

NO. COA97-942

NORTH CAROLINA COURT OF APPEALS

Filed: 16 June 1998

DAVID I. FLOREK AND WIFE, DARLENE M. FLOREK,  
Plaintiffs-Petitioners,

v.

BORROR REALTY COMPANY (formerly THE BORROR CORPORATION, d/b/a  
DOMINION HOMES), DAVID D. HUNDLEY AND WIFE, LAURINDA L. HUNDLEY,  
Defendants-Respondents.

Appeal by plaintiffs from orders entered 16 April 1997 and 2  
May 1996 by Judge Robert L. Farmer and Judge Henry V. Barnette.  
Heard in the Court of Appeals 20 April 1998.

Plaintiffs filed their complaint 7 July 1995 in Wake County  
Superior Court. This lawsuit stems from the sale of a house by  
defendant Hundleys to the Floreks. The house in question was built  
by defendant Borrer Realty Company ("Borrer") and was sold to  
defendant Hundleys in the summer of 1988 at a price below market  
value, as part of Mr. Hundley's employment agreement with Borrer.  
This agreement provided that Borrer would provide a house at below  
market price to Mr. Hundley as a condition of his employment as  
Assistant Secretary of the Borrer Corporation, doing business as  
Dominion Homes. The Hundleys resided in the house without incident  
until Mr. Hundley was terminated 14 October 1988 from his position  
with Borrer due to lack of sales production. The Hundleys  
subsequently sold the house to plaintiff Floreks 30 March 1989  
after contracting for sale in February.

As part of Mr. Florek's job with Glaxo Wellcome, plaintiffs  
resided in England for a period of time ending in the spring of

1995. Upon their return to North Carolina in April 1995, plaintiffs discovered cracks in the brick veneer of their house. After consulting with an engineer, plaintiffs learned that their house was built on unsuitable soils and therefore underpinning the walls, installing an underdrain, and recaulking would be necessary to remedy the situation.

In their complaint, plaintiffs allege claims against Borrer for breach of implied warranties and negligent construction, including both ordinary negligence and wilful and wanton negligence. Additionally, plaintiffs allege fraud, negligent misrepresentation, and unfair and deceptive trade practices claims against both Borrer and the Hundleys. As an alternative form of relief, plaintiffs seek rescission of the contract of sale against the defendant Hundleys.

Defendant Borrer filed a motion for judgment on the pleadings "on the grounds that the undisputed facts entitle Defendant to such judgment as a matter of law" and:

[m]ore particularly, the pleadings establish that Plaintiffs' claims are barred by the six-year statute of repose set forth in N.C. Gen. Stat. § 1-50(6)(e), and Plaintiffs' own Complaint fails to allege adequately the existence of any agency relationship between this Defendant and Defendant David D. Hundley at the time of any alleged misrepresentations on David D. Hundley's part.

Judge Barnette granted defendant Borrer's motion as to all claims except the fraud claim on 2 May 1996. Defendant Borrer subsequently filed a motion for summary judgment contending that there was no genuine issue of material fact on the fraud claim as

to Borrer. Judge Farmer entered judgment on defendant Borrer's motion 16 April 1997. Plaintiffs appeal from these two orders dispensing with all claims against Borrer. All claims asserted against defendant Hundleys are pending.

*Haywood, Denny & Miller, L.L.P., by Michael W. Patrick, for plaintiff petitioners.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Mark A. Ash and Christopher G. Smith, for defendant respondent Borrer Realty Company.*

SMITH, Judge.

The threshold issue before us is whether plaintiffs' appeal is interlocutory and thus not properly before this Court. "It is well established that the entry of summary judgment for fewer than all defendants is not a final judgment and is not immediately appealable unless it affects a substantial right or is certified pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990)." *Long v. Giles*, 123 N.C. App. 150, 152, 472 S.E.2d 374, 375 (1996). Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is "the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries. . . ." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982). Upon careful consideration of the issue of derivative liability, however, this Court recently held there is no possibility of inconsistent verdicts, when a principal whose

liability is derivative is determined to be not liable by the trial court and the claims against the alleged agent remain. *Long*, 123 N.C. App. at 152-53, 472 S.E.2d at 375.

Examination of plaintiffs' claims summarily establishes the lack of any possibility of inconsistent verdicts on the claims leveled solely at defendant Borrer or defendant Hundleys. We are unpersuaded by appellants' substantial right argument that the negligent construction and breach of implied warranties claims, which are only against Borrer, present the possibility of an inconsistent verdict. Thus, the only remaining claims which could potentially affect appellants' substantial rights are those alleging fraud, negligent misrepresentation, and unfair and deceptive trade practices against Borrer and defendant Hundleys. These claims, however, are based upon a principal and agent relationship. Thus, there is no possibility of inconsistent verdicts as any liability on the part of Borrer hinges upon a finding of liability on the part of defendant Hundleys. See *Long*, 123 N.C. App. 153, 472 S.E.2d 374 (finding no possibility of inconsistent verdicts when the liability of a defendant found not liable by the trial court is derivative of a finding of liability against a defendant who remains a party to the pending lawsuit).

Although appellants attempt to establish Borrer's liability as a principal on the common claims alleged against both Borrer and the Hundleys, the undisputed facts before us establish that Mr. Hundley was not an employee or agent of Borrer at the time defendant Hundleys sold the house to plaintiff Floreks. Appellants

are correct in their recognition that their negligent construction and breach of implied warranties are alleged solely against Borrer. Therefore, there is no possibility of an inconsistent verdict on these claims, or any other, and the appeal should be dismissed.

This Court has held that "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal," and appellants in the instant case fail to establish that a substantial right will be lost absent immediate appellate review. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Appellants' argument fails to establish any possibility of an inconsistent verdict. A well-established principle to which this Court adheres is:

It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

*Id.* at 380, 444 S.E.2d at 254.

In view of the foregoing, we dismiss this action in accordance with the procedural rules which are designed to "promote[] judicial economy by avoiding fragmentary, premature and unnecessary appeals and permit[] the trial court to fully and finally adjudicate all the claims among the parties before the case is presented to the appellate court." *Jarrell v. Coastal Emergency Services of the Carolinas*, 121 N.C. App. 198, 201, 464 S.E.2d 720, 722-23 (1995).

Appeal dismissed.

Judges Martin, Mark D., and McGee concur.