

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-1662

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

HULYA GARRETT,
Plaintiff,

v.

Iredell County
No. 08 CVD 1552

CHARLES W. BURRIS,
Defendant.

Appeal by plaintiff from order entered 6 May 2009 by Judge Edward L. Hedrick, IV in Iredell County District Court. Heard in the Court of Appeals 12 May 2010.

Gregory Hunt, Attorney at Law, PLLC, by Gregory Hunt, for plaintiff-appellant.

J. Elliott Field, Attorney at Law, by J. Elliott Field, for defendant-appellee.

GEER, Judge.

Plaintiff Hulya Garrett appeals from an order denying her claim for absolute divorce from defendant Charles W. Burris. Since nothing in the record indicates that defendant's counterclaims have been resolved, plaintiff's appeal is interlocutory. The trial court's order does not contain a certification pursuant to Rule 54(b) of the Rules of Civil Procedure, and plaintiff has failed to demonstrate that any substantial right is at stake. Consequently, we hold the appeal is not properly before this Court and dismiss the appeal as interlocutory.

Facts

Plaintiff filed a complaint on 6 May 2008 seeking postseparation support, alimony, equitable distribution, and absolute divorce from defendant. Although plaintiff and defendant had never been formally married, plaintiff contended the parties were married under the common law of Texas. On 29 May 2008, defendant filed an answer denying the material allegations of the complaint; alleging various defenses; and asserting counterclaims for summary eviction, conversion and claim and delivery, and abuse of process. Plaintiff filed a reply on 7 August 2008. On 17 October 2008, plaintiff filed a supplemental pleading asserting that the parties had lived apart since their August 2007 separation.

On 23 and 24 April 2009, the trial court held a hearing limited solely to the issue of absolute divorce. Following the hearing, the court entered an order on 6 May 2009, in which the court concluded plaintiff had failed to prove by a preponderance of the evidence that she and defendant, while in Texas, had a present agreement to be husband and wife. Consequently, the trial court denied plaintiff's claim for absolute divorce. Plaintiff appealed this order only.

Discussion

Although defendant has not challenged the Court's jurisdiction over this appeal, since it is a matter of jurisdiction, we are required to address whether plaintiff's appeal should be dismissed

as interlocutory. "An interlocutory order 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." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). This Court has explained that an order is interlocutory when it dismisses the claims of one party while leaving the claims of another pending. *See Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 38, 626 S.E.2d 315, 320 (holding appeal of dismissal of defendant's counterclaims was interlocutory when plaintiff's claims had yet to be tried), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006); *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 4, 362 S.E.2d 812, 815 (1987) (holding summary judgment in favor of defendants on plaintiff's claims did not adjudicate defendants' counterclaims, and, therefore, plaintiff's appeal was interlocutory).

Moreover, this Court has specifically found divorce decrees to be interlocutory when other claims or counterclaims remained pending. *See, e.g., Washington v. Washington*, 148 N.C. App. 206, 208, 557 S.E.2d 648, 650 (2001) (holding order granting divorce from bed and board was not final judicial determination of all claims raised in pleadings because issue of child custody remained undecided); *Hamilton v. Hamilton*, 36 N.C. App. 755, 759, 245 S.E.2d 399, 402 (1978) (holding decree of absolute divorce granted to husband on his counterclaim was interlocutory judgment that neither

terminated nor determined remaining issues arising from pleadings), *aff'd*, 296 N.C. 574, 251 S.E.2d 441 (1979).

Here, although the trial court's determination that there was no common law marriage may have disposed of plaintiff's remaining claims, the same is not true for defendant's counterclaims. The record does not indicate that those claims have ever been resolved. Plaintiff's appeal of the trial court's order denying an absolute divorce is, therefore, interlocutory.

Generally, "there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). There are two circumstances, however, in which a party may immediately appeal from an interlocutory order. *Id.* First, pursuant to Rule 54(b), "the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action." *Meherrin Indian Tribe v. Lewis*, ___ N.C. App. ___, ___, 677 S.E.2d 203, 206 (2009) (quoting *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174-75, 521 S.E.2d 707, 709 (1999)), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010). "Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Id.* (quoting *Rowe*, 351 N.C. at 175, 521 S.E.2d at 709).

The trial court in this case did not certify the order denying absolute divorce pursuant to Rule 54(b). Therefore, plaintiff must

show that a substantial right will be adversely affected if she is not able to appeal the order immediately. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253-54 (1994). "Our courts generally have taken a restrictive view of the substantial right exception[,] " placing on the appellant the burden of establishing the existence of a substantial right. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

In plaintiff's "Statement of the Grounds for Appellate Review," she asserts only: "The District Court Judge's judgment/order dismissing Ms. Garrett's complaint, and all claims contained therein, is a final judgment/order and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(c)." Plaintiff does not address the pending counterclaims and makes no argument as to the existence of any substantial right.

It is well established that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order[.]" *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. See also *FMB, Inc. v. Creech*, ___ N.C. App. ___, ___, 679 S.E.2d 410, 414 (2009) (dismissing appeal where appellant failed to show substantial right with respect to one claim and failed to argue substantial right as to remaining claims). Since plaintiff has failed to make any argument on appeal regarding the existence of a substantial right, she has not established a right to appeal from the order. *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254.

"If there is no right of appeal, it is the duty of an appellate court to dismiss the appeal on its own motion." *Stafford v. Stafford*, 133 N.C. App. 163, 164, 515 S.E.2d 43, 44, *aff'd per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999). "'The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.'" *Id.* (quoting *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985)). Accordingly, we dismiss this appeal.

Dismissed.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).