NO. COA06-786

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

JUSTIN H. LEWIS and
THOMAS E. HABER,
Plaintiffs,

v.

Orange County
No. 04CVS993

GOVERNORS CLUB, INC.,
TEXTRON, INC. and
TEXTRON FINANCIAL CORP.,
Defendants.

Appeal by plaintiffs from orders entered 23 December 2004 and 27 April 2006 by Judge James Clifford Spencer, Jr., and Judge Judson D. DeRamus, Jr., respectively, in Orange County Superior Court. Heard in the Court of Appeals 7 February 2007.

Northen Blue, LLP, by J. William Blue, Jr., for plaintiff appellants.

Patterson, Dilthey, Clay, Bryson & Anderson, LLP, by Ronald C. Dilthey and Tobias S. Hampson, for Governors Club, Inc. defendant appellee.

Young Moore and Henderson, P.A., by David M. Duke and Nathan J. Taylor, for Textron, Inc. and Textron Financial Corp. defendant appellees.

McCULLOUGH, Judge.

Plaintiffs appeal from orders granting defendants' motion to dismiss and motion for summary judgment. We affirm.

FACTS

On 17 May 2004, Justin H. Lewis ("Lewis") and Thomas H. Haber ("Haber") filed a complaint in Orange County Superior Court which made the following allegations. Lewis and Haber were employees of defendant Governors Club ("Governors Club"), who are in the business of maintaining and operating a golf course. On 31 May 2003, following a golf tournament conducted by Governors Club, Haber was operating a gasoline-powered utility cart, in which Lewis was a passenger. They were told to use the cart to pick up miscellaneous items that had been distributed around the golf course in connection with the golf tournament. They loaded the cart and were on their way back to the clubhouse when they had to descend a hill. As they descended the hill, Lewis and Haber were unable to slow the cart, and they ultimately were unable to control the cart. It rolled over and caught on fire causing injuries to Lewis and Haber.

Haber and Lewis, through their original complaint, asserted claims against Governors Club and Textron. Their claim against Governors Club asserted that certain duties were breached, including: (1) failure to establish and follow appropriate preventative maintenance and inspection schedules in connection with the cart; (2) failure to conduct daily brake tests on the vehicle; (3) failure to conduct training sessions for the employees and other individuals who used the vehicle; (4) failure to perform necessary repairs, including repair of the brake assembly; (5) allowing the vehicle to be used on hilly terrain, with the unrepaired brake assembly; (6) failure to place a particular cap on

the cart's gasoline tank; and (7) failure to warn of such dangerous conditions. Their complaint against Textron, who was alleged to be the manufacturer of the beverage cart, included: failure to inspect the cart; failure to perform preventative maintenance; failure to conduct brake tests; failure to perform necessary repairs; and failure to provide a certain gasoline tank cap, or to instruct Governors Club that one should be provided. On 23 December 2004, the trial court granted Governors Club's motion to dismiss pursuant to Rule 12(b)(6).

On 15 June 2005, Haber and Lewis filed an amended complaint which included Textron Financial Corporation as a defendant. Plaintiffs alleged in the amended complaint, among other things, that Textron Financial Corporation was a subsidiary of Textron and that it also failed to inspect the cart, failed to perform preventative maintenance, failed to conduct brake tests, failed to perform necessary repairs, and failed to provide a certain gasoline tank cap, or to instruct Governors Club that one should be provided. The amended complaint also restated the claim against Textron that was articulated in the original complaint. On 27 April 2006, the trial court granted Textron and Textron Financial Corporation's motion for summary judgment.

Haber and Lewis appeal.

I.

Haber and Lewis contend the trial court erred in granting Governors Club's motion to dismiss pursuant to Rule 12(b)(6) because the complaint set forth a claim for relief as described in

Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991). We disagree.

"'A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. For the purpose of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.'" *Morris v. E.A. Morris Charitable Found.*, 161 N.C. App. 673, 675, 589 S.E.2d 414, 416 (2003) (citation omitted), *disc. review denied*, 358 N.C. 235, 593 S.E.2d 592 (2004).

> "Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim."

Id. (citation omitted).

"[T]he North Carolina Workers' Compensation Act was created to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003), *reh'g denied*, 358 N.C. 159, 593 S.E.2d 591 (2004). "In exchange for these 'limited but assured benefits,' the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the

Act." *Id.* (citations omitted). In *Woodson*, our Supreme Court recognized an exception to the general rule and stated:

> [W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228. Subsequently, the Court stated:

> The *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves. This exception applies only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death.

Whitaker, 357 N.C. at 557, 597 S.E.2d at 668.

After reviewing many of the cases that followed *Woodson*, we believe the material allegations contained in plaintiffs' complaint were insufficient to assert a claim. For example, the complaint states that Governors Club failed to follow preventative maintenance and inspection schedules, failed to conduct daily brake tests, failed to perform necessary repairs to the beverage cart, and failed to warn plaintiffs of the dangerous conditions of the vehicle. Also, the complaint alleges that Governors Club's misconduct was in violation of standards, such as OSHA safety

standards, and that Governors Club knew that its acts were in violation of those standards. However, the factual allegations contained in the complaint do not illustrate that Governors Club intentionally engaged in conduct knowing it would be substantially certain to cause serious injury or death to its employees. Accordingly, we disagree with plaintiffs' contention.

II.

Haber and Lewis contend the trial court erred in granting Textron's motion for summary judgment. We disagree.

Granting summary judgment is appropriate only "if 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) (2005). "There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Harrison v. City of Sanford*, ___ N.C. App. ___, ___, 627 S.E.2d 672, 675, *disc. review denied*, 361 N.C. 166, ___ S.E.2d ___ (2006). On appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 573-74 (1999).

In their complaint, plaintiffs allege that Textron's negligence caused plaintiffs' injuries. "It is well established that in order to prevail in a negligence action, plaintiffs must

offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages." *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995). Plaintiffs' main contention is that Textron "regularly performed service and maintenance on the beverage cart" and they negligently performed that service and maintenance.

In the instant case, we conclude that the trial court did not err in granting Textron's motion for summary judgment. Although there is case law which illustrates that any person who engages in an undertaking, even a voluntary undertaking, may be obligated to use reasonable care in the prosecution of that undertaking, *Hawkins v. Houser*, 91 N.C. App. 266, 270, 371 S.E.2d 297, 299 (1988), plaintiffs have not provided any competent evidence that Textron engaged in such an undertaking that caused plaintiffs' injuries. After reviewing the record, it appears that Textron was not performing regular service and maintenance on the beverage cart, but was only performing specific repairs on the beverage cart at the request of Governors Club. Also, Governors Club stated in a response to an interrogatory that "[t]he only time that Textron, Inc. would perform any work on the [beverage cart] ... is upon a specific request for service by Governors Club, and this service would be separately billed to Governors Club." In addition, Governors Club stated in the same response that "Textron, Inc. would have no obligation to service the brake system or gas tank unless specifically engaged to do so." Accordingly, we disagree with plaintiffs' contention.

Affirmed.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).