An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-910

Filed: 17 April 2018

New Hanover County, No. 16 CVS 4261

ANTHONY J. KIGGINS, Plaintiff,

v.

JARED CRAVEN, Defendant.

Appeal by defendant from order entered 5 May 2017 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 22 March 2018.

Deborah Sandlin for defendant-appellant.

No appellee brief filed.

DIETZ, Judge.

Defendant Jared Craven appeals the trial court court's denial of his Rule 12(b)(6) motion to dismiss. Craven acknowledges that his appeal is interlocutory but contends that the appeal affects a substantial right.

As explained below, this Court previously examined the identical substantial right argument asserted in this case and rejected it. We are bound by this holding

and, even if we were not, we agree that Craven has not shown that the challenged order affects a substantial right. Accordingly, we dismiss this appeal for lack of appellate jurisdiction.

Facts and Procedural History

Plaintiff Anthony Kiggins filed a criminal conversation action against Defendant Jared Craven alleging that Craven had sexual relations with Kiggins's wife. Craven moved to dismiss under Rule 12(b)(6), arguing that the tort of criminal conversation is unconstitutional. The trial court denied the motion to dismiss. Craven timely appealed.

Analysis

Ordinarily, the denial of a Rule 12(b)(6) motion to dismiss is an interlocutory order that is not immediately appealable. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Thus, to establish appellate jurisdiction, the appellant "must include in its statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005) (citation omitted).

Craven argues that the trial court's order denying his motion to dismiss is immediately appealable because "the denial of Defendant's motion to dismiss on

constitutional grounds involves a substantial right. Because the stand-alone tort of criminal conversation is unconstitutional, Defendant would suffer irreparable harm if forced to proceed to trial before resolution on the merits of his constitutional challenge in the appellate division."

This Court previously has considered—and rejected—this identical substantial right argument. In *Filipowski v. Oliver*, the defendant in a criminal conversation and alienation of affections suit appealed the denial of her Rule 12(b)(6) motion to dismiss on constitutional grounds. 219 N.C. App. 398, 398, 723 S.E.2d 789, 790 (2012). The defendant in *Filipowski* asserted the same substantial right argument that Craven asserts here. *Id.* This Court dismissed the appeal, holding that the defendant failed "to demonstrate why the order at issue affects a substantial right which will be lost if the order is not reviewed prior to a final judgment in the case." *Id.* at 399, 723 S.E.2d at 790.

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Moreover, even if we were not bound by *Filipowski*, we would nevertheless conclude that this appeal does not affect a substantial right. Like other litigants who do not prevail on a Rule 12(b)(6) motion that they believe is meritorious, Craven can pursue this argument, if necessary, after entry of final

judgment. Accordingly, we reject Craven's substantial right argument and dismiss this appeal for lack of appellate jurisdiction.

Conclusion

For the reasons discussed above, we dismiss this appeal for lack of appellate jurisdiction.

DISMISSED.

Judges HUNTER, JR. and ZACHARY concur.

Report per Rule 30(e).