determinations.’”)(quoting Epstein, 179 F.3d at 648); *see also* Fine v. Am. Online, Inc., 743 N.E.2d 416, 422 (Ohio Ct. App. 2000) (“collateral review is properly limited to the determination of (1) whether

safeguards to guarantee sufficient notice and adequate representation were in place during the prior litigation and (2) whether such safeguards were applied”). The record and the Parties’ briefs clearly demonstrate that Judge Nowicki undertook a thorough analysis and concluded the due process requirements had been met. Unlike any of the case the trial court relied upon in justifying the collateral attack on the Wrobel Judgment, Judge Nowicki had the benefit of and thoroughly considered Judge Tennille’s continued objections to the settlement throughout the course of her deliberations and before concluding the settlement was fair, adequate and reasonable and the notice plan was the best notice practicable and comported with Illinois law and Due Process, Class Counsel’s representation was adequate, and Class Counsel was not overcompensated. (R. 232-247) Even after considering Judge Tennille’s objections (the same objections contained in his May 7, 2007 Order)¹, Judge Nowicki reiterated in a separate Order her previous conclusions. (R. 432) Accordingly, the Parties and the pertinent authorities are in agreement that Judge Tennille was without authority to re-litigate those previously answered issues in this forum.

In sum, Judge Tennille was without jurisdiction to enter further orders after the entry of the Wrobel judgment and the stipulation of dismissal with prejudice; the Illinois judgment is entitled to Full faith and Credit as it is a valid judgment and

¹ See R. 314-18, 379-88, 389; *see also* R. 29-41, 389, 430, 432.


Judge Nowicki undertook the required analysis and concluded (and subsequently reiterated) that the Settlement was fair and reasonable and the Notice satisfied Illinois law and Due Process. Accordingly, this Honorable Court should correct those errors and reverse all Orders entered by the trial court after the Parties' stipulation of voluntary dismissal with prejudice.

CONCLUSION


Plaintiff-Appellants agree with Defendant-Appellants that this Court vacate all of the trial court's orders entered after December 16, 2004, dismiss this case with prejudice, and order any other and further relief that this Court deems appropriate.

Respectfully submitted this the 4th day of January, 2008.

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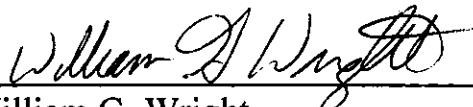
**CERTIFICATE OF COMPLIANCE WITH N.C. RULE OF APPELLATE
PROCEDURE 28(j)**

1. This brief complies with the proportional type limitation of N.C. R. App. P. 28(j) because:

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Signed



William G. Wright

Attorney for: Appellant

Dated: January 4, 2008

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a copy of this document in the above-entitled action upon all other parties to this cause by:

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