

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-13

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

CHRIS SAMS,
Plaintiff,

v.

Buncombe County
No. 05 CVD 842

ROBERT SAMS,
BETTY FORD SAMS,
Defendant.

Appeal by Defendant Robert H. Sams, Jr. from an order entered 17 August 2005 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 24 July 2006.

Carol B. Andres for plaintiff-appellee.

Mary Elizabeth Arrowood for defendant-appellant.

MARTIN, Chief Judge.

Chris Sams ("plaintiff") and Robert H. Sams, Jr. ("defendant") were married to one another in May 1995. On 16 November 2000, plaintiff filed an action against defendant in Buncombe County District Court, Case No. 00 CVD 5943, seeking, *inter alia*, an equitable distribution of marital property. Defendant filed an answer and counterclaim seeking, *inter alia*, an equitable distribution of marital property. No action for divorce was ever filed in the case and on 27 August 2001, the parties filed a joint

voluntary dismissal of all claims pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

More than three years later, on 24 February 2005, plaintiff filed an action against defendant seeking a divorce and alleging claims for child custody and equitable distribution of marital property. The parties were divorced on 7 June 2005. Thereafter, on 8 August 2005, defendant filed a motion to dismiss plaintiff's equitable distribution claim. In his motion, defendant argued the equitable distribution claim should be dismissed because plaintiff had voluntarily dismissed her first equitable distribution claim in Buncombe County District Court Case No. 00 CVD 5943, and plaintiff failed to file her second equitable distribution claim within one year after the voluntary dismissal of her first equitable distribution claim.

By order entered 17 August 2005, the trial court denied defendant's motion to dismiss. Although a copy of the divorce judgment is not included in the record, the trial court expressly stated in its order denying defendant's motion to dismiss that plaintiff's equitable distribution and custody claims were severed from the judgment of divorce and reserved for hearing on a later date.

The issue dispositive of this appeal is whether defendant's appeal should be dismissed as interlocutory. Here, defendant is appealing from the trial court's denial of his motion to dismiss plaintiff's claim for equitable distribution. Ordinarily, a trial court's denial of a motion to dismiss is an interlocutory order

from which there is no right of appeal. *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 629, 347 S.E.2d 369, 373 (1986). 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); and (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).

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 order is reviewable only if it affects a substantial right. The question of whether an interlocutory appeal affects a substantial right must be considered in light of the "particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Sharpe v. Worland*, 351 N.C. 159, 162-63, 522 S.E.2d 577, 579 (1999) (citations omitted), *disc. review denied*, 352 N.C. 150, 544 S.E.2d 228 (2000); *see also Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("Whether an interlocutory appeal affects a substantial right is determined on a case by case basis.") "Our courts generally have taken a restrictive view of the substantial right exception[,]" and "[t]he burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Id.* (citations omitted). In addition, 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).

Here, defendant's brief to this Court does not contain a statement of the grounds for appellate review as required by Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure. Indeed, the only reference defendant makes as to whether this appeal affects a substantial right is in the conclusion of his appellate brief. There, defendant summarily states he "seeks an order finding that this matter affects a substantial right of [d]efendant and allowing this appeal to be heard at this time to avoid the necessity of a full equitable distribution trial" We conclude this conclusory statement does not satisfy defendant's burden of showing this appeal affects a substantial right. "Further, this Court has consistently stated that avoidance of a rehearing or trial is not a substantial right entitling a party to an immediate appeal." *McIntyre*, ___ N.C. App. at ___, 623 S.E.2d at 832 (citation omitted); *Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003). Because defendant has failed to meet his burden of identifying a substantial right which would be affected were this Court to decline review of the instant appeal, the appeal must be dismissed as interlocutory. *McIntyre*, ___ N.C. App. at ___, 623 S.E.2d at 832.

Appeal dismissed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).