

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-36
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

THOMAS LAWSON MINTZ, JR., as
Administrator of the Estate of
BRANDON LEE MINTZ,
Plaintiff,

v.

Columbus County
No. 11 CVS 500

JOHN DANIEL KELLEY and NATIONWIDE
MUTUAL INSURANCE COMPANY,
Defendants.

Appeal by plaintiff from order entered 8 August 2012 by
Judge Ola M. Lewis in Columbus County Superior Court. Heard in
the Court of Appeals 5 June 2013.

*John Alan High, PLLC, by John Alan High, for plaintiff
appellant.*

*Robinson Elliott & Smith, by William C. Robinson and
Katherine A. Tenfelde, for defendant appellee.*

McCULLOUGH, Judge.

Thomas Lawson Mintz, Jr. ("plaintiff"), as administrator of
the estate of Brandon Lee Mintz, appeals from the trial court's
order granting Nationwide Mutual Insurance Company
("Nationwide") summary judgment. For the following reasons, we

dismiss the appeal.

I. Background

This case stems from an 18 April 2009 head-on car accident in which plaintiff's decedent was killed. As a consequence of the accident, plaintiff, as administrator of decedent's estate, filed a complaint on 8 April 2011, asserting causes of action against an individually named defendant, John Daniel Kelley, for damages in the wrongful death of decedent and against defendant Nationwide Mutual Insurance Company for a declaratory judgment that Nationwide owes the maximum combined uninsured/underinsured motorist insurance coverage allowed by statute, one million dollars, under the policy held by decedent's parents, plaintiff and Ella Sue Mintz ("Mrs. Mintz").

At the time of the car accident, the insurance policy provided for liability insurance coverage for bodily injury and combined uninsured/underinsured motorist coverage for bodily injury with limits of \$50,000 per person and \$100,000 per accident. In the complaint, however, plaintiff alleged that neither he nor Mrs. Mintz were notified of the opportunity to purchase increased combined uninsured/underinsured motorist coverage in accordance with N.C. Gen. Stat. § 20-279.21.

Therefore, pursuant to N.C. Gen. Stat. § 20-279.21(b) and *Williams v. Nationwide*, 174 N.C. App. 601, 621 S.E.2d 644 (2005), plaintiff claimed the estate was entitled to the maximum coverage allowed, one million dollars.

On 14 December 2011, Nationwide filed a motion for summary judgment. After two hearings on Nationwide's motion for summary judgment were postponed, the matter came on for hearing on 16 July 2012 in Columbus County Superior Court, the Honorable Ola M. Lewis presiding. During the hearing, plaintiff argued summary judgment in favor of Nationwide was inappropriate because Nationwide admitted in its answer that it never offered plaintiff or Mrs. Mintz the opportunity to purchase increased uninsured/underinsured motorist coverage. Nationwide attempted to clarify its response at the hearing and alternatively moved to amend its pleading pursuant to Rule 15 of the N.C. Rules of Civil Procedure. At the conclusion of the hearing, the trial court took the matter under advisement.

Nationwide filed an amended answer on 23 July 2012. Thereafter, an Order Granting Defendant Nationwide's Motion To Amend and Defendant Nationwide's Motion For Summary Judgment was filed on 8 August 2012. Plaintiff appeals.

II. Analysis

Plaintiff's primary argument on appeal is that the trial court erred in granting Nationwide's motion for summary judgment and denying summary judgment in his favor. We, however, do not reach the merits of the appeal.

"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). "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).

Notwithstanding . . . , immediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a "substantial right."

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations omitted).

In this case, plaintiff filed the complaint against an individually named defendant and Nationwide. By motion filed 22 August 2011, counsel for the individually named defendant's

insurance carrier, State Farm Mutual Automobile Insurance Company ("State Farm"), sought to remove the individually named defendant as a real party in interest, to relieve State Farm from the duty to defend the litigation, and to withdraw as counsel for the individually named defendant. The motion alleged that State Farm paid to plaintiff the full policy limits under the individually named defendant's insurance policy in exchange for plaintiff's execution of a covenant not to execute judgment on the individually named defendant.

On 14 May 2012, the trial court entered an order relieving State Farm from any duty to defend in the litigation and allowing State Farm's counsel to withdraw from the individually named defendant's representation. However, the order allowed the litigation to proceed against the individually named defendant pursuant to the terms of the covenant not to execute judgment. Consequently, the individually named defendant remained a party in the case.

Where the trial court granted summary judgment in favor of Nationwide without disposing of the wrongful death claim against the individually named defendant, the order is interlocutory. Furthermore, there is no Rule 54(b) certification from the trial

court and plaintiff does not argue deprivation of a substantial right on appeal.¹ As a result, we must dismiss the appeal.

III. Conclusion

For the reasons discussed above, we dismiss the appeal as interlocutory.

Dismissed.

Judges HUNTER (Robert C.) and GEER concur.

Report per Rule 30(e).

¹ "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 v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).