IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-192

Filed: 2 October 2018

Durham County, No. 15 CVS 2972

LISA BIGGS, Individually and as Administrator, Estate of Kelwin Biggs, Plaintiffs,

v.

DARYL BROOKS, NATHANIEL BROOKS, SR., KYLE OLLIS, Individually, and BOULEVARD PRE-OWNED, INC., Defendants.

Appeal by plaintiff from order entered 4 May 2017 by Judge W. Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals 5 September 2018.

Couch & Associates, PC, by Finesse G. Couch and C. Destine A. Couch, for plaintiff-appellant.

Burton, Sue & Anderson, LLP, by Stephanie W. Anderson, for defendant-appellees Kyle Ollis and Boulevard Pre-Owned, Inc.

ELMORE, Judge.

Plaintiff Lisa Biggs, widow of Kelwin Biggs and representative of his estate, appeals from an interlocutory partial summary judgment order dismissing her claims against two of four defendants in a wrongful death action she filed after her husband was tragically killed in an automobile collision. However, because plaintiff has failed

to acquire the trial court's certification under N.C. Gen. Stat. § 1A-1, Rule 54(b) that its order is appropriate for immediate appellate review, and has failed to demonstrate under N.C. Gen. Stat. §§ 1-227 and 7A-27 that delaying her appeal until final judgment would irreparably affect her substantial rights, we dismiss plaintiff's appeal for want of appellate jurisdiction.

I. Background

On 8 January 2015, defendant Kyle Ollis, the president of defendant Boulevard Pre-Owned, Inc. (collectively, "Boulevard defendants"), sold a 1995 Chevrolet Camaro Z28 to defendant Nathaniel Brooks, Sr. ("Nathaniel"). That same day, the Boulevard defendants gave possession of the Camaro to Darryl[1] Brooks ("Darryl"), a household family member of Nathaniel's (collectively the "Brooks defendants"), authorizing Darryl to drive it off Boulevard's dealership lot. On 11 March 2015, according to plaintiff's complaint, Darryl negligently crashed the Camaro into the backend of Kelwin Biggs' car, pushing it into the opposite lane, which caused a second collision with an oncoming vehicle, tragically resulting in Kelwin's death. As a result of the collision, Darryl was later convicted by a jury of second-degree murder, felony death by vehicle, driving while license revoked for impaired driving, felony serious injury by vehicle, and reckless driving.[2]

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[1] While the complaint and order names "Daryl," the record discloses his name is spelled "Darryl," which we use throughout this opinion.

[2] Darryl's appeal from the resulting criminal judgments is currently pending before this Court. *See State v. Brooks*, No. 18-64 (N.C. Ct. App. docketed Jan. 19, 2018).

On 6 May 2015, plaintiff filed a wrongful death action against Darryl, Nathaniel, and the Boulevard defendants. She sued Darryl for negligence in driving the Camaro while unlicensed, speeding, and being inattentive and drunk when he crashed into Kelwin's car on 11 March 2015. She sued Nathaniel for negligent entrustment of his Camaro to Darryl, alleging that Nathaniel knew or should have known that Darryl's license had been revoked and he was a reckless driver, and also for liability under the family purpose doctrine, alleging that Darryl was a household family member and that the Camaro was being used as a family purpose automobile. She sued Boulevard, and Ollis individually under a piercing the corporate veil liability theory, for negligent entrustment of the Camaro to Darryl, alleging that the Boulevard defendants knew or should have known Darryl was unlicensed and a reckless driver, when it gave Darryl possession of Nathaniel's newly purchased Camaro and authorized him to drive it off the dealership on 8 January 2015. Plaintiff also asserted claims of negligent infliction of emotional distress and sought punitive damages against each defendant on the same bases underlying her negligence and negligent entrustment claims.

On 3 March 2017, the Boulevard defendants moved for summary judgment on all of the claims brought against them. After a hearing, the trial court entered an order on 3 May 2017 granting the motion, thereby dismissing the Boulevard

defendants from the action. Plaintiff appeals this partial summary judgment order; her claims against the Brooks defendants remain pending.

II. Jurisdiction

Plaintiff acknowledges the partial summary judgment order is interlocutory because it resolved only her claims against the Boulevard defendants.

"Generally, there is no right of immediate appeal from interlocutory orders." *Radiator Specialty Co. v. Arrowood Indem. Co.*, ___ N.C. App. ___, ___, 800 S.E.2d 452, 458 (2017) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 726 (1990)). Although plaintiff did not acquire certification from the trial court that its order is appropriate for immediate appellate review, N.C. Gen. Stat. § 1A-1, Rule 54(b) (2017), she claims a right to immediate appeal on substantial-right grounds, N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) (2017), primarily under an inconsistent-verdict theory, *see, e.g.*, *Radcliffe v. Avenel Homeowners Ass'n, Inc.*, ___ N.C. App. ___, ___, 789 S.E.2d 893, 901 (2016) ("[A] substantial right is affected 'where a possibility of inconsistent verdicts exists if the case proceeds to trial.' " (quoting *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627, 727 S.E.2d 311, 314 (2012))), *cert. denied*, 369 N.C. 569, 799 S.E.2d 42 (2017).

To demonstrate a right to immediate appellate review of an interlocutory order on substantial-right grounds under an inconsistent-jury-verdict theory, an appellant "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*, 219 N.C. App. at 627–28, 727 S.E.2d at 314–15 (citation, quotation marks, and brackets omitted). "Issues are the 'same' if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011) (citation omitted).

"It is the appellant's burden to present appropriate grounds for . . . acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (quoting *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005)); *see also* N.C. R. App. P. 28(b)(4) ("When an appeal is interlocutory, the statement [of the grounds for appellate review] *must contain sufficient facts and argument* to support appellate review on the ground that the challenged order affects a substantial right." (emphasis added)). "Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Hanesbrands*, 369 N.C. at 218, 794 S.E.2d at 499 (quoting *Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338).

Here, in the statement of grounds for appellate review section of her brief, plaintiff acknowledges her burden but nonetheless fails to make a sufficient showing.

In her brief, plaintiff merely asserts, without further explanation or argument, "the . . . factual issues regarding Defendants' negligence, negligent entrustment, willful, wanton negligence, recklessness, agency and punitive damages, are intertwined[,]" and "[b]oth sets of claims involve potential negligence related to the Camaro vehicle driven by Darryl Brooks and owned by Defendants." However, plaintiff has neither identified what specific claims have been dismissed and remain pending against which defendants, identified any same factual issue(s) as to any claim, nor explained how any inconsistent jury verdict might result from two trials.

Nonetheless, based on our review of the record, including the factual allegations and liability theories underlying the claims asserted in the complaint, the pleadings, and the convictions against Darryl, we discern no possibility of prejudicially inconsistent jury verdicts if plaintiff were required to undergo separate trials. While plaintiff sued both the Boulevard defendants and Nathaniel for negligently entrusting the Camaro to Darryl, the factual allegations and liability theories underlying those claims raise wholly unrelated issues. Plaintiff's claims against Nathaniel raise issues of whether he breached a duty of care to plaintiff arising from his actions in allegedly authorizing Darryl to drive the Camaro on 11 March 2015. Plaintiff's claims against the Boulevard defendants concern whether they breached a duty of care to plaintiff arising from their actions in giving possession of Nathaniel's newly purchased Camaro to Darryl and authorizing him to drive it off

the dealership lot on 8 January 2015. Whether the Boulevard defendants were negligent in entrusting the Camaro to Darryl by allowing him to drive it off the dealership lot on 8 January 2015 raises wholly separate factual issues from whether, two months later on 8 March 2015, Nathaniel was negligent in entrusting Darryl to drive that same Camaro. As a potential second trial would raise issues of whether the Boulevard defendants independently violated an unrelated duty of care from that of Nathaniel, we discern no risk of inconsistent jury verdicts if those claims were tried separately.

Additionally, although not identified by either party, we recognize our holding in *Haynie v. Cobb*, 207 N.C. App. 143, 698 S.E.2d 194 (2010), that the plaintiff sufficiently demonstrated a substantial right to justify immediate appellate review of an interlocutory partial summary judgment order dismissing his negligent entrustment claim against an automobile owner where the underlying negligence claim against the driver remained pending. *Id.* at 145–47, 698 S.E.2d at 197. We reasoned the first jury may find the driver negligent, while the second jury may find the driver not negligent, and thus find the owner not liable under a negligent entrustment theory. *Id.* at 147, 698 S.E.2d at 197. Here, contrarily, the convictions against Darryl arising from the 11 March 2015 incident establish no similar concern if the claims against Darryl and the Boulevard defendants were tried separately.

Plaintiff also attempts to rely on *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 430 S.E.2d 476 (1993), to support another substantial right-theory—that is, the "substantial right to have determined in a single proceeding whether [she has] been damaged by the actions of one, some or all defendants where [her] claims arise upon the same series of transactions," *id.* at 524, 430 S.E.2d at 480—but has failed to adequately analyze or apply that case to her own. *See* N.C. R. App. P. 28(b)(6); *see also Radiator Specialty*, ___ N.C. App. at ___, 800 S.E.2d at 459 (noting that the appellant "neither applie[d] nor analogize[d] the facts or procedural posture of [a case cited to support his claimed substantial right] to its case and, therefore, fail[ed] to establish adequately that our finding of a substantial right in [that case] controls [the appellant's case]"). Nonetheless, we note that although the claims arise from the same motor vehicle collision, as concluded above, the basis for liability of the Boulevard defendants arises from its actions of giving Darryl possession of Nathaniel's newly purchased Camaro on 8 January 2015, which is wholly independent from the liability of either of the Brooks defendants on 11 March 2015. *See Bridges v. Parrish*, 222 N.C. App. 320, 327, 731 S.E.2d 262, 267 (2012), *aff'd*, 366 N.C. 539, 742 S.E.2d 794 (2013) ("[T]he basis for the defendant's liability [for negligent entrustment] is not imputed negligence [of the driver], but *the independent and wrongful breach of duty in entrusting* his automobile to one who he knows or

should know is likely to cause injury." (quoting *Hutchens v. Hankins*, 63 N.C. App. 1, 23, 303 S.E.2d 584, 597, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983))).

Further, the substantial right identified is inapplicable here because the bases for liability of Nathaniel and the Boulevard defendants are separate and based on different duties owed to plaintiff—that is, a car dealership's duty not to entrust a newly sold car to an automobile purchaser's household family member to drive that car off the dealership lot without first checking his or her driving license and record, and the purchaser of that automobile's duty not to entrust a household family member with the automobile when he or she knew or should have known, *inter alia*, that person's license had previously been revoked for impaired driving. *Cf. Myers v. Barringer*, 101 N.C. App. 168, 173, 398 S.E.2d 615, 618 (1990) ("This case . . . involves medical malpractice claims against defendants, each of whom had a separate and distinct contract from the others and each of whom owed a different duty to the [plaintiffs]. An independent contractor physician stands legally apart from a hospital which provides an environment for the physician to practice medicine. Thus, the claim against [the hospital] involves issues which are not factually the same, particularly the duty a hospital owes a patient and the duty owed by an independent contractor physician to his patient, and this appeal is premature." (citation omitted)).

III. Conclusion

Because plaintiff has failed to allege sufficient facts or argument to support her claim that delaying her appeal from the trial court's non-Rule 54(b)-certified partial summary judgment order until final judgment would irreparably affect her substantial rights, we dismiss her untimely appeal for want of jurisdiction.

DISMISSED.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).