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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-890

Filed: 6 March 2018

Buncombe County, No. 15 CVS 289

SHAWN T. JOHNSON, Plaintiff,

v.

KELSEY IRENE HAYNES; JOHNSON HAYNES REAL ESTATE, INC.; STAY ASHEVILLE; PRIVATE DINNER CHEF; BURTON HAYNES, INC.; TIFTON HAYNES individually and as Trustee or the successor in trust under the WHITE ORCHID TRUST dated December 17, 2014, and any amendments thereto; THE WHITE ORCHID TRUST, Defendants.

Appeal by Plaintiff from orders entered 24 January 2017 by Judge Sharon Tracey Barrett in Buncombe County Superior Court. Heard in the Court of Appeals 6 February 2018.

*Currin & Currin, by George B. Currin, for plaintiff-appellant.*

*McGuire, Wood & Bissette, P.A., by Murphy H. Fletcher and Joseph P. McGuire, for defendants-appellees.*

MURPHY, Judge.

To obtain appellate review, an interlocutory appeal must be properly certified for appeal pursuant to N.C. R. Civ. P. 54(b), deprive the appellant of a substantial right, or arise from certain domestic situations under N.C.G.S. § 50-19.1. When an

appellant files an interlocutory appeal without showing that a substantial right will be affected, and the appeal meets neither of the other requirements outlined above, there is no right to appeal.

Shawn T. Johnson (“Plaintiff”) filed a single notice of appeal from the trial court’s *Order Granting Partial Summary Judgment* and *Order Denying Plaintiff’s Motion to Withdraw Admissions*. After careful review, we dismiss Plaintiff’s appeal as interlocutory.

### **BACKGROUND**

Plaintiff filed a complaint against Defendants-Appellants (“Defendants”) seeking recovery on a variety of claims arising out of his prior romantic and business relationship with Kelsey Irene Haynes. Defendants denied liability for any claims and counterclaimed for “fraud,” “assault and battery,” “IIED,” “unjust enrichment,” “monies owed,” “conversion,” “tortious interference with contract,” “breach of fiduciary duties,” “defamation,” and “unfair trade practices.”

As litigation progressed, Plaintiff was properly served with Defendants’ *Request for Admissions to Plaintiff* on 7 July 2016. Plaintiff failed to respond within 30 days and Defendants’ counsel notified Plaintiff that the requests were “deemed admitted.” Plaintiff filed a motion to withdraw admissions on 24 October 2016, and Defendants filed a motion for summary judgment on 25 October 2016. After a hearing on both motions, the trial court entered separate orders on 24 January 2017 granting

partial summary judgment for Defendants and denying Plaintiff's motion to withdraw admissions. The trial court dismissed with prejudice all but four of Plaintiff's claims. Plaintiff's surviving claims are entitled "fraudulent transfers of real and personal property," "conversion," "constructive trust," and "request for accounting." Plaintiff filed notice of appeal with this Court on 9 February 2017.

### **ANALYSIS**

"A judgment is either interlocutory or the final determination of the rights of the parties." N.C. R. Civ. P. 54(a). "An appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding . . . ." N.C.G.S. § 1-277(a) (2017). "Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002) (citation omitted). "Where the dismissal of an appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right is prejudiced and therefore such dismissal is immediately appealable." *Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006) (citation omitted). Plaintiff's appeal is interlocutory and subject to dismissal.

### **Motion for Summary Judgment**

Plaintiff acknowledges that the trial court's order granting partial summary judgment is interlocutory, but argues that it affects his substantial right to avoid inconsistent verdicts on the same issues and such issues "will be lost, prejudiced, or inadequately preserved without an immediate appeal." In order for the right to avoid two trials to be a substantial right, a two-part test must be met: "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995) (citation omitted). However, the mere fact that claims arise out of the same transaction or set of transactions does not make an order immediately appealable. *See Hamilton v. Mortg. Info. Servs.*, 212 N.C. App. 73, 81, 711 S.E.2d 185, 191 (2011) ("[W]e must evaluate the specific proof required to litigate each claim in order to determine whether inconsistent verdicts might result in the event that we refrained from considering Plaintiff's appeal on the merits at this time.").

On appeal, Plaintiff argues that,

Should this Court dismiss Plaintiff's appeal as interlocutory, [Defendants'] counterclaims would proceed to trial and the jury in that trial could render a verdict that no partnership existed between Plaintiff and [Defendants]. At that point, Plaintiff could appeal the trial court's Order Granting Partial Summary Judgment. On appeal, this Court might reverse the trial court's Order Granting Partial Summary Judgment and conclude that Plaintiff's forecast of evidence was sufficient to show the existence of a partnership between Plaintiff and [Defendants] and remand the case for a second trial on the claims that had been dismissed. At that subsequent trial, the jury could

conclude that a partnership did exist between Plaintiff and [Defendants], thereby rendering an inconsistent verdict with the jury's verdict in the first trial.

We are not persuaded by Plaintiff's argument as to his theory on the possibility for inconsistent verdicts. While the trial court's grant of partial summary judgment dismissed many of Plaintiff's claims relating to partnership, it is evident from the Record that summary judgment was granted on grounds other than the existence of a partnership. Plaintiff's surviving claims also rely on the existence of a partnership relationship. Plaintiff makes no other argument to demonstrate how a trial on the remaining claims and counterclaims would prejudice any subsequent trial of the dismissed claims. *See Hien Nguyen v. Taylor*, 200 N.C. App. 387, 394, 684 S.E.2d 470, 475 (2009) ("Although the facts involved in the claims remaining before the trial court may overlap with the facts involved in the claims that have been dismissed, plaintiffs have failed to show that they will be prejudiced by the possibility of inconsistent verdicts in two separate proceedings."). Further, "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order . . . ." *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citation omitted); *Krause v. RK Motors, LLC*, \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_\_, 797 S.E.2d 335, 339 (2017) ("It is not the role of the appellate courts . . . to create an appeal for an appellant." (internal citation and quotation marks omitted)); *see, e.g., Hanna v. Wright*, \_\_\_\_ N.C. App. \_\_\_\_, 800

S.E.2d 475 (2017); *Moon Wright & Houston, PLLC v. Cole*, \_\_\_\_ N.C. App. \_\_\_\_, 798 S.E.2d 551 (2017). As such, we do not scour the record for potential inconsistencies in future verdicts, and we limit our review to Plaintiff's argument that the trial court's order affects a substantial right to avoid inconsistent verdicts on the issue of partnership. Plaintiff has failed to demonstrate that the possibility of future litigation involving the same underlying facts could credibly result in inconsistent verdicts. Therefore, no substantial right of Plaintiff has been affected, and the current order is not subject to interlocutory review.

**Motion to Withdraw Admissions**

Plaintiff asks us to further consider whether the trial court abused its discretion in denying Plaintiff's motion to withdraw admissions. However, this order is also interlocutory, and "interlocutory discovery orders are not ordinarily appealable prior to entry of a final judgment." *Sharpe v. Worland*, 351 N.C. 159, 164, 522 S.E.2d 577, 580 (1999).

Plaintiff's argument that immediate appeal is necessary to avoid inconsistent verdicts is not applicable to discovery orders. Our Supreme Court has recognized only two exceptions to the general rule that discovery orders are not immediately appealable. The first exception is "when a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable . . . ." *Willis v.*

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*Duke Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976). The second exception is “when . . . a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right . . . .” *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. These are the only two exceptions that have been recognized. Plaintiff’s interlocutory appeal does not fall into either of the two narrow exceptions recognized by our Supreme Court.

**CONCLUSION**

Plaintiff’s interlocutory appeal is dismissed.

DISMISSED.

Judges BRYANT and BERGER concur.

Report per Rule 30(e).