

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA16-926

Filed: 20 June 2017

Forsyth County, No. 15 CVS 6015

DORIS TUCKER, in Her Capacity as Administrator of THE ESTATE OF MARY ELLEN THOMPSON, Plaintiff,

v.

THE CLERK OF COURT OF FORSYTH COUNTY, EX REL SUSAN FRYE; BRYAN THOMPSON; FRED P. FLYNT, III; WILLIAM M. SPEAKS, JR.; LIBERTY MUTUAL GROUP, INC. (FORMERLY KNOWN AS OHIO CASUALTY INSURANCE CO.); CLINARD INSURANCE GROUP, INC.; and DUDLEY WITT, Defendants.

Appeal by Plaintiff from orders entered 29 February and 3 March 2016, by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Court of Appeals 20 April 2017.

*Reginald D. Alston for Plaintiff-Appellant.*

*Sharpless & Stavola, P.A., by Molly A. Whitlatch, Pamela S. Duffy, and Frederick K. Sharpless, for Defendant-Appellee Thompson.*

*William M. Speaks, Jr., Defendant-Appellee, pro se.*

McGEE, Chief Judge.

*I. Procedural History*

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The Estate of Mary Ellen Thompson, through its administrator Doris Tucker,<sup>1</sup> (“Plaintiff”), filed a complaint on 20 October 2015 (“the complaint”) naming the following Defendants: the Clerk of Court of Forsyth County, ex rel. Susan Frye (“Clerk of Court”); Bryan Thompson (“Thompson”); Fred P. Flynt, III (“Flynt”); William M. Speaks, Jr. (“Speaks”); Liberty Mutual Group, Inc. (Formerly Known As Ohio Casualty Insurance Co.) (“Liberty”); Clinard Insurance Group, Inc. (“Clinard”); and Dudley Witt (“Witt”). In the complaint, Plaintiff alleged multiple claims – including RICO claims – contending that a pattern of racketeering activity was conducted by the Clerk of Court, Thompson, Flynt, and Speaks that resulted in damages in excess of \$1,600,000.00. Plaintiff also alleged fraud claims against multiple Defendants, including Liberty.

Both Thompson and Witt filed answers on 16 December 2015 that included, *inter alia*, motions to dismiss. One of the motions filed by Thompson was a Rule 12(b)(6) motion to dismiss for failure to state a claim for Plaintiff’s fraud and RICO claims against him. Speaks filed a motion to dismiss on 4 January 2016 pursuant to Rule 12(b)(6) for failure to state a claim for Plaintiff’s fraud and RICO claims against him. Liberty also filed an answer on 4 January 2016 that included a Rule 12(b)(6) motion to dismiss. Flynt filed a motion to dismiss pursuant to Rule 12(b)(6) on 6

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<sup>1</sup> At the time the complaint was filed, the administrator of the Estate of Mary Ellen Thompson was Calvin Brannon, but by the time the 29 February and 3 March 2016 orders were entered, Doris Tucker had replaced Calvin Brannon.

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January 2016. Clinard filed a motion to dismiss pursuant to Rule 12(b)(6) on 19 January 2016. The Clerk of Court filed a motion to dismiss pursuant to Rule 12(b)(6) on 29 January 2016.

Plaintiff entered voluntary dismissals with prejudice with respect to Witt, Clinard, and Flynt on 16 February 2016. The trial court heard Speaks' and Thompson's motions to dismiss on 19 February 2016, and granted both on the grounds that Plaintiff had failed to state either fraud or RICO claims against Speaks or Thompson.<sup>2</sup> Plaintiff filed a notice of appeal from the orders dismissing the claims against Speaks and Thompson, limiting notice of appeal to the dismissal of Plaintiff's RICO claims against Speaks and Thompson. The record does not indicate the current status of Plaintiff's claims against the Clerk of Court or Liberty.

*II. Interlocutory Appeal Jurisdiction*

We must first address the interlocutory nature of Plaintiff's appeal. As Plaintiff acknowledges, because there are still unsettled claims against two Defendants, this appeal is from interlocutory orders and not generally subject to immediate appellate review. It is well settled:

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

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

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<sup>2</sup> The order dismissing the claims against Thompson was entered 29 February 2016; the order dismissing the claims against Speaks was entered 3 March 2016.

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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) (2009). The burden rests on the appellant to establish the basis for an interlocutory appeal.

*Pentecostal Pilgrims & Strangers Corp. v. Connor*, 202 N.C. App. 128, 131, 688 S.E.2d 81, 83 (2010) (citations omitted).

Plaintiff's entire statement of her grounds for appellate review is as follows:

[The trial court] signed orders dated February 29, 2016 and March 3, 2016 granting [D]efendants William Speakes' and Bryan Thompson's Motions to Dismiss the RICO claims in the complaint. An immediate appeal from these "interlocutory" rulings to the Court of Appeals is based upon [N.C. Gen. Stat. 7A-27(b)(3)(a.)] in that it could negatively impact the "substantial right" of the Estate of Mary Thompson to pursue a remedy to a final judgment if this matter is not corrected. *Travco Hotels v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 403 S.E.2d 593 (1991)[.]

Clearly, Plaintiff's statement does not indicate that the issues in this appeal have been certified pursuant to Rule 54(b) of the Rules of Civil Procedure, nor does the record so indicate. See N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015); N.C.R. App. P. 28(b)(4). It was, therefore, Plaintiff's duty to include in her brief "sufficient facts and

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argument to support appellate review on the ground that the challenged order affects a substantial right.” *Pentecostal*, 202 N.C. App. at 131, 688 S.E.2d at 83. Plaintiff failed to do so, and in fact does not even allege such, stating merely that failure to conduct immediate review “*could* negatively impact the ‘substantial right’ of the Estate of Mary Thompson to pursue a remedy to a final judgment[.]” (Emphasis added). Plaintiff makes no argument, and provides no supporting law, concerning how, in this matter, failure to immediately review the 29 February and 3 March 2016 orders would negatively impact any substantial right “to pursue a remedy to a final judgment” such that immediate review is warranted.

The one opinion cited by Plaintiff in her statement of grounds for appellate review, and which includes no pinpoint cite, stands for the general principle that “[u]nder N.C. Gen. Stat. §§ 1-277 and 7A-27, an order is immediately appealable if the order affects a substantial right and the loss of that right will injure the party appealing if not corrected prior to final judgment.” *Travco*, 102 N.C. App. at 661, 403 S.E.2d at 594 (citation omitted). Plaintiff makes no argument that the facts and law of *Travco* support her contention that failure to immediately decide her interlocutory appeal would affect any substantial right of hers and thereby do injury to her case. *Id.* at 663, 403 S.E.2d at 595. In fact, *Travco* concerns the unrelated issue of whether “the trial court’s order denying [the defendant’s] motion to disqualify” the plaintiff’s counsel from representing the plaintiff could be immediately appealed. *Id.*

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Because Plaintiff fails to meet her burden of “establish[ing] the basis for an interlocutory appeal[.]” *Pentecostal*, 202 N.C. App. at 131, 688 S.E.2d at 83 (citation omitted), she fails to demonstrate that this Court has jurisdiction to consider her arguments on appeal. We therefore dismiss Plaintiff’s appeal.

DISMISSED.

Judges DILLON and TYSON concur.

Report per Rule 30(e).