An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA03-1411

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2004

DUNGAN & MITCHELL, P.A.,
a North Carolina Professional
Association,
Plaintiff,
v. Buncombe County
No. 01 CVD 1930

DILLINGHAM CONSTRUCTION
COMPANY, INC., a North Carolina
Corporation, DAVID DILLINGHAM,
and JUDY DILLINGHAM,
Defendants.

Appeal by defendants from judgment entered 10 February 2003 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 25 August 2004.

Dungan & Associates, P.A., by Shannon Lovins, for plaintiff-appellee.

Michael E. Casterline, for defendants-appellants.

GEER, Judge.

The plaintiff law firm, Dungan & Mitchell, P.A., sued defendants Dillingham Construction Company, Inc., David Dillingham, and Judy Dillingham, for unpaid attorney's fees. After the trial court entered summary judgment on liability, a jury found that defendants owed plaintiff $30,621.48. Defendants have argued on appeal that the trial court erred in granting summary judgment and in its instructions to the jury. We hold that defendants failed to

properly notice appeal from the summary judgment decision and that the trial court was not required to give defendants' proposed instructions.

Factual Background

Defendant David Dillingham has been in the construction business since approximately 1966. He is the president and treasurer of defendant Dillingham Construction Company, Inc.; his wife, defendant Judy Dillingham, helps with the company. In 1998, Mr. Dillingham hired Robert Dungan of the plaintiff law firm in connection with two matters involving First Union. First, Dillingham Construction Company was two years in arrears on a First Union note personally guaranteed by both David and Judy Dillingham. Mr. Dillingham acknowledged in his deposition that he and his wife expected "to be sued personally and corporately as well." Second, Mr. Dillingham had just discovered that an employee of his company had repeatedly cashed company checks with First Union in violation of the company's corporate resolution on file with First Union. Additionally, Mr. Dillingham later retained plaintiff in connection with a series of lawsuits arising out of a construction project at Appalachian State University, where his company was serving as a grading contractor.

Plaintiff sent defendants monthly invoices for the services rendered in these matters. Initially, defendants paid the invoices without question, but they ceased paying defendants after July 1999. After plaintiff withdrew from representation of defendants for non-payment of fees, defendants sought fee dispute resolution

with the North Carolina State Bar. On 13 February 2001, the State Bar's Client Assistance Committee notified Mr. Dillingham by letter that the Committee had declined to mediate the matter based on its conclusion that the fees charged were reasonable.

On 6 April 2001, plaintiff filed a complaint against defendants, alleging that defendants owed plaintiff $30,621.48 in fees. On 4 June 2001, defendants answered, admitting that "some Defendants engaged Plaintiff's services for the purpose of representation in several legal matters." The answer also admitted that "Plaintiff did attempt to provide services to certain Defendants on certain legal matters," but denied owing the claimed debt. The answer did not assert any counterclaims. The lawyer who filed the answer ultimately withdrew from representation of defendants. On 3 September 2002, his successor was also allowed to withdraw, but the trial court ordered "that the trial of this matter not be delayed by [counsel's] withdrawal or to otherwise allow Defendants to retain other counsel."

On 27 November 2002, plaintiff filed a motion for summary judgment. Although defendants had been served with a Notice of Hearing, indicating that the motion would be heard on 9 December 2002, defendants failed to appear at the summary judgment hearing or otherwise submit evidence in opposition to the motion. The trial court, after reviewing the Dillinghams' depositions (on its own initiative), granted partial summary judgment against defendants "jointly and severally on the issue of liability," but

denied summary judgment on the issue of damages. This order was filed on 10 December 2002.

On 12 December 2002, defendants filed a motion requesting ten days' additional time to file opposing affidavits for the summary judgment hearing. The motion stated that defendants were not represented by counsel and that the notice of hearing "was served by mail on the Wednesday before Thanksgiving and due to the holiday and the vacation of David and Judy Dillingham, defendants have been unable to prepare opposing affidavits." The court denied the motion on the same day.

Beginning on 29 January 2003, the parties (all represented by counsel) tried the issue of damages before a jury in Buncombe County District Court, with the Honorable Shirley H. Brown presiding. A single issue was submitted to the jury: "What Amount, if any, do the Defendants owe the Plaintiff on account?" The jury found that defendants owed plaintiff $30,621.48. On 10 February 2003, Judge Brown entered a judgment for this amount together with $7,822.04 in interest. On 7 March 2003, defendants filed notice of appeal.

I

As their first assignment of error, defendants contend that the trial court erred in granting partial summary judgment for plaintiff. We must decide whether this issue is properly before the Court. Defendants' notice of appeal, filed by trial counsel, stated:

> COMES NOW the Defendants, by and through undersigned counsel, and hereby gives Notice

> of Appeal to the North Carolina Court of Appeals from the Judgment signed on the 6th day of February, 2003, and filed and entered on the 10th day of February, 2003, by the Honorable Shirley H. Brown, Judge Presiding over Superior Court [sic] of Buncombe County, entering Judgment in favor of the Plaintiff.

The notice of appeal thus failed to specifically appeal from the trial court's summary judgment order entered on 10 December 2002.

Proper notice of appeal requires that the appealing party "designate the judgment or order from which appeal is taken and the court to which appeal is taken . . . ." N.C.R. App. P. 3(d). "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). Our Court has held that a mistake in designating the judgment or in designating the part appealed from, if only a portion is designated, should not result in loss of the appeal, so long as the court is able fairly to infer an intent to appeal from a specific judgment and the appellee is not misled by the mistake. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990). Here, even if we construe defendants' notice of appeal liberally, it does not give rise to any inference of an intent to appeal the summary judgment order.

N.C. Gen. Stat. § 1-278 (2003) provides another means by which an appellate court may obtain jurisdiction to review an order not included in a notice on appeal. It states: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." This Court has held that "[a]ppellate review pursuant to G.S. § 1-278 is proper

under the following conditions: '(1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.'" *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59 (2000) (quoting *Gaunt v. Pittaway*, 135 N.C. App. 442, 445, 520 S.E.2d 603, 606 (1999)), *appeal dismissed and disc. review denied*, 353 N.C. 370, 547 S.E.2d 2 (2001). All three conditions must be met. *Id.* at 642, 535 S.E.2d at 59.

In *Gaunt*, the appellant filed a notice of appeal from the trial court's order granting summary judgment, but did not, in the notice of appeal, mention the trial court's order granting a motion to dismiss one cause of action. After concluding that "[t]he record in the case before us . . . reflects nothing that could be construed as an objection by plaintiffs to the orders entered by the trial court prior to [the summary judgment order]," 135 N.C. App. at 446, 520 S.E.2d at 606, the Court held that "[p]laintiffs' request for appellate review of the orders entered prior to [the summary judgment order] under N.C.G.S. § 1-278 is immediately defeated for plaintiffs' failure to object to the orders . . . ." *Id.* at 447, 520 S.E.2d at 607.

After reviewing the record on appeal and the transcript of the trial proceedings in this case, we have been unable to identify any objection to the trial court's summary judgment order or any other act otherwise providing notice of an intent to appeal that order. *Compare Brooks*, 139 N.C. App. at 642, 535 S.E.2d at 59 ("Wal-Mart

registered its objection at trial to the . . . order when entered, thus preserving the issue for appellate review. . . . In short, plaintiff indisputably was put on notice that Wal-Mart intended to question on appeal [the order at issue] . . . ."). As in *Gaunt*, the lack of any objection and the failure to include the order in the notice of appeal precludes this Court from reviewing the summary judgment order. We are bound by *Brooks* and *Gaunt*. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("We hold . . . that a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court."). We thus do not have jurisdiction to consider defendants' first assignment of error addressing the trial court's summary judgment order.

II

Defendants' second assignment of error contends that the trial court erred in failing to give their proffered jury instructions. On appeal, this Court considers a jury charge contextually and in its entirety. *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002). The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. *Id.* The party asserting error bears the burden of showing "that such error was likely, in light of the entire charge, to mislead the jury." *Id.*

Defendants requested that 14 special instructions be given to the jury (numbered 1(a) through 1(n)). Instruction 1(a) — informing the jury (1) that the court had already found that defendants retained plaintiff and that plaintiff provided services to defendants and (2) that the jury was to decide "the amount of money, if any, owed to the Plaintiff for the services it provided Defendants" — is essentially identical to the instruction actually given. Defendants have shown no reason why their particular instruction should have been given.

Instructions 1(b), (d), (e), (f), (g), (h), and (i) all seek to have the jury instructed with the pattern jury instructions regarding the elements for contract formation, including the definition of a contract, the requirement of mutual assent and consideration, and the means by which mutual assent may be proven. Defendants argue that the trial court, by limiting the issue to the amount owed to plaintiff, "ignored the essential dispute between the parties according to the assertions in their pleadings and according to the evidence each presented at trial." Since, however, the trial court had granted summary judgment on the question of liability and the trial related only to the question of how much defendants owed plaintiff, the trial court properly declined to instruct the jury regarding the requirements for proving a contract.

Proposed instructions 1(c), (j), and (k) set out the fact that the parties had differing contentions regarding the amount to be paid, including plaintiff's contention that the agreement provided

for hourly fees and defendants' contention that they had agreed on a flat fee for some work and an hourly fee for other work. A trial court is not, however, required to state the parties' contentions. *N.C. Bd. of Transp. v. Rand*, 299 N.C. 476, 483, 263 S.E.2d 565, 570 (1980) ("Indeed, the trial court is not required to state the contentions of the parties at all."); *York v. N. Hosp. Dist. of Surry County*, 88 N.C. App. 183, 191, 362 S.E.2d 859, 865 (1987) ("The trial court is not required to state the contentions of the parties . . . ."), *disc. review denied*, 322 N.C. 116, 367 S.E.2d 922 (1988).

Defendants have not specifically argued why the trial court should have given proposed instructions 1(l), (m), and (n) and, therefore, we need not address those instructions. We note, however, that proposed instruction 1(l) sought to have the jury instructed regarding *quantum meruit*. Since the court had already found that a contract existed, an award based on *quantum meruit* was not permissible. *Maxwell v. Michael P. Doyle, Inc.*, __ N.C. App. __, __, 595 S.E.2d 759, 765 (2004) ("[R]ecovery in *quantum meruit* is not, in any event, available when, as here, there is an express contract."). Proposed instructions 1(m) and (n) seek to assert a claim for legal malpractice even though defendants' answer did not allege a counterclaim for legal malpractice. Accordingly, the trial court properly declined to use these proposed instructions.

In short, defendants have failed to demonstrate that the trial court was required to give their requested instructions.

Defendants have not argued any other basis for setting aside the jury verdict. We, therefore, hold that there was no error.

No error.

Judges HUNTER and LEVINSON concur.

Report per Rule 30(e).