NO. COA01-815

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

DANIEL G. DODDER and JOANN DODDER,
Plaintiff-Appellants,

v.

Forsyth County
No. 94 CVS 6219

YATES CONSTRUCTION COMPANY, INC.,
Defendant-Appellee.

Appeal by plaintiffs from judgment entered 6 December 2000 by Judge Russell G. Walker, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 27 March 2002.

White and Crumpler, by Dudley A. Witt, for plaintiff appellants.

Bennett, Guthrie & Dean, P.L.L.C., by Rodney A. Guthrie and Stanley P. Dean, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff Daniel Dodder and his wife, Joann Dodder, appeal the trial court's entry of directed verdict for defendant Yates Construction Company (Yates). The pertinent facts are as follows: (For a full factual recitation, *see Tise v. Yates Construction Co.*, 345 N.C. 456, 480 S.E.2d 677 (1997), a companion case.). On 26 June 1992, plaintiff Daniel Dodder was employed as a police officer with the Winston-Salem Police Department in Winston-Salem, North

Carolina. In the early morning hours of 26 June, Dodder and a fellow officer responded to a call that unknown persons were tampering with heavy construction equipment (a motor grader) at a construction site maintained by Yates near New Walkertown Road. Upon arriving at the construction site, Dodder and his fellow officer did not locate any suspects and were unable to determine whom to contact about the security of the construction equipment. The officers noticed the grader parked at a shopping center adjacent to the construction site and attempted to disable it by removing fuses. However, they succeeded only in disabling the grader's lighting system.

After the officers left the scene, four individuals returned to the construction site and resumed tampering with the construction equipment. One of the individuals, later identified as Conrad Crews, got onto the grader, started it, and drove it onto a road and traveled toward East Drive. Plaintiff and his fellow officer again responded to the reported disturbance and went to East Drive in their patrol cars. They were met there by Lieutenant Aaron Tise. All three officers were in their own patrol cars. As Crews drove the grader onto Lakeshore Drive, he crushed Lieutenant Tise's car; Lieutenant Tise later died of his injuries. Crews also collided with plaintiff's patrol car and seriously injured him.

On 1 September 1994, plaintiff and his wife filed a lawsuit against Yates, alleging negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and

loss of consortium. On 28 February 1995, Yates filed an amended answer, moved to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001), and alleged that (1) the theft of the grader was a bar to any recovery by plaintiffs; (2) Yates exercised reasonable care at all times; (3) plaintiff's employer (the City of Winston-Salem) was contributorily negligent; (4) the City's negligence was intervening and superseding; (5) plaintiff was negligent; and (6) plaintiff's negligence was intervening and superseding.

The case was heard at the 30 October 2000 Civil Session of Forsyth County Superior Court. After plaintiffs' presentation of evidence, defendant moved for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 (2001). The trial court granted defendant's motion, and plaintiffs appealed.

On appeal, plaintiffs argue the trial court erred by granting defendant's motion for directed verdict because they produced sufficient evidence to withstand the motion, and because the decision "conflicted" with matters that had already been resolved in their favor in previous decisions from both this Court and the Supreme Court. After careful examination of the arguments, we disagree with plaintiffs and affirm the decision of the trial court.

We first address the law of the case doctrine. "According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision becomes the law of the case and

governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994). "Furthermore, under general rules of estoppel by judgment, plaintiff is similarly precluded from relitigating an issue adversely determined against him." *Id.* at 418, 438 S.E.2d at 753. Plaintiffs argue the trial court's grant of a directed verdict in favor of defendant was contrary to an earlier unpublished decision by our Court in a companion case, *Tise v. Yates Construction Co.*, 131 N.C. App. 155, 510 S.E.2d 417, *disc. review denied*, 349 N.C. 534, 526 S.E.2d 476 (1998). In that case, a panel of this Court reversed the trial court's grant of defendant's Rule 12(b)(6) motion and stated that "plaintiff's complaint contained sufficient allegations of negligence to survive defendant's Rule 12(b)(6) motion, and the trial court therefore erred by granting the motion." Plaintiffs now urge us to conclude that the motion for directed verdict was also improperly granted in favor of defendant. We do not agree.

The question in *Tise* was whether plaintiff had sufficiently pled her complaint to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted. "A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure presents the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under

some legal theory." *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991).

In the present appeal, however, the central concern is whether plaintiffs presented enough evidence to survive a Rule 50 motion for directed verdict. "When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991) (citations omitted). Because a Rule 12(b)(6) motion has a different standard of proof than a motion for directed verdict, we hold that the law of the case doctrine does not apply in the present case and does not require reversal of the trial court's grant of directed verdict in favor of defendant. *See Southland Assoc. Realtors v. Miner*, 73 N.C. App. 319, 326 S.E.2d 107 (1985); *Edwards v. Northwestern Bank*, 53 N.C. App. 492, 281 S.E.2d 86, *disc. review denied*, 304 N.C. 389, 285 S.E.2d 831 (1981). Having concluded that the law of the case doctrine does not apply to this case, we now consider whether the trial court properly granted a directed verdict for Yates.

"A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff." *Wellmon v. Hickory Construction Co.*, 88 N.C. App. 76, 79, 362 S.E.2d 591, 593 (1987), *disc. review denied*, 322 N.C. 115, 367 S.E.2d 921 (1988). To survive a motion for directed verdict, a

plaintiff "must make out his case by proving the facts essential to his cause of action or by proving facts permitting an inference of the material facts as a fair and logical conclusion." *Southern Bell Telephone and Telegraph Co. v. West*, 100 N.C. App. 668, 670, 397 S.E.2d 765, 767 (1990), *aff'd*, 328 N.C. 566, 402 S.E.2d 409 (1991). "In deciding the motion, the trial court must treat non-movant's evidence as true, considering the evidence in the light most favorable to non-movant, and resolving all inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence." *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990). "Some degree of probability, however small, must exist to provide the jury with a question of causation to resolve." *Hinson v. National Starch & Chemical Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659-60 (1990). With these principles in mind, we turn to the case at hand.

"Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992). "'To recover damages for actionable negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach. . . .'" *Matthieu v. Gas Co.*, 269 N.C. 212, 217, 152 S.E.2d 336, 341 (1967) (quoting *Petty v. Print Works*, 243 N.C. 292, 298, 90 S.E.2d 717, 721 (1956)). *See also Waltz v. Wake County Bd. of Education*, 104 N.C.

App. 302, 303-04, 409 S.E.2d 106, 107 (1991), *disc. review denied*, 330 N.C. 618, 412 S.E.2d 96 (1992).

"The general rule is that the intervening or superseding criminal acts of another preclude liability of the initial negligent actor when the injury is caused by the criminal acts." *Tise*, 345 N.C. at 460, 480 S.E.2d at 680; *see also Muse v. Charter Hospital of Winston-Salem*, 117 N.C. App. 468, 476, 452 S.E.2d 589, 595-96, *aff'd*, 342 N.C. 403, 464 S.E.2d 44 (1995). Presented with the identical facts, the Supreme Court in *Tise* stated

> [t]he criminal acts in this case were an intervening cause that relieved the City of any actionable negligence by cutting off the proximate cause flowing from the acts of the agents of the City in attempting to disable the grader. This superseding cause was a new cause, which intervened between the original negligent act of the City and the injury ultimately suffered by Tise.

Id. at 461, 480 S.E.2d at 681. Yates urges us to extend that reasoning to it: Because the criminal acts shielded the City from liability, those criminal acts should also shield Yates from liability.

Yates also contends the criminal acts were not foreseeable. "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Butner v. Spease*, 217 N.C. 82, 89, 6 S.E.2d 808, 812 (1940). Our Supreme Court in *Tise* stated that "[Crews'] unauthorized operation of the grader could not have been foreseeable from the officers' acts of

attempting to disable the grader." *Id.* at 461, 480 S.E.2d at 681.

Though our Supreme Court in *Tise* held that Crews' criminal actions were not foreseeable by the officers, there has been no determination of whether Crews' actions were foreseeable by Yates. Plaintiff presented evidence that (1) Yates knew or should have known the grader could be easily started without a key and operated by unauthorized persons; (2) Yates did not take precautions against unauthorized use of its construction equipment by unauthorized individuals; (3) Yates knew or should have known its construction site was located in a high crime area; and (4) unauthorized use of the grader by an untrained, unauthorized individual was likely to result in injury or death.

The rule of proximate cause, as understood and applied in this jurisdiction, was reiterated by the Supreme Court in *Tise,* 345 N.C. at 461, 480 S.E.2d at 681. Application of that rule in the present case leads us to conclude Crews' acts were not foreseeable as a matter of law. It follows, then, that we are not permitted to conduct an independent analysis focusing on acts of perceived negligence; the thief's intervention prevents this Court and/or a jury from engaging in such an inquiry.

> "'[T]he general rule of law is that if between the negligence and the injury there is the intervening crime or willful and malicious act of a third person producing the injury but that such was not intended by the defendant, and could not have been reasonably foreseen by it, "the causal chain between the original negligence and the accident is broken."'"

Williams v. Mickens, 247 N.C. 262, 264, 100 S.E.2d 511, 513 (1957)

(quoting *Ward v. R.R.*, 206 N.C. 530, 532, 174 S.E. 443, 444 (1934)). *See also Dean v. Construction Co.*, 251 N.C. 581, 111 S.E.2d 827 (1960); and *Spurlock v. Alexander*, 121 N.C. App. 668, 468 S.E.2d 499, *disc. review denied*, 343 N.C. 753, 473 S.E.2d 619 (1996).

After careful examination of the record and the arguments of the parties, we conclude that the trial court did not err in granting a directed verdict in favor of Yates.

No error.

Judges WYNN and BIGGS concur.

Report per Rule 30(e).