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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-747

Filed: 21 February 2017

Davie County, No. 14 CVS 32

JOHN F. STOWERS AND WIFE SUSAN EDWARD STOWERS, Plaintiffs

v.

MICHAEL J. PARKER, JULIE A. PARKER AND PARKER and PARKER, A  
GENERAL PARTNERSHIP, Defendants

Appeal by plaintiffs from order entered 16 December 2015 by Judge Kevin M.  
Bridges in Davie County Superior Court. Heard in the Court of Appeals 25 January  
2017.

*Rodney C. Mason, for plaintiff-appellants.*

*J. Chad Bomar, for defendant-appellees.*

CALABRIA, Judge.

John F. Stowers and Susan Edward Stowers (collectively, “plaintiffs”) appeal from an order granting defendants’ motion for summary judgment. However, the trial court’s order did not address pending counterclaims, and plaintiffs fail to demonstrate that they are entitled to immediate review. Accordingly, we dismiss plaintiffs’ appeal as interlocutory.

**I. Background**

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The instant case involves allegations of legal malpractice. In 2008, plaintiffs hired defendant Michael J. Parker (“Mr. Parker”) to represent them in *Lakey v. Stowers* (08 CVS 299), a dispute over ownership of a private road in Davie County, North Carolina. The case ended on 26 May 2010 when the trial court granted the Lakeys’ motion for summary judgment, declared them sole owners of Horseshoe Trail, and enjoined plaintiffs from further use of the road.

On 16 May 2013, plaintiffs initiated the instant action by filing a verified complaint against Mr. Parker; his partner, Julie A. Parker; and their law firm, Parker and Parker (collectively, “defendants”). On 12 November 2013, plaintiffs filed an amended complaint, contending that Mr. Parker failed to adequately argue the dispositive summary judgment motion in *Lakey v. Stowers*, and that all defendants were liable for his alleged malpractice. On 12 December 2013, defendants filed an answer, a motion to dismiss, and counterclaims for fraud and misrepresentation. The trial court denied defendants’ motion to dismiss plaintiffs’ complaint on 4 December 2014.

On 23 April 2015, defendants filed a motion for summary judgment, which was denied. Plaintiffs subsequently moved for a continuance of the trial, and defendants consented on the condition that the court enter a discovery scheduling order. On 8 May 2015, the trial court entered an order scheduling trial for 18 January 2016 and setting a timeline for the parties’ discovery. The court ordered plaintiffs to designate,

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by 15 July 2015, all expert witnesses that they intended to call at trial. The discovery scheduling order specifically directed that “[n]o expert witnesses may be designated by the parties other than as set forth herein.”

On 15 July 2015, plaintiffs designated Laurel O. Boyles (“Mr. Boyles”) as their sole legal expert witness. According to the expert witness designation, Mr. Boyles believed that Mr. Parker failed to exercise the requisite standard of care in defending against the Lakeys’ motion for summary judgment. However, when defendants deposed Mr. Boyles on 26 October 2015, he withdrew all of the opinions outlined in plaintiffs’ expert witness designation. Specifically, Mr. Boyles testified that he would not offer any opinion that defendants: “failed to use their best judgment in the prosecution” of the underlying case; “failed to exercise reasonable and ordinary care and diligence” in using or applying their knowledge and skill; or “failed to represent [plaintiffs] with the skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise . . . .” Mr. Boyles also testified that he held no opinion on the issues of causation or damages.

On 24 November 2015, defendants filed a second motion for summary judgment. According to defendants, North Carolina law requires the plaintiff in a legal malpractice action to “establish the standard of care and practice via expert testimony.” Defendants contended that plaintiffs would be unable to “offer competent evidence” with respect to those issues because Mr. Boyles withdrew his opinions, and

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the discovery scheduling order “makes clear that [p]laintiffs may designate no expert witness after” 15 July 2015. Defendants also submitted the affidavit of their own legal expert witness, G. Gray Wilson (“Mr. Wilson”), who opined, *inter alia*, that Mr. Parker “exercised reasonable and ordinary care and diligence in the use of his skill and application of knowledge to [plaintiffs’] cause; and he represented [plaintiffs] with such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise . . . .” Mr. Wilson further opined that Mr. Parker’s legal services “did not proximately cause any damage to [plaintiffs] because the Lakey plaintiffs would more likely than not have prevailed on the merits in the underlying lawsuit even had their summary judgment motion been denied.”

On 7 December 2015, the trial court held a hearing on various motions that had been filed. In support of their motion for summary judgment, defendants proffered case law, Mr. Wilson’s affidavit, the discovery scheduling order, and Mr. Boyles’s deposition testimony. Plaintiffs submitted an affidavit from Mr. Boyles, asking to withdraw as plaintiffs’ expert witness and explaining that he “was physically and mentally unable to testify” to his opinions in the case. Plaintiffs requested that the trial court “either deny [defendants’] motion or continue it” and allow plaintiffs to find another expert witness “within a reasonable period of time[.]”

On 16 December 2015, the trial court entered an order granting defendants’ motion for summary judgment and denying as moot plaintiffs’ previously filed

motions to compel and to modify the discovery scheduling order. Plaintiffs timely appealed.

## II. Analysis

Plaintiffs contend that the trial court erred in: (1) granting defendants' motion for summary judgment, because the issue of Mr. Parker's alleged malpractice "does not require expert testimony to determine"; and (2) denying plaintiffs' motion for continuance. However, we decline to consider these issues. The trial court's order is interlocutory, and plaintiffs neither argue nor demonstrate that they are entitled to immediate review.

"A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2015). "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citation and internal quotation marks omitted). However, there are two exceptions to this general rule. *See id.* (citation omitted). First, a party may appeal when the trial court "enter[s] a final judgment as to one or more but fewer than all of the claims or parties" and certifies in the judgment that "there is no just reason" to delay appellate review. N.C. Gen. Stat. § 1A-1, Rule 54(b); *Munden v. Courser*, 155 N.C. App. 217, 218, 574 S.E.2d 110, 112 (2002) (stating that "[e]ven if the lower court's ruling on the parties' motions

for partial summary judgment was considered a final judgment as to the issue presented, no appeal of right will lie unless the decree is certified for appeal by the trial court”). Second, an immediate appeal may be taken from an interlocutory order “which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.” N.C. Gen. Stat. § 1-277(a).

“[I]t is the appellant’s burden to present appropriate grounds for this Court’s acceptance of an interlocutory appeal and our Court’s responsibility to review those grounds.” *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253. To that end, the appellant’s brief must contain a statement of the grounds for appellate review, including “citation of the statute or statutes permitting” our review. N.C.R. App. P. 28(b)(4).

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.

*Id.*

In the instant case, the trial court granted defendants' motion for summary judgment on plaintiffs' claim for legal malpractice. However, the court did not address defendants' counterclaims for fraud and misrepresentation, and there is nothing in the record to suggest that these claims were dismissed or otherwise extinguished.<sup>1</sup> Accordingly, the trial court's order is interlocutory. The court did not certify the order for immediate appeal, as required by N.C. R. Civ. P. 54(b), and plaintiffs do not contend that it affects a substantial right or is otherwise subject to immediate review pursuant to N.C. Gen. Stat. § 1-277(a). Indeed, plaintiffs' brief fails to include *any* statement of the grounds for appellate review, in violation of N.C.R. App. P. 28(b)(4).

We note that neither party has addressed the interlocutory nature of plaintiffs' appeal. Nevertheless, where an appellate court determines that the appealing party has no such right, the "court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Metcalf v. Palmer*, 46 N.C. App. 622, 625, 265 S.E.2d 484, 485 (1980) (citation and internal quotation marks omitted). Having so determined, we dismiss plaintiffs' appeal.

APPEAL DISMISSED.

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<sup>1</sup>In their "Motion to Modify the Pending Discovery Scheduling Order," filed 21 October 2015 and scheduled for hearing on 7 December 2015, plaintiffs requested additional time for discovery in order to "allow them to meet [defendants'] defenses *and counterclaims raised in this action . . .*" (emphasis added). The trial court's summary judgment order did not dispose of defendants' counterclaims. Consequently, these claims remain pending.

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Judges McCULLOUGH and INMAN concur.

Report per Rule 30(e).