NO. COA09-906

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

HARCO NATIONAL INSURANCE COMPANY,
Plaintiff,

v.

Wake County
No. 05 CVS 2500

GRANT THORNTON LLP,
Defendant.

Appeal by petitioner-intervenor Rosemont Reinsurance Ltd. from order entered 20 February 2009 and order entered 24 March 2009 by Judge Ben F. Tennille in Wake County Superior Court. Heard in the Court of Appeals 12 January 2010.

*Robinson, Bradshaw & Hinson, P.A., by David C. Wright, III, and Adam K. Doerr; and Coghlan Kukankos LLC, by Gregory J. Simon, Pro Hac Vice, for petitioner-intervenor appellant.*

*Yates, McLamb & Weyher, LLP, by Barbara B. Weyher and Thomas C. Younger, III; and Cohen & Grigsby, P.C., by Kerrin M. Kowach and Richard R. Nelson, II, Pro Hac Vice, for defendant appellee.*

HUNTER, JR., Robert N., Judge.

Petitioner-intervenor Rosemont Reinsurance Ltd. ("Rosemont Re") appeals from orders filed by the Honorable Ben F. Tennille. The order filed on 20 February 2009 granted, with limitations, Rosemont Re's motion to intervene under Rule 24 of the N.C. Rules of Civil Procedure. The order filed on 24 March 2009 addressed

Rosemont Re's motion "to clarify" the 20 February 2009 order. In the 24 March 2009 order, Judge Tennille reaffirmed the prior order's conclusion to allow Rosemont Re to participate in the case for the limited purposes of filing amicus briefs upon any issue raised by the parties that affects Rosemont Re's status as a subrogee, and restated that Rosemont Re could participate in mediation to resolve the case. Harco filed a motion to continue mediation on 9 March 2009, and Judge Tennille denied Harco's motion on 13 March 2009. Notice of Appeal from the 20 February 2009 and 24 March 2009 orders was filed by Rosemont Re on 20 April 2009.

The notice of appeal taken from the 20 February 2009 order was filed after the 30-day time period for giving notice of appeal under Rule 3 of the North Carolina Rules of Appellate Procedure. Nothing in the record indicates that a tolling period extending this 30-day period had commenced pursuant to Rule 50(b), Rule 52(b), or Rule 59 of the North Carolina Rules of Civil Procedure. N.C.R. App. P. 3(c)(3) (2010) ("[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion[.]"). Rosemont Re did not request this Court to consider their appeal as a petition for writ of certiorari.

Based on our review of the record, we hold that: (1) the appeal of the 20 February 2009 order allowing intervention was not timely filed, and therefore dismissal is proper as to this order, and (2) even though notice of appeal was timely filed as to the 24

March 2009 order, the order does not affect a substantial right. Without a certification pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the appeal as to this order is not immediately appealable.

**I. BACKGROUND**

This litigation was filed on 23 February 2005 when Harco National Insurance Company ("Harco") sought to recover losses it suffered on bonds that Harco insured for the Capital Bonding Corporation, an entity that had been audited by Grant Thornton ("Thornton"). Rosemont Re had reinsured $20 million of the losses suffered by Harco. Contained in the pleadings between Thornton and Harco was the fourteenth defense raised by Thornton which sought to reduce the amount of damages Harco could receive by the $20 million which it had received from Rosemont Re.

At the time this litigation was pending, a simultaneous arbitration proceeding over coverage issues was being fought between Harco and Thornton, which resulted in Harco recovering the $20 million. This payment made Rosemont Re a subrogee of Harco, and thus Rosemont Re claims to have a monetary interest in the outcome of the litigation seeking to recover these funds.

On 23 December 2008 Rosemont Re sought intervention under Rule 24. A review of Rosemont Re's Memorandum of Law in support of its motion to intervene discloses the following litigation positions it took before the trial court. Most importantly, it identified the limited interest it sought to protect by its intervention in this matter.

> But Rosemont Re's intervention here is not simply a matter of propriety. Its interests are directly and adversely affected by the claim made by Grant Thornton in its answer that Harco's damages "are barred, in whole or in part, or its alleged damages must be reduced, set off or offset, by any monies [Harco] . . . recovers from others that reinsured [Harco's] risk in participating in the CBC bond program." Grant Thornton Answer, p. 18, Fourteenth Defense. In other words, Grant Thornton has asked this Court to reduce or eliminate over $20 million that Harco would otherwise - under traditional subrogation principles - be required to hold as "trustee" for Rosemont Re. Furthermore, although Harco is a vigorous advocate with respect to the claims it has asserted against Grant Thornton, Harco's interests in recovering reinsured losses are less certain. Indeed, Harco has expressed an interest in clarifying the subrogation relationships arising from its reinsured losses, something that can occur fairly and effectively only if Rosemont Re becomes a party to this action. As noted below, in seeking intervention, Rosemont Re does not attempt to assert a new cause of action, create a new seat at the trial table or otherwise seek to participate as a "new party" in this case: it merely seeks to protect its subrogation interests arising from the indivisible cause of action Harco has filed against Grant Thornton.

(Footnote omitted.) The motion to intervene was supported by Harco and opposed by Grant Thornton in a memorandum before the trial court. In reply to the opposition memorandum, Rosemont Re took the following additional litigation position:

> Given the timing and limited scope of Rosemont Re's participation, there will be little if any impact on the current proceeding. Harco's motion to amend its pleadings and Grant Thornton's motion regarding choice of law issues currently are pending before the Court and will be resolved imminently. There still are several months before the deadline for summary judgment motions and it may be up to a year or more

> before trial and the time judgment is rendered. With regard to fact discovery, Grant Thornton already has obtained Rosemont Re's arbitration documents and had ample opportunity to take third-party discovery with respect to any issues supporting its affirmative defenses. From Rosemont Re's viewpoint, the damages issue is a matter of law for the Court to decide and there is no need to re-open fact discovery for any party.

This litigation position was continued at the hearing of the motion for intervention:

> [THE COURT:] . . . Is there anything that you need to do to be able to protect your rights, other than to be able to participate as an amicus on the issue of the subrogation claim?
>
> MR. SIMON: Two points in response, Your Honor. One is that, looking ahead as far as the summary judgment motion, we would want to be heard as an amicus or as a party for the limited purpose of filing a brief on the damages issue.
>
> Second – or on that point, the second thing I'd say is who knows where the case goes from there.
>
> * * * *
>
> Just a legal matter, maybe a point that didn't come through in the papers, is Rosemont Re is not seeking to intervene as a separate party; we're seeking to intervene as a subrogee, as Harco's subrogee, in a single, indivisible cause of action.

The trial court thereafter granted Rosemont Re's motion to intervene in its 20 February 2009 order as follows: "Rosemont Re's Motion to Intervene is GRANTED for the limited purpose of (1) filing amicus briefs upon any issue raised by the parties that affects Rosemont Re's status as a subrogee[.]"

On 9 March 2009, the parties filed a motion to continue the mediation which was then scheduled for 31 March 2009. This motion was necessitated by the position that Thornton took that Rosemont Re was not a party, and therefore did not need to be at mediation, and Harco's position that Rosemont Re have access to certain discovery information which was under seal prior to the mediation. Following an exchange of correspondence on this issue, on 13 March 2009, the trial court entered an order requiring that the mediation proceed as scheduled and allowing Rosemont Re to participate in the mediation. The trial court also declined to grant Rosemont Re the right to see discovery documentation; however, the trial court wrote that it "expect[ed] Grant Thornton to provide Rosemont with a limited number of documents it considers critical to mediation provided Rosemont signs on to the Protective Order if the documents disclosed have been marked 'Confidential.'" This Order was not appealed.

On 18 March 2009, Rosemont Re filed a motion to "clarify" the 20 February 2009 order. The motion, in actuality, sought to modify the court's 20 February 2009 order to allow Rosemont Re to: "(1) . . . review the pleadings filed under seal provided Rosemont Re signs on to the Protective Order; (2) grant Rosemont Re leave to file a Complaint in Intervention and file motions with regard to matters which directly impact its interest as Subrogee of Harco; and (3) clarify that Rosemont Re's Motion to Intervene was granted, not denied, and that the limits imposed do not go to Rosemont Re's status as a litigant." (Footnote omitted.) At the same time,

Rosemont Re filed a "Complaint in Intervention" and a supporting memorandum.

The motion to clarify was granted in part and denied in part on 24 March 2009. In his order, Judge Tennille denied all of Rosemont Re's substantive changes suggested above, and granted the motion only by amending the conclusion of his 20 February 2009 order to read as follows:

> For the reasons set forth above, Rosemont Re's Motion to Intervene is GRANTED for the limited purposes of (1) filing amicus briefs upon any issue raised by the present parties that affects Rosemont Re's status as a subrogee and (2) participating in mediation to resolve this case. In all other respects, Rosemont Re's Motion to Intervene is DENIED.

Notice of Appeal to both the 20 February 2009 order and the 24 March 2009 order was filed on 20 April 2009.

## II. ANALYSIS

### A. Jurisdiction

In order to confer jurisdiction on this Court, a litigant must comply with Rule 3 of North Carolina Rules of Appellate Procedure. Rule 3 provides in part:

> (c) . . . In civil actions and special proceedings, a party must file and serve a notice of appeal:
>
> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period; provided that

> (3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

N.C.R. App. P. 3(c)(1)-(3) (2010).

In this case, because the 20 February 2009 order was not timely appealed, our precedent requires that we must dismiss the appeal as to this order.

Conversely, notice of appeal was properly filed as to the order determining the "motion to clarify" entered on 24 March 2009; however, since it does not dispose of the entire controversy, the order is clearly interlocutory. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (order made during pendency of an action not disposing of entire controversy is interlocutory). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

> An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits.

*High Rock Lake Partners v. N.C. DOT*, __ N.C. App. __, __, 693 S.E.2d 361, 366 (2010).

In its brief, Rosemont Re argues that a substantial right has been affected. However, we hold that if a substantial right has been affected, the right would properly be found in the 20 February 2009 order and not the 24 March 2009 order merely "clarifying" the substantive rights determined in the first order.

"A motion is properly treated according to its substance rather than its label." *Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981). "This Court has previously stated that '[t]he conservation of judicial manpower and the prompt disposition of cases are strong arguments against allowing repeated hearings on the same legal issues. The same considerations require that alleged errors of one judge be corrected by appellate review and not by resort to relitigation of the same issue before a different trial judge.'" *Huffaker v. Holley*, 111 N.C. App. 914, 915-16, 433 S.E.2d 474, 475 (1993) (addressing repeated motions for summary judgment under Rule 56) (quoting *Carr v. Carbon Corp.*, 49 N.C. App. 631, 636, 272 S.E.2d 374, 378 (1980)).

In its 24 March 2009 order, the trial court denied the substantive portions of Rosemont Re's motion for clarification. It appears upon review that the motion for clarification was simply a procedural device by which Rosemont Re sought to relitigate the same issues which had been determined in its motion to intervene, presenting to the trial court a new litigation position. We do not see how the 24 March 2009 order substantially changed Rosemont Re's substantial rights from the rights it had obtained in the 20 February 2009 order. Therefore, we do not think this order affects

a substantial right. Because the 24 March 2009 order does not contain a Rule 54(b) certification, we conclude that an appeal as to this order is interlocutory and not immediately appealable.

**III. CONCLUSION**

We note that this case is a companion with another appeal currently pending in this Court. Unlike the other appeal, however, this case does not contain a petition for a writ of certiorari. Since Rosemont Re has not otherwise provided sufficient grounds showing that this Court has jurisdiction, this appeal is

Dismissed.

Judges JACKSON and STEPHENS concur.

Report per Rule 30(e).