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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-456

Filed: 6 December 2016

Carteret County, No. 14 CVS 421

JOSEPH P. MCVICKER and wife, SUSAN MCVICKER, Plaintiffs,

v.

BOGUE SOUND YACHT CLUB, INC., Defendant.

Appeal by plaintiffs from order entered 4 March 2016 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 19 October 2016.

Harvell and Collins, P.A., by Russell C. Alexander and Wesley A. Collins, for plaintiffs- appellants.

Parker Poe Adams & Bernstein LLP, by Andrew A. Bennington, for defendant-appellee.

ELMORE, Judge.

Joseph and Susan McVicker ("plaintiffs" or "the McVickers") appeal from an order granting partial summary judgment to the Bogue Sound Yacht Club, Inc. ("defendant" or "HOA"). This case involves a dispute between a yacht club homeowner's association and two of its members, the McVickers, about the HOA fining the McVickers for refusing to pay a $250.00 refundable construction bond before clearing and removing dead and overgrown vegetation located on their

undeveloped property. However, because the McVickers appeal from an interlocutory order and have failed to demonstrate that they would be deprived of a substantial right absent immediate review, we lack jurisdiction and must dismiss.

I. Background

In October 2013, the McVickers hired a crew of three to four independent contractors to maintain vegetation on their undeveloped property located within the Bogue Sound Yacht Club subdivision. The crew worked for multiple days and used chainsaws and a dump truck to clear and remove dead trees and other brush.

Before the crew finished their work, the HOA sent the McVickers a notice of violation, requesting that they cease work immediately and submit a minor application and $250.00 refundable construction bond in order to receive HOA approval for the work being done on their property. The McVickers ignored this notice of violation. The crew continued with their work, which finished the next day.

Several days later, the HOA sent the McVickers a notice of hearing, inviting them to an adjudicatory hearing before the HOA's board of directors on the issue of whether they would be fined for failing to submit the required application and bond for approval, an invitation which the McVickers accepted. After participating in the hearing, the McVickers were sent the board's written decision, explaining that the board had decided to give them a seven-day cure period in order to submit the application and bond or be fined for each day of noncompliance. The McVickers

initially refused and then submitted the application and bond under protest to stop the running of the fine. The HOA retroactively approved their application and returned the bond in full but fined the McVickers as threatened.

The McVickers sued the HOA, advancing two claims for declaratory relief and a claim for breach of fiduciary duty. In their first two claims, the McVickers sought a declaration that (1) the HOA violated N.C. Gen. Stat. § 47F-3-107.1, a provision of the North Carolina Planned Community Act (the "Act"), by fining the McVickers; and (2) the HOA violated its governing covenants, by acting without authority in requiring the bond. In their third claim, the McVickers alleged that the HOA's board of directors breached their fiduciary duty to the McVickers and other members of the HOA by selectively enforcing covenants and inequitably imposing fines.

The parties filed cross-motions for partial summary judgment. After a hearing, the trial court entered an order granting partial summary judgment in the HOA's favor, dismissing with prejudice the McVickers' two declaratory judgment actions. The McVickers appeal.

II. Analysis

The McVickers acknowledge that the partial summary judgment order they appealed is interlocutory but assert they have a right to immediate appeal because delaying the appeal until final judgment would deprive them of their substantial

right to avoid inconsistent verdicts in multiple trials. The HOA fails to address the appealability of this interlocutory order.

The right to appeal exists only when authorized by statute. *See Veazey v. City of Durham*, 231 N.C. 354, 362, 57 S.E.2d 377, 381 (1950) ("[A]n appeal can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal."). The right to appeal interlocutory orders exists but is limited. *See* N.C. Gen. Stat. § 1-277 (2015); N.C. Gen. Stat. § 1A-1, Rules 54(b); N.C. Gen. Stat. § 7A-27(b)(3) (2015). "[I]t is the duty of an appellate court to dismiss an appeal if there is no right to appeal." *Pasour v. Pierce*, 46 N.C. App. 636, 639, 265 S.E.2d 652, 653 (1980) (citing *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978)).

"Generally, there is no right of immediate appeal from interlocutory orders," *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990), unless (1) the trial court enters a final judgment as to fewer than all claims in an action and certifies under Rule 54(b) that there is no just reason to delay the appeal; or (2) the interlocutory order qualifies under N.C. Gen. Stat. §§ 1-277 and 7A-27(d)(1) (2015), most frequently because delay "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999) (citations and quotation marks omitted).

Where, as here, the trial court did not certify its order under Rule 54(b) but a party claims a right to immediate appeal based upon the deprivation of a substantial right, that party bears the "burden of showing this Court that the order deprives the[m] . . . of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture,* 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). If an appellant fails to meet this burden, "we are required to dismiss that party's appeal on jurisdictional grounds." *Hamilton v. Mortgage Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011) (citations omitted). "Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed." *Nello L. Teer Co. v. Jones Bros., Inc.*, 182 N.C. App. 300, 303, 641 S.E.2d 832, 835 (2007) (citation and quotation marks omitted).

The McVickers claim a right to immediate appellate review on the basis that delaying the appeal until final judgment would deprive them of their substantial right to avoid inconsistent verdicts in separate trials. We disagree.

"[A] substantial right is affected if the trial court's order granting summary judgment to some, but not all, [claims] creates the possibility of separate trials involving the same issues which could lead to inconsistent verdicts." *Hamby v. Profile Prods., L.L.C.,* 361 N.C. 630, 634, 652 S.E.2d 231, 234 (2007) (citation omitted). To demonstrate this substantial right, "the party must show that (1) the same factual

issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Callanan v. Walsh*, 228 N.C. App. 18, 21, 743 S.E.2d 686, 689 (2013) (citation and quotation marks omitted). "Issues are the 'same' if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton*, 212 N.C. App. at 79, 711 S.E.2d at 190 (citation omitted). However, "[t]he mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding." *Id.* at 80, 711 S.E.2d at 190 (citing *Moose v. Nissan of Statesville, Inc.,* 115 N.C. App. 423, 428, 444 S.E.2d 694, 698 (1994)).

Here, in addressing an alleged common factual nexus among all of their claims, the McVickers assert:

> [T]here are common or shared facts relating to the propriety of [(1)] the [HOA's] requirement of posting an improvement bond for the cutting of trees on . . . [the McVickers'] property, [(2)] the [HOA's] imposition of a fine against . . . [the McVickers] for failing to initially pay said bond, and [(3)] in considering the reasonableness of . . . the [HOA's] conduct in this case in comparison to its history of enforcement of the bond requirement in other cases.

However, the McVickers fail to identify *which facts* relevant to the resolution of these issues would overlap. Nonetheless, assuming *arguendo* that the McVickers have sufficiently alleged that common facts overlap, the McVickers advance the following

scenario to demonstrate how delaying their appeal until final judgment on all claims would pose the risk of inconsistent verdicts in separate trials:

> Assuming *arguendo* that the plaintiffs would have received a verdict in their favor on their third claim for relief, and further, that this Court of Appeals would have later reversed and remanded to the Superior Court on the first claim for relief, there is a potential that a different judge and jury could determine that the fine against the plaintiffs was proper, based upon a similar set of facts. Plaintiffs submit that the appeal is properly before the Court based upon *Watson Elec. Constr.* and *Moose*, supra.

Although the McVickers neither apply the cases cited nor advance any further argument, our understanding of the McVickers hypothetical is this. If their third claim for breach of fiduciary duty proceeds separately and a jury determines the fine against the McVickers was *improper*, this would be inconsistent with a determination in their first claim for declaratory relief that the fine was *proper*. However, the McVickers failed to establish a logical relationship between determinations that the fine against them was "proper" in relation to the nature of its first and third claims.

In *Hamilton*, we addressed and rejected a similar argument that the separate litigation of claims alleging "the charging of unreasonable fees" and "that the work performed in exchange for the payment of those fees was unlawfully performed by non-lawyers" created a risk of inconsistent verdicts because "in order to resolve both categories of claims, the jury must consider facts relating to the 'scope of the work

performed' in return for the payment of the challenged fees." 212 N.C. App. at 83–84, 711 S.E.2d at 192–93. We reasoned:

> There is . . . a clear difference in the manner in which these facts will be viewed during the jury's consideration of each class of claims. In evaluating the reasonableness of the challenged fees, "the scope of the work performed" is relevant for the purpose of examining the appropriateness of the amount charged in light of the nature and extent of the work performed and in comparing the fees charged by [the defendant] with those typically charged for comparable services by other industry participants. On the other hand, in evaluating Plaintiff's claims that work was unlawfully performed by non-lawyers, the "scope of the work performed" is relevant for the purpose of ascertaining whether the work in question could only have been performed by licensed attorneys in light of the unauthorized practice statutes, the extent of the work actually performed by licensed attorneys, and the amount that was paid for the performance of legal work by non-lawyers.

Id. Thus, we determined:

> The mere fact that the "scope of the work performed" is relevant to both classes of claims does not, standing alone, establish that separate consideration of these claims creates a risk of inconsistent verdicts given the differences in the nature of the inquiry that must be conducted as part of the evaluation of those claims.

Id. at 84, 711 S.E.2d at 193.

Here, the McVickers first claim alleges that the HOA "fail[ed] to comply with the statutory requirements for the imposition of fines"; their third claim alleges that the HOA "breached its fiduciary duty to its owners/members, including [the

McVickers]" by selectively enforcing its covenants and seeking fines in an inequitable manner. The issue of whether the fine was "proper" is relative to each claim: in their first claim, the issue of fine propriety concerns whether the HOA violated a governing statute when fining the McVickers; in their third claim, whether the HOA fined the McVickers in a relatively equitable manner. Accordingly, a determination that the fine was improper in relation to their claim for breach of fiduciary duty would not necessarily be inconsistent with a determination that the fine was proper in relation to their claim for declaratory judgment.

As in *Hamilton*, "[t]he mere fact that the [propriety of the fine] is relevant to both . . . claims does not, standing alone, establish that separate consideration of these claims creates a risk of inconsistent verdicts," 212 N.C. App. at 84, 711 S.E.2d at 193, and the McVickers advanced no argument as to how separate consideration of their claims creates a risk of inconsistent verdicts "given the differences in the nature of the inquiry that must be conducted as part of the evaluation of those claims." *Id.* "It is not the duty of this Court to construct arguments for or find support for an appellant's right to appeal; the appellant must provide sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014) (citing *Hamilton*, 212 N.C. App. at 79, 711 S.E.2d at 190). Accordingly, since the McVickers have failed to satisfy their burden to demonstrate

that they would be deprived of a substantial right absent immediate appeal, we lack jurisdiction to entertain their appeal and must dismiss. *See Hamilton*, 212 N.C. App. at 86, 711 S.E.2d at 194 (dismissing appeal of interlocutory order on jurisdictional grounds where appellant failed to demonstrate substantial right of avoiding inconsistent verdicts in multiple trials).

III. Conclusion

Because the McVickers appeal from an interlocutory order and have failed to demonstrate a right to immediate review under the theory that delay until final judgment would deprive them of their substantial right to avoid inconsistent verdicts in multiple trials, we lack jurisdiction and must dismiss.

DISMISSED.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).