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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1167

Filed 17 September 2024

Durham County, No. 23 CVS 1463

LISA BIGGS, Individually, and as Administrator, ESTATE OF KELWIN BIGGS,
Plaintiff,

v.

ERIE INSURANCE EXCHANGE, BOULEVARD PRE-OWNED INC., and DARYL
BROOKS, Defendants.

Appeal by defendant Erie Insurance Exchange from an order entered 19 June
2023 by Judge Brian C. Wilks in Durham County Superior Court. Heard in the Court
of Appeals 13 August 2024.

*Couch & Associates, PC, by Finesse G. Couch and C.A. Couch , for the Plaintiff-
Appellee.*

*Martineau King PLLC, by Geoffrey A. Marcus and Natasha M. Durkee, for Erie
Insurance Exchange, Defendant-Appellant.*

WOOD, Judge.

Erie Insurance Exchange (“Defendant”) appeals the trial court’s denial of their
motion to dismiss the complaint filed by Lisa Biggs, individually, and as
administrator of the estate of Kelwin Biggs (“Plaintiff”). On 6 April 2023 Defendant

timely filed a 12(b)(6) Motion to dismiss Plaintiff's claim based upon collateral estoppel or issue preclusion. On 19 June 2023 the trial court denied the motion with prejudice. Defendant then filed this interlocutory appeal.

I. Factual and Procedural History

On 8 January 2015, Boulevard Pre-Owned, Inc. ("Boulevard"), entered into an agreement to sell a 1995 Chevrolet Camaro to Nathaniel Brooks ("Nathaniel"). Boulevard and Nathaniel executed a bill of sale, signed and notarized title transfer forms, and executed various other documents typical in the process of selling an automobile including insurance and registration paperwork. After the paperwork was complete, at relative of Nathaniel, Daryl Brooks ("Daryl"), drove the Camaro off the lot.

Shortly after the sale, the North Carolina Department of Motor Vehicles rejected the title transfer paperwork submitted by Boulevard because Boulevard had misplaced its copy of Nathaniel's driver's license. Boulevard tried unsuccessfully to contact Nathaniel multiple times between January 2015 and March 2015.

On 11 March 2015, Daryl was driving the Camaro. On this day, he was driving while impaired when he caused a motor vehicle accident that led to the death of Kelvin Biggs.

On 6 May 2015, Plaintiff filed a complaint in Durham County Superior Court against Daryl, Nathaniel, Kyle Ollis, the owner of Boulevard, and Boulevard Pre-Owned, Inc asserting claims for negligence, negligent entrustment, piercing the

corporate veil, negligent infliction of emotional distress and punitive damages. On 3 March 2017, Klye Ollis and Boulevard filed a Motion for Summary judgment which the trial court granted on 4 May 2017. Following entry of a final judgment on the remaining claims against Daryl Brooks, Plaintiff appealed the trial court's decision granting summary judgment in favor of Kyle Ollis and Boulevard. On 16 August 2022, this Court affirmed the trial court's order granting summary judgment.

On or around 22 July 2021, while the appeal of the decision granting summary judgement in favor of Kyle Ollis and Boulevard was pending in this Court, Plaintiff filed a motion for a Declaratory Judgment action against Defendant in Durham Superior Court. On 18 January 2022, after receiving the adverse ruling on the Motion for Summary Judgment from this Court, Plaintiff voluntarily dismissed the Declaratory Judgment action.

On 18 January 2023 Plaintiff filed the underlying complaint in Durham County Superior Court against Defendant, Boulevard, and Daryl seeking a declaratory judgment defining the parties' rights and obligations under a Garage Auto Policy issued by Defendant to the named insured, Boulevard, as it pertains to the collision on 11 March 2015. On 9 February 2023 Defendant moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure based on the doctrine of collateral estoppel or issue preclusion. On 29 March 2023, Plaintiff filed an Amended Complaint and Defendant re-filed its Motion to Dismiss on the same basis as before.

On 19 June 2023, the trial court entered an Order denying Defendant's Motion to Dismiss. On 13 July 2023, Defendants filed written notice of appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(3).

II. Analysis

On appeal, Defendants argue the trial court erred in denying their motion to dismiss Plaintiff's Amended Complaint based upon collateral estoppel or issue preclusion. However, at the outset we must address the issue of appellate jurisdiction of Defendant's interlocutory appeal.

The trial court's 19 June 2023 Order denying Defendant's Motion to Dismiss Plaintiff's Complaint was not a final order as it did not resolve all pending claims and, therefore, is interlocutory. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("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.") Generally, there is no right of immediate appeal from an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, two exceptions exist. An order may be appealed immediately if "(i) the trial court certifies the case for immediate appeal pursuant to N.C. [Gen. Stat.] § 1A-1, Rule 54(b), or (ii) the order 'affects a substantial right of the appellant that would be lost without immediate review.'" *McIntyre v. McIntyre*, 175 N.C. App. 558, 562, 623 S.E.2d 828, 831(2006) (citation omitted).

An interlocutory appeal of the “denial of a motion to dismiss premised on res judicata and collateral estoppel does not *automatically* affect a substantial right; the burden is on the party seeking review of the interlocutory order to show how it will affect a substantial right absent immediate review.” *Whitehurst Inv. Props., LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (emphasis in original). “The appellant bears the burden of demonstrating that the order is appealable despite the interlocutory nature.” *Dewey Wright Well and Pump Co., Inc. v. Worlock*, 243 N.C. App. 666, 669, 778 S.E.2d 98, 100 (2015) (citation omitted).

This Court has previously held that in order “to confer appellate jurisdiction in this circumstance, the appellant *must* include in *its opening brief*, in *the statement of grounds for appellate review*, sufficient facts and argument to support appellate review on the ground that the unchallenged order affects a substantial right.” *Bartels v. Franklin Operations, LLC*, 288 N.C. App. 193, 197-98, 885 S.E.2d 357, 361 (2023) (emphasis in original) (citation omitted).

“[I]f the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of the appellate jurisdiction.” *Denney v. Wardson Constr., Inc.* 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019). Such is the case here.

In its opening brief, Defendant merely summarized our language from *Semelka* stating, “a trial court’s order rejecting the affirmative defense of collateral estoppel can affect a substantial right, so long as the party asserting the doctrine of collateral

estoppel has made a colorable argument that the doctrine applies.” *See Semelka v. Univ. of N.C.*, 289 N.C.App. 198, 208, 888 S.E.2d 385, 393 (2023). Defendant provides no further facts or arguments. Absent facts and any assertion as to why the challenged order affects a substantial right, we are constrained to dismiss the appeal for lack of appellate jurisdiction. “[T]his Court will not ‘construct arguments for or find support for appellant's right to appeal from an interlocutory order’ on our own initiative That burden falls solely on the appellant.” *Denney v. Wardson Constr., Inc.* 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019) (citing *Jeffreys v. Raliegh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)).

III. Conclusion

We conclude Defendant’s appeal from the trial court’s order denying its motion to dismiss is not properly before us as it is an interlocutory order. We further conclude Defendant has failed to assert any argument as to how or why the challenged order affects a substantial right. Consequently, this Court lacks appellant jurisdiction. Defendant’s appeal is dismissed.

DISMISSED.

Judges ZACHARY and CARPENTER concur.

Report per Rule 30(e).