

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-17

Filed: 17 March 2020

Gaston County, No. 18 CVS 1309

ELEANOR HAMRICK, Plaintiff,

v.

GASTON COUNTY DEPARTMENT OF SOCIAL SERVICES, A REMEDIE FOR HOME CARE SERVICES, INC., INTEGRITY CARE SERVICES, INC., IZELLA JOHNSON, in her official capacity, and IZELLA JOHNSON, in her individual capacity, Defendants.

Appeal by plaintiff from judgment entered 24 August 2018 by Judge Jesse B. Caldwell, III, in Gaston County Superior Court. Heard in the Court of Appeals 7 August 2019.

*The Nesmith Law Firm, PLLC, by Erica R. Nesmith, for plaintiff-appellant.*

*Stott, Hollowell, Palmer & Windham, LLP, by Martha Raymond Thompson, for defendant-appellee.*

BRYANT, Judge.

Where plaintiff appeals an interlocutory order but fails to present a Rule 54(b) certification for the order or establish that a substantial right would be lost if not immediately reviewed, we dismiss the appeal.

*Opinion of the Court*

On 2 April 2018 in Gaston County Superior Court, plaintiff Eleanor Hamrick filed a civil complaint against defendants Gaston County Department of Social Services (hereinafter “GCDSS”); A Remedié for Home Care, Inc. (hereinafter “Remedié”); Integrity Care Services, Inc. (hereinafter “Integrity”); and Izella Johnson in both her official and individual capacities. Plaintiff sought to recover compensatory and punitive damages pursuant to claims of (1) negligence and (2) negligent infliction of emotional distress. Per the complaint, plaintiff—an elderly woman in need of supervision for mobility issues—fell and sustained injuries while at her home on 2 April 2015. On that date, defendant Johnson was plaintiff’s home health provider and was employed by defendant Remedié (now known as Integrity) through a contract with the GCDSS.

On 19 April 2018, Gaston County o/b/o GCDSS filed a motion and order for extension of time to answer plaintiff’s complaint. On 11 June 2018, GCDSS filed a motion to dismiss plaintiff’s complaint pursuant to Rule 12(b)(1), (2), (4), (5), and (6) for lack of personal jurisdiction, lack of subject matter jurisdiction, improper service and insufficient service of process, and failure to state a claim upon which relief may be granted. In pertinent part, Gaston County asserted that “[a]ny attempt to correct service and process defects would be futile as Gaston County Department of Social Services [(“GCDSS”)] is not an entity in existence and cannot be a party subject to suit[.]”

On 12 July 2018, plaintiff filed a motion to amend the complaint pursuant to Rule 15(a) “by rewriting the Complaint to include Gaston County Department of Health and Human Services.”

Gaston County’s motion to dismiss plaintiff’s complaint and plaintiff’s motion to amend her complaint were heard in Gaston County Superior Court 20 August 2018 before the Honorable Jesse B. Caldwell, III, Senior Resident Judge presiding. On 24 August 2018, the court entered an order granting Gaston County’s motion to dismiss, denying plaintiff’s motion to amend her complaint, and denying an oral motion plaintiff made during the 20 August 2018 hearing to add Gaston County as a party. Plaintiff appeals.

---

Before we reach the issues plaintiff presents on appeal, we must first consider whether the appeal is properly before this Court.

“The appeals process is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment.” *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (citation omitted). An order “made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy” is an interlocutory order. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)

(citation omitted). “Generally, there is no right of immediate appeal from an interlocutory order.” *Feltman v. City of Wilson*, 238 N.C. App. 246, 250, 767 S.E.2d 615, 618 (2014) (citation omitted).

Here, plaintiff filed a civil complaint against defendants GCDSS, Remedie, Integrity, and Johnson. Plaintiff appealed the 24 August 2018 order by which the trial court granted Gaston County’s motion to dismiss plaintiff’s claims against GCDSS, denied plaintiff’s motion to amend the complaint to change the name put forth as Gaston County Department of Social Services to Gaston County Department of Health and Human Services, and denied plaintiff’s oral motion to add Gaston County as a party. The trial court’s 24 August 2018 order did not address the remaining defendants—Remedie, Integrity, or Johnson—and the record on appeal reflects no final judgment or order regarding these defendants. On appeal, in her brief to this Court, plaintiff acknowledges the interlocutory nature of her appeal “as all claims remain outstanding for all other named defendants.” Therefore, the trial court’s 24 August 2018 order is not final, and this appeal is interlocutory.

There are two avenues whereby a party may appeal an interlocutory order.

First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) . . . . Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review.

*Id.* at 250, 767 S.E.2d at 619. The record does not reflect a Rule 54(b) certification made by the trial court. So, we consider whether the trial court's 24 August 2018 order deprived plaintiff of a substantial right which will be lost absent immediate review. *See id.*

The "substantial right" test for appealability of interlocutory orders is "more easily stated than applied." "[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 [one] is entitled to have preserved and protected by law: a material right." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 219, 794 S.E.2d 497, 499–500 (2016) (second alteration in original) (citation omitted). "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters*, 294 N.C. at 208, 240 S.E.2d at 343. "[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted).

The burden to show that an appeal is proper is borne by the appellant[]. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (per curiam). When an interlocutory order is the subject of the appeal, "the appellant[] must include in [her] 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.'" *Id.*

*Opinion of the Court*

(quoting N.C. R. App. P. 28(b)(4)). The appellant[] must present more than a bare assertion that the order affects a substantial right; [she] must demonstrate *why* the order affects a substantial right. *Id.* “Where the appellant fails to carry the burden of making such a showing to the [C]ourt, the appeal will be dismissed.” *Id.* (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)).

*Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009) (fifth alteration in original); *see also* N.C.R. App. P. 28(b)(4) (2019) (“When an appeal is interlocutory, the statement [of the grounds for appellate review] must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.”).

In her brief to this Court, plaintiff asserts that

[Gaston County] and [defendant Remedie, now known as Integrity,] are jointly liable. Pursuant to *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982), an appellant has the right to have issues of liability as to all parties tried by the same jury. *Id.* *Bernick* provides that two trials on questions of liability can render conflicting judgments. *Id.* As such, having one jury decide whether all or none of the defendants causes an injury is a substantial right. *Id.*

*See also* *N.C. Dep’t of Transp. v. Page*, 119 N.C. App. 730, 735–36, 460 S.E.2d 332, 335 (1995) (considering whether a substantial right will be affected by the possibility of two trials “[t]his Court has . . . create[ed] a two-part test requiring a party to show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.” (citation omitted)).

*Opinion of the Court*

While she now alleges joint liability between Gaston County and defendant Remedie in her brief before this Court, plaintiff did not address joint liability at the hearing before the trial court. Nor did she allege joint liability in her complaint. In her complaint, plaintiff asserts that respondeat superior is the issue. At the hearing, plaintiff asserted that agency applies because defendant had a contract with one of the other defendants—Integrity. The trial court seemed confused about what plaintiff was alleging and asked during the hearing, “[a]re you arguing agency here, that Integrity is the County’s agent?” Plaintiff responded, “I would make that argument, Your Honor.” The trial court further stated, “[i]n the complaint I don’t actually see the specific agency pled. I do see respondeat superior, which involves an element of agency,” however, plaintiff did not address respondeat superior during the hearing.

Plaintiff alleges that a department of Gaston County is named as potentially liable to plaintiff for injuries allegedly sustained as a result of conduct by Johnson, who was employed by Remedie, now known as Integrity. At the time, Remedie was under contract with the Gaston County department to provide home health care. Plaintiff filed a civil complaint seeking compensatory and punitive damages pursuant to claims of negligence and negligent infliction of emotional distress. On the facts asserted, it appears that Gaston County’s liability can only be derivative of liability incurred by Johnson and/or Remedie. As such, the success of plaintiff’s claims against

Gaston County are solely dependent upon the success of plaintiff's claims against Johnson and/or Remedie. Therefore, in the event a trial to determine Gaston County's liability is separate from a trial to determine any liability incurred by Johnson and/or Remedie, plaintiff cannot show that "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Page*, 119 N.C. App. at 735–36, 460 S.E.2d at 335 (citation omitted). *See Long v. Giles*, 123 N.C. App. 150, 153, 472 S.E.2d 374, 375–76 (1996) ("Because the issue of the defendant AEF's liability[, which was dismissed on summary judgment,] is derivative of a finding of liability against [the employee's] estate, there is no possibility of inconsistent verdicts, and no substantial right is involved that would make an appeal of summary judgment appropriate at this time."). Thus, plaintiff has failed to establish that the deprivation of the right to join Gaston County to this civil suit would potentially work injury to plaintiff if not corrected before appeal from the final judgment. *See Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. Therefore, plaintiff has failed to carry the burden of showing to the Court that what is at stake is a substantial right, "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right." *Hanesbrands Inc.*, 369 N.C. at 219, 794 S.E.2d at 499–500 (alteration in original) (citation omitted). Accordingly, plaintiff's interlocutory appeal is dismissed.



HAMRICK V. GASTON CTY. DSS

*Opinion of the Court*

DISMISSED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).