

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-1344

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

BILLY DAVID FULFORD,
Plaintiff-Appellee

v.

Durham County
No. 00 CVS 5120

JAMES EDWARD AIKEN and
FRANKLIN EUGENE AIKEN,
Co-Executors of the Estate
of EDWARD FRANKLIN AIKEN,
Defendants-Appellants

Appeal by defendants from order entered 24 August 2001 by Judge Anthony M. Brannon in Durham County Superior Court. Heard in the Court of Appeals 1 July 2002.

Anderson & Anderson, by Michael J. Anderson, for plaintiff-appellee.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for defendants-appellants.

BRYANT, Judge.

Plaintiff Billy David Fulford initiated this personal injury action against Edward Franklin Aiken in Durham County Superior Court on or about 22 November 2000. Aiken died on 24 September 1998. His estate was opened on or about 5 November 1998, was duly administered by Co-executors of the estate James Edward Aiken and Franklin Eugene Aiken (defendants), and was closed on or about 3

November 1999. Defendants were discharged of their duties as Co-executors of Aiken's Estate on that same date.

Plaintiff did not discover that Aiken was deceased until after the original and alias pluries summons, issued to Aiken, were not successfully served. Plaintiff filed an amended complaint, naming James Edward and Franklin Eugene Aiken as defendants, on or about 19 January 2001. Summonses, issued to defendants as Co-executors of the Estate of Aiken, were then timely served. Defendants answered the amended complaint on or about 26 February 2001, in which they moved to dismiss plaintiff's complaint, pursuant to N.C.R. Civ. P. 12(b), "for insufficiency of service of process, lack of service of process and the expiration of the applicable statute of limitations." Defendants stated that they were served with the complaint and summons in this matter after the Estate of Aiken was closed and they no longer had authority as Co-executors of said estate.

On 21 March 2001, plaintiff filed a petition to reopen the Estate of Aiken with the Clerk of Wake County Superior Court. The petition was granted by the Clerk, and letters testamentary were issued to defendants on 29 March 2001. On 30 March 2001 and 27 June 2001, additional summonses were issued to and served upon defendants as Co-executors of the Estate of Aiken. Plaintiff then filed a motion to file supplemental pleadings, in order to substitute the name of the Estate's personal representatives in light of the issuance of the new letters testamentary, and to change the caption of the case. All of the pending motions were

calendared for hearing, and this matter was heard during the 16 August 2001 civil session of Durham County Superior Court.

After hearing the evidence and arguments of counsel, the court entered an order denying defendants' Rule 12(b) motion to dismiss based upon the alleged failure of plaintiff to serve them (as duly appointed Co-executors of the Estate of Aiken) with summonses prior to the expiration of the applicable statute of limitations. The trial court certified its order in this regard pursuant to N.C.R. Civ. P. 54, being immediately appealable. Defendants, then, noticed appeal from the trial court's order to this Court. Plaintiff, thereafter, filed a motion to dismiss defendants' appeal as premature. This motion is currently pending before the Court.

We note that while the trial court certified this matter under N.C.R. Civ. P. 54 as immediately appealable, such certification is not dispositive when the order appealed from is interlocutory. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998). This Court has previously held that an order denying a motion to dismiss for lack of personal jurisdiction premised upon insufficiency of service of process, is interlocutory and does not affect a substantial right within the meaning of N.C.G.S. § 1-277(b). See *Hart v. F. N. Thompson Constr. Co.*, 132 N.C. App. 229, 511 S.E.2d 27 (1999); *Berger v. Berger*, 67 N.C. App. 591, 313 S.E.2d 825 (1984). In *Hart*, the Court explained, "This Court has interpreted G.S. § 1-277(b) as allowing an immediate right of appeal only when the jurisdictional challenge is substantive rather than merely procedural." 132 N.C. App. at

231, 511 S.E.2d at 28.

Despite the trial court's Rule 54(b) certification, we note that the instant order presents procedural issues with respect to plaintiff's compliance with the Rules of Civil Procedure, rather than the substantive issue of insufficient minimum contacts to establish personal jurisdiction as a matter of due process. See *Hart*, 132 N.C. App. 229, 511 S.E.2d 27; *Berger*, 67 N.C. App. 591, 313 S.E.2d 825. Hence, defendants' appeal is premature. Accordingly, plaintiff's motion to dismiss this appeal is allowed, and this appeal is dismissed.

Dismissed.

Judges MARTIN and HUNTER concur.

Report per Rule 30(e).