NO. COA12-898
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

NORTH CAROLINA II, LP and APEX FIRST DEVELOPMENT, LLC,
Plaintiffs,

v. Forsyth County
No. 12 CVS 842

BRANCH BANKING AND TRUST COMPANY,
Defendant.

Appeal by Plaintiff from judgment entered 19 April 2012 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 29 November 2012.

*Vann & Sheridan, LLP, by Paul A. Sheridan, for Plaintiff-Appellant.*

*Kilpatrick, Townsend & Stockton, LLP, by Susan Holdsclaw Boyles and Dustin T. Greene, for Defendant-Appellee.*

BEASLEY, Judge.

North Carolina II, LP, and Apex First Development, LLC, (Plaintiffs) appeal from an order granting Defendant's motion to dismiss. For the following reasons, we affirm.

In 2007, Plaintiffs contracted with Mainline Construction Company ("Mainline") to work on several tracts in one of its real-estate developments. Mainline performed the contracted

work until November 2008, when it ceased work prior to completion. A dispute arose regarding contract price and adequacy of the work performed, resulting in Plaintiffs withholding payment due.

Defendant is Mainline's largest lender and creditor. Plaintiffs alleged in their Complaint against Defendant that Mainline submitted a "Loan Base Report" to Defendant detailing its accounts payable, per their mutual loan agreements, in November 2008 showing that Plaintiffs owed it $1,164,537.23 for work performed, but increased this claim to $2.6 million in December 2008. In December 2008, Mainline filed lien claims against Plaintiff requesting damages in the amount of $2,182,203.19.

In September 2009, Mainline filed for bankruptcy, still owing Defendant between $12 million and $13 million. Defendant became an assignee on Mainline's action against Plaintiffs. In January 2011, several lien enforcement actions against Plaintiffs were consolidated, including the three Mainline liens, to one action in Wake County ("Wake County Action"). In April 2011, Plaintiffs moved to amend their counterclaims against Mainline in the Wake County Action to include claims

against Defendant. This motion was denied. The Wake County Action proceeds without appeal.

On 3 February 2012, Plaintiffs filed the present action against Defendant, claiming that Defendant continued Mainline's slander to title against them or aided and abetted therein by continuing to pursue the Wake County Action which claimed amounts owed that Defendants knew or should have known were excessive based on the reports provided to it by Mainline. On 19 April 2012, the trial court granted Defendant's motion to dismiss this action on the basis of the failure to state a claim recognized under North Carolina law and, in the alternative, that the claims were barred because they were compulsory counterclaims to the Wake County Action that should have been raised in that action.

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations

state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)(citations omitted).

Plaintiffs argue that the trial court erred in determining that the complaint did not state a recognized claim for aiding and abetting slander to title under North Carolina law and in dismissing the Complaint under Rule 13(a) in the alternative. Specifically, Plaintiffs refer to Section 876 of the Restatement (Second) of Torts to argue that Defendants are liable as aiders and abettors. We disagree.

Section 876 of the Restatement of Torts reads as follows:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts § 876 (1979). "The Restatement of Torts . . . is not the law of North Carolina unless a section

has specifically been adopted." *Hinson v. Jarvis*, 190 N.C. App. 607, 611, 660 S.E.2d 604, 607 (2008)(citations omitted).

We have only adopted Section 876 in limited circumstances: "This Court has stated that section 876 of the Restatement of Torts is adopted as it is applied to the negligence of joint tortfeasors." *Id.* (internal quotation marks and citations omitted). This application has been included in cases involving multiple defendants involved in drag racing, *Boykin v. Bennett*, 253 N.C. 725, 731, 118 S.E.2d 12, 14 (1961), and multiple defendants who fired pellet guns where it is not possible to determine which shot caused the injury, *McMillan v. Mahoney*, 99 N.C. App. 448, 452-53, 393 S.E.2d 298, 300-01 (1990).

In *Hinson,* we declined, however, to adopt Section 876 or to apply it "to a third person whose conduct did not fall below an ordinary standard of care or involve an issue as to which person was the cause of the harm alleged." *Hinson,* 190 N.C. App. at 613, 660 S.E.2d at 608. We find *Hinson* controlling here and note that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)(citations omitted).

We find the facts of this case more congruous with those of *Hinson* than with *Boykin* or *McMillan*. As we identified in *Hinson*, in both *Boykin* and *McMillan*, there was an element of incitement or acting in concert present: the defendant incited the behavior of or acted in concert with the offending tortfeasor by performing some negligent act. *Hinson*, 190 N.C. App. at 611-13, 660 S.E.2d at 607-08; *see also Boykin*, 253 N.C. at 731-32, 118 S.E.2d at 16-17; *McMillan*, 99 N.C. App. at 453, 393 S.E.2d at 301. Conversely, in *Hinson*, we found that a wife who rode as a passenger in the car with her husband who did not have a current license and was prone to strokes "was only complicit in her husband's breach of ordinary care and did not 'incite' him to drive." *Hinson*, 190 N.C. App. at 612, 660 S.E.2d at 608.

Here, we are bound by, and agree with, the precedent set by *Hinson*. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Defendant played no role in inciting any tortious action by Mainline. Any action by Defendant occurred after Mainline's alleged tort. The Complaint outlines actions by the Defendant that are more closely aligned with complicit action than with incitement. We find no case law, and Plaintiff cites none, that adopts Section 876 to apply in these circumstances.

Because we affirm the trial court's order dismissing Plaintiffs' action in this case based on the foregoing analysis of failure to state a claim, we decline to review the trial court's alternative basis for granting the motion to dismiss under the compulsory counterclaim theory as it is without effect.

Affirmed.

Judge STROUD concurs in result only.

Judge HUNTER, JR. concurs.

Report per Rule 30(e).