

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-524

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

LAURENCE B. WILSON, JR.,
and ELIZABETH B. WILSON,
Plaintiffs

v.

Carteret County
No. 00 CVS 786

MICHAEL TAYLOR,
Defendant

Appeal by defendant from order entered 19 February 2001 by Judge Jay D. Hockenbury in Carteret County Superior Court. Heard in the Court of Appeals 13 February 2002.

Kennedy Covington Lobdell & Hickman, L.L.P., by A. Lee Hogewood, III, for plaintiffs-appellees.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, Jr., for defendant-appellant.

WALKER, Judge.

Plaintiffs filed this action on 31 July 2000, seeking a judgment quieting title to certain real property located in their residential subdivision and for a declaratory judgment pursuant to N.C. Gen. Stat. § 1-253 declaring the validity of their right to use this property as a landing. Defendant answered and counterclaimed for a judgment declaring that he owned the real property in fee simple, or alternatively, that he had acquired title through adverse possession. Defendant also moved the trial

court to dismiss plaintiff's action for failing to join necessary parties pursuant to Rule 19 of the Rules of Civil Procedure. On 19 February 2001, the trial court denied defendant's motion and defendant appealed.

We note the real property in dispute in this case is the identical property at issue in *Hill, et. al. v. Taylor*, ___ N.C. App. ___, ___ S.E.2d. ___ (No. COA01-155, filed 19 March 2002). However, because the trial court's order in *Hill* addresses issues different from the one at issue here, we elect not to consolidate the cases for discussion.

We initially address whether defendant's appeal is properly before this Court. Generally, an order denying a motion to dismiss is not immediately appealable as it is interlocutory in nature. See *Thompson v. Norfolk Southern Ry. Co.*, 140 N.C. App. 115, 535 S.E.2d 397 (2000); *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 519 S.E.2d 540 (1999), *disc. rev. denied*, 351 N.C. 352, 542 S.E.2d 207 (2000). However, an interlocutory order may be appealed provided: (1) it affects a substantial right, or (2) it is final as to some but not all the claims or parties and the trial court certifies pursuant to Rule 54(b) that there is no just reason to delay the appeal. *Bartlett v. Jacobs*, 124 N.C. App. 521, 477 S.E.2d 693 (1996), *disc. rev. denied*, 345 N.C. 340, 483 S.E.2d 161 (1997); see also N.C. Gen. Stat. § 1A-1, Rule 54(b) (1999).

Defendant asserts that there are other individuals who are necessary plaintiffs to this lawsuit; therefore, the trial court's

order denying his motion to dismiss affects a substantial right. However, the denial of defendant's motion neither prevents him from raising the issue as a defense at trial nor prohibits him from moving to join any party he deems may be necessary for a proper determination of his counterclaim. See N.C. Gen. Stat. § 1A-1, Rule 12(h)(2)(1999) (permitting a defense for failure to join necessary parties "at the trial on the merits"). Moreover, this Court has previously held that the denial of a motion to dismiss for failure to join a necessary party does not by itself affect a substantial right. See *Fraser v. Di Santi*, 75 N.C. App. 654, 331 S.E.2d 217, *disc. rev. denied*, 315 N.C. 183, 337 S.E.2d 856 (1985); *Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

We conclude the trial court's denial of defendant's motion does not affect a substantial right. Furthermore, the trial court has not certified its order pursuant to Rule 54(b). Therefore, we conclude defendant's appeal is premature and must be dismissed.

Appeal dismissed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).