

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-219
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

FSI, INC.,
Plaintiff,

v.

Mecklenburg County
No. 11 CVS 11635

ANDY NEWSON and BENTON &
PARKER COMPANY, INC.,
Defendants/Third-Party
Plaintiffs,

v.

DEEP SOUTH SURPLUS, INC.,
FORMERLY KNOWN AS DEEP SOUTH
SURPLUS OF GEORGIA, INC.,
Third-Party Defendant.

Appeal by defendants/third-party plaintiffs from order entered 16 July 2012 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2013.

No brief filed on behalf of plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Paul C. Lawrence, Joseph S. Murray, IV, and M. Duane Jones, for defendants/third-party plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, LLP, by Reid C. Adams, Jr. and Jonathan R. Reich, for third-party defendant-appellee.

GEER, Judge.

Defendants/third-party plaintiffs Andy Newson and Benton & Parker Company, Inc. (collectively "Benton & Parker") appeal from the trial court's order granting summary judgment to third-party defendant Deep South Surplus, Inc., formerly known as Deep South Surplus of Georgia, Inc., on Benton & Parker's third-party claims for contribution, indemnification, and breach of contract. Because Benton & Parker's appeal is interlocutory and Benton & Parker has made no argument that the appealed order deprives it of a substantial right that would be lost absent review prior to a final determination of all the claims in this case, we dismiss Benton & Parker's appeal.

Facts

On 17 June 2011, plaintiff FSI, Inc. filed a complaint against Benton & Parker alleging claims for negligence, breach of contract, breach of fiduciary duty, unfair and deceptive practices ("UDP"), and punitive damages arising out of Benton & Parker's work as an insurance broker to procure an allegedly deficient insurance policy for FSI. On 8 August 2011, Benton & Parker filed an answer denying many of the material allegations of FSI's complaint. Also on 8 August 2011, Benton & Parker filed a third-party complaint against Deep South alleging claims for contribution, indemnification, and breach of contract.

On 17 October 2011, Deep South filed an answer denying the material allegations of the third-party complaint. On 31 May 2012, Deep South filed a motion for summary judgment on the claims set out in the third-party complaint. On 16 July 2012, the trial court entered an order granting Deep South's motion for summary judgment as to all claims in the third-party complaint. Benton & Parker appealed to this Court.

The record on appeal in this appeal does not include any orders by the trial court explaining the disposition of the claims filed by FSI against Benton & Parker, and Benton & Parker's brief to this Court makes no mention of any disposition of the underlying claims brought against it by FSI. Deep South's brief to this Court notes that FSI moved for summary judgment against Benton & Parker, and the trial court granted FSI's motion in part as to the UDP claim.

Benton & Parker has appealed the order granting partial summary judgment to FSI in a second appeal, docket number COA13-222. The record on appeal in COA13-222 shows that FSI filed a motion for partial summary judgment on 23 February 2012, and an amended motion for summary judgment on 31 May 2012. In its amended motion for summary judgment, FSI sought summary judgment on its claims for negligence and UDP. On 24 February 2012, Benton & Parker filed a motion for partial summary judgment

seeking summary judgment on FSI's claims for negligence, breach of fiduciary duty, UDP, and punitive damages.

On 23 July 2012, the trial court entered an order denying Benton & Parker's motion for partial summary judgment, granting FSI's motion for summary judgment as to the UDP claim only, and denying FSI's motion for summary judgment as to all other claims, leaving pending FSI's claims for negligence, breach of contract, and breach of fiduciary duty. In its 23 July 2012 order, the trial court, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, certified that it found "there is no just reason to delay entry of final judgment against Defendants Benton & Parker and Newson."

On 27 July 2012, Benton & Parker filed a motion for reconsideration of the 23 July 2012 partial summary judgment order pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. On 21 August 2012, Benton & Parker timely filed notice of appeal from the 23 July 2012 order. The trial court entered an order denying Benton & Parker's motion for reconsideration on 23 September 2012. On 19 October 2012, Benton & Parker filed notice of appeal from the 23 September 2012 order.

Discussion

We must initially address this Court's jurisdiction over this appeal. "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." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (emphasis added) (internal citation omitted). Here, the 16 July 2012 order granting Deep South's motion for summary judgment as to all claims in the third-party complaint was an interlocutory order rather than a final judgment because FSI's claims against Benton & Parker for negligence, breach of contract, and breach of fiduciary duty remain pending. *Id.* at 361, 57 S.E.2d at 381.

Our Supreme Court has held that "[i]n general, a party may not seek immediate appeal of an interlocutory order." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 709 (1999). However, "[i]n interlocutory orders may be appealed immediately under two circumstances. The first is when the trial court certifies [under Rule 54(b)] no just reason exists to delay the appeal after a final judgment as to fewer than all the claims or parties in the action. The second is when the appeal involves a

substantial right of the appellant and the appellant will be injured if the error is not corrected before final judgment." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 47-48, 619 S.E.2d 495, 496 (2005) (internal citation omitted).

In this case, the trial court did not include a Rule 54(b) certification in its order. As a result, this Court has jurisdiction over this appeal only if "'the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.'" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quoting *S. Uniform Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988)).

Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure provides that "[w]hen an appeal is interlocutory, the statement [of grounds for appellate review in the appellant's brief] must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." Benton & Parker makes no argument in its brief that a substantial right exists that would be jeopardized absent review prior to a final determination of all claims between all parties in this case. Rather, Benton & Parker mistakenly asserts that this Court has jurisdiction over the

appeal because "[t]he 16 July 2012 Order by the Honorable F. Lane Williamson granting summary judgment is a final judgment and appeal therefore lies to the North Carolina Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)."

"It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. See also *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (holding that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant"). Since Benton & Parker has made no showing that jurisdiction exists in this Court based on a substantial right analysis, we dismiss this appeal as interlocutory. See *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254 (dismissing interlocutory appeal where appellant "presented neither argument nor citation to show this Court that [appellant] had the right to appeal the order dismissing its counterclaims").

Dismissed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

Report per Rule 30(e).