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NO. COA05-1438

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

NELSON BORDAS and SUSAN BORDAS,
Plaintiffs

v.

ARVIDA d/b/a ST. JOE/ARVIDA CO.,
L.P., Trademark owner of "ARVIDA,"
and ARVIDA OF GEORGIA, INC., a
Georgia corporation, ARVIDA/JMB
PARTNERS, a Florida general
partnership; ARVIDA/JMB PARTNERS,
LP, a Delaware partnership, ARVIDA/
JMB MANAGERS, INC., a Delaware
corporation, as members of THE
CULLASAJA JOINT VENTURE; CULLASAJA
CLUB, INC.; CULLASAJA HOMEOWNERS'
ASSOCIATION, INC.; MICHAEL OSOWSKI;
MICHAEL OSOWSKI ARCHITECT, P.A.;
JAMES McCURLEY; J. M. INSPECTION
SERVICE; JOHN D. McKEY, JR.,
TRUSTEE; JOHN D. McKEY, Individually,
and CANDACE McKEY, Individually;
ROBERT BARNES; BARNES McCANN CUSTOM
HOMES, INC.; DAVID PARHAM, ELMER
LUKER, and TONY FRANKS,
Defendants

Jackson County
No. 03 CvS 592

Appeal by plaintiffs from an order entered 28 June 2005 by
Judge Ronald K. Payne in Jackson County Superior Court. Heard in
the Court of Appeals 14 August 2006.

*Womble Carlyle Sandridge & Rice, P.L.L.C., by Burley B.
Mitchell, Jr. and Mark A. Davis, for plaintiff-appellants.*

*Ball Barden & Bell, P.A., by Thomas R. Bell, for defendant-
appellee Cullasaja Homeowners' Association, Inc.*

HUNTER, Judge.

Homeowners Nelson ("Nelson") and Susan ("Susan") Bordas (collectively "plaintiffs") appeal from a grant of summary judgment in favor of Callusaja Homeowners' Association, Inc. ("defendant"). Plaintiffs contend genuine issues of material fact exist regarding defendant's negligence. Upon careful review, we affirm the trial court.

On 6 September 2002, Nelson suffered severe injuries when a boulder apparently dislodged from a roadway retaining wall, bounded downhill, and struck him in the back of the head and neck while he was working in the yard of his home on Lot 194 on West Kelsey Court in the community of Callusaja Club located in Highlands, North Carolina. The accident rendered Nelson quadriplegic.

On 21 October 2003, plaintiffs filed a complaint in Jackson County Superior Court asserting claims of negligence against multiple parties, including present defendant. According to the complaint, the roadway retaining wall from which the boulder dislodged had been poorly constructed, directly resulting in Nelson's injury. Plaintiffs alleged that defendant failed to exercise reasonable care with respect to the development, construction, and maintenance of the community of Callusaja Club. Specifically, plaintiffs alleged defendant breached its duty in the following ways:

(a) Negligently allowed development of an unplatted, unplanned roadway off Lost Trail known as West Kelsey Court;

(b) Negligently allowed said roadway to be built in nonconformance with North Carolina

Department of Transportation specifications for a developer's road;

(c) Negligently allowed homes to be built without a conforming roadway and without proper retaining walls to assure proper road width and protection and safety to the adjacent homeowners; and

(d) Negligently allowed improper and inadequate drainage to exist which created a hazardous condition on Lot 194, specifically, the existence of a drainage pipe that created an unstable condition on the already improperly and dangerously constructed nonconforming retaining wall, without proper sealing and securement of rocks and boulders in and around the drainage pipe.

Defendant filed a motion for summary judgment, which came before the trial court on 28 June 2005. At the hearing, plaintiffs presented evidence tending to show that defendant was responsible for maintenance and repair of the common property within the community. Among other evidence, plaintiffs submitted a recorded "Declaration of Covenants, Restrictions and Easements" (hereinafter "declaration") regulating Cullasaja Club. The declaration provides that defendant has the right, and where applicable, the obligation, to "promulgate rules and regulations relating to the use, operation and maintenance of the Common Property[.]" In addition, defendant

shall maintain and keep in good repair the Common Property. This maintenance shall include, without limitation, maintenance, repair and replacement, subject to any insurance then in effect, of all landscaping and improvements situated on the Common Property. In addition, [defendant] shall maintain grass and other landscaping located along or in dedicated rights of way which were installed and maintained by Declarant, to the extent permitted by the applicable governmental authority. The foregoing

maintenance shall be performed consistent with the Development-Wide Standard.

Plaintiffs presented further evidence tending to show that defendant sent a letter in January 1998 to the contractor in charge of the construction of plaintiffs' home regarding construction items which would need to be resolved before defendant could allow plaintiffs' home to tie into the community septic system and before defendant would accept responsibility for maintenance of the roadway, West Kelsey Court. The construction items to be addressed included the following:

The section of roadway remaining to be paved must be of a width to permit two-way traffic to pass. You stated that this would be accomplished by installing a retaining wall in front of the houses on lots 194 and 195, back-filling, and then paving to adequate width.

Defendant later amended these requirements as follows:

The section of roadway remaining to be paved must include at least two sections of a minimum width of eighteen feet (18') to permit two-way traffic. This would be accomplished by installing stacked boulders along the front of the houses on lots 194 and 195 to serve as a retaining wall, back-filling, capping with an impervious surface such as concrete, and then paving to adequate width. The remainder of the roadway will be paved to a minimum width of fourteen feet (14').

West Kelsey Court and its retaining wall were finished in June of 1998. The retaining wall was a stacked boulder retaining wall, but it was not capped with concrete as required by defendant.

Michael Osowski ("Osowski"), an architect and member of defendant's architectural control committee ("ACC") testified that defendant subsequently contacted him with concerns about West

Kelsey Court. Defendant asked Osowski to "review and measure the road, and advise them whether the road was extended as indicated in the [above] memo, and whether the swale or ditching appeared to be in conformance." Osowski testified that he inspected the road "[o]nly in respect to width and the drainage" and advised defendant that if there were further concerns, a engineer should be hired to evaluate the road. Osowski stated, however, that he saw no evidence that either the road or retaining wall were failing to "perform[] [their] intended function[s]." After completing his inspection, Osowski informed defendant by letter dated 10 August 2000 that:

The improved roadway in front of lots # 194 and 195 is approximately 15 feet (15') wide instead of 18 feet (18') as required by the agreement. Assuming that the road past lot #194 can be less than 18 feet (18') in width as provided in the modified letter of agreement dated May 5, 1998, then the remainder of the road improvements ahead of lot #195 need to be brought up to 18 feet (18') in width. It appears there is adequate space on the side opposite the houses to widen the pavement to the desired minimum. A portion of the bank above the road will require excavation and the balance can be paved over the previously excavated grade.

Elliot Dunwoody ("Dunwoody"), member and president of defendant organization from August 2001 to August 2002, testified that various issues, including roadway access, arose between defendant and the developer of Lot 194, plaintiff's homesite. Defendant ultimately determined that there was no need to extend West Kelsey Court and thus abandoned its previous requirements of widening the road and capping the retaining wall. The various

issues between defendant and the developer were finally resolved in a written settlement agreement signed in November of 2000. The agreement did not contain any of the relevant conditions previously required by defendant and reported by Osowski. Defendant accepted responsibility for West Kelsey Court as a result of the settlement agreement.

In December 2001, defendant hired a structural engineer, William Lapsley ("Lapsley"), to perform a comprehensive investigation and report as to the infrastructure of the entire community, including inspection of West Kelsey Court and its retaining wall. Lapsley personally walked and inspected West Kelsey Court at least twice. Lapsley noticed no pavement failures or distress in the road, or any other "compromise in the roadbed there . . . [f]rom an engineering standpoint[.]" Lapsley stated that he was "surprised" there were no signs of distress in the roadway, given the steep vertical drop on the downhill side of the road, which was the side of the road upon which plaintiffs' home was located, and the retaining wall, which visually did not appear to be "structurally and engineeringly sound." However, as there was no distress to the roadway, Lapsley "didn't feel that it was justified to rebuild the road or the slope in that area." Lapsley advised defendant "that they should monitor [West Kelsey Court] because [he] suspected that there may be signs of distress in the future." Lapsley made no other recommendation to defendant concerning the roadway or retaining wall. The "Comprehensive Infrastructure Report" was completed and presented to defendant in

June 2002. In his report, Lapsley recommended repairs to twelve slopes/embankments along various roads in the community, but did not include West Kelsey Court. Nelson was injured several months later, on 6 September 2002.

Upon reviewing the evidence and arguments presented by both parties, the trial court granted summary judgment in favor of defendant. Plaintiffs appeal.

Plaintiffs argue the trial court erred in granting summary judgment in favor of defendant in that (1) defendant owed plaintiffs a legal duty to use reasonable care in the construction and maintenance of the community so as to avoid foreseeable injury to homeowners; and (2) genuine issues of material fact exist as to whether defendant breached this duty.

Summary judgment is appropriate when a review of the evidence reveals that there are no genuine issues as to any material facts and that "any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005); *Harris v. Tri-Arc Food Sys., Inc.*, 165 N.C. App. 495, 498, 598 S.E.2d 644, 646, *disc. review denied*, 359 N.C. 188, 607 S.E.2d 270 (2004). "The burden is on the party moving for summary judgment to show the absence of any genuine issue of fact and his entitlement to judgment as a matter of law." *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 429, 562 S.E.2d 602, 603 (2002).

"The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot

surmount an affirmative defense which would bar the claim."

Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (citation omitted).

"In a negligence action, to survive a motion for summary judgment, [the] plaintiff must establish a *prima facie* case by showing: '(1) that [the] defendant failed to exercise proper care in the performance of a duty owed [the] plaintiff; (2) the negligent breach of that duty was a proximate cause of [the] plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that [the] plaintiff's injury was probable under the circumstances.'"

Harris, 165 N.C. App. at 498, 598 S.E.2d at 647 (citation omitted).

Plaintiffs argue defendant owed them a legal duty to use reasonable care in the construction and maintenance of the community premises, including the allegedly improperly constructed retaining wall. Plaintiffs presented no evidence, however, that defendant participated in the construction of plaintiffs' home, the roadway, or the retaining wall. Defendant did not accept the roadway until after completion of its construction. Although the community's declaration requires defendant's ACC to approve any construction or development within the community, it specifically provides that "[p]lans and specifications are not reviewed for engineering or structural design or quality of materials" and denies any liability for defective design or materials. As a member of the ACC, Osowski inspected West Kelsey Court, but only for its width and drainage, not for its structural or engineering soundness or design. Osowski recommended that defendant obtain an engineer's opinion on any further issues. Defendant subsequently

hired Lapsley, a structural engineer experienced in roadway and slope/embankment construction to inspect West Kelsey Court. Plaintiffs concede that defendant "did not actually construct the wall[.]" There are therefore no genuine issues of material fact regarding defendant's role in construction of the allegedly defective retaining wall. This leaves only maintenance.

Plaintiffs presented substantial evidence tending to show that defendant was responsible for maintaining the roadway and embankment. Thus, the evidence tended to establish that defendant had a legal duty to take reasonable care in maintaining the roadway and retaining wall to avoid foreseeable harm to residents and visitors of the community, including plaintiffs. *Compare Ridge v. Grimes*, 53 N.C. App. 619, 620, 281 S.E.2d 448, 449 (1981) (citation omitted) (noting that if a street is open to public use, "it is incumbent on those who constructed and maintain them to see that they are safe for all").

In this respect, however, plaintiffs failed to produce evidence that defendant had sufficient knowledge, or reason to know, that the retaining wall was improperly constructed or presented a danger to any residents. See *Harris*, 165 N.C. App. at 498, 598 S.E.2d at 647 (citations omitted) (noting that, in order to establish a *prima facie* case for negligence, the plaintiff must show that "a person of ordinary prudence should have foreseen that [the] plaintiff's injury was probable under the circumstances"). Dunwoody testified that, prior to the accident, he never heard of any problems or complaints about West Kelsey

Court, its construction or maintenance, or concerns about the retaining wall. Plaintiffs testified they did not inform defendant of any potential problems or concerns with the roadway or its retaining wall. Defendant hired a professional engineer, Lapsley, to inspect the community, including the allegedly defective roadway and retaining wall. The inspection commenced less than a year before, and concluded a few months prior to the time that Nelson was injured. Lapsley made many recommendations, which defendant followed. Lapsley did not inform defendant that the retaining wall was defective or needed repair. Although plaintiffs attempt to make much of testimony by Lapsley in which he states that the retaining wall did not appear to be "structurally and engineeringly sound," he makes clear in his testimony that there were no signs of distress in the roadway, and therefore, no reason for immediate action. Rather, Lapsley advised defendant to monitor the roadway for future signs of distress, which defendant did. Lapsley stated that, given the fact that there were no signs of distress in the roadway, there was no reason "to tell [defendant] to do any work to that slope." Similarly, Lapsley stated that there was "no reason" to obtain a road engineer or another structural engineer to make any corrections to the area because "there was no distress to the road." Plaintiffs make no claim that Lapsley was negligent in his inspection of the roadway or embankment.

Plaintiffs emphasize the concerns defendant had with West Kelsey Court during its construction in an attempt to establish that defendant should have known the roadway and retaining wall

were poorly constructed. Specifically, plaintiffs cite defendant's previous requirement that West Kelsey Court be widened to permit two-way traffic, accompanied by installation of a stacked boulder retaining wall supported by back-filling and capped "with an impervious surface such as concrete." Because the retaining wall was never capped with concrete or similar material, as required by defendant, plaintiffs argue that defendant had knowledge that the retaining wall was defective. The undisputed evidence establishes, however, that defendant's requirements regarding a stronger retaining wall arose in the context of extending and widening West Kelsey Court to permit two-way traffic. Defendant eventually determined that West Kelsey Court did not need to be extended, and that widening the road to permit two-way traffic was therefore unnecessary. Accordingly, it eliminated its previous requirement of capping the retaining wall.

Plaintiffs failed to present genuine issues of material fact regarding defendant's failure to take reasonable steps to prevent foreseeable harm to plaintiffs. See *Harris*, 165 N.C. App. at 500, 598 S.E.2d at 648 (holding that summary judgment for the defendant restaurant was proper where the evidence showed that collapse of the ceiling which injured the plaintiff was caused by a latent construction defect of which the defendant had no knowledge, nor any reason to discover the defect). Prior to Nelson's accident, plaintiffs did not relay any concerns regarding the retaining wall to defendant. Defendant hired a structural engineer, Lapsley, to perform a comprehensive review of the infrastructure of the

community, including West Kelsey Court and the retaining wall. Lapsley inspected the road and retaining wall during a six-month period prior to Nelson's injury. The road showed no signs of distress. Lapsley did not advise defendant to repair or take any steps with regard to West Kelsey Court beyond monitoring the road for future distress. Defendant followed all recommendations of the resulting review. Plaintiffs do not assert that the professional engineering review was inaccurate or that Lapsley was negligent in inspecting West Kelsey Court or the retaining wall. Under these circumstances, defendant was entitled to rely upon the professional engineering review and its recommendations. See *Harris*, 165 N.C. App. at 500, 598 S.E.2d at 648 (stating that, where "the building was inspected and approved for occupancy by the building inspector [and where the] plaintiff . . . failed to produce any evidence to support her allegation that regular inspections of the ceiling would have been necessary or reasonable under the circumstances[,]" the plaintiff failed to show that the defendant had any reason to know or discover the latent construction defect that led to collapse of the ceiling). Indeed, it is unclear what more defendant could have done to prevent this unfortunate incident. The trial court properly granted summary judgment to defendant.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Report per Rule 30(e).