NO. COA01-409

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

NEAL CASKEY and
PAUL DELLINGER,
Petitioners,

v. Lincoln County
No. 00 SP 203

DANIEL L. GREEN and
JANE H. GREEN,
Respondents.

Appeal by respondents from order entered 27 December 2000 by Judge James W. Morgan in Lincoln County Superior Court. Heard in the Court of Appeals 23 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Charles J. Murray, for the State.

No brief filed for Neal Caskey and Paul Dellinger, petitioners, pro se.

Pendleton & Pendleton, P.A., by Wesley L. Deaton, for respondent-appellants.

HUDSON, Judge.

Daniel L. Green and Jane H. Green ("respondents") appeal from an order denying their motion to dismiss. The order is interlocutory, and respondents have failed to demonstrate that a substantial right will be affected if they are not given the right of immediate appeal. Accordingly, this appeal is dismissed.

The pertinent procedural history is as follows. On 11

September 2000, Neal Caskey and Paul Dellinger ("petitioners") filed a petition with the Clerk of the Lincoln County Superior Court pursuant to N.C. Gen. Stat. § 65-75 (1999). In it, they sought access to property owned by respondents, on which remains of their ancestors are allegedly buried. An earlier such petition had been dismissed by the Clerk for insufficiency of process.

On 26 September 2000, respondents filed a response to the 11 September 2000 petition, alleging seven defenses, of which only two are at issue in this appeal. Respondents asked the court to dismiss the petition on the basis of *res judicata* because the dismissal of the earlier petition constituted an adjudication on the merits. Additionally, respondents contended that the petition should be dismissed because N.C.G.S. § 65-75 is unconstitutional. The State appears in this case, pursuant to N.C. Gen. Stat. § 1-260 (1999), to defend the constitutionality of N.C.G.S. § 65-75. The Lincoln County Superior Court, finding that the earlier proceeding was not decided on the merits and that N.C.G.S. § 65-75 is not unconstitutional, denied the motion to dismiss. Respondents appeal.

The order denying respondents' motion to dismiss is clearly interlocutory. *See Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974) ("Many decisions of this Court hold that refusal of a Motion to Dismiss is not a final determination within the meaning of the statute and, therefore, is not appealable."). In general, there is no right to appeal from an interlocutory order. *See, e.g., Jeffreys v. Raleigh Oaks Joint*

Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). However, there are two circumstances under which a party may appeal an interlocutory order: "First, 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." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174-75, 521 S.E.2d 707, 709 (1999) (citing N.C.G.S. § 1A-1, Rule 54(b)). Second, "a party may appeal an interlocutory order where delaying the appeal will irreparably impair a substantial right of the party." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999); *see* N.C. Gen. Stat. §§ 1-277, 7A-27(d) (1999).[1]

Here, the trial court did not certify that there is no just reason to delay the appeal. Thus, an immediate appeal from the interlocutory order here is proper if delay would irreparably impair a substantial right of respondents. The party desiring an immediate appeal of an interlocutory order bears the burden of showing that such appeal is necessary to prevent injury to a substantial right. *See Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254.

Respondents argue that they are entitled to an immediate

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[1] North Carolina Rule of Appellate Procedure 28(b) was amended 18 October 2001 to add a new subsection, now 28(b)(4), which requires that the brief contain a statement of the grounds for appellate review; when an appeal is interlocutory, "the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." This amendment does not apply to briefs, as in this case, filed before the effective date.

appeal on two grounds. First, they cite *McCallum v. North Carolina Cooperative Extension Service*, 142 N.C. App. 48, 542 S.E.2d 227, *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001), in which this Court stated that "our Supreme Court has ruled that the denial of a motion for summary judgment based on the defense of *res judicata* . . . is immediately appealable." 142 N.C. App. at 51, 542 S.E.2d at 231. In *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993), the case upon which *McCallum* relies, our Supreme Court explained that "while '[t]he right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal, . . . the right to avoid the possibility of two trials on the same issues can be such a substantial right.'" *Id.* at 490-91, 428 S.E.2d at 160 (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)) (alterations in original). Subsequent to *McCallum*, we held that "denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999) (internal quotation marks omitted), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000).

Here, respondents argue that this action was previously determined on its merits, and *res judicata* applies. However, the previous action was dismissed for insufficiency of process, and respondents have not actually litigated the issues in the case.

Thus, they face neither the prospect of two trials nor the specter of inconsistent verdicts.

Respondents next assert that "the trial court's denial of [their] motion to dismiss based on the unconstitutionality of the statute . . . affects a substantial right." Respondents are correct that we have recognized an immediate right to appeal an interlocutory order when a constitutional right is affected. *See, e.g.*, *Shaw v. Williamson*, 75 N.C. App. 604, 331 S.E.2d 203, *disc. review denied*, 314 N.C. 669, 335 S.E.2d 496 (1985). The cases respondents have cited, however, involved a constitutional right that would have been lost or severely compromised without an immediate appeal. *See, e.g.*, *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 718-19, 504 S.E.2d 802, 806-07 (1998) (holding that gag order restricting parties' First Amendment right to communicate with others was immediately appealable); *Shaw*, 75 N.C. App. at 606-07, 331 S.E.2d at 204 (stating that without an immediate appeal, defendant's right against self-incrimination "could be lost beyond recall and his appeal at the end of the trial would be of no value"). Respondents have neither alleged nor demonstrated that an immediate appeal is necessary to protect a constitutional right.

Respondents have failed to show that the denial of their motion to dismiss affects a substantial right. Accordingly, this appeal is dismissed as interlocutory.

Appeal dismissed.

Judges THOMAS and JOHN concur.

Report per Rule 30(e).