

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-632

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

SHIRLEY THOMAS CURRIN,
Plaintiff,

v.

Wake County
No. 05 CVS 5613

SUSAN MARIE BRISTOL and
JOHN J. SANTILLI,
Defendants.

Appeal by plaintiff and defendants from orders entered 9 December 2005 and 12 December 2005 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 7 February 2007.

Womble Carlyle Sandridge & Rice, PLLC, by John C. Cooke and Elizabeth T. Smith, for plaintiff.

Vining & Associates, PLLC, by Steven J. Vining, for defendants.

GEER, Judge.

Defendants Susan Marie Bristol and John J. Santilli appeal from an order granting partial summary judgment to plaintiff Shirley Thomas Currin on the parties' cross-motions for summary judgment and an order denying defendants' motion for reconsideration. Plaintiff has filed notice of cross appeal, although he contends that defendants' appeal is an improper interlocutory appeal. We agree with plaintiff. Because this

appeal is interlocutory and because defendants have failed to identify a "substantial right" that will be lost absent immediate review, we dismiss the appeal.

Facts

Plaintiff and defendants were partners in a veterinary practice known as Mayfair Animal Hospital, LLP. On 1 January 1999, the partners entered into a written partnership agreement. Among other matters, the agreement governed the withdrawal of partners and the valuation of the withdrawing partner's interest in the business. Under section 15 of the partnership agreement, a withdrawing partner was entitled to receive compensation from the remaining partners "[i]n the event that [the] partner shall give notice of his or her intent to withdraw, and the remaining partners elect to purchase the interest of the withdrawing partner."

Sometime in the spring of 2004, plaintiff announced his intent to withdraw from the partnership effective 1 October 2004. In May 2005, plaintiff filed this action against his former partners, alleging that he had not received the compensation due under the partnership agreement for his interest in the business. Plaintiff sought (1) damages for breach of the partnership agreement, (2) an accounting of the partnership's funds, and (3) a declaratory judgment setting forth defendants' fiduciary obligations to plaintiff.

In their answer, defendants denied any breach of the agreement, alleging that "they ha[d] repeatedly advised [p]laintiff that they would not exercise their option to purchase his interest

in the partnership, as is their right under the partnership agreement." Defendants also asserted a counterclaim seeking a declaration that they had the right to unilaterally dissolve the partnership.

Following cross-motions for summary judgment, the superior court entered an order on 9 December 2005 granting summary judgment to plaintiff on his first claim for relief for breach of contract. The court concluded that "Defendants by their actions, elected to purchase Plaintiff's partnership interest" and that "[t]heir subsequent refusal to pay for that interest is a breach of the partnership agreement." With respect to plaintiff's breach of contract damages, the trial court held that the value of plaintiff's interest should be calculated, under the agreement, based on the business valuation relied upon by plaintiff rather than the appraisal submitted by defendants. The court, however, deferred making a final determination of damages because it lacked necessary information regarding the applicable rate of interest.

The trial court also addressed defendants' counterclaim, declaring that the partnership could not be dissolved without plaintiff's consent since he had not yet been paid for his partnership interest. The court did not, however, specifically address plaintiff's second and third claims for relief. Acknowledging that its resolution of the case was not final, the court concluded its 9 December 2005 order with the following directive to the parties: "The Court further directs that such further proceedings as are just and proper be undertaken for the

prompt resolution of the remaining claims of the parties and entry of final judgment." On 12 December 2005, the trial court entered an order denying defendants' motion for reconsideration.

Defendants appealed from the two orders. Plaintiff subsequently filed a notice of cross appeal, but stated in that notice: "Plaintiff believes that the Defendants' Notice of Appeal is without legal force or effect and should be dismissed as an appeal of an interlocutory order which does not affect a substantial right."

Discussion

Because the trial court's partial summary judgment order and its denial of the motion for reconsideration did not fully resolve all of plaintiff's claims against defendants and left undetermined the amount of damages owed to plaintiff, this order is interlocutory. See *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."); *Steadman v. Steadman*, 148 N.C. App. 713, 714, 559 S.E.2d 291, 292 (2002) (where partial summary judgment order in plaintiff's favor postponed for later decision the amount of damages and attorneys' fees to be awarded, such order was interlocutory). Generally, there is no right to appeal from an interlocutory order unless (1) the trial court made the required certification under Rule 54 of the Rules of Civil Procedure, or (2) the order affects a substantial right that would

be lost without immediate review. *Eckard v. Smith*, 166 N.C. App. 312, 316, 603 S.E.2d 134, 137-38 (2004), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 410, *aff'd per curiam*, 360 N.C. 51, 619 S.E.2d 503 (2005).

There has been no certification under Rule 54 in this case. Indeed, the trial court's order acknowledged that "further proceedings" would be necessary "for the prompt resolution of the remaining claims of the parties and entry of final judgment." The appeal is, therefore, only proper if the partial summary judgment order affects a substantial right that would be lost without immediate review.

The appellant bears the burden of establishing the existence of a substantial right. *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 262 (2001). To meet this burden, he must make a two-pronged showing: "First, the right itself must be substantial. Second, the deprivation of that substantial right must potentially work injury if not corrected before appeal from a final judgment." *Perry v. N.C. Dep't of Corr.*, 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006) (internal citation omitted).

Defendants first contend that "these orders affect the substantial rights of Defendants to have all matters resolved by the same trier of fact." This one-sentence assertion is unsupported by factual elaboration or citation to authority. N.C.R. App. P. 28(b)(4), however, requires that the statement of grounds for appellate review "contain sufficient facts and argument to support appellate review on the ground that the challenged order

affects a substantial right." As "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order," *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994), we reject this unsupported assertion as a basis for permitting this interlocutory appeal.

Next, defendants argue: "[B]ecause the Trial Court clearly violated the scope of its authority under Rule 56 by acting as the trier of fact and by electing between differing conclusions from the undisputed facts, these orders affected the substantial rights of Defendants to have the proper trier of fact determine the issues in a lawsuit." According to defendants, the orders violated defendants' "right to have this matter heard by a jury, which affects their substantial rights and is immediately appealable." Defendants have not, however, explained why any error could not be fully addressed following entry of final judgment.

The cases upon which defendants rely do not involve errors in entering summary judgment, but rather were appeals from orders denying a specific request for a jury trial. See *Dep't of Transp. v. Wolfe*, 116 N.C. App. 655, 656, 449 S.E.2d 11, 12 (1994) ("we note that while the order defendant appeals from is interlocutory, since the trial court denied defendant's request for a jury trial the order affects a substantial right and is, therefore, immediately appealable"); *Dick Parker Ford, Inc. v. Bradshaw*, 102 N.C. App. 529, 531, 402 S.E.2d 878, 880 (1991) (holding that denial of motion for jury trial "affects a substantial right"). In this

case, the dispute is not over whether defendants are entitled to a jury trial as to claims surviving summary judgment, but rather whether the trial court properly entered partial summary judgment.

If we were to accept defendants' argument that a substantial right arises whenever a trial court misapplies Rule 56, we would be authorizing interlocutory appeals from all partial summary judgment orders. This we cannot do. See *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993) ("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.").

Finally, defendants contend that "the substantial procedural irregularities in the manner in which this order was issued also affect the substantial rights of Defendants." Defendants, in violation of N.C.R. App. P. 28(b)(4), again cite no authority to support this contention. Further, they do not identify the specific "substantial right" at stake and make no attempt to show how they would be injured if required to wait until a final judgment to appeal on these grounds. They have, therefore, met neither prong of the "substantial right" analysis.

In sum, we conclude that defendants have not demonstrated the existence of any substantial right that would be lost without immediate review. Accordingly, we dismiss the appeal.

Dismissed.

Judges TYSON and ELMORE concur.

Report per Rule 30(e).