

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-260

Filed: 4 October 2016

Wake County, No. 15 CVS 1191

FRANCISCO FAGUNDES, Plaintiff,

v.

AMMONS DEVELOPMENT GROUP, INC.; EAST COAST DRILLING & BLASTING, INC.; SCOTT CARLE; and JUAN ALBINO, Defendants.

Appeal by plaintiff from order entered 8 December 2015 by Judge James K. Roberson in Wake County Superior Court. Heard in the Court of Appeals 21 September 2016.

*Edwards Kirby, LLP, by William W. Plyler, and The Jernigan Law Firm, by Leonard T. Jernigan, Jr., and Anthony L. Lucas, for plaintiff-appellant.*

*Ragsdale Liggett PLLC, by Amie C. Sivon and John M. Nunnally, for defendant-appellee Ammons Development Group, Inc.*

TYSON, Judge.

Francisco Fagundes (“Plaintiff”) appeals from the trial court’s order granting Ammons Development Group, Inc.’s (“Ammons”) motion to dismiss. The trial court’s order is interlocutory. Plaintiff has not properly conferred jurisdiction upon this Court. The appeal is dismissed.

I. Factual Background

*Opinion of the Court*

Ammons is the developer of Heritage East, a planned residential subdivision located in Wake Forest, North Carolina. Ammons contracted with East Coast Drilling & Blasting, Inc. (“East Coast”) to drill, blast, and crush rock for site preparation on the Heritage East project. Plaintiff was employed by East Coast and worked as a heavy equipment operator in its rock crushing division. Plaintiff was not assigned to the blasting division or involved in the blasting operation in any way.

On 25 June 2013, Juan Albino, a blaster employed by East Coast and co-defendant in this action, misinformed Plaintiff that his location at that time was safe from flying debris and rocks. After a blast, Plaintiff was struck by a basketball-size piece of rock, which permanently injured his left leg.

Plaintiff brought a strict liability claim against Ammons, who moved to dismiss the claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court granted Ammons’ motion to dismiss. The other named Defendants remain as parties and did not appeal or cross-appeal. Plaintiff appeals from this ruling.

II. Issues

Plaintiff argues the trial court erred in granting Ammons’ motion to dismiss. He asserts Ammons is strictly liable for his injuries caused by blasting, an ultrahazardous activity, performed by an independent contractor Ammons hired.

Ammons first argues Plaintiff’s brief did not properly follow Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure. Ammons moved in its brief for the

*Opinion of the Court*

appeal to be dismissed because: (1) the appeal is interlocutory since the trial court's order was not final, (2) the trial court's order granting the motion to dismiss did not contain a Rule 54(b) certification, and (3) Plaintiff's principal brief did not show the order affects a substantial right.

Ammons also argues the trial court properly granted its motion to dismiss because (1) a developer cannot be strictly liable to employees of an independent contractor performing an ultrahazardous activity and (2) the complaint discloses the Plaintiff assumed the risk by working for a blasting company, which required him to be present at blasting sites.

III. Standard of Review

An interlocutory order or judgment is "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, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (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). There are two exceptions to this rule:

[F]irst, an interlocutory order is immediately appealable "when the trial court enters 'a final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)

*Opinion of the Court*

(quoting Rule 54(b)). Secondly, an interlocutory order may be immediately appealed 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.” *Southern Uniform Rentals v. Iowa Nat’l Mutual Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988); N.C.G.S. § 1-277(a) (2001); N.C.G.S. § 7A-27(d) (2001).

*Evans v. Evans*, 158 N.C. App. 533, 535, 581 S.E.2d 464, 465 (2003).

IV. Rule 28(b)

When appealing an interlocutory order, Rule 28(b) of the North Carolina Rules of Appellate Procedure requires an appellant’s brief to include:

A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting 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.

N.C. R. App. P. 28(b)(4) (2015); *see Pentecostal Pilgrims & Strangers Corp. v. Connor*, 202 N.C. App. 128, 131, 688 S.E.2d 81, 83 (2010).

In non-interlocutory appeals, Rule 28 is generally considered a nonjurisdictional rule and “a party’s failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal.” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transport Co., Inc.* 362 N.C. 191, 198-99, 657 S.E.2d

*Opinion of the Court*

365 (2008). Dismissal of a non-interlocutory appeal is only appropriate “in the most egregious instances of nonjurisdictional default.” *Id.* at 200, 657 S.E.2d at 366.

However, this Court has repeatedly held a violation of Rule 28 is jurisdictional in interlocutory cases since “the *only way* an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right.” *Larsen v. Black Diamond French Truffles, Inc.*, \_\_ N.C. App. \_\_, \_\_, 772 S.E.2d 93, 96 (2015) (emphasis in original).

Where a party appeals an interlocutory order or judgment and fails to allege sufficiently he or she would be deprived of a substantial right absent immediate review, this Court acquires no jurisdiction and must dismiss. *See, e.g., Larsen*, \_\_ N.C. App. at \_\_, 772 S.E.2d at 95. After reviewing an appeal from an interlocutory order, this Court stated:

It is not the duty of this Court to construct arguments for or find support for [an] 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). In *Larsen*, this Court held where the appellant’s principal failed to state “any grounds for appellate review,” it would not allow an appellant “to use their reply brief

*Opinion of the Court*

to independently establish grounds for appellate review.” *Larsen*, \_\_ N.C. App. at \_\_, 772 S.E.2d at 95 (emphasis in original).

Here, Plaintiff argues his Rule 28 violation should be construed as nonjurisdictional and his principal brief’s failure to specifically assert the trial court’s order affects a substantial right is not such an “egregious error” requiring us to dismiss. *See Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 200, 657 S.E.2d at 366. Plaintiff further argues it is “abundantly clear” from the record that his appeal affects as a substantial right.

Plaintiff also argues his case is distinguishable from *Larsen*, because his principal brief cited N.C. Gen. Stat. § 7A-27(b), which includes a subsection allowing appeals from an interlocutory order that affects a substantial right. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2015).

The only statement for appellate jurisdiction asserted in the Plaintiff’s brief is:

The ground for appellate review of a *final judgment* of the Superior Court is pursuant to N.C. Gen. Stat. § 7A-27(b).

(emphasis supplied). Although Plaintiff’s brief cited N.C. Gen. Stat. § 7A-27(b) generally and not § 7A-27(b)(3)(a) specifically, the clearly stated ground for appellate jurisdiction asserted the trial court’s order purportedly appealed from constituted a “final judgment.” *See* N.C. Gen. Stat. § 7A-27(b)(1) (2015).

As Ammons correctly notes, the trial court’s grant of its Rule 12(b)(6) motion to dismiss is not a final judgment in this case. First, Plaintiff continues to assert

*Opinion of the Court*

unadjudicated claims against additional defendants in this action. Plaintiff and Defendants, East Coast, Carle, and Albino, recognized these unadjudicated claims remain before the trial court and filed a joint motion to continue the action while Ammons' motion to dismiss is pending before this Court. The motion to continue was granted by the trial court on 31 March 2016. Second, Plaintiff did not seek a Rule 54(b) certification for immediate appeal from the trial court. Finally, Plaintiff never asserted in its principal brief that this appeal affects a substantial right, which will be lost absent immediate review.

This Court has consistently held “[a] reply brief does not serve as a way to correct deficiencies in the principal brief.” *Larsen*, \_\_ N.C. App. at \_\_, 772 S.E.2d at 96 (internal quotation marks and citation omitted). We reject Plaintiff's argument asserted in his reply brief that we should infer a substantial right had been raised within the substance of Plaintiff's principal brief. *See Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254.

Plaintiff improperly asserted the trial court's order was an immediately appealable “final judgment,” and did not assert in his principal brief the order affects a substantial right to be lost without an immediate appeal. *See* N.C. R. App. P. 28(b)(4). We are bound by this Court's precedents, which do not allow this jurisdictional mistake to be corrected in Plaintiff's reply brief. *See Larsen*, \_\_ N.C. App. at \_\_, 772 S.E.2d at 96. Plaintiff's interlocutory appeal failed to confer

*Opinion of the Court*

jurisdiction upon this Court. We are compelled to dismiss. *Larsen*, \_\_ N.C. App. at \_\_, 772 S.E.2d at 95.

V. Conclusion

Rather than asserting grounds for appellate jurisdiction over an interlocutory order by arguing a substantial right or by seeking a Rule 54(b) certification, Plaintiff erroneously claimed the trial court's order granting Ammons' motion to dismiss was a "final judgment." This error failed to confer appellate jurisdiction upon this Court. Jurisdiction cannot be corrected in the reply brief. *See Larsen*, \_\_ N.C. App. at \_\_, 772 S.E.2d at 96. We do not consider or address the merits of this case. Plaintiff's interlocutory appeal is dismissed for lack of jurisdiction. *See id.*

DISMISSED.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).