NO. COA01-1321

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

BRIAN SCOTT LESCRINIER,
Plaintiff-Appellant,

v. Guilford County
No. 00 CVS 2838

NORTH POINT PARTNERS, II, L.L.C.; WILLARD-STEWART, INC.; CUNNINGHAM BRICK CO., INC.; and JOSE A. MARTINEZ,
Defendants-Appellees.

Appeal by plaintiff from order entered 24 August 2001 by Judge Peter M. McHugh in Superior Court, Guilford County. Heard in the Court of Appeals 12 June 2002.

Morgan, Herring, Morgan, Green, Rosenblutt & Gill, PLLC, by James F. Morgan and John Haworth, for plaintiff-appellant.

Pinto Coates Kyre & Brown, PLLC, by David L. Brown, for defendants-appellees.

McGEE, Judge.

Brian Scott Lescrinier (plaintiff) filed a complaint on 14 December 2000 to recover for personal injuries he alleged were caused by the negligence of North Point Partners, II, L.L.C. (North Point), Willard-Stewart, Inc. (Willard-Stewart), Cunningham Brick Co., Inc. (Cunningham), and Jose A. Martinez (Martinez). North Point filed an answer on 10 January 2001 denying negligence on its part and alleging that plaintiff was contributorily negligent.

North Point, Willard-Stewart, Cunningham and Martinez filed separate motions for summary judgment along with supporting affidavits. The trial court granted Cunningham's and Martinez's motions for summary judgment and denied Willard-Stewart's motion for summary judgment. Plaintiff has not appealed the orders granting the motions of Cunningham and Martinez for summary judgment, nor has Willard-Stewart appealed the order denying its motion for summary judgment.

The trial court held a hearing on defendant's motion for summary judgment during the 20 August 2001 term of Superior Court, Guilford County. The evidence before the trial court tended to show the following. Plaintiff testified in a deposition that on 6 October 1995 he went to visit friends at Ambassador Court Apartments (apartment complex) in High Point. Around 11:30 p.m. that night, plaintiff and his friends went to a second apartment in the complex to visit a young man named Steve. Plaintiff had been to the apartment complex before but had not previously noticed construction work going on there. However, plaintiff testified that on the night of 6 October, he did observe construction work in the apartment complex. Plaintiff said he had three to four beers to drink that night.

While at Steve's apartment, plaintiff noticed that Steve had gone out to the patio because he was not feeling well and was throwing up. Plaintiff went to the patio to see if Steve was all right. Plaintiff stated there were no patio lights on, and so that Steve "wouldn't make a mess on [plaintiff's] shoes [plaintiff]

stepped around [Steve], and that's when [plaintiff] fell off into [a] hole." Plaintiff explained that he tripped over something which caused him to fall into the hole and land on a cinder block located within the hole. After falling, plaintiff went back inside Steve's apartment where he noticed blood on his clothes. Plaintiff testified he was diagnosed with a ruptured urethra when he went to the emergency room the next day.

Glenn Hedgecock (Hedgecock), director of new construction at Willard-Stewart, submitted an affidavit on behalf of Willard-Stewart stating that Willard-Stewart was hired by North Point as general contractor for a construction project at the apartment complex. Hedgecock stated in the affidavit that

> [t]he "hole" complained of by plaintiff . . . is a shallow foundation trench . . . which is commonly dug around buildings in order to permit renovations to the exterior. The foundation trench for the [apartment complex] was dug around certain portions of the buildings as part of the installation of the brick on the apartments' exterior.

He further stated that "[t]he foundation trench was not dug in areas near walkways or where pedestrian traffic was expected."

William B. Millis (Millis), a North Point owner, submitted an affidavit stating that North Point hired Willard-Stewart as an "independent general contractor" to perform renovations and additions at the apartment complex. Millis further stated that Willard-Stewart was not under North Point's direct control and that North Point did not instruct anyone affiliated with Willard-Stewart on the particulars of how to renovate or construct the apartment building. Millis stated that North Point "had no knowledge of any

dangerous or unreasonable condition on the premises of [the apartment complex] prior to the incident complained of by the Plaintiff in this action."

The trial court granted North Point's motion for summary judgment in an order entered 24 August 2001. Plaintiff appeals from this order.

I.

We must first determine whether plaintiff's appeal is properly before our Court. An interlocutory order is one which does not dispose of the case as to all parties and issues and is therefore not a final order. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Because plaintiff's action against Willard-Stewart is still pending in the trial court, the trial court's order granting summary judgment for North Point is an interlocutory order.

Generally, there is no right of immediate appeal from an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. 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. *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). However, an appeal from an interlocutory order may be taken in two circumstances: (1) if the order is final as to one or more of the claims or parties, and the trial court certifies that there is no just reason to delay the appeal; or (2) the order deprives the

appellant of a substantial right that would be lost absent immediate review. *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000). *See also* N.C. Gen. Stat. §§ 1-277(a) (2001) and 7A-27(d) (2001). Plaintiff argues that the trial court's order granting North Point's motion for summary judgment affects his substantial right to have all issues of liability determined by the same jury.

"The 'substantial right' test for appealability is more easily stated than applied." *Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980). *See also Waters*, 294 N.C. 200, 240 S.E.2d 338. Whether or not a substantial right will be affected by delay in hearing an interlocutory appeal is to be decided on a case-by-case basis. *Waters*, 294 N.C. at 208, 240 S.E.2d at 343. "A substantial right is 'one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.'" *Turner*, 137 N.C. App. at 142, 526 S.E.2d at 670 (quoting *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)). A substantial right is likely to be affected where a possibility of inconsistent verdicts exists if the case proceeds to trial. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

In the case before us, we find that "plaintiff['s] appeal is reviewable under the substantial right exception because a dismissal now would raise the possibility of inconsistent verdicts in later proceedings." *Hoots v. Pryor*, 106 N.C. App. 397, 402, 417 S.E.2d 269, 273, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148

(1992). North Point alleges in its answer that plaintiff's actions at the apartment complex constitute contributory negligence. It is possible that in a proceeding against Willard-Stewart alone, a jury could find plaintiff contributorily negligent. If, in an appeal of that verdict, plaintiff renews his appeal of the trial court's order allowing North Point's motion for summary judgment, and our Court finds that said order was in error, then a second trial would be required as to the claim against North Point. It is possible that in this second trial, a jury could determine plaintiff was not contributorily negligent. Thus, if plaintiff's case were to be tried in two separate proceedings, the possibility of inconsistent verdicts arises. We find that plaintiff's appeal, though interlocutory, should not be dismissed in that it affects a substantial right.

II.

We next consider plaintiff's argument that the trial court erred in granting North Point's motion for summary judgment.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). As the moving party, North Point has the initial burden of showing either that an essential element of plaintiff's claim does not exist as a matter of law or that plaintiff cannot produce evidence to support an essential element of his claim. *Evans v. Appert*, 91

N.C. App. 362, 365, 372 S.E.2d 94, 96, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988). If North Point carries that burden, plaintiff, as the non-movant, must then offer a forecast of evidence which shows that there is a genuine issue of material fact for trial with respect to the issues raised by North Point. *Evans*, 91 N.C. App. at 365, 372 S.E.2d at 96; N.C. Gen. Stat. § 1A-1, Rule 56(e) (2001). The trial court must consider the evidence in the light most favorable to the non-movant. *See Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 488 S.E.2d 608 (1997), *aff'd*, 347 N.C. 666, 496 S.E.2d 379 (1998).

In a negligence action, to survive a motion for summary judgment, a plaintiff must establish a *prima facie* case by showing: "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996) (citations omitted).

Our Supreme Court ruled in *Nelson v. Freeland* that owners and occupiers of land have a "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). Reasonable care requires that a landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied

knowledge. *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 89, 555 S.E.2d 303, 306 (2001) (citing *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981)). Therefore, in order to show actionable negligence by a landowner, a plaintiff must forecast evidence tending to "show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992).

Our Supreme Court determined that *Nelson* was to have retrospective application and it therefore applies to the case before us. *Nelson*, 349 N.C. at 633, 507 S.E.2d at 893. North Point, as owner of the apartment complex, owed plaintiff a duty of reasonable care in the maintenance of its premises. Plaintiff alleges in his complaint that North Point breached that duty "by permitting the hole to exist without lighting or guarding of any kind when it knew or in the exercise of due care should have known of the existence of the hole."

We find that in this case, plaintiff has failed to forecast any evidence of North Point's negligence. There is no evidence in the record that North Point made the hole that plaintiff alleged created a dangerous condition. There is no evidence of any previous accidents at the apartment complex due to the alleged dangerous condition; nor is there evidence showing any tenants or visitors to the apartment complex complained about the existence of the hole. The record fails to reveal how long the hole existed

before plaintiff's accident. No evidence discloses that North Point was involved in the day-to-day construction activity in the apartment complex and Millis, a North Point owner, denied North Point had knowledge of any dangerous or unreasonable condition on the premises. Although plaintiff refers to invoices paid by Willard-Stewart for the delivery of bricks and other supplies before plaintiff's injury as evidence that North Point should have known of the existence of the hole, we fail to discern how this information put North Point on actual or constructive notice of a dangerous condition.

Viewing the evidence in a light most favorable to plaintiff as the non-movant and giving him the benefit of all inferences therein, plaintiff has failed to produce any evidence tending to show that North Point breached a duty owed to plaintiff. The trial court did not err in granting North Point's motion for summary judgment.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).