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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1301

Filed: 16 October 2018

Onslow County, No. 14-CVS-4011

KINGS HARBOR HOMEOWNERS ASSOCIATION, INC., Plaintiff,

v.

ROY T. GOLDMAN and wife, DIANA H. GOLDMAN, Defendants.

Appeal by defendants from orders entered 17 August 2017 by Judge R. Kent Harrell in Onslow County Superior Court. Heard in the Court of Appeals 16 April 2018.

Cranfill Sumner & Hartzog LLP, by Melody J. Jolly and Elizabeth King, and Marshall, Williams & Gorham, LLP, by Charles D. Meier, for plaintiff.

Robert W. Detwiler for defendants.

BERGER, Judge.

Roy and Diana Goldman (collectively, “Defendants”) appeal from two orders, entitled “Order on Remand” (“Remand Order”) and “Order on Motion for Attorney Fees—G.S. 1D-45” (“Fee Order”). This is the second time that this dispute is before this Court. *See Kings Harbor Homeowners Ass’n, Inc. v. Goldman*, ___ N.C. App. ___, 800 S.E.2d 129 (2017) (“*Kings Harbor I*”). In the current appeal, Defendants contest

Opinion of the Court

- (1) the Remand Order for failing to comply with this Court's prior mandate order; and
- (2) the Fee Order's denial of Defendants' motion for attorney's fees.

Factual and Procedural Background

Because only procedural aspects of this case have changed since *Kings Harbor I*, we adopt that opinion's recitation of the pertinent facts:

Kings Harbor is a planned residential community located in Onslow County North Carolina, developed by Industrial Homes, Inc. ("the Developer"). Evidence tends to show the Developer intended to provide access to Kings Creek as an amenity for the Kings Harbor lot owners. On 12 August 2005, the Developer recorded a map entitled "Final Plat for King's Harbor II." The map identifies a "10' Pedestrian Walkway Easement" [(the "walkway easement")] located on Lot 37, running from the [Kings Harbor Homeowners Association, Inc.'s ("the HOA")] maintained street to the creek boundary of Lot 37. The maps do not show any easement or pier extending into the creek. The pier and deck at issue was built years after the map was recorded. The Developer recorded a revised map five years later, for the purpose of showing removal of off-site septic systems. Otherwise, the original and revised maps are identical.

The same day the original map was recorded, 12 August 2005, the Developer also recorded the "Declaration of Restrictive Covenants Kings Harbor II" ("the Declaration"). Paragraph 11 of the Declaration, entitled "Common Area," states:

All lot owners shall have use of the walkway on Lot 37 as shown on the recorded plat. Repairs and maintenance of said walkway shall be the responsibility of the Homeowners' Association. Hours of walkway use shall be limited to 9:00 a.m. through 9:00 p.m. daily.

Opinion of the Court

The Declaration contains no reference to a pier or any improvements built beyond the walkway.

After the original map and Declaration were recorded, the Developer began construction of a wooden pier and walkway on Lot 37 of the subdivision, with the apparent intention that the pier would eventually be conveyed to the HOA. The Developer filed an application in January 2006 with the North Carolina Department of Environmental and Natural Resources, which sought a permit to construct the pier under the North Carolina Coastal Area Management Act (“CAMA”). The plans submitted in support of the permit application depicts the pier connecting with the walkway easement. The Division of Coastal Management issued the permit to the Developer on 5 April 2006. The permit refers to the pier as a “community access facility.”

Construction of the pier was completed in August 2007. Since that time, the pier has been in continual use by the Kings Harbor lot owners. The pier was constructed on Kings Creek and can be accessed via the ten-foot pedestrian walkway easement over Lot 37. Shortly after construction of the pier was completed, a sign was erected at the walkway’s entrance, which read, “Kings Harbor Pier.”

On 28 March 2006, the Developer conveyed Lot 38 via general warranty deed to Mrs. Goldman’s mother, Willa Mae Hartley. Ms. Hartley began living in the home constructed on Lot 38 in 2007. Lot 38 is located adjacent to Lot 37. When Mrs. Goldman visited her mother, she would see neighbors openly using the walkway and pier.

In March 2011, the Developer conveyed Lot 37 to Ms. Hartley via general warranty deed for the purchase price of \$100,000.00. On 16 October 2014, the Developer purported to convey all of its title, rights, and interests in the community pier and walkway easement to the HOA. Ms. Hartley never took any action to discourage or prevent the HOA lot owners from using the walkway or pier, nor acted in a way to suggest she asserted exclusive ownership to either. The pier is the sole structure on Lot 37.

Opinion of the Court

Ms. Hartley died in August 2011, and the Goldmans inherited Lots 37 and 38. They began living in the house on Lot 38 in 2012. The Goldmans observed other lot owners continued to use and enjoy the walkway and pier after they moved into the house. Prior to September 2014, the Goldmans took no action to prevent members of the HOA community from using the walkway and pier.

Mr. Goldman became an officer and director of the HOA's board in January 2013. He participated in multiple board meetings where the pier was discussed. For example, at the meeting in April 2013, Mr. Goldman proposed a new sign at the pier addressing times the pier was open, swimming, and boat launchings. Minutes from the HOA board meetings in 2013 show Mr. Goldman repeatedly participated in discussions about the HOA's control and maintenance of the walkway and pier. On 22 April 2014, the minutes reflect the Board discussed purchasing insurance coverage on behalf of the HOA for the walkway and pier.

Mr. Goldman drafted a letter in July 2014, which proposed the HOA agree for him to move the ten-foot easement on Lot 37 from the side closest to his house to the "far side" of Lot 37, to "give the community a more direct access as well as allowing maximum usage of our combined lots."

During the summer of 2014, the Goldmans began to assert exclusive ownership of the pier. On 30 August 2014, the Goldmans placed a chain across the entrance to the pier. The chain was removed by HOA representatives. The Goldmans replaced the chain within a week, which was also removed by the HOA. On 21 October 2014, the Goldmans erected a locked wooden gate across the entrance to the pier.

On 27 October 2014, the HOA filed suit against the Goldmans for a declaratory judgment to determine the parties' ownership rights of the pier. The HOA also claimed trespass against the Goldmans, and sought punitive damages and injunctive relief. The Goldmans counterclaimed and asserted exclusive ownership of the

Opinion of the Court

pier. The parties filed cross-motions for summary judgment.

By written order dated 18 July 2016, the trial court: (1) denied the Goldmans' motion for summary judgment; (2) dismissed the Goldmans' counterclaim; (3) granted the HOA's motion for summary judgment on its claim for declaratory relief; (4) granted the HOA's motion for summary judgment on its claim for trespass and awarded nominal damages; and (5) entered a permanent injunction, which enjoined Defendants from blocking or obstructing the walkway or community pier.

The trial court declared the ten-foot walkway easement and pier were dedicated and constructed for the use and enjoyment of the HOA lot owners, the HOA holds *all rights and title* to the easement and pier as common property, and the Goldmans do not possess exclusive rights to the easement and community pier.

Kings Harbor I, ___ N.C. App. at ___, 800 S.E.2d at 131-32.

In Defendants' first appeal to this Court, Defendants argued that

the trial court erred by: (1) considering certain portions of affidavits submitted by the HOA in support of the HOA's partial motion for summary judgment, and (2) granting summary judgment in favor of the HOA and denying the Goldmans' motion for summary judgment and dismissing their counterclaim, where a genuine issue of material fact exists regarding lawful ownership of the pier.

Id. at ___, 800 S.E.2d at 132. The *Kings Harbor I* Court held:

It is undisputed that the ten-foot walkway easement and servitude across Lot 37 was created and reserved for the benefit of the lot owners, and granted to the HOA. This easement is clearly shown on the record map, and is referenced in the legal description of the deed to Ms. Hartley. . . .

[T]he ten-foot access easement shown on the recorded plat ends at the boundary of Lot 37. Without

Opinion of the Court

permission from the Goldmans, the easement cannot be extended by implication into the creek, to include riparian rights or structures located thereon. . . . [Defendants] inherited the riparian rights appurtenant to Lot 37 from Ms. Hartley, including the pier built thereon. The trial court erred by determining the HOA holds any, much less all, rights, title, or extended easement onto the pier. . . .

Under *de novo* review, we reverse the order of the trial court granting summary judgment in favor of Plaintiff and remand for entry of an order granting Defendant's motion for summary judgment.

Id. at ___, 800 S.E.2d at 134-35.

This Court's mandate was filed with the trial court on June 29, 2017. On July 14, 2017, Defendants filed a motion requesting for the trial court to "enter an order complying with the opinion of the North Carolina Court of Appeals, and award the Defendants their attorney's fees and costs pursuant to N.C.G.S. § 1D-45." This motion was heard on August 14, 2017.

On August 17, 2017, the trial court entered the Fee Order and Remand Order. In the Fee Order, the trial court found that the HOA's "claim for punitive damages was neither frivolous or malicious," and thus, denied Defendants' motion for payment of attorney's fees pursuant to N.C. Gen. Stat. § 1D-45 (2017). In the Remand Order, the trial court found:

1. That the issues addressed by the Court of Appeals in its opinion were whether the trial court erred by: 1) considering certain portions of affidavits submitted by the HOA in support of the HOA's partial motion for summary judgment, and 2) granting summary judgment in favor of the HOA and denying Goldmans' motion for summary

Opinion of the Court

judgment and dismissing their counterclaim, where a genuine issue of material fact exists regarding lawful ownership of the pier.

2. That the Court concluded that the trial court erred by determining the HOA holds any, much less all, rights, title, or extended easements onto the pier and that accordingly, the trial court erred by granting partial summary judgment in favor of the HOA and denying the Goldmans' motion for summary judgment and dismissing their counterclaim.

3. The mandate issued by the Court of Appeals was for entry of an order granting Defendant's motion for summary judgment.

4. Defendant's Motion for Summary Judgment requested judgment on all claims raised in the pleadings which could include Defendant's prayer for relief for immediate possession of the easement over Lot 37.

5. The issue of the ten foot easement over Lot 37 was not an issue which the Court framed as being addressed in its opinion.

6. That throughout the findings included in the opinion, the Court noted the "undisputed" nature of the ten foot easement across Lot 37 "created and reserved for the benefit of the lot owners and granted to the HOA[.]" However, the trial court's order for summary judgment in favor of the Plaintiff, which included the ten foot easement, was reversed by the Court of Appeals.

7. Plaintiff's claims for trespass and punitive damages arises out of the alleged actions of the Defendants in restricting the use of the pier by other homeowners in the subdivision. Those claims are tied to the viability of the claim for ownership or use of the pier itself.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That as to Plaintiff's claims relating to ownership of the pier located on Lot 37 or use of said pier under any express or implied easement, Defendant's Motion for Summary Judgment is granted. Plaintiff's claims on that issue are dismissed.

Opinion of the Court

2. That as to Plaintiff's claims for trespass and punitive damages, Defendants Motion for Summary Judgment is granted. Plaintiff's claims on that issue are dismissed.

3. In that the prior judgment awarded summary judgment in favor of the Plaintiff on its claim for use of the ten foot easement over Lot 37 and that decision was reversed by the Court of Appeals, claims of the parties relating to the use of the ten foot easement over Lot 37 are preserved for hearing at a later date.

Before the trial court could conduct the hearing promised in the Remand Order's third conclusion, Defendants filed their notice of appeal on August 23, 2017. In the present appeal, Defendants assert that the trial court erred by failing to comply with this Court's mandate and in denying Defendants' motion for attorney's fees.

On February 16, 2018, the HOA moved to dismiss Defendants' appeal of the Remand Order, contending it is interlocutory and does not affect a substantial right.

Analysis

The threshold question is whether this case is properly before us. An order is either interlocutory or the final determination of the rights of the parties. . . . An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy.

Berth Oil Co. v. N.C. Dep't of Transp., ___ N.C. App. ___, ___, 808 S.E.2d 488, 496 (2017) (citations and quotation marks omitted).

Once the trial court enters an order that decides all substantive claims, the right to appeal commences.

Opinion of the Court

Failure to appeal from that order forfeits that right. Because attorney's fees and costs are collateral to a final judgment on the merits, an unresolved request for attorney's fees and costs does not render interlocutory an appeal from the trial court's order.

Duncan v. Duncan, 366 N.C. 544, 545, 742 S.E.2d 799, 800 (2013).

“While an interlocutory appeal may be allowed in exceptional cases, this Court must dismiss an interlocutory appeal for lack of subject-matter jurisdiction, unless the appellant is able to carry its burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature.” *C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, L.L.C.*, ___ N.C. App. ___, ___, 803 S.E.2d 679, 682 (2017) (citations and quotation marks omitted). “This Court will not construct appellant's arguments in support of a right to interlocutory appeal.” *Union Cnty. v. Town of Marshville*, ___ N.C. App. ___, ___, 804 S.E.2d 801, 806 (2017) (citation omitted).

There are generally two instances in which an interlocutory appeal may be allowed:

First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal [pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure]. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Opinion of the Court

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citations and quotation marks omitted).

Here, the trial court did not certify either the Remand Order or Fee Order for immediate appeal pursuant to Rule 54(b), and Defendants do not claim that either order affected a substantial right. Rather, Defendants assert that appellate review is proper as neither order is interlocutory.

I. Remand Order

Defendants assert that the trial court erred in entering the Remand Order as it does not strictly implement the mandate order arising from *Kings Harbor I* pursuant to the law of the case doctrine. Defendants contend that the mandate order granted Defendants' ownership of the walkway easement, but rather than enforcing that right, the trial court deferred determining who owned the walkway easement until after a later hearing could be conducted. We disagree.

[U]nder the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal. This doctrine applies to both criminal and civil cases alike.

State v. Paul, 231 N.C. App. 448, 450, 752 S.E.2d 252, 254 (2013) (citations and quotation marks omitted).

Opinion of the Court

The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure. However, the general rule only applies to issues actually decided by the appellate court. The doctrine of law of the case does not apply to dicta, but only to points actually presented and necessary to the determination of the case.

Condellone v. Condellone, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642 (citations and quotation marks omitted), *disc. review denied*, 352 N.C. 672, 545 S.E.2d 420 (2000).

The rule that a decision of an appellate court is ordinarily the law of the case, binding in subsequent proceedings, is basically a rule of procedure rather than of substantive law, and must be applied to the needs of justice with a flexible, discriminating exercise of judicial power. Therefore, in determining the correct application of the rule, the record on former appeal may be examined and looked into for the purpose of ascertaining what facts and questions were before the Court. Moreover, [a]n appellate court may on second appeal, correct an entry in the former judgment so as to make it express the true decision of the case.

Hayes v. Wilmington, 243 N.C. 525, 537, 91 S.E.2d 673, 682 (1956) (citations and quotation marks omitted).

In the first appeal in the matter *sub judice*, the *Kings Harbor I* Court held that the HOA owned the walkway easement and Defendants owned the pier. As previously stated, the *Kings Harbor I* Court held:

It is undisputed that the ten-foot walkway easement and servitude across Lot 37 was created and reserved for the benefit of the lot owners, and granted to the HOA. This easement is clearly shown on the record map, and is

Opinion of the Court

referenced in the legal description of the deed to Ms. Hartley. . . .

[T]he ten-foot access easement shown on the recorded plat ends at the boundary of Lot 37. Without permission from the Goldmans, the easement cannot be extended by implication into the creek, to include riparian rights or structures located thereon. . . . Goldmans inherited the riparian rights appurtenant to Lot 37 from Ms. Hartley, including the pier built thereon. The trial court erred by determining the HOA holds any, much less all, rights, title, or extended easement onto the pier. . . . Under *de novo* review, we reverse the order of the trial court granting summary judgment in favor of Plaintiff and remand for entry of an order granting Defendants' motion for summary judgment.

Kings Harbor I, ___ N.C. App. at ___, 800 S.E.2d at 134-35.

The *Kings Harbor I* Court clearly held that the HOA owned the walkway easement by stating that “[i]t is undisputed that the ten-foot walkway easement and servitude across Lot 37 was created and reserved for the benefit of the lot owners, and granted to the HOA.” *Id.* As summary judgment may only be issued if there is no genuine issue of material fact, the *Kings Harbor I* Court affirmed, in part, the trial court’s prior grant of summary judgment recognizing the HOA’s ownership of the walkway easement. Therefore, pursuant to the law of the case doctrine, the trial court was required to follow this Court’s mandate in *Kings Harbor I* “without variation or departure” to enforce Defendants’ ownership of the pier and the HOA’s ownership of the walkway easement. *Condellone*, 137 N.C. App. at 551, 528 S.E.2d at 642.

Opinion of the Court

On remand, the trial court properly granted summary judgment in Defendants' favor, which recognized Defendants as the true owners of the pier. However, the trial court incorrectly deferred final judgment in this matter by preserving the "claims of the parties relating to the use of the ten foot easement over Lot 37 . . . for hearing at a later date." As previously discussed, *Kings Harbor I* implicitly affirmed the trial court's prior grant of the walkway easement to HOA. Thus, the Remand Order's preservation for further hearing regarding the ownership of the walkway easement is moot. *See Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

As the Remand Order disposes of all pending issues and relieves the trial court from taking further action as to the merits of this matter, the Remand Order effectively serves as a final judgment on the matter. Thus, Defendants' current appeal of the Remand Order is not interlocutory. *See Duncan*, 366 N.C. at 546, 742 S.E.2d at 801 ("An order that completely decides the merits of an action therefore constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs.")

In sum, appellate review of the Remand Order is proper as it arises from a final judgment on the merits. We reverse and remand for the trial court to enter a revised

Opinion of the Court

remand order to dispose of all pending claims and enforce the HOA's ownership of the walkway easement and Defendants' ownership of the pier.

II. Fee Order

“Once the trial court enters an order that decides all substantive claims, the right to appeal commences.” *Duncan*, 366 N.C. at 545, 742 S.E.2d at 800. Here, the Remand Order—as revised—has resolved the merits of the action so the appeal of Defendants' motion for attorney's fees is proper.

Defendants challenge the trial court's finding that the HOA's punitive damages claim was neither frivolous nor malicious and also contest the denial of Defendants' motion for attorney's fees. Defendants contend that because the *Kings Harbor I* Court mandated entry of summary judgment for Defendants, this Court found neither law nor evidence in support of the HOA's punitive damages claim; the HOA's punitive damages claim was frivolous as it presented no rational argument; and Defendants were entitled to attorney's fees as a matter of law for defending against a frivolous or malicious punitive damages claim per N.C. Gen. Stat. § 1D-45.

“We review awards of attorneys' fees, including awards pursuant to N.C. Gen. Stat. § 1D-45 for an abuse of discretion.” *Philips v. Pitt Cnty. Mem'l. Hosp., Inc.*, 242 N.C. App. 456, 458, 775 S.E.2d 882, 884 (2015) (citation omitted); *see also Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 528, 586 S.E.2d 507, 513 (“The decision to award or deny the award of attorney fees will not be disturbed

Opinion of the Court

on appeal unless the trial court has abused its discretion.”), *affirming order*, 160 N.C. App. 520, 586 S.E.2d 507 (2003).

Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or [is] so arbitrary that it could not have been the result of a reasoned decision. In order to determine whether the trial court has abused its discretion, we consider whether there is competent evidence to support the court’s findings and whether those findings support the court’s conclusions.

GE Betz, Inc. v. Conrad, 231 N.C. App. 214, 242, 752 S.E.2d 634, 654 (2013) (citations and quotation marks omitted), *disc. review denied*, 367 N.C. 786, 766 S.E.2d 837 (2014).

“In North Carolina, parties to litigation are generally responsible for their own attorneys fees unless a statute provides otherwise.” *McLennan v. Josey*, 247 N.C. App. 95, 98, 785 S.E.2d 144, 147 (2016) (citation omitted). Applicable here, Section 1D-45 of North Carolina’s General Statutes states that a trial court “shall award reasonable attorneys’ fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious.” N.C. Gen. Stat. § 1D-45 (2017).

Under N.C. Gen. Stat. § 1D-45, a claim for punitive damages is “frivolous” where its proponent can present no rational argument based upon the evidence or law in support of it. Furthermore, a claim is “malicious” where it is wrongful and done intentionally without just cause or excuse or as a result of ill will.

Opinion of the Court

Philips v. Pitt Cnty. Mem'l. Hosp., Inc., 242 N.C. App. 456, 458, 775 S.E.2d 882, 884 (2015) (citations and quotation marks omitted).

The granting of summary judgment “is not in itself a sufficient reason for the court to award attorney’s fees, but may be evidence to support the court’s decision to make such an award.” N.C. Gen. Stat. § 6-21.5 (2017); *see also McLennan*, 247 N.C. App. at 99, 785 S.E.2d at 148 (“The granting or denial of a motion for summary judgment is not in itself a sufficient reason for the court to award attorney’s fees. However, . . . entering summary judgment may be evidence that a pleading lacks a justiciable issue.” (citations and quotation marks omitted)).

In the matter *sub judice*, the trial court’s written Fee Order denied Defendants’ motion for attorney’s fees pursuant to Section 1D-45 and found after “having reviewed the pleadings, the order of the Court of Appeals, the record on appeal, and having heard the arguments of counsel, . . . that the Plaintiff’s claim for punitive damages was neither frivolous or malicious.” The trial court did not make findings of fact to address whether the HOA knew or should have known that its punitive damages claim was frivolous or malicious. Without findings of fact, we cannot review the trial court’s conclusion that the HOA’s claim for punitive damages was neither frivolous nor malicious. Accordingly, we must remand for the trial court to make the requisite findings of fact justifying the denial of Defendants’ motion for attorney’s fees under Section § 1D-45.

Opinion of the Court

Conclusion

This Court has jurisdiction to review Defendants' appeal as the Remand Order, as revised, serves as a final judgment disposing of all pending claims in this matter. We reverse and remand for the trial court to enter a revised remand order enforcing the HOA's ownership of the walkway easement and Defendants' ownership of the pier. We further remand for the trial court to make specific findings of fact to support its denial of Defendants' motion for attorney's fees.

REVERSED AND REMANDED.

Chief Judge MCGEE and Judge STROUD concur.

Report per Rule 30(e).