

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-362

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

CURTIS CARPENTER,
Plaintiff,

v.

Forsyth County
No. 08 CVS 7731

CHARICA RENE CREWS,
Defendant.¹

Appeal by Plaintiff from order entered 15 September 2009 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 11 October 2010.

Reginald D. Alston for Plaintiff-Appellant.

Pinto Coates Kyre & Brown, PLLC, by Brady A. Yntema and David G. Harris, II, for Unnamed Defendant-Appellee North Carolina Farm Bureau Insurance Company.

STEPHENS, Judge.

Plaintiff Curtis Carpenter ("Carpenter") appeals from the trial court's order allowing Unnamed Defendant North Carolina Farm Bureau Mutual Insurance Company's ("Farm Bureau") motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). For the reasons set forth below, we dismiss this interlocutory appeal.

I. Procedural History and Factual Background

¹ This appeal involves the Unnamed Defendant North Carolina Farm Bureau Insurance Company.

On 2 October 2008, Carpenter filed a negligence action in Forsyth County Superior Court against Defendant Charica Rene Crews ("Crews") for injuries he sustained when his vehicle was struck by a vehicle owned by Crews on 7 October 2005. At the time of the accident, Carpenter's vehicle was purportedly insured by Farm Bureau and the Farm Bureau policy provided uninsured motorist coverage to Carpenter.

At the time the complaint was filed, summons was issued for Crews.² The complaint was filed with a Certificate of Service, which was not hand-dated or file-stamped, which stated:

This is to certify that the undersigned has this date served the foregoing Complaint upon the unnamed defendant Farm Bureau Insurance by placing in the U.S. Mail, a copy of said Complaint in an envelope with adequate postage, addressed to the following:

Scott Lambeth
Farm Bureau Insurance
7017-B Albert Pick Rd.
Greensboro, NC 27409

This the ___ day of October, 2008.

On 31 October 2008, Farm Bureau filed a motion for extension of time to file its answer. The motion was granted and an order was issued extending the time for Farm Bureau to file its answer through 5 December 2008. On 25 November 2008, summons was issued to the Commissioner of Insurance³ for "unknown defendant[,]"

² Although the summons was file-stamped on 29 December 2008, there is no indication on the face of the summons whether the summons was served or not served.

³ N.C. Gen. Stat. § 58-16-30 (2010) provides for service of process on insurance companies through the North Carolina Commissioner of Insurance.

presumably meaning the *unnamed* defendant, which was served on 26 November 2008. On 8 December 2008, Farm Bureau filed an answer asserting, *inter alia*, that Carpenter's claim against Farm Bureau was barred by the expiration of the statute of limitations.

On 29 December 2008, Carpenter had an alias and pluries summons issued to Crews. On 12 January 2009, Carpenter filed an Affidavit of Service of Commissioner of Insurance by Certified Mail stating that a copy of the summons and complaint was sent via certified mail, return receipt requested, to the Commissioner of Insurance on 30 December 2008 and that the Commissioner of Insurance had received said summons and complaint on 5 January 2009.⁴

On 12 January 2009, the alias and pluries summons issued 29 December 2008 for Crews was returned unserved. Alias and pluries summonses were then issued for Crews on 19 February and 7 April 2009. Crews was served by publication on 15, 22, and 29 April 2009.

On 26 May 2009, Farm Bureau filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The motion was heard on 29 June 2009. On 8 August 2009, the trial court issued a Memorandum of Order finding that Farm Bureau's motion to dismiss should be allowed because Carpenter's claim against Farm Bureau was barred by the expiration of the statute of limitations. An order

⁴ Attached to the Affidavit was a letter from the process agent for Farm Bureau which states that the agent received a copy of the "Civil Summons Alias and Pluries Summons" together with a copy of the Complaint.

allowing Farm Bureau's motion to dismiss was entered 15 September 2009. On 13 October 2009, Carpenter filed a notice of appeal from the trial court's order and requested that the court "issue a stay of all further proceedings in this matter until the Court of Appeals['] decision is rendered." The record does not indicate whether the trial court has ruled on Carpenter's request for a stay.

II. Jurisdiction

Neither party has addressed the jurisdictional threshold question of whether this appeal is interlocutory and, if so, whether the order appealed from affects a substantial right. "[I]t 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." *Yordy v. N.C. Farm Bureau Mut. Ins. Co.*, 149 N.C. App. 230, 230-31, 560 S.E.2d 384, 385 (2002) (quoting *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980)). After careful review, we must dismiss this appeal as interlocutory.

"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." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). An order which does not dispose of all claims as to all parties in an action is interlocutory. *Cunningham v. Brown*, 51 N.C. App. 264, 267, 276 S.E.2d 718, 722 (1981).

Ordinarily, there is no right of appeal from an interlocutory order. *CBP Resources, Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 170, 517 S.E.2d 151, 153 (1999). An interlocutory order may be immediately appealed, however, "(1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Id.* at 171, 517 S.E.2d at 153 (citations and quotation marks omitted).

In this case, Carpenter filed his negligence action against Crews. Thereafter, Carpenter attempted to serve process upon Farm Bureau, his uninsured motorist insurance carrier, to make Farm Bureau a party to the action. See N.C. Gen. Stat. § 20-279.21(b)(3)(a) (2010) ("The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name."). As the trial court's grant of Farm Bureau's motion to dismiss was not a final judgment as to Crews,⁵ the order is interlocutory.

⁵ We note that Farm Bureau's attorney appeared at the hearing on the motion to dismiss only on behalf of Farm Bureau and not on behalf of Crews. Furthermore, the record contains no final order pertaining to Crews and Carpenter's request for a stay "of all further proceedings in this matter" indicates that Carpenter's action against Crews is still pending.

Moreover, the trial court did not certify that there is no just reason for delay of this appeal pursuant to Rule 54(b) and in his appellate brief, Carpenter did not acknowledge that his appeal is interlocutory and, thus, did not provide this Court with a jurisdictional basis as to which, if any, substantial right would be affected absent immediate review, as required by N.C. R. App. P. 28(b)(4).⁶

Accordingly, Carpenter had no right of appeal and his appeal is dismissed.

DISMISSED.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).

⁶ N.C. R. App. P. 28(b)(4) states:

An appellant's brief shall contain . . . [a] statement of the grounds for 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.