

No. COA 23-496

TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

KENNETH SHANE NANTZ

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)

Petitioner-Appellee,

)

)

v.

)

From Mecklenburg County

)

CITY OF CHARLOTTE and CITY OF
CHARLOTTE CIVIL SERVICE BOARD,

)

)

)

Respondent-Appellant.

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)

PETITIONER-APPELLEE'S MOTION TO DISMISS APPEAL

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v.)	<u>From Mecklenburg County</u>
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PETITIONER-APPELLEE'S MOTION TO DISMISS APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Petitioner-Appellee Kenneth Shane Nantz (“Nantz”), through undersigned counsel, moves this Court under Rule 37(a) of the North Carolina Rules of Appellate Procedure, to dismiss this appeal on the grounds that the trial court’s order is interlocutory, and there is no immediate right to appellate review. In support of this motion, Nantz shows as follows:

BACKGROUND

1. In or around October 2019, retirees of the Charlotte Fire Department (“CFD”) complained about a poorly written recruiting Instagram post, dated September 6, 2019. (R p. 40).

2. In an email, Chief Johnson claimed that the Instagram account was unauthorized and that the post was an inaccurate description of CFD recruitment strategy. (R p. 42).

3. After Chief Johnson’s statement, someone put two copies of an email to Chief Johnson in the truck of a member of the CFD firefighter’s association, Marty Puckett (“Puckett”). (R pp. 87, 88).

4. These internal emails indicated that Chief Johnson knew and approved the recruitment strategy reflected in the Instagram post. *Id.*

5. Puckett gave copies of the email to Nantz to help determine whether the email could have originated from the City’s email system. (R p. 110).

6. Nantz took an existing email in his City email account, deleted the message portion and repopulated it with some of the information contained in the message portion of the emails he received from Puckett. *Id.*

7. Nantz determined that the internal email left in Puckett's truck followed the formatting of the City's email system and could have come from that system. *Id.*

8. Puckett, not Nantz, made a Facebook post with one copy of the email found in his truck and stated the information in the Instagram post seemed to follow the official recruitment strategy. (R p. 182).

9. After Puckett posted the email to Facebook, CFD investigated and found the draft with a different subject line in Nantz's email drafts' folder. (R p. 109).

10. The email CFD found was the email Nantz had repopulated in response to Puckett's request for help. (R p. 110).

11. Chief Johnson claimed that Nantz created and gave Puckett the two copies of the email, and that the email falsely portrayed CFD recruitment strategy. (R p. 8-9).

12. However, the emails were not an exact match as the contents were different. *Compare* (R pp. 87, 88) *with* (R p. 109).

13. Chief Johnson prepared a citation to terminate Nantz before he ever met with Nantz. (R p. 38).

14. The citation for termination was later reduced to a suspension. (R p. 8).

15. Nantz appealed his suspension to the City of Charlotte Civil Service Board (“CSB”). (R p. 10).

16. Following a hearing in which the CSB limited the amount of time available for Nantz to present evidence, CSB affirmed the suspension. (R p. 24).

17. Nantz appealed to the Mecklenburg County Superior Court for judicial review of the CSB decision.

18. On December 28, 2022, the Superior Court entered an Order on Nantz’s appeal (the “Remand Order”). (R p. 221).

19. In the Remand Order, the Superior Court concluded: (1) the CSB’s decision was not supported by competent evidence and does not have a rational basis in the evidence; (2) the decision to limit the presentation of evidence deprived Nantz of his due process; (3) the limitation of time put counsel for Nantz in the untenable position of choosing between cross-examination and presenting evidence; and (4) given the number of witnesses and technical nature of the testimony CSB abused its discretion in placing a limitation on the presentation of evidence. *Id.*

20. On January 21, 2023, the City and CSB filed their Notice of Appeal of the Remand Order. (R p. 223).

21. Nantz now moves this Court to dismiss the City and CSB’s appeal as it is interlocutory.

22. North Carolina Rule of Appellate Procedure 37(a) allows a party to move for an order or relief at any time before the case is called for oral argument. This case has not been called for oral argument.

ARGUMENT

23. The City and CSB's appeal should be dismissed because the Remand Order is interlocutory, and there is no right to immediate appeal.

24. A Superior Court order "is either 'interlocutory or the final determination of the rights of the parties.'" *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188 (2011) (*quoting* N.C. Gen. Stat. § 1A-1, 54).

25. "An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy." *Beroth Oil Co. v. N.C. Dep't of Transp.*, 256 N.C. App. 401, 410, 808 S.E.2d 488, 496 (2017) (*quoting* *Peterson v. Dillman*, 245 N.C. App. 239, 242, 782 S.E.2d 362, 365 (2016)).

26. The City and CSB's appeal is an interlocutory appeal because it was noticed from an order that did not dispose of the entire case but rather remanded the case back to the CSB for a new hearing. (R p. 221).

27. “[T]his Court must dismiss an interlocutory appeal for lack of subject-matter jurisdiction, unless the appellant is able to carry its burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature.” *C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, LLC*, 255 N.C. App. 8, 11, 803 S.E.2d 679, 682 (2017) (quoting *Hamilton*, 212 N.C. App. at 77, 711 S.E.2d at 188).

28. “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” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citing *GLYK & Assocs. v. Winston-Salem Southbound Ry. Co.*, 55 N.C. App. 165, 170-71, 285 S.E.2d 277, 280 (1981)).

29. The City and CSB must show that the Remand Order deprives them “of a substantial right which would be jeopardized absent a review prior to a final determination on the merits” in order to meet their burden of showing the Remand Order is appealable. *C. Terry Hunt*, 255 N.C. App. at 12, 803 S.E.2d at 682 (quoting *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253).

30. “A substantial right has consistently been defined as ‘a legal right affecting or involving a matter of substance as distinguished from

matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right.” *Coates v. Durham Cty.*, 266 N.C. App. 271, 273, 831 S.E.2d 392, 394 (2019) (quoting *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009)).

31. As this Court has recognized, “avoidance of a rehearing or trial is not a ‘substantial right’ entitling a party to an immediate appeal.” *Id.* at 274, 831 S.E.2d at 394 (quoting *Blackwelder v. Dep’t of Hum. Res.*, 60 N.C. App. 331, 335 299 S.E.2d 777, 780 (1983)).

32. Indeed, the Court has consistently held that when a superior court is sitting in an appellate capacity and remands a case to a municipal body for additional proceedings, the remand order is not immediately appealable. *Akers v. City of Mount Airy*, 175 N.C. App. 777, 779–80, 6225 S.E.2d 145, 145-46 (2006) (dismissing appeal of a remand order for lack of jurisdiction because the appellate court could “identify no substantial right that w[ould] be lost to petitioners absent an immediate appeal”); *see also Coates*, 266 N.C. App. at 274–75, 831 S.E.2d at 395 (concluding “we must dismiss this appeal” because remand order was interlocutory and appellant “failed to show that a substantial right would be lost absent appeal”); *Heritage Pointe Builders, Inc. v. N.C. Licensing Bd. of Gen. Contractors*, 120 N.C. App. 502, 504, 462 S.E.2d 696, 698 (1995)

(“Assuming the existence of a substantial right in this case, the record does not support a determination that the Board’s right to pursue the contentions made in this appeal would be impaired or prejudiced if it were forced to delay presentation of these contentions until entry of a final order in the trial court.”); *Jennewein v. City Council of Wilmington*, 46 N.C. App. 324, 326, 264 S.E.2d 802, 803 (1980) (dismissing appeal of remand order because it “did not affect a substantial right of either party which cannot be corrected upon appeal from final judgment without either party suffering injury in the meantime”); *E.D. ex rel. Ashley v. Charlotte-Mecklenburg Bd. of Educ.*, No. COA23-16, 2023 WL 3834839, at *4 (N.C. Ct. App. June 6, 2023) (dismissing appeal of a remand order as interlocutory) (unpublished).

33. The City and CSB is unable to meet its burden to show that the Remand Order affects a substantial right based on the established precedent of this Court.

CONCLUSION

WHEREFORE, Petitioner-Appellee respectfully moves this Court under Rule 37(a) to dismiss the appeal for lack of jurisdiction.

Respectfully submitted, this 22nd day of August, 2023.

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Electronically Submitted

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N.C.R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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RULE 37(c) STATEMENT

The undersigned counsel for Petitioner-Appellee informed counsel for the Respondent-Appellant of the intended filing of the instant motion to dismiss appeal. Upon information and belief, Respondent-Appellant does not consent to the dismissal of the appeal and intends to file a response.

Electronically Submitted
Margaret B. Maloney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing MOTION TO DISMISS APPEAL on counsel for Respondent-Appellant by email addressed as follows:

Jill Y. Sanchez-Myers: Jill.SanchezMyers@Charlottenc.gov
Mindy Sanchez: Mindy.Sanchez@Charlottenc.gov

This the 22nd day of August, 2023.

Electronically Submitted
Margaret B. Maloney