

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1621

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

JOSEPH HORRY, JR.,
Plaintiff,

v.

Durham County
No. 04 CVS 5634

DAVID H. WOODBURY,
Individually, and as the
Executor of the Estate of
Ruth N. Horry,
Defendant.

Appeal by defendant from an order entered 21 September 2005 by Judge Steve A. Balog in Durham County Superior Court. Heard in the Court of Appeals 24 July 2006.

Brady, Nordgren, Morton & Malone, PLLC, by Travis K. Morton, for plaintiff-appellee.

Marsh & Marsh, by William A. Marsh, III, for defendant-appellant.

MARTIN, Chief Judge.

This cause of action arises from allegations that David H. Woodbury, Individually, and as the Executor of the Estate of Ruth N. Horry ("defendant") engaged in improper conduct while acting under a power of attorney for Ruth N. Horry and while serving as the executor of the Estate of Ruth N. Horry. Joseph Horry, Jr. ("plaintiff"), as the sole heir under the Last Will and Testament of Ruth N. Horry dated 20 July 1995, brought this action against

defendant seeking compensatory and punitive damages for defendant's allegedly improper conduct. In his responsive pleading, defendant moved to dismiss plaintiff's claim for punitive damages pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 9 August 2005, after discovery had been exchanged between the parties, plaintiff filed a motion for summary judgment seeking judgment in plaintiff's favor as to all claims alleged in the complaint. Thereafter, defendant also filed a motion for summary judgment. By order dated 21 September 2005, the trial court granted in part, and denied in part, plaintiff's motion for summary judgment; granted in part, and denied in part, defendant's motion for summary judgment; and denied defendant's Rule 12(b)(6) motion to dismiss plaintiff's claim for punitive damages. Defendant appeals.

Although the parties do not raise the issue, we must first consider, *sua sponte*, whether defendant's appeal is properly before this Court. See *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980) ("if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties"). "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quoting *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)). Further, the trial court's denial

of a motion for summary judgment is an interlocutory order from which an appeal generally cannot immediately be taken. *Lovelace v. City of Shelby*, 153 N.C. App. 378, 381, 570 S.E.2d 136, 138, *disc. review denied*, 356 N.C. 437, 572 S.E.2d 785 (2002).

There are, however, two means by which an interlocutory order may be immediately appealed: (1) the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) (2006); or (2) the order "affects a substantial right of the appellant that would be lost without immediate review." *McIntyre v. McIntyre*, ___ N.C. App. ___, ___, 623 S.E.2d 828, 831 (2006) (citation omitted). These rules are "designed to prevent fragmentary and premature appeals . . . and ensure trial divisions fully dispose of a case before an appeal can be heard." *Bailey*, 301 N.C. at 209, 270 S.E.2d at 434. Here, the trial court did not certify its order pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. As such, this interlocutory order is reviewable only if it affects a substantial right. When an appeal is interlocutory, the appellant must include in his statement of grounds for appellate review "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4) (2006).

Defendant failed to include any statement of the grounds for appellate review in his brief and does not address any substantial right he might lose absent immediate appellate review. As this Court has previously 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, 115 N.C. App. at 380, 444 S.E.2d at 254. Because defendant has failed to carry his burden of showing his appeal affects a substantial right, we dismiss his appeal. *Id.*

Appeal dismissed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).