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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-539

Filed 07 March 2023

Cumberland County, No. 20 CVS 5751

JUSTIN EMMANUEL ELLIOTT, Plaintiff,

v.

CUMBERLAND COUNTY; et al., Defendants.

Appeal by plaintiff from judgment entered 24 January 2022 by Judge D. Jack Hooks, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 23 January 2023.

*Attorney Matthew S. Bissette, for plaintiff-appellant.*

*Attorney Martin S. Driggers, Jr., for defendant-appellee Cape Fear Aviation Maintenance, LLC d/b/a Cape Fear Aviation.*

*Attorney James M. Dedman, IV, for defendant-appellee Educational Data Systems Incorporated.*

FLOOD, Judge.

Plaintiff appeals from the 24 January 2022 Order granting Defendants' Motion for Summary Judgment. We hold there is a genuine issue of material fact as to whether Plaintiff was contributorily negligent.

**I. Factual and Procedural Background**

On 17 February 2020, Justin Elliott (“Plaintiff”), Vanessa Leal (“Leal”), Dominique Northcutt (“Northcutt”), and Jake Parsons (“Parsons”) were injured in a plane crash at Gray’s Creek Airport. The crash occurred during an aviation career day sponsored by the Cumberland County Workforce Development Board (the “Board”) in partnership with Fayetteville Technical Community College (“FTCC”) and Cape Fear Aviation Maintenance (“Cape Fear Aviation”). Cape Fear Aviation is a flight school and aviation maintenance company owned and operated by Scot Smith. Educational Data Systems Incorporated (“EDSI”) is a contract company that helps with the federal Workforce Innovative and Opportunities Act (“WIOA”) to reduce unemployment. The Board, acting through EDSI, partnered with FTCC and Cape Fear Aviation to sponsor and conduct the career day. The goal of the event was to create “a career pathway for young adults and transitioning military members.”

The career day consisted of three stations: (1) the maintenance shop, where participants could see the day-to-day activities of an aircraft mechanic; (2) the aircraft, where participants could see the plane, and familiarize themselves with pre-flight and post-flight procedures; and (3) a discovery flight, where participants were allowed an opportunity to fly in the plane. A discovery flight is an introductory lesson for a person to determine whether they are interested in aviation. It is typical during these thirty to forty-five minute flights for a certified instructor to walk passengers through the basics of flying, answer any questions they may have about aviation, and

allow passengers to be on controls when they are in the designated practice area. In a discovery flight, a pilot may allow a passenger to feel the controls with their hands and feet, but passengers do not manipulate the controls themselves. All participants of the aviation career day were instructed not to touch anything without the permission of a certified flight instructor.

Plaintiff attended the event to learn about traffic controls and other areas of aviation. Plaintiff did not want to participate in the discovery flight initially, but felt pressured into it by flight instructors and other participants. During the discovery flight in question, Plaintiff was seated in the front left seat of the aircraft, Parsons was in the front right seat, Leal was in the right rear seat, and Northcutt was in the left rear seat. Nineteen-year-old Parsons was the pilot in command of the Cessna 172 that crashed and was responsible for the flight and safety of its passengers. Parsons received his flight instructor certificate in August 2019 and had logged 265 hours as an instructor at the time of the accident. The plane was scheduled to be piloted by a retired military pilot, but he suffered a migraine prior to takeoff and asked Parsons to pilot the flight instead. The change in pilots made Plaintiff even more nervous about the flight, but he did not express his concerns to anyone prior to takeoff.

At the beginning of the discovery flight, Parsons asked Plaintiff if he wanted to drive the aircraft to the runway. Plaintiff was “skeptical,” but agreed, and Parsons instructed Plaintiff how to drive the aircraft to the runway. Parsons took over control

of the aircraft once they reached the runway and instructed Plaintiff to make sure he was not touching any of the pedals during takeoff. Plaintiff alleges Parsons gave him further instructions on what to do during takeoff. During his deposition, Plaintiff made the following statement regarding those instructions:

[Parsons] told me to watch the speedometer to whenever it got to that – in between 50 or 80 miles – 75 to 80 miles per hour. And we kind of got to that point and he gave me the signal to do whatever. I’m not sure if it was a push in – again, I’m not sure if it was a push in or pull out. Did that. And then that’s when we proceeded to take off.

Plaintiff testified he let go of the controls and grabbed the safety handlebar when the plane felt as if it was vertically straight up in the air. Plaintiff blacked out “for a quick second,” and never put his hands back on the controls. After the plane was in a nearly vertical position, it stalled, and then came crashing back down to the ground.

As a result of the crash, Plaintiff suffered two broken ankles, a cracked sternum, lacerations to the head, and injuries to the back. Parsons suffered several broken bones in his ankle, two fractured and one broken vertebrae, extensive fractures to the left side of his face, a broken clavicle, and injuries to his kidneys and lungs. Due to the extent of his injuries, Parsons has no memory or personal knowledge of anything that occurred during the flight. Leal and Northcutt were also severely injured.

In her deposition, Elayne Humphrey (“Humphrey”), a certified flight instructor who witnessed the crash, recounted statements made to her by Plaintiff and Leal

following the crash. While visiting Plaintiff and Leal at the hospital, Humphrey asked Plaintiff what happened, to which he allegedly responded: “when [Plaintiff] took off, he pulled back and he kept pulling back until all the buttons and noises were screaming at him, and [Parsons] was yelling at [Plaintiff] to let go, and he couldn’t.”

Humphrey further testified in her deposition it is standard procedure to allow passengers to shadow or “ghost” the pilot on controls. During the aviation career day, Humphrey allowed a passenger to have his hands on the controls the entire time, including during takeoff. This “standard procedure” was corroborated, as it pertains to the aviation career day, by Lee Howell (“Howell”), a representative for EDSI. Howell provided deposition testimony regarding the discovery flight he participated in, stating Northcutt was in the front seat and had her hands on the controls the entire flight. From Howell’s position in the backseat, he could not ascertain whether Northcutt was controlling the plane, but she had her hands on the airplane controls during takeoff. Parsons, however, gave contradictory deposition testimony by stating he “never” let any passenger hold the controls during “takeoff or landings” of a discovery or introductory flight:

[M]y practice, or the way I always do things with discovery flights, never during takeoff or landings should the student be on the controls. . . . the only people I have allowed to be on the controls while flying is someone who’s had their license or was doing flight lessons with me.

On 19 October 2020, Plaintiff filed a complaint in Cumberland County Superior Court alleging negligence against Scot Smith, Roger Smith, Cynthia Smith,

Parsons, and Cape Fear Aviation (collectively the “Cape Fear Aviation Defendants”); and EDSI.<sup>1</sup> On 29 December 2020, Defendant EDSI filed an answer and counterclaims, claiming common law indemnity and contribution. On the same day, the Cape Fear Aviation Defendants and Defendant EDSI (collectively “the Defendants”) filed individual Answers and asserted counterclaims for negligence and property damage against Plaintiff. On 24 September 2021, Defendant EDSI moved for summary judgment and dismissal of all claims by Plaintiff. The Cape Fear Aviation Defendants likewise filed a Motion for Summary Judgment, alleging Plaintiff was contributorily negligent and the sole proximate cause of the crash. The trial court granted both motions, concluding Plaintiff was contributorily negligent, and no act or omission of Defendants was the proximate cause of the accident. Defendants’ counterclaims against Plaintiff are still pending in Cumberland County Superior Court. Plaintiff filed notice of appeal from the order on 22 February 2022.

## **II. Jurisdiction**

As a threshold matter, we must determine whether this appeal is properly before this Court. “Generally, there is 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 order or judgment is interlocutory if it is made

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<sup>1</sup> Plaintiff also filed claims against FTCC, Cumberland County, and Cumberland County employees Peggy Aazam, and Nedra Clayborne Rodriguez. Plaintiff’s claims against FTCC remain pending in superior court. Cumberland County, Aazam, and Rodriguez were voluntarily dismissed from the suit.

during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.” *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). In the present case, the trial court’s Order dismissing Plaintiff’s claims is interlocutory because it did not dispose of all issues but requires further action on Defendants’ counterclaims. *See N.C. Dept. of Transp.*, 119 N.C. App. at 733, 460 S.E.2d at 334.

This general rule supports the aim of the appellate process “to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment.” *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (quoting *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 699, 671 (1951)). “Accordingly, interlocutory appeals are discouraged except in limited circumstances.” *Id.* at 311, 698 S.E.2d at 40. These limited circumstances can arise when the trial court certifies the case for immediate review, or if the ruling deprives the appellant of a substantial right that will be lost absent immediate review. *See* N.C. R. Civ. P. 54(b); *see also* N.C. Gen. Stat. § 7A-27(b)(3) (2021).

In this case, the trial court declined to certify the order for immediate appeal. Plaintiff instead argues the merits of this case should be heard because the trial court’s order affects a substantial right under N.C. Gen. Stat. § 1-277(a). Our Supreme Court has determined a “substantial right is ‘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) (quoting *Oestreicher v. Am. Nat’l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)).

The “substantial right” doctrine has developed into a two-part test requiring the appellant to, first, show the right is “substantial,” and, second, the enforcement of the substantial right would be “lost, prejudiced, or be less than adequately protected” if the ruling is not reviewed before the final judgment. *J&B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5–6, 362 S.E.2d 812, 815 (1987). “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). “An appellant is required to show ‘that the same factual issues are present in both trials *and* that [Appellant] will be prejudiced by the possibility that inconsistent verdicts may result.’” *Greenbrier Place, LLC v. Baldwin Design Consultants, P.A.*, 280 N.C. App. 144, 147, 866 S.E.2d 332, 335 (2021) (emphasis in original) (citation omitted); *see also Carcano v. JBSS, LLC*, 200 N.C. App. 162, 168, 684 S.E.2d 41, 47 (2009) (finding the factual issue of whether defendants caused plaintiffs’ damages was a factual issue common to all claims).

Defendants use multiple unpublished cases, without indicating their



unpublished status, to argue no substantial right is involved. *See* N.C.R. App. P. 30(e)(3). We disagree. The order granting Defendants' Motion for Summary Judgment concluded Plaintiff was contributorily negligent and the sole proximate cause of the accident. A determination of the Cape Fear Aviation Defendants' negligence claims against Plaintiff has not yet been reached. Therefore, whether Plaintiff was negligent is a factual issue common to his negligence claims against all Defendants and the Cape Fear Aviation Defendants' negligence claims against Plaintiff. *See Carcano*, 200 N.C. App. at 168, 684 S.E.2d at 47. Further, Plaintiff would be prejudiced by the possibility of inconsistent verdicts because a subsequent trial of Plaintiff's negligence claims against Defendants could find Plaintiff was not negligent, where a trial of the Cape Fear Aviation Defendants' claims against Plaintiff could find Plaintiff was negligent. *See Greenbrier*, 280 N.C. App. at 147, 866 S.E.2d at 335.

Defendant EDSI's claims, however, were for contribution and indemnity which are derivative of a finding of liability against Defendant EDSI for injuries suffered by Leal and Northcutt. Unlike the Cape Fear Aviation Defendants, Defendant EDSI's claims do not involve the same factual issues as Plaintiff's claims of negligence because they do not assert negligence claims against Plaintiff. Moreover, there is no possibility of inconsistent verdicts because if Defendant EDSI is found liable to Leal or Northcutt, EDSI could indemnify Plaintiff regardless of whether Plaintiff is found negligent. *See Long v. Giles*, 123 N.C. App. 150, 153, 472

S.E.2d 374, 375–76 (1996) (holding issue of liability was derivative of a finding of liability against defendant, and therefore, did not involve a substantial right). Nevertheless, for the sake of judicial economy, we will review the merits of Plaintiff's appeal against both the Cape Fear Aviation Defendants and Defendant EDSI. *See Valentine v. Solosko*, 270 N.C. App. 812, 814, 842 S.E.2d 621, 624 (2020) (“where judicial economy will be served by reviewing the interlocutory order, we will treat the appeal as a petition of writ of certiorari and consider the order on the merits.”).

This Court therefore finds, the appeal of Plaintiff's claims against the Cape Fear Aviation Defendants affect a substantial right of Plaintiff's and will be considered in full. Plaintiff's appeal of claims against Defendant EDSI do not involve a substantial right, but will be considered on its merits to serve judicial economy. *See Valentine*, 270 N.C. App. at 814, 842 S.E.2d at 624.

### **III. Analysis**

The issue on appeal is whether the trial court erred in granting Defendants' Motion for Summary Judgment by concluding Plaintiff was contributorily negligent. Plaintiff argues the trial court erred in granting Defendants' Motions for Summary Judgment as to Plaintiff's contributory negligence. Viewing the forecast of evidence presented in the light most favorable to Plaintiff, we agree.

#### **A. Standard of Review**

“Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that ‘there is no genuine issue

as to any material fact and that any party is entitled to a judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). Summary judgment is proper when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. R. Civ. P. 56(c). Summary judgment, however, “is rarely appropriate” in contributory negligence cases, and “only where the evidence establishes a plaintiff’s negligence so clearly that no other reasonable conclusion may be reached.” *Cone v. Watson*, 224 N.C. App. 241, 245, 736 S.E.2d 210, 213 (2012). “Contradictions or discrepancies in the evidence even when arising from plaintiff’s evidence must be resolved by the jury rather than the trial judge.” *Duval v. OM Hospitality*, 186 N.C. App. 390, 395, 651 S.E.2d 261, 265 (2007).

### **B. Contributory Negligence**

“Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains.” *Proffitt v. Gosnell*, 257 N.C. App. 148, 152, 809 S.E.2d 200, 204 (2017). “Contributory negligence . . . may arise where a plaintiff knowingly exposes himself to a known danger when he had a *reasonable* choice or option to avoid that danger, or when a plaintiff heedlessly or carelessly exposes himself to a danger or risk of which he knew or should have

known.” *Lashlee v. White Consol. Indus., Inc.*, 144 N.C. App. 684, 690, 548 S.E.2d 821, 825–26 (2001) (emphasis in original). “[T]he existence of contributory negligence[, however], does not depend on plaintiff’s subjective appreciation of danger; rather contributory negligence consists of conduct which fails to conform to an objective standard of behavior-the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.” *Duval*, 186 N.C. at 395, 651 S.E.2d at 265 (citation omitted).

Defendants in this case relied on statements allegedly made by Plaintiff to Humphrey following the accident to show Plaintiff was contributorily negligent. In this case, discrepancies in the forecasted evidence exist as to whether Parsons instructed Plaintiff to manipulate the controls during takeoff. Parsons gave deposition testimony stating his standard practice would never allow a first time flyer to have his hands on the controls during takeoff. Plaintiff testified he only had his hands on the controls because Parsons instructed him to. These discrepancies are noted here, but are properly resolved by a jury. *See Duval*, 186 N.C. App. at 395, 651 S.E.2d at 265.

The remaining forecasted evidence, taken in the light most favorable to Plaintiff, shows Parsons “instruct[ed Plaintiff] . . . to either push in or pull out [the yoke]” during takeoff. Under Parsons’ “instructions”, Plaintiff drove the plane to the runway. Once they reached the runway, Parsons provided further guidance on how to “cause liftoff for the plane.” Further, there is ample evidence in the Record showing

it was common for pilots to allow passengers to have their hands on the controls during discovery flights, and pilots allowed other participants of the career day event to have their hands on the controls during their introductory flights. On one hand, it is possible a jury could find Plaintiff acted as an ordinarily prudent person would have under the same or similar circumstances, as indeed other participants of the career day had, in following the instructions of Parsons and fully participating in the discovery flight. *See Duval*, 186 N.C. App. at 395, 651 S.E.2d at 265. On the other hand, it is also possible a jury could find Plaintiff had a reasonable alternative by not participating in the flight, or allowing Parsons to control the plane. *See Lashlee*, 144 N.C. App. at 690, 548 S.E.2d at 825–26. We therefore reverse the trial court’s order granting summary judgment in favor of Defendants.

#### **IV. Conclusion**

We hold there is a genuine issue of material fact as to whether Plaintiff was contributorily negligent.

REVERSED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).