NO. COA12-328

NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2012

ELONA NICOLE (JARRELL) JOHNSON,
Plaintiff,

v. Wake County
No. 09 CVS 002069

ROBERT OPSITNICK, JR., and ANNA OPSITNICK,
Defendants.

Appeal by Defendants from orders entered 20 July 2011 by Judge Henry Hight and from judgment entered 16 September 2011 and order entered 17 October 2011 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 29 August 2012.

Huggard, Obiol, & Blake, PLLC, by John P. Huggard, for Plaintiff.

Crawford & Crawford, LLP, by Robert O. Crawford, III, for Defendants.

STEPHENS, Judge.

Procedural Background

This appeal arises from a dispute between Plaintiff Elona Nicole (Jarrell) Johnson and her parents, Defendants Robert Opsitnick, Jr., ("Robert") and Anna Opsitnick ("Anna") (collectively, "Defendants"), over their handling of Plaintiff's trust accounts. On 5 February 2009, Plaintiff filed a complaint alleging that Defendants had failed to pay a promissory note dated 7 October 1998 in the principal amount of $40,777.63 ("the promissory note"). On 20 November 2009, Plaintiff filed an amended complaint adding a second cause of action for punitive damages for obtaining property by false pretenses and conspiracy pursuant to N.C. Gen Stat. § 1-538.2. Plaintiff alleged that Defendants had obtained the loan evidenced by the promissory note without the intent to fully repay it. In response, Defendants asserted 15 affirmative defenses, contending, *inter alia*, that the payment of the promissory note was released by an 8 March 1999 settlement agreement between the parties ("the settlement agreement").

On 26 April 2011, Plaintiff moved for partial summary judgment as to her first cause of action. Defendants also moved for summary judgment. Following a hearing, the trial court allowed Plaintiff's motion for partial summary judgment, finding that "the general release [in the settlement agreement] did not

release the $40,777.63 promissory note[.]" The trial court also denied Defendants' summary judgment motion.

Plaintiff's second cause of action proceeded to jury trial on 15 August 2011 with Defendants appearing *pro se*. Defendants moved for a directed verdict at the close of Plaintiff's evidence, which the trial court denied. Defendants did not renew their motion for directed verdict immediately at the close of all evidence. However, after a lengthy discussion of a "limited motion to dismiss" by Plaintiff and the court's proposed jury instructions, Robert asked, "Your honor, is it—a motion to renew our motion for directed verdict too late, just for the record[?]" The trial court responded, "Yes, I'll accept that." The parties and trial court returned to their discussion of jury instructions and other matters, and then the court recessed. No ruling on Defendants' renewed motion for a directed verdict appears in the record on appeal.

Eleven issues were submitted to the jury: (1) whether Anna obtained property from Plaintiff's trust account by false pretenses; (2) whether Robert obtained property from Plaintiff's trust account by false pretenses; (3) whether Anna conspired with Robert to obtain Plaintiff's property by false pretenses; (4) whether Robert conspired with Anna to obtain Plaintiff's

property by false pretenses; (5) and (6) how much each Defendant owed Plaintiff in compensatory damages; (7) what payments, if any, had been made on the loan underlying the promissory note; (8) whether Defendants took advantage of a position of trust and confidence to induce Plaintiff to enter into a settlement agreement so as to void that settlement agreement; (9) whether Defendants acted openly, fairly, and honestly when inducing Plaintiff to enter the settlement agreement; (10) whether Plaintiff breached the settlement agreement; and (11) what damages Defendants were entitled to as a result of any breach.

The jury, answering "yes" to issues 1-4 and 8 and "no" to issue 9, returned verdicts for Plaintiff on the substantive issues of whether Defendants obtained the loan under false pretenses, took advantage of a position of trust, and failed to act openly, fairly, and honestly to induce Plaintiff to enter into the settlement agreement. In response to issues 5 and 7, the jury found Defendants had made no payments on the promissory note and awarded compensatory damages in the amount of $40,777.63 plus 2% interest. In light of their determination that Defendants' actions voided the settlement agreement, the jury did not address issues 10 and 11.

On 19 August 2011, the jury awarded punitive damages against each Defendant, $210,000.00 as to Robert and $75,000.00 as to Anna. Defendants moved for judgment notwithstanding the verdict ("JNOV") pursuant to Rule 50. N.C. Gen. Stat. § 1A-1, Rule 50 (2011). The court took the motion under advisement.

On 16 September 2011, the court entered judgment on the verdicts, awarding judgment pursuant to the partial summary judgment order for the amount owed on the promissory note, determined that this amount was the same as the compensatory damages awarded by the jury, and thus remitted the compensatory damages. The judgment also held that Defendants had taken advantage of a position of trust and confidence through concealment of facts to induce Plaintiff to enter the settlement agreement, and as result, the settlement agreement was void. The punitive damages verdicts were included in the judgment. By order filed 17 October 2011, the trial court denied Defendants' motion for JNOV. Defendants appeal.

Factual Background

Robert met Plaintiff's biological mother, Renee Fitch, in 1978 while both were completing basic training with the United States Army. After assignment to separate posts, Robert learned that Fitch was pregnant with his child. Plaintiff was born in

Colorado on 18 December 1979. Because Fitch was involved in another relationship at the time, she and Robert agreed that he would have no contact or involvement with Plaintiff.

When Plaintiff was about three years old, Fitch died as a result of a medical error, which in turn led to a wrongful death action and a substantial settlement with Plaintiff as the beneficiary. Plaintiff remained in Colorado in the custody of her grandmother and aunt, who also served as co-conservators of the settlement funds. In July 1987, Robert, who by that time was married to Anna, with whom he had two children, was awarded custody of Plaintiff. Anna legally adopted Plaintiff. In 1989, Plaintiff's grandmother and aunt resigned as co-conservators and were replaced by a Colorado bank. In January 1993, the funds were converted to a trust and Robert was named trustee by a Colorado probate court; Anna was appointed successor trustee. The funds in the trust totaled approximately $258,000.00.

Between 1993 and 1998, Robert made numerous loans of trust funds secured by promissory notes to various friends and family members, including Anna. Robert often directed Anna to handle the trust on his behalf when he was deployed overseas, and he compensated Anna for administering and monitoring the trust. In 1997, Plaintiff, then age 17, ran away from home and had little

contact with her parents thereafter. On 7 October 1998, Anna signed the promissory note with a principal sum of $40,777.63 for loans of trust funds to herself. Shortly thereafter, Defendants received a letter dated 5 October 1998 from an attorney retained by Plaintiff to seek an accounting of the trust. Defendants agreed to supply an accounting by 18 December 1998.

Between November 1998 and March 1999, the parties, represented by counsel, engaged in settlement negotiations. On 8 March 1999, Defendants signed the final version of the settlement agreement which provided, *inter alia*, that a new trustee would be appointed and that Plaintiff would grant a complete release as to all matters relating to Defendants' handling of the trust. Plaintiff signed the settlement agreement on 25 March 1999. By consent order entered 17 May 1999, the trust assets were transferred and a new trustee named. In August 1999, by consent motion, the trust was terminated and the remaining assets of over $270,000.00 were turned over to Plaintiff. The parties had little contact over the next several years, until Robert became aware in 2005 that Plaintiff believed the 1998 promissory note was still owed to her with the balance due in February 2006. Robert contacted Plaintiff to explain

that all debts and loans connected to the trust had been released by the settlement agreement. In April 2006, Plaintiff's counsel sent Defendants a letter demanding payment of the promissory note, but there were no further communications between the parties until the filing of the initial complaint in February 2009.

Discussion

On appeal, Defendants make two arguments: that the trial court erred in (1) denying Defendants' motion for JNOV and upholding the jury's award of punitive damages, and (2) finding as a matter of law on Plaintiff's motion for partial summary judgment that the settlement agreement's general release did not release the promissory note. We dismiss.

Denial of Defendants' Motion for JNOV

Defendants argue that the trial court erred in denying their motion for JNOV and upholding the jury's award of punitive damages. In support of this argument, Defendants raise three contentions: that the award of punitive damages was improper because no compensatory damages were awarded, that the evidence of intent and/or conspiracy to obtain property by false pretenses was insufficient, and that the evidence that Defendants took advantage of a position of trust or failed to

act openly and honestly to induce Plaintiff to enter the settlement agreement was insufficient. As discussed below, these arguments are not properly before us.

We begin by addressing Plaintiff's arguments that we cannot review the order denying the motion for JNOV because Defendants never obtained a ruling from the trial court on the renewal of their motion for directed verdict at the close of all evidence. We are not persuaded.

> Motions for judgments notwithstanding the verdict are based on N.C.R. Civ. P. 50(b)(1), which states that a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. Clearly, from the plain meaning of this Rule, a motion for judgment notwithstanding the verdict cannot be allowed unless a proper motion for directed verdict was entered earlier in the trial. Rule 50(a) sets out the guidelines for motions for directed verdict. By this rule, motions for directed verdict must state the specific grounds therefor. Further, the motion for directed verdict must be made at the close of all the evidence.

Enns v. Zayre Corp., 116 N.C. App. 687, 690, 449 S.E.2d 478, 480 (1994) (citations, quotation marks, and brackets omitted). Where a defendant's motion for directed verdict at the close of the plaintiff's evidence is denied, and the defendant fails to renew the motion at the close of all evidence, the defendant

fails to preserve his right to move for JNOV, and waives any appellate review of the denial of either the motion for directed verdict or a subsequent motion for JNOV. *City of Charlotte v. Hurlahe*, 178 N.C. App. 144, 153-54, 631 S.E.2d 28, 34 (2006).

As noted *supra*, Defendants *did* renew their motion for directed verdict after the close of all evidence during a discussion of jury instructions, and although the request came later than usual, the trial court permitted Defendants to make the motion. However, the trial transcript reveals that the court never ruled on the renewed motion. As Plaintiff correctly notes, our Rules of Appellate Procedure provide that a party making a motion in the trial court bears the responsibility of obtaining a ruling on that motion in order to preserve the matter for review on appeal. N.C.R. App. P., Rule 10(a) ("In order to preserve a question for appellate review . . . . it is . . . necessary for the complaining party to obtain a ruling upon the party's request, objection or motion."); *see, e.g., Walden v. Morgan*, 179 N.C. App. 673, 678, 635 S.E.2d 616, 620 (2006) (dismissing argument on appeal where the appellant failed to obtain a ruling on its objection and motion).

Plaintiff urges that the conjunction of Civil Procedure Rule 50 and Appellate Procedure Rule 10(a) mandates that

Defendants' failure to obtain a ruling on their second motion for directed verdict acts to bar their right to appeal from the subsequent denial of their motion for JNOV. However, the plain language of Rule 50(b)(1) itself defeats Plaintiff's argument:

> Whenever *a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted*, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, *a party who has moved for a directed verdict* may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (emphasis added). Thus, Rule 50 requires a proper *motion* for directed verdict to preserve a party's right to later move for JNOV, but this right is explicitly preserved so long as the motion "*is denied or for any reason is not granted*[.]" *Id.* Here, Defendants renewed their motion for directed verdict in a timely manner and *it was not granted*. Accordingly, Defendants preserved both their right to move for JNOV in the trial court, and on the basis of their timely notice of appeal from the denial of that motion, their

right of appellate review of the trial court's denial.

However, Rule 50 also makes clear that only the specific matters raised in a motion for directed verdict can be raised in a later motion for JNOV. *See id.* ("Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of *the legal questions raised by the motion*.") (emphasis added); *see also Lee v. Tire Co.*, 40 N.C. App. 150, 156, 252 S.E.2d 252, 256-57 (1979) (holding that "[a] motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus the movant cannot assert grounds not included in the motion for directed verdict") (citation and quotation marks omitted).

At the close of Plaintiff's evidence the following colloquy occurred:

> MR. OPSITNICK: Your Honor, Defendants would make an oral motion for motion [sic] for directed verdict.
>
> THE COURT: Wish to be heard further on that?
>
> MR. OPSITNICK: I do, Your Honor. I think that everything that's been put out and that you've heard, that there is enough evidence there to show that the Defendants did not

> have a conspiracy to defraud her of her money under false pretenses at all.
>
> THE COURT: The motion is denied.

As noted *supra*, after the close of all evidence, Defendants merely renewed their motion, and did not raise any additional issues, including the propriety of punitive damages. As a result, the only argument in support of Defendants' motion was that, as a matter of law, Plaintiff did not produce sufficient evidence of "a conspiracy to defraud her of her money under false pretenses[.]" Defendants having failed to argue this issue on appeal, it is abandoned. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Defendants' arguments regarding the award of punitive damages are not preserved for appellate review, and accordingly, we dismiss them.

Grant of Plaintiff's Motion for Partial Summary Judgment

Defendants also argue that the trial court erred in finding as a matter of law on Plaintiff's motion for partial summary judgment that the settlement agreement's general release did not release the promissory note. Specifically, Defendants contend that the settlement agreement *did* cover the promissory note and

released Defendants from any obligation to repay it. We must dismiss this argument as moot.

As noted *supra*, the eighth issue sent to the jury was whether Defendants took advantage of a position of trust and confidence to induce Plaintiff to enter into the settlement agreement so as to void that agreement. The jury answered this issue "yes," and Defendants have not brought forward any challenges to the jury's verdict on that issue for appellate review. Accordingly, it is the law of this case that the settlement agreement is void. A void settlement agreement cannot release any liability or obligation. *See*, *e.g.*, Black's Law Dictionary 1604 (8th 2004) (defining void as "[o]f no legal effect; null"). Given this result, the question addressed by the order granting Plaintiff's motion for partial summary judgment, to wit, whether the settlement agreement released Defendants' obligations under the promissory note, is now moot. Even if we were to agree with Defendants that the grant of partial summary judgment was erroneous, their liability to Plaintiff under the promissory note would remain unchanged: either the promissory note was *not released* by the settlement agreement and thus Defendants owe Plaintiff pursuant to the note, or the promissory note *was intended to be released* by the

settlement agreement, which has now been found to be void and to no legal effect, and thus Defendants owe Plaintiff pursuant to the note.

"As a general rule, this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citation, quotation marks, and brackets omitted). "Whenever in the course of litigation it becomes apparent that there is an absence of a genuine adversary issue between the parties, the court should withhold the exercise of jurisdiction and dismiss the action." *Bizzell v. Insurance Co.*, 248 N.C. 294, 296, 103 S.E.2d 348, 350 (1958). Accordingly, Defendants' appeal is

DISMISSED.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).