

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA23-1116

Filed 6 August 2024

Henderson County, No. 20 CVS 1721

PUBLIC SERVICE COMPANY OF
NORTH CAROLINA, INC. d/b/a
DOMINION ENERGY NORTH
CAROLINA, Plaintiff,
v.

SEN-ASHEVILLE I, LLC, Defendant.

Appeal by Defendant from judgment entered 10 April 2023 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 14 May 2024.

Parker Poe Adams & Bernstein LLP, by Katie M. Iams, Daniel E. Peterson, & Caroline B. Barrineau, for Plaintiff-Appellee.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt & Joseph T. Petrack, for Defendant-Appellant.

CARPENTER, Judge.

SEN-Asheville I, LLC (“Defendant”) appeals from the trial court’s final judgment. Defendant challenges the final judgment by arguing that the antecedent summary-judgment order (the “Order”) is erroneous. Therefore, according to

Defendant, the final judgment is flawed because the Order is flawed. After careful review, we dismiss for lack of jurisdiction.

I. Factual & Procedural Background

This case involves an easement, contract interpretation, and tree removal. Public Service Company of North Carolina, Inc. (“Plaintiff”) is a utility company; Defendant is a resort company. Defendant owns property (the “Property”) in Hendersonville, North Carolina, on which it operates a resort. Plaintiff owns an easement (the “Easement”) over part of the Property.

The Easement allows Plaintiff to maintain an underground natural-gas pipeline that runs through the Property. In relevant part, the Easement contract states: “[Plaintiff] shall have . . . the right from time to time to cut all trees[,] undergrowth and other obstructions that may injure, endanger or interfere with the construction, operation, maintenance and repair of [Plaintiff’s pipeline]”

On 2 November 2020, Plaintiff sued Defendant. Plaintiff alleged that it attempted to enter the Easement in order to trim trees, and Defendant wrongfully stopped Plaintiff from doing so. Plaintiff sought declaratory, injunctive, and monetary relief.

On 15 January 2021, Defendant filed a counterclaim, which Defendant amended on 16 November 2021. In relevant part, Defendant’s counterclaim requested declaratory judgment on these questions:

d. Does the [Easement] permit the Plaintiff to clear cut the

Opinion of the Court

entire area within the [Easement] because clear cutting makes it easier to monitor the [Easement] by aircraft?

. . . .

f. Does the [Easement] grant Plaintiff the right to cut down trees which are not located within the [Easement] if the canopy of said trees impedes Plaintiff's monitoring of the [Easement] by aircraft?

g. How are the three disinterested persons to calculate damages for the purposes of the provision contained in the [Easement] which [guarantees that Plaintiff will cover damages to property outside of the Easement]?

h. Does the [Easement] require Plaintiff to demonstrate that a tree or other vegetation growing in the [Easement] is injurious, endangering or interfering with the construction, operation, maintenance and repair of a buried gas pipeline before it is entitled to cut down said tree or vegetation?

On 24 May 2022, Defendant moved for summary judgment concerning the above-quoted questions from its counterclaim. On 12 July 2022, Plaintiff moved for summary judgment concerning "all claims, counterclaims, and defenses."

On 3 January 2023, the trial court entered the Order, which denied Plaintiff's motion for summary judgment and partially granted and partially denied Defendant's motion for summary judgment. The trial court only granted Defendant summary judgment in one respect: The trial court concluded, as a matter of law, that before Plaintiff could remove the disputed trees, the Easement contract required Plaintiff to show that the trees "may injure, endanger or interfere with the construction, operation, maintenance and repair of" Plaintiff's pipeline.

The trial court did not resolve any factual disputes concerning which trees, if any, Plaintiff could remove from the Property: "Instead, all trees and overhanging

branches—including the ones that were already cleared—will be subject to a factual determination of whether they ‘may injure, endanger or interfere with the construction, operation, maintenance and repair of’” Plaintiff’s pipeline.

After a five-day trial in Henderson County Superior Court, the jury found that Plaintiff could remove several trees on the Property. On 10 April 2023, the trial court entered a final judgment enjoining Defendant from interfering with Plaintiff’s tree removal. On 11 May 2023, Defendant filed written notice of appeal from both the Order and the final judgment. On 7 February 2024, Plaintiff moved to dismiss this appeal.

II. Jurisdiction

In its motion to dismiss this appeal, Plaintiff asserts that Defendant abandoned any arguments concerning the final judgment, and that the remainder of Defendant’s arguments only concern the Order, which is unreviewable. We agree with Plaintiff.

A. Final Judgment

“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.” N.C. R. App. P. 28(b)(6). “It is well-settled that arguments not presented in an appellant’s brief are deemed abandoned on appeal.” *Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) (citing N.C. R. App. P. 28(b)(6)).

On appeal, Defendant clearly states the relief it seeks: “[Defendant]

respectfully requests that this Court reverse the trial court's Summary Judgment Order" Indeed, Defendant only presents the following issue on appeal: "Did the trial court err in its Summary Judgment Order under N.C. R. Civ. P. 56, and as a result of that error, was a jury trial conducted based upon an erroneous premise created by the Summary Judgment Order?"

On appeal, Defendant does not analyze the final judgment. Rather, Defendant tries to sidestep the final judgment by arguing that it is "based upon an erroneous premise created by the Summary Judgment Order." Defendant has therefore abandoned any arguments directly challenging the final judgment. *See id.* at 361, 782 S.E.2d at 394. Accordingly, Defendant is limited to collaterally contesting the final judgment by directly disputing the Order.

B. The Order

We have jurisdiction over appeals from final judgments. N.C. Gen. Stat. § 7A-27(b)(1) (2023). But we typically lack jurisdiction over interlocutory orders. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Cap., L.C.*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998).

An order denying summary judgment is interlocutory. *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). An order granting partial summary judgment is also interlocutory. *Curl v. Am. Multimedia, Inc.*, 187

N.C. App. 649, 652, 654 S.E.2d 76, 78–79 (2007).

Consistent with our general rule against reviewing interlocutory orders, a denial of summary judgment is not reviewable after final judgment. *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (“[T]he denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.”). On the other hand, a grant of partial summary judgment becomes reviewable after final judgment. *D.G. II, LLC v. Nix*, 213 N.C. App. 220, 229, 713 S.E.2d 140, 147 (2011) (“The jury verdict was a final determination as to damages. Therefore, at that point, the trial court’s order granting defendants’ motion for partial summary judgment became an appealable order.”).

Here, the Order partially granted and partially denied Defendant’s motion for summary judgment, and the trial court entered a final judgment after entering the Order. Therefore, we lack jurisdiction to review the Order’s denial of summary judgment, *see Harris*, 314 N.C. at 286, 333 S.E.2d at 256, but we have jurisdiction to review the Order’s grant of summary judgment, *see D.G.*, 213 N.C. App. at 229, 713 S.E.2d at 147.

But Defendant does not ask us to reverse the Order’s grant of summary judgment—which makes sense, because the grant of summary judgment favored Defendant. Specifically, the trial court concluded that Plaintiff’s right to remove trees was *limited* to those trees that “may injure” the pipeline.

Instead, Defendant argues that the trial court should have *extended* its grant

Opinion of the Court

of summary judgment to conclude that Plaintiff could not remove *any* trees: Defendant argues that there was no genuine issue of material fact concerning which trees could be removed. Put directly, Defendant argues that the trial court erred by partially *denying* its motion of summary judgment and sending factual questions to the jury.

As detailed above, however, we lack jurisdiction to review the trial court's denial of summary judgment. *See Harris*, 314 N.C. at 286, 333 S.E.2d at 256. Accordingly, because Defendant does not seek reversal of the Order's grant of summary judgment, and because we lack jurisdiction to review the trial court's denial of summary judgment, we grant Plaintiff's motion to dismiss this appeal.

III. Conclusion

We grant Plaintiff's motion to dismiss.

DISMISSED.

Judges STROUD and THOMPSON concur.

Report per Rule 30(e).