NO. COA02-444

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

TAMMY GABRIEL JOHNSON,
Plaintiff,

v.

Catawba County
No. 98 CVD 126

RONALD GENE JOHNSON,
Defendant.

Appeal by defendant from order filed 31 December 2001 by Judge Jonathan L. Jones in Catawba County District Court. Heard in the Court of Appeals 30 December 2002.

Sigmon, Sigmon, Isenhower & Poovey, by W. Gene Sigmon, for plaintiff appellee.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant appellant.

GREENE, Judge.

Ronald Gene Johnson (Defendant) appeals from an order filed 31 December 2001 denying in part his motion to set aside a judgment entered against him.

On 14 February 1998, Tammy Gabriel Johnson (Plaintiff) filed a complaint against Defendant seeking, among other things, equitable distribution of marital property. Defendant filed an answer dated 5 February 1998. On 20 December 1999, following a hearing on or about 7 July 1999, the trial court entered a judgment

finding the only marital assets were a mobile home and residential lot and the amount of marital debts paid by Plaintiff exceeded Defendant's interest. The trial court further found Defendant suffered from a cocaine addiction and wasted marital income and assets on illegal drugs. Based on these findings, the trial court concluded a fifty-fifty distribution would be inequitable and awarded Plaintiff the entire interest in the mobile home and residential lot. On 3 May 2000, Defendant filed an amended answer and on 6 October 2000, filed a motion to set aside judgment alleging he was not properly served with notice of the date of hearing and the trial court's judgment and was thus not present at the hearing, resulting in an *ex parte* judgment. The trial court denied the motion on 29 March 2001. Defendant gave notice of appeal to this Court but failed to perfect the appeal.

On 6 June 2001, Defendant again moved to set aside the trial court's 20 December 1999 judgment. This motion alleged certain property denominated "marital property" by Plaintiff's equitable distribution affidavit was, in fact, not marital property. In support of his motion, Defendant made a showing the residential lot, upon which the mobile home was located, was purchased before the marriage and held by the parties as tenants in common. The trial court subsequently entered a 31 December 2001 order allowing in part and denying in part Defendant's motion. The trial court set aside the portion of the 20 December 1999 judgment requiring transfer of Defendant's interest in the residential lot but refused to set aside the remainder of the equitable distribution judgment.

The trial court also provided the matter would be calendared for a hearing to allow further testimony as to the amounts paid or contributed by the respective parties to the purchase of the real estate. After such a hearing, the trial court stated, it "w[ould] impose an adequate remedy for the parties; giving each part credit for the value of the party of realty, which is separate in character."

The dispositive issue is whether the trial court's 31 December 2001 order affects a substantial right.

Although not raised by either party, we note the 31 December 2001 order is interlocutory. *See Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 334-35, 299 S.E.2d 777, 780 (1983) (a trial court's order that does not finally determine the issues presented, but instead directs some further proceeding, is not a final judgment and is interlocutory). While generally not immediately appealable, interlocutory orders may, however, be immediately appealable under certain circumstances. *See* N.C.G.S. §§ 1-277, 1A-1, Rule 54(b), 7A-27(d) (2001).

This matter was not certified by the trial court pursuant to Rule 54(b) as being immediately appealable. *See* N.C.G.S. § 1A-1, Rule 54(b). Therefore, the only basis upon which this appeal may rest is that the judgment from which the parties appeal affects a substantial right. *See* N.C.G.S. §§ 1-277(a), 7A-27(d)(1) (2001). Under sections 1-277(a) and 7A-27(d)(1), an otherwise interlocutory judgment may be appealed upon a showing: (1) the judgment affects

a substantial right and (2) the deprivation of the right will potentially work injury to the appellant if not corrected before appeal of the final judgment. *See Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Appellate Rule 28(b)(4), which was added by amendment effective 31 October 2001, requires a party appealing from an interlocutory order to include a statement in its brief showing "the challenged order affects a substantial right" absent immediate review by this Court. N.C.R. App. P. 28(b)(4). Moreover, this Court has stated:

> It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Failure to make such a showing subjects an appeal to dismissal. *Id.*

In this case, Defendant has failed to include in his brief to this Court the requisite statement to show the 31 December 2001 order affects a substantial right pursuant to Appellate Rule 28(b)(4). Moreover, we discern no substantial right that will be affected absent immediate appeal. The only injury Defendant will suffer if he is not permitted immediate appellate review of the issue presented is the necessity of additional proceedings before the district court "to allow testimony and receive evidence as to amounts paid or contributed by the respective parties" to the purchase of the residential lot. It is well settled the avoidance

of a trial or an administrative hearing is not a substantial right entitling a party to immediate appellate review. *See Blackwelder*, 60 N.C. App. at 335, 299 S.E.2d at 780.

Thus, the 31 December 2001 order does not deprive Defendant of a substantial right. Accordingly, we must dismiss this appeal as interlocutory.

Dismissed.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).