An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2022-NCCOA-238

No. COA21-539

Filed 5 April 2022

Hyde County, No. 19 CVS 60

HEATHER O'NEAL and FLETCHER O'NEAL, Plaintiffs,

v.

ARLEEN BURLEY and DEVIL SHOAL OYSTER & CLAM CO., LLP, Defendants.

Appeal by defendant from judgment entered 6 May 2021 by Judge Wayland J. Sermons, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 23 February 2022.

Chad Hunter Stoop for Defendant-Appellant Arleen Burley.

Casey C. Varnell for Plaintiffs-Appellees.

CARPENTER, Judge.

¶ 1 Arleen Burley ("Defendant") appeals from the trial court's 6 May 2021 order (the "Order"), judicially dissolving the North Carolina partnership, Devil Shoal Oyster & Clam Co., LLP ("Devil Shoal")[1], which Defendant formed in July of 2015 with Plaintiff Heather O'Neal. The Order also, *inter alia*, distributed Devil Shoal

[1] Devil Shoal is not a party to this appeal.

assets, including funds received by the partnership through disaster financial assistance programs. Because we conclude the Order is interlocutory, and there is no immediate right of appeal, we dismiss Defendant's appeal.

I. Factual and Procedural Background

¶ 2 This case arises from a dispute between two general partners of a partnership over the classification and distribution of partnership assets. On 1 October 2015, Plaintiff Heather O'Neal and Defendant (collectively, the "Partners") executed the "Limited Partnership Agreement" (the "Agreement"), memorializing the terms and conditions of the partnership. The conditions of the partnership included: (1) Defendant would provide the partnership use of a shellfish bottom lease ("Lease 9802") and related water column amendment, granted by the North Carolina Division of Marine Fisheries to Defendant in her individual name; (2) Plaintiff Heather O'Neal would provide the partnership a boat and crew to set up, maintain, and harvest shellfish on Lease 9802; (3) the Partners would share equally the costs of gear and seed; and (4) the Partners would share equally the net profit of the business. The Agreement also provided that the partnership term would "continue until mutually agreed dissolution or transfer."

¶ 3 On 9 January of 2018, Devil Shoal obtained its own 4.84-acre shellfish bottom lease ("Lease 9787") and a corresponding amendment to add the superjacent water column. The Partners agreed through an addendum to the Agreement that Devil

Shoal would "fully own and operate" Lease 9787 and its respective water column.

¶ 4 In July of 2018, the Partners had discussions concerning Plaintiff Heather O'Neal buying out Defendant's share of Devil Shoal. After unsuccessful negotiations, Plaintiff Heather O'Neal informed Defendant by email on 1 August 2018 that she would be seeking a separate lease but would continue to utilize Lease 9787 with her own gear and seed until Plaintiff Heather O'Neal obtained a new lease. On 2 August 2018, Defendant responded to Plaintiff Heather O'Neal's email, advising "[a]ny seed or gear purchased by you needs to be placed on your own lease" and "[s]eed and equipment placed on the partnership leases becomes the property of Devil Shoal Oyster & Clam Co."

¶ 5 On 17 December 2019, Plaintiff Heather O'Neal and her spouse, Fletcher O'Neal (collectively, the "Plaintiffs"), commenced the instant action by filing a verified complaint and issuing a summons for Defendant. In their complaint, Plaintiffs sought a judicial decree dissolving the Devil Shoal partnership and a declaratory judgment against Defendant, holding she committed a violation of N.C. Gen. Stat. § 75-1.1 for unfair and deceptive trade practices by "willfully and intentionally misappropriat[ing] insurance proceeds that were paid to the Partnership . . . ." As an alternative cause of action to the Chapter 75 violation, Plaintiffs alleged a cause of action for constructive fraud related to the allocation of insurance proceeds. On 21 January 2020, Defendant filed an answer *pro se*. On 20 February 2020, Defendant

filed, through counsel, an amended answer.

¶ 6 On 6 April 2021, a bench trial was held before the Honorable Wayland J. Sermons, Jr., judge presiding. Testimony from the parties revealed the following: Plaintiff Fletcher O'Neal performed services for Devil Shoal as the farm manager, in which he purchased seed, performed marketing tasks, sold product, and obtained the necessary permits. He was not paid by Devil Shoal for his services.

¶ 7 No new crops had been planted on behalf of Devil Shoal since 2017. Plaintiffs planted and harvested oyster crops on Lease 9787 in 2018 and 2019, using seed and gear they purchased individually. Defendant began planting clams again at Lease 9208 in June of 2019, which were separate from the partnership. In 2019, Hurricane Dorian destroyed "about half of [the oyster] crop" planted by Plaintiffs and some of the clam crop planted by Defendant. During this period, Devil Shoal's crops on Lease 9802 and Lease 9787 were protected under the Noninsured Crop Disaster Assistance Program ("NAP"). Plaintiffs and Defendant applied for NAP financial assistance under the partnership name because Devil Shoal was the named lessee of the Lease 9787 and "the [insurance] policy was under the partnership [name]." Based on a calculation worksheet prepared by the Farm Service Agency of the United States Department of Agriculture ("USDA"), Devil Shoal was entitled to a NAP payment of $63,328.00, minus a $3,157.00 insurance premium. In December of 2019, NAP proceeds totaling $59,596.00 were deposited into the Devil Shoal bank account.

Using these funds, Defendant paid off two remaining partnership loans and took $34,059.95 as her share.

¶ 8 In addition to NAP, Defendant and Plaintiffs applied for assistance under the Wildfires and Hurricanes Indemnity Program ("WHIP") for the damaged 2018 and 2019 crops, listing Devil Shoal as the producer. The gross WHIP payments were calculated to be $541.00 for clam crops in 2018, and $22,538.00 for oyster crops in 2019.

¶ 9 On 6 May 2021, the trial court entered its written Order, in which it found, *inter alia*, that: (1) Plaintiffs' Chapter 75 unfair and deceptive trade practices claim was dismissed at the 6 April 2021 hearing; (2) the Partners made a *de facto* separation of the two leases in 2018 although both continued to use partnership assets[2]; and (3) "a 75% to Plaintiff [Heather] O'Neal and 25% to Defendant Burley is a proper division of all net NAP and WHIP payments already received for the 2019 year, given the relative size and scope of each lease contributed to the partnership by each partner.[3]" The trial court then judicially dissolved Devil Shoal and ordered the affairs of the partnership be wound up. Defendant timely appealed from the Order.

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[2] The Agreement provides only one path to dissolution of the partnership: by mutual agreement of the Partners. The trial court made no finding, and the evidence does not tend to show, that the Partners reached a mutual agreement to dissolve the partnership.

[3] There is no indication in the record as to what authority the trial court relied upon to deviate from the agreed upon share of profits set forth in the Agreement, which appears to have remained in effect until the partnership was judicially dissolved.

II. Issues

¶ 10 On appeal, Defendant argues the trial court erred in: (1) concluding Devil Shoal is a limited partnership; (2) splitting and allocating the insurance proceeds between the Partners; and (3) classifying, allocating, and distributing the assets and liabilities to the Partners pursuant to the winding up of the partnership.

III. Jurisdiction

¶ 11 As an initial matter, we must determine whether this Court has jurisdiction to hear the merits of Defendant's appeal. Both parties contend the Order is a final judgment, and therefore, appeal lies of right directly to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021). We disagree.

¶ 12 "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." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (citation omitted). Conversely, "a final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361–62, 57 S.E.2d at 381.

¶ 13 Here, the trial court dismissed Plaintiffs' second cause of action, the unfair and deceptive trade practices claim, following the close of evidence at the 6 April 2021 hearing. The trial court then judicially dissolved the partnership in the

Order, disposing of Plaintiffs' first cause of action and leaving the first alternative cause of action for constructive fraud to be decided. In addition, the Order specifically stated the trial court was to retain jurisdiction of the matter "for entry of further Orders necessary to finish the wind up and distribution of assets of the Partnership." Because the Order "di[d] not dispose of the case" and left further action "to settle and determine the entire controversy," it constitutes an interlocutory order. *See id.* at 362, 57 S.E.2d at 381.

¶ 14 Because we conclude the Order is interlocutory, we next consider whether Defendant has properly shown she has an immediate right to appeal from the Order. There are two circumstances in which a party may appeal an interlocutory order:

> [f]irst, a party is permitted to appeal from an interlocutory order when the trial court enters "a final judgment as to one or more but fewer than all of the claims or parties" and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when "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, 379, 444 S.E.2d 252, 253, (1994) (citations omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2021); N.C. Gen. Stat. § 1-277 (2021). In either case, the appellant bears the burden of showing the interlocutory order is immediately appealable. *Id.* at 379, 444 S.E.2d at 253. The appellant's brief must contain a statement with "sufficient facts and argument to

support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4). "If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds." *Hamilton v. Mortgage Info. Servs.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011), *disc. rev. denied*, 366 N.C. 579, 739 S.E.2d 855 (2013).

¶ 15 In this case, the trial court did not certify the Order under Rule 54(b) of the North Carolina Rules of Civil Procedure. *See Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253; *see also* N.C. Gen. Stat. § 1A-1, Rule 54(b). Moreover, Defendant does not acknowledge in her brief the Order is interlocutory nor did she meet her burden of demonstrating that the Order is immediately appealable. *See Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253. Therefore, we dismiss the appeal because we are without jurisdiction to hear the matter. *See Hamilton.*, 212 N.C. App. at 77, 711 S.E.2d at 189.

IV. Conclusion

¶ 16 We hold the Order is interlocutory in nature. Accordingly, we dismiss Defendant's appeal.

APPEAL DISMISSED.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).