

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-698

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

DONNA S. ISGETT,
Plaintiff-appellee,

v.

Wake County
No. 99 CVD 11006

LENARD R. BEECHAM,
Defendant-appellant.

Appeal by defendant from order entered 6 February 2001 by Judge Kristin H. Ruth in Wake County District Court. Heard in the Court of Appeals 20 February 2002.

Elisabeth P. Clary, for plaintiff-appellee.

Webb & Webb, by John Webb, and Sally H. Sherer for defendant-appellant.

BRYANT, Judge.

Defendant appeals from the 6 February 2001 order of the trial court denying: 1) his motion to dismiss based on lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted; and 2) his motion for summary judgment. For the reasons stated herein we dismiss this appeal as interlocutory.

On 9 May 1990, plaintiff Donna S. Isgett, a resident of Florence County, South Carolina, brought an action to establish paternity and child support for her minor child pursuant to the Uniform Reciprocal Enforcement of Support Act [URESA]. The action

was forwarded to North Carolina for enforcement in Wake County as the putative father, Lenard R. Beecham [defendant], was a resident of Wake County. Defendant filed in Wake County District Court a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. On 1 March 1991, the Wake County District Court granted defendant's motion and dismissed plaintiff's complaint with prejudice based on lack of subject matter jurisdiction.

On 16 August 1999, plaintiff filed a petition in Florence County under the Uniform Interstate Family Support Act [UIFSA] for establishment of paternity, child support and medical coverage. On 21 January 2000, defendant, who was still residing in Wake County, filed in Wake County District Court motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted based on the doctrine of *res judicata*. Defendant also motioned for summary judgment based on *res judicata*. In an order entered 6 February 2001 the court denied defendant's motions. Defendant appealed.

Defendant presents three assignments of error. First, does *res judicata* bar an action brought under UIFSA by a plaintiff whose earlier action against the same defendant under URESA was dismissed with prejudice? Second, did the trial court err in failing to grant defendant's motions to dismiss and for summary judgment because the plaintiff sought the same relief that was denied in a prior action? Third, did the trial court err in making findings of

fact not supported by the evidence and conclusions of law not supported by the facts or the law?

Our first and final determination is whether defendant appeals from an interlocutory order.

Generally, there is no right to appeal from an interlocutory order. "'An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.'" An appeal from an interlocutory order may be taken under two circumstances: 1) the order is final as to some but not all the parties and there is no just reason to delay the appeal; or 2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

Darroch v. Lea, ___ N.C. App. ___, ___, 563 S.E.2d 219, 221 (2002) (citations omitted). The denial of a motion for summary judgment is generally not immediately appealable because such denial does not affect a substantial right. *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993). However, "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." *Id.* at 491, 428 S.E.2d at 161. The doctrine of *res judicata*, or claim preclusion, provides that "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). A dismissal on the basis of lack of subject matter jurisdiction is not on the merits; therefore, the doctrine of *res judicata* does not apply. *Foreman v. Foreman*, 144 N.C. App.

582, 586, 550 S.E.2d 792, 795, review denied, 354 N.C. 68, 553 S.E.2d 38 (2001).

In *Foreman*, the plaintiff-wife and defendant-husband were married in England. Upon their divorce in 1990, they entered into a British support order wherein, the husband was to pay £2,700 in annual spousal support. When the husband moved to North Carolina, the wife petitioned to enforce the British support order under URESA by registering it in Wake County in April 1995. In September 1995, the petition was dismissed for lack of subject matter jurisdiction. In June 1997, the wife again petitioned for enforcement of the British order in Wake County, this time under UIFSA. The trial court concluded that *res judicata* did not bar the wife's second claim under UIFSA as the case had not been adjudicated on the merits. This Court agreed, stating that "[w]hile this case involved the same cause of action and the same parties as a previous case (the initial 1995 Wake County petition), there had not been a final judgment in that previous case. There was a dismissal based on a lack of subject matter jurisdiction, which 'is not on the merits and thus is not given *res judicata* effect.'" *Foreman*, 144 N.C. App. at 586, 550 S.E.2d at 795.

In the case *sub judice*, defendant argues that this appeal is not from an interlocutory order because plaintiff's claim was previously dismissed with prejudice and therefore the doctrine of *res judicata* applies. However, the record reveals that plaintiff's previous claim did not involve a final judgment on the merits but was dismissed based on lack of subject matter jurisdiction. As

this Court stated in *Foreman*, *res judicata* does not apply to a dismissal on the basis of lack of subject matter jurisdiction. Thus, the trial court correctly did not dismiss the case based on *res judicata*. All other issues on appeal are interlocutory and are dismissed. We therefore hold that this appeal is from an interlocutory order and is not properly before this Court.

DISMISSED.

Judges WALKER and HUNTER concur.

Report per Rule 30(e).