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NO. COA10-44

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

CAROLYN HAYES, Individually and
as Administrator of the Estate of
John Hayes, Deceased,
Plaintiff,

v.

Durham County
No. 08 CVS 01889

TIME WARNER CABLE, INC., Owner
and General Partner of Time
Warner Entertainment-Advance/
Newhouse Partnership,
Registered as a Vance County
General Partnership dba Time
Warner Cable and General
Partner of Time Warner
Entertainment Company, Limited
Partnership; and
Ronald Francis Rice, Jr.,
Defendants.

Appeal by plaintiff from order entered 15 June 2009 by Judge
J. B. Allen in Durham County Superior Court. Heard in the Court of
Appeals 18 August 2010.

*Bishop & Smith, PLLC, by Keith A. Bishop, for plaintiff-
appellant.*

*Burton & Sue, LLP, by Stephanie W. Anderson, for Ronald
Francis Rice, Jr., defendant-appellee.*

HUNTER, JR., Robert N., Judge.

Carolyn Hayes ("plaintiff"), individually and as
Administratrix of the Estate of John Hayes, brings an admittedly

interlocutory appeal to determine whether the trial court's grant of summary judgment denying her claims of gross negligence against one of several defendants was erroneous. The trial court did not grant a Rule 54(b) certification nor did plaintiff petition this court for a writ of certiorari. Nonetheless, plaintiff contends that this Court has jurisdiction to consider her appeal because the trial court's ruling affects her "substantial right" to avoid two trials on the same or overlapping factual issues that could result in inconsistent verdicts. After careful review, we disagree and dismiss the appeal for lack of jurisdiction.

I. Factual and Procedural Background

On Saturday evening, 23 October 2004, John Hayes ("decedent"), a cable maintenance worker for Diverse Networks, Inc., was called by his employer at his Durham residence and asked to travel to Henderson, North Carolina, to assist coworker Ronald Francis Rice, Jr. ("Rice"), in repairing a downed cable line. Rice had been working unsuccessfully to repair the downed line most of the day. Initial repair efforts were frustrated when a temporarily installed new cable line strung between poles abutting Highway 39 South was dislodged by a passing tractor-trailer rig.

When decedent arrived at the repair site, the area was pitch black and had no artificial lighting. The new cable line had become entangled in foliage and needed to be dislodged. Decedent climbed the tree in which the line was tangled and cut limbs that were impeding the repair. While decedent was in the tree, Rice handed him a metal "lay-up pole," or extension pole, from

decedent's truck. When decedent used the pole to disentangle the cable line from the tree, electricity arced from an overhead power line to the pole. Decedent was instantly electrocuted and fell from the tree. He survived the fall and spoke to Rice, but died shortly thereafter at approximately 10:00 p.m.

Plaintiff filed a wrongful death action against Time Warner Cable, Inc. ("TWC") and Rice. In the last amended version of her complaint, plaintiff alleges three claims against TWC for willful negligence, negligence, and breach of contract. As alleged, the claims against TWC focus on the following factual and legal issues: whether TWC requested and permitted decedent to perform an inherently dangerous activity; failed to ask the power company to deactivate the power lines; failed to appreciate and warn decedent of the risks involved in the work; failed to notify the power company of inadequate clearance between the power lines and cable lines and permitted such condition to exist; failed to comply with federal, state, and local laws and safety regulations; and permitted decedent and Rice to work without proper tools and training. Plaintiff additionally alleges negligence and breach of contract by TWC when it permitted decedent to engage in an inherently dangerous activity without adequate warnings or safeguards in violation of TWC's contract with the power company, its own Master Pole Attachment Agreement, and the National Electrical Safety Code.

The claims against Rice, on the other hand, allege gross negligence in calling for decedent to work in the dark; failure to

warn decedent about workplace hazards; and failure to know and apply cardiopulmonary resuscitation to save decedent's life after he was electrocuted.

II. Interlocutory Appeal Jurisdiction

When appealing an interlocutory order, Rule 28(b) of the North Carolina Rules of Appellate Procedure specifically requires that an appellant's brief include the following:

A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C.R. App. P. 28(b)(4) (2010). The burden rests on the appellant to establish the basis for an interlocutory appeal. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

Decedent's complaint states causes of action against two defendants, Rice and Time Warner Cable. The trial court's grant of Rice's motion for summary judgment was not a final judgment as to all parties to the litigation, and as such, the order was interlocutory. See *Pratt v. Staton*, 147 N.C. App. 771, 772-73, 556 S.E.2d 621, 623 (2001) ("An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in

the action to go forward, is plainly an interlocutory order.”). The North Carolina Supreme Court has distinguished final judgments from interlocutory orders in the following manner:

Judgments and orders of the Superior Court are divisible into these two classes: (1) Final judgments; and (2) interlocutory orders. A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. 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, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Rule 54 of the North Carolina Rules of Civil Procedure provides, in pertinent part, that an interlocutory order is immediately appealable if the order represents “a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment.” N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009).

A party may appeal an interlocutory order if it affects a substantial right claimed in any action or proceeding and “[will] work injury [to the appellant] if not corrected before final judgment.” *Goldston*, 326 N.C. at 728, 392 S.E.2d at 737. A substantial right is “a legal right affecting or involving a matter of substance as distinguished from matters of form: a right

materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.'" *Oestreicher v. Am. Nat'l Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (citation omitted). Whether an order affects a substantial right is decided on a case-by-case basis. *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984).

The resolution of these claims of gross negligence against Rice, while they involve some of the same operative facts as those of the claims against TWC, do not appear to present a potential for inconsistent verdicts. The basic issue in the decedent's case against Rice is whether Rice owed a duty to the decedent. On the other hand, the claims against TWC depend on whether TWC provided a safe work environment or proper training to the decedent. The answer to the question of whether Rice was negligent in failing to warn the decedent about the overhead power lines, assisting the decedent by handing him an extension pole, or failing to administer CPR, is not necessary for determining either TWC's duty or its liability.

III. Conclusion

For the reasons stated herein, we dismiss this interlocutory appeal for lack of jurisdiction.

Dismissed.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).