IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-164

Filed 5 December 2023

Iredell County, No. 20CVS2472

CHRISTOPHER G. CHAGARIS, Plaintiff,

v.

BRIAN VANDERGRIFT, Defendant.

Appeal by plaintiff from order entered 16 October 2022 by Judge David L. Hall in Iredell County Superior Court. Heard in the Court of Appeals 18 October 2023.

Plumides, Romano & Johnson, PC, by Richard B. Johnson, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough, LLP, by Lorin J. Lapidus, for defendant-appellee.

GORE, Judge.

Plaintiff, Christopher G. Chagaris, appeals the summary judgment in favor of defendant. Plaintiff argues the trial court erred in concluding there was no genuine issue of material fact regarding sexual relations between defendant and Angela Chagaris during plaintiff's marriage to Angela. Upon review of the parties' briefs and the record, we affirm.

I.

Plaintiff and Angela were married in 1996 and separated on 1 February 2019. Post-separation, Angela admitted to meeting men through the Ashley Madison website during her and plaintiff's marriage. Angela admitted to having sexual intercourse with other men. On 5 October 2020, plaintiff filed a lawsuit against defendant, Brian Vandergrift, alleging claims for Intentional Infliction of Severe Emotional Distress, Negligent Infliction of Severe Emotional Distress, Alienation of Affections, and Criminal Conversation. Defendant filed a motion to dismiss the claims, and the trial court dismissed the Intentional Infliction of Severe Emotional Distress and the Negligent Infliction of Severe Emotional Distress claims, but it denied dismissal of the Alienation of Affection and Criminal Conversation claims.

Through discovery, plaintiff found defendant and Angela shared approximately 258 texts and 137 phones calls. Defendant and Angela admitted to meeting at a Starbucks in Charlotte and sharing similar interests in yoga. They also met two other times at a McDonald's in Biscoe, North Carolina, and at a McDonald's in Albemarle, North Carolina.

Plaintiff discovered Angela rented hotel rooms in both Biscoe and Albemarle on 17 November 2017 and 8 December 2017, respectively. During those dates, defendant and Angela texted multiple times. Angela admitted she likely met a guy from Ashley Madison at those hotels. However, defendant denied ever having an Ashley Madison account, and there is no evidence in the record to indicate he had such account. Both defendant and Angela deny having had a romantic or sexual

relationship together. There is no evidence in the record of defendant and Angela meeting apart from their admitted visits to Starbucks and McDonalds.

Accordingly, after extensive discovery, defendant moved for summary judgment. On 3 October 2022, the trial court heard defendant's motion for summary judgment. Upon review of the motion, the arguments, the pleadings, affidavits, discovery, and the presented case law, the trial court granted defendant's motion for summary judgment of the remaining claims and dismissed the case with prejudice. Plaintiff timely appealed the final order.

II.

Plaintiff argues the trial court erred in granting summary judgment because he forecast sufficient "circumstantial evidence to create a genuine issue of material fact" to overcome summary judgment. He argues the circumstantial evidence created a presumption of sexual intercourse between defendant and Angela through the opportunity and inclination doctrine. Under the opportunity and inclination doctrine, "adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations." *In re Trogdon*, 330 N.C. 143, 148 (1991). Defendant argues plaintiff did not preserve this argument, because he failed to argue this doctrine before the lower court. We agree.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure sets out the guidelines for preserving an issue for appellate review. Under this rule, the "party

must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). Our Courts consider and apply this statutory requirement when parties argue legal theories for the first time during appellate review. *See In re A.B.*, 272 N.C. App. 13, 16 (2020); *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 348 (2011). In such situations, we will not review the argument if the appealing party did not first make this argument before the trial court and allow the lower court to make a ruling. *Rolan v. N.C. Dept. of Agric. & Consumer Servs.*, 233 N.C. App. 371, 381 (2014). As our Supreme Court says, "the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10 (1934).

In the present case, plaintiff solely argues there is circumstantial evidence under the opportunity and inclination doctrine to presume defendant and Angela had sexual intercourse. Using this doctrine, he explains the presumption should overcome summary judgment on the disputed elements of the alienation of affection and criminal conversation claims. However, plaintiff never argued this doctrine before the trial court, and there is nothing in the record to contextually imply this doctrine. Therefore, we will not consider this argument for the first time on appeal.

III.

For the foregoing reasons, we affirm the trial court's order granting defendant's motion for summary judgment.

AFFIRMED.

Judge COLLINS and Judge FLOOD concur.

Report per Rule 30(e).