

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-194

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

WILLIE D. GILBERT, II
Plaintiff,
v.

Wilson County
No. 04 CVS 628

THE NORTH CAROLINA STATE BAR,
Defendant.

Appeal by defendant from judgment entered 12 September 2005 by Judge Milton F. Fitch, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 11 October 2006.

Michaux & Michaux, P.A., by Eric C. Michaux, for plaintiff-appellee.

The North Carolina State Bar, by David R. Johnson, Deputy Counsel; and A. Root Edmonson, Deputy Counsel, for defendant-appellant.

LEVINSON, Judge.

The North Carolina State Bar (defendant), appeals an order granting in part the summary judgment motion by plaintiff, Willie D. Gilbert, II. We dismiss the appeal as interlocutory.

The procedural history of the legal proceedings between these parties is summarized as follows: In July 1999 defendant served plaintiff with a grievance alleging that he had engaged in professional misconduct in his representation of a client. On 26 April 2000 defendant filed an amended complaint with its Disciplinary Hearing Commission (DHC). The complaint, 00 DHC 03,

alleged that, on a number of occasions between 1997 and 1999, plaintiff engaged in professional misconduct in his representation of several clients. A hearing was conducted on the complaint in July 2000. "In its order filed 1 November 2000, the DHC found [plaintiff] guilty of violating the following rules of the NORTH CAROLINA REVISED RULES OF PROFESSIONAL CONDUCT: 1.5 (collecting an illegal or excessive fee); 1.7 (engaging in a conflict of interest); 8.4(b) (engaging in criminal conduct that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer); 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 8.4(d) (engaging in conduct prejudicial to the administration of justice); 8.4(g) (intentionally prejudicing his clients); and 1.15-2(h) (failing to disburse funds as directed by client)." *N.C. State Bar v. Gilbert*, 151 N.C. App. 299, 302, 566 S.E.2d 685, 687 (2002), *aff'd*, 357 N.C. 502, 586 S.E.2d 89 (2003). The DHC ordered that plaintiff's law license be suspended for five years, but allowed the last three years' suspension to be stayed if plaintiff complied with certain requirements. Plaintiff appealed the DHC's order of discipline, which was affirmed by this Court in *N.C. State Bar v. Gilbert*, *id.*

On 16 April 2002 the defendant filed a civil suit against plaintiff seeking recovery of monies paid to one of plaintiff's clients from the North Carolina State Bar's Client Security Fund. Judgement was entered against plaintiff on 11 March 2004, from which plaintiff appealed. This Court, in an unpublished opinion, vacated the trial court's order and remanded for entry of a new

order. *N.C. State Bar v. Gilbert*, 2006 N.C. App. LEXIS 483.

On 12 September 2003 defendant filed a new complaint with the DHC, in 03 DHC 16. This complaint, which was based on a grievance from 17 July 2000, alleged that in 1998 plaintiff engaged in professional misconduct by mishandling \$290 of the money in his business trust fund. Defendant sought plaintiff's disbarment.

On 9 April 2004 plaintiff filed the complaint in the instant case. Plaintiff asserted that defendant's prosecution of the complaint in 03 DHC 16 was unlawful, vindictive, and was brought in bad faith in retaliation for plaintiff's zealous pursuit of appellate relief in the earlier actions against him. Plaintiff alleged violation of his rights under the U.S. and North Carolina constitutions, and sought declaratory and injunctive relief and compensatory damages. Plaintiff moved for summary judgment, and a hearing was conducted on 29 November 2004. On 12 September 2005 the trial court entered an order declaring defendant's prosecution of 03 DHC 16 to be a bad faith and vindictive prosecution brought in violation of plaintiff's constitutional rights. The court denied plaintiff's motion for summary judgment on the issue of whether the prosecution of 03 DHC 16 violated his double jeopardy rights, and granted summary judgment for defendant on that issue. The trial court further ordered that plaintiff was entitled to attorneys' fees and to such compensatory damages as he was able to prove at trial. The court also entered a permanent injunction barring defendant from any further prosecution of 03 DHC 16. From this order defendant has appealed.

Preliminarily, we must determine if this appeal is properly before us. "A judgment is either interlocutory or the final determination of the rights of the parties." N.C.G.S. § 1A-1, Rule 54(a) (2005). "The distinction between the two was addressed in *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950), wherein the Court stated:

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.

Embler v. Embler, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (quoting *Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381 (citations omitted)). In the instant case, the order for summary judgment states that the trial court "expressly retains jurisdiction over this matter for purposes of any further proceedings in this case, including but not limited to proceedings for the enforcement of this Order, for the determination of the attorneys' fees to be awarded, and proceedings (i.e., a trial) for the determination of the compensatory damages to be awarded, if any." We conclude, and defendant concedes, that this is an interlocutory appeal.

"A final judgment is always appealable. However, an interlocutory order is immediately appealable only under two circumstances. 'First, if the order or judgment is final as to

some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie.' Under Rule 54(b), the trial judge must certify that there is no just reason for delay. Since there was no certification in the instant case, this avenue of interlocutory appeal is closed to defendant." *Embler, id.* (quoting *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)). Moreover, in the present case, the absence of such a certification represents a deliberate decision on the part of the trial court. The defendant asked the court to certify the case for immediate appellate review, and the trial court expressly denied this request, stating that:

I think that the Court ought to have the whole matter. We've gone up interlocutory, or attempted, on the injunction. I think the Court sent it back. Let's give them the whole ball of wax when we give it to them. Denied.

"The other situation in which an immediate appeal may be taken from an interlocutory order is when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Embler* at 165, 545 S.E.2d at 261 (citation omitted).

Defendant contends that immediate review is warranted on the basis of a substantial right. Defendant states that its purpose is "to promulgate and enforce the disciplinary rules governing the conduct of attorneys[,]" and that the "[d]eprivation of its power to enforce the rules affects a substantial right[.]" However, defendant fails to articulate how delaying its appeal until the

case is resolved will jeopardize its ability to enforce the Rules of Professional Conduct. Nor does defendant identify any circumstance making review of the particular claim, which alleges that plaintiff mishandled \$290 in 1998, of such urgency that the appeal cannot be delayed.

"Whether a party may appeal an interlocutory order pursuant to the substantial right exception is determined by a two-step test. '[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.'" *Wood v. McDonald's Corp.*, 166 N.C. App. 48, 55, 603 S.E.2d 539, 544 (2004) (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (other citation omitted)).

In the instant case, the trial court granted summary judgment on the issue of liability but explicitly retained jurisdiction to determine the issue of damages. "It is well settled that a judgment which determines liability but which leaves unresolved the amount of damages is interlocutory and cannot affect a substantial right:

. . . [If such a] partial . . . judgment is in error defendant can preserve its right to complain of the error on appeal from the final judgment by a duly entered exception. Even if defendant is correct on its legal position, the most it will suffer from being denied an immediate appeal is a trial on the issue of damages.

Steadman v. Steadman, 148 N.C. App. 713, 714, 559 S.E.2d 291, 292 (2002) (quoting *Johnston v. Royal Indemnity Co.*, 107 N.C. App. 624, 625, 421 S.E.2d 170, 171 (1992)) (internal citation omitted). "In

the case at bar, the orders of the trial court denying defendant's motion for summary judgment against [plaintiff] and granting [plaintiff's] motion for summary judgment against defendant determined the issue of liability and left only the question of damages for trial. Such an order does not affect a substantial right and is therefore not immediately appealable[.] . . . [Defendant's] appeal must be dismissed." *Freeman v. Reliance Ins. Co.; Chamblee v. Reliance Ins. Co.*, 68 N.C. App. 620, 622, 315 S.E.2d 798, 800 (1984) (citations omitted).

For the reasons discussed above, we conclude that defendant appeals from an interlocutory order not affecting a substantial right, and that its appeal must be

Dismissed.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).