

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-805

NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2007

JOSEPH R. PAWLIK,
Plaintiff,

v.

New Hanover County
No. 05 CVS 1525

BENEDICT FORTUNATI and
DENISE WURST,
Defendants.

Appeal by plaintiff from order entered 29 November 2005 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 19 March 2007.

The Kuhn Law Firm, PLLC, by Benjamin R. Kuhn, for plaintiff-appellant.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew A. Nichols, for defendants-appellees.

GEER, Judge.

Plaintiff Joseph R. Pawlik appeals from an order of the superior court dismissing his claims against defendants Benedict Fortunati and Denise Wurst. Because defendants' counterclaims are still pending, and plaintiff has failed to demonstrate that this interlocutory appeal is properly before the Court, we dismiss the appeal.

Facts

Plaintiff and defendants have been neighboring landowners in Wilmington, North Carolina since 1993. According to plaintiff's complaint, in February 2001, plaintiff spoke in opposition to defendants' request to paint their house "cobalt blue" at a hearing before the City of Wilmington's Historic Preservation Commission. Plaintiff alleges that defendants thereafter "subjected [him] to intentional acts of harassment and intimidation," including the construction of various barriers and a spite fence along the common boundary line between their properties, the installation of flood lights directed at his property, and verbal assaults.

On 25 April 2005, plaintiff filed suit against defendants in New Hanover County Superior Court, asserting claims for private nuisance and intentional and negligent infliction of emotional distress. On 11 October 2005, defendants filed an answer, denying the material allegations of plaintiff's complaint and asserting various affirmative defenses and counterclaims, including claims for malicious prosecution, abuse of process, invasion of privacy, trespass, and nuisance. Defendants also sought dismissal of plaintiff's complaint based on a failure to exhaust administrative remedies, the statute of limitations, a failure to state a claim for relief, and a failure to properly plead special damages.

On 29 November 2005, the trial court entered an order granting defendants' motion to dismiss plaintiff's complaint. The trial court did not rule on defendants' counterclaims. Plaintiff has appealed the trial court's order dismissing his claims. Defendants have moved to dismiss plaintiff's appeal, contending that because

defendants' counterclaims are still pending, plaintiff's appeal is interlocutory and not properly before this Court.

Discussion

An order is interlocutory if it is made during the pendency of an action and does not dispose of the case, but rather requires further action by the trial court in order to finally determine the entire controversy. *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993). Thus, an order is interlocutory when it dismisses the claims of one party while leaving the claims of another pending. See *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 38, 626 S.E.2d 315, 320 (appeal of dismissal of defendant's counterclaims was interlocutory when plaintiff's claims had yet to be tried), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006); *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 4, 362 S.E.2d 812, 815 (1987) (summary judgment in favor of defendants on plaintiff's claims did not adjudicate defendants' counterclaims, and, therefore, plaintiff's appeal 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 in part*, 359 N.C. 321, 611 S.E.2d 410, *aff'd in part*, 360 N.C. 51, 619 S.E.2d 503 (2005). It

is the appellant's responsibility to explain to this Court the basis of our jurisdiction to hear an interlocutory appeal.

Specifically, Rule 28(b)(4) of the Rules of Appellate Procedure requires that the appellant include in his brief "[a] statement of grounds for appellate review." The rule provides further:

Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain 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). In violation of this rule, plaintiff's brief failed to include the mandated statement.

Once defendants moved to dismiss his appeal, plaintiff filed a motion to amend his brief to add a section regarding the grounds for appellate review. The proposed new section states in its entirety: "This case is appealed pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1), as the trial court's order deprives the Plaintiff-Appellant of a substantial right which would be lost absent immediate review." We note that this proposed amendment still fails to comply with the requirement in the rule that "the statement must contain 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). Plaintiff has

pointed to no facts and has made no argument to support his generalized assertion that his appeal involves a "substantial right." This appeal is, therefore, subject to dismissal based on the failure to comply with N.C.R. App. P. 28(b)(4).

In his response to defendants' motion to dismiss the appeal, plaintiff supplied the argument improperly omitted from his brief. He contends that although defendants' counterclaims are still pending, they involve the same facts and circumstances as plaintiff's claims, and, therefore, he "is exposed to the possibility of inconsistent verdicts and the court system is tasked with hearing the same facts and circumstances in two separate trials."

In *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982), our Supreme Court held that, although the desire to avoid a trial generally does not involve a substantial right, the prospect of undergoing two trials may affect a substantial right "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." Based on this principle, this Court has concluded that a substantial right is affected when the dismissed claims and the claims that remain pending have "'overlapping factual issues.'" *Liggett Group Inc. v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993) (quoting *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989)).

Although plaintiff asserts generally that his claims and defendants' counterclaims involve overlapping factual issues, he makes no real effort to specifically explain how a jury verdict on defendants' counterclaims might be inconsistent with a jury verdict on his own claims. He simply states in conclusory fashion that defendant's counterclaims "raise the very issues and sets of facts" that are "at the heart" of plaintiff's complaint, and are "part and parcel" of defendants' "abuse" of plaintiff. He does not point to specific allegations or claims for relief in his complaint that overlap with those in defendants' counterclaims.

A review of plaintiff's complaint reveals that his causes of action seek relief based upon defendants' conduct directed toward plaintiff and his property, including the use of unattractive barriers, construction of a spite fence, the directing of flood lights at plaintiff's property, and verbal assaults and threats. On the other hand, defendants' counterclaims seek relief for plaintiff's conduct directed toward them and their property, including invasion of their privacy through cameras focused on their property, malicious prosecution and abuse of process, trespass by plaintiff onto defendants' property, and nuisance. Our review of the claims suggests that plaintiff and defendants could each be liable for torts committed against the other. In other words, whatever the outcome of defendants' counterclaims, there would not necessarily be a threat of inconsistent verdicts if plaintiff's claims were, after appeal, allowed to proceed. Plaintiff provides no explanation otherwise. *Compare Bob*

Timberlake Collection, 176 N.C. App. at 38, 626 S.E.2d at 320 (concluding that, because defendant's allegations of fraud would be available defensively against plaintiff's claim and offensively as separate claim by defendant, trial court's order dismissing defendant's claims affected defendant's substantial rights).

We do not find plaintiff's conclusory statements pertaining to the "sets of facts" underlying the parties' pleadings sufficient to support our review in the absence of a specific discussion of the parties' respective claims and the pertinent underlying factual contentions. See *Murphy v. Coastal Physician Group, Inc.*, 139 N.C. App. 290, 295, 533 S.E.2d 817, 820 (2000) (holding that defendant's reference to "issues arising out of [plaintiff's] contract" as an overlapping factual issue was not sufficient to support interlocutory appellate review because it merely identified the source of the issues rather than actual overlapping issue). As this Court has explained, "[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, therefore, dismiss plaintiff's appeal as interlocutory.

Dismissed.

Chief Judge MARTIN and Judge WYNN concur.

Report per Rule 30(e).