An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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-544

No. COA21-802

Filed 2 August 2022

Wake County, No. 20 CVD 9071

MELBA SMITH, Plaintiff,

v.

TROY GREENWALD and TROY GREENWALD ENTERPRISES, LLC, d/b/a BELTONE OF THE TRIANGLE, Defendants.

Appeal by plaintiff from order entered 11 October 2021 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 11 May 2022.

E. Gregory Stott for plaintiff-appellant.

Howard A. Jacobson for defendants-appellees.

DIETZ, Judge.

¶ 1 Plaintiff Melba Smith appeals the trial court's grant of summary judgment on her claim against Defendants Troy Greenwald and Troy Greenwald Enterprises, LLC. In her appellant's brief, Smith asserts that the challenged order is a final judgment, but the record on appeal indicates that there are other, unresolved counterclaims asserted by Defendants that remain pending in the trial court. Because the challenged order is not a final judgment and Smith has not met her burden to

show that the order affects a substantial right, we dismiss this appeal for lack of jurisdiction.

Facts and Procedural History

¶ 2 Defendant Troy Greenwald Enterprises, LLC sells, fits, and services Beltone brand hearing aids. Defendant Troy Greenwald is the President of the company and a licensed hearing aid dealer and fitter for Beltone products.

¶ 3 Plaintiff Melba Smith purchased hearing aids from Defendants and later asserted that the hearing aids were defective. In August 2020, Smith filed a complaint for breach of the warranty of merchantability. In December 2020, Defendants answered and asserted counterclaims for fraud, unfair and deceptive practices, and breach of contract.

¶ 4 In September 2021, Defendants moved for summary judgment on Smith's breach of warranty claim. The trial court granted the motion and entered summary judgment in favor of Defendants on Smith's claim. Smith appealed that order. The summary judgment order does not address the Defendants' counterclaims and the record on appeal does not indicate that those claims have yet been addressed by the trial court.

Analysis

¶ 5 Before we can address the merits of Smith's arguments, we must determine whether we have appellate jurisdiction.

¶ 6 In the statement of grounds for appellate review, Smith contends that the summary judgment order is a final judgment. The record on appeal does not support this contention.

¶ 7 "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. R. Civ. P. 54(a). A "final judgment" is one that disposes of the entire action and "leaves nothing further to be done in the trial court." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019). By contrast, a judgment "which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" is not a final judgment. N.C. R. Civ. P. 54(b). Generally, "there is no right of appeal from an interlocutory order." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Id.*

¶ 8 The summary judgment order that is the subject of this appeal is not a final judgment. The record indicates that Defendants' claims for fraud, unfair and deceptive practices, and breach of contract have not been adjudicated by the trial court and remain pending below. Thus, there is more to be done in the trial court. *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438.

¶ 9 The "only way an appellant may establish appellate jurisdiction in an

interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right." *Larsen*, 241 N.C. App. at 77–78, 772 S.E.2d at 96. "To confer appellate jurisdiction based on a substantial right, the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Doe v. City of Charlotte*, 273 N.C. App. 10, 21, 848 S.E.2d 1, 9 (2020). If "the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction." *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438.

¶ 10 Because Smith wrongly asserted that this appeal is from a final judgment, and provided no explanation of why the challenged order affects a substantial right, we are deprived of jurisdiction to hear this appeal. *Id.* As we have held in dismissing many past cases in this same situation, it is "not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the 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). When an appellant fails to make that showing, our only recourse is to dismiss the appeal for lack of appellate

jurisdiction. *Id.*

DISMISSED.

Judges DILLON and WOOD concur.

Report per Rule 30(e).