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CIVIL LIABILITY

Summary Judgment Upheld In Sexual Assault Case

After returning home from her job as an analyst in Sara Lee Corporation's business government department on August 24, 2005, Penny Fox called the manager of her department, Prudy Yates, and reported that, as she was preparing to leave for the day, one of her coworkers, John Ziekle, came up behind her, trapped her in her cubicle, put his arm around her neck, and fondled her breast.

Although she later complained that Yates told her not to report Ziekle's misconduct, Fox called the company's HR Director, Amy Bostwick, the next day, described the assault, and arranged a meeting the following day. After telling Fox she would investigate the incident, Bostwick conferred with Nathan Chapman, the Senior HR Manager in Ziekle's department, interviewed Ziekle, suspended him, and later terminated his employment without allowing him to return to the workplace.

Except for a few days that December, Fox also did not return to work, although from the company's perspective she was free to do so. Instead, after waiting until September 2009 to file her complaint, she sued Ziekle and Sara Lee, alleging assault, battery, false imprisonment, and negligent and intentional infliction of emotional distress. When Ziekle failed to answer, the trial court entered a default judgment against him for \$752,492. However, it granted Sara Lee's Rule 12(b)(6) motion to dismiss on grounds that Fox's

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WORKERS' COMPENSATION

There were no published workers' compensation decisions issued by our appellate courts in October.

DENNIS MEDIATIONS, LLC

GEORGE W. DENNIS III

NCDRC CERTIFIED SUPERIOR COURT MEDIATOR

NC INDUSTRIAL COMMISSION MEDIATOR

dennismediations@gmail.com

919-805-5002

www.dennismediations.com

claims were barred by the statute of limitations. Fox appealed to the Court of Appeals.

On April 5, 2011, in *Fox v. Sara Lee Corp.*, 210 N.C. App. 706 (2011) ("*Fox I*"), the Court found that Fox abandoned her assault, battery, and false imprisonment claims, but it also concluded that she was "under a disability at the time she suffered the severe emotional distress which caused her claims to accrue" and, therefore, was "an incompetent adult" for purposes of tolling the statute of limitations. So, it reversed the dismissal of her emotional distress claims and remanded the case for them to be addressed by the trial court.

After Sara Lee answered the complaint, Fox voluntarily dismissed her negligent infliction of emotional distress (NIED) claim, leaving as the sole surviving cause of action an intentional infliction of emotional distress (IIED) claim. Sara Lee then filed a motion for summary judgment, which was granted by the trial court. Fox appealed.

On October 21, in *Fox v. Sara Lee Corporation* ("*Fox II*"), the Court of Appeals found that supervisor Yates' "erroneous advice" to not report Zickle's assault "at best ... caused [Fox] to delay reporting defendant Zickle's actions to Ms. Bostwick for a period of time from the evening of 24 August 2005 until 25 August 2005." It was "unable to discern what effect, if any, Ms. Yates' allegedly erroneous instructions ... had upon plaintiff's actions," since she disregarded them by reporting the alleged assault to the company's HR Director and then met with her to discuss the incident in more detail.

The Court found no merit in Fox's contention that Sara Lee was liable because it ratified Zickle's allegedly tortious conduct. While it agreed with plaintiff that, in considering a motion for summary judgment, "the evidence must be viewed in the light most favorable to the nonmoving party and all inferences from that evidence must be drawn against the moving party," it found that in the present case "[t]o the

extent that there are any genuine issues raised by the evidence, ... they are not material, since even if we view the evidence in the light most favorable to plaintiff, it does not support ratification by ... Sara Lee."

Distinguishing the cases cited by Fox in support of her appeal, *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431 (1989), and *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409 (1996), the Court held that, to prove ratification, "plaintiff must first show that defendant Sara Lee 'had knowledge of all the material facts and circumstances relative to the wrongful act, and ... by words or conduct, show[ed] an intention to ratify the act.'" In this case, there was only one act alleged, "the 24 August 2005 groping," and not the kind of "continuous course of conduct" present in *Denning-Boyles* and *Brown*. "Instead of ratifying, or even briefly tolerating, defendant Zickle's conduct, ... Sara Lee took action to protect plaintiff from further wrongful conduct" by immediately initiating an investigation, completing it quickly, and terminating Zickle's employment. Therefore, the Court found no error in the trial court's granting of Sara Lee's motion for summary judgment.

Res Judicata Held Inapplicable

In September 2006, Hristos and Maria Basmases signed a promissory note in which they agreed to repay the \$304,056 they borrowed from New Century Mortgage Corporation to purchase their home in Iredell County. The loan, which was secured by a deed of trust, was later sold to Wells Fargo Bank. After the Basmases stopped making mortgage payments in early 2009, Wells Fargo filed a petition to foreclose, but it was denied by Judge Theodore Royster because Wells Fargo failed to produce evidence that it was a "holder" of the note in accordance with the Uniform Commercial Code.

When Wells Fargo filed a second foreclosure petition in March 2012, the Basmases sought a permanent injunction and declaratory judgment that foreclosure was barred by *res judicata*.

However, the trial court disagreed. Its order denying the requested relief found that “[n]ew facts have occurred since Judge Royster’s ... order ... by way of ... Defendants’ presentation of the original Note ..., creating a change in circumstances that would preclude any *res judicata* effect of said order....” Plaintiffs then gave notice of appeal.

On October 7, in *Basmas v. Wells Fargo Bank National Association*, the Court of Appeals found that while the essential elements of *res judicata* are “(1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and the later suit; and (3) an identity of parties or their privies in both suits,” the Supreme Court added a caveat to that rule in *Flynt v. Flynt*, 237 N.C. 754 (1953), in which it held that “the estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties when in the interval the facts have changed or new facts have occurred which may alter the legal rights ... of the litigants.”

In the present case, because the Basmases failed to properly preserve their objection to the trial court’s finding that their continued default on the loan after entry of Judge Royster’s order constituted “new facts,” and since they did not challenge the trial court’s finding that Wells Fargo’s documentation of its status as holder of the promissory note was another “change in circumstances that would preclude any *res judicata* effect of said order,” the trial court did not err in denying the Basmases’ claim for declaratory relief.

Interlocutory Appeals Dismissed

Whitehurst Investment Properties, LLC v. NewBridge Bank

In December 2001, Henry James Bar-Be-Que, Inc. (“HJBBQ”) leased a 2.28 acre tract of land from Starmount Company pursuant to a “Ground

Lease” that called for monthly rent payments of \$4,966 and provided that if the property were subleased, Starmount would be entitled to any rent payments made by the sublessee in excess of the amount owed under the Ground Lease. HJBBQ subsequently obtained a loan from NewBridge Bank to construct a building on the property and secured the debt with a Deed of Trust that provided for the bank to receive any excess rent payments made by a sublessee.

After Starmount sold the property to Whitehurst Investment Properties, HJBBQ defaulted on the loan. In an “Assignment in Lieu of Foreclosure,” it assigned its interest in the Ground Lease to Henry Properties, LLC (“HP”), a wholly owned subsidiary of NewBridge. When HP subleased the property to REFS, LLC for \$9,500 per month, a dispute arose over which party was entitled to that portion of the rent payments made by REFS that exceeded \$4,966.

The trial court entered judgment in favor of NewBridge and HP, but on August 21, 2012, the Court of Appeals reversed in *NewBridge v. Kotis Holdings, LLC*, __ N.C. App. __ (2012), holding that, in exchange for the “Assignment in Lieu of Foreclosure,” the Deed of Trust executed by HJBBQ was cancelled. Therefore, the “Ground Lease” became the controlling contract, and under it, any excess rent payments made by the sublessee were owed to Starmount and, therefore, to Whitehurst.

On remand, the trial court granted Whitehurst’s motion for summary judgment. Nevertheless, HP refused Whitehurst’s demand for payment of the excess rent, so it sued NewBridge and HP, claiming that because HP was NewBridge’s alter ego, the bank was liable for the excess rents received by HP. The defendants moved to dismiss on *res judicata* and collateral estoppel grounds, but their motion was denied by the trial court. NewBridge appealed.

On October 21, in *Whitehurst Investment Properties, LLC v. NewBridge Bank*, the Court of Appeals dismissed the appeal because

NewBridge “failed to demonstrate how a substantial right would be lost without immediate review of the trial court’s interlocutory order.” It found that “the burden is on the party seeking review of an interlocutory order to show how it will affect a substantial right absent immediate review,” and while there is caselaw holding that denial of a motion for summary judgment based on *res judicata* or collateral estoppel *may* affect a substantial right, “to meet its burden of showing how a substantial right would be lost without immediate review, the appealing 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.”

In the present case, because the sole claim at issue in the prior action was Whitehurst’s request for a declaratory judgment to determine which party was entitled to excess rent payments, whereas the purpose of the subsequent action was to collect those payments, the Court found that “the claims asserted here are distinct from those litigated in the First Action, [so] NewBridge has failed to demonstrate the existence of ... an inconsistent verdict and consequently failed to show how a substantial right would be deprived without immediate appellate review.” As a consequence, it dismissed NewBridge’s appeal.

Campbell v. Campbell

In May 2012, Suzanne Davis and William Campbell separated after a decade of marriage. Davis filed separate complaints for equitable distribution and absolute divorce. Campbell did not oppose Davis’ motion for summary judgment in the divorce action, and it was granted by the trial court. He *did* file an answer and counterclaim in her equitable distribution action, but mistakenly failed to assert his own claim for equitable distribution.

Davis voluntarily dismissed her equitable distribution claim. Because, under N.C.G.S. § 50-11(e), entry of an absolute divorce judgment bars

new claims for equitable distribution, Davis’ voluntary dismissal permanently ended all equitable distribution litigation, so Campbell filed a Rule 60(b) motion to set aside the divorce judgment, contending that his failure to assert a claim for equitable distribution was the result of excusable neglect, as his attorney had recently given birth to a premature baby that weighed less than two pounds and was hospitalized with life-threatening conditions. He instructed her to file a claim for equitable distribution, and she thought she had, but she mistakenly failed to do so, having been distracted by her newborn’s medical needs. The trial court granted Campbell’s Rule 60(b) motion and set aside the absolute divorce judgment. Davis appealed.

On October 21, in *Campbell v. Campbell*, the Court of Appeals dismissed the appeal for lack of appellate jurisdiction. It found the trial court’s Rule 60(b) order “a textbook example of a non-final, interlocutory order.” And, while interlocutory orders entered before a final judgment are immediately appealable if (1) the trial court certifies the case for appeal under Rule 54(b) or (2) “the challenged order affects a substantial right ... that would be lost without immediate review,” neither exception to the general rule against interlocutory appeals applied in this case.

Although the trial court issued an order entitled “Certification of Order for Immediate Appellate Review” purporting to authorize an immediate appeal under Rule 54(b), the Court held that Rule 54 only applies when the trial court has entered “a final judgment as to one or more but fewer than all of the claims or parties,” whereas in the present case, the Rule 60(b) order from which appeal was taken was not a “final judgment on some but not all claims.” Because “[i]t is well-settled that the trial court’s mistaken certification of a non-final order under Rule 54(b) is ineffective and does not confer appellate jurisdiction,” the Court found no merit in Davis’ argument that her appeal was properly before it under Rule 54.

It also found no merit in her argument that the trial court's Rule 60(b) order affected a substantial right because "[t]his Court, and our Supreme Court, repeatedly have held that Rule 60(b) motions setting aside the entry of summary judgment (as happened here) *do not* affect a substantial right."

As for Davis' argument that those cases were not controlling because the trial court's Rule 60(b) order was "analogous to the denial of a motion based on collateral estoppel, which affects a substantial right," the Court found that collateral estoppel did not apply. Its purpose is to prevent repetitious lawsuits and ensure that parties "are not forced to re-litigate issues that were fully litigated and actually determined in previous legal actions," whereas in the present case, the trial court order at issue "will not force Ms. Davis to re-litigate equitable distribution issues ... already ... determined by a court in an earlier proceeding." As no court had yet adjudicated the parties' equitable distribution claim, the Court found that "Ms. Davis cannot rely on our collateral estoppel precedent to immediately appeal the trial court's Rule 60(b) order."

Having failed to establish that the trial court's order deprived her of a substantial right, and as Rule 54(b) did not apply, the Court dismissed Davis' appeal for lack of appellate jurisdiction.

The full text of the appellate decisions summarized in this newsletter can be found at www.nccourts.org.

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GEORGE W. DENNIS III

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