IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-545

Filed: 3 November 2015

Wilkes County, No. 13 CVS 1304

KEVIN REAVIS and WENDY REAVIS, Plaintiffs,

v.

BENJAMIN DAVID COLLINS, RENAE COLLINS and DEAN WILSON and WANDA WILSON, Defendants.

Appeal by plaintiffs and defendant Wanda Wilson from order entered 21 January 2015 by Judge David L. Hall in Wilkes County Superior Court. Heard in the Court of Appeals 22 October 2015.

The Vetro Law Firm, P.C., by Michael Vetro and Caitlynne Zolzer, for plaintiffs-appellants Kevin Reavis and Wendy Reavis.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Stephen G. Teague, for defendants-appellees Benjamin David Collins and Renae Collins.

William F. Lipscomb, for defendant-appellant Wanda Wilson.

TYSON, Judge.

Kevin and Wendy Reavis ("Plaintiffs") appeal from order granting summary judgment in favor of Defendants David and Renae Collins ("the Collinses"). Defendant Wanda Wilson ("Ms. Wilson") cross-appeals from order denying her motion for summary judgment. We dismiss both appeals as interlocutory.

I. Factual Background

The Collinses own a residence ("the property") on 254 Golf Course Road, located in Elkin, Wilkes County, North Carolina. The property was formerly owned by the Wilsons, who are the parents of Renae Collins ("Renae"). The Wilsons conveyed the property by gift to Renae and her husband. The Collinses leased the residence to Cindy Sharp ("Ms. Sharp") in October 2010.

Ms. Sharp could no longer afford the rent payments, and agreed to vacate the premises on 9 November 2011. The Collinses subsequently granted permission to Ms. Sharp to remain at the premises until 14 November 2011, per an oral agreement.

Ms. Sharp called Renae a few days prior to vacating the premises and expressed concern that someone had apparently tried to break into the dwelling. Ms. Sharp asked Renae "to have her dad keep an eye on the place." On 12 November 2011, Ms. Wilson called Renae, who was in Raleigh at the time, and informed her Dean Wilson ("Mr. Wilson") had seen two unknown individuals located on the property without permission. Renae asked her parents, who lived near the property, to drive over to the property and request all unknown individuals to leave the premises.

When Mr. Wilson arrived on the property, he observed Plaintiffs pumping kerosene out of the fuel tank on the property. The Plaintiffs stated they had purchased the kerosene from Ms. Sharp. The Wilsons called Renae and informed her

about the situation. Renae responded, "They're not supposed to be taking kerosene out of that tank."

The Plaintiffs contend Ms. Wilson ordered them to put the kerosene back and to leave the premises. The Plaintiffs alleged Mr. Wilson threatened Ms. Reavis, pulled two hoses out of a kerosene collection barrel, while the pumps were running, and sprayed Ms. Reavis and the bed of the Reavises' pickup truck with kerosene. Ms. Reavis testified in her deposition she grabbed the hoses from Mr. Wilson and threw them on the ground.

Ms. Reavis testified at this point, Mr. Wilson picked up a brick and threatened her. Ms. Reavis told Ms. Wilson, "You better tell him to put the brick down. It's not going to turn out good if he throws that brick at me." Mr. Wilson placed the brick on the ground, and the Wilsons continued to insist the Reavises leave the property.

The kerosene tank was positioned on a concrete platform at the top of a retaining wall on the property. Mr. Reavis had parked his pickup truck adjacent to the retaining wall and concrete platform, so the bed of the pickup truck and the concrete platform were approximately the same distance from the ground.

Ms. Reavis testified she was standing at the top of the retaining wall, "soaked with kerosene," and stepped from the retaining wall onto the bed of the pickup truck. As she landed on the slippery, kerosene-soaked truck bed, she lost her footing and fell backwards.

Ms. Reavis was treated at the Wilkes Regional Medical Center Emergency Department, where she was diagnosed with a torn ACL and injuries to her meniscus, ligaments, tendons, and other leg structures.

Plaintiffs commenced this action by filing a complaint on 12 December 2013, in which they alleged claims against the Wilsons and the Collinses for: (1) assault; (2) battery; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; and (5) negligence. Plaintiffs alleged the Wilsons were acting as agents of the Collinses. Plaintiffs sought compensatory and punitive damages.

The Collinses filed a motion for summary judgment on 19 December 2014. The Collinses alleged "neither of them directed and/or otherwise authorized or committed" any of the substantive claims Plaintiffs alleged in their complaint. The Collinses filed an amended motion for summary judgment on 30 December 2014.

Ms. Wilson filed a motion for summary judgment on 22 December 2014, in which she alleged no evidence shows she engaged in any of the conduct underlying the claims Plaintiffs alleged in their complaint.

Defendants' motions for summary judgment came on for hearing on 5 January 2015. On 21 January 2015, the trial court entered an order granting the Collinses' motion for summary judgment. The trial court's order denied Ms. Wilson's motion for summary judgment, holding "the plaintiffs have forecast sufficient evidence to sustain a genuine issue of material fact as to defendant Wanda Wilson[.]"

Plaintiffs gave timely notice of appeal from the order granting the Collinses' motion for summary judgment. Ms. Wilson gave timely notice of appeal from the order denying her motion for summary judgment. Ms. Wilson also filed a petition for writ of certiorari on 19 May 2015, in which she asks this Court to review her appeal.

II. Issues

Plaintiffs argue the trial court erred by granting the Collinses' motion for summary judgment and assert genuine issues of material fact exist regarding the existence of an agency relationship between the Wilsons and the Collinses.

Ms. Wilson argues the trial court erred by denying her motion for summary judgment. Ms. Wilson asserts no material fact shows she participated in any of the alleged conduct underlying Plaintiffs' claims for relief, and she was entitled to judgment as a matter of law.

III. Standard of Review

A. Plaintiffs' Appeal from Order Granting Summary Judgment

Summary judgment is proper where "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) (2013); *see Draughon v. Harnett Cnty. Bd. Of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003)

(citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

"In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citation omitted).

> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.
>
> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. Ms. Wilson's Appeal from Order Denying Motion for Summary Judgment

"[T]he denial of a motion for summary judgment is a nonappealable interlocutory order." *Northwestern Financial Group v. Cnty. of Gaston*, 110 N.C. App.

531, 535, 430 S.E.2d 689, 692 (citation omitted), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). This Court will only address the merits of such an appeal if "a substantial right of one of the parties would be lost if the appeal were not heard prior to the final judgment." *Id.* (citation omitted).

IV. Analysis

A. Appellate Jurisdiction

We must initially determine whether Plaintiffs' and Ms. Wilson's respective appeals are properly before us. An order or judgment is interlocutory if it does not settle all pending issues and "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80 (citation omitted), *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). Here, the trial court's allowance of the Collinses' motion for summary judgment and denial of Defendant Wanda Wilson's motion for summary judgment did not settle all of the pending issues in the case.

The trial court's order is not a final judgment. This appeal is interlocutory. *Id.* While the Collinses did not assert Plaintiffs' appeal should be dismissed as interlocutory, this Court may do so *sua sponte*. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980); *Milton v. Thompson*, 170 N.C. App. 176, 179, 611 S.E.2d 474, 477 (2005).

Plaintiffs acknowledge this appeal is interlocutory, but assert the trial court's order affects a substantial right, which would be lost if not reviewed prior to a final determination of the case, and is proper pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a).

Defendant Wanda Wilson also acknowledges her appeal is interlocutory, and has filed a petition requesting this Court allow certiorari review of the merits of her appeal. We discuss each party's appeal in turn.

B. Plaintiffs' Interlocutory Appeal

The general rule is an interlocutory order is not immediately appealable. "The prohibition against appeals from interlocutory orders prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Feltman v. City of Wilson*, __ N.C. App. __, __, 767 S.E.2d 615, 618-19 (2014) (internal citations and quotation marks omitted). There are well-established exceptions:

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Id. at __, 767 S.E.2d at 619. The appealing party bears the burden to establish that a substantial right would be jeopardized unless an immediate appeal is allowed. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

This Court held a substantial right is affected when "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't. of Transp. v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995) (citation omitted); *see also Estate of Redding ex rel. Redding v. Welborn*, 170 N.C. App. 324, 328-29, 612 S.E.2d 664, 668 (2005) (citation omitted); *Camp v. Leonard*, 133 N.C. App. 554, 558, 515 S.E.2d 909, 912 (1999) (citation omitted).

Here, the trial court did not certify its order for immediate appellate review under Rule 54(b). Plaintiffs argue the trial court's order granting summary judgment in favor of the Collinses deprives them of a substantial right and is immediately appealable. Plaintiffs assert "[t]he negligent or intentional conduct of Defendants Wilson is a fundamental issue in Plaintiffs' claims against the Wilsons and in Plaintiffs' claims against the Collins[es]." We disagree.

Plaintiffs purport to rely on our Supreme Court's holding in *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982), to support their contention that there is a risk of inconsistent verdicts if they cannot proceed with their interlocutory appeal. In *Bernick*, the plaintiff was struck in the face by a hockey stick swung by the defendant. *Id.* at 437, 293 S.E.2d at 407. The blow shattered the plaintiff's mouthguard, broke

his jaw, and knocked out several of his teeth. The plaintiff alleged the defendant's conduct was reckless and negligent, or in the alternative, intentional and willful. *Id.* The plaintiff also alleged the manufacturers of the mouthguard, Cooper of Canada, Ltd., breached express and implied warranties, and knowingly placed a defective product on the market. *Id.*

Our Supreme Court stated:

> Plaintiff Bernick alleged in his complaint that the conduct of the defendants Jurden and the hockey club and that of the defendants Cooper caused his injuries. He has a right to have the issue of liability as to all parties tried by the same jury. In a separate trial against the defendants Jurden . . . , the jury could find that the blow by Jurden's hockey stick was not intentional, negligent, or was not the cause of plaintiff's injury and damages. Then, if summary judgment in favor of the Cooper defendants were reversed on appeal, at the ensuing trial the second jury could find that plaintiff's injuries were the result of Jurden's . . . negligent, intentional, or even malicious conduct, and either not foreseeable by or not within the scope of any warranties made by the Cooper defendants. Thus, the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries is indeed a substantial right.

Id. at 439, 293 S.E.2d at 408-09.

Here, no overlap of factual issues exists between Plaintiffs' claims against the Wilsons and Plaintiffs' claims against the Collinses, which could result in inconsistent verdicts. Plaintiffs' claims against the Wilsons are for: (1) assault; (2)

battery; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; and (5) negligence.

Plaintiffs' claims against the Collinses seek to impute liability based upon agency theory. The central issues in Plaintiffs' tort claims against the Wilsons are separate and distinct from the issues Plaintiffs must prove in order to establish a principal-agent relationship existed between the Collinses and the Wilsons. Plaintiffs have failed to carry their burden to show a substantial right would be jeopardized unless an immediate appeal of the trial court's order granting the Collinses' motion for summary judgment is allowed. *See Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262. Plaintiffs' interlocutory appeal is dismissed.

C. Ms. Wilson's Petition for Writ of Certiorari

Ms. Wilson recognizes the trial court's order denying her motion for summary judgment is interlocutory and not immediately appealable. Ms. Wilson requests this Court issue writ of certiorari to address the merits of her argument, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgements and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists[.]").

"[O]ur courts have frequently observed that a writ of certiorari is an extraordinary remedial writ." *N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471

S.E.2d 115, 117 (1996) (citation omitted). Ms. Wilson has failed to present a compelling basis for such extraordinary relief. Ms. Wilson's petition for writ of certiorari merely alleges the record and depositions relevant to Plaintiffs' appeal is the same evidence relevant to her appeal. These circumstances do not justify our issuance of certiorari review, especially in light of our decision to dismiss Plaintiffs' appeal as interlocutory, discussed *supra*. In our discretion, we deny the petition for writ of certiorari and dismiss Ms. Wilson's appeal.

V. Conclusion

Plaintiffs' appeal is interlocutory. Plaintiffs have failed to carry their burden to show they would be deprived of a substantial right absent immediate review, which cannot be addressed on appeal from a final judgment. Plaintiffs' appeal is dismissed.

Ms. Wilson's appeal is also interlocutory. In our discretionary authority, we deny Ms. Wilson's petition for writ of certiorari. Ms. Wilson's appeal is dismissed.

DISMISSED.

Judges McCULLOUGH and DIETZ concur.

Report per Rule 30(e).