An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 17-1203

Filed: 15 May 2018

Mecklenburg County, No. 16-CVS-20217

LINDA M. BOWMAN and ROBERT B. BOWMAN, Plaintiffs,

v.

BROTHERS AIR & HEAT, INC., d/b/a Brothers Heating Cooling Plumbing, Defendant.

Appeal by plaintiffs from partial summary judgment entered 17 August 2017 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 March 2018.

Parker Poe Adams & Bernstein LLP, by Michael G. Adams and Morgan H. Rogers, for plaintiffs-appellants.

York Williams, L.L.P., by Gregory C. York, for defendant-appellee.

ZACHARY, Judge.

Plaintiffs Linda M. Bowman and Robert B. Bowman appeal from the trial court's order granting Brothers Air & Heat, Inc.'s motion for summary judgment with respect to plaintiffs' claims for fraud, negligent misrepresentation, unfair and deceptive trade practices, and punitive damages. The trial court denied defendant's

motion for summary judgment with respect to plaintiffs' claims for breach of implied warranty of fitness for a particular purpose, negligence, and negligence *per se*. Plaintiffs appeal from this order of partial summary judgment. However, the trial court's order is interlocutory, and plaintiffs fail to demonstrate that they are entitled to immediate review. Accordingly, we dismiss plaintiffs' appeal.

Background

Defendant installed, serviced, and maintained the HVAC system in plaintiffs' home from 2007 to 2016. In 2013, an employee of defendant recommended that plaintiffs replace their downstairs, five-ton HVAC unit with a new five-ton air unit. Plaintiffs followed this recommendation and defendant installed a five-ton unit in a like-for-like exchange. It is undisputed that defendant did not perform a load calculation to determine what size unit was appropriate for the downstairs of plaintiffs' home. In March 2016, Mrs. Bowman noticed staining on the wall in her closet, and one of defendant's employees went to plaintiffs' home to examine the spot. Defendant's employee told Mrs. Bowman that the spot appeared to be dust or dirt and should be cleaned with soap and water. Shortly thereafter, Mrs. Bowman experienced health problems. In August 2016, defendant replaced the HVAC system's malfunctioning damper. However, in September 2016, Mrs. Bowman found large black spots on the walls above the supply vents in the master bedroom closet. As a result, she had one of defendant's employees inspect the system; the employee also

inspected the house and stated that the spots appeared to be mold. On 13 September 2016, CDA Environmental, LLC conducted a Limited Mold Inspection and reported that the plaintiffs' home was infested with black mold. The EI Group, Inc. confirmed this finding.

In October and November 2016, plaintiffs obtained estimates from three HVAC contractors to replace the system that defendant had installed. Each of the three companies provided estimates based upon five tons of cooling capacity for the first floor of plaintiffs' home. Plaintiffs chose to replace the HVAC system with a three-ton capacity air conditioner for the original first floor and enclosed breezeway together with a two-ton cooling capacity system for the master bedroom suite.

Plaintiffs commenced this action against defendant on 7 November 2016, alleging breach of implied warranty of fitness for a particular purpose, negligence and negligence *per se*, fraud, negligent misrepresentation, and unfair and deceptive trade practices claims arising from defendant's installation, service, and maintenance of the HVAC system in plaintiffs' home. On 30 June 2017, defendant moved for summary judgment on all claims. After a hearing on 7 August 2017, the trial court granted defendant's motion for summary judgment as to plaintiffs' claims for fraud, negligent misrepresentation, unfair and deceptive trade practices, and punitive damages. However, the trial court denied defendant's motion for summary judgment as to plaintiffs' claims for negligence, negligence *per se*, and breach of implied

warranty of fitness for a particular purpose. Plaintiffs appeal from this partial summary judgment order.

Discussion

On appeal, plaintiffs acknowledge that the order is interlocutory. Nevertheless, plaintiffs assert that they are entitled to immediate review in that the order "affects [a] substantial right[] . . . because the dismissed claims involve a common set of factual issues as to the remaining claims." We disagree.

There is generally "no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "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. Durham*, 231 N.C. 354, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993).

An immediate appeal may be permitted, however, where the interlocutory order affects a substantial right. As a rule, an appeal of an interlocutory order "will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final

judgment." *Hanesbrands, Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation omitted); *see also* N.C. Gen. Stat. § 1-277(a) (2017); N.C. Gen. Stat. § 7A-27(b)(3) (2017).

A substantial right has consistently been defined as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right." *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (citation, quotation marks, and brackets omitted); *see also Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) ("A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.") (citation and quotation marks omitted). "The right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed." *Id.* (citation and quotation marks omitted).

This Court "take[s] a restrictive view of the substantial right exception to the general rule prohibiting immediate appeals from interlocutory orders." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011) (citation omitted). Furthermore, the burden is on the appellant to establish 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." *Jeffreys v. Raleigh Oaks Joint*

Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citation and quotation marks omitted).

"A party's right to avoid separate trials of the same factual issues *may* constitute a substantial right." *Nello L. Teer Co., Inc. v. Jones Bros., Inc.*, 182 N.C. App. 300, 303-04, 641 S.E.2d 832, 836 (2007) (citing *Green v. Duke Power Co.,* 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)) (emphasis added). Nevertheless, "the possibility of undergoing a second trial affects a substantial right *only* when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green*, 305 N.C. at 608, 290 S.E.2d at 596 (emphasis added). "Where a party is appealing an interlocutory order to avoid two trials, the party must 'show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.' " *Clements v. Clements*, 219 N.C. App. 581, 585, 725 S.E.2d 373, 376 (2012) (quoting *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995)).

Here, plaintiffs cite *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 684 S.E.2d 41 (2009), in support of their assertion that the partial summary judgment order affects a substantial right because the dismissed claims and the remaining claims involve a common set of factual issues, which "could result in inconsistent verdicts on factual issues." *Turner*, 137 N.C. App. at 142, 526 S.E.2d at 670. In *Carcano*, this Court held

that the plaintiffs' appeal of a partial summary judgment order dismissing claims for unjust enrichment, unfair and deceptive trade practices, common law fraud/breach of fiduciary duty, constructive trust, and punitive damages, but not dismissing the claim for breach of contract, affected a substantial right because there were factual issues in common between the dismissed claims and the remaining breach of contract claim. *Carcano*, at 168, 684 S.E.2d at 47. Without immediate review, inconsistent verdicts could result because "[c]ommon to all claims is the factual issue of whether [the] defendants caused [the] plaintiffs' damages by falsely representing that 'JBSS, LLC,' validly existed as an LLC and by inducing [the] plaintiffs to invest in the business." *Id*.

Plaintiffs argue that inconsistent verdicts could result absent review of the interlocutory order in the present case because of the common factual issues: defendant's admitted failure to perform the required load calculation; defendant's recommendation of an oversized HVAC system; and defendant's representation that the staining was not mold. It is not evident, however, that these are the dispositive facts.

The conclusive issues differ from those posited by plaintiffs. Upon careful review, it is manifest that plaintiffs' claims for negligent misrepresentation, fraud, unfair and deceptive trade practices, and punitive damages hinge on (1) defendant's intent in recommending the HVAC system to plaintiffs, and (2) defendant's intent in

making statements to Mrs. Bowman regarding the discoloration on her wall. In contrast, plaintiffs' claims for negligence, negligence *per se*, and breach of the implied warranty of fitness for a particular purpose are based on defendant's duty under the North Carolina Residential Building Code to perform a Manual J load calculation prior to installing the HVAC system. The factual issues coincide neatly with the trial court's order for partial summary judgment, leaving no danger of inconsistent verdicts.

Accordingly, plaintiffs fail to demonstrate that the order for partial summary judgment affects a "substantial right and will work injury to [them] if not corrected before appeal from final judgment." *Hanesbrands, Inc.*, 369 N.C. at 218, 794 S.E.2d at 499. Therefore, we dismiss plaintiffs' interlocutory appeal.

DISMISSED.

Judges HUNTER and DIETZ concur.

Report per Rule 30(e).