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NO. COA11-535
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

BRUCE FLETCHER NELSON,
JAN NELSON MacINNIS, and
GWYN R. PARSONS, Trustee of
Administrative Trust upon death
of James A. Nelson, and Personal
Representative pursuant to the
Will of James A. Nelson,
Plaintiffs,

v.

Orange County
No. 09 CVS 664

MARTHA NELSON BROWN, and
STATE EMPLOYEES' CREDIT UNION,
Defendants.

Appeal by defendants from order entered 28 October 2010 by
Judge Marvin K. Blount, III, in Orange County Superior Court.
Heard in the Court of Appeals 27 October 2011.

*Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, for
Bruce Fletcher Nelson and Jan Nelson MacInnis plaintiff
appellees.*

*Bailey & Dixon, LLP, by G. Lawrence Reeves, Jr. and Allison
Pope Cooper, for State Employees' Credit Union defendant
appellant.*

*Clement Law Office, by Charles E. Clement and D. Dale
Howard, for Martha Nelson Brown defendant appellant.*

McCULLOUGH, Judge.

State Employees' Credit Union ("SECU") and Martha Nelson Brown ("Ms. Brown") (collectively "defendants") appeal from the trial court's order granting partial summary judgment in favor of Bruce Fletcher Nelson and Jan Nelson MacInnis (collectively "plaintiffs"). The partial summary judgment is against defendant SECU, but not against Ms. Brown. Therefore, the order is interlocutory and we must determine if it affects a substantial right sufficient to warrant review. For the following reasons, we conclude that a substantial right is not involved and must dismiss the case as interlocutory.

I. Background

On 3 October 2008, James A. Nelson, an account holder with SECU, telephoned his local SECU branch in Boone, North Carolina, and instructed Ellen Shook, a financial services officer, to transfer \$85,000.00 from one of his revocable trust funds to a new payable on death ("POD") account with his daughter, Ms. Brown, as the sole beneficiary. Mr. Nelson's wife predeceased him, but together they had three children, plaintiffs Bruce Fletcher Nelson and Jan Nelson MacInnis, and defendant Martha Nelson Brown. He held several revocable trusts at SECU and his last will and testament, in effect, provided for his estate to be divided equally among the three children.

When she received the call, Ms. Shook immediately recognized Mr. Nelson's distinctive voice and quickly mailed an Account Services Form ("ASF") to him for the purpose of setting up the POD account. Mr. Nelson later telephoned Ms. Shook to acknowledge receipt of the ASF form and requested confirmation of the establishment of the POD account. Soon thereafter, Ms. Shook received the ASF form, executed it, and established the account in Mr. Nelson's name. The signature section of the ASF form read, "I (we) as depositor(s) have read and received a copy of the Rules and Regulations governing this account and these services and agree to adhere to same." None of Mr. Nelson's children were aware of the POD account until after his death. Upon Mr. Nelson's death, SECU disbursed the full proceeds of \$85,000.00 to Ms. Brown. The executor of Mr. Nelson's estate inquired about the account and was told it was payable to Ms. Brown and not a part of his estate or trust. Plaintiffs subsequently demanded that Ms. Brown return the \$85,000.00 to their father's estate.

Plaintiffs initially commenced this action against Ms. Brown, individually, on 24 April 2009, seeking damages under claims of constructive fraud and conversion. Plaintiffs claimed Ms. Brown improperly induced their father into opening the POD account and naming her as sole beneficiary. Ms. Brown responded

by filing a Motion to Dismiss. Plaintiffs subsequently amended their complaint on 24 March 2010, adding SECU as a codefendant and seeking damages based on the argument that SECU willfully and wantonly and/or negligently violated N.C. Gen. Stat. § 54-109.57, constituting fraud, unfair and deceptive trade practices, and conversion. N.C. Gen. Stat. § 54-109.57, in relevant part states, "[t]he person or persons establishing an account under this subsection shall sign a statement containing language set forth in a conspicuous manner and substantially similar to the following: . . ." SECU's ASF form did not contain the "language," but referred to their Rules and Regulations, which contained the requisite language. Each SECU account holder received a copy of the Rules and Regulations upon the establishment of their initial account. The statute also contains a clause deeming it to be non-exclusive.

SECU filed an answer to the claims, along with a Motion for Change of Venue. Ms. Brown again filed a Motion to Dismiss with an answer to the amended complaint. On 17 August 2010, plaintiffs filed a Motion for Partial Summary Judgment as to SECU, to which SECU filed a response. The trial court held a hearing on the Motion for Partial Summary Judgment on 27 September 2010 before Judge Marvin K. Blount, III. Judge Blount subsequently filed an Order on 28 October 2010, granting partial

summary judgment in favor of plaintiffs by finding that SECU violated the statute and therefore failed to create a right of survivorship in Ms. Brown to the proceeds of the POD account. Defendants appeal.

II. Analysis

Defendants raise one issue on appeal, but we must first address the issue of jurisdiction. Defendants initially concede that the trial court's order granting partial summary judgment in plaintiffs' favor is interlocutory, but contend that a failure to review their appeal would affect a substantial right. Alternatively, defendants request that we treat their appeal as a petition for writ of certiorari and decide the appeal on the merits if we rule that the denial of their appeal does not affect a substantial right. Plaintiffs note that defendants' appeal is interlocutory, but also request that we treat it as a petition for writ of certiorari and address the merits of the case.

"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." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "A grant of partial summary judgment, because it does not completely dispose of the case, is

an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). "The purpose of this rule is 'to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.'" *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578-79 (1999) (quoting *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)).

An interlocutory order may be immediately appealed in two ways:

First, an interlocutory order can be immediately appealed if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal. N.C.R. Civ. P. 54(b). Second, an interlocutory order can be immediately appealed under N.C. Gen. Stat. §§ 1-277(a) (1983) and 7A-27(d)(1) (1995) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review."

Bartlett v. Jacobs, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996) (quoting *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)).

Our Supreme Court has stated that "the right to avoid the possibility of two trials on the same issues can be such a substantial right." *Green v. Duke Power Co.*, 305 N.C.

603, 606, 290 S.E.2d 593, 595 (1982) (quotation marks and citation omitted). If overlapping issues are present between those argued on appeal and those remaining at trial, "[t]his Court has created a two-part test to show that a substantial right is affected, requiring a party to show '(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exist[s].'" *Camp v. Leonard*, 133 N.C. App. 554, 558, 515 S.E.2d 909, 912 (1999) (citation omitted).

McGuire v. Dixon, ___ N.C. App. ___, ___, 700 S.E.2d 71, 73 (2010). "Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

In the case at hand, the trial court declined to certify the order for interlocutory review under Rule 54(b) of the North Carolina Rules of Civil Procedure, and consequently we must turn to the issue of whether it affects one of defendants' substantial rights. See N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009). Defendants first contend that the same factual issues would be relevant in both trials, but that cannot be the case as plaintiffs argue SECU negligently failed to follow the statutory requirements of creating a POD account while Ms. Brown

improperly induced her father into making her the sole beneficiary of the account. These factual issues are clearly different, therefore defendants' claim under the first prong fails and we must move to the argument regarding potentially inconsistent verdicts. Defendants lay out an elaborate hypothetical situation as to how they may have the possibility of two trials on the same issues resulting in inconsistent verdicts, but we disagree.

Defendants contend that the trial court's order removes from the jury's province any issue about whether the non-exclusivity provisions of N.C. Gen. Stat. § 54-109.57 (2009) required SECU to disburse the \$85,000.00 to Ms. Brown, regardless of whether the ASF form and Mr. Nelson's account complied with the statute. As a result, defendants argue a jury will not be able to decide whether SECU's failure to create a valid POD account potentially created a valid *inter vivos* trust or other contractual device. Consequently, the only issue remaining for a jury would be that of plaintiffs' damages. If we dismiss the case as interlocutory and a jury is left to solely resolve the issue of damages, defendants argue they may prevail in any post-judgment appeal. This, hypothetically, would result in the case being remanded for a new trial on all of plaintiffs' claims and the issue of damages. In that situation, two

different juries will have decided the same issue, namely damages. Theoretically, this could create the possibility of inconsistent verdicts and as a result defendants contend they are due immediate appellate review.

Unfortunately, "defendant[s] [have] referred us to no case nor has our research revealed one holding that a partial summary judgment entered for plaintiff[s] on the issue of liability only leaving for further determination at trial the issue of damages is immediately appealable by defendant[s]. The cases uniformly hold to the contrary." *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 492, 251 S.E.2d 443, 448 (1979) (citations omitted). Even assuming that both defendants are held responsible for damages relating to the invalid account, there can only be one satisfaction. "It is the general rule that, although judgments may be recovered against all persons participating in a single wrong, there can only be one full satisfaction[.]" *Bowen v. Insurance Co.*, 270 N.C. 486, 492, 155 S.E.2d 238, 243 (1967). Therefore, defendants have not shown the possibility of inconsistent verdicts affecting a substantial right.

In the alternative, all parties ask that we deem this appeal a petition for writ of certiorari under N.C.R. App. P. 21(c) (2011). Defendants have "not pointed to any 'manifest injustice' or compelling need 'to expedite decision in the

public interest,' as required in order for this Court to suspend the requirements of Rule 21 under Rule 2 of the Rules of Appellate Procedure." *Burton v. Phoenix Fabricators & Erectors, Inc.*, 185 N.C. App. 303, 307-08, 648 S.E.2d 235, 238 (2007), *disc. review allowed, cert. denied*, 362 N.C. 352, 661 S.E.2d 242 (2008). "[E]ven if we were to treat [defendants'] brief as a petition for writ of certiorari, [defendants have] not shown that the circumstances of this case are such that immediate appellate review is necessary." *Id.* at 308, 648 S.E.2d at 239. Consequently, we decline to review defendants' appeal as a petition for writ of certiorari and do not address defendant's single issue on appeal.

III. Conclusion

In the present case, the trial court did not certify defendants' appeal for immediate appellate review and our declining to hear the appeal does not affect a substantial right. Accordingly, we must dismiss the case as interlocutory and also deny review of the appeal as a writ of certiorari because there is no need for expedited or immediate review.

Dismissed.

Judges HUNTER, JR. and THIGPEN concur.

Report per Rule 30(e).