An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-676

NORTH CAROLINA COURT OF APPEALS

Filed: 21 February 2006

JOINT REDEVELOPMENT COMMISSION
OF THE COUNTY OF PASQUOTANK AND
THE CITY OF ELIZABETH CITY,
NORTH CAROLINA,
Plaintiff

v.

Pasquotank County
No. 00 CVS 641

MARY JACKSON-HEARD and
BARBARA SEAFORTH,
Defendants

Appeal by defendants from order entered 9 February 2005 by Judge J. Richard Parker in Pasquotank County Superior Court. Heard in the Court of Appeals 6 February 2006.

Hornthal, Riley, Ellis & Maland, L.L.P., by Donald I. McRee, Jr., for plaintiff-appellee.

Mary F. Jackson-Heard and Barbara S. Seaforth, pro se defendants-appellants.

MARTIN, Chief Judge.

Defendants appeal from an order allowing plaintiff's motion to strike their counterclaim. For the reasons set forth below, we dismiss their appeal.

On 11 September 2000, plaintiff Joint Redevelopment Commission of the County of Pasquotank and City of Elizabeth City ("the Commission") filed a complaint, declaration of taking, and notice

of deposit condemning a 4,012-square-foot parcel of land owned by defendants and located in Pasquotank County. Defendants filed their answer to the complaint on 15 November 2000. More than four years later, on 19 November 2004, defendants filed a "Counterclaim" against the Commission, naming as additional counterclaim-defendants Pasquotank County, Pasquotank County Board of Commissioners, Elizabeth City, and the City Counsel of Elizabeth City. In their counterclaim, defendants alleged a conspiracy among the counterclaim-defendants "to make the property lose its economic value" through a series of racially discriminatory re-zoning, annexation, and development activities in violation of defendants' rights under the United States Constitution and the Civil Rights Act of 1866.

Plaintiff moved to strike the counterclaim based on defendants' failure to comply with the requirements of N.C. Gen. Stat. § 1A-1, Rules 13(f) and 15(a) for amending their answer to include a counterclaim. The trial court heard the motion on 18 January 2005. In its order allowing the motion, the court found that defendants' answer filed 15 November 2000 did not include their counterclaim against plaintiff or any third party, as required by N.C. Gen. Stat. § 40A-25 (2005). The court noted that defendants filed their counterclaim "four years following the filing of their Answer," but failed to "file a motion seeking an order from this court allowing the filing of a counterclaim by amendment upon showing . . . oversight, inadvertence or excusable neglect." Regarding the consequences of their delay, the court

found as follows:

> 4. On September 3, 2003, the Honorable Dwight L. Cranford entered a Discovery Scheduling Order requiring the completion of all discovery in this matter by February 15, 2004.
>
> 5. As appears from the record, an Administrative Order was entered on November 29, 2004 setting this matter for jury trial at the May 16, 2005 civil session of Pasquotank County Superior Court.
>
> 6. Allowing the Defendants' counterclaim will likely require the reopening of discovery in order to allow the Plaintiff, the County of Pasquotank and the City of Elizabeth City the opportunity to determine any affirmative defenses each may have and to determine the basis for the allegations set forth in the Defendants' counterclaim.

Based upon these findings, the court concluded as follows:

> 1. Allowing the Defendants' counterclaim setting forth for the first time allegations that Plaintiff, and other nonparties, have discriminated against the Defendants will unduly prejudice the Plaintiff by requiring the Plaintiff to defend a claim in addition to the claim now pending, will require that the Plaintiff expend additional resources to defend against the Defendants' new allegations and will delay the trial of this matter.
>
> 2. The Defendants have failed to comply with Rule 13(f) and Rule 15(a) of the Rules of Civil Procedure requiring that prior to filing a counterclaim or amendment to pleadings a party seek leave of the court.
>
> 3. The Defendants have not demonstrated that their failure to amend their Answer to add the proposed counterclaim was due to oversight, inadvertence or excusable neglect.

Defendants filed timely notice of appeal from the order.

In seeking immediate review of the interlocutory order striking their counterclaim, defendants maintain that the order

threatens a substantial "right to avoid another trial involving the same issues." While acknowledging that they did not file a motion seeking leave of court to amend their answer to include the counterclaim, defendants aver that they faxed a letter to plaintiff's counsel giving notice of the counterclaim on 26 September 2004 and did not receive a response. In their brief to this Court, defendants present a history of the property and of the alleged actions by the counterclaim defendants which, they claim, "made Defendants' property worthless." They accuse the counterclaim-defendants of "a history of racial discrimination" resulting in "a net loss of land to African Americans" and a systematic devaluation of property located in the Fairgrounds Community of Pasquotank County.

Because it did not resolve plaintiff's complaint for condemnation of defendants' property, the order striking defendants' counterclaim is a non-final, interlocutory order. A right of immediate appeal lies from an interlocutory order only if the order either (1) disposes of one or more claims or parties and is certified for immediate appeal by the trial court under N.C. Gen. Stat. § 1S-1, Rule 54(b), or (2) threatens a substantial right of the appealing party absent review prior to a final determination on the merits. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994); N.C. Gen. Stat. §§ 1-277, 7A-27(d) (2005). A party taking an interlocutory appeal must demonstrate "'appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review

those grounds.'" *Arnold v. City of Asheville*, __ N.C. App. __, __, 610 S.E.2d 280, 282 (2005) (quoting *Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 685, 513 S.E.2d 598, 600 (1999), *aff'd*, 351 N.C. 349, 524 S.E.2d 804 (2000)).

The trial court did not certify its order for immediate appeal under Rule 54(b). Therefore, defendants must show the order affects a substantial right which cannot be preserved by an appeal from the final judgment. "The burden is on the appealing party to establish that a substantial right will be affected." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000); N.C.R. App. P. 28(b)(4) (requiring interlocutory appellant to state "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right").

Although defendants did not file a motion to amend their answer, the order striking their counterclaim is in the nature of a denial of a motion to amend a pleading more than thirty days after service under N.C. Gen. Stat. § 1A-1, Rule 15(a) (2005). Generally, "orders denying a motion to amend pleadings are interlocutory and do not affect a substantial right." *Tiber Holding Corp. v. DiLoreto*, __ N.C. App. __, __, 613 S.E.2d 346, 348, *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2005). When a defendant moves to amend an answer to include a compulsory counterclaim under N.C. Gen. Stat. § 1A-1, Rule 13(a), however, an order denying the motion is deemed to affect a substantial right giving rise to a right of immediate appeal. *See Hudspeth v.*

Bunzey, 35 N.C. App. 231, 234, 241 S.E.2d 119, 121, *disc. rev. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978).

Defendants do not claim or show that their counterclaim was compulsory. Instead, they rely upon a conclusory assertion of a substantial "right to avoid another trial involving the same issues." *See, e.g.*, *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). While avoidance of two trials can constitute a substantial right, this is true "'only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.'" *Turner*, 137 N.C. App. at 142, 526 S.E.2d at 670 (quoting *Green*, at 608, 290 S.E.2d at 596). Defendants do not explain how the trial court's order threatens such an outcome; nor do they suggest any common issues of fact which are shared by plaintiff's condemnation action and their counterclaim.

> 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 defendants have failed to satisfy their burden of establishing grounds for appellate review under N.C.R. App. P. 28(b)(4), we dismiss their appeal as interlocutory.

We note that the argument offered by defendants in their brief to this Court lacks citation to any relevant authority or any legal

analysis that would support a finding of error by the trial court. Therefore, their appeal is also subject to dismissal for non-compliance with N.C.R. App. P. 28(b)(6). *See, e.g., Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (noting that appellate rules are mandatory and that non-compliance may result in dismissal). Finally, we note that the trial court did not abuse its discretion in striking the counterclaim, in light of defendants' non-compliance with N.C. Gen. Stat. § 1A-1, Rule 15(a), and the court's uncontested findings of prejudice arising from their four-year delay in asserting the counterclaim. *See Draughon v. Harnett Cty Bd. of Educ.*, 166 N.C. App. 464, 467, 602 S.E.2d 721, 724 (2004).

Dismissed.

Judges BRYANT and GEER concur.

Report per Rule 30(e).