NO. COA10-28

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

SANDRA B. WILKINS,

Plaintiff,

v.

Guilford County
No. 08 CVS 3835

BRIAN ANDREW FARAH, M.D., and GUILFORD PSYCHIATRIC, ASSOCIATES, P.A.,

Defendants.

Appeal by plaintiff from order entered 14 September 2009 by Judge Edgar Gregory in Guilford County Superior Court. Heard in the Court of Appeals 19 August 2010.

Jerry R. Everhardt, for plaintiff-appellant.

Young, Moore, and Henderson, P.A., by Robert M. Clay, and Teague, Campbell, Dennis, and Gorham, L.L.P., by Carrie E. Meigs, for defendants-appellees.

JACKSON, Judge.

Sandra B. Wilkins ("plaintiff") appeals from the trial court's order granting a motion for partial summary judgment based upon the doctrine of collateral estoppel in favor of Brian Andrew Farah, M.D. ("Dr. Farah") and Guilford Psychiatric Associates, P.A. (collectively, "defendants"). For the reasons set forth below, we dismiss this interlocutory appeal.

On or about 1 May 1999, plaintiff began working for the Guildford County Department of Social Services ("DSS"). On or about 17 May 1999, Dr. Farah met with plaintiff and prescribed Adderall for plaintiff's previously diagnosed condition of Attention Deficit Disorder ("ADD"). Dr. Farah instructed plaintiff to use Adderall rather than Ritalin, which had been prescribed by a different doctor. Dr. Farah prescribed an initial dose of five milligrams twice per day, and he instructed plaintiff to monitor the effect of the Adderall according to her ADD symptoms. Dr. Farah allowed plaintiff to increase her dosage to a maximum of forty milligrams per day as needed.

Plaintiff's next visit with Dr. Farah occurred on 14 June 1999, when she explained to Dr. Farah that she was taking forty milligrams per day, the maximum prescribed dosage. Plaintiff reported improvement while using the increased dosage, and Dr. Farah recommended that plaintiff continue using this dosage.[1] Plaintiff continued to take forty milligrams of Adderall daily until she left the care of Dr. Farah in January 2000.

On 19 July 1999, after approximately three months of employment with DSS, plaintiff received a performance appraisal.

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[1] We note that, in plaintiff's complaint, plaintiff does not mention her improvement from the use of Adderall. However, defendants' answer indicates this, and most notably, so does our prior opinion concerning plaintiff's lawsuit against DSS, which arose out of these same facts. *See Wilkins v. Guilford Cty.*, 158 N.C. App. 661, 582 S.E.2d 74 (2003). We noted that plaintiff "reported that the 'target symptoms' of '[c]oncentration, focus, ability to stay on task, inattentiveness, [and] distractibility [sic]' had improved and that she was not experiencing any negative side effects." *Id.* at 663, 582 S.E.2d at 76.

She received a rating of four on a scale of one to five, which indicated that plaintiff "frequently exceed[ed] overall standards for [her] job." On 17 December 1999 plaintiff received another performance appraisal, and she received a two out of five, which indicated that her "work is below job expectations in several areas." On 14 January 2000, DSS terminated plaintiff's employment.

On 18 December 2000, plaintiff filed a complaint against Guilford County, DSS, and DSS director John W. Shore ("Shore"). The complaint alleged, *inter alia*, that plaintiff had a disability within the meaning of the Americans with Disabilities Act, codified at 42 U.S.C. § 12101, *et seq.*, while taking Adderall and that the termination of her employment violated this statute. On 27 December 2001, the trial court granted defendants' motion for summary judgment and plaintiff appealed to this Court. In *Wilkins v. Guilford Cty.*, 158 N.C. App. 661, 582 S.E.2d 74 (2003), we affirmed the trial court's entry of summary judgment in favor of Guilford County, DSS, and Shore.

On 11 February 2008, plaintiff instituted this action against defendants. On 14 September 2009, the trial court entered a partial summary judgment order. This order dismissed with prejudice plaintiff's claims for damages against Dr. Farah arising out of the termination of her employment with DSS, reasoning that plaintiff was collaterally estopped from bringing such claims against Dr. Farah. Pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the trial court certified the issue for immediate appellate review, stating that there was "no just reason

for delay" notwithstanding that the order adjudicated less than all of plaintiff's claims.

Initially, we must address whether this appeal properly lies from the trial court's order. "It is well established in this jurisdiction that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980) (citing *Dicky v. Herbin*, 250 N.C. 321, 108 S.E.2d 632 (1959); *Rogers v. Brantley*, 244 N.C. 744, 94 S.E.2d 896 (1956)).

Our Supreme Court has explained that

> [a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . 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.

Id. at 209, 270 S.E.2d at 433 (citations omitted). The trial court's declaration that a judgment is final does not make it so. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). Although final judgments always may be appealed, there are only two ways by which interlocutory orders may be appealed: "when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial

right under N.C.G.S. §§ 1-227(a) and 7A-27(d)(1)." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citing *Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999)).

It is incumbent upon the appellant to demonstrate that her appeal is properly before this Court. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (per curiam). When based upon an interlocutory order, "the appellant must include in its 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.'" *Id.* (quoting N.C. R. App. P. 28(b)(4)). Furthermore, although "the trial court's determination that there is no just reason to delay the appeal, while accorded great deference, [it] cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (internal citations and quotation marks omitted). Ultimately, "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). When the appellant fails to meet this burden, her appeal will be dismissed. *Id.* at 380, 444 S.E.2d at 254. This Court has no duty "to construct arguments for or find support for appellant's right

to appeal from an interlocutory order[.]" *Id.* Plaintiff argues that "[o]ther claims remain outstanding[,]" and the trial court's order states that "there is no just reason for delay, despite the fact that this Order adjudicates less than all the claims of the plaintiff." Therefore, it is clear that the trial court's order is interlocutory because it "does not finally dispose of the case and requires further action by the trial court." *Bailey*, 301 N.C. at 209, 270 S.E.2d at 434.

We note that, in the case *sub judice*, plaintiff does not present any argument concerning whether a substantial right has been affected. Instead, plaintiff seeks to base appellate review solely upon the trial court's certification pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that there is no just reason for delaying the appeal of trial court's order. Therefore, because we will not "construct arguments for or find support for appellant's right to appeal from an interlocutory order," *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254, we consider only whether the trial court's certification pursuant to Rule 54(b) was proper.

This Court has addressed a trial court's certification that no just reason for delay exists in *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 652 S.E.2d 284 (2007). In *Kinesis*, the plaintiff filed suit against two former employees, presenting eight business-related claims. *Id.* at 5, 652 S.E.2d at 289. The defendants responded with numerous defenses and counterclaims. *Id.* at 6–7, 652 S.E.2d at 289–90. The trial court granted partial

summary judgment to approximately half of the claims and counterclaims and certified the judgment for immediate appeal pursuant to Rule 54(b). *Id.* at 7–8, 652 S.E.2d at 290. We affirmed the trial court's Rule 54(b) certification because the "claims that have been dismissed and those that remain are 'factually and legally intertwined' such that proceeding to trial could result in verdicts inconsistent with the earlier dismissals." *Id.* at 9, 652 S.E.2d at 291.

Similarly, in *Albert v. Cowart*, ___ N.C. App. ___, ___, 682 S.E.2d 773, 767–77 (2009), we held that the trial court's determination that there was "no just reason for delay" was proper. The defendant allegedly opened a bank account with the plaintiff's money under both of their names and used the funds for his personal expenses. *Id.* at ___, 682 S.E.2d at 775–76. The plaintiff claimed breach of fiduciary duty, unjust enrichment, constructive fraud, and conversion, and the trial court granted partial summary judgment which determined that the account at issue was not held with a right of survivorship. *Id.* at ___, 682 S.E.2d at 776. The trial court certified the judgment for immediate appeal pursuant to Rule 54(b), and we held that this certification was proper because the issue of survivorship was "central and determinative to the controversy between [the] parties and limited to a question of law[.]" *Id.* at ___, 682 S.E.2d at 777.

In contrast to these cases, in the case *sub judice*, the trial court's certification for immediate appeal pursuant to Rule 54(b) is not proper. Plaintiff's claim against defendants arises

pursuant to a theory of malpractice and suggests that plaintiff has sustained damages resulting from the side effects of her consumption of Adderall and the termination of her employment with DSS. The trial court granted partial summary judgment with respect to plaintiff's claim for damages arising out of the termination of her employment. However, even assuming, without deciding, that judgment on an element of damages constitutes a "claim" for purposes of Rule 54(b), we hold that this issue is neither "'factually and legally intertwined' such that proceeding to trial could result in verdicts inconsistent with the earlier dismissal[] [,]" *Kinesis*, 187 N.C. App. at 9, 652 S.E.2d at 291, nor is the issue implicated "central and determinative to the controversy[,]" *Albert*, ___ N.C. App. at ___, 682 S.E.2d at 777, of the claims that plaintiff expressly states "remain outstanding."

Plaintiff fails to articulate how other claims may be affected if we do not presently address this interlocutory appeal, and from the complaint presented in the record, there is no indication that inconsistency will result from dismissal of this interlocutory appeal. Accordingly, we hold that plaintiff has failed to meet her "burden [of] present[ing] appropriate grounds for this Court's acceptance of [her] interlocutory appeal[,]" *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253. Therefore, we do not address the merits of this interlocutory appeal.

Dismissed.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).