An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1028

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

KATHLYN MARIE STEIN and
MICHAEL HOOTSTEIN,
Plaintiffs

v. Buncombe County
No. 01 CVS 1219

ASHEVILLE CITY SCHOOLS,
COOPERATIVE LEARNING CENTER
(now BUNCOMBE COMMUNITY SCHOOL
WEST, at the time administered
jointly by BLUE RIDGE HUMAN
SERVICES FACILITIES, INC. and/or
BLUE RIDGE MENTAL HEALTH and/or
ASHEVILLE CITY SCHOOLS and/or
BUNCOMBE COUNTY SCHOOLS also known
as WOLFE CREEK SCHOOL), BUNCOMBE
CO. BOARD OF EDUCATION, BLUE RIDGE
CENTER FOR MENTAL HEALTH, BUNCOMBE
COUNTY DEPT. OF SOCIAL SERVICES, CITY
OF ASHEVILLE, BLUE RIDGE AREA AUTHORITY
and BUNCOMBE COUNTY,
Defendants

Appeal by plaintiffs from order entered 11 June 2001 by Judge James E. Lanning in Buncombe County Superior Court. Heard in the Court of Appeals 24 April 2002.

Law Office of Leslie O. Wickham, Jr., by Leslie O. Wickham, Jr., for plaintiff-appellants.

McGuire, Wood & Bissette, P.A., by Frederick S. Barbour; and Robert W. Oast, Jr., City Attorney, for defendant-appellee City of Asheville.

Roberts & Stevens, P.A., by Christopher Z. Campbell and Gary

T. Bruce, for defendant-appellee Buncombe County Board of Education.

CAMPBELL, Judge.

Plaintiffs appeal from the trial court's grant of motions to dismiss made by defendant City of Asheville and defendant Buncombe County Board of Education. The motions to dismiss were granted pursuant to Rule 12(b)(6).

This action arises out of the shooting of Kathlyn Marie Stein ("plaintiff Stein") on 17 March 1998, by thirteen-year-old Jerrell T. Bowman ("Bowman"). Plaintiff Stein was driving on the city streets of Asheville when she was shot in the head by Bowman, resulting in permanent physical and mental injuries. On 1 March 2001, plaintiffs filed a complaint against numerous public entities alleging that their joint negligence caused the shooting of plaintiff Stein. Plaintiff Stein sought recovery for the damages suffered as a result of the shooting. Michael Hootstein, plaintiff Stein's husband, asserted a claim for loss of consortium. Specifically, the defendants named in plaintiffs' complaint were the Asheville City School System, the Buncombe County School System, the Buncombe County Department of Social Services, the City of Asheville Parks and Recreation Department and the Blue Ridge Center for Mental Health. On or about 15 March 2001, prior to the filing of a responsive pleading by any of the defendants, plaintiffs amended their complaint as a matter of course pursuant to N.C. R. Civ. P. 15(a). In this amended complaint, plaintiffs

added negligence claims against the Blue Ridge Area Authority and Buncombe County.

On or about 26 April 2001, defendant City of Asheville Parks and Recreation Department filed a motion to dismiss for insufficiency of process under Rule 12(b)(4), insufficient service of process under Rule 12(b)(5), and for failure to state a claim under Rule 12(b)(6). On or about 4 May 2001, defendant Buncombe County School System filed an answer in which it denied the essential allegations of plaintiffs' complaint. In addition, the Buncombe County School System filed a motion to dismiss pursuant to Rules 12(b)(4), 12(b)(5) and 12(b)(6).

On 11 June 2001, the trial court allowed plaintiffs' oral motion to amend their complaint to change the designation of defendant City of Asheville Parks and Recreation Department to defendant City of Asheville, and to change the designation of defendant Buncombe County Public School System to defendant Buncombe County Board of Education. The trial court denied the motions to dismiss for insufficiency of process and insufficient service of process filed by defendant City of Asheville and defendant Buncombe County Board of Education. However, the trial court granted the motions to dismiss for failure to state a claim under Rule 12(b)(6) filed by defendant City of Asheville and defendant Buncombe County Board of Education. As a result, the trial court ordered that plaintiffs' complaint against the City of Asheville and the Buncombe County Board of Education be dismissed with prejudice. Plaintiffs appeal.

The dispositive issue is whether plaintiffs' appeal must be dismissed as interlocutory.

Although the parties have not raised the issue, the interlocutory nature of the appeal is appropriately raised by this Court *sua sponte*. *Abe v. Westview Capital,* 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) (citing *Bailey v. Gooding,* 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980)). An order is interlocutory if it does not dispose of the case as to all of the parties, "but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham,* 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Generally, a party may not immediately appeal from an interlocutory order. *Abe,* 130 N.C. App. at 334, 502 S.E.2d at 881. This is so "to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey v. Gooding,* 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980). However, a party may immediately appeal an interlocutory order if: (1) the trial court has entered a final judgment as to one or more but fewer than all of the claims or parties *and* has certified in the judgment, pursuant to N.C. R. Civ. P. 54(b), that there is no just reason to delay the appeal, or (2) the denial of an immediate appeal would affect a substantial right. *Abe*, 130 N.C. App. at 334, 502 S.E.2d at 881; N.C. R. Civ. P. 54(b) (2001); N.C. Gen. Stat. § 1-277 (2001). In either situation, "it is the appellant's burden to present argument in his brief to this Court to support

acceptance of the appeal, as it 'is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order.'" *Id.* (quoting *Jeffreys v. Raleigh Oaks Joint Venture,* 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)).[1]

In the instant case, the order appealed from is interlocutory as there has been no final judgment as to all of the parties. While the trial court's order does constitute a final adjudication of the claims against the City of Asheville and the Buncombe County Board of Education, the record does not indicate that plaintiffs' claims against the other named defendants (Asheville City Schools, Blue Ridge Center for Mental Health, Blue Ridge Area Authority, Buncombe County and Buncombe County Department of Social Services) have been dismissed or otherwise adjudicated. The trial court did not certify the order pursuant to Rule 54(b), and plaintiffs have failed to present any argument in their brief to this Court that a

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[1] We note that the North Carolina Rules of Appellate Procedure were amended effective 31 October 2001 to add, *inter alia*, subsection 28(b)(4), which requires the brief of the appellant to contain a statement of the grounds for appellate review. Accordingly, under N.C. R. App. P. 28(b)(4), when an appeal is based on Rule 54(b) certification, the appellant must include a statement in his brief to this Court indicating "there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay." N.C. R. App. 28(b)(4) (2001). When an appeal is based on a substantial right, the appellant must include a statement in his brief to this Court "contain[ing] sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Id.* These requirements of Rule 28(b)(4) do not apply in this case because appellant's brief was filed before 31 October 2001.

substantial right will be affected if this appeal is not accepted at this time. Accordingly, plaintiffs' appeal must be dismissed.[2]

Dismissed.

Judges WALKER and McGEE concur.

Report per Rule 30(e).

[2] We recognize this Court's discretionary authority under N.C. R. App. P. 21(a)(1) to treat a purported appeal as a petition for writ of certiorari and to issue its writ in order to consider the appeal. However, we decline to do so for the reasons stated in this opinion and because we do not feel that the denial of this appeal at this time will affect a substantial right of plaintiffs. Further, as the Supreme Court stated in *Bailey*, "we strongly feel that fragmented appeals such as that here presented seriously encroach upon judicial time and effort and threaten the orderly administration of justice." *Bailey*, 301 N.C. at 211, 270 S.E.2d at 435.