IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-620

No. COA20-807

Filed 16 November 2021

Bertie County, No. 14 CVS 45

EMILY URQUHART AYSCUE, THOMAS MIZELL URQUHART, JR., and BETSEY DERR URQUHART, Plaintiffs,

v.

BURGES URQUHART GRIFFIN, JR., and LOWGROUNDS LAND CO., LLC, Defendants.

Appeal by plaintiff from order entered 30 June 2020 by Judge Cy A. Grant in Bertie County Superior Court. Heard in the Court of Appeals 3 November 2021.

Batts, Batts & Bell, LLP, by Joseph G. McKellar and Joseph L. Bell, Jr., for plaintiff-appellant Ayscue.

Jones & Carter, P.A., by Ernest R. Carter, Jr. and Cecelia D. M. Jones, for defendants-appellees.

TYSON, Judge.

¶ 1 Emily Urquhart Ayscue ("Ayscue") appeals from an order denying her motion *in limine*.

I. Background

¶ 2 Ayscue, Thomas Mizell Urquhart, Jr., and Betsey Derr Urquhart (collectively "Plaintiffs") own real property as tenants in common. An adjoining property is owned

by Lowgrounds Land Co., LLC ("Lowgrounds"), a North Carolina limited liability company. Burges Urquhart Griffin, Jr. is a member/manager of Lowgrounds (collectively "Defendants"). All individual parties are family members.

¶ 3 The facts underlying this case are set forth in detail in this Court's previous opinion *Ayscue v. Griffin*, 263 N.C. App. 1, 823 S.E.2d 134 (2018).

> Both Plaintiffs' and Defendants' tracts were originally portions of the estate of Burges Urquhart, who died in 1903. Plaintiffs and Griffin are descendants of Burges Urquhart. Upon Burges Urquhart's death, his real property was divided among his five children. Burges Urquhart's real property was divided through a plat map of the entire property prepared by surveyor, William Parker, and dated 5 December 1905 ("the Parker Plat"). The Parker Plat was filed in the Bertie County Registry and is recorded at Book 138, Page 183.
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> In 1965, L.T. Livermon, Jr., R.L.S., drew a new map of the Burges Urquhart tracts shown on the Parker Plat without re-surveying the property and recorded his map in the Bertie County Registry at Map Book 2, Page 106 ("the Livermon Map"). The 1965 Livermon Map includes an express disclaimer: "There was no error of closure calculated." It is unclear if the boundary lines of the respective tracts shown, including the subject properties, as depicted on the 1965 Livermon Map actually close.
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> In 2013, Plaintiffs hired surveyor Mark Pruden, R.L.S, to prepare a survey of the disputed boundary line as shown on the Parker Plat. Pruden conducted an initial survey and then a corrected version ("The Pruden Survey"). The Pruden Survey is recorded in the Bertie County Registry at Map Book 13, Page 820. The Pruden Survey displays the boundary line between the parties' properties lying between two points east of a pond called "Blue Hole."

Pruden testified in a deposition that he had determined the boundary line of the respective tracts by using the same bearing as the boundary line on the 1905 Parker Plat. The Pruden Survey depicts the common boundary line of the respective properties as having the bearing of N 27°30'00" W, which is equivalent to the bearing of "S 27 1/2 E" for the boundary line shown on the Parker Plat. The Pruden Survey does not depict the boundaries of all of Plaintiffs' and Defendants' properties, does not demonstrate any error of closure, and shows only the disputed boundary line and southern border of Plaintiffs' property. Pruden's testimony does not indicate he surveyed each of the parties' tracts in their entirety.

Defendants hired surveyor, Randy Nicholson, R.L.S., to map the location of the boundary line in late 2013. Nicholson's map ("the Nicholson Map") shows the purported boundary line as contended by Plaintiffs and Pruden. The Nicholson Map indicates and locates the actual boundary line as lying between two points situated west of the boundary line shown on the Pruden Survey and as contended by Plaintiffs.

On 26 February 2014, Plaintiffs filed a complaint alleging Defendants "came onto Plaintiffs' property without permission and cut down trees and other vegetation on approximately three and one half acres . . . of Plaintiffs' property near the boundary line between Plaintiffs' and Defendant Lowgrounds's property" shortly before April 2013.

Plaintiffs' complaint asserts claims for quiet title, trespass to land, and recovery of statutory double damages for "the value of the timber, shrubs, wood and trees injured, cut or removed from their [p]roperty" pursuant to N.C. Gen. Stat. § 1-539.1. Plaintiffs' complaint demands "a jury trial on all issues of fact to which they are so entitled."

Defendants filed their answer and asserted, in part, that the property Plaintiffs' alleged Defendants trespassed

> upon is actually owned by Lowgrounds. Defendants also demanded in their answer "a jury trial on all issues of fact to which they are so entitled."
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> On 11 March 2015, the trial court entered a consent order ("the Consent Order") to appoint surveyor Paul Toti, R.L.S., to "go upon the lands, find, mark and prepare a plat showing *where on the ground said boundary lines exist*" as shown on the Parker Plat. (Emphasis supplied). The Consent Order provides, in relevant part: "The parties agree that the survey, when completed may be used by the Court in determining the issues presented in the instant action."
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> On 1 July 2016, before Toti had completed his survey, Plaintiffs filed a motion *in limine* to request an order instructing Toti to disregard the Nicholson Map in preparing his survey. Plaintiffs argued the line depicted on the Nicholson Map, which Defendants contend is the correct line, was based upon incompetent evidence, which Toti should not have considered in conducting his survey.

Id. at 2-4, 823 S.E.2d at 136-37.

¶ 4 The trial court had entered an order that determined, *inter alia*, the boundary line depicted on the Nicholson Map, which is the line advocated by Defendants, was the division line between the parties' properties.

¶ 5 This Court vacated the order, holding: "[t]he trial court improperly deprived Plaintiffs of their right to a jury trial on the factual issue of the physical location on the ground of the disputed boundary line." *Id.* at 14, 823 S.E.2d at 143. Upon remand, following a hearing, the trial court entered an "Order Allowing Plaintiffs' Motion in Limine in Part and Denying Plaintiffs' Motion in Limine in Part" on 30

June 2020. This order excluded the Nicholson Map but also forbade Toti from "offer[ing] his opinion as to the location of the disputed boundary line." Ayscue appeals.

II. Jurisdiction

¶ 6 Our Supreme Court has long held: "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) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

¶ 7 "This general prohibition against immediate appeal exists because there is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568 (2007) (citations omitted).

¶ 8 Our Supreme Court has held there are two circumstances where a party is permitted to appeal an interlocutory order:

> First, a party is permitted to appeal from an interlocutory order 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. Second, a party is permitted to appeal from an interlocutory order when 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) (internal citations and quotation marks omitted).

¶ 9 In this case, the trial court's order is interlocutory because it does not dispose of any of Plaintiff's claims. Under either circumstance laid out in *Jeffreys*, "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]" *Id.* "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[.]" *Id.* at 380, 444 S.E.2d at 254.

¶ 10 The trial court did not certify the judgment for "no just reason for delay" of the appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2019). In order for this Court to acquire jurisdiction of Ayscue's interlocutory appeal, she must show the trial court's order deprives her of a substantial right. *See Jeffreys,* 115 N.C. App. at 379, 444 S.E.2d at 253.

¶ 11 Ayscue's principal brief is wholly insufficient to establish grounds for appellate review. Ayscue's principal brief does not mention the interlocutory nature of the

appeal nor the issue of a substantial right deprivation, and failed to include any statement of grounds for appellate review, in violation of our appellate rules. *See* N.C. R. App. P. 28(b)(4) ("An appellant's brief shall contain . . . 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 interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.").

¶ 12 As the appellant, Ayscue is not allowed to use her "reply brief to independently establish grounds for appellate review" when her principal brief does not contain any assertion of grounds for appellate review. *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 78, 772 S.E.2d 93, 96 (2015).

¶ 13 When an appeal is interlocutory, Rule 28(b)(4) of our appellate code is a jurisdictional rule. The only way an appellant may establish appellate jurisdiction in an interlocutory appeal is by showing grounds for appellate review based upon the order affecting a substantial right that will be lost absent an immediate review. Ayscue has not shown she possesses a substantial right which would be jeopardized or lost absent an immediate appellate review. We express no opinion on the merits, if any, of Plaintiffs' claims or of Defendants' defenses.

III. Conclusion

¶ 14 Ayscue's principal brief does not establish grounds for appellate review. This

Court's binding precedent does not allow an appellant to attempt to use their reply brief to independently establish grounds for appellate review where none are stated in the principal brief. *Id.*

¶ 15 Ayscue has failed to show either a substantial right as a basis for the interlocutory appeal nor has she filed a petition seeking a writ of certiorari. Ayscue has failed to show she possesses "a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Topping v. Meyers*, 270 N.C. App. 613, 627, 842 S.E.2d 95, 105 (2020) (citation omitted).

¶ 16 This Court is without appellate jurisdiction. Ayscue's interlocutory appeal is dismissed and this cause is remanded for further proceedings. We express no opinion on the validity, if any, of Plaintiffs' claims nor Defendants' defenses thereto. *It is so ordered.*

DISMISSED.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).