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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-88

No. COA20-804

Filed 1 February 2022

Mecklenburg County, No. 19-CVS-3233

DANA WATTLEY, as Administrator of Estate of Anderson Biggers, Plaintiff,

v.

JAMES WORTHAM-THOMAS, IV and RYAN DOUGLAS, Defendants.

Appeal by plaintiff from judgment entered 18 March 2020 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 7 September 2021.

*J. Elliot Field, JC, PLLC, by J. Elliott Field, for plaintiff-appellant.*

*The McIntosh Law Firm, P.C., by Ted F. Mitchell, for defendant-appellee Ryan Douglas.*

STROUD, Chief Judge.

¶ 1 Plaintiff Dana Wattley appeals from a judgment granting Defendant Ryan Douglas's motion for summary judgment "on the basis of insufficiency of process and insufficiency of service of process under Rule 12(b)(4) and Rule 12(b)(5), respectively, of [the] North Carolina Rules of Civil Procedure." We dismiss Plaintiff's appeal because (1) her appeal is interlocutory, (2) North Carolina Rule of Civil Procedure

54(b), N.C. Gen. Stat. §1A-1, Rule 54(b) (2021), does not apply, and (3) Plaintiff does not argue the judgment affects a substantial right.

## I. Background

¶ 2 We will note only the basic facts of the case and the procedural history necessary to understand our decision to dismiss this appeal as interlocutory. On 20 February 2019, Plaintiff filed suit for wrongful death as well as assault and battery in the murder of her son. The murder occurred on 27 May 2017, so the statute of limitations for the wrongful death action would run as of 27 May 2019. Based on the facts alleged in her complaint, Plaintiff attempted to sue the people who participated in her son's murder, and her initial complaint listed the defendants' names as "James Thomas" and "Ryan Gregory Douglass Powell." (Capitalization altered.) The address given on the original summons issued on 20 February 2019 for Ryan Gregory Douglass Powell was an address on Winged Elm Court in Charlotte. The original summons was served by the Sheriff on Defendant "James Thomas" on 27 February 2019, but on 20 March 2019, it was returned unserved as to the Defendant "Ryan Gregory Douglass Powell," with the note "unable to locate after several attempts."

¶ 3 On 27 March 2019, another summons was issued, also directed to Ryan Gregory Douglass Powell at the same address as the first summons, on Winged Elm Court. This summons was served by the Sheriff on 9 April 2019. On 7 May 2019, Ryan Gregory Douglas Powell notified Plaintiff's attorney and filed an affidavit with

the court noting that his name was "Ryan G. Douglas Powell" and he resided at the address on Winged Elm Court, but he asserted that he had no connection with the death of Plaintiff's son or anyone involved in the case.

¶ 4 On 22 May 2019, an "Alias and Pluries Summons" was issued for "Ryan Gregory Douglass Powell" at an address on Beaver Creek Drive in Charlotte. On 27 May 2019, this summons was served by Deputy Sheriff Tarvin Oliver on "Ryan Powell" at the address stated on the summons. A hand-written note on the summons regarding service stated: "Defendant's mother Boothe Novelette attempted to refuse service. She was asked pertinent questions that were in summons concerning her son's involvement and she confirmed the information, but attempted to refuse service and the summons was dropped at her feet."

¶ 5 On 26 June 2019, Plaintiff's counsel filed an "Affidavit of Non-Service as to Ryan Gregory Douglass Powell" acknowledging that the "Ryan Gregory Douglass Powell" who was served in April 2019 "is not the defendant against which Plaintiff's allegations lie" and that "service on April 9, 2019 against Ryan Gregory Douglass Powell is not service against the correct party." Also on June 26, Defendant Ryan Douglas, through counsel, filed a "Special Appearance for Purposes of Contesting Jurisdiction, Sufficiency of Process and Service of Process, and Motions to Dismiss. He alleged that his "given name is, and always has been, 'Ryan Douglas,'" and he had never used the names "Ryan Gregory Douglass Powell" or "Ryan G. Douglas Powell"

or "Ryan Powell." He also alleged that his mother, Novelette M. Boothe, resided at the Beaver Creek Drive address, but that he had not lived at that address since June 2017 and he "has not been a resident, nor citizen of North Carolina since that time, having a drivers license issued and paying state income taxes in the state of his new residence." On 11 July 2019, Defendant Ryan Douglas filed an affidavit alleging additional details regarding his name and residence. He alleged he had moved to New York in June 2017 to live with his father and included a copy of his New York State Driver License, issued on 28 August 2018.

¶ 6 On 17 July 2019, Deputy Tarvin Oliver filed a "Supplemental Affidavit" in which he alleged he was the Sheriff's deputy who served the Summons and complaint on "Ryan Gregory Douglass Powell's mother" on 22 May 2019. He also alleged:

> 4. Ms. Boothe identified herself as the Ryan Gregory Douglass Powell's mother upon answering the door. Ms. Boothe said that Ryan Gregory Douglass Powell was not home at the time. Ms. Boothe confirmed that Ryan Gregory Douglass Powell did in fact live at 8806 Beaver Creek Drive, Charlotte NC 28269.
> 5. Ms. Boothe attempted to refuse to accept service on behalf of Ryan Gregory Douglass Powell by refusing to take the Summons and Complaint from my hands. I then left the Summons and Complaint at her feet with instructions to deliver them to Ryan Gregory Douglass Powell.
> 6. At no point during the service of the Summons and Complaint did Ms. Boothe claim or assert that Ryan Gregory Douglass Powell did not live at 8806 Beaver Creek Drive, Charlotte, NC 28269.

¶ 7 The trial court held a hearing on the pending motions on 17 July 2019 and

issued its order on 3 September 2019. In this order, the trial court denied Defendant-Appellee Ryan Douglas's motions to dismiss "pursuant to Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure" and granted Plaintiff's motion to amend the complaint's caption to change the name "Ryan Gregory Douglass Powell" to "Ryan Douglas." The trial court also sanctioned Plaintiff for the past unreasonable mistake of failing to remove Ryan G. Douglas Powell from the case after Plaintiff's counsel discovered that the person initially served was not the correct defendant.[1] In the same order, as to the first defendant, a court order allowed Plaintiff's motion to amend the complaint's caption to change that defendant's name from "James Thomas" to "James Wortham-Thomas, IV."

¶ 8 A few days after that order, Plaintiff filed an amended complaint correcting the caption to list the defendants' names as "James Wortham-Thomas, IV" and "Ryan Douglas."

¶ 9 Following the trial court's September 2019 order and the subsequent filing of the amended complaint, Defendant-Appellee Ryan Douglas continued to argue both the process and service of process were insufficient. First, he filed a motion for reconsideration of the trial court's September 2019 order alleging, in relevant part,

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[1] Ryan G. Douglas Powell appeared by counsel at the hearing upon his motion to dismiss, and the trial court awarded attorney fees since Mr. Powell had to incur attorney fees to be removed as a defendant in the wrongful death action where Plaintiff's counsel was aware of the error months before the hearing.

the Alias and Pluries Summons was directed at Douglas Powell, not him, and that he did not live at the address that summons was served to since he had moved out of his mother's house about two years prior. The trial court "declined to grant a hearing" on the motion for reconsideration but said "[t]he issues can be raised at a summary judgment hearing before any Superior Court judge." Douglas's "Motions to Dismiss and Answer" repeated those arguments, among others. (Capitalization altered.)

¶ 10 Further, apparently taking the trial court's suggestion, Douglas filed a motion for summary judgment, which he later amended, with the amended motion and his later-filed brief in support of summary judgment focusing on the insufficiency of process and insufficiency of service of process arguments from Rules 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure. To support his amended motion for summary judgment, Douglas cited a number of affidavits from himself and his family members averring he did not live at the address where the Alias and Pluries Summons was served on his mother as well as a supplemental affidavit and bodycam footage from the officer who served that Summons indicating the officer may have been mistaken in initially saying Douglas's mother said Douglas lived at that address. Deputy Tarvin Oliver's second "Supplemental Affidavit" clarified that Ms. Boothe had "stated multiple times that the name on the Summons and Complaint was not correct and she attempted to refuse service on behalf of 'Ryan Gregory Douglass Powell.'" He also noted that "[w]hile Ms. Boothe may have stated that her

son 'lived' at her house, she also seemed to have difficulty understanding me. I suspect she is Jamaican by birth." He alleged that he turned on his bodycam during the attempt at service because he was concerned she was "becoming flustered, excited and emotional. Her difficulty in understanding me seemed to increase as she became more excited and emotional."

¶ 11 Following a hearing on 2 March 2020, the trial court granted Douglas's motion for summary judgment "on the basis of insufficiency of process and insufficiency of service of process under Rule 12(b)(4) and Rule 12(b)(5) . . . ." The judgment did not address Defendant Wortham-Thomas, and the record does not indicate the case against Wortham-Thomas has been terminated. Plaintiff appealed the trial court's grant of summary judgment to Defendant-Appellee Douglas.

## II. Interlocutory Nature of the Appeal

¶ 12 Although neither party addresses the issue in their briefs, we first must consider whether Plaintiff's appeal is interlocutory because "[i]t is well established in this jurisdiction that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). "In general, a party may not seek immediate appeal of an interlocutory order." *Department of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 709 (1999) (citing *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d

377, 381 (1950)). The general rule disallowing appeals from interlocutory orders has two exceptions:

> First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. N.C.G.S. § 1A–1, Rule 54(b) (1990). Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381; see also N.C.G.S. § 1–277 (1996); N.C.G.S. § 7A–27 (1995); *Tridyn Indus., Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979).

*Id.*, 351 N.C. at 174–75, 521 S.E.2d at 709.

¶ 13 Thus, a reviewing court first conducts a threshold inquiry into whether the order on appeal is a final judgment or is interlocutory. *See Veazey*, 231 N.C. at 361–62, 57 S.E.2d at 381–82 (laying out the distinction between final judgments and interlocutory orders). If the order is interlocutory, then the reviewing court must determine whether either of the exceptions allowing for appeals of interlocutory orders applies. *See Rowe*, 351 N.C. at 174–75, 521 S.E.2d at 709 (laying out exceptions). While the reviewing court follows these steps, "[t]he burden rests on the appellant to establish the basis for an interlocutory appeal." *Dailey v. Popma*, 191 N.C. App. 64, 68, 662 S.E.2d 12, 15 (2008). Following those principles, we evaluate the judgment on appeal.

¶ 14 Addressing the threshold inquiry first, a final judgment "disposes of the cause

as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazy*, 231 N.C. at 361–62, 57 S.E.2d at 381. By contrast, an interlocutory order "is one 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." *Id.*, 231 N.C. at 362, 57 S.E.2d at 381.

¶ 15 Here, Plaintiff's "Statement of the Grounds for Appellate Review" in her brief states the judgment on appeal "is a final judgment." (Capitalization altered.) But the judgment on appeal only granted summary judgment as to Defendant Douglas; it did not address Defendant Wortham-Thomas. Further, nothing included in the record indicates Defendant Wortham-Thomas is no longer a party to this case. To the contrary, the certificates of service of documents in the case, including the 25 March 2020 certificate of service for the Summary Judgment Order, note service upon Defendant James Wortham-Thomas at an address in Michigan. As such, the judgment on appeal did not "dispose[] of the cause *as to all the parties*" and therefore is not a final judgment. *Id.*, 231 N.C. at 361, 57 S.E.2d at 381 (emphasis added). Put another way, the grant of summary judgment on appeal is an interlocutory order because it "leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.*, 231 N.C. at 362, 57 S.E.2d at 381. Specifically, the trial court must still resolve the case against Defendant Wortham-Thomas.

¶ 16 Because the judgment on appeal is interlocutory, we turn to the two exceptions

that allow appeals from interlocutory orders. *Rowe*, 351 N.C. at 174–75, 521 S.E.2d at 709. Rule of Civil Procedure 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties *only if there is no just reason for delay and it is so determined in the judgment.* Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. *In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.* Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

N.C. Gen. Stat. § 1A-1, Rule 54(b) (emphasis added). Rule of Appellate Procedure 28(b)(4) in turn requires the "statement of the grounds for appellate review" to show that the requirements of Rule 54(b)—namely a final judgment as to less than all parties or claims and the certification by the trial court that there is no just reason for delay—have been met.

¶ 17 Here, the requirements of Rule of Civil Procedure 54(b) and Rule of Appellate Procedure 28(b)(4) have not been met. While Plaintiff's statement of the grounds for appellate review indicates the judgment on appeal "is a final judgment," it does not

indicate the trial court certified that there is no just reason for delay in its judgment. Looking at the judgment itself, the trial court neither indicated it was a final judgment nor certified there was no just reason for delaying the appeal. As a result, the judgment does not meet the requirements in the plain text of Rule 54(b) and that Rule cannot provide a basis for the interlocutory order to be immediately appealable.

¶ 18 Therefore, Plaintiff can only immediately appeal the grant of summary judgment if it affects a substantial right. *See Rowe*, 351 N.C. at 174–75, 521 S.E.2d at 709 (listing substantial right as the other exception to the bar on appealing interlocutory orders). As with the Rule 54(b) exception, Rule of Appellate Procedure 28(b)(4) requires an appellant's statement of the grounds for appellate review to "contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." This Court's caselaw has emphasized that a failure to indicate which substantial right the challenged order would affect warrants dismissal. *See, e.g., Pentecostal Pilgrims and Strangers Corp. v. Connor*, 202 N.C. App. 128, 133, 688 S.E.2d 81, 84 (2010) (dismissing appeal because appellant "did not recognize that its appeal was interlocutory and, as such, did not provide this Court with a jurisdictional basis as to which, if any, substantial right would be affected absent immediate review"); *Munden v. Courser*, 155 N.C. App. 217, 219, 574 S.E.2d 110, 112 (2002) (dismissing interlocutory appeal where "Plaintiffs' brief contain[ed] no statement regarding a substantial right that would be

affected by our dismissal . . . ").

¶ 19 Here, Plaintiff's statement of the grounds for appellate review does "not recognize that [her] appeal [i]s interlocutory and, as such, d[oes] not provide this Court with a jurisdictional basis as to which, if any, substantial right would be affected absent immediate review." *Pentecoastal Pilgrims*, 202 N.C. App. at 133, 688 S.E.2d at 84. Even extending it to her entire brief as in *Munden*, 155 N.C. App. at 219, 574 S.E.2d at 112, Plaintiff never argues the failure to allow her to immediately appeal would affect any substantial right. Thus, given this exception also does not apply, we must dismiss the appeal as interlocutory.

¶ 20 While the document in the record entitled "Organization of the Court" contains a conclusory statement that "the judgment affects a substantial right of the Plaintiff,"(capitalization altered), that statement does not meet the requirements to argue the grant of summary judgment affects a substantial right. First, this statement is in the record, not Plaintiff's brief as required under Rule of Appellate Procedure 28(b)(4). Second, Plaintiff has not made any argument in support of her right to an immediate appeal based upon a substantial right. "[A]ppellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right" or the appeal will be dismissed. *Hoke County Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009) (emphasis in original). Plaintiff's statement in the record at most

presents a bare assertion and thus even if considered would still not save the appeal from dismissal.

## III. Conclusion

¶ 21 Because the grant of summary judgment as to Defendant Ryan Douglas is interlocutory and Plaintiff has not met her burden of showing Rule of Civil Procedure 54(b) applies or the ruling affected a substantial right, we dismiss her appeal.

DISMISSED.

Judges DILLON and TYSON CONCUR.

Report per Rule 30(e).