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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-452

Filed: 4 December 2018

Ashe County, No. 17 CVS 397

WBTV, LLC, Plaintiff,

v.

ASHE COUNTY, through the ASHE COUNTY BOARD OF COMMISSIONERS; WILLIAM SANDS in his capacity as Chairman; PAULA PERRY in her capacity as Vice Chair; LARRY RHODES, JEFF ROSE, GARY ROARK in their capacities as members of the Board of Commissioners; SAM YEARICK in his capacity as County Manager; TERRY BUCHANAN, in his capacity as the Ashe County Sheriff (Suspended); RICHARD CLAYTON in his capacity as the acting Ashe County Sheriff; and JOHN T. KILBY and KILBY & HURLEY in their capacity as County Attorneys, Defendants.

Appeal by plaintiff from order entered 5 December 2017 by Judge Susan Bray in Ashe County Superior Court. Heard in the Court of Appeals 16 October 2018.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for plaintiff-appellant.

D. Brandon Christian, Ronnie M. Mitchell, and David A. Wijewickrama for defendants-appellees Terry Buchanan and Richard Clayton.

DIETZ, Judge.

WBTV, LLC brings this interlocutory appeal challenging the dismissal of two defendants in this multi-party Public Records Act lawsuit. As explained below, WBTV

failed to show that the challenged order affects a substantial right—indeed, WBTV’s brief does not even include the mandatory statement of the grounds for appellate review necessary to confer jurisdiction under our case law. The defendants pointed out this fatal jurisdictional defect in their appellee brief, but WBTV did not acknowledge the defect or take any action to remedy it, for example, by filing a petition for a writ of certiorari. Thus, under well-settled precedent governing our power to hear appeals, we are constrained to dismiss this appeal for lack of appellate jurisdiction.

Facts and Procedural History

Between April 2017 and July 2017, WBTV sent a series of public records requests to various public officials in Ashe County. Among other things, WBTV sought copies of text messages between the Ashe County Board of Commissioners and Defendant Terry Buchanan, who was then the Sheriff of Ashe County.

On 6 November 2017, after failing to receive the documents it requested, WBTV brought suit seeking a declaratory judgment that the requested text messages were public records under our State’s Public Records Act and an order compelling Defendants to produce the records.

On 21 November 2017, former Sheriff Buchanan and then-acting Sheriff Richard Clayton moved for judgment on the pleadings. The trial court held a hearing on the motion on 4 December 2017. WBTV acknowledges that, at the time of this

Opinion of the Court

hearing, “[n]o other defendant had filed an answer or other responsive pleading to the Complaint.”

The day after the hearing, the trial court entered an order granting Buchanan’s and Clayton’s motion for judgment on the pleadings. The court’s order emphasized that the court was not addressing the remaining claims in the case against the remaining parties:

[T]he motion for judgment on the pleadings by Defendants Buchanan and Clayton is GRANTED, and the plaintiff’s claims against Defendant Terry Buchanan and Defendant Richard Clayton are dismissed. Any other claims against any other defendants are unadjudicated and are unaffected by this Order.

WBTB timely appealed.

Analysis

This Court endeavors, whenever possible, to decide cases on the merits of the issues the parties present for appeal. But “courts of law must have their power properly invoked by an interested party” and “a default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court.” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364 (2008).

In appeals from final judgments, the appealing party confers jurisdiction on this Court by timely filing a notice of appeal. A final judgment is one that “that leaves

nothing further to be done in the trial court.” *State v. Oakes*, 240 N.C. App. 580, 582, 771 S.E.2d 832, 834 (2015).

But the jurisdictional rules are different when litigants appeal from non-final, interlocutory orders because “[a]s a general rule, there is no right of appeal from an interlocutory order.” *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015). “The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.” *Id.*

Because the trial court did not certify this case for appeal under Rule 54(b), the only basis on which WBTV could appeal this interlocutory order is a showing that the challenged order “[a]ffects a substantial right.” N.C. Gen. Stat. § 7A-27(b)(3)(a). Under our Rules of Appellate Procedure, that showing is made in the appellant’s statement of the grounds for appellate review. N.C. R. App. P. 28(b)(4). That statement must include “sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.” *Larsen*, 241 N.C. App. at 77, 772 S.E.2d at 95. This is a jurisdictional requirement—if the statement of the grounds for appellate review does not contain a showing that the challenged order affects a substantial right, this Court lacks the power to hear the appeal. *Id.* at 77–78, 772 S.E.2d at 96.

WBTV, LLC v. ASHE CTY.

Opinion of the Court

Here, as WBTV acknowledges in its brief, this is an appeal from a non-final, interlocutory order. WBTV brought suit against multiple parties, including Ashe County, members of the County Board of Commissioners, the County Manager, and the County Attorneys. These parties did not move for judgment on the pleadings and the trial court's order dismissing the claims against Buchanan and Clayton expressly states that the claims against these other parties "are unadjudicated and are unaffected by this Order."

We therefore examine the statement of the grounds for appellate review in this case to determine if we have appellate jurisdiction. That is effectively the end of this case, because WBTV's brief does not contain a statement of the grounds for appellate review, nor is there any mention of how the challenged order affects a substantial right anywhere else in WBTV's brief. In an interlocutory appeal like this one, this is a fatal jurisdictional defect that compels us to dismiss the appeal. *See Edwards v. Foley*, __ N.C. App. __, __, 800 S.E.2d 755, 756 (2017); *Larsen*, 241 N.C. App. at 78, 772 S.E.2d at 96.

As we have observed many times before, "[w]e recognize that this precedent can have harsh consequences. In this case, for example, one can imagine arguments that *could* have been made for why the challenged order affects a substantial right." *Kennihan v. Kennihan*, __ N.C. App. __, 815 S.E.2d 746, 2018 WL 3233092, at *2 (2018) (unpublished). But "[i]t is not the duty of this Court to construct arguments

Opinion of the Court

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

Moreover, as we observed in *Kennihan*, “the General Assembly has provided this Court with a means to avoid the potential injustice that results from this type of jurisdictional defect—we have broad authority under N.C. Gen. Stat. § 7A-32 to issue a writ of certiorari to review an appeal where the Court otherwise would lack appellate jurisdiction.” 2018 WL 3233092, at *2. But we explained in *Kennihan* that “even after [the appellee] filed his appellee brief, pointing out the deficiency in the statement of grounds for appellate review and asking this Court to dismiss the appeal for lack of jurisdiction, [the appellant] did not acknowledge the defect, nor ask this Court to exercise our discretionary power to issue a writ of certiorari. Thus, we are constrained to follow our holdings in *Jeffreys*, *Larsen*, and *Edwards* and dismiss this appeal for lack of appellate jurisdiction.” *Id.*

The same is true here. Buchanan and Clayton included an entire section in their appellate brief explaining why WBTV failed to establish appellate jurisdiction, ending with the observation that WBTV “utterly failed in its brief to address the issue of whether its appeal affects a substantial right.” WBTV never responded to this argument or acknowledged its mistake; nor did it petition this Court for a writ of

WBTV, LLC v. ASHE CTY.

Opinion of the Court

certiorari to cure the jurisdictional defect. Accordingly, consistent with past cases, we are constrained to dismiss this appeal for lack of jurisdiction.

Conclusion

We dismiss this appeal for lack of appellate jurisdiction.

DISMISSED.

Judges BRYANT and INMAN concur.

Report per Rule 30(e).