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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-656

Filed: 7 January 2020

Robeson County, No. 17 CVS 1950

PAUL LEFTWICH and LAURA LEFTWICH, Plaintiffs,

v.

JOHN S. MORRIS, Defendant.

Appeal by defendant from order entered 15 April 2019 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 5 December 2019.

Musselwhite, Musselwhite, Branch & Grantham, by J. William Owen, for plaintiff-appellees.

Marshall, Williams & Gorham, L.L.P., by Ellen P. Wortman, for defendant-appellant.

TYSON, Judge.

John S. Morris (“Defendant”) appeals from the trial court’s order denying his motion for leave to amend his answer to add a counterclaim. We dismiss as interlocutory.

I. Background

On 26 July 2014, Paul and Laura Leftwich (“Plaintiffs”) were seriously injured in a motor vehicle accident while driving on N.C. Highway 41 in Robeson County. Defendant allegedly turned his vehicle into the path of Plaintiffs’ vehicle, which caused a head-on collision between Plaintiffs’ vehicle and an oncoming vehicle being driven by Robert W. Allen. Prior to the initiation of this case, Allen filed suit against Paul Leftwich and Defendant in a companion case arising from the incident in Mecklenburg County Superior Court.

On 25 July 2017, Plaintiffs filed a complaint against Defendant in Robeson County Superior Court, which alleged negligence and sought punitive damages. Defendant filed his motion to dismiss and answer on 25 September 2017. His answer raised several affirmative defenses, including contributory negligence, but contained no counterclaims.

On 18 December 2017, Paul Leftwich was deposed by Allen’s counsel for the companion case in Mecklenburg County. Plaintiffs’ counsel in this case did not participate in that deposition. The deposition purportedly revealed facts to support a counterclaim by Defendant for contribution against Paul Leftwich in the case at bar.

On 23 February 2018, Plaintiffs’ counsel asked Defendant’s counsel for an extension of time to answer Defendant’s initial discovery requests and to informally stay discovery pending the outcome of the jury trial in the companion case. The

companion case resolved on 23 May 2018. Plaintiffs subsequently answered Defendant's discovery requests.

Defendant deposed Laura Leftwich in this case on 7 February 2019. On 18 March 2019, Defendant filed a motion for leave to amend his answer to include a counterclaim for contribution against Paul Leftwich. The trial court heard arguments and issued an order denying the motion on 15 April 2019.

The trial court concluded, as a matter of law, Defendant's proposed counterclaim was a compulsory counterclaim subject to the three-year statute of limitations applicable to the alleged negligence. The court determined the proposed counterclaim could not "relate back" to the filing of Defendant's original answer and was time-barred. The court also concluded Defendant's proposed counterclaim would unfairly delay and prejudice Plaintiffs, and that Defendant failed to show "oversight, inadvertence, or excusable neglect" in seeking leave to amend his pleading. Defendant timely filed his notice of appeal.

II. Interlocutory Appeal

Defendant argues an appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2017). The denial of a motion for leave to amend is generally interlocutory in nature and is not subject to immediate appellate review, while the underlying action remains pending. *N.C. Farm Bureau Mutual Ins. Co. v. Wingle*, 110 N.C. App, 397, 404, 429 S.E.2d 759, 764 (1993). "[T]he appellant

has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

Defendant argues for us to accept his interlocutory appeal, asserting this Court has held “the denial of a motion to amend the answer to allege a compulsory counterclaim affects a substantial right and is immediately appealable.” *Hudspeth v. Bunzey*, 35 N.C. App. 231, 234, 241 S.E.2d 119, 121 (1978). When this Court applies the rule from *Hudspeth* to a denial of a motion to amend pleadings, we first review the record to determine whether the alleged affected right is substantial, such that the denial is immediately appealable. *See, e.g., Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 28-29, 598 S.E.2d 570, 589-90 (2004); *Wingler*, 110 N.C. App. at 404, 429 S.E.2d at 764.

In this case, Defendant argues the trial court erred by finding his proposed counterclaim for contribution to be compulsory. Presuming, without deciding, Defendant’s argument has merit, his arguments fail to demonstrate any issue which affects a substantial right and presents no grounds to warrant an immediate, interlocutory appeal. Defendant does not carry his burden to show the order deprives him of a substantial right.

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Opinion of the Court

Rather than carry his burden to show his affected right is substantial, Defendant affirmatively asserts the purported affected right is *not* substantial. The facts in this case are unlike *Hudspeth*, or any other cases Defendant cites. Defendant's argument is without merit and is overruled.

We dismiss this appeal as interlocutory. We express no opinion on the merits, if any, of Defendant's arguments. *It is so ordered.*

DISMISSED.

Judges MURPHY and YOUNG concur.

Report per Rule 30(e).