IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-396

No. COA20-479

Filed 20 July 2021

Mecklenburg County, No. 17 CVS 4268

WILLIAM MATTHEW WILSON, Plaintiff,

v.

QUEEN CITY JUMP, LLC d/b/a SKY HIGH; SKY HIGH SPORTS, LLC, a Nevada limited liability company; SKY HIGH SPORTS OPPORTUNITIES, LLC, a Nevada limited liability company; JERRY RAYMOND, and JOHN DOES I-X, Defendants.

Appeal by Defendant, and cross-appeal by Plaintiff, from judgment entered 22 January 2020 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 March 2021.

*Thomas L. Odom, Jr., and Martha C. Odom for Plaintiff-Appellee/Cross-Appellant.*

*W. James Flynn for Defendant-Appellant/Cross-Appellee.*

GRIFFIN, Judge.

¶ 1 Defendant Queen City Jump, LLC, appeals from an order granting in part and denying in part Defendant's motion for summary judgment. Plaintiff William Matthew Wilson cross-appeals from the same order. Upon review, we dismiss Defendant's appeal and Plaintiff's cross-appeal as interlocutory.

## I. Factual and Procedural Background

¶ 2 On 15 March 2014, Plaintiff was injured while jumping on a trampoline at a trampoline arena operated by Defendant as franchisee and Sky High Sports Opportunities, LLC, as franchisor. Prior to entering the trampoline arena, Plaintiff signed an "Assumption of Risk, Waiver and Indemnity Agreement[,]" which provided in pertinent part:

> I AGREE TO ASSUME ALL THE RISKS AND RESPONSIBILITIES SURROUNDING THE ACTIVITIES OFFERRED BY [DEFENDANT]. IN ADVANCE, I RELEASE, WAIVE, FOREVER DISCHARGE, AND COVENANT NOT TO SUE [DEFENDANT] FROM AND AGAINST ANY AND ALL LIABILITY FOR ANY HARM . . . ARISING OUT OF OR RELATED TO ANY LOSS, DAMAGE, OR INJURY . . . THAT MAY BE SUSTAINED BY ME, . . . WHETHER CAUSED BY THE NEGLIGENCE OR GROSS NEGLIGENCE OF [DEFENDANT] AND ITS AFFILLIATES WITH REGARD TO ANY ACTIVITIES OR FACILITIES AT THE EVENT. IT IS MY EXPRESS INTENT THAT THIS RELEASE SHALL BE DEEMED A RELEASE, WAIVER, DISCHARGE AND COVENANT NOT TO SUE [DEFENDANT].

¶ 3 On 25 April 2017, Plaintiff filed an amended complaint against Sky High Sports, LLC, Sky High Sports Opportunities, LLC, ("Sky High Defendants"), Jerry Raymond, and Defendant alleging various tort claims arising from the injuries Plaintiff sustained at the trampoline arena.

¶ 4 Defendant filed a motion for summary judgment on 1 November 2019 arguing,

*inter alia*, that all of "Plaintiff's claims against [Defendant] [we]re barred by the Assumption of Risk, Waiver, and Indemnity Agreement that Plaintiff signed." On 22 January 2020, the trial court entered an order denying Defendant's motion for summary judgment with respect to Plaintiff's claims of negligence and negligence *per se*. The trial court granted the remainder of Defendant's motion and dismissed Plaintiff's claims "for (1) product liability; (2) breach of warranty; (3) respondeat superior based upon the actions of [Sky High Defendants] and/or Jerry Raymond; and (4) gross negligence[.]"

¶ 5 Defendant and Plaintiff each timely filed notice of appeal from the trial court's order.

## II. Analysis

¶ 6 "Ordinarily, appellate courts do not review the denial of a motion for summary judgment because of its interlocutory nature." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "However, immediate appeal of interlocutory orders and judgments is available in at least two instances:" (1) "when the trial court certifies . . . that there is no just reason for delay of the appeal; and" (2) "when the interlocutory order affects a substantial right." *Turner v. Hammock's*

*Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (internal quotation marks and citation omitted).

¶ 7 The trial court in this case did not certify its order as immediately appealable. Accordingly, our review is limited to whether Defendant or Plaintiff has established that the trial court's order affects a substantial right as to their respective claims on appeal.

¶ 8 "The substantial right test for appealability of interlocutory orders is that [1] the right itself must be substantial and [2] the deprivation of that . . . right must potentially work injury . . . if not corrected before appeal from final judgment." *Frost v. Mazda Motor of America, Inc.*, 353 N.C. 188, 192-93, 540 S.E.2d 324, 327 (2000) (internal quotation marks and citations omitted). "A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *In re Accutane Litigation*, 233 N.C. App. 319, 325-26, 759 S.E.2d 13, 18 (2014) (internal quotation marks and citation omitted). The burden is on the appellant to present "in the statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Peters v. Peters*, 232 N.C. App. 444, 447, 754 S.E.2d 437, 440 (2014) (brackets and citations omitted).

**A. Defendant's Appeal**

¶ 9 Defendant argues that it has a substantial right "to immunity from suit"

pursuant to the terms of the exculpatory agreement. By denying in part Defendant's motion for summary judgment and failing to dismiss all of Plaintiff's claims based on the terms of the exculpatory agreement, Defendant contends that the trial court's order deprived Defendant of a substantial right "to immunity from suit and from having to face a trial[.]"

¶ 10 Our appellate courts have not considered whether a claim to immunity from suit based upon the terms of an exculpatory agreement constitutes a substantial right for purposes of interlocutory jurisdiction. Defendant characterizes its claimed immunity as "analogous to c[ases] involving public official immunity" in which "[t]his Court has held that a public official's right to be immune from suit is a substantial right." Due to the significant distinctions between public official immunity and contract immunity, we conclude that Defendant's claim to immunity from suit does not constitute a substantial right warranting immediate review of his appeal.

¶ 11 "[T]he 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). While our caselaw defines a substantial right as "one which will clearly be lost or irremediably adversely affected" absent immediate review, *Accutane Litigation*, 233 N.C. App. at 325-26, 759 S.E.2d at 18 (internal quotation marks and citation omitted), our analysis cannot turn "on a party's agility in so characterizing the right asserted." *Digital Equipment Corp. v. Desktop Direct,*

*Inc.*, 511 U.S. 863, 872 (1994).

¶ 12 Accordingly, it is important to note that a creative appellant can frame practically any affirmative defense as a substantial "right not to stand trial[.]" *See Digital Equipment Corp.*, 511 U.S. at 873 (stating "that virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'" (citations omitted)). Indeed, any affirmative defense entitling a defendant to dismissal of a plaintiff's claims at the summary judgment stage may be characterized as a right to avoid trial. We therefore must look beyond unhelpful abstractions and scrutinize the substance of the asserted right, or else we risk rendering our finality requirement meaningless. *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (stating that a substantial right must be one "affecting or involving a matter of substance as distinguished from matters of form").

¶ 13 It is well-established that "[c]ontracts exempting persons from liability for negligence are not favored by the law and are strictly construed against the party claiming such exemption." *Jordan v. Eastern Transit & Storage Co.*, 266 N.C. 156, 161, 146 S.E.2d 43, 48 (1966). "Nonetheless, such an exculpatory contract will be enforced unless it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest." *Fortson v. McClellan*, 131 N.C. App. 635, 636, 508 S.E.2d 549, 551 (1998) (citations omitted); *see also Hall v. Sinclair*

*Refining Co.*, 242 N.C. 707, 709-10, 89 S.E.2d 396, 397-98 (1955) (stating that "contractual provisions violative of the law or contrary to some rule of public policy are void and unenforceable"). "A release [from liability] is an affirmative defense which must be specially pleaded and on which defendants have the burden of proof." *Alston v. Monk*, 92 N.C. App. 59, 63, 373 S.E.2d 463, 466 (1988); *see also McNair v. Goodwin*, 262 N.C. 1, 7, 136 S.E.2d 218, 223 (1964) (stating that "a contract of release may be pleaded by each party as a bar to suit by the other with respect to the subject matter of the release").

¶ 14 By contrast, "[t]he defense of public official immunity is a 'derivative form' of governmental immunity." *Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016) (citation omitted). "[T]he doctrine of governmental, or sovereign, immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Sumney v. Barker*, 142 N.C. App. 688, 690, 544 S.E.2d 262, 265 (2001) (citation omitted). Interlocutory orders "denying dispositive motions based on the defenses of governmental and public official[] immunity affect a substantial right and are immediately appealable." *Fullwood*, 250 N.C. App. at 36, 792 S.E.2d at 549. We have held that a substantial right is affected "in these situations because 'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.'" *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (1996) (citations

omitted).

¶ 15 Here, Defendant's argument that it has a substantial right to immunity from suit rests on the flawed assumption that Defendant is also entitled to avoid litigating the validity of the exculpatory agreement at trial. In the context of public official immunity, statute or constitutional provision directly confers immunity from suit. Accordingly, the law serves as the source of immunity, and whether immunity is apparent in such cases is a straightforward legal question. Contract immunity is different. The terms of the contract dictate whether and to what extent a party is shielded from liability, and the validity of the contract is a necessary condition precedent to its enforcement. The defendant must first satisfy its burden of proving that the contract is valid before the question of immunity is properly presented.

¶ 16 Defendant therefore cannot establish that the trial court's order deprived Defendant of a substantial right to immunity from suit. To hold otherwise would require this Court to assume that Defendant has not only a substantial right to immunity from suit, but also a substantial right to avoid litigating the legal validity of the exculpatory agreement itself.

¶ 17 Parties may contractually agree to limit or eliminate a party's liability for certain legal claims. However, there is no substantial right to avoid proving that the underlying contract is valid at trial. Unlike with public official immunity, "[c]ontracts exempting persons from liability for negligence are not favored by the law[.]" *Jordan*,

266 N.C. at 161, 146 S.E.2d at 48. An exculpatory contract is void and unenforceable if "it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest." *Fortson,* 131 N.C. App. at 636, 508 S.E.2d at 551 (citations omitted). Even assuming *arguendo* that Defendant could meet its burden of showing that the contract is valid and enforceable, *Alston*, 92 N.C. App. at 63, 373 S.E.2d at 466, the contract must then be strictly construed against Defendant, *Jordan*, 266 N.C. at 161, 146 S.E.2d at 48. The extent to which exculpatory contracts are disfavored by our law is clear. One is not deprived of a substantial right because he must prove that an exculpatory contract is valid at trial.

¶ 18 Lastly, we note that Plaintiff's claim of negligence *per se* is still pending against Defendant in the trial court. The gravamen of Plaintiff's claim is that Defendant failed "to comply with the Amusement Device Safety Act." Plaintiff similarly argues in his Complaint and on appeal that the exculpatory agreement is void and unenforceable because "[i]t violates public policy and public interest in North Carolina" in that, *inter alia*, it violates the "Amusement Device Safety Act." Were we to address the merits of Defendant's argument that the exculpatory agreement is valid in an interlocutory posture, we would necessarily have to pass on the merits of Plaintiff's negligence *per se* claim.

¶ 19 As stated above, the validity of the contract is a condition precedent to immunity, and the extent to which Defendant's liability is limited is determined by

strictly construing the terms of the contract against Defendant. Assuming *arguendo* that the contract is valid but that the terms do not bar Plaintiff's recovery, Plaintiff would then have to litigate his claim of negligence *per se* with this Court having determined that the exculpatory agreement did not violate the Amusement Device Safety Act.

¶ 20 The terms included in exculpatory contracts may vary widely from case-to-case and confer different limitations on a party's liability in negligence. An exculpatory agreement is void and unenforceable if "it violates a statute, is gained through inequality of bargaining power, or is contrary to a substantial public interest." *Fortson,* 131 N.C. App. at 636, 508 S.E.2d at 551 (citations omitted). The question of whether a contract is valid under this standard may be deeply interconnected with the substance of a plaintiff's negligence claims in any given case. This inquiry will in many cases, as here, involve questions of whether and to what degree a defendant's conduct was negligent. We are therefore disinclined to undertake this inquiry at the interlocutory stage.

¶ 21 Accordingly, we cannot conclude that Defendant has established a substantial right for purposes of interlocutory jurisdiction.

**B. Plaintiff's Cross-Appeal**

¶ 22 Plaintiff argues that he has a substantial right to avoid two trials resulting in inconsistent verdicts because, absent immediate review, there is a "risk that two

juries [will] decide th[e] facts differently, leading to two judgments from the same initial lawsuit with incompatible outcomes."

¶ 23 A judgment or order may affect a substantial right "if there are overlapping factual issues between the claim determined and any claims which have not yet been determined." *Liggett Grp., Inc. v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993) (citations and internal quotation marks omitted).

> [W]hen common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial on the same fact issues if the appeal is eventually successful. This possibility in turn "creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

*Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989) (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

¶ 24 In order to establish that there is a risk of inconsistent verdicts, Plaintiff "must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials *and* (2) the possibility of inconsistent verdicts on those issues exists[.]" *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627-28, 727 S.E.2d 311, 314-15 (2012) (citation and internal quotation marks omitted).

¶ 25 In this case, "[a]lthough the facts involved in the claims remaining before the

trial court may overlap with the facts involved in the claims that have been dismissed," Plaintiff has "failed to show that [he] will be prejudiced by the possibility of inconsistent verdicts in two separate proceedings." *Hien Nguyen v. Taylor*, 200 N.C. App. 387, 394, 684 S.E.2d 470, 475 (2009). We therefore dismiss his cross-appeal as interlocutory.

¶ 26 "[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.'" *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (2005) (quoting N.C. R. App. P. 28(b)(4)). To that end, "[t]he appellant[] must present more than a bare assertion that the order affects a substantial right; [he] must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (emphasis in original) (citation omitted). "It is not the duty of this Court to construct arguments for or find support for the appellant's right to appeal from an interlocutory order." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). "Where the appellant fails to carry the burden of making such a showing to the [C]ourt, the appeal will be dismissed." *Johnson*, 168 N.C. App. at 518-19, 608 S.E.2d at 338 (citation omitted).

¶ 27 In his statement of grounds for appellate review, Plaintiff provides as follows:

> Plaintiff has filed claims against two sets of [d]efendants,

> and these claims involve nearly identical questions about the operation of the trampoline arena premises, and the trampoline arena product itself, with prior or similar injuries locally and nationwide. The resolution of those questions is determinative of both the claims against [Defendant], as franchisee, and the Sky High Defendants, as franchisor. There are claims against the Sky High Defendants still pending in the trial court. Plaintiff has met his burden to show that there is a risk of inconsistent verdicts. Accordingly, the challenged order affects a substantial right and is immediately appealable.

¶ 28 This passage is insufficient to establish a risk of inconsistent verdicts. Plaintiff merely states that a set of unspecified "claims" "involve nearly identical questions about operation of the trampoline arena premises, and the trampoline arena product itself[.]" Plaintiff does not refer to any specific claims or any specific facts, and instead asserts that he "has met his burden to show that there is a risk of inconsistent verdicts." Beyond these conclusory statements, Plaintiff provides no basis to support immediate review of his appeal. Accordingly, we dismiss his cross-appeal as interlocutory.

## III. Conclusion

¶ 29 For the reasons stated herein, we dismiss Defendant's appeal and Plaintiff's cross-appeal for lack of appellate jurisdiction.

DISMISSED.

Judge WOOD concurs.

Judge INMAN concurs in result only.

Report per Rule 30(e).