

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-654

Filed: 7 April 2020

Avery County, No. 17 CVS 129

JOHN ISENHOUR, III and WENDY THOMPSON, as Co-Trustees of the ANN C. THOMPSON REVOCABLE TRUST OF APRIL 6, 2016, Plaintiffs,

v.

WYNFIELD ISENHOUR FRAME, Defendant.

Appeal by defendant from order entered 24 January 2019 by Judge Gary M. Gavenus in Avery County Superior Court. Heard in the Court of Appeals 4 February 2020.

King Law Offices, PLLC, by Brian W. King, and Parsons Law, PA, by Patrick K. Bryan, for plaintiffs-appellees.

Hedrick Law Office, by Jeffery M. Hedrick, and Joseph W. Seegers for defendant-appellant.

BERGER, Judge.

On interlocutory appeal, Wynfield Isenhour Frame (“Defendant”) argues that the trial court erred when it (1) did not join all grantees named in the subject deed as necessary parties; (2) determined the subject deed was null and void as a matter of law; and (3) granted a motion *in limine* brought by John Isenhour, III (“Tripp”) and

Wendy Thompson (collectively, “Plaintiffs”) which excluded evidence of Defendant’s conversations with Ann C. Thompson (“Decedent”). Because Defendant’s appeal does not affect a substantial right, we dismiss for lack of jurisdiction. Additionally, we deny Defendant’s petition for writ of certiorari and dismiss Plaintiffs’ motion for sanctions.

Factual and Procedural Background

Decedent was the owner of real property located in Linville, North Carolina (the “Property”). On April 4, 2016, Decedent established the Ann C. Thompson Revocable Trust (the “Trust”). Article II of the Trust stated, in pertinent part, that Decedent could add property to the Trust at any time. Decedent subsequently passed away on July 30, 2016. Under the terms of Decedent’s will, the Property was to be distributed to the Trust.

On July 28, 2014, prior to the creation of the Trust, Decedent named Defendant as attorney-in-fact in a durable power of attorney (“2014 POA”). On July 22, 2016, Defendant, in her purported capacity as attorney-in-fact for Decedent, executed a deed reserving a life estate in the Property for Decedent and conveying the remainder interest to herself and Tripp (the “Deed”). The Deed and the 2014 POA were not recorded until January 4, 2017, more than five months after Decedent’s death.¹

¹ Defendant previously recorded the 2014 POA in Indian River County, Florida, where Decedent resided on July 15, 2016.

However, on August 13, 2015, Decedent executed, delivered, and filed a durable power of attorney (“2015 POA”) which named Tripp as Decedent’s attorney-in-fact. The 2015 POA expressly revoked the 2014 POA.

On May 18, 2017, Plaintiffs filed a complaint alleging that Defendant breached her fiduciary duty, fraudulently transferred the Property, fraudulently recorded the 2014 POA and the Deed, and misrepresented herself as the owner of the Property. On July 3, 2017, the trial court entered a preliminary restraining order that prevented Defendant from accessing the Property and from receiving rental income from the Property.

On December 19, 2017, Defendant filed numerous motions to dismiss. Specific to this appeal, Defendant argued the matter should be dismissed pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure because Plaintiffs failed to join the Estate of Ann C. Thompson and Tripp, in his individual capacity. On March 20, 2018, the trial court denied Defendant’s motions. Defendant subsequently filed an answer on April 9, 2018.

On August 15, 2018, Plaintiffs filed a motion for summary judgment regarding their claims to quiet title, constructive fraud, and breach of fiduciary duty. On October 16, 2018, Plaintiffs filed a motion for judgment on the pleadings with regards to their claim of quiet title. The trial court denied Plaintiffs’ motion for judgment on the pleadings on January 2, 2019.

On January 15, 2019, Defendant filed a motion to dissolve the preliminary restraining order and a motion for summary judgment with respect to all claims. On January 22, 2019, Plaintiffs filed a motion to strike Defendant's deposition testimony regarding oral communications she had with Decedent pursuant to North Carolina's Dead Man's Statute. The trial court granted Plaintiffs' motion to strike portions of the deposition concerning purported communications between Decedent and Defendant regarding the distribution of Decedent's assets.

On January 24, 2019, the trial court granted summary judgment in Plaintiffs' favor on their claim to quiet title. In that same order, the trial court also denied Plaintiffs' and Defendant's motions for summary judgment for the remaining claims of breach of fiduciary duty and constructive fraud. Additionally, the trial court granted Plaintiffs twenty days to join the Estate of Ann C. Thompson before it would grant Defendant's motion to dismiss.

Defendant appeals, arguing that the trial court erred when it (1) did not join all grantees named in the Deed as necessary parties; (2) determined the Deed was null and void as a matter of law; and (3) granted Plaintiffs' motion *in limine* excluding evidence of Defendant's conversations with Decedent.

Analysis

As an initial matter, we must address our jurisdiction over Defendant's interlocutory appeal.

An order is either interlocutory or the final determination of the rights of the parties. . . . An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy.

Beroth Oil Co. v. N.C. Dep't of Transp., 256 N.C. App. 401, 410, 808 S.E.2d 488, 496 (2017) (citations and quotation marks omitted).

Ordinarily, an interlocutory order is not immediately appealable. *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006). However, a party may seek immediate appellate review when an interlocutory order affects a substantial right. N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a) (2019). “[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).

“A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.” *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation and quotation marks omitted). In determining whether an interlocutory order affects a substantial right, our Court engages in a two-part inquiry. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). First, we must determine whether the right is substantial. *Id.* at 726, 392 S.E.2d at 736. Then, we must determine whether

deprivation of that substantial right will injure the complaining party if not corrected prior to an appeal from final judgment. *Id.* at 726, 392 S.E.2d at 736.

In the instant case, Defendant has failed to demonstrate that a substantial right would be jeopardized absent interlocutory review by this Court. Defendant contends that because Tripp was not joined as a party to these proceedings, there is a risk for inconsistent verdicts. Defendant correctly argues that a substantial right may be affected when there is the risk of inconsistent verdicts. *See Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (“Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.”). However, Tripp eliminated any possibility of an inconsistent verdict when he filed an Affidavit of Alignment of Interest in which he stated that the Trust was the rightful owner of the Property, and that he agreed to be bound by any order of the trial court regarding title to the Property.

Moreover, this Court has expressly held that “the denial of motions predicated on a plaintiff’s failure to join allegedly necessary parties does not affect a substantial right and is not immediately appealable.” *Smith v. Lake Bay E., LLC*, 228 N.C. App. 72, 75, 743 S.E.2d 684, 686 (2013). Under the facts of this case, “we decline to depart from our substantial precedent holding that the denial of a motion to dismiss for

failure to join a necessary party does not affect a substantial right.” *Builders Mut. Ins. Co. v. Meeting St. Builders, LLC*, 222 N.C. App. 646, 652, 736 S.E.2d 197, 201 (2012).

While Defendant also parenthetically cites to binding authority that discusses access to property and the income derived therefrom, Defendant has failed to address how these cases demonstrate that a substantial right has been affected *in this case*. Accordingly, Defendant has failed to demonstrate that she has been deprived of a substantial right which would justify our review.

Having determined that Defendant has failed to carry her burden of demonstrating that the trial court’s interlocutory rulings have affected a substantial right, we are required to dismiss Defendant’s appeal for lack of jurisdiction. *Turner*, 137 N.C. App. at 143, 526 S.E.2d at 671. Additionally, given this Court’s general policy against piecemeal appellate review, in our discretion, we decline to issue a writ of certiorari to address Defendant’s arguments on the merits. *See Harbour Point Homeowners’ Ass’n, Inc. v. DJF Enters., Inc.*, 206 N.C. App. 152, 165, 697 S.E.2d 439, 448 (2010). Lastly, because the trial court is better equipped to address Plaintiffs’ motion for sanctions in the first instance, we dismiss Plaintiffs’ motion for sanctions without prejudice.

Conclusion

ISENHOUR V. FRAME

Opinion of the Court

For the reasons stated herein, we dismiss Defendant's interlocutory appeal for lack of jurisdiction. Additionally, we deny Defendant's petition for writ of certiorari, and dismiss Plaintiffs' motion for sanctions without prejudice.

DISMISSED.

Judges STROUD and COLLINS concur.

Report per Rule 30(e).