An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1205

Filed: 19 June 2018

Wake County, No. 16 CVS 3081

SUSAN NORCIA GIUSTO, Plaintiff,

v.

ROBERTSON VENTURES, INC. d/b/a SERVPRO OF RALEIGH NE & NORTH DURHAM, and ERIE INSURANCE EXCHANGE, Defendants.

Appeal by defendant Robertson Ventures, Inc. from order entered 16 June 2017 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 4 April 2018.

King Law Group, PLLC, by Ronnie P. King, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by David L. Levy and Laura M. Forrest, for defendant-appellant Robertson Ventures, Inc.

No brief filed for non-appealing defendant Erie Insurance Exchange.

ELMORE, Judge.

Defendant Robertson Ventures, Inc. ("Servpro") appeals from an order denying its motion for summary judgment as to plaintiff Susan Norcia Giusto's claims for negligence, breach of contract, and breach of warranty. This appeal is interlocutory

in nature, and the trial court did not certify the summary judgment order as immediately appealable pursuant to Rule 54(b) of our Rules of Civil Procedure. Although plaintiff did not file a motion to dismiss Servpro's appeal, she argues extensively in her brief that it should be dismissed because the summary judgment order does not deprive Servpro of a substantial right. We agree. Accordingly, we dismiss Servpro's interlocutory appeal for lack of appellate jurisdiction.

I. Background

Servpro is one of the largest nationwide cleaning and restoration franchise systems in the United States. The Servpro franchise involved in this litigation is a North Carolina corporation with its principal place of business in Wake County.

On 8 November 2010, plaintiff—at the direction of her homeowners insurance carrier, which is also a non-appealing defendant here—contacted Servpro regarding a toilet overflow the night before that had caused flooding in her home. A Servpro crew immediately responded to plaintiff's home but required her to sign a contract entitled "Authorization to Perform Services and Direction of Payment" before its employees would begin working. The contract included the following provisions:

> 2. . . . .
>
> (e) Client acknowledges and agrees that mold is commonly found throughout the environment and that it is impossible to eradicate mold. PROVIDER DOES NOT GUARANTEE THE REMOVAL OR ERADICATION OF MOLD.
>
> . . . .

> 7. . . . . NO ACTION, REGARDLESS OF FORM, RELATING TO THE SUBJECT MATTER OF THIS CONTRACT MAY BE BROUGHT MORE THAN ONE (1) YEAR AFTER THE CLAIMING PARTY KNEW OR SHOULD HAVE KNOWN OF THE CAUSE OF ACTION.

Servpro performed water remediation services at plaintiff's home from on or about 8 November to 11 November 2010. Sometime between 11 November and mid-December 2010, Servpro returned to plaintiff's home to reattach ductwork. Plaintiff began to experience health issues shortly after Servpro's second visit.

On or about 5 September 2011, plaintiff discovered a substance in her air vent that appeared to be mold growing where the water from her toilet had traveled nearly one year earlier. Plaintiff contacted Servpro again, which responded to plaintiff's home for the third and final time and determined there was no mold.

On 8 November 2013, plaintiff filed her initial complaint, which she voluntarily dismissed without prejudice in March 2015. Plaintiff filed an essentially identical complaint on 8 March 2016.

In her complaint, plaintiff alleged that Servpro's negligent acts or omissions had caused mold to grow in her air vent, which ultimately resulted in health issues and damages to plaintiff's home. Servpro asserted the one-year contractual limitations period as a defense in its answer filed 10 April 2016.

During her 8 November 2016 deposition, plaintiff explained how the Servpro crew that initially responded to her home "wanted to get moving" and told her it was

"[their] job to get the house dry." Plaintiff testified that the crew showed her a document and told her to sign it so they could start working; she was not aware that there was writing on the back of the document, and she did not turn the document over before signing it. As to when plaintiff discovered the mold issue, the following exchange took place between plaintiff and defense counsel:

> Q. All right. So that's kind of — that's September 2011, Labor Day 2011, is sort of when you first became aware of or of the belief that [Servpro] did or did not do something that had caused you to become sick and had caused I guess further damage to your house. Is that fair?
>
> A. Fair.
>
> . . . .
>
> Q. Okay. So this lawsuit was filed more than a year after you first became aware of this claim that you had against [Servpro].
>
> A. Right.

On 10 January 2017, Servpro filed a motion for summary judgment. Following a 24 April 2017 hearing on the motion, the trial court entered an interlocutory order denying summary judgment on 16 June 2017. From that order, Servpro appeals.

II. Discussion

Our General Statutes authorize an appeal to be taken from any order of a superior court that affects a substantial right. *See* N.C. Gen. Stat. § 1-277(a) (2017); *see also* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2017). A substantial right is "a legal right

affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [party] is entitled to have preserved and protected by law: a material right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation omitted). In ruling on the appealablity of an interlocutory order pursuant to the substantial right exception, this Court must first determine if the right itself is "substantial." If it is, we must then determine if "the enforcement of the substantial right [would] be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5–6, 362 S.E.2d 812, 815 (1987).

Servpro acknowledges that the order denying its motion for summary judgment is interlocutory, but contends that appellate review is proper because the order deprives the franchise of its constitutional right to contract. According to Servpro, "where a trial court's interlocutory order has impinged on a Constitutionally guaranteed right of the defendant, North Carolina courts have concluded that the right is a 'substantial right' and that the trial court's order is therefore immediately appealable on an interlocutory basis." Servpro summarizes its "substantial right" argument as follows:

> By virtue of the Authorization Contract entered into by the parties, Servpro contracted for the right to be free from the time, expense and inconvenience of any lawsuit after the expiration of one year from the time that Plaintiff knew or should have known of a basis for any such lawsuit. There can be no question that the denial of summary judgment

> deprived Servpro of its fundamental right to enter into a contract including such protections.

In response, plaintiff contends

> Servpro's argument runs counter to a long line of cases that hold that a trial court's refusal to dismiss an action on the basis of a time bar does not impair a substantial right and that avoiding the time and expense of a trial is not a substantial right that would justify an immediate appeal.

Plaintiff cites to this Court's decision in *Lee v. Baxter*, 147 N.C. App. 517, 556 S.E.2d 36 (2001), to support her argument.

In *Lee*, the defendant asserted that appellate review of the trial court's interlocutory order was proper because the statute of repose constituted a " 'vested right' not to be sued and is therefore similar to the defense of immunity, which is considered a substantial right." *Id.* at 519, 556 S.E.2d at 37 (citation omitted). In rejecting the defendant's argument and dismissing its appeal, this Court reasoned that

> [t]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action. We do not believe the statute of repose creates a similar entitlement. Unlike a claim for immunity, [defendant's] right to raise the statute of repose defense will not be lost if we do not review the case prior to a final judgment since [defendant] may raise the issue on appeal from a final judgment. The only loss [defendant] will suffer will be the time and expense of trial. We note, however, that avoiding the time and expense of trial is not a substantial right justifying immediate appeal.
>
> In addition, we note that our Supreme Court has

> previously determined that a motion to dismiss based on a statute of limitations does not affect a substantial right and is therefore not appealable. For this purpose, we see no reason to treat a motion for summary judgment based on the statute of repose differently than a motion to dismiss based on the statute of limitations.

Id. at 520, 556 S.E.2d at 37–38 (internal citations, quotation marks, and brackets omitted).

Here, Servpro characterizes its substantial right as a "fundamental right to enter into a contract" that includes a one-year limitations period. However, similar to the defendant's argument in *Lee*, the underlying basis of Servpro's claimed right is "the right to be free from the time, expense and inconvenience" of a lawsuit. Servpro attempts to distinguish *Lee* by asserting that "there is not a constitutional right to a statute of repose, but there is a constitutional right of freedom to contract."

As plaintiff notes, for purposes of appellate review of an interlocutory order, there is no practical difference between a defense based on a statutory time limitation and a defense based on a contractual time limitation. Thus, because Servpro's right to raise the contractual limitations period as a defense to civil liability will not be lost if we do not review the case prior to a final judgment, and because avoiding the time and expense of trial is not a substantial right justifying an immediate appeal, we conclude that Servpro's appeal must be dismissed. *See Anderson v. Atlantic Casualty Ins. Co.*, 134 N.C. App. 724, 727, 518 S.E.2d 786, 789 (1999); *see also Barfield v. N.C. Dept. of Crime Control & Pub. Safety*, 202 N.C. App. 114, 120, 688 S.E.2d 467, 471–72

(2010) ("In sum, there are no justifiable grounds for hearing this interlocutory appeal. Although defendant wraps its arguments in a shroud of sovereign immunity, the essence of defendant's arguments pertain to a defense to liability. We therefore dismiss this interlocutory appeal[.]").

III. Conclusion

We agree with plaintiff that Servpro has not sufficiently demonstrated the existence of a substantial right such that this Court has jurisdiction to review the summary judgment order. Accordingly, we dismiss Servpro's interlocutory appeal.

DISMISSED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).