

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-453

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

DAVID N. FLORES,
ALFREDO CONTRERAS,
and JUAN RIVERA,
Plaintiffs,

v.

Currituck County
No. 99-CVS-384

SOLTERO BALTIERRES ARCO
a/k/a SOLTERO BALTIERRES
ARCOS,
Defendant.

GOVERNMENT EMPLOYEES
INSURANCE COMPANY a/k/a
GEICO, INSURANCE CO.,
Unnamed Defendant.

Appeal by unnamed defendant from judgment entered 29 January 2001, by Judge William C. Griffin, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 30 January 2002.

Jones Marcari Russoto Walker & Spencer, by Donald W. Marcari, for plaintiffs.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr., and L. Phillip Hornthall, III, for defendant.

BIGGS, Judge.

This appeal arises out of the trial court's denial of the motion to dismiss by the unnamed defendant, Government Employee's Insurance Company (GEICO), pursuant to Rule 12(b)(2), (4) and (5). We conclude that this appeal is interlocutory and does not affect a substantial right. Accordingly, it must be dismissed.

On 22 August 1997, David Flores, Alfredo Contreras, and Juan Rivera (plaintiffs), and Soltero Baltieres Arco (defendant), were in an automobile accident involving three other vehicles while traveling on North Carolina Highway 168 in Currituck County. At the time of the accident, plaintiffs were passengers in a rental car driven by defendant. Defendant was uninsured.

Plaintiffs filed suit against the defendant for negligence on 4 November 1999. The complaint and summons were served through the North Carolina Commissioner of Motor Vehicles on 15 November 1999, and again on 27 June 2000. There is no evidence in the record that defendant ever personally received either the summons or complaint.

GEICO, plaintiffs' automobile insurer, made an appearance as an unnamed defendant and alleged uninsured motorist insurer and filed a response to the complaint. In that response, GEICO filed a motion to dismiss on behalf of defendant and GEICO, for lack of jurisdiction over the person, insufficiency of process and service of process, and for failure to state a claim upon which relief can be granted. GEICO was never served with process by plaintiffs. On 29 January 2001, the trial court denied GEICO's motion to dismiss pursuant to Rules 12(b) (2), (4), and (5). From this order, GEICO filed a notice of appeal on 2 February 2001.

Though GEICO sets forth three assignments of error in the record on appeal, those which it has failed to address in its brief are deemed abandoned pursuant to Rule 28(c) of the North Carolina Rules of Appellate Procedure.

GEICO's sole argument in its brief on appeal is that the trial court erred in denying its motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2), (4), and (5). Specifically, GEICO argues, that the court lacked jurisdiction over GEICO, and that there was insufficient process and insufficient service of process.

Ordinarily, an order denying a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b) is considered interlocutory and not affecting a substantial right, and consequently there is no right of immediate appeal therefrom. *Berger v. Berger*, 67 N.C. App. 591, 313 S.E.2d 825, *disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984); *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982); *Hart v. F. N. Thompson Const. Co.*, 132 N.C. App. 229, 511 S.E.2d 27 (1999). However, an immediate right to appeal from an order denying a motion to dismiss exists, pursuant to N.C.G.S. § 1-277 (b), which provides, that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." N.C.G.S. § 1-277(b) (1999). This Court has interpreted N.C.G.S. § 1-277(b) as allowing an immediate right of appeal only when the jurisdictional challenge is substantive rather than merely procedural. *Berger*, 67 N.C. App. 591, 313 S.E.2d 825 (1984). In *Berger*, we held that

[w]hile N.C.G.S. § 1-277(b) appears to authorize such right, it is our duty on appeal to examine the underlying nature of defendant's motion: If defendant's motion

raises a due process question of whether his contacts within the forum state were sufficient to justify the court's jurisdictional power over him, then the order denying such motion is immediately appealable under G.S. § 1-277(b). If, on the other hand, defendant's motion, though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, then the order denying such motion is interlocutory and does not fall within the ambit of G.S. § 1-277(b).

Berger, 67 N.C. App. at 595, 313 S.E.2d at 828-29, see also, *Cook v. Cinocca*, 122 N.C. App. 642, 471 S.E.2d 108 (1996) (court dismisses appeal as interlocutory where defendant argues that he was not served with a copy of the summons and complaint.)

GEICO's appeal in the case *sub judice* does not allege insufficient minimum contacts with North Carolina to establish personal jurisdiction as a matter of due process; rather, this appeal presents procedural issues with respect to plaintiffs' compliance with the Rules of Civil Procedure for issuance and service of process under Rules 12(b)(4) and (5). Accordingly, N.C.G.S. § 1-277(b) is inapplicable; thus, GEICO's appeal is premature and must be dismissed.

Appeal dismissed.

Judge WALKER dissents.

Judge MCGEE concurs.

Report per Rule 30(e).

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WALKER, Judge, dissenting.

I respectfully dissent from the majority opinion which concludes that this appeal is interlocutory and should be dismissed.

Our Supreme Court has held that when "there was no valid service of process, the [trial] court acquired no jurisdiction over defendant, . . . and defendant's motion to dismiss under Rule 12(b) on jurisdictional grounds should have been allowed by [the trial court]." *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974) (*citations omitted*). Thus, the courts have no personal jurisdiction over an unnamed defendant when there is a lack of any service of process and a lack of summons against it.

"[A]n appeal lies immediately from refusal by the trial court to dismiss a cause for want of jurisdiction over the person where the motion is made pursuant to G.S. 1A-1, Rule 12(b)(2)."

Chamberlin v. Chamberlin, 70 N.C. App. 474, 475, 319 S.E.2d 670, 671 (1984) (citing *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982)). Here, the unnamed defendant moved to dismiss for a lack of personal jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(2), by reason of the failure of the plaintiff to issue and serve it with summons. The trial court denied the motion. Thus, the unnamed defendant has an immediate right to appeal from that order.

The majority bases its conclusion that the defendant is not entitled to an immediate appeal on *Berger v. Berger*, 67 N.C. App. 591, 313 S.E.2d 825 (1984). In *Berger*, plaintiff issued a summons against the defendant and personally served him within the State. The defendant contended that plaintiff failed to strictly comply with Rule 3 of the Rules of Civil Procedure which deals with the commencement of a suit through the issuance of a summons; thus, he should be granted a motion to dismiss for lack of personal jurisdiction. *Berger*, 67 N.C. App. at 595-96, 313 S.E.2d at 828-29. This Court held that the defendant had no right to immediately appeal a denial of a motion to dismiss when the basis of the motion was the failure to comply with procedural aspects of sufficiency of service or process. *Id.*

However, here the unnamed defendant alleged more than a failure to comply with the procedural aspects of service of process. Instead, it asserts that the record fails to show that the alleged uninsured motorist carrier was ever served with a summons and complaint as required by N.C. Gen. Stat. § 20-

279.21(b)(3)a (1999). Thus, the unnamed defendant is entitled to an immediate appeal of the denial of its motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2), and this appeal is not interlocutory. Furthermore, this is a case where judicial economy is best served by the Court deciding the service issue at this juncture.