

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-778

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

SHIRLEY PEPPERS MERRITT,  
Plaintiff,

v.

Wake County  
No. 00 CVD 07791

DURHAM TAXICAB ASSOCIATION,  
INC., and GEBREEGZIABHER  
BERHE WANDEM,  
Defendants.

Appeal by plaintiff from judgment entered 12 March 2001, by Judge Alice C. Stubbs in Wake County Superior Court. Heard in the Court of Appeals 27 March 2001.

*E. Gregory Stott, for plaintiff-appellant.*

*Newsom, Graham, Hedrick & Kennon, by Joel M. Craig and Kenneth R. Murphy, III, for defendant-appellee.*

BIGGS, Judge.

This appeal arises from an order, taxing plaintiff and her counsel with defendants' attorney fees for failure to comply with a discovery request. We conclude that this appeal is interlocutory, does not affect a substantial right, and, therefore, must be dismissed.

On 12 July 2000, plaintiff filed a negligence action against defendants, Durham Taxicab Association and Gebreegziabher Berhe Wandem, requesting monetary damages for personal injuries she suffered as a result of an automobile accident which occurred on 7

January 2000. Plaintiff was a passenger in a vehicle which collided with the taxi driven by defendant Wandem.

Over the next several months, the parties conducted discovery and served responses and objections to their respective discovery requests. On 11 January 2001, defendants filed a Motion to Compel plaintiff to make discovery. On 16 January 2001, plaintiff filed two motions: (1) a Motion to Compel defendant to make discovery and (2) a Motion for Protective Order. On 19 February 2001, a hearing on all the motions was held. Upon consideration of the motions, the trial court (1) granted defendants' Motion to Compel; (2) granted plaintiff's first request in its Motion to Compel and denied its second request; and (3) denied plaintiff's Motion for Protective Order.<sup>1</sup> The trial court then taxed plaintiff and her counsel with the defendant's reasonable attorney fees and expenses incurred in connection with the foregoing motions. From entry of the order assessing costs, plaintiff appeals.

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Plaintiff argues first, that the filing of this notice of appeal is appropriate in that the appeal is not interlocutory. We disagree.

This Court has repeatedly held that an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the

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<sup>1</sup>Though the trial court's order refers to two Motions to Compel filed by the plaintiff on 16 January 2001, the record only has evidence that one such motion was filed. Also, the order references a Motion for Protective Order and Motion for Sanctions, yet the record contains no Motion for Sanctions.

ruling is not reviewed before final judgment. *Cochran v. Cochran*, 93 N.C. App. 574, 378 S.E.2d 580 (1989); *Benfield v. Benfield*, 89 N.C. App. 415, 366 S.E.2d 500 (1988); *Dunlap v. Dunlap*, 81 N.C. App. 675, 344 S.E.2d 806, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). However, where a party is adjudged to be in contempt for noncompliance with a discovery order, or has been assessed with certain other sanctions, the order is immediately appealable since it affects a substantial right under N.C.G.S. § 1-277 (1999) and N.C.G.S. § 7A-27(d) (1) (1999). See *Willis v. Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976) (when civil litigant is adjudged in contempt for failure to comply with discovery order, the order is immediately appealable).

In the present action, the order from which plaintiff appeals does not hold either party in contempt and does not impose sanctions. Rather, in its discretion, pursuant to Rule 37(a)(4) of the Rules of Civil Procedure, the trial court ordered:

the reasonable fees and expenses incurred in connection with the foregoing motions should be apportioned as follows: Plaintiff and Plaintiff's attorney . . . shall pay to Defendants' attorney . . . the sum of \$300.00 for Defendant's reasonable attorney fees and expenses in connection with Defendants' Motion to Compel within 30 days of the date of this Order.

The portion of the order requiring plaintiff to pay defendants' attorney's fees is authorized by N.C.G.S. § 1A-1, Rule 37(a)(4) (1999). *Graham v. Rogers*, 121 N.C. App. 460, 466 S.E.2d 290 (1996). An order granting attorney's fees has been held by this Court to be interlocutory because it does not finally

determine the action, nor affect a substantial right "which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Cochran*, 93 N.C. App. at 577, 378 S.E.2d at 582.

We hold this appeal is premature and must be dismissed; thus, we decline to address plaintiff's remaining assignments of error.

Appeal dismissed.

Judges WYNN and MCCULLOUGH concur.

Report per Rule 30(e).