251 N.C. App.—No. 2 Pages 372-527

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 14, 2019

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

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[1]Sworn in 1 January 2017 [2]Sworn in 1 January 2017 [3]Appointed 24 April 2017
[4]Retired 31 December 2016 [5]Retired 24 April 2017 [6]Appointed 1 August 2016. Term ended 31 December 2016.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis[7]

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

[7]Retired 31 August 2018.

COURT OF APPEALS

CASES REPORTED

FILED 30 DECEMBER 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appeal and Error—appealability—equitable distribution action terminated—other matters discussed—An equitable distribution action was effectively terminated by a trial court order declaring a prior equitable distribution order void, and the Court of Appeals had jurisdiction, even though other pending matters may have been discussed. **Hogue v. Hogue, 425.**

Appeal and Error—appealability—guilty plea—The Court of Appeals (COA) had jurisdiction to hear defendant's appeal of her guilty plea. The COA was bound by the Supreme Court's decision in *Dickens*, and thus, defendant had a direct right of appeal pursuant to N.C.G.S. § 15A-1444(e). **State v. Zubiena, 477.**

Appeal and Error—appealability—notice of appeal—motion to amend—Although plaintiffs contend the trial court abused its discretion by denying their motion to amend the complaint, the Court of Appeals did not have jurisdiction to review the trial court's order. Plaintiff's' notice of appeal did not refer to or encompass this issue, nor could the issue be fairly inferred from the language in the notice of appeal. **Gause v. New Hanover Reg'l Med. Ctr., 413.**

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

ADELMAN v. GANTT

[251 N.C. App. 372 (2016)]

JEFFREY A. ADELMAN, PLAINTIFF
v.
LEROY GANTT, DEFENDANT

No. COA16-339

Filed 30 December 2016

1. Easements—easement implied by prior use—easement by necessity

The trial court did not err by granting plaintiff an easement implied by prior use and by necessity. Plaintiff reasonably believed the entire concrete driveway would continue to serve in the same manner as it had been for the past forty years. Further, plaintiff established the two elements required to obtain an easement by necessity over the concrete driveway.

2. Easements—sufficiency of description—motion for new trial —motion for supplemental proceedings

The trial court did not err by denying plaintiff's motion for a new trial or for supplemental proceedings. The trial court's description of the easement in the March 2015 judgment met the criteria for finding an easement implied by prior use and by necessity. Further, the information provided by Exhibit 1 was not new or additional since it provided an almost identical survey to the one put into evidence during the trial.

Appeal by defendant from judgment entered 30 March 2015 and order entered 6 October 2015 by Judge Karen Eady-Williams in Mecklenburg County District Court. Heard in the Court of Appeals 1 November 2016.

Weaver, Bennett & Bland, P.A., by Michael David Bland, for plaintiff-appellee.

Pamela A. Hunter for defendant-appellant.

BRYANT, Judge.

Where there was competent evidence sufficient to establish each element of plaintiff's easement claims introduced at trial, we affirm. Where the trial court's description of the easement was not ambiguous, the trial court correctly denied defendant's motion for a new trial or supplemental proceedings, and we affirm.

Plaintiff Jeffrey A. Adelman owns real property located at 1904 Harrill Street in Charlotte, North Carolina known as Lot 18. Defendant Leroy Gantt owns an adjoining lot, Lot 1, at 1900 Harrill Street. Lots 1 and 18 were previously owned by a common owner, James and Kathleen Blair.

In August 1978, the Blairs conveyed Lot 1 to defendant and Lot 18 to defendant's mother. Lot 18 contains a concrete driveway that provides ingress and egress for automobiles to the rear of Lot 18 and has been so used since the time it was constructed. The property in dispute is a two-foot-wide strip of the concrete driveway, which is located on Lot 1, defendant's property, where the driveway meets the public right of way (North Harrill Street). For over forty years the property in dispute has functioned as a driveway for the occupant of Lot 18.

In 1989, defendant had his property surveyed. The survey depicted the two-foot portion of the current driveway as being part of defendant's property. The 1989 survey also illustrated a chain-link fence at the edge of the concrete driveway that separated Lots 1 and 18 on defendant's grass line.

On 30 June 2008, plaintiff acquired Lot 18. At that time, defendant's chain-link fence remained on his grass line, and the concrete driveway was free from any obstruction. When plaintiff purchased Lot 18, based on the prior use of the concrete driveway and placement of the fence, plaintiff believed the entire concrete driveway was his property and for his use and enjoyment.

On or about 1 April 2014, plaintiff hired a contractor to install fence posts and a privacy fence in his backyard. During construction, three fence posts were placed in close proximity to the parking area behind defendant's home. Defendant questioned plaintiff as to whether the posts were actually on defendant's property. Plaintiff showed defendant a survey and defendant acknowledged the fence posts were located on plaintiff's property.

On or about 2 May 2014, defendant hired a surveyor to plot his property lines. The survey revealed plaintiff's fence posts were on plaintiff's property, and also reaffirmed the findings of the 1989 survey, which illustrated that two feet of defendant's northern property fell within a portion of plaintiff's concrete driveway. On 27 May 2014, defendant hired workmen to move the chain-link fence that bordered the concrete driveway into the concrete driveway so that it aligned exactly with defendant's property line as shown on a survey thereof. The new location of the fence narrowed the driveway by two feet and made entering and exiting Lot 18 difficult for plaintiff and his guests.

As a result of defendant's relocation of the fence, plaintiff has damaged the mirrors of two of his cars and does not leave the house at night because the fence limits his ability to get out of his driveway. Plaintiff has also contemplated renting his home, but potential renters were dissuaded from renting his property upon seeing the difficulties posed by the fence and the driveway. When plaintiff had a shed built in his backyard, workers had to bring their material in through a neighbor's driveway (with the neighbor's consent), as the workers' truck could not fit in plaintiff's driveway. Although defendant contends he needs the portion of the concrete driveway behind his chain-link fence for parking, prior to this dispute he parked his car in the same spot in front of his home for thirty-nine years, and he also has a carport in the back of his lot that provides additional parking.

On 14 August 2014, plaintiff filed a complaint and summons in Mecklenburg County District Court seeking damages for nuisance, prescriptive easement, easement by prior use, and easement by necessity. Defendant filed his motion and answer on 26 September 2014.

On 5 December 2014, an Arbitration Award and Judgment was filed, which ordered defendant "to remove the portion of [the] fence from the front of his house to the street on the side that burdens the property with plaintiff." On 11 December 2014, defendant filed a request for trial *de novo*.

On 2 February 2015, a bench trial was held in the Mecklenburg County District Court, the Honorable Karen Eady-Williams, Judge presiding, regarding plaintiff's request for an easement implied by prior use and by necessity over the portion of the concrete driveway in issue. The trial court orally granted plaintiff's request for an easement on the date of the hearing. Before the written judgment was filed and entered, plaintiff submitted a proposed order to the court and attached a recent survey of the property at issue conducted in February 2015 and labeled Exhibit 1.

By written judgment entered 30 March 2015, the trial court found and concluded that plaintiff was entitled to an easement under the theories of implied easement by prior use and easement by necessity. The trial court also found defendant's placement of the fence "served no reasonable purpose for the [d]efendant," "constitute[d] a nuisance by the [d]efendant as to the [p]laintiff," and ordered defendant to remove any portion of the fence located within the concrete driveway serving plaintiff's lot.

On 1 April 2015, defendant filed a motion for a new trial based on the description of the property in the judgment as not being specific or detailed enough to satisfy the easement requirements. Defendant also contended that plaintiff's Exhibit 1, the February 2015 survey of the property in dispute, was improperly "admitted" and considered by the trial court after plaintiff closed his case-in-chief. Defendant's motions for new trial and supplemental proceeding were denied on 6 October 2015 by Judge Eady-Williams. Defendant appeals.

On appeal, defendant argues the trial court erred by (I) granting plaintiff an easement by preexisting use and by necessity over defendant's property; and (II) denying defendant's motion for a new trial.

I

[1] Defendant contends the trial court committed reversible error by granting plaintiff an easement implied by prior use and by necessity. Specifically, defendant contends there was no competent testimony or evidence that the common owner of the property intended that the use of the driveway continue (prior use), and that because plaintiff does not need the use of defendant's driveway to reach a public road, any legal theory that an easement by necessity exists is negated.[1] We disagree.

The standard of review on appeal from a judgment entered after a non-jury trial is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted). The trial court's findings of fact are "conclusive on appeal if there is evidence to support those findings." *Id.* (citation omitted). "A trial court's conclusions of law, however, are reviewable *de novo*." *Id.* (citation omitted).

"Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (citations omitted). Where specific findings are challenged, "[i]f the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary." *Boundary Dispute Between Lots 97 & 98 of C.M. Bost Estate v. R.L. Wallace Constr. Co.*, 199 N.C. App. 522, 527, 681 S.E.2d 553, 557 (2009)

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1. Defendant also challenges the trial court's Finding of Fact No. 5 which states as follows: "On February 2, 2015, at the conclusion of the hearing, the undersigned orally granted Plaintiff's request for an easement."

(quoting *Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341 (2001)). "In evaluating the credibility of the witnesses, the trial judge determines the weight to be given to their testimony and the reasonable inferences to be drawn therefrom." *Id.* (quoting *Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 184 N.C. App. 1, 10, 645 S.E.2d 810, 816 (2007)).

In the instant case, the trial court made the following findings of fact and conclusions of law relevant to easement implied by prior use and by necessity:

> 16. To establish the existence of the easement, which is a two feet portion of the concrete driveway, Plaintiff testified that when he purchased his house in June 2008, he believed he had full use of the concrete driveway based on his understanding of the prior use of this driveway. He understandably believe[d] that the entire concrete driveway was his property and for his use and enjoyment.
>
> 17. Plaintiff also provided photographs of his neighbor, the Defendant, erecting a chain link fence on a small portion of the concrete driveway, which was on the actual property line, but limiting Plaintiff's full use of the driveway and causing him concern about trying to access his back yard to park his vehicles.
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> . . .
>
> 24. Prior to in or about August 1978, both Plaintiff's and Defendant's lots had originally been owned by the same land owner, but they were later divided and Defendant's mother lived on one lot (Lot 18) while Defendant lived on the adjacent lot (Lot 1).
>
> 25. Per Plaintiff's evidence and Plaintiff's Exhibit 3 (Deed recorded August 2, 1978), the property was severed in August 1978.
>
> 26. Defendant testified that the driveway had always been between the two properties and had been used solely as a driveway when his mother resided there. It had no other use. He did not testify to any restrictions on the use of the driveway at any time when his mother lived next to him. It had been used as a driveway for over 40 years or since his mother owned the house.

27. Defendant further testified that he routinely parked on the street when his mother lived next to him. He did this for 39 years. And he has a carport at the back of his house, which is located on a corner lot.

28. During trial, Defendant never testified that he had any need to use his mother's driveway to park his vehicle or otherwise while she resided next door. This allegation came about after Plaintiff moved into his mother's former home.

. . .

31. Prior to the two plots of land being divided in 1978 and at the time that Plaintiff purchased the property in 2008, the expectation was that the driveway would be used in its entirety as a driveway for the house where Plaintiff resides (Lot 18).

. . .

CONCLUSIONS OF LAW

. . .

10. The order entered by this Court on March 30, 2015 met the criteria listed above for the finding of an easement implied by prior use and necessity to unencumber property adjacent to Defendant's property.

A. Easement Implied by Prior Use

"An easement is a right to make some use of land owned by another without taking a part thereof." *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (citation omitted). An easement is non-possessory and serves only the limited purpose that gives rise to its creation. *See id.* at 270, 192 S.E.2d at 455 (citation omitted).

> To establish an easement implied by prior use, plaintiff[] must prove that: (1) there was a common ownership of the dominant and servient parcels of land and a subsequent transfer separated that ownership, (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was "apparent, continuous and permanent," and (3) the claimed easement is "necessary" to the use and enjoyment of plaintiff['s] land.

Metts v. Turner, 149 N.C. App. 844, 849, 561 S.E.2d 345, 348 (2002) (quoting *Knott v. Wash. Hous. Auth.*, 70 N.C. App. 95, 98, 318 S.E.2d 861, 863 (1984)). "[A]n easement from prior use may be implied to protect the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer." *Id.* (alteration in original) (quoting *Knott*, 70 N.C. App. at 98, 318 S.E.2d at 863).

1. "Apparent, Permanent, and Continuous" Use[2]

"[W]here one conveys a part of his estate, he impliedly grants all of those apparent or visible [appurtenant] easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part." *Wiggins v. Short*, 122 N.C. App. 322, 328–29, 469 S.E.2d 571, 576 (1996) (citations omitted) (quoting *Carmon v. Dick*, 170 N.C. 305, 306–07, 87 S.E. 224, 225 (1915)).

Here, there was ample evidence that the concrete driveway was for access to defendant's mother's home (later, plaintiff's home), it was permanent in nature, and had been used by defendant's mother for over forty years. At trial, plaintiff testified that when he purchased his home in 2008 (1) the concrete driveway had been solely used as a driveway by the grantor (defendant's mother); (2) defendant had parking located in the front and back of his home; and (3) the chain-link fence separating the two property lots originally ran along the grass line of defendant's property rather than on the actual property line, until May 2014, when defendant hired workmen to relocate the fence onto the driveway. In addition to plaintiff's testimony, defendant introduced a survey of the property at issue, and both parties introduced photographs for the court to consider. Thus, the evidence presented at trial demonstrated that plaintiff reasonably believed the entire concrete driveway would continue to serve in the same manner as it had been for the past forty years.

2. Necessity

As with implied easements by necessity, *see infra* Section 1.B, there is a degree of necessity required in order to imply an easement by prior use. *See Smith v. Moore*, 254 N.C. 186, 190, 118 S.E.2d 436, 438 (1961). Our Courts have been markedly generous in their definition of what is "necessary" for the beneficial use of land to satisfy the element of

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2. It is undisputed that a common owner originally owned Lots 1 and 18 and the property was later severed prior to plaintiff's purchase of Lot 18. Thus, the first element of both theories of easement—implied by prior use and necessity—is not at issue.

necessity. *See*, *e.g.*, *Metts*, 149 N.C. App. at 850, 561 S.E.2d at 348–49 (holding that where an alternate road existed, but was never used, the plaintiff was still entitled to an implied easement by prior use); *McGee v. McGee*, 32 N.C. App. 726, 729, 233 S.E.2d 675, 677 (1977) (holding that where a second route was "unsuitable," the easement was reasonably necessary).

Here, competent evidence was presented by plaintiff which established the concrete driveway including the two-foot easement is reasonably necessary to plaintiff's enjoyment and use of his land. Plaintiff provided photographs and testimony for the court to consider, and specifically testified that without the access to the two feet of the concrete driveway at issue (1) plaintiff and his guests had difficulty entering and exiting his lot, (2) the restriction caused damage to the mirrors on two of his cars; (3) plaintiff does not leave his home at night because the restriction obstructs his view; (4) potential renters of the home on plaintiff's lot were dissuaded from renting the house because of the difficulty posed by the restriction in the driveway; and (5) a serviceman hired could not access plaintiff's home via the restricted driveway and was compelled to use the driveway of a neighbor.

Accordingly, the testimony, exhibits, and photographs sufficiently provided competent evidence for the trial court to find that unobstructed access to the concrete driveway was reasonably necessary, and, in turn, to find and grant an easement implied by prior use.

B. Easement by Necessity

> [A]n easement by necessity will be implied upon proof of two elements: (1) the claimed dominant parcel and the claimed servient parcel were held in common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became "necessary" for the claimant to have the easement.

Wiggins, 122 N.C. at 331, 469 S.E.2d at 577–78 (1996) (citing *Harris v. Greco*, 69 N.C. App. 739, 745, 318 S.E.2d 335, 339 (1984)).

1. Reasonable Belief

"To establish a right of way as 'necessary,' it is not required that the party thus claiming show absolute necessity. It is sufficient to show physical conditions and use which would 'reasonably lead one to believe that the grantor intended the grantee should have the right of access.' "

Id. at 331, 469 S.E.2d at 578 (quoting *Oliver v. Ernul*, 277 N.C. 591, 599, 178 S.E.2d 393, 397 (1971)).

In *Jernigan v. McLamb*, this Court held that easements by necessity are a result of the application of the presumption that whenever a party conveys property, he or she conveys whatever is necessary for the beneficial use of that property. 192 N.C. App. 523, 526, 665 S.E.2d 589, 592 (2008) (citation omitted).

Here, defendant testified that plaintiff's predecessor in interest (defendant's mother) was the only person to use the concrete driveway. Furthermore, defendant never testified that he had any need to use his mother's driveway for any purpose while she resided there. Based on defendant's testimony, it was reasonable for plaintiff to believe that his predecessor in interest conveyed the property with the right to continue to use the concrete driveway (in its entirety) for ingress and egress. Plaintiff's reasonable belief is reaffirmed by the fact that he had full use of the driveway for six years, until defendant moved the fence in 2014.

2. Essential to Use and Enjoyment

To establish an easement by necessity, the movant must show that the easement is essential to the use and enjoyment of the property. *See Oliver*, 277 N.C. at 599, 178 S.E.2d at 397 (citation omitted). When a grantee does not have "full beneficial use of their property," granting an easement by necessity is appropriate. *See Jernigan*, 192 N.C. App. at 527, 665 S.E.2d at 592 (citation omitted). In *Jernigan*, this Court granted an easement by necessity where the lack of legally enforceable access to the property at issue could have an impact on the property's value. *Id.* at 528, 665 S.E.2d at 592–93.

Here, plaintiff testified that at a certain point when he contemplated renting the house on Lot 18, potential renters were dissuaded from renting upon seeing the difficulty of entering and exiting the property via the driveway posed by the chain-link fence which fenced off two feet of the concrete driveway. Such testimony demonstrated that plaintiff's property value was negatively impacted by the obstruction of the chain-link fence erected by defendant. Therefore, sufficient evidence was provided to show that full use of the concrete driveway is essential to the plaintiff's use and enjoyment of his property.

Thus, the record reflects that competent evidence was introduced at trial to support the trial court's conclusion that plaintiff established the two elements required to obtain an easement by necessity over the concrete driveway. Accordingly, defendant's arguments as to easement implied by prior use and easement by necessity are overruled.

II

[2] Defendant contends the trial court committed reversible error when it denied his motion for new trial or for supplemental proceedings. Specifically, defendant contends that plaintiff failed to introduce competent evidence at trial for the court to determine the specific boundaries of any easement over defendant's land, and that Exhibit 1 constitutes evidence improperly submitted by plaintiff after plaintiff rested his case at trial. We disagree.

"[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (citations omitted).

> [W]here the grant of an easement of way does not definitely locate it, it has been consistently held that a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances[.] . . . It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be that which was intended by the grant.

Edwards v. Hill, 208 N.C. App. 178, 191, 703 S.E.2d 452, 461 (2010) (alterations in original) (quoting *Allen v. Duvall*, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984)). "No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement . . . are sufficient to effect that purpose . . . . The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) (citation omitted).

With regard to Exhibit 1 and defendant's contention that the description of the easement was ambiguous, the trial court made the following relevant findings of fact and conclusions of law:

> 10. Defendant further contends in his Motion that Plaintiff's "Exhibit 1," which is a recent survey of the property at issue, was admitted after the hearing and considered by this Court after the Plaintiff closed his case in chief.

11. However, at the conclusion of the trial in February 2015, this Court orally granted the Plaintiff's request for an easement without consideration or regard to the more recent survey as it did not exist.

12. Contrary to Defendant's allegations, this Court did not consider the recent survey, which had been attached to the Proposed Order and titled Plaintiff's "Exhibit 1," in its original oral ruling. This Court had no need to consider additional evidence or the recent survey as the other evidence presented by the Plaintiff was deemed sufficient for orally the [sic] granting of Plaintiff's request at the conclusion of the February 2015 hearing.

13. Furthermore, a similar survey to what was provided by Plaintiff in the 2015 survey had already been received into evidence during the February 2015 trial. This was not new information to the Court. It was virtually identical to what had been admitted during trial.

. . .

18. During the trial, Defendant introduced as his "Exhibit 1" a survey of the property that had been conducted in 1989. The survey clearly depicted the two feet portion of the current driveway as being part of Defendant's property. And Defendant testified to the same.

. . .

22. This evidence of where the property at issue was located was clear and unambiguous during the trial. And neither party objected to the introduction or admissibility of the Defendant's survey.

23. Defendant never questioned the location or description of the property at issue. He introduced the survey which clearly identified the portion of the property at issue. And, in his testimony, he detailed the exact location of the property.

. . .

33. Exhibit 1, which is the recent survey attached to the Order entered in March 2015, was provided for illustrative purposes only. It is not additional evidence that has been or was considered by this Court.

34. The description of the property provided by the parties at trial and in the March 2015 Order at issue was/is sufficient. And the description of the easement is sufficiently certain to permit with [sic] identification of the location of the easement with reasonable certainty.

. . .

CONCLUSIONS OF LAW

. . .

6. In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant. 17 Am.Jur., Easements, Sec. 25. The grant of the easement in the case at bar can be fairly interpreted without confusion or ambiguity.

. . .

11. The description of the property listed in Order dated March 30, 2015 was sufficient to meet the legal criteria for identification of the easement.

12. There is no uncertainty, ambiguity nor vagueness in the description of the easement at issue.

13. The description of the easement is sufficiently certain to permit with [sic] identification and location of the easement with reasonable certainty.

14. No additional evidence was received by the undersigned after the Plaintiff closed his case and no such evidence was considered in any of the undersigned's rulings in this matter.

Courts have described easements with terminology reflecting the expectations of the grantor and grantee, without formal descriptions such as metes and bounds. *See Metts*, 149 N.C. App. at 849, 561 S.E.2d at 348. In *Metts*, this Court found the trial court properly identified an easement by prior use despite the defendants' contention that there could not be an implied easement because there was no attempt to locate the easement (a roadway) on the ground of the defendants' property. *Id.* at 849, 561 S.E.2d at 349. Because the trial court "found that the roadway was plainly visible and appeared on the tax map," and "[t]he witnesses testified to the roadway's existence and use by affidavit[,]" this Court held this was legally sufficient to identify the easement at issue. *Id.* at 850, 561 S.E.2d at 349 (citation omitted).

Here, the trial court's description of the easement in the March 2015 judgment met the criteria for finding an easement implied by prior use and by necessity. The March 2015 order properly identified plaintiff's easement as "an easement over the portion of the concrete driveway located on Lot 1." This conclusion reflects the trial court's finding that it was the expectation and intention of the predecessor-in-interest of plaintiff and defendant that the concrete driveway located on Lot 18 provide means of ingress and egress for the owner or occupant of Lot 18. Furthermore, the identification of the easement located over the "concrete paved driveway that is physically located on the Defendant's property" described a right of way that was "plainly visible," *see id.*, and reflected plaintiff's reasonable expectation that he would be able to continue to use this right of way without encumbrances. Accordingly, the trial court correctly denied defendant's motion for new trial as the description of the easement is not ambiguous.

Defendant also contends the trial court erroneously relied on plaintiff's Exhibit 1 in finding plaintiff was entitled to an easement. However, this contention is without merit. At the conclusion of the February 2015 trial, the trial court orally granted plaintiff's request for an easement, without consideration of plaintiff's Exhibit 1, as it was not presented to the trial court at that time. Moreover, the information provided by Exhibit 1 was not new or additional; it provided an almost identical survey to the one put into evidence during the trial. Accordingly, defendant's argument is overruled. The judgment of the trial court is

AFFIRMED.

Judges CALABRIA and STEPHENS concur.

DAVID WICHNOSKI, O.D., P.A. v. PIEDMONT FIRE PROT. SYS., LLC

[251 N.C. App. 385 (2016)]

DAVID WICHNOSKI, O.D., P.A. D/B/A SPECTRUM EYE CARE AND WICHNOSKI RE, LLC, PLAINTIFFS

v.

PIEDMONT FIRE PROTECTION SYSTEMS, LLC, AND SHIPP'S FIRE EXTINGUISHER SALES AND SERVICES, INC., DEFENDANTS

AND

SHIPP'S FIRE EXTINGUISHER SALES AND SERVICES, INC., THIRD-PARTY PLAINTIFF

v.

ANDUJAR CONSTRUCTION, INC., COLONY INVESTORS, LLC, CUSTOM SECURITY, INC., AND ELECTRICAL CONTRACTING SERVICES, INC., THIRD-PARTY DEFENDANTS

No. COA16-759

Filed 30 December 2016

Civil Procedure—damage to property—partial recovery from insurance company—motion to intervene

The trial court erred by holding that Main Street America Assurance Company (Main Street), an insurance company, could not intervene by right in an action arising from water freezing and causing flooding in a commercial condominium. Although plaintiffs opposed intervention by the insurance company because they had not been reimbursed fully for their losses, the right to intervene under N.C.G.S. § 1A-1, Rule 24(a)(2) does not turn on partial or full subrogation, but on whether the insurer had a direct and immediate interest in plaintiffs' action against third-party defendants, as well whether the insurer's ability to protect its interest could be impaired or impeded by plaintiffs' action and whether its interest is adequately represented by plaintiffs.

Appeal by Proposed Intervenor from order entered 9 June 2016 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Court of Appeals 28 November 2016.

Smith Moore Leatherwood, LLP, by John W. Reis, for Proposed Intervenor-Appellant, Main Street America Assurance Company.

Goldstein Law PLLC, by Jay M. Goldstein; and Saltz Matkov P.C., by Albert S. Nalibotsky, for Plaintiffs-Appellees.

McGEE, Chief Judge.

I. Background

David Wichnoski, O.D., P.A., d/b/a Spectrum Eye Care ("Spectrum") (together with Wichnoski RE, LLC, "Plaintiffs"), is a professional corporation engaged in the practice of optometry in Unit 105 ("the unit" or "Plaintiffs' unit") of a commercial condominium building ("the condominium") located at 7615 Colony Road, in Charlotte. Wichnoski RE LLC owns the unit in which Spectrum conducts its optometry practice. Defendant Piedmont Fire Protection Systems, LLC, ("Piedmont") installed the fire sprinkler system in the condominium. Defendant Shipp's Fire Extinguisher Sales and Services, Inc., ("Shipp's") conducted professional inspection(s) on the condominium's fire sprinkler system.

On or prior to 8 January 2014, freezing water pooled in a dry-pipe section of the condominium's fire sprinkler system and caused a pipe fitting to crack. As a result of the fractured pipe fitting, water flooded several units in the building, including Plaintiffs' unit, and caused property damage.

At the time of the water loss incident ("the incident"), Plaintiffs maintained an insurance policy ("the policy") with Main Street America Assurance Company ("Main Street"). The policy contained different policy limits for individual categories of coverage. After the incident, Plaintiffs made a claim under the policy for structural damages, damages to contents, loss of income, and damages to computer equipment and data. In total, Main Street paid Plaintiffs approximately $980,440.48 under the policy.

Plaintiffs filed a lawsuit against Piedmont and Shipp's (collectively, "Defendants") on or about 11 September 2015, alleging Defendants' negligence was the direct and proximate cause of Plaintiffs' damages from the water loss incident. Plaintiffs' complaint did not mention Main Street or its payments to Plaintiffs under the policy.[1] Main Street filed a motion to intervene in the lawsuit on 29 April 2016 and attached a complaint for damages, naming all then-existing defendants. In its motion to intervene, Main Street contended that "by asserting direct claims against the third parties[,] this proposed Intervenor's Complaint would allow [Main Street] to pursue its subrogation rights against all defendants and third-party defendants in this case[.]" Main Street alleged it was entitled to both

1. Plaintiffs named Piedmont and Shipp's as the only defendants. Four additional third-party defendants were subsequently added to the action by Shipp's Amended Answer: Andujar Construction, Inc.; Colony Investors, LLC; Custom Security, Inc.; and Electrical Contracting Services, Inc.

mandatory and permissive intervention under North Carolina Rule of Civil Procedure 24 ("Rule 24"). *See* N.C. Gen. Stat. § 1A-1, Rule 24 (2015).

Plaintiffs filed a motion opposing Main Street's motion to intervene on 17 May 2016. Plaintiffs alleged that

> [s]ince Main Street only partially reimbursed its policyholders for their losses, Main Street is not entitled to assert a claim in its own name. Main Street is neither a real party in interest in this action nor a "necessary party" under North Carolina law. . . . The Court should [also] exercise its discretion [by] denying Main Street's motion, as its presence in the lawsuit will prejudice [Plaintiffs'] interests.

Plaintiffs provided only one example of "partial reimbursement" from Main Street. Plaintiffs noted that, although they claimed damages to business personal property of approximately $450,000.00, Main Street paid only $320,000.00 on that claim, which was the policy limit for that specific category of damages.

The motion to intervene was heard on 23 May 2016. Main Street first argued it had a right to intervene in the action under N.C.G.S. § 1A-1, Rule 24(a)(2), which entitles a party to intervene if

> the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Main Street argued its payment to Plaintiffs, totaling more than $980,000.00, created a "direct and appreciable interest" in the transaction at issue in the lawsuit. Plaintiffs acknowledged receiving total payments in the amount alleged by Main Street, but nevertheless maintained that they were only partially compensated for their claims because "at a minimum[,] there was an uninsured loss as to the personal property portion of [Plaintiffs'] lawsuit."

Main Street further argued that its participation in the lawsuit was necessary to protect its own interests because, "[a]bsent intervention, [a subrogated] insurer is to a large extent, at the mercy of its insured's efforts and success in recovering from the responsible third-party." According to Main Street, Plaintiffs could not adequately represent Main Street's interest in recouping its payments, because Plaintiffs claimed an *uninsured* loss of only $130,000.00. Main Street contended this could

serve as a "disincentive [for Plaintiffs] to use their resources to seek damages beyond what was necessary to make themselves whole." Main Street also argued it should be permitted to intervene as a matter of discretion under N.C. Gen. Stat. § 1A-1, Rule 24(b)(2), because its intervention in the action would not "unduly delay or prejudice the adjudication of the rights of the original parties."

Plaintiffs cited *Hardware Dealers Mutual Fire Ins. Co. v. Sheek*, 272 N.C. 484, 158 S.E.2d 635 (1968), in support of their argument that, under current North Carolina law, "[an] insurer has no . . . legal right to bring an action [against third-party tortfeasors] unless they have fully compensated their insured. . . . The insured has the sole right to bring the action and will hold in trust any monies recovered that are ultimately owed to the insurer." Despite Main Street's total payments to Plaintiffs, Plaintiffs noted that "certain [individual] components of [their] loss" were subject to policy coverage limits. In particular, Plaintiffs' policy covered damages to contents (*i.e.*, personal property) up to $320,000.00. Plaintiffs submitted a claim for personal property loss of $450,000.00. According to Plaintiffs, because Main Street paid the policy limit with respect to that particular line item, rather than the full amount of Plaintiffs' claim, Plaintiffs were only "partially reimbursed" for their total loss. Plaintiffs argued that, notwithstanding N.C.G.S. § 1A-1, Rule 24, an insurer "do[es] not have a legal right to intervene in a case where the insured has not been made whole[.]" When the trial court asked why Plaintiffs opposed intervention by Main Street, counsel for Plaintiffs submitted that "having the insurance company as a plaintiff, can have . . . a negative bearing on the fact-finder. . . . Well, if . . . the jury knows that the insured has already been paid, it's less likely that they'll – they'll even find in the insured's favor."

The trial court agreed with Plaintiffs, finding that Main Street had not paid "the full extent" of Plaintiffs' damages and that

> under established law in North Carolina, . . . the plaintiff/property owner and insured still retains the exclusive right to file the lawsuit for the recovery of the damages and to the extent that the insurance carrier has an interest in that . . . recovery by way of subrogation. . . . [T]he plaintiff/property owner, insure[d,] acts as a trustee for that recovery for the benefit of the insurance carrier to the extent of the interest of that party in any recovery and . . . in carrying out that role as trustee, . . . there is adequate protection for the interest of the insurance carrier.

The court concluded that "this is a situation that [does not] allow[] for . . . intervention as a matter of right[.]" It further found that permitting discretionary intervention by Main Street would "result in undue delay."

Main Street's motion to intervene was denied by order filed 9 June 2016. The trial court deemed *Hardware Dealers* wholly dispositive on the issue of intervention of right, finding that

> where a subrogating insurance carrier has only partially reimbursed its insured, the insured has the sole right to sue the wrongdoer. Here Main Street reimbursed [P]laintiffs, it's [sic] insured, for only a portion of their losses. Therefore, Plaintiffs have the sole right to sue to recover for the damages [allegedly] caused by the defendants.

The court further found that

> [a]llowing [discretionary] intervention at this time [would] refocus the primary direction of the litigation . . . and cause delay by requiring the amendment of pleadings. . . . The addition of the subrogating insurer as a party plaintiff may also prejudice [Plaintiffs'] rights by unnecessarily injecting insurance into [Plaintiffs'] claims against the defendants.

Main Street appeals.

II. Standard of Review

A trial court's decision regarding intervention of right is reviewable *de novo*. *Harvey Fertilizer & Gas Co. v. Pitt Cty.*, 153 N.C. App. 81, 86, 568 S.E.2d 923, 926 (2002); *see also Hill v. Hill*, 121 N.C. App. 510, 511, 466 S.E.2d 322, 323 (1996) ("Intervention of right is an absolute right and denial of that right is reversible error, regardless of the trial court's findings."). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the trial court." *Anderson v. Seascape at Holden Plantation, LLC*, 232 N.C. App. 1, 8, 753 S.E.2d 691, 697 (2014) (citation and quotation marks omitted) (alterations in original). A trial court's decisions regarding permissive intervention are reviewed for abuse of discretion only. *Harvey Fertilizer*, 153 N.C. App. at 86, 568 S.E.2d at 926. "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (citation and internal quotation marks omitted).

III. Intervention of Right

1. N.C. Gen. Stat. § 1A-1, Rule 24(a)(2)

N.C. Gen. Stat. § 1A-1, Rule 24(a)(2), provides that "anyone shall be permitted to intervene in an action:"

> When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Pursuant to this provision, the party seeking to intervene must demonstrate "(1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties." *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjust.*, 202 N.C. App. 177, 185, 689 S.E.2d 576, 583 (2010). Main Street alleges it has a right to intervene in Plaintiffs' lawsuit under Rule 24(a)(2) because it meets all three of the above requirements.

2. *Hardware Dealers*

Plaintiffs rely exclusively on *Hardware Dealers* in support of their argument that, because Main Street only "partially reimbursed" Plaintiffs for their losses related to the 8 January 2014 incident, Main Street has no right to intervene in Plaintiffs' action(s) against third-party tortfeasors for damages arising from that incident. The trial court agreed with Plaintiffs, finding that under *Hardware Dealers*, "[i]t is well-established law in North Carolina . . . that where a subrogating insurance carrier has only partially reimbursed its insured, the insured has the sole right to sue the wrongdoer." This was the only basis for the trial court's conclusion of law that Main Street was not entitled to intervene under Rule 24(a)(2). Importantly, we note that *Hardware Dealers* did not involve interpretation or application of N.C.G.S. § 1A-1, Rule 24, which had not yet been enacted when that case was pending before the trial court.[2] As discussed below, we find Plaintiffs' reliance on *Hardware Dealers* misplaced.

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2. N.C.G.S. § 1A-1, Rule 24, was ratified by the North Carolina General Assembly on 27 June 1967. Although the Supreme Court's decision in *Hardware Dealers* was filed on 12 January 1968, the trial court had dismissed the plaintiff's action on or about 24 April 1967, approximately two months before N.C.G.S. § 1A-1, Rule 24, was ratified. The rule was not raised or discussed in our Supreme Court's opinion.

In *Hardware Dealers*, the plaintiff-insurer brought suit against an alleged tortfeasor to recover the amount the plaintiff had paid to its insured, a furniture and hardware store, for damages caused by a fire. 272 N.C. at 484, 158 S.E.2d at 636. The defendant subsequently filed an affidavit in which an officer of the insured stated that the business's total losses exceeded the full amount of its insurance coverage by approximately $2,000.00.[3] The defendant argued that "therefore, . . . any action against this defendant for the damages alleged in the complaint [could] be maintained only by the insured[.]" *Id.* at 485, 158 S.E.2d at 636. Our Supreme Court agreed with the defendant, holding that

> when an insurer of property pays the insured's loss, he is subrogated to the extent of the payment to [the] insured's claim against the wrongdoer who caused the damage. If the sum paid covers the entire loss, the insurer is subrogated to the entire cause of action and may sue the wrongdoer without making the insured a party. When the insurer pays only a part of the loss, the insured must bring the suit for the entire loss in his own name. He becomes a trustee for the insurer to the extent of the amount the insurer has paid. If the insured refuses to bring the suit, the insurer may sue in its own name, for the amount it has paid, and make the insured a party defendant.

Id. at 486, 158 S.E.2d at 637. The Court concluded that the plaintiff-insurer was not the real party in interest, and that "[because] defendants have the right to demand that they be sued by the real party in interest and by none other[,]" this provided a complete defense to the plaintiff's suit.[4] *Id.* at 487, 158 S.E.2d at 638.

Main Street contends *Hardware Dealers* was implicitly overruled by *Colon v. Bailey*, 316 N.C. 190, 340 S.E.2d 478 (1986) (*per curiam*).

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3. The plaintiff did not challenge the defendant's contention that the insured's loss exceeded the amount it had paid to the insured under the insurance policy. Indeed, in a written motion to amend its complaint by making the insured a party, "the plaintiff [affirmatively] allege[d] the insured's loss exceeded the amount of plaintiff's coverage. When the [trial c]ourt ascertained this fact in the pre-trial conference, the [c]ourt concluded the plaintiff could not maintain the action." 272 N.C. at 487, 158 S.E.2d at 638.

4. The Court also held the plaintiff-insurer "had the legal right to demand that the insured assert its claim against the wrongdoer and to hold in trust for it so much of the recovery as was required to reimburse it for the amount paid. In the event the insured refused to prosecute its claim, the insurer could sue both the insured and the wrongdoer." 272 N.C. at 487, 158 S.E.2d at 638.

In *Colon*, the plaintiffs owned a restaurant that was destroyed by fire. The plaintiffs had an insurance policy with Great American Insurance Company ("Insurance Company") insuring the building in the event of fire loss and a separate policy with a different insurer ("the other insurer") insuring the building's contents. Insurance Company paid the plaintiffs the entire amount of their policy, and the plaintiffs also received payments from the other insurer. The plaintiffs subsequently signed a mutual release agreement with the defendants, who were lessees of plaintiffs' restaurant, in which the plaintiffs and defendants agreed to divide the proceeds recovered from the other insurer and further "released and discharged each other 'from all claims, suits, causes of action and charges' arising out of [the] defendants' lease of [the] plaintiffs' property." *Colon v. Bailey*, 76 N.C. App. 491, 492, 333 S.E.2d 505, 505-06 (1985).[5]

Several months after signing this agreement, the plaintiffs sued the defendants for breach of their lease agreement and negligent maintenance of equipment. Insurance Company sought to intervene, asserting "subrogation to the rights of [the] plaintiffs to the extent it had paid on [the] plaintiffs' policy." *Id.* at 492, 333 S.E.2d at 506. The defendants raised as a defense the mutual release agreement, which they contended barred all claims by the plaintiffs. The trial court denied Insurance Company's motion to intervene and entered summary judgment for the defendants. *Id.*

On appeal, the plaintiffs and Insurance Company argued that there was a genuine issue of fact as to whether the mutual release agreement released all claims or merely those claims related to the proceeds received from the other insurer. *Id.* at 493, 333 S.E.2d at 506. Insurance Company also contended it was entitled to intervention of right under N.C.G.S. § 1A-1, Rule 24(a)(2). *Id.* at 494, 333 S.E.2d at 507. This Court held that the trial court correctly interpreted the parties' mutual release agreement as a bar to the plaintiffs' suit against the defendants. We further concluded that, because summary judgment was proper, there was no pending "action" in which Insurance Company could intervene. Thus, N.C.G.S. § 1A-1, Rule 24(a)(2), which permits a party to intervene "in an action," did not apply. *Id.*

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5. This citation is to the Court of Appeals opinion, which contained the operative facts and procedural background of the case. Our Supreme Court reversed in a one-sentence, *per curiam* decision.

The dissenting judge maintained that the trial court erred in denying Insurance Company's motion to intervene:

> When [Insurance Company] moved to intervene the action was still pending, . . . and since [Insurance Company's] motion shows that it has a substantial interest in the transaction which is the subject of the suit, is so situated that the disposition of the action will impair its ability to protect that interest and its interest is not being adequately represented by [the] plaintiffs, it ha[d] the absolute right to intervene under the terms of Rule 24(a)(2).

Id. at 494-95, 333 S.E.2d at 507. Our Supreme Court subsequently reversed the decision of the Court of Appeals, "[f]or the reasons stated in the dissenting opinion[.]" *Colon v. Bailey*, 316 N.C. 190, 340 S.E.2d 478 (1986) (*per curiam*). We now consider whether the enactment of N.C.G.S. § 1A-1, Rule 24(a)(2), and the Supreme Court's *per curiam* reversal in *Colon*, modified or overruled *Hardware Dealers* with respect to partial subrogation claims.

We find *Hardware Dealers* inapposite to a discussion of mandatory intervention under N.C.G.S. § 1A-1, Rule 24(a)(2). The question at issue in *Hardware Dealers* – whether, at common law, an insurer could initiate an action against a tortfeasor to recover amounts paid to its insured – is not presently before us. Instead, the question is whether Rule 24(a)(2) entitles Main Street to intervene in an action already instituted by its insured. Nothing in the plain language of N.C.G.S. § 1A-1, Rule 24(a)(2), which was not yet in effect when *Hardware Dealers* was pending before the trial court, and which was not discussed, interpreted, or applied in the Supreme Court's decision in that case, suggests that the rule's applicability turns upon a proposed intervenor's status as partially or fully subrogated to the rights of the claimant. In the present case, because the trial court erroneously deemed *Hardware Dealers* dispositive on the issue of intervention of right, it failed to consider whether Main Street met the actual requirements of N.C.G.S. § 1A-1, Rule 24(a)(2). We do so now.

3. Interest Relating to the Property or Transaction Which is the Subject of the Action

N.C.G.S. § 1A-1, Rule 24(a)(2), first requires that a party seeking to intervene of right must "claim[] an interest relating to the property or transaction which is the subject of the action[.]" Our Supreme Court has held that

> where no other statute confers an unconditional right to intervene, the interest of a third party seeking to intervene as a matter of right under N.C.G.S. § 1A-1, Rule 24(a) must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment. . . . One whose interest in the matter in litigation is not a direct or substantial interest, but is an *indirect*, inconsequential, *or* a *contingent* one cannot claim the right to defend.

Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 459, 515 S.E.2d 675, 682-83 (1999) (citation and internal quotation marks omitted) (emphases in original). Thus, the focus under N.C.G.S. § 1A-1, Rule 24(a)(2), is not whether a proposed intervenor's interest is "partial" or "total," as Plaintiffs assert, but whether it is "direct and immediate" as opposed to "indirect, inconsequential, or . . . contingent[.]" Our appellate courts have recognized, even under the common law rule articulated in *Hardware Dealers*, that a partially subrogated insurer has a "clear . . . interest in the subject matter of [a] suit" brought by its insured. *See S & N Freight Line, Inc. v. Bundy Truck Lines, Inc.*, 3 N.C. App. 1, 6, 164 S.E.2d 89, 92 (1968); *see also Burgess v. Trevathan*, 236 N.C. 157, 161, 72 S.E.2d 231, 234 (1952) ("Since an insurance company which pays the insured for *a part of the loss* is entitled to share to the extent of its payment in the proceeds of the judgment in the action brought by the insured against the tort-feasor [sic] to recover the total amount of the loss, *it has a direct and appreciable interest in the subject matter of the action*[.]" (emphases added)). In the present case, the trial court "agree[d] . . . that [Main Street's] claim is one in which the insurance carrier has an interest[.]"

In *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987), this Court characterized subrogation as "an equitable remedy in which one steps into the place of another and takes over *the right to claim monetary damages* to the extent that the other could have[.]" *Id.*, 88 N.C. App. at 11, 362 S.E.2d at 818 (emphasis added). Thus, regardless of whether an insurer is partially or fully subrogated, the fact of subrogation "vests an equitable right to reimbursement in the insurer[.]" *Id.* at 12, 362 S.E.2d at 819. We conclude this "right to reimbursement" is an "interest" for purposes of N.C.G.S. § 1A-1, Rule 24(a)(2). This is consistent with *Colon*, in which the proposed intervenor was found to have a "substantial interest" in the suit, under Rule 24(a)(2), where it had paid "the full amount of [its insured's] *policy*[;]" *i.e.*, not necessarily the full amount of the insured's *loss*. *Colon*, 76 N.C. App. at 492, 333 S.E.2d at 505 (emphasis added).

This is also consistent with the rule followed in the federal courts, as announced by the United States Supreme Court in *U.S. v. Aetna Cas. & S. Co.*, 338 U.S. 366, 94 L. Ed. 171 (1949). In that case, the Court held:

> In cases of partial subrogation the question arises whether suit may be brought by the insurer alone, whether suit must be brought in the name of the insured for his own use and for the use of the insurance company, or whether all parties in interest must join in the action. Under the common-law practice rights acquired by subrogation could be enforced in an action at law only in the name of the insured to the insurer's use. [Our Court has] characterized this rule as "a vestige of the common law's reluctance to admit that a chose in action may be assigned, [which] is today but a formality which has been widely abolished by legislation." . . . *No reason appears why such a practice should now be required in cases of partial subrogation, since both insured and insurer "own" portions of the substantive right and should appear in the litigation in their own names.*

Id., 338 U.S. at 381, 94 L. Ed. at 185 (internal citations and quotation marks omitted) (emphasis added); *see also Virginia Electric & Power Co. v. Carolina Peanut Co.*, 186 F.2d 816, 820 (4th Cir. 1951) (holding insurance company should have been allowed to intervene in action by its insured to recover for damages sustained in a fire, because "it is elementary that in such a case an insurance company which has paid *a part of the loss* is entitled to a *pro rata* portion of any amount that may be recovered, and is entitled to join in the suit for the recovery of damages." (emphases added)); *Aikens v. Ludlum*, 113 N.C. App. 823, 824, 440 S.E.2d 319, 320 (1994) (holding that where "North Carolina decisions addressing [a rule of state civil procedure are] insufficient to answer [a] question, we are guided by federal law [if] the North Carolina version of [the rule] is virtually identical to its United States counterpart.").[6]

We conclude that the right to intervene under N.C.G.S. § 1A-1, Rule 24(a)(2), does not turn upon whether a proposed intervenor-insurer has been partially or fully subrogated to the claim(s) of its insured. Plaintiffs' interpretation would render Rule 24(a)(2), which refers only to "an interest," a nullity as applied to partially subrogated insurers. *See Quick v. Insurance Co.*, 287 N.C. 47, 55, 213 S.E.2d 563, 568 (1975)

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6. Rule 24(a)(2) of the Federal Rules of Civil Procedure is "virtually identical" to N.C.R. Civ. P. 24(a)(2). *See* Fed. R. Civ. P. 24(a)(2).

("There is a doctrine that if legislation undertakes to provide for the regulation of human conduct in respect to a specific matter or thing already covered by the common law, and parts of which are omitted from the statute, such omissions must be taken generally as evidences [sic] of the legislative intent to repeal or abrogate the same." (citation and quotation marks omitted)); *Moore v. Nationwide Mut. Ins. Co.*, 191 N.C. App. 106, 109, 664 S.E.2d 326, 328 (2008) (" 'When the legislature acts, it is always presumed that it acts with full knowledge of prior and existing law[.]' " (citation omitted)). Whether an insurer has paid part or all of an insured's loss, it has acquired "an interest" – *i.e.*, recoupment of payment(s) made to the insured – in a lawsuit by the insured to recover damages arising out of the same event or transaction that triggered the insurance payment(s).

In its motion to intervene, Main Street alleged its insurance payments to Plaintiffs "for damages to the structure, contents, loss of income, and computer equipment and data . . . totaled an amount in excess of $900,000." Plaintiffs concede they received more than $980,000.00 from Main Street. *See Councill v. Town of Boone Bd. of Adjust.*, 146 N.C. App. 103, 108, 551 S.E.2d 907, 910 (2001) (holding that "undisputed allegations [were] sufficient to establish that appellants [were] interested parties" under N.C.G.S. § 1A-1, Rule 24(a)(2)). Main Street thus satisfied the first requirement set forth in N.C.G.S. § 1A-1, Rule 24(a)(2), by demonstrating a direct and immediate interest in Plaintiffs' action against the third-party defendants. Because Main Street "claims an interest relating to the property or transaction which is the subject of [Plaintiffs'] action," the task of the trial court was to determine whether Main Street had shown a possibility of "practical impairment of the protection of that interest" and "inadequate representation of that interest by existing parties." *See Hunt v. Hunt*, ___ N.C. App. ___, ___, 784 S.E.2d 219, 223 (2016) (citation and quotation marks omitted).

4. Impair or Impede

Both the "impair or impede" and the "adequately represented" provisions of N.C.G.S. § 1A-1, Rule 24(a)(2), involve factual determinations to be made on a case-by-case basis. *See, e.g.*, *Charles Schwab & Co. v. McEntee*, 225 N.C. App. 666, 674, 739 S.E.2d 863, 868 (2013) (finding no right to intervene where proposed intervenor "ha[d] not *alleged facts* which would indicate that its interest was not adequately represented[.]" (emphasis added)); *Bailey and Assocs., Inc.*, 202 N.C. App. at 185-86, 689 S.E.2d at 583-84 (finding intervenors were entitled to intervene under Rule 24(a)(2), where facts showed numerous ways in which "they and their property would be injured" if a particular party prevailed

in the lawsuit). In the present case, the trial court made no findings with respect to Rule 24(a)(2)'s "impair or impede" prong.

The Official Comment to Rule 24 explicitly emphasizes that, under subsection 24(a)(2), "the harm to the intervenor's interest is to be considered from a 'practical' standpoint, rather than technically." *See* Official Comment to N.C.G.S. § 1A-1, Rule 24. Importantly, N.C.G.S. § 1A-1, Rule 24(a)(2), does not require that disposition of an action may "destroy" or "eliminate" a proposed intervenor's ability to protect its interest, but only that it "*may* as a *practical matter* impair or impede [the movant's] ability to protect its interest." Thus, it is not necessary that denying intervention would foreclose any possibility of recovery by the insurer. For instance, "even under subrogation law, the 'claim-splitting' rule does not in every case necessarily bar a *second* suit by a partially subrogated insurer on the same facts giving rise to a prior suit by its insured."[7] *Slurry*, 88 N.C. App. at 15, 362 S.E.2d at 821 (emphasis in original). Additionally, "[a] tort-feasor [sic] may not defeat an insurance carrier's subrogation rights when he has knowledge of the subrogated claim and thereafter secures a consent judgment or release from the injured or damaged party." *State Farm Mutual Auto. Ins. Co. v. Blackwelder*, 103 N.C. App. 656, 658, 406 S.E.2d 301, 302 (1991) (citation omitted); *cf. Johnston County v. McCormick*, 65 N.C. App. 63, 67, 308 S.E.2d 872, 874 (1983) ("The general rule in insurance subrogation cases . . . is that payment by a tort-feasor [sic] of an injured party's claim *without notice of a subrogee's interest* is a complete defense to a subrogee's claim against the tort-feasor." (emphasis added)). Because all third-party defendants[8] in the present case know of Main Street's subrogation rights as a result of Main Street's efforts to intervene in the action, a settlement between Plaintiffs and some or all of the defendants would not necessarily preclude Main Street from asserting its subrogation rights against the defendants. However, requiring an insurer to enforce its subrogation rights through separate lawsuits may nevertheless be an

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7. "[T]he common law rule against claim-splitting is based on the principle that all damages incurred as the result of a single wrong must be recovered in one lawsuit." *Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993) (citation omitted) (emphasis in original). "Under North Carolina law, a plaintiff is entitled to one compensation for all loss and damage . . . which were the certain and proximate results of the single wrong or breach of duty, and the demand cannot be split and several actions maintained for the separate items of damage." *Harris-Teeter Super Markets v. Watts*, 97 N.C. App. 101, 104, 387 S.E.2d 203, 205 (1990) (citation and internal quotation marks omitted).

8. *See supra* n.1.

impractical method of protecting the insurer's interest. *See, e.g.*, *New v. Service Co.*, 270 N.C. 137, 139, 153 S.E.2d 870, 873 (1967) ("The purpose of making the insurer a party [to the insured's suit against an alleged tortfeasor] is to determine *and to protect*, in one action, the rights of all who may have an interest in the litigation." (emphasis in original)); *Parrish v. Grain Dealers Mutual Ins. Co.*, 90 N.C. App. 646, 649, 369 S.E.2d 644, 646 (1988) (Greene, J., concurring) ("In many instances, pursuit of a subrogation claim against an underinsured tortfeasor is futile because of the financial status of the tortfeasor.").

We find that Main Street's ability to protect its interest may be impaired or impeded by the disposition of Plaintiffs' action. In its motion to intervene, Main Street contended that "[w]ithout the addition of [Main Street] in the case, . . . Plaintiffs and their counsel [could] file a voluntary dismissal or settle out with one or more of the defendants at any time[.]" Absent intervention, an insurer's ability to recover directly from its policyholder is constrained by the insured's level of success in recovering from the third parties. If Plaintiffs' ultimate recovery is insufficient to fully satisfy Main Street's subrogation rights, Main Street will have to seek recovery from numerous third parties, with uncertain prospects of success. *See State ex rel. Crews v. Parker*, 319 N.C. 354, 360, 354 S.E.2d 501, 505 (1987) (finding proposed intervenor's interest in reimbursement would "[c]learly . . . be impaired by any judgment . . . which failed to take her claim for reimbursement into account, regardless of whether she would be bound by that judgment. She would, as a practical matter, suffer the expense and inconvenience of bringing a separate suit against [the] defendant."); *see also Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (finding intervenors' ability to protect their interest would be impaired or impeded by disposition of action because "[i]f [plaintiff] prevail[ed] . . . , [the intervenors] would have to satisfy their judgment from other assets of the insureds and the existence and amount of such assets [were] questionable."); *Alford v. Davis*, 131 N.C. App. 214, 218, 505 S.E.2d 917, 920 (1998) (citing *Teague* as providing "the current approach to interpreting [N.C.]G.S. § 1A-1, Rule 24[.]").

5. Adequate Representation

We also find Main Street has satisfied Rule 24(a)(2)'s third requirement by showing its interest is not adequately represented by Plaintiffs.

While the trial court did find that "there [was] adequate protection for the interest of the insurance carrier," it did so based on the common law rationale followed in *Hardware Dealers*, that "the plaintiff/property owner . . . acts as a trustee . . . for the benefit of the [partially

subrogated] insurance carrier to the extent of the interest of that party in any recovery[.]" The mere fact that "the law imposes the duty upon [a] policyholder to act as the trustee for the insurer to the extent of the amounts paid by the insurer" does not necessarily ensure the policyholder will (or can) "adequately represent" a subrogated insurer's interest as contemplated by N.C.G.S. § 1A-1, Rule 24(a)(2). In the present case, the trial court recognized the inherent disadvantage to Main Street, finding Plaintiffs would hold "*any funds they recover* from the defendants in trust for themselves and Main Street, the subrogating insurer." Plaintiffs allege an uninsured loss of $130,000.00. Main Street, by contrast, has a vested interest of nearly one million dollars. This discrepancy alone suggests Plaintiffs cannot adequately represent Main Street's interest. Our Supreme Court has held that an insured must account to its insurer only "[w]hen the insured obtains *full satisfaction* from the wrongdoer[.]" *Insurance Co. v. R.R.*, 165 N.C. 143, 147, 80 S.E. 1069, 1072 (1914) (emphasis added). Main Street can recover directly from Plaintiffs only to the extent that Plaintiffs' ultimate recovery exceeds the amount of Plaintiffs' uncompensated losses. *See Powell v. Water Co.*, 171 N.C. 345, 352, 88 S.E. 426, 430 (1916) (noting that, where insured brings suit against tortfeasor for entire damages, insured "holds recovery *first to make good his own loss*, and then in trust for the insurer[.]" (emphasis added)).

As Main Street observed at the hearing on its motion to intervene, Plaintiffs may have little incentive "to use their resources to seek damages beyond what [is] necessary to make themselves whole." This proposition does not require an assumption that Plaintiffs would act in bad faith in their efforts to recover on Main Street's behalf; it merely acknowledges that they may encounter practical limitations that Main Street's participation could alleviate. Main Street alleged it has "all the resources to pay for a fire protection engineering expert and to assist in . . . bearing [Plaintiffs'] costs." Finally, Plaintiffs' opposition to Main Street's effort to intervene indicates that, at minimum, Plaintiffs' and Main Street's interests are not entirely aligned.

In addition to the above considerations, we note that "[o]ur courts favor the swift and efficient resolution of disputes." *Crews*, 319 N.C. at 360, 354 S.E.2d at 505. In *Crews*, the State and the intervenor had concurrent interests in obtaining reimbursement of child support payments from the defendant. When the State and the defendant submitted a proposed settlement to the trial court, the other interested party moved to intervene. The trial court denied the motion and this Court affirmed. Our

Supreme Court reversed. In addition to finding that the intervenor met the requirements of N.C.G.S. § 1A-1, Rule 24(a)(2), the Court held that

> [a]llowing the [S]tate to settle [the] defendant's obligation to pay public assistance arrearages without providing [the intervenor] an opportunity to litigate in this action her own claim for arrearages inevitably prolongs and complicates the litigation process. This is precisely the type of situation contemplated by the rule for intervention of right.

Id. at 360-61, 354 S.E.2d at 505; *see also Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 578, 541 S.E.2d 157, 163 (2000) ("The interests of judicial economy and efficiency weigh in favor of suits that will settle all of the issues in the underlying controversy."). We find this reasoning instructive in the present case.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order and hold that Main Street is entitled to intervene in Plaintiffs' lawsuit pursuant to N.C.G.S. § 1A-1, Rule 24(a)(2). Because we hold that the trial court's order must be reversed, we do not reach Main Street's additional argument regarding discretionary intervention under N.C.G.S. § 1A-1, Rule 24(b)(2). The case is remanded to the trial court with instructions to enter an order allowing intervention by Main Street.

REVERSED AND REMANDED.

Judges BRYANT and ENOCHS concur.

FINKS v. MIDDLETON

[251 N.C. App. 401 (2016)]

MARSHELLE MIDDLETON FINKS, PLAINTIFF
v.
COLIN HUMPHREY MIDDLETON (INDIVIDUALLY); AND COLIN HUMPHREY MIDDLETON, EXECUTOR OF THE ESTATE OF SYLVIA HUMPRHEY MIDDLETON; COLIN HUMPRHEY MIDDLETON, TRUSTEE OF THE SYLVIA MIDDLETON REVOCABLE TRUST; AND COLIN HUMPRHEY MIDDLETON, ATTORNEY-IN-FACT FOR SYLVIA HUMPHREY MIDDLETON, DEFENDANTS

No. COA16-630

Filed 30 December 2016

1. Appeal and Error—interlocutory orders and appeals—substantial right—inconsistent verdicts—multiple trials

Although defendants appealed from the trial court's interlocutory order denying multiple motions to dismiss, they were entitled to an immediate appeal because it affected a substantial right to avoid inconsistent verdicts in multiple trials.

2. Wills—inheritance dispute—standing—civil action

The trial court properly denied defendant brother's motions to dismiss under Rules 12(b)(1), (b)(6), and 9 in an inheritance dispute. Plaintiff sister had standing to assert a civil action and retained standing even after the mother's 2012 will was probated. The case was remanded with instructions to hold any pending caveat in abeyance until resolution of plaintiff's civil action.

Appeal by defendants from order entered 15 March 2016 by Judge Michael D. Duncan in Rockingham County Superior Court. Heard in the Court of Appeals 16 November 2016.

Scott Law Group, PLLC, by Harvey W. Barbee, Jr. and Robert G. Scott; and Willis W. Apple, PA, by Willis W. Apple, for plaintiff-appellee.

Boydoh & Hale, PLLC, by J. Scott Hale, for defendant-appellants.

ELMORE, Judge.

This appeal arises from a bitter sibling dispute between Marshelle Middleton Finks and her brother, Colin Humphrey Middleton, over Marshelle's expected inheritance of their elderly mother Sylvia Middleton's ("Sylvia") estate, which purportedly diminished in value from a net worth of over $800,000.00 in real and personal property to $0.00 in the four years preceding her death. In 2009, Sylvia allegedly

executed a will (the "2009 Will") naming Colin and Marshelle as co-executors and contemplating a virtually equal estate distribution among her three children: Colin, Marshelle, and Lexa Middleton Herzog. In early 2012, however, Sylvia created an *inter vivos* revocable trust (the "Sylvia Middleton Revocable Trust"), naming herself initial trustee and Colin successor trustee; executed a new continuing power-of-attorney, naming Colin attorney-in-fact; and executed a new will (the "2012 Will"), naming Colin executor and transferring her entire residuary estate into the Sylvia Middleton Revocable Trust. Over the next few months, Sylvia engaged in a series of transactions conveying multiple parcels of realty by deed to herself as initial trustee of the trust, to a business entity owned and operated by Colin, and to Colin, individually. In 2013, Sylvia was admitted into a nursing home due to advanced dementia. Sylvia died in 2015 with an estate value of $0.00.

Shortly after Sylvia's death, after discovering the changes to her estate plan, Marshelle sued Colin individually, as executor of Sylvia's estate, as trustee of the Sylvia Middleton Revocable Trust, and as Sylvia's attorney-in-fact, for fraud, constructive fraud, conversion, unjust enrichment, and punitive damages. Marshelle alleged that since January 2012, Colin had exploited Sylvia's diminished cognitive ability due to her progressive dementia and had unduly influenced Sylvia to revise her estate plan to benefit Colin to the exclusion of Marshelle and Lexa and to convey multiple parcels of realty to Colin or to entities within Colin's control. Colin moved to dismiss Marshelle's claims for lack of standing, failure to state a claim, and failure to plead with sufficient particularity. Hours before his motions to dismiss were heard, he filed an application to probate the 2012 Will, which was approved that day. Subsequently, Colin submitted the probated 2012 Will for consideration during the hearing on his motions to dismiss. The trial court denied Colin's motions to dismiss on all grounds. Colin appeals.

I. Background

Marshelle's complaint generally alleged the following facts. When the parties' father died in 2009, he left Sylvia an estate of approximately $800,000.00 consisting of both real and personal property. Sylvia, an only child, also inherited her parents' considerable estate, consisting of multiple parcels of real property, homes, barns, and cash.

On 2 February 2009, Sylvia executed the 2009 Will. According to its terms, Sylvia "desired that her three children[, Colin, Marshelle, and Lexa,] use the assets and property that they receive from her, in part, for the education and maintenance of their children"; that her "three children

. . . receive equal shares of certificates of deposit, IRA accounts and stocks, mutual funds, cash, etc."; that her "residuary estate . . . be given to the three children . . . equally"; and that Marshelle and Colin would serve as co-executors. Additionally, the 2009 Will devised certain homes and parcels of real property among the three siblings. After executing the 2009 Will, Sylvia began exhibiting noticeable signs of dementia.

Shortly before January 2012, Colin urged Sylvia to revise her estate plan and brought her to a law firm for that purpose. On 9 January 2012, Sylvia created the Sylvia Middleton Revocable Trust, naming herself initial trustee and Colin successor trustee. Additionally, Sylvia executed a new continuing power-of-attorney, naming Colin attorney-in-fact and Colin's wife, Davina, successor attorney-in-fact; a healthcare power-of-attorney; and the 2012 Will, appointing Colin executor and Davina successor executor.

According to its terms, the 2012 Will revoked all prior wills; bequeathed all tangible personal property to Sylvia's residuary estate; and transferred all real and personal property of her residuary estate to the Sylvia Middleton Revocable Trust. Additionally, the 2012 Will directed that Sylvia's "residuary estate . . . be added to and administered as a part of the [Sylvia Middleton Revocable] Trust created . . . for the benefit of my children, [Colin], [Marshelle], and [Lexa] . . . ."

Over the next few months, several relevant events occurred. On 1 February 2012, Colin formed "Humphrey's Ridge Resort, LLC," a business entity naming Colin as manager and member, and naming Davina, Sylvia, and the Sylvia Middleton Revocable Trust as members. On 14 March 2012, Colin brought Sylvia back to a law firm, where Sylvia executed four quitclaim deeds conveying six parcels of realty: three parcels—134.48, 39.90, and 31.60 acres—were conveyed to Humphrey's Ridge Resort, LLC; two parcels—77.53 and 0.703 acres—were conveyed to Sylvia as initial trustee of the Sylvia Middleton Revocable Trust; and one parcel—21.67 acres—was conveyed to Colin individually. On 5 June 2012, Colin brought Sylvia to a different law firm, where she executed two non-warranty deeds conveying two parcels of realty: one for a parcel of 0.572 acres, conveying an interest of one-half to Marshelle and one-half to Sylvia, as trustee of the Sylvia Middleton Revocable Trust; the other clarifying a clerical error in recording one of the previous quitclaim deeds. On 10 December 2012, Colin brought Sylvia back to the first law firm, where she as trustee of the Sylvia Middleton Revocable Trust executed a quitclaim deed conveying the 77.53-acre parcel to Humphreys Ridge Resort, LLC. In addition to these conveyances, Marshelle alleged that since January 2012, Colin "acquired numerous items of personal

property that . . . were beyond his apparent means, including . . . several cars and a new boat."

In April 2013, Colin placed Sylvia into Countryside Manor Nursing Home ("Countryside"). Sylvia's treating doctor at Countryside informed Colin that Sylvia had memory problems and needed to remain admitted due to her progressive dementia. Although Colin never informed Marshelle, Marshelle learned about Sylvia's dementia and admission into Countryside from her cousin. On 18 September 2013, when Marshelle first visited Sylvia at Countryside, Sylvia stated that she could not remember virtually anything that had occurred over the last three years, "and did not know how she got to Countryside, who brought her there and why." On approximately 31 December 2013, Marshelle met with a Countryside doctor who informed her that Sylvia had been taking "memory medication." Sylvia subsequently went "through a violent stage as a result of her advancing dementia" and then was "removed to the memory unit at Spring Arbor in Greensboro in approximately May of 2014." During the summer of 2015, Colin moved his family "from his meager mobile home located on Belews Creek Lake into the larger, more extravagant Belews Creek lakefront residence owned by [Sylvia]." On 2 August 2015, Sylvia died. After Sylvia's death, Colin refused to discuss Sylvia's estate with Marshelle or the creation or terms of the Sylvia Middleton Revocable Trust to which Colin became successor trustee.

On 27 October 2015, Marshelle sued Colin, alleging causes of action for fraud, constructive fraud, conversion, unjust enrichment, and punitive damages. Marshelle alleged that Colin breached the fiduciary duty he owed to Sylvia through a series of transactions unlawfully transferring Sylvia's assets from her estate to Colin or to entities within his control, which left nothing in her estate to be distributed upon her death to her other children, contrary to Sylvia's wishes according to the 2009 Will. Marshelle asserted that the estate planning documents Sylvia executed on 9 January 2012 were invalid, including the 2012 Will, as was the creation of the Sylvia Middleton Revocable Trust, based on Sylvia's progressive cognitive decline due to dementia and based on Colin's undue influence. Specifically, Marshelle alleged that by 9 January 2012, "the dementia suffered by [Sylvia] had progressed to the point . . . that she was not . . . legally competent to execute documents of significant import to the management and control of her assets for the remainder of her life, and/or to the ultimate disposition of her assets upon her death." Marshelle also challenged the validity of Sylvia's subsequent *inter vivos* conveyances of realty.

On 4 January 2016, Colin filed an answer, denying the existence of the 2009 Will, admitting he was named a successor trustee of the Sylvia Middleton Revocable Trust and a successor trustee of the "Sylvia Middleton Revocable Trust Agreement Amended and Restated," and filed motions to dismiss Marshelle's action pursuant to Rules 9, 12(b)(1), and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 16 February 2016, Colin filed a notice of hearing and renewed motions to dismiss. Colin's motions to dismiss were scheduled to be heard at the 22 February 2016 civil session of the Rockingham County Superior Court.

Shortly before Colin's motions to dismiss were heard, Colin initiated an estate proceeding, No. 16 E 110, and filed, *inter alia*, an application for probate of the 2012 Will, which showed an estate value of $0.00. That same day, an assistant clerk of court issued a certificate of probate for the 2012 Will. Subsequently, during the hearing on his motions to dismiss, Colin submitted the certification of probate to the trial court for consideration. By written order entered on 15 March 2016, the trial court denied Colin's motions to dismiss under Rules 9, 12(b)(1), and 12(b)(6). Colin appealed.

After the appellate record was filed, Colin filed a motion to amend the record, asserting that Marshelle had filed a caveat on 31 May 2016 seeking to invalidate the 2012 Will on grounds of lack of testamentary incapacity and undue influence[1] and seeking to include in the record Marshelle's "Estate Proceeding Summons and Petition for Caveat" because they "are relevant and directly related to the issue of [Marshelle's] standing, which is at issue on appeal." Simultaneously, Colin filed his principal brief, which makes reference to the caveat proceeding and relies upon it in making his substantial right and standing arguments. On 8 August 2016, this Court denied Colin's motion to amend the record on appeal to include Marshelle's estate proceedings summons and petition for caveat.

II. Jurisdiction

[1] It is undisputed that Colin appeals from an interlocutory order. However, Colin claims a right to appeal because, absent immediate

1. Although we have denied Colin's motion to amend the record on appeal to include Marshelle's caveat petition based upon his argument that the caveat proceedings "are relevant and directly related to the issue of [Marshelle's] standing, which is at issue on appeal," we take judicial notice of Marshelle's caveat petition for the limited purpose of explaining context and determining the appealability of this interlocutory order. *See Whitmire v. Cooper*, 153 N.C. App. 730, 735 n.4, 570 S.E.2d 908, 911 n.4 (2002) (taking judicial notice of a related action between the parties and relying on that judicially noticed action's pendency in holding that the trial court properly dismissed the action on appeal), *disc. review denied*, *appeal dismissed*, 356 N.C. 696, 579 S.E.2d 104 (2003).

review, he would be deprived of his substantial right to avoid inconsistent verdicts in multiple trials, since delay would permit Marshelle's civil action and her separate caveat to proceed simultaneously. Marshelle argues that Colin's appeal should be dismissed as interlocutory because his "argument regarding inconsistent verdicts and multiple trials turns . . . on matters which are not part of the record before the Court" and "references to extraneous material and arguments based upon materials that are not part of the record on appeal must be disregarded by this Court." Marshelle advances no argument to dispute Colin's claimed substantial right.

"Generally, the denial of a party's motion to dismiss is interlocutory, and thus is not immediately appealable." *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 459, 646 S.E.2d 418, 422 (2007) (citation omitted). "However, interlocutory orders are immediately appealable if delaying the appeal will irreparably impair a substantial right of the party." *Newcomb v. Cnty. of Carteret*, 183 N.C. App. 142, 145, 643 S.E.2d 669, 671 (2007) (citations and internal 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. 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)).

"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) (citation and internal quotation marks 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). "The extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis." *Id.* at 78, 711 S.E.2d at 189.

Colin contends that because Marshelle in her caveat "seeks to set aside the [2012] Will upon the same grounds alleged . . . in [her civil] action," inconsistent verdicts are possible since "the same factual issues are being litigated in two separate proceedings between [Marshelle] and [Colin]."

Here, Marshelle's caveat seeks to invalidate the 2012 Will because Sylvia lacked testamentary capacity and was unduly influenced by Colin to execute it. These allegations raise issues as to whether Sylvia had

the requisite mental capacity to execute a will on 9 January 2012 and whether the execution of that will was procured by Colin's undue influence. Marshelle also requests that Colin produce Sylvia's 2009 Will for probate. In Marshelle's civil action, she alleges that, *inter alia*, as a result of Colin's allegedly fraudulent behavior and undue influence over Sylvia's diminished mental capacity, Sylvia revised her estate plan by executing certain estate planning documents on 9 January 2012, including the 2012 Will, and that due to the extent of Sylvia's progressive dementia on that date, she was not legally competent to execute estate planning documents. Marshelle's civil action does not seek to set aside the 2012 Will because at that time the 2012 Will had not been probated. Rather, her civil action was focused on whether Colin unlawfully caused Sylvia to substantially alter her estate plan; improperly obtained possession of Sylvia's assets during her lifetime; converted over $25,000.00 of Sylvia's real and personal property to his own use; engaged in fraud by effectuating various transactions involving Sylvia for his own benefit; and took advantage of Sylvia's declining mental faculties to obtain property to which he was not entitled.

However, whether Sylvia lawfully executed the 2012 Will on 9 January 2012 implicates overlapping factual issues in Marshelle's civil action because on that date Sylvia executed other estate planning documents—including the continuing power-of-attorney and creating the Sylvia Middleton Revocable Trust—the validity of which are also challenged in Marshelle's civil action against Colin. Additionally, since Marshelle has alleged that Sylvia's diminished mental faculties were the result of progressive dementia, the progress of the disease on 9 January 2012 is relevant when considering the validity of subsequent transactions transferring Sylvia's real and personal property to herself as trustee of the Sylvia Middleton Revocable Trust and to Colin individually. Accordingly, we conclude that we have jurisdiction to entertain Colin's appeal.

III. Analysis

[2] Colin contends the trial court erred by denying his motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction because Marshelle "lacks standing to challenge the will outside a caveat proceeding." At issue is whether the superior court lost jurisdiction and Marshelle lost standing in the pending civil action because Colin probated the 2012 Will.

"Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss."

Fuller v. Easley, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citations omitted). "We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

To have standing to bring an action, one must be a "real party in interest[.]" N.C. Gen. Stat. § 1-57 (2015). "A real party in interest is . . . benefited or injured by the judgment in the case . . . . [and] who by substantive law has the legal right to enforce the claim in question." *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18–19, 234 S.E.2d 206, 209 (1977) (citations omitted). Typically, the real party in interest in cases of fraud and undue influence seeking to set aside conveyances of realty is the person against whom the actions were taken. *See Holt v. Holt*, 232 N.C. 497, 501, 61 S.E.2d 448, 452 (1950). However, if the person against whom the actions were taken dies but the cause of action still exists, "the right [to sue] passes to the heirs in case of intestacy and to the devisees in case the grantor leaves a will." *Id.* at 502, 61 S.E.2d at 452 (internal citations omitted).

"If a party does not have standing to *bring* a claim, a court has no subject matter jurisdiction to hear the claim." *In re Will of McFayden*, 179 N.C. App. 595, 600, 635 S.E.2d 65, 69 (2006) (emphasis added) (citation and internal quotation marks omitted). However, "[s]tanding is determined at the time of the filing of a complaint." *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009); *Simeon v. Hardin*, 339 N.C. 358, 369, 451 S.E.2d 858, 866 (1994) ("When standing is questioned, the proper inquiry is whether an actual controversy existed 'at the time the pleading requesting . . . relief is filed." (citation omitted)). Additionally, "it is the general rule that once jurisdiction attaches, 'it will not be ousted by subsequent events.' " *Id.* (quoting *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978)).

> "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding. . . . If the converse of this were true, it would be within the power of the defendant to preserve or destroy jurisdiction of the court at his own whim."

Quesinberry v. Quesinberry, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778–79 (2009) (quoting *Peoples*, 296 N.C. at 146, 250 S.E.2d at 911).

Here, when Marshelle initiated her civil action against Colin, no script had been admitted to probate as Sylvia's will. Therefore, when Marshelle filed her complaint, she had standing, either as an heir or devisee under the 2009 Will, to challenge the conveyances of realty on Sylvia's behalf; the subsequent probate of the 2012 Will did not retroactively extinguish that standing. Indeed, if we were to hold otherwise, Colin would be wielding the "power . . . to preserve or destroy jurisdiction of the court at his own whim." *Peoples*, 296 N.C. at 146, 250 S.E.2d at 911. Furthermore, even after the 2012 Will was probated, Marshelle had standing as a named beneficiary under its terms. *See Holt*, 232 N.C. at 502, 61 S.E.2d at 452 (citations omitted). Therefore, we overrule Colin's challenge as to this issue.

Colin also argues that Marshelle lacks standing because "all issues raised in [her civil action] are governed by [her] caveat petition" and cites to *Mileski v. McConville*, 199 N.C. App. 267, 273, 681 S.E.2d 515, 520 (2009) ("Plaintiff's essential claim—that defendants' undue influence procured the will submitted to the Clerk of Court and procured the transfer of assets—can be properly determined through a caveat proceeding."), to support his position. *Mileski* is readily distinguishable. In *Mileski*, the plaintiff filed his civil action *after* the contested will was probated, unlike Marshelle who filed hers before. 199 N.C. App. at 268–69, 681 S.E.2d at 517. Neither party has pointed to an instance in our case law where a plaintiff filed a civil action implicating the validity of a will before that will was probated and our research has disclosed none. Additionally, the *Mileski* Court's holding implies that it determined the caveat proceeding provided the plaintiff in that case with a complete and adequate remedy. *Id.* at 273, 681 S.E.2d at 520.

However, our case law recognizes that "the purpose of a caveat proceeding is limited and . . . where adequate remedy cannot be obtained in a caveat proceeding, the plaintiff is entitled to proceed with a tort claim." *Wilder v. Hill*, 175 N.C. App. 769, 772, 625 S.E.2d 572, 575 (2006) (citing *Murrow v. Henson*, 172 N.C. App. 792, 800, 616 S.E.2d 664, 669 (2005) ("[T]he inadequacy of relief in a caveat proceeding entitles a plaintiff to proceed with his or her tort claim.")). "[T]he question is whether a caveat proceeding was available and, if so, whether such a proceeding would provide an adequate remedy to plaintiffs." *Murrow*, 172 N.C. App. at 800, 616 S.E.2d at 669.

Here, no caveat proceeding was available when Marshelle filed her civil action. Additionally, such a caveat proceeding would provide inadequate relief, since a judgment setting aside the 2012 Will or probating

the 2009 Will would neither set aside the Sylvia Middleton Revocable Trust nor Sylvia's *inter vivos* conveyances of realty to which Marshelle claims entitlement. Therefore, we conclude, "the inadequacy of relief in [the] caveat proceeding entitles [Marshelle] to proceed with . . . her tort claim." *Id.* Accordingly, we affirm the trial court's denial of Colin's motion to dismiss under Rule 12(b)(1).

In light of our determination that Marshelle had standing to assert the claims in her civil action, Colin's remaining Rule 9 and 12(b)(6) arguments, which hinge upon the invalid premise that Marshelle lacked standing, are meritless. We have considered each of Marshelle's civil action claims through the lens that Marshelle has standing and conclude that the trial court properly denied Colin's motions to dismiss under Rules (9) for failure to plead with sufficient particularity and 12(b)(6) for failure to state a claim.

However, given the facts of this case, because allegations in Marshelle's civil action raise issues as to the validity of certain estate planning documents allegedly executed on 9 January 2012, we believe the proper course would be for the superior court to hold caveat proceedings in abeyance until Marshelle's civil action claims are resolved. *See Baldelli v. Baldelli*, __ N.C. App. __, __, 791 S.E.2d 687 (2016) (reversing a superior court's dismissal of the plaintiff's claims under the prior pending action doctrine on the basis that a related equitable distribution action was pending in district court and remanding the case to the superior court with instructions to hold the plaintiff's claims in abeyance until resolution of the district court action).

In *Baldelli*, the plaintiff and defendant, who incorporated multiple business entities during their marriage, were involved in an equitable distribution action in district court when the plaintiff filed a subsequent civil action in superior court alleging, *inter alia*, breach of fiduciary duty. __ N.C. App. at __, 791 S.E.2d at 687. The superior court dismissed plaintiff's claim for lack of subject matter jurisdiction on the basis that the prior pending action doctrine established jurisdiction in the district court and divested the superior court of jurisdiction. *Id.* at __, 791 S.E.2d at 690.

On appeal, we reversed the superior court's dismissal of the plaintiff's claims under the prior pending action doctrine because the plaintiff, in her district court action, would be unable to recover the relief she requested in her superior court action. *Id.* However, we observed that the plaintiff's district court and superior court actions raised issues so interrelated it would not be in the interest of judicial economy or clarity

for both actions to proceed simultaneously. *Id.* Therefore, we remanded the case to the superior court with instructions to hold the plaintiff's civil action claims in abeyance until the equitable distribution action in district court was resolved. *Id.* at __, 791 S.E.2d at 691. We explained:

> However, because the parties and subject matter of Plaintiffs' breach of fiduciary duty claim are closely related—when not identical—to the parties and the subject matter to be decided in a portion of the district court action, and because there is a clear interrelationship between the issues in both actions, we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously. To allow both actions to proceed concurrently would be to invite conflict between the resolution of interrelated issues in the two actions.

Id. at __, 791 S.E.2d at 690. We believe this same reasoning should apply here.

Here, Marshelle alleges, *inter alia*, fraud and constructive fraud against Colin for which she claims damages in excess of $25,000.00. If Marshelle prevails on her civil action claim, she will set aside certain *inter vivos* conveyances of realty that may be returned to Sylvia's estate for distribution. Accordingly, under *Baldelli*, we believe Marshelle's civil action should be resolved prior to the determination of the caveat proceeding. As in *Baldelli*, the parties and the subject matter to be decided in the caveat proceeding may be closely related, if not identical, to the parties and the subject matter to be decided in a portion of Marshelle's civil action. "[B]ecause there is a clear interrelationship between the issues in both actions, we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously." *Id.*

Thus, we believe it is appropriate for the superior court to hold any caveat to the 2012 Will in abeyance until resolution of Marshelle's civil action. Accordingly, we affirm the superior court's denial of Colin's Rule 12(b)(1), (b)(6), and (9) motions to dismiss but remand with instructions to hold any caveat proceeding in abeyance until resolution of the civil action.

IV. Conclusion

Although interlocutory, the trial court's order denying Colin's multiple motions to dismiss affected his substantial right to avoid inconsistent verdicts in multiple trials. We hold that the trial court properly denied

Colin's motions to dismiss under Rules 12(b)(1), (b)(6), and 9 because Marshelle had standing to assert the claims in her civil action and retained standing even after Sylvia's 2012 Will was probated. Although the 2012 Will was probated after Marshelle's civil action was initiated, since a caveat proceeding would not provide her with an adequate remedy, she is entitled to proceed in her civil action. Since issues raised in Marshelle's civil action may be inextricably entwined with issues raised in a separate caveat proceeding, we remand with instructions to hold any pending caveat in abeyance until resolution of Marshelle's civil action.

AFFIRMED AND REMANDED.

Judge STEPHENS concurs.

Judge DIETZ concurs by separate opinion.

DIETZ, Judge, concurring.

I concur in the judgment in this case but would have dismissed the appeal for lack of jurisdiction because the appellant failed to establish that the denial of the motion to dismiss affected a substantial right. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

GAUSE v. NEW HANOVER REG'L MED. CTR.

[251 N.C. App. 413 (2016)]

JOYCE VERA LIVINGSTON GAUSE, INDIVIDUALLY,[1] NATALIE GAUSE, AS GAL ON BEHALF OF JOYCE VERA LIVINGSTON AND VERTIS GAUSE, INDIVIDUALLY, PLAINTIFFS
v.
NEW HANOVER REGIONAL MEDICAL CENTER, DEFENDANT

No. COA16-595

Filed 30 December 2016

1. Medical Malpractice—failure to comply with pleading requirements—professional services—clinical judgment

The trial court did not err by dismissing plaintiffs' ordinary negligence claim based on their failure to comply with a pleading requirement applicable to a medical malpractice claim. Plaintiffs' discovery responses revealed allegations that defendant was negligent in furnishing or failing to furnish professional services. Further, undisputed evidence produced in discovery showed that the patient's injury stemmed from the x-ray technician's activities which required her to use clinical judgment.

2. Pleadings—Rule 9(j)—Rule 56—new theory of negligence

The trial court did not err by allegedly considering matters outside the pleadings. Plaintiffs misconstrued the interaction between Rule 9(j) and Rule 56 of the North Carolina Rules of Civil Procedure. Plaintiffs were bound by their pleadings and could not raise a new theory of negligence for the first time on appeal.

3. Appeal and Error—appealability—notice of appeal—motion to amend

Although plaintiffs contend the trial court abused its discretion by denying their motion to amend the complaint, the Court of Appeals did not have jurisdiction to review the trial court's order. Plaintiff's' notice of appeal did not refer to or encompass this issue, nor could the issue be fairly inferred from the language in the notice of appeal.

Appeal by Plaintiffs from order entered 5 April 2016 by Judge Charles Henry in New Hanover County Superior Court. Heard in the Court of Appeals 2 November 2016.

1. Per the custom of this Court, we style the caption of our opinion as it appears in the order from which the appeal is taken. In this matter, following the deaths of Mr. and Mrs. Gause, this Court allowed Plaintiffs' Motion to Substitute Parties, ordering that "Natalie Joyce Gause shall be substituted for Joyce Vera Livingston Gause, and Josie May Gause Brown shall be substituted for Vertis Ceamore Gause."

The Law Offices of Adam Neijna, PLLC, by Adam M. Neijna, for Plaintiffs-Appellants.

Harris, Creech, Ward & Blackerby, P.A., by Heather M. Beam, R. Brittain Blackerby, and Jay C. Salsman, for Defendant-Appellee.

Linwood L. Jones for North Carolina Hospital Association, amicus curiae.

INMAN, Judge.

When a hospital patient injured in a fall during an x-ray examination brings a claim for ordinary negligence, but pre-trial discovery reveals that the fall occurred when the x-ray technician was rending services requiring specialized skill and clinical judgment, the claim sounds in medical malpractice and is subject to dismissal based on the patient's failure to comply with Rule 9(j) of the Rules of Civil Procedure.

Plaintiffs Natalie Gause ("Natalie") and Josie May Gause Brown (collectively "Plaintiffs"), in their respective capacities for decedents Joyce Vera Livingston Gause ("Mrs. Gause" or "Plaintiff Gause"), and her husband, Vertis Ceamore Gause, appeal from an order dismissing Plaintiffs' negligence cause of action and denying Plaintiffs' Motion to Amend the Complaint.[2] Because Plaintiffs' complaint sounded in medical malpractice, not ordinary negligence, we affirm the trial court.

I. Factual and Procedural Background

On 16 March 2015, Natalie drove her mother, Mrs. Gause, to the Emergency Department of New Hanover Regional Medical Center ("Defendant" or "New Hanover") because Mrs. Gause was experiencing chest pains related to a fall several days prior. Mrs. Gause was 73-years-old and had a history of falling due to unsteadiness, often requiring assistance to walk distances.

At a triage station in the Emergency Department, a nurse assessed Mrs. Gause's chief complaint, determined her priority status, and ordered the hospital protocol for evaluating a complaint of chest pain. The nurse entered an order requesting, *inter alia*, an "x-ray chest PA or AP."

2. The trial court's order also dismissed Plaintiffs' claim of injury based on the theory of *res ipsa loquitur*. Plaintiffs do not appeal that portion of the order.

A posterior-anterior ("PA") chest x-ray requires the patient to be in a standing position with an x-ray board, called a wall bucky, in front of the patient and the x-ray tube behind the patient. An anterior-posterior ("AP") chest x-ray may be taken with the patient standing, sitting, or lying down. A "PA" x-ray is optimal because it provides a superior image with the most information about the patient, allowing a more accurate diagnosis.

After waiting several minutes, Mrs. Gause was taken into a restricted area within the emergency department and assessed by another nurse. Following the second nurse's assessment, the x-ray technician, Kayne Darrell ("Darrell"), met Mrs. Gause and Natalie in the triage hallway and transported Mrs. Gause in a wheelchair to a radiology room. Natalie remained in the hallway.

Darrell and Mrs. Gause were the only two people in the radiology room when Darrell explained the chest x-ray process to Mrs. Gause, stating that she would ask Mrs. Gause to stand at the wall bucky. Darrell asked Mrs. Gause if she thought that she would be able to stand for the x-ray. Mrs. Gause answered, "I think so."

According to Darrell, as soon as Mrs. Gause said, "I think so," to Darrell's surprise she "immediately, and rapidly, stood up, unassisted" from the wheelchair. According to a doctor with whom Darrell spoke later that day, Darrell said that "she stood the patient up" from the wheelchair.

Darrell watched as Mrs. Gause took a few steps toward the wall bucky, watched Mrs. Gause for three or four seconds, and assessed that Mrs. Gause seemed "very stable." Darrell then turned around and walked several steps away from the patient to move a tube into position to take the x-ray. After three or four seconds, Darrell turned back toward Mrs. Gause and saw her falling backward. Darrell immediately ran to try to break the fall but could not reach Mrs. Gause before her head struck the floor. Mrs. Gause suffered a severe traumatic brain injury as a result of the fall.

Mrs. Gause's brain injury left her unable to communicate and unable to independently perform basic activities of daily living. She became a resident at a long-term nursing care facility where she received twenty-four-hour, around-the-clock care. She died in the nursing care facility on 10 June 2016, approximately 15 months after the fall.

On 15 July 2015, while Mrs. Gause was still living, Plaintiffs filed a complaint in New Hanover County Superior Court alleging Defendant was liable for ordinary negligence and negligence on a theory of

res ipsa loquitur. In the ordinary negligence claim, Plaintiffs alleged that "Defendant negligently/or carelessly:"

> a. transported Plaintiff to and/or from the x-ray room;
>
> b. asked Plaintiff to stand without properly supporting her;
>
> c. allowed Plaintiff to sit up and/or stand without properly securing her;
>
> d. placed Plaintiff in an unsteady position;
>
> e. failed to take adequate measures to support Plaintiff;
>
> f. failed to properly secure Plaintiff while transporting her;
>
> g. allowed Plaintiff to be at risk of falling;
>
> h. failed to take adequate precautions and/or safety measures to prevent Plaintiff from falling while transporting her to and/or from x-ray[.]
>
> . . . .

The Complaint did not label any claim as one for medical malpractice and did not contain a certification of compliance with Rule 9(j), which requires expert review prior to the filing of a medical malpractice action.

On 1 October 2015, Defendant filed an Answer asserting, *inter alia*, that the Complaint "should be dismissed for failure of the Plaintiff[s] to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure." The parties then proceeded with discovery.

In response to an interrogatory, Plaintiff Gause listed 20 specific ways that Defendant was negligent, including, *inter alia*, contentions that Defendant "[f]ailed to inquire as to Plaintiff's condition, history of falls, limited mobility, problems with standing, and risk of falling;" "[f]ailed to conduct a fall risk assessment to determine whether to take the x-ray PA or AP;" and "[f]ailed to properly administer the x-ray."

Plaintiffs' counsel took the deposition of Darrell, who testified that she assessed Mrs. Gause upon first meeting her and continuing until Mrs. Gause had taken a few steps away from the wheelchair without assistance. Darrell testified that her assessment was based on her clinical judgment and observations of the patient, including the patient's mental status, and on more than 22 years of experience as an x-ray technician.

Following written discovery and depositions, Defendant filed a Motion for Summary Judgment. Two days later, Plaintiffs filed a Motion

to Amend the Complaint to add a claim of medical negligence against Defendant. The proposed Amended Complaint alleged that, pursuant to Rule 9(j), the medical care and relevant records "have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." The proposed Amended Complaint did not allege when the expert review had occurred.

Defendant's Motion for Summary Judgment and Plaintiffs' Motion to Amend came on for hearing on 4 February 2016 in New Hanover Superior Court, Judge Charles Henry presiding. On 5 April 2016, the trial court entered an order dismissing Plaintiffs' *res ipsa loquitur* claim, dismissing Plaintiffs' negligence claim without prejudice, and denying Plaintiffs' Motion to Amend.

Plaintiffs filed a Notice of Appeal.

II. Standard of Review

> Summary judgment is appropriate if 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 a judgment as a matter of law. A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.

Sturgill v. Ashe Mem'l Hosp., Inc., 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007) (citations and internal quotation marks omitted).

III. Analysis

A. Medical Malpractice or Ordinary Negligence Theory

[1] Plaintiffs argue that the trial court erred in dismissing their ordinary negligence claim based on their failure to comply with a pleading requirement applicable only to a medical malpractice claim. We disagree for two reasons. First, Plaintiffs' discovery responses reveal allegations that Defendant was negligent in furnishing or failing to furnish professional services. Second, undisputed evidence produced in discovery shows that Mrs. Gause's injury stemmed from the x-ray technician's activities which required her to use clinical judgment. We conclude that Plaintiffs' claim necessarily sounds in medical malpractice and not in ordinary negligence.

In North Carolina, the distinction between a claim of medical malpractice and ordinary negligence is significant for several reasons, including that medical malpractice actions cannot be brought without prior review of the medical care and relevant medical records by a person reasonably expected to qualify as an expert and to testify that the defendant provided substandard care. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015). Failure to allege compliance with Rule 9(j) in a complaint for medical malpractice requires dismissal. *Id.*

"Whether an action is treated as a medical malpractice action or as a common law negligence action is determined by our statutes[.]" *Smith v. Serro*, 185 N.C. App. 524, 529, 648 S.E.2d 566, 569 (2007). A medical malpractice action is defined in relevant part as "[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.[3] N.C. Gen. Stat. § 90-21.11(2)(a) (2015). "The statutory definition of medical malpractice is a broad one." *Duke Univ. v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 640, 386 S.E.2d 762, 766 (1990) (citation omitted).

The term "professional services" is not defined by our statutes but has been defined by this Court as "an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual." *Sturgill*, 186 N.C. App. at 628, 652 S.E.2d at 305 (citations and internal quotation marks omitted). Our courts have classified as medical malpractice those claims alleging injury resulting from activity that required clinical judgment and intellectual skill. *See Sturgill*, 186 N.C. App. at 630, 652 S.E.2d at 306; *Alston v. Granville Health Sys.*, 221 N.C. App. 416, 421, 727 S.E.2d 877, 881 (2012). Our courts have classified as ordinary negligence those claims alleging injury caused by acts and omissions in a medical setting that were primarily manual or physical and which did not involve a medical assessment or clinical judgment. *See, e.g.*, *Horsley v. Halifax Reg'l Med. Ctr., Inc.*, 220 N.C. App. 411, 725 S.E.2d 420 (2012), and cases cited therein.

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3. A "health care provider" is "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: . . . radiology[.]" N.C. Gen. Stat. § 90-21.11(1)(a). The parties do not dispute that an x-ray technician is a health care provider.

This Court in *Sturgill*, 186 N.C. App. at 631, 652 S.E.2d at 307, affirmed the trial court's order allowing a motion for summary judgment and dismissing the plaintiff's complaint for failure to comply with Rule 9(j). *Sturgill* involved a claim by the estate of a 76-year-old man who suffered a severe head injury after falling in his hospital room. *Id.* at 625, 652 S.E.2d at 304. The estate filed a complaint pleading ordinary negligence. *Id.* at 626, 652 S.E.2d at 304. The defendant argued that the claim was actually for medical malpractice and subject to dismissal because it did not allege compliance with Rule 9(j). *Id.* at 626-27, 652 S.E.2d at 304. The trial court, and ultimately this Court, agreed. *Id.* at 631, 652 S.E.2d at 307. Although the plaintiff contended that the hospital, through its nurses, was negligent in failing to follow a fall prevention plan and supervise the decedent, this Court noted that the complaint alleged that the decedent fell because nurses failed to restrain him in his hospital bed. *Id.* at 628-29, 652 S.E.2d at 305. This Court also cited an affidavit submitted by the plaintiff, filed in opposition to the motion for summary judgment, stating that the decedent was injured because he was not "properly restrained." *Id.* at 629-30, 652 S.E.2d at 306. This Court held that "[b]ecause the decision to apply restraints is a medical decision requiring clinical judgment and intellectual skill, . . . it is a professional service." *Id.* at 630, 652 S.E.2d at 306.

Also on facts similar to those now before us, in *Alston*, 221 N.C. App. at 421, 727 S.E.2d at 881, this Court held that a claim arising from a patient's fall in the hospital sounded in medical malpractice. The decedent in *Alston* was lying unconscious on a hospital operating table when she fell to the floor and was injured. *Id.* at 419, 727 S.E.2d at 880. The decedent's estate sued the hospital and surgeon on a theory of *res ipsa loquitur*, alleging that it was unknown how the decedent fell and that the injury would not have occurred in the absence of negligence. *Id.* at 419, 727 S.E.2d at 879. Discovery, however, revealed that the decedent fell because medical personnel had failed to secure her in restraints. *Id.* at 420-21, 727 S.E.2d at 880. Following the defendants' motions for summary judgment, the trial court dismissed the action for failure to comply with Rule 9(j). *Id.* at 417, 421, 727 S.E.2d at 878, 881. Affirming the trial court, this Court held that the plaintiff could not state a claim for *res ipsa loquitur* because the cause of the decedent's fall was no longer unknown. *Id.* at 420-21, 727 S.E.2d at 880. This Court also held that the plaintiff's claim sounded in medical malpractice because "[t]he evidence presented by [the d]efendants in support of their summary judgment motions . . . shows that the decision to restrain a patient under anesthesia is one that requires use of specialized skill and knowledge and,

therefore, is considered a professional service." *Id.* at 421, 727 S.E.2d at 881 (citations omitted).

Here, Plaintiffs' Complaint alleged that "Defendant negligently and/or carelessly," *inter alia*, "failed to take adequate precautions and/or safety measures to prevent Plaintiff [Gause] from falling while transporting her to and/or from x-ray;" and/or "failed to perform such acts and/or take those measures necessary to protect Plaintiff [Gause] from falling." These allegations, general as they are, sound in medical malpractice, because deciding what precautions and measures were "adequate" and "necessary" required medical personnel to use clinical judgment and intellectual skill. But our holding turns on more than the Complaint.

Plaintiffs' interrogatory responses specify numerous contentions that Defendant, through its agents and employees, was negligent in furnishing or failing to furnish the following services: assessing the patient, inquiring about and reviewing the patient's medical history, and administering the x-ray. Each of these services—assessment, inquiry, review, and administering a diagnostic imaging procedure—involves specialized knowledge and skills which are predominantly mental or intellectual, rather than physical or manual. *See Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998).

Darrell testified in deposition that she assessed Mrs. Gause from the moment they met until the moment Darrell determined that she could walk away from Mrs. Gause to position the x-ray tube. Darrell testified that her assessment was based upon her clinical experience, judgment, and observations of the patient. Plaintiffs argue it could be reasonably inferred from the evidence that despite her testimony, Darrell used no judgment or skill and performed no assessment of Mrs. Gause, but simply stood her up and walked away, allowing her to fall. Such an inference, however, would not remove this case from the statutory definition of medical malpractice which includes a claim for injury "arising out of the furnishing *or failure to furnish* professional services." N.C. Gen. Stat. § 90-21.11(2)(a) (emphasis added).

It is undisputed that Darrell took Mrs. Gause into her care following a nurse's order for "x-ray chest PA or AP." The nature of the order—providing for alternative methods of imaging—necessarily required Darrell to make a clinical judgment regarding how to administer the x-ray. Darrell testified that when making such decisions, "what you're trying to do is – is give the radiologist an optimal image without compromising the patient's safety and comfort." Whether Darrell failed to assess Mrs. Gause or inadequately assessed her in choosing to take a standing

x-ray, Mrs. Gause's injury arose from medical malpractice as defined by statute.

Plaintiffs contend that this case is controlled by a line of decisions classifying claims in medical settings as ordinary negligence. Those cases are all factually and legally inapposite.

In *Norris v. Rowan Mem'l Hosp., Inc.*, 21 N.C. App. 623, 623, 205 S.E.2d 345, 346 (1974), a 75-year-old patient fell from a hospital bed and fractured her hip after nurses failed to raise her bedrails in clear violation of a hospital rule. This Court held that "the alleged breach of duty did not involve the rendering or failure to render professional nursing or medical services requiring special skills[,]" because the nurses were not allowed any discretion about raising the bedrails. *Id.* at 626, 205 S.E.2d at 348. Unlike the nurses in *Norris*, Darrell was required by the x-ray order to decide whether to take the x-ray with Mrs. Gause standing, sitting, or lying down.

In *Lewis v. Setty*, 130 N.C. App. at 607, 503 S.E.2d at 673, the plaintiff, a quadriplegic, fell and was injured while being transferred from an examination table to his wheelchair by the defendant doctor and the plaintiff's aide. In holding that the plaintiff's action sounded in ordinary negligence, this Court reasoned that "the removal of the plaintiff from the examination table to the wheelchair did not involve an occupation involving specialized knowledge or skill, as it was predominately a physical or manual activity." *Id.* at 608, 503 S.E.2d at 674. Unlike the defendants in *Lewis*, Darrell was not engaged in a predominately physical or manual activity when Mrs. Gause fell.

In *Horsley v. Halifax Reg'l Med. Ctr., Inc.*, 220 N.C. App. at 412, 725 S.E.2d at 421, the plaintiff brought an action for gross negligence after falling from a standing position while admitted as a patient at the defendant hospital. Hospital nurses knew that the plaintiff required assistance to stand or walk without falling. *Id.* at 412, 725 S.E.2d at 420. Later that evening, the plaintiff was standing against the wall near the nurses' station and said aloud that she was going to fall; however, none of the nurses offered her a wheelchair, cane, or walker. *Id.* at 412, 725 S.E.2d at 421. The plaintiff fell and was injured. *Id.* The trial court dismissed the plaintiff's claim for failure to include a 9(j) certification. *Id.* at 412, 725 S.E.2d at 421. This Court reversed the trial court, reasoning that "nothing in the record indicates that the decision to offer a cane to a patient requires a written order or a medical assessment" or "require[s] specialized skill[,]" and therefore "expert testimony . . . is not necessary to develop a case of negligence for the jury." *Id.* at 414, 725 S.E.2d at

421-22. By contrast, Plaintiffs here asserted in their discovery responses that Defendant failed to properly assess Mrs. Gause. And Darrell confirmed in her deposition that deciding whether to take a standing x-ray required assessment and clinical judgment.

Plaintiffs also argue that Defendant is estopped from asserting that this action is one for medical malpractice because Defendant objected to discovery on the basis that Plaintiffs had not alleged a medical malpractice cause of action. Judicial estoppel bars inconsistent assertions of fact, but generally "the doctrine should not be applied to prevent the assertion of inconsistent legal theories . . . such a limitation is necessary to avoid interference with our liberal pleading rules, which permit a litigant to assert inconsistent, even contradictory, legal positions within a lawsuit." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 32, 591 S.E.2d 870, 890 (2004). Plaintiffs' argument is without merit.

In sum, Plaintiffs' claim sounds in medical malpractice and not in ordinary negligence, and it was subject to dismissal for failing to comply with Rule 9(j). Further, because Plaintiffs' Complaint contained no 9(j) certification, it did not allege a viable claim for medical malpractice.

B. Considering Matters Outside the Pleadings

[2] The trial court, consistent with our precedent, determined that Plaintiffs' Complaint was subject to dismissal for failure to comply with Rule 9(j) based in part on written discovery responses and deposition testimony. *See Alston*, 221 N.C. App. at 420-21, 727S.E.2d at 880-81 (affirming summary judgment against the plaintiff because evidence produced in discovery revealed that the plaintiff's claim was for medical malpractice and not negligence *res ipsa loquitur*); *Sturgill*, 186 N.C. App. at 629-30, 652 S.E.2d at 306 (affirming summary judgment against the plaintiff based in part on affidavit submitted in evidence). In arguing that the trial court was prohibited from considering matters outside the pleadings,[4] Plaintiffs misconstrue our precedent regarding the interaction between Rule 9(j) and Rule 56 of the North Carolina Rules of Civil Procedure, which provides for dismissal of an action on summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56 (2015).

4. Defendant argues that this Court lacks jurisdiction to determine whether the trial court erred by considering matters outside the pleadings because Plaintiffs' Notice of Appeal and Proposed Issues on Appeal contained in the settled record did not designate it as an issue. Defendant's argument is without merit. Rule 3(d) of the North Carolina Rules of Appellate Procedure requires a notice of appeal to identify the party who is appealing, the judgment or order from which the party appeals, the court to which the party addresses the appeal, and the signature of the appealing party's counsel of record.

Plaintiffs misstate the holding by the North Carolina Supreme Court in *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102 (2002). In that decision, vacating a decision by this Court regarding the constitutionality of Rule 9(j), the Supreme Court held that the issue was not preserved for appeal because the plaintiff's complaint asserted *res ipsa loquitur* "as the sole basis for the negligence claim." *Id.* The Court explained that "pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim[,]" and treated the plaintiff's complaint as a binding judicial admission that his claim, if viable at all, was supported only by the theory of *res ipsa loquitur*. *Id. Anderson* has been construed by this Court to prohibit a plaintiff from changing the theory of negligence without first amending the complaint. It does not mean that the trial court must look exclusively to the complaint in deciding on summary judgment that a plaintiff's claim must be dismissed for failure to comply with Rule 9(j). *Anderson*'s reasoning was applied by this Court in *Sturgill* when the plaintiff argued a theory of negligence different from the theory alleged in her complaint, which this Court held constituted a claim for medical malpractice. *Sturgill*, 186 N.C. App. at 630, 652 S.E.2d at 306. This Court held that "plaintiff is bound by her pleadings, and may not raise this new theory of negligence for the first time on appeal." *Id.* at 630, 652 S.E.2d at 306-07. Plaintiffs' argument is without merit.

C. Motion to Amend

[3] Plaintiffs contend that the trial court abused its discretion in denying Plaintiffs' Motion to Amend the Complaint. We do not have jurisdiction to review the trial court's order as to this issue because Plaintiff's' Notice of Appeal did not refer to or encompass this issue, nor can the issue be fairly inferred from the language in the Notice of Appeal.

Rule 3(d) of the North Carolina Rules of Appellate Procedure provides that a notice of appeal "shall designate the judgment or order from

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N.C. R. App. P. 3(d). Plaintiffs' Notice of Appeal identified all of the required information and specified that it was appealing from the trial court's order "which dismissed Plaintiffs' action without prejudice." The appeal of the dismissal inherently includes an appeal from the trial court's analysis and conclusions leading to the dismissal, including its reference to matters outside the pleadings. *See Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 273, 258 S.E.2d 864, 867 (1979). Rule 10(b) of the North Carolina Rules of Appellate Procedure requires the appellant to include at the conclusion of the record a numbered list of proposed issues presented on appeal, but the rule also provides that "[p]roposed issues on appeal are to facilitate the preparation of the record on appeal *and shall not limit the scope of the issues presented on appeal in an appellant's brief*." N.C. R. App. P. 10(b) (emphasis added).

which appeal is taken . . . ." N.C. R. App. P. 3(d). "Rule 3 is jurisdictional, and if the requirements of the rule are not complied with, the appeal must be dismissed." *Foreman v. Sholl*, 113 N.C. App. 282, 291, 439 S.E.2d 169, 175 (1994) (citation omitted). "[T]he appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider . . . ." *Smith*, 43 N.C. App. at 272, 258 S.E.2d at 866. *Smith* recognized that some specific issues may "merge" into broader issues. *Id.* at 272-73, 258 S.E.2d at 866. There, the plaintiff's notice of appeal referred to the trial court's order allowing "Defendants' Motions for Summary Judgment." *Id.* at 272, 258 S.E.2d at 866. This Court held that the notice was sufficient to include in its scope the plaintiff's appeal from the trial court's conclusion that the complaint failed to state a claim for which relief could be granted, noting that "[t]he fact that the trial court labeled the defense in the order as one for failure to state a claim does not prevent us from regarding it as one for summary judgment." *Id.* at 273, 258 S.E.2d at 866-67 (citation omitted). This Court further held that "a notice of appeal should be deemed sufficient to confer jurisdiction on the appellate court on any issue if, from the content of the notice, it is likely to put an opposing party on guard the issue will be raised[.]" *Id.* at 274, 258 S.E.2d at 867.

In this case, Plaintiffs' Notice of Appeal specified that Plaintiffs were appealing the trial court's order "which dismissed Plaintiffs' action without prejudice." Unlike in *Smith*, the trial court's denial of Plaintiffs' Motion to Amend was entirely independent of the trial court's ruling dismissing the action without prejudice. *See Foreman*, 113 N.C. App. at 292, 439 S.E.2d at 176 (holding notice was insufficient to preserve third issue for appeal because the plaintiffs stated only two issues for appeal in their notice, and the third issue was not sufficient to dismiss the plaintiffs' entire claim). The trial court could have denied Defendant's Motion for Summary Judgment and still rejected Plaintiffs' Motion to Amend. Theoretically, at least, the trial court could have dismissed Plaintiffs' ordinary negligence claim and allowed Plaintiffs' Motion to Amend to state a medical malpractice claim, although our precedent disfavors such an outcome. *See Alston v. Hueske*, __ N.C. App. __, __, 781 S.E.2d 305, 310 (2016) ("Because the legislature has required strict compliance with [Rule 9(j)], our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a)."); *see also Keith v. N. Hosp. Dist. of Surry Cty.*, 129 N.C. App. 402, 405, 499 S.E.2d 200, 202 (1998) ("To read Rule 15 in this manner would defeat the objective of Rule 9(j), which . . . seeks to avoid the *filing* of frivolous medical malpractice claims.").

Finally, because the Notice of Appeal identified the order as dismissing the action *without prejudice*, it is not fairly inferred from the Notice that an appeal from the ruling on the Motion to Amend was intended or even necessary. Rule 3(d) can be treacherous for an appellant whose notice identifies one but not all provisions in the order or judgment from which the appellant seeks relief.

IV. Conclusion

For the reasons we have explained, we affirm the trial court's conclusion that this is an action for medical malpractice requiring a certification as provided in Rule 9(j), and we dismiss the remainder of Plaintiffs' appeal for lack of jurisdiction.

AFFIRMED IN PART; DISMISSED IN PART.

Judges DAVIS and ENOCHS concur.

DIANE MAUREEN HOGUE, Plaintiff
v.
TERRY LEE HOGUE, Defendant

No. COA16-710

Filed 30 December 2016

1. Appeal and Error—appealability—equitable distribution action terminated—other matters discussed

An equitable distribution action was effectively terminated by a trial court order declaring a prior equitable distribution order void, and the Court of Appeals had jurisdiction, even though other pending matters may have been discussed.

2. Appeal and Error—equitable distribution—motion for contempt—motion to dismiss—not the proper mechanism for relief

The trial court lacked the authority to void an equitable distribution order where the order was entered by a trial court judge, the parties reconciled and subsequently separated again, plaintiff demanded compliance with the terms of the order and defendant refused, plaintiff filed a motion for contempt, and the trial court dismissed that motion. A motion to dismiss a contempt motion is not the proper mechanism to seek relief from a final order or judgment.

HOGUE v. HOGUE

[251 N.C. App. 425 (2016)]

Appeal by plaintiff from order entered 18 April 2016 by Judge Jeannette R. Reeves in Lincoln County District Court. Heard in the Court of Appeals 30 November 2016.

The Jonas Law Firm, P.L.L.C., by Johnathan L. Rhyne, Jr. and Rebecca J. Yoder, for plaintiff-appellant.

Wesley E. Starnes for defendant-appellee.

ELMORE, Judge.

After the parties' separation, the trial court entered an order of equitable distribution. The parties reconciled shortly thereafter and continued their marital relationship for three years before separating again. Upon their second separation, plaintiff filed a motion for contempt against defendant for failing to comply with the terms of the equitable distribution order. Defendant moved to dismiss plaintiff's motion. The trial court granted defendant's motion to dismiss, concluding that the equitable distribution order was void upon the parties' reconciliation. We hold that, in ruling on defendant's motion to dismiss plaintiff's motion for contempt, the trial court lacked subject matter jurisdiction to void the equitable distribution order previously entered in the same action. We vacate the trial court's order declaring the prior equitable distribution order void.

I. Background

Diane Hogue (plaintiff) and Terry Hogue (defendant) were married on 24 November 1986 and separated on 11 October 2008. Plaintiff filed a complaint on 19 May 2009 for an equitable distribution of the parties' marital and divisible property. She later amended her complaint to include claims for child custody, child support, and alimony.

On 14 March 2011, the trial court entered an order of equitable distribution. The court concluded that an unequal division in favor of plaintiff was equitable and ordered defendant to pay a distributive award in the amount of $665,471.10. Defendant filed a Rule 59 motion for a new trial ten days later, along with a Rule 60 motion for relief based upon "mistake and surprise committed during the hearing and in the rendering of the judgment," and "misrepresentation and misconduct of the plaintiff." Sometime in March or April after the equitable distribution order was entered, the parties reconciled and began living together again as husband and wife. They closed on a new home that summer and liquidated most of the extraneous personal property subject to distribution.

Defendant's Rule 59 and 60 motions were never heard and neither party complied with the terms of the equitable distribution order.

The parties continued their marital relationship for about three years. In December 2014, plaintiff moved out of the marital home and sent defendant a letter demanding that he comply with the terms of the equitable distribution order. When defendant refused, plaintiff filed a motion for contempt and order to show cause. Defendant in turn moved to dismiss plaintiff's motion, arguing that the resumption of the parties' marital relations voided the executory portions of the equitable distribution order, and the order was not revived upon their subsequent reconciliation. Because the executory portions of the order were void and unenforceable, defendant averred, plaintiff's motion for contempt should be dismissed.

On 18 April 2016, the trial court entered an order granting defendant's motion to dismiss. The court concluded that, pursuant to *Schultz v. Schultz*, 107 N.C. App. 366, 374, 420 S.E.2d 186, 191 (1992), the equitable distribution order was "void and unenforceable" because the parties reconciled while every provision of the order remained executory. The court also concluded that "equity dictates voiding the order." Defendant's pending Rule 59 and 60 motions were dismissed as moot and the case continued until the next court term for the purpose of "status review."

Plaintiff timely appeals from the order granting defendant's motion to dismiss and adjudging the equitable distribution order void and unenforceable.

II. Discussion

[1] The trial court's order declaring the prior equitable distribution order void and unenforceable in effect determined the equitable distribution action. While other pending matters may have been discussed at the status review, the equitable distribution action had been terminated. Because the order would otherwise be final within the meaning of Rule 54(b) but for the other pending claims or motions in the action, this court has jurisdiction over the appeal pursuant to N.C. Gen. Stat. § 50-19.1 (2015).

[2] The parties disagree as to the effect of their reconciliation on the trial court's order of equitable distribution, or more specifically, whether the trial court erred in concluding that resumption of the marital relationship voids the executory portions of an equitable distribution order. A separate but related issue—and the only one we decide today—is whether the trial court, in ruling on defendant's motion to dismiss

plaintiff's contempt motion, had authority to adjudge the equitable distribution order void.

A district court judge may not ordinarily modify, overrule, or change the judgment of another district court judge previously made in the same action. *In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007); *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972); *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981). Pursuant to Rule 60(b), however, a trial judge may relieve a party from a final order or judgment for reasons including mistake, newly discovered evidence, fraud, the judgment is void, or it is no longer equitable that the judgment have prospective application. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2015). An order entered "pursuant to Rule 60(b) 'does not overrule a prior judgment or order but, consistent with statutory authority, relieves parties from the effect of the judgment or order.' " *Duplin Cnty. Dep't of Soc. Servs. ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 482, 751 S.E.2d 621, 623 (2013) (quoting *Charns v. Brown*, 129 N.C. App. 635, 639, 502 S.E.2d 7, 10 (1998)); *see also Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 904 (1978) ("A [trial court] judge has the authority to grant relief under a Rule 60(b) motion without offending the rule that precludes one [trial court] judge from reviewing the decision of another." (citing *Charleston Capital Corp. v. Love Valley Enters., Inc.*, 10 N.C. App. 519, 179 S.E.2d 190 (1971))).

The trial court adjudged the equitable distribution order void and unenforceable upon defendant's motion to dismiss plaintiff's motion for contempt rather than a Rule 60(b) motion. A motion to dismiss a contempt motion is not the proper mechanism to seek relief from a final order or judgment. And while a trial court may, under appropriate circumstances, act sua sponte to grant relief under Rule 60(b), *Pope v. Pope*, ____ N.C. App. ____, ____, 786 S.E.2d 373, 378 (May 17, 2016) (No. COA15-1062) (citing *Carter v. Clowers*, 102 N.C. App. 247, 253, 401 S.E.2d 662, 665 (1991)), the record does not suggest that the trial court was acting under Rule 60(b) when it entered its order in this case. The order must be vacated. *See Hieb v. Lowery*, 121 N.C. App. 33, 38–39, 464 S.E.2d 308, 311–12 (1995) (holding that superior court judge lacked authority to modify judgment of another previously entered where "plaintiff made no Rule 60(b) motion" and judge did not "purport to act pursuant to Rule 60(b)"), *aff'd*, 344 N.C. 403, 407–08, 474 S.E.2d 323, 325–26 (1996); *see also Crook v. KRC Mgmt. Corp.*, 206 N.C. App. 179, 184, 697 S.E.2d 449, 453 (2010) ("If one trial judge enters an order that unlawfully overrules an order entered by another trial judge, such an order must be vacated . . . ." (citation omitted)).

III. Conclusion

Because the trial court lacked authority to declare the equitable distribution order void upon defendant's motion to dismiss plaintiff's motion for contempt, we vacate the order. We want to make clear, however, that our decision does not preclude defendant from seeking relief from the equitable distribution order pursuant to Rule 60(b), or the trial court from acting *sua sponte* to grant such relief pursuant to Rule 60(b).

VACATED.

Judges HUNTER, JR. and ENOCHS concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF
v.
LILLIAN DIANNE HULL AND ANNITTA B. CROOK, DEFENDANTS

No. COA16-522

Filed 30 December 2016

Statutes of Limitation and Repose—claim by insurance company—subrogation

The trial court did not err in an action arising from a multi-car vehicle accident by dismissing plaintiff-insurance company's complaint for failing to bring a lawsuit based upon its subrogation rights within the applicable three-year statute of limitations. It was clear from the complaint that the alleged breach of the subject insurance policy occurred when defendants affirmatively declared that settlement funds would not be returned.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 23 February 2016 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 17 October 2016.

Caudle & Spears, P.A., by Harold C. Spears and Christopher P. Raab, for plaintiff-appellant.

Doran, Shelby, Pethel and Hudson, P.A., by Michael Doran, for defendants-appellees.

ENOCHS, Judge.

The North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") appeals from the trial court's order dismissing its complaint pursuant to Lillian Dianne Hull's and Annitta B. Crook's ("Defendants") Rule 12(b)(6) motion to dismiss. After careful review, we affirm.

Factual Background

Farm Bureau is an insurer authorized and licensed to issue insurance policies in North Carolina. Hull was insured under a business automobile policy issued by Farm Bureau ("Farm Bureau Policy"). The Farm Bureau Policy, provided a single limit of $100,000.00 in uninsured motorist ("UM") and underinsured motorist ("UIM") coverage, through the North Carolina Uninsured Motorist Coverage Endorsement ("Endorsement"). Crook was listed as a driver under the policy.

In May 2011, Hull was a passenger inside a vehicle, owned and operated by Crook, when another vehicle, owned and operated by Deborah Branham ("Branham"), crossed the center line and collided with Crook's vehicle. Shortly after this initial collision, a third vehicle, operated by Brandon Robinson ("Robinson"), also struck Defendants' vehicle.

Both Hull and Crook were injured during the collision and underwent medical treatment. Hull asserted medical expenses in excess of $58,000.00, and Crook asserted medical expenses in excess of $104,000.00. Five other individuals were injured in the accident, but none of them are parties to this action.

At the time of the accident, Branham was insured under an automobile liability insurance policy issued by Integon/GMAC ("GMAC") with policy limits of $30,000.00 per person and $60,000.00 per accident. Robinson was insured under automobile liability insurance policies by Allstate Insurance Company ("Allstate") with policy limits of $100,000.00 per person and $300,000.00 per accident, and by Mercury Insurance Company ("Mercury") with a policy limit of at least $250,000.00 per person.

As a result of the multiple claims asserted against Branham, GMAC tendered the limits of its liability coverage for Branham to Defendants and the five other individuals injured in the accident. Of those funds, Hull received $10,420.00 and Crook received $16,127.52, for a combined total of $26,547.52. Farm Bureau was given notice of GMAC's tender of Branham's policy limits.

Defendants claimed Branham qualified as an underinsured motorist under the Farm Bureau Policy and asserted a UIM claim. Farm Bureau did not advance, but offered to pay the Defendants' UIM claims for $73,452.48, the $100,000.00 UIM policy limit minus the liability settlements Defendants received from GMAC, Branham's carrier. The letter proposing this particular settlement to Defendants offered to waive Farm Bureau's "subrogation rights to the above referenced claim." The "referenced claim" in this letter addressed only GMAC's tender of Branham's policy limits to Defendants and none others. This offer by Farm Bureau to tender the balance of its UIM limits was also subject to the express condition that Defendants execute and return a Release and Trust Agreement for Underinsured Motorist Coverage ("Settlement Agreement") before the funds accompanying the agreement were disbursed.

Consistent with the Farm Bureau Policy and Endorsement, this Settlement Agreement included a paragraph that expressly preserved Farm Bureau's subrogation rights against any other party from which Defendants might recover damages. This paragraph required Defendants to hold any such money in trust for payment to Farm Bureau pursuant to its subrogation rights. However, both Defendants struck through and initialed this paragraph, signed the altered Settlement Agreements, and returned them to Farm Bureau without the tendered proceeds on 14 March 2012.

Defendants subsequently asserted claims against Robinson, the driver of the third vehicle, for their damages suffered due to his negligence in the accident. When Farm Bureau learned of this additional potential recovery, it claimed subrogation rights against any recovery from Robinson or his insurance companies.

Farm Bureau subsequently filed the present Complaint for Declaratory Judgment to determine and establish those rights on 1 May 2015. On 9 July 2015, Defendants notified Farm Bureau their claims against Robinson and his insurance companies had settled. Crook settled her claim against Robinson for a payment of $140,000.00. Hull settled her claim for $75,000.00.

On 4 February 2016, the trial court heard Defendants' Rule 12(b)(6) motion to dismiss. Prior to the hearing Farm Bureau amended its complaint to add a second claim for relief seeking monetary damages. Farm Bureau filed this amendment with both Defendants' and the court's consent. At the hearing, Defendants informed the court that their pending Rule 12(b)(6) motion was also being asserted against the amendment to the complaint filed that day.

On 23 February 2016, the trial court entered an order granting Defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim. It is from this order that Farm Bureau appeals.

Analysis

On appeal, Farm Bureau contends that the trial court erred in granting Defendants' motion to dismiss. We disagree.

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A., 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (quoting *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007)).

In the present case, Farm Bureau argues that its subrogation claims are not barred by the applicable statute of limitations. It contends that the breach of its insurance policies with Defendants occurred when Defendants reached a settlement with Robinson's insurance carrier and Defendants refused to pay Farm Bureau under the subrogation clause of Hull's policy.

Defendants, conversely, contend that the breach of Hull's policy occurred when they marked out the subrogation clause of the policy, initialed it, and remitted it to Farm Bureau along with a letter stating that they no longer intended to honor Farm Bureau's subrogation rights. If Farm Bureau is correct as to the time of breach, its claim is timely. However, if Defendants are correct, Farm Bureau's claim is time-barred.

" 'The statute of limitations for a breach of contract action is three years. The claim accrues at the time of notice of the breach.' " *Ludlum*

v. State, 227 N.C. App. 92, 94, 742 S.E.2d 580, 582 (2013) (quoting *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002)).

In the present case, Farm Bureau's complaint reveals on its face that it alleged Defendants breached their contract on 14 March 2012 when Defendants expressly manifested their intent not to honor Farm Bureau's subrogation rights. The complaint plainly states the following:

> 11. By letter date March 9, 2012, Farm Bureau offered to settle Hull and Crook's UIM claims for the total sum of $73,452.48 (representing the difference between the UIM policy limits of $100,000.00 and the liability settlements in the sum of $26,547.52 that Hull and Crook received from Integon/GMAC) on the condition that Hull and Crook execute and return a Release and Trust Agreement for Underinsured Motorist Coverage. True, genuine and authentic copies of Farm Bureau's March 9, 2012, letter and the Release and Trust Agreement are attached hereto as Exhibit B and incorporated herein by reference.
>
> 12. Contrary to the express condition of settlement, Hull and Crook materially altered the Release and Trust Agreement by marking through its second paragraph, signed the altered Release and Trust Agreements, returned it to Farm Bureau by letter date March 14, 2012, and negotiated Farm Bureau's check. Copies of the March 14, 2012, letter and the altered Release and Trust Agreements are attached hereto as Exhibit C and incorporated herein by reference.
>
> 13. Hull and Crook had no authority or right to negotiate the settlement checks on any terms other than those offered by Farm Bureau.
>
> 14. Farm Bureau demanded that Hull and Crook return the settlement funds, but Hull and Crook refused to do so.

It is readily apparent from Farm Bureau's own complaint that it alleged breach of the subject insurance policy occurred on 14 March 2012 when Defendants (1) expressly stated to Farm Bureau that they were not honoring their subrogation rights; (2) marked out and initialed the paragraph on the Release and Trust Agreements for Underinsured Motorist Coverage concerning subrogation; and (3) refused to return the settlement funds despite Farm Bureau's express demand that they do so.

In the present case, there existed more than the mere apprehension or the mere threat of an action – indeed, Farm Bureau alleged two claims in its amended complaint and did not "relinquish" the first claim of Defendants' obligation to return the $73,452.48 until it did so in its briefs and at oral argument. The claim for that money accrued when Defendants affirmatively declared the funds would not be returned – a clear disagreement and, necessarily, more than a threat or apprehension of a lawsuit.

Even assuming *arguendo* that Defendants' actions were not a direct breach of contract, Defendants actions would alternatively, at the very least, constitute an anticipatory breach of contract which would begin to toll the three-year statute of limitations.

> The doctrine of anticipatory breach is well known: when a party to a contract gives notice that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise perform under the contract because of the anticipatory breach of the first party. Because by their words and conduct, defendants indicated that they would no longer honor the contract, plaintiff was excused from its obligation to tender the purchase price and *had an action for breach of contract*.

Phoenix Ltd. P'ship of Raleigh v. Simpson, 201 N.C. App. 493, 505, 688 S.E.2d 717, 725 (2009) (internal citation and quotation marks omitted and emphasis added). Our Supreme Court has long held that "[i]t is established by the decisions in this jurisdiction . . . [t]hat the cause of action [for breach of contract] accrues at the time of default, which may arise from abandonment *or anticipatory breach*[.]" *Lipe v. Citizens Bank & Trust Co.*, 207 N.C. 794, 795-96, 178 S.E. 665, 666 (1935) (emphasis added).

"Breach may also occur by repudiation. Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligations under the contract *before* the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises." *Millis Const. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) (internal citations omitted). "[F]or a breach of contract action, the claim accrues upon breach." *Miller v. Randolph*, 124 N.C. App. 779, 781, 478 S.E.2d 668, 670 (1996).

In the present case, the tortfeasors were known to the parties at the time of Defendants' clear and unambiguous repudiation of Farm Bureau's subrogation rights. Despite this fact, Farm Bureau did not initiate its cause of action based upon these subrogation rights until 1 May 2015 — over three years after Defendants' express anticipatory breach of them on 14 March 2012.

Consequently, the trial court did not err in dismissing Farm Bureau's complaint for failing to bring its lawsuit based upon its subrogation rights within the applicable three year statute of limitations. "Having resolved this case on that issue, we need not consider the remaining issues presented by the parties to this Court, and any discussion of them would be obiter dictum." *Stark ex rel. Jacobsen v. Ford Motor Co.*, 365 N.C. 468, 481, 723 S.E.2d 753, 761-62 (2012).

Conclusion

For the reasons stated above, the trial court's order granting Defendants' motion to dismiss is affirmed.

AFFIRMED.

Chief Judge McGEE concurs.

Judge TYSON concurring in part, dissenting in part in a separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

The majority's opinion concludes Farm Bureau's claim was barred by the applicable statute of limitations, and as such does not address the merits of this case. I concur with the majority that Farm Bureau's breach of contract claim is time-barred, but only to the extent Farm Bureau's claim asserted Defendants were obligated to return the sum of $73,452.48 paid to them pursuant to their UIM claims. Farm Bureau waived this claim in its briefs and again at oral argument.

Rather, Farm Bureau has requested (1) a declaration that it is subrogated to the proceeds of the Robinson recovery to the extent of its prior payment of UIM benefits to Defendants; and, (2) a recovery from Defendants out of the proceeds from the Robinson recovery offsetting the amount Farm Bureau previously paid Defendants under Defendant Hull's policy. The majority does not attempt to distinguish Farm Bureau's breach of contract claim from its declaratory judgment action, and

argues all claims are time-barred. Farm Bureau's declaratory judgment action and request for recovery from the Robinson proceeds are timely filed and are not time-barred under the statute. I respectfully dissent.

I. Statute of Limitations

Defendants argue the complaint demonstrates Farm Bureau's claim is barred by the applicable three year statute of limitations. They assert Farm Bureau's subrogation claim arose when Farm Bureau made payments to Defendants. They point out the record demonstrates Farm Bureau forwarded funds on 9 March 2012, which Defendants received on 12 March 2012, and Farm Bureau was made aware that Defendants altered the Settlement Agreement by 15 March 2012. Farm Bureau's complaint was filed 1 May 2015.

Farm Bureau responds its subrogation claim could not and did not accrue until settlement proceeds from Robinson were tendered to Defendants, as Farm Bureau had not suffered any subrogation damages prior to that point.

The majority holds Farm Bureau's complaint was time-barred because a breach of contract occurred when the Defendants struck through the subrogation language in the Settlement Agreements, and Farm Bureau brought its action more than three years after that point. Farm Bureau's initial complaint, which asserted "Defendants are obligated to return the sum of $73,452.48" received pursuant to their initial UIM claim, would be barred by the statute of limitations. Farm Bureau tendered those funds over three years prior to bringing its claims.

However, Farm Bureau explicitly relinquished this contract claim in its briefs and at oral argument, stating, "Farm Bureau waives any claim for the return of the specific funds paid to the Defendants under the UM/UIM provisions of the Farm Bureau Policy, to the extent that such a claim was asserted in its Complaint." Rather, Farm Bureau is timely seeking (1) a declaration that it is subrogated to the proceeds of the Robinson recovery to the extent of its prior payment of UIM benefits to Defendants; and, (2) a recovery from Defendants out of those proceeds from Robinson offsetting UIM benefits Farm Bureau had previously paid. These claims were timely filed and are not barred by the statute of limitations.

A. Standard of Review

" 'Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure . . . when some fact disclosed in the complaint necessarily defeats the plaintiff's

claim.' " *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (quoting *Hooper v. Liberty Mut. Ins. Co.*, 84 N.C. App. 549, 551, 353 S.E.2d 248, 250 (1987)). Therefore, "[an affirmative] statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996).

B. Analysis

Neither party disputes and we agree the applicable statute of limitations in this case is three years. *See* N.C. Gen. Stat. § 1-52(1) (2015) (three-year statute of limitations for breach of contract claims); N.C. Gen. Stat. § 1-52(2) (2015) (establishing three-year statute of limitations for statutorily-based claims for which no other statute of limitation is provided); *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 222, 176 S.E.2d 751, 756 (1970) (applying the three-year statute of limitations from N.C. Gen. Stat. § 1-52(1) to a claim for equitable subrogation). Rather, this issue concerns when Farm Bureau's right of action to file a claim accrued, and commenced the running of the statute of limitations.

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises[.]" *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962) (citations and quotation marks omitted). The statute of limitations "cannot begin to run against an aggrieved party who under no circumstances could have maintained an action at the time the wrongful act was committed *until* that aggrieved party becomes entitled to maintain an action." *Williams v. General Motors Corp.*, 393 F.Supp. 387, 392 (M.D.N.C. 1975), *aff'd*, 538 F.2d 327 (4th Cir. 1976) (emphasis in original); *see Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) ("In no event can a statute of limitation begin to run until plaintiff is entitled to institute action."). For example, in breach of contract actions, [t]he claim accrues at the time of notice of the breach." *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002).

In contrast, courts only exercise jurisdiction in declaratory judgment actions where an "actual controversy" exists between the parties. *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984). Our Supreme Court has acknowledged, while the "actual controversy" rule is difficult to apply in some cases, "[a] mere difference of opinion between parties does not constitute a controversy within the

meaning of the Declaratory Judgment Act." *Id.* (citation and quotation marks omitted).

"Mere apprehension or the mere threat of an action or a suit is not enough." *Id.* Litigation must appear unavoidable for an actual controversy to exist. *Id.* "Thus the Declaratory Judgment Act does not 'require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.' " *Id.* (quoting *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942)).

Here, Farm Bureau did not waive its subrogation rights. As noted, the waiver contained in Farm Bureau's initial settlement offerto Defendants only waived subrogation rights to the "above referenced claim," specifically GMAC's tender of Branham's policy limits to Defendants, and did not waive its future subrogation rights against other recoveries.

The majority holds the statute of limitations began to run when Defendants altered the Settlement Agreements and retained the proceeds tendered therewith, as this constituted an anticipatory breach and repudiation of the contract. The majority, quoting *Millis Const. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987), states:

> Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligation under the contract before the time for performance under the terms of the contract, the issues of anticipatory breach or breach by anticipatory repudiation arises. (emphasis and citations omitted).

However, this Court has further explained:

> For repudiation to result in a breach of contract, "the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute[.]" *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917) (citation and quotation marks omitted). *Furthermore, even a "distinct, unequivocal, and absolute" "refusal to perform" is not a breach "unless it is treated as such by the adverse party."* *Id.* (citation and quotation marks omitted). Upon repudiation, the non-repudiating party "may at once treat it as a breach of the entire contract and bring his action

> accordingly." *Id.* (citation and quotation marks omitted). Thus, breach by repudiation depends not only upon the statements and actions of the allegedly repudiating party but also upon the response of the non-repudiating party. *See id.*

D.G. II, LLC. v. Nix, 211 N.C. App. 332, 338-339, 712 S.E.2d 335, 340-41 (2011) (emphases supplied) (quoting *Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 237, 700 S.E.2d. 232, 235-36 (2010)).

Here, Farm Bureau did not treat Defendants' action of altering the Settlement Agreements as a "breach of the entire contract." *See id.* Rather, Farm Bureau allowed Defendants to retain the tender of the UIM benefits, which Farm Bureau acknowledges Defendants were rightfully owed under the policy. As stated in Defendants' answer, Farm Bureau "agreed to allow Defendants to have full use and control of said UIM funds, with the parties agreeing to disagree as to each other's position regarding subrogation rights as against future recoveries." As such, an anticipatory breach did not occur.

At the time of Farm Bureau's tender of the UIM policy limits, no other recovery existed from which Farm Bureau could seek to be subrogated. As addressed below, the purpose of UIM coverage is "to place a policy holder *in the same position that the policy holder would have been in* if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage." *Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. 137, 142, 566 S.E.2d 835, 838 (2002) (emphasis supplied) (citations and quotation marks omitted), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 627 (2003). If Defendants had never received any additional recovery from Robinson, who was fully insured, Farm Bureau could not have asserted any subrogation rights.

Similarly, had Defendants recovered an amount from Robinson less than the $73,452.48 UIM benefits paid by Farm Bureau, Farm Bureau would have only been entitled to subrogation rights against the additional recovery in the amount actually received by Defendants, and not the full amount it had previously paid to Defendants. Here, Defendants received an amount in excess of the $73,452.48 Farm Bureau had previously paid, which allowed Farm Bureau to assert subrogation rights against the additional recovery for the entire amount previously paid under the UIM policy.

Under the Farm Bureau Policy and Endorsement, Farm Bureau's subrogation rights are *directly dependent* upon an additional recovery by Defendants. Until Defendants received the additional recovery

from the fully insured Robinson and then denied Farm Bureau subrogation, Farm Bureau had no actionable claim for subrogation. As such, no actionable claim for a declaration of its subrogation rights could or did arise until Defendants' recovery and denial. *See Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 61.

If Farm Bureau had brought a declaratory judgment action for subrogation at any time between its tender of the UIM limits and notice of Robinson's settlement, no actual controversy would have supported its claim. *See id.* The declaratory judgment action in this case did not accrue until after Farm Bureau was notified of Defendants' settlement proceedings with Robinson, Defendants denied Farm Bureau's subrogation rights to those accessible funds, and "litigation appear[ed] unavoidable." *Id.* Farm Bureau timely filed its action for declaratory judgment within three years after receiving notice of Defendants' negotiations with Robinson, ultimate payment by Robinson, and Defendants' refusal to subrogate. *See* N.C. Gen. Stat. § 1-52.

Farm Bureau's declaratory judgment action and claim for recovery from the proceeds received by Defendants from fully insured tortfeasor Robinson is properly filed and is not barred by the statute of limitations applicable to the Defendants' original breach of contract. Because I would hold these remaining claims are not time-barred, I address the other issues raised by Farm Bureau in this case.

II. Preservation of Farm Bureau's Arguments for Subrogation Rights Under the Endorsement and N.C. Gen. Stat. § 20-279.21(b)(3)-(4)

Farm Bureau asserts it properly preserved its claims for appeal based upon the Endorsement and N.C. Gen. Stat. § 20-279.21(b)(3)-(4). I agree.

A. Standard of Review

This Court has repeatedly held "the law does not permit parties to swap horses between courts in order to get a better mount, meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (citations and quotation marks omitted).

B. Analysis

Farm Bureau's complaint requests the trial court to "enter a Declaratory Judgment . . . *construing the BAP policy.*" (emphasis supplied). Defendants contend this language limits Farm Bureau's

arguments to the main policy and does not include the Endorsement. I disagree.

The Farm Bureau Policy provides additional coverage to Defendants through the North Carolina Uninsured Motorist Coverage Endorsement (the "Endorsement"). This additional coverage includes both UM and UIM coverage for bodily injury, as the term "underinsured motor vehicle" is included within the definition of "uninsured motor vehicle" in the Endorsement. The Endorsement is an essential part and extension of Farm Bureau's Policy. As such, Farm Bureau properly preserved its arguments regarding the Endorsement's UM and UIM coverage.

Farm Bureau also properly preserved its arguments under N.C. Gen. Stat. § 20-279.21(b)(3)-(4). North Carolina law clearly states the provisions of N.C. Gen. Stat. § 20-279.21 are read into the Farm Bureau Policy to the same extent as if they were actually incorporated therein: "Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written into it." *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 272, 172 S.E.2d 284, 286-87 (1970) (emphasis, citations, and quotation marks omitted). When Farm Bureau sought a declaration of its subrogation rights by "construing the BAP policy," the Endorsement and applicable statutory provisions were also properly incorporated therein and were before the trial court to consider.

III. Farm Bureau's Subrogation Rights Under the Endorsement and N.C. Gen. Stat. § 20-279.21(b)(3)-(4)

Neither party disputes Branham, the initial tortfeasor, was an underinsured motorist or that upon GMAC's tender of Branham's policy limits, Defendant Hull was able to access her UIM coverage under the Farm Bureau Policy and Endorsement. Rather, Farm Bureau argues the Farm Bureau Policy, Endorsement, and N.C. Gen. Stat. § 20-279.21(b)(3)-(4), expressly provide subrogation rights to Farm Bureau with respect to Defendants' recovery from Robinson. Farm Bureau also asserts that neither the statute nor the Farm Bureau Policy and Endorsement require that Farm Bureau advance its policy limits in regards to the GMAC tender to preserve its subrogation rights against any future recovery by Defendants.

A. Standard of Review

When considering a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, "[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are

sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat. Bank of N.C.*, 85 N.C. App. 669, 670-71, 355 S.E.2d 838, 840 (1987).

> In order to overcome such a motion, a plaintiff is not required to "conclusively establish" any factual issue in the case. Rather, the only question properly before a court reviewing a Rule 12(b)(6) motion is whether "the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true."

Feltman v. City of Wilson, 238 N.C. App. 246, 256, 767 S.E.2d 615, 622 (2014) (emphasis, citation, and quotation marks omitted). The allegations in the complaint, taken as true, must be reviewed in the light most favorable to the nonmoving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994).

B. Analysis

The Motor Vehicle Safety and Financial Responsibility Act of 1953 (the "Act") "is a remedial statute and the underlying purpose is the protection of innocent victims who have been injured by financially irresponsible motorists." *Haight v. Travelers/Aetna Property Casualty Corp.*, 132 N.C. App. 673, 678, 514 S.E.2d 102, 106, *disc. review denied*, 350 N.C. 831, 537 S.E.2d 824 (1999); N.C. Gen. Stat. § 20-271.1-.39 (2015). "The terms of the Act are written into every North Carolina automobile liability policy, and where the terms of a policy conflict with those of the Act, the Act will prevail." *Farm Bureau Ins. Co. of N.C., Inc. v. Blong*, 159 N.C. App. 365, 369, 583 S.E.2d 307, 310, *disc. review denied*, 357 N.C. 578, 589 S.E.2d 125 (2003).

The Act includes provisions outlining the requirements for both UM and UIM coverage. N.C. Gen. Stat. § 20-279.21(b)(3)-(4) (2015). UM coverage "fill[s] the gap" in situations where a tortfeasor has no liability insurance. James E. Snyder, Jr., *North Carolina Automobile Insurance Law* § 30-1 (3d ed.1999).

Whereas, UIM coverage is a secondary source of recovery, which "allows the insured to recover when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate fully the injured party." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) (citation and quotation marks omitted); *see* Snyder, *North Carolina Automobile Insurance Law* § 30-1. "UIM coverage is intended

to place a policy holder *in the same position that the policy holder would have been in* if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage." *Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. at 142, 566 S.E.2d at 838 (emphasis supplied). An injured party is not entitled to and may not obtain UIM proceeds, if the tortfeasor's insurance is sufficient to compensate his damages or if it is greater than his UIM coverage. N.C. Gen. Stat. § 20-279.21(b)(4).

In support of this interpretation of the statute, both the UM and UIM provisions of the Act provide an insurer with subrogation rights against additional recovery received by the injured party. For subrogation rights under UM coverage, N.C. Gen. Stat. § 20-279-21(b)(3) provides:

> In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of coverage, the insurer making payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of that person against *any person or organization legally responsible for the bodily injury for which the payment is made*, including the proceeds recoverable from the assets of the insolvent insurer.

N.C. Gen. Stat. § 20-279.21(b)(3) (emphasis supplied).

The subrogation rights of insurers under the UIM provision are more limited:

> An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. *No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured*

> *motorist where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice.*

N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis supplied).

1. Subrogation Rights Against Recovery from Joint Tortfeasors

This Court has previously considered whether the plain language of N.C. Gen. Stat. § 20-279.21(b)(3)-(4) extend and protect an insurer's subrogation rights against a joint tortfeasor, who is not underinsured. *Blong*, 159 N.C. App. at 371, 583 S.E.2d at 310-11. In *Blong*, a drunk driver ran a red light and struck another vehicle containing five teenagers. *Id.* at 366, 583 S.E.2d at 308. The drunk driver's insurance carrier tendered the limits of its policy to the victims and their families almost immediately after the accident, but the amount was inadequate to compensate their damages. *Id.*

The victims and their families filed two "dram shop" lawsuits, contending the businesses were negligent in serving alcohol to a person who was already intoxicated. *Id.* at 366-67, 583 S.E.2d at 308. At the same time, the victims and their families sought further compensation under their own UIM coverage. *Id.* at 367, 583 S.E.2d at 308. One of the victims was covered under a policy through Farm Bureau, which tendered the full amount it owed under the policy: $250,000. *Id.* The policy had a limit of $300,000 per accident, but the victims already received $50,000 from the drunk driver's insurance company and, like in the present case, Farm Bureau waived its subrogation rights against that initial $50,000 recovery from the underinsured tortfeasor. *Id.* at 366-67, 583 S.E.2d at 308-09.

Prior to tendering the limits of the policy, Farm Bureau informed the policy holder it would seek an offset of its UIM payments from the amount recovered in the dram shop actions. *Id.* at 367, 583 S.E.2d at 309. The parties "agreed to disagree" about future subrogation rights. *Id.* Farm Bureau's tender of payment was thus made without prejudice to Farm Bureau's right to seek a determination of its subrogation rights, which was the ultimate question before this Court in *Blong*. *Id.*

Although *Blong* was a UIM case, this Court considered both the provisions of N.C. Gen. Stat. § 20-279.21(b)(3) and (4) regarding UM and UIM coverage in making this determination. *Id.* at 371, 583 S.E.2d at 310-11. This Court first held the broad language stated in the UM provision

allowing subrogation "against any person or organization legally responsible" also applied to UIM coverage. *Blong*, 159 N.C. App. at 371, 583 S.E.2d at 310-11. This Court then interpreted that subrogation language to encompass the liability and coverage of the bars involved in the dram shop lawsuits. *Id.* at 373, 583 S.E.2d at 312.

This Court in *Blong* noted the issue of how to interpret the language of N.C. Gen. Stat. § 20-279.21(b)(3) had arisen, but was not addressed in a prior case because the insurer had waived any rights to subrogation under its policy. *Id.* at 371, 583 S.E.2d at 311 (citing *Silvers v. Horace Mann Ins. Co.*, 90 N.C. App. 1, 11-12, 367 S.E.2d 372, 378 (1988), *modified and remanded*, 324 N.C. 289, 378 S.E.2d 21 (1989)). The policy in *Blong* did not present such an impediment. *Id.* As such, this Court held Farm Bureau was entitled to subrogation for the recovery received as a result of the dram shop lawsuits, and stated "[p]laintiff insurer, by the Act and present policy, is subrogated to defendants' right to recover from *any legally responsible party*." *Id.* at 372, 583 S.E.2d at 311 (emphasis supplied).

Here, the facts and issues alleged by Farm Bureau in its amended complaint parallel those before this Court in *Blong*. *See id.* at 366-67, 583 S.E.2d at 308-09. As in *Blong*, Defendants received an initial settlement from the underinsured driver's insurer, GMAC. Farm Bureau waived subrogation to that amount and paid out the balance of its UIM policy limits to Defendants. This tender of payment was conditioned upon Defendants signing and returning the Settlement Agreement as tendered, which included a provision providing Farm Bureau with subrogation rights against any recovery received from "any other person or persons, organizations, associations or corporations[.]" Also, as in *Blong*, controversy arose over the subrogation rights of Farm Bureau against any future recovery Defendants received from joint tortfeasors. In both cases, this controversy resulted in Farm Bureau seeking a declaration of its rights once recovery was realized. *See id.*

When Defendants recovered from Robinson in this case, Farm Bureau properly asserted subrogation rights against Defendants' recovery from Robinson as a "legally responsible party," provided that Farm Bureau had not waived its subrogation rights under the Farm Bureau Policy, Endorsement, and Act. *See id.* at 371, 583 S.E.2d at 311. Defendants' answer specifically confirms Farm Bureau had not and did not waive its subrogation rights to future recoveries against other tortfeasors. To do so, as the majority allows here, allows Defendants a double recovery as a result of and arising from their original wrongful conduct.

2. Waiver of Subrogation Rights by Failure to Advance

Relying upon the Farm Bureau Policy and Endorsement, N.C. Gen. Stat. § 20-279.21(b)(4), and North Carolina Supreme Court precedent, Defendants argue when Farm Bureau failed to advance the amount of tentative liability settlement offered by GMAC within thirty days of being notified, this failure resulted in a waiver of Farm Bureau's subrogation rights to any future claims or recoveries from joint tortfeasors. Farm Bureau's complaint admits it was notified of the GMAC settlement offer and that it did not advance. However, Farm Bureau argues its failure to advance only waived its subrogation rights against future recovery from Branham and GMAC; and not advancing did not result in a waiver of its rights against all future claims from any other joint tortfeasors.

Defendants rely on *Lunsford v. Mills*, to argue Farm Bureau was required to advance the tentative liability settlement as a pre-condition to preserve and assert subrogation rights under N.C. Gen. Stat. § 20-279.21(b)(4). *Lunsford v. Mills*, 367 N.C 618, 766 S.E.2d 297 (2014). Farm Bureau argues *Lunsford* does not hold that UIM insurers cannot waive subrogation recovery from the underinsured tortfeasor, or that UIM insurers must advance their UIM policy limits to preserve their subrogation rights against some future unknown or unidentified recovery from other tortfeasors.

In *Lunsford*, Lunsford sued all the joint tortfeasors in one action claiming they were jointly and severally liable for his injuries. *Id.* at 620, 766 S.E.2d at 299. While one of the tortfeasors in that action was underinsured, the combined insurance of the tortfeasors was over the limits of Lunsford's UIM coverage with Farm Bureau. *Id.* Pursuant to that action, the underinsured driver's insurance company tendered the limits of its policy to Lunsford. *Id.* Lunsford's attorney notified Farm Bureau of the underinsured driver's tender and demanded Farm Bureau tender payment of Lunsford's UIM claims. *Id.*

Lunsford eventually settled its claims with the other tortfeasors for an amount that exceeded his UIM coverage with Farm Bureau. *Id.* Unlike here, Farm Bureau never tendered the UIM coverage to Lunsford, but filed a motion for summary judgment on Lunsford's UIM claims. *Id.* at 620-21, 766 S.E.2d at 299. Lunsford also moved for summary judgment, maintaining that his UIM policy "stacked" and he was entitled to receive $350,000—the amount of his aggregated UIM coverage minus the $50,000 recovered from the underinsured driver. *Id.* at 621, 766 S.E.2d at 299-300. The trial court granted Lunsford's motion for summary judgment and ordered that Farm Bureau pay Lunsford $350,000. *Id.* at 621, 766 S.E.2d at 300.

Our Supreme Court upheld the trial court's order and held an insured is only required to exhaust the liability insurance of a single at-fault driver in order to trigger payment of UIM benefits. *Id.* at 627, 766 S.E.2d at 303. In support of its conclusion, the Court briefly addressed subrogation and noted, "[i]f . . . insureds were required to exhaust the liability policies of all at-fault motorists as a prerequisite to recovering UIM coverage, there would be no need to provide UIM carriers subrogation or reimbursement rights, and consequently, these provisions would be rendered meaningless." *Id.* at 628, 766 S.E.2d at 304.

The Court reiterated that the purpose of the UIM statute is "to place a policy holder in the same position that the policy holder would have been in if the tortfeasor had had liability coverage equal to the amount of the . . . UIM coverage." *Id.* at 628 n.1, 766 S.E.2d at 304 (quoting *Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. at 142, 566 S.E.2d at 838). In doing so, the Court noted the statute allows an insurer to "seek recovery of any overpayment through the exercise of its rights to subrogation or reimbursement. Through these mechanisms, insurers are able to recoup any overpayment and insureds are divested of any so-called 'windfall' " *Id.* The effect of the majority's conclusion here specifically allows Defendants a double recovery and the prohibited "windfall."

In *Lunsford*, the insurer, "could have preserved its subrogation rights by advancing its UIM policy limits." *Id.* at 628, 766 S.E.2d at 304. Contrary to the facts here and before us, the insurer in *Lunsford* had not paid the insured any amounts under the insured's UIM policy or attempted to preserve its rights to subrogation in any other way. *Id.*

While Farm Bureau admits it did not advance in this case, it expressly reserved its subrogation rights through other means. First, unlike in *Lunsford*, this case did not originate as a single action against multiple tortfeasors. Defendants, here, first pursued a claim against the underinsured driver and his carrier, GMAC. Upon notice of this settlement, Farm Bureau, in this case, tendered the policy limits owed to Defendants under the UIM coverage in the Endorsement. Farm Bureau's offer to settle Defendants' UIM claims for $73,452.48 represented the precise difference between the UIM policy limits of $100,000 and the initial liability settlements from GMAC in the sum of $26,547.52. Farm Bureau did not need to preserve its subrogation rights against GMAC, because Farm Bureau's tender of the policy limits already accounted for and credited GMAC's tender of proceeds against the UIM policy limits.

Second, Farm Bureau expressly conditioned the tender upon Defendants' signature and return of the Settlement Agreements

accompanying the proffered check. This Settlement Agreement expressly asserted Farm Bureau's policy and statutory subrogation rights against any future tortfeasor recovery received by Defendants. Unilaterally and without authority, Defendants crossed through that provision providing Farm Bureau subrogation rights to future recovery and failed to return the proceeds check tendered with the Settlement Agreements. Defendants' action was an express rejection of the Settlement Agreement and proceeds as tendered. This action constituted a counter-offer to Farm Bureau, as a rejection of terms as tendered becomes counteroffer. *See Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) ("[I]f the seller purports to accept but changes or modifies the terms of the offer, he makes what is generally referred to as a qualified or conditional acceptance. . . . Such a reply from the seller is actually a counteroffer[.]" (citations and quotation marks omitted)). Farm Bureau never agreed to release its subrogation rights against recovery by Defendants from other joint tortfeasors.

Finally, Farm Bureau did not waive its rights to subrogation under the Farm Bureau Policy and Endorsement. This Court has specifically looked at the coverage provided under the UIM policy in determining whether an insurer has waived its subrogation rights. *See Blong*, 159 N.C. App at 371, 583 S.E.2d at 311 (citing *Silvers*, 90 N.C. App. at 11-12, 367 S.E.2d at 378). As noted in *Blong*, the broad subrogation language of N.C. Gen. Stat. § 20-279.21(b)(3) is "subject to the terms and conditions of such coverage." *Id.*

The Farm Bureau Policy initially addresses Farm Bureau's subrogation rights under "Transfer of Rights of Recovery Against Others to Us," which states:

> If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

Like the language in N.C. Gen. Stat. § 20-279.21(b)(3), this language provides Farm Bureau with broad subrogation rights against "any person or organization" from whom the insured has the right to recover damages.

Under the Endorsement, UIM coverage is only triggered and payable if the insured is damaged by an *underinsured vehicle*. The Endorsement's "Transfer of Rights of Recovery Against Others to Us"

amends, but does not replace, Farm Bureau's subrogation rights concerning its UIM coverage:

> a. If we make any payment on the Named Insured's behalf, we are entitled to recover what we paid from other parties. The Named Insured must transfer rights of recovery against others to us. The Named Insured must do everything necessary to secure these rights and do nothing to jeopardize them.
>
> However, our rights under this paragraph do not apply with respect to vehicles described in Paragraphs F.4.a., c. and d. of the definition of "uninsured motor vehicle". For these vehicles, if we make any payment and the Named Insured recovers from another party, that Named Insured must hold the proceeds in trust for us and pay us back the amounts we have paid.
>
> b. Our rights do not apply under this provision with respect to damages caused by an "accident" with [an underinsured] vehicle described in Paragraph b. of the definition of "uninsured motor vehicle" if we:
>
> (1) Have been given prompt written notice of a tentative settlement between an "insured" and the insurer of [an underinsured] vehicle described in Paragraph b. of the definition of "uninsured motor vehicle"; and
>
> (2) Fail to advance payment to the "insured" in an amount equal to the tentative settlement within 30 days after receipt of notification.

Under the Endorsement, the language waiving subrogation rights by failing to advance only and expressly applies to a recovery *from the underinsured vehicle*, and not broadly to anyone from whom the insured has a right to recover. For subrogation rights against damages recovered from any other vehicle, the main provision in the Farm Bureau Policy applies and gives Farm Bureau subrogation rights against anyone from whom the insured has the right to recover damages.

Farm Bureau did not need to preserve its subrogation rights against recovery from GMAC under the Endorsement, because Farm Bureau took that recovery into account as a credit when it tendered the balance of its UIM policy limits to Defendants.

On the other hand, Robinson was not operating an *underinsured vehicle*. As such, the damages caused by Robinson do not meet the definitional trigger required in order for the limitation in the Endorsement to apply. Rather the broad language of the Farm Bureau Policy is applicable, which preserves Farm Bureau's subrogation rights against the recovery from the fully insured Robinson.

UIM coverage "allows the insured to recover when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate fully the injured party." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. at 494, 467 S.E.2d at 41. Its purpose is not for injured parties to receive a "windfall" and net recovery in excess of their actual damages. *See Lunsford*, 367 N.C. at 628 n.1, 766 S.E.2d at 304; *Walker v. Penn Nat. Sec. Ins. Co.*, 168 N.C. App. 555, 558-59, 608 N.C. App. 107, 110 (2005) (holding the trial court erred in failing to credit defendant with the $30,000.00 paid by the liability carrier); *N.C. Farm Bureau Mut. Ins. Co. v. Gurley*, 139 N.C. App. 178, 183, 532 S.E.2d 846, 849 (2000) ("While we realize that the insureds will never be fully compensated for their loss, we see no evidence that the legislature intended to award the insureds more than they would have received if the tortfeasor had been insured or uninsured." (citations and quotation marks omitted)).

Farm Bureau's complaint, when viewed in light most favorable to Farm Bureau, alleges a claim upon which relief can be granted. *See Feltman*, 238 N.C. App. at 256, 767 S.E.2d at 622. While Farm Bureau admits it did not advance, this case is distinguishable from *Lunsford*, as Farm Bureau tendered the limits of the amount owed to Defendants under the Farm Bureau Policy and Endorsement. Furthermore, as in *Blong*, Farm Bureau tendered this amount on the express condition that its subrogation rights against future recoveries were preserved. *See Blong*, 159 N.C. App. at 367, 583 S.E.2d at 309. The trial court erred by granting Defendants' Rule 12(b)(6) motion to dismiss.

3. Applicability to Defendant Crook

Defendants argue the subrogation provisions in the Farm Bureau Policy and Endorsement do not apply to Defendant Crook, as she was not a named insured. I disagree.

The Endorsement's "Transfer of Rights of Recovery Against Others To Us," states, "[i]f we make any payment on the Named Insured's behalf, we are entitled to recover what we paid from other parties. *The Named Insured must transfer rights of recovery against others to us*. The Named Insured must do everything necessary to secure

these rights[.]" (emphasis supplied). While this provision only requires the "Named Insured" to transfer the rights of recovery against others to Farm Bureau, this provision only changes, but does not replace, the Farm Bureau Policy "Transfer of Rights" provision. The Farm Bureau Policy "Transfer of Rights" provision is much broader, and requires "any person or organization to or for whom we make payment" to transfer their rights of recovery against others to Farm Bureau. This includes any recovery received by Defendant Crook. Defendants' argument is without merit.

VIII. Conclusion

While I concur that Farm Bureau's breach of contract claim seeking a return of the UIM benefits paid to Defendants is time-barred, as Farm Bureau stipulates, the remaining Farm Bureau declaratory judgment claims are not time-barred.

Farm Bureau declaratory judgment action and claim for recovery of proceeds received by Defendants from Robinson could not and did not accrue until Farm Bureau received notice of Defendants' negotiations with and payment by Robinson, and Defendants' denied of Farm Bureau's subrogation rights to that recovery. Farm Bureau brought its declaratory judgment action within three years of Defendants' denial of Farm Bureau's subrogation rights to the Robinson recovery, Farm Bureau's claim is not barred by the statute of limitations.

Since the Endorsement and the Act are essential parts and an extension of the Farm Bureau Policy, Farm Bureau properly preserved its arguments under the Farm Bureau Policy, the Endorsement, and the Act. Finally, Farm Bureau's complaint, when viewed in light most favorable to Farm Bureau, alleges a claim upon which relief can be granted.

As such, the trial court erred in granting Defendant's motion to dismiss Farm Bureau's declaratory judgment action. I do not address Farm Bureau's equitable subrogation argument, as the trial court erred in granting Defendants' motion to dismiss. I concur in part and respectfully dissent in part.

RIDLEY v. WENDEL

[251 N.C. App. 452 (2016)]

BENJAMIN RIDLEY, PLAINTIFF
v.
BRET WENDEL; HENDRICK LUXURY COLLISION CENTER, LLC; CITY CHEVROLET AUTOMOTIVE COMPANY; NATIONWIDE MUTUAL FIRE INSURANCE COMPANY; AND EACH OF THEM, DEFENDANTS

No. COA16-363

Filed 30 December 2016

1. Evidence—expert testimony—auto repair—damage not noticed

The trial court did not err in a case arising from a failed auto repair following a collision by allowing plaintiff's expert to testify that defendant did not "just accidentally miss all this damage." The witness was tendered as an expert in automotive repair without objection and was so admitted, the testimony followed his expert opinion, which was not objected to, about the obviousness of the damage to the vehicle, and the testimony was provided in response to a general question and assisted the jury in understanding the evidence.

2. Evidence—expert testimony—auto repair—motivation not to repair

The trial court did not err in a case arising from a failed auto repair following a collision by allowing an expert witness to testify that the there was "motivation for not fixing the damaged areas." The testimony did not address defendant's motivations but instead gave a general overview based upon the witness's area of expertise of why a body shop may not repair certain damage to a vehicle.

3. Unfair Trade Practices—auto repairs—repairs not done

The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict on plaintiff's claim for unfair and deceptive trade practices arising from failed auto repairs after a collision. There was more than a scintilla of evidence that plaintiff suffered damages from defendant's representations that the vehicle was repaired when it was not, that defendant knew or should have known that it was not repaired, and that defendant had conducted unauthorized repairs.

4. Damages—failed auto repairs—remittitur

The trial court properly denied defendant a new trial where defendant argued that the jury ignored the instructions on damages,

but the trial court properly calculated the remittitur of damages to put plaintiff in the same position he would have been in had he not been the victim of fraud.

5. Attorney Fees—failed auto repair—authority for award

The trial court's award of attorney fees was reversed in a case that rose from a failed auto repair after a collision. The award was under N.C.G.S. § 20-354.9 for violation of the North Carolina Motor Vehicle Repair Act, but the case was not tried under the Act and the jury was neither given instructions on nor asked to render a verdict on any cause of action related to the Act.

Appeal by defendant City Chevrolet Automotive Company from judgment entered 4 January 2016 by Judge Daniel A. Kuehnert in Catawba County Superior Court. Heard in the Court of Appeals 28 November 2016.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellant.

Law Offices of Jason E. Taylor, PC, by Lawrence B. Serbin and Jason E. Taylor, for plaintiff-appellee.

ENOCHS, Judge.

City Chevrolet Automotive Company ("Defendant")[1] appeals from judgment entered on 4 January 2016 following a jury verdict finding Defendant liable to Benjamin Ridley ("Plaintiff") for fraud and negligence and awarding damages in the amount of $200,000.00. The judgment of the trial court remitted the jury's verdict to $110,270.66, found Defendant had violated the Unfair and Deceptive Trade Practices Act, trebled the damages to $330,811.98, and awarded attorneys' fees and costs to Plaintiff. On appeal, Defendant contends that the trial court erred in allowing Plaintiff's expert witness to testify regarding the motivations and intent of Defendant; in denying Defendant's motion notwithstanding the verdict on the claim for unfair and deceptive trade practices; in denying Defendant's motion for a new trial; and in awarding Plaintiff attorneys' fees. After careful review, we affirm the judgment, but reverse the grant of attorneys' fees.

1. City Chevrolet Automotive Company is the only defendant which is a party to the present appeal.

Factual Background

On 12 June 2013, Plaintiff was involved in a motor vehicle accident in his 2008 Land Rover LR3. Plaintiff's vehicle struck Bret Wendel's vehicle when Wendel turned in front of Plaintiff at an intersection as the traffic light turned yellow. Plaintiff was travelling at 40 miles per hour at the time of the collision and both vehicles were damaged.

After the accident, Plaintiff contacted Land Rover Corporation of America to find out who they recommended to repair his vehicle. Plaintiff ultimately selected Hendrick Luxury Collision Center ("Hendrick") to do the repairs. He specifically relayed his concerns to Hendrick that because of the force of the collision there was likely to be unseen damage to the vehicle's frame.

Approximately one month later, Hendrick notified Plaintiff that his vehicle had been repaired and was ready to be picked up. Hendrick, however, had not performed any repairs on the vehicle. Unbeknownst to Plaintiff, the repairs had, in actuality, all been performed by the collision repair shop of Defendant.

Plaintiff picked up his vehicle from Hendrick and drove it home. On his way home, he noticed that the vehicle was pulling to the right significantly and whenever he hit a bump in the road, "there was a very loud clanking like metal slapping metal[.]" When Plaintiff arrived home, he inspected the vehicle and noticed that the front left tire had an eighteen inch gash in it and was the same tire that had been on the vehicle at the time of the collision. Plaintiff contacted Hendrick with his concerns about the repairs to his vehicle and, on 8 August 2013, Hendrick took Plaintiff's Land Rover back to their shop for further inspection and repairs.

Hendrick had possession of the vehicle "approximately from June until . . . the first part of September." When Hendrick returned the vehicle to Plaintiff, it still pulled to the right, but the clanking sound was no longer heard. Plaintiff attempted to contact Hendrick several times over the next several weeks, but Hendrick never returned any of his phone calls.

Wendel was insured by Nationwide Mutual Fire Insurance Company ("Nationwide"). After Hendrick returned his vehicle to him for the second time, Plaintiff contacted Nationwide and requested that they reimburse him for the diminished value of his Land Rover. Nationwide made Plaintiff an offer of reimbursement, but Plaintiff did not believe that it was fair, and so he declined the offer.

To determine the exact diminished value of his vehicle, Plaintiff took his vehicle to Michael Bradshaw at K&M Auto in Hickory, North Carolina. After inspecting Plaintiff's vehicle, Bradshaw determined that the Land Rover was not safe and "shouldn't be on the road." The vehicle had several issues that had either not been repaired or had been repaired improperly. Plaintiff left the vehicle at K&M Auto and contacted Nationwide to discuss these issues.

It was at this time that Nationwide "made the decision to total loss the vehicle" and notified Plaintiff that he "would get paid the value of the vehicle in a couple of days." Nationwide produced a supplemental estimate of repair that included replacing the frame of the vehicle. This estimate, or the separate estimate prepared by Bradshaw, required that the vehicle be declared a total loss. However, Nationwide then represented to Plaintiff that they would need to have the vehicle inspected by a third-party to confirm that the frame of the vehicle did, in fact, need to be replaced. This inspection was never performed because Plaintiff backed out of the agreed-upon inspection.

On 15 July 2014, Plaintiff filed suit against Defendant, Wendel, Hendrick, and Nationwide for damage done to his vehicle in the original collision, as well as damages related to the repair of his vehicle. Plaintiff asserted claims for negligence, fraud, negligent misrepresentation, civil conspiracy, tortious breach of contract, bad faith refusal to settle, and unfair and deceptive trade practices. Nationwide was dismissed as a defendant, and the claims against Wendel were ordered to be tried separately. Beginning on 9 November 2015, a jury trial was held on Plaintiff's claims against Defendant and Hendrick in Catawba County Superior Court before the Honorable Daniel A. Kuehnert.

The jury returned a verdict against Defendant and Hendrick on 18 November 2015. The jury found Defendant guilty of fraud and negligence and awarded Plaintiff $200,000.00 in damages. Because civil conspiracy was not found by the jury, Hendrick was dismissed from the suit pursuant to the trial court's granting of its post-judgment motion to dismiss. On 20 November 2015, Defendant moved for judgment notwithstanding the verdict and a new trial. On 1 December 2015, Plaintiff filed a motion for costs and attorneys' fees.

The trial court remitted the jury's verdict to $110,270.66 when it entered judgment on 28 December 2015. The trial court also found unfair and deceptive trade practices, and trebled the damages to $330,811.98. The trial court also awarded Plaintiff attorneys' fees pursuant to the North Carolina Motor Vehicle Repair Act in the amount of $100,725.00,

as well as costs totaling $6,726.68. It is from this judgment that Defendant appeals.

Analysis

I. Expert Witness Testimony

[1] Defendant first argues on appeal that the trial court erred in allowing Plaintiff's expert to testify that Defendant did not "just accidentally miss all this damage" and that there was "motivation for not fixing the damaged areas" of the vehicle. Specifically, Defendant argues that this testimony should have been excluded as it "suggests whether legal conclusions should be drawn or whether legal standards are satisfied." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587, 403 S.E.2d 483, 489 (1991). We disagree, and affirm the trial court on this issue.

It is well established that "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 232 N.C. App. 95, 98, 753 S.E.2d 361, 365 (2014) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004)), *aff'd*, 368 N.C. 880, 787 S.E.2d 1 (2016). " 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1998)).

Rule 702(a) of the North Carolina Rules of Evidence provides that

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> > (1) The testimony is based upon sufficient facts or data.
> >
> > (2) The testimony is the product of reliable principles and methods.

> (3) The witness has applied the principles and methods reliably to the facts of the case.

Furthermore, pursuant to Rule 704 of the North Carolina Rules of Evidence, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Expert testimony is admissible if " 'the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' " *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (citing *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978)), *cert. denied*, __ U.S. __, 181 L. Ed. 2d 529 (2011).

In the present case, Plaintiff's expert, Michael Bradshaw, had worked in the automobile collision repair industry for twenty-five years. As an automotive steel structural technician and as an estimator, Bradshaw had achieved the "platinum level" of the Inter-Industry Conference on Auto Collision Repair. He was recognized by Automotive Service Excellence as a certified collision repair technician and collision estimator. Also, he was certified by 17 different automobile manufacturers to provide collision repair for their vehicles. Mr. Bradshaw was tendered as an expert in automotive repair without objection, and was so admitted.

Plaintiff's expert was asked, and answered in the negative, whether "any professional body tech [could] just accidentally miss all this damage." This testimony followed his expert opinion, which was not objected to, as to the obviousness of the damage to the vehicle. We find that this testimony was provided in response to a general question and assisted the jury in understanding the evidence before it. It did not address the intent or motivation of Defendant.

[2] Defendant also argues that the expert should not have been allowed to testify that there was "motivation for not fixing the damaged areas." However, this testimony did not address Defendant's motivations, but instead gave a general overview — based upon the witness' area of expertise — of why a body shop may not repair certain damage to a vehicle. Bradshaw explained different methods by which an automotive repair shop can bill for services and opined that the method used by Defendant could embolden a shop not to repair all of the damage to a vehicle.

None of the testimony Defendant argues was improperly admitted invaded the province of the jury. Rather, it comprehensively assisted the jury in understanding the evidence and determining a fact in issue. "The

[expert] witness may offer testimony in the form of an opinion or inference even though it may embrace the ultimate issue to be decided by the jury." *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 283 (1990) (citation, quotation marks, and ellipses omitted).

To prevail on this issue, Defendant must not only show that the challenged testimony was improperly admitted, but must also show that it was prejudicial. "In civil cases, the burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby." *HAJJM*, 328 N.C. at 589, 403 S.E.2d at 490 (citation, quotation marks, and brackets omitted). As shown above, the challenged expert testimony was properly admitted and, therefore, whether this expert's testimony was prejudicial need not be addressed. The trial court did not err, and this assignment of error is overruled.

II. Unfair and Deceptive Trade Practices

[3] Defendant argues in its second assignment of error that the trial court erred in denying its motion for judgment notwithstanding the verdict on Plaintiff's claim for unfair and deceptive trade practices. Defendant asks this Court to grant it a new trial because of the inconsistency between the basis for fraud pled in Plaintiff's complaint and the jury's rejection of this basis in their verdict. It contends that for this reason, Plaintiff's fraud claim cannot support the finding of unfair and deceptive trade practices. We disagree, and affirm the trial court's denial of Defendant's motion.

A motion for a judgment notwithstanding the verdict is, fundamentally, the renewal of an earlier motion for a directed verdict. *Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 306, 319 S.E.2d 290, 292 (1984). When a motion for judgment notwithstanding the verdict is brought, the issue is "whether the evidence is sufficient to take the case to the jury and to support a verdict for [the non-moving party]." *Id.* The evidence is to be considered in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences that can be drawn from that evidence. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). "This is a high standard for the moving party, requiring a denial of the motion if there is more than a scintilla of evidence to support the non-movant's *prima facie* case." *Ellis v. Whitaker*, 156 N.C. App. 192, 195, 576 S.E.2d 138, 140 (2003).

N.C. Gen. Stat. § 75-1.1(a) (2015) states, in pertinent part, that "unfair or deceptive acts or practices in or affecting commerce [ ] are declared unlawful." Our Supreme Court has maintained that " '[i]n order

to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.' " *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (quoting *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001)).

"While our Supreme Court has held that to succeed under G.S. 75-1.1, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452-53, 279 S.E.2d 1, 7 (1981). Moreover, while "[a] mere breach of contract, even if intentional, is not an unfair or deceptive act under Chapter 75[,]" *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006), "substantial aggravating circumstances attending the breach [may allow the plaintiff] to recover under the Act[.]" *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) (citation omitted).

In the present case, evidence was presented, which when viewed in the light most favorable to Plaintiff, tended to show that Plaintiff had suffered damages due to Defendant's representations to him that his vehicle was repaired, when Defendant knew or should have known that it was not fully or properly repaired. Furthermore, the evidence tended to show that Defendant had also conducted unauthorized repairs to Plaintiff's vehicle. These actions by Defendant had the tendency or capacity to mislead or create the likelihood of deception. Additionally, these facts were ultimately found by the jury. Consequently, because more than a scintilla of evidence was presented establishing these facts, the trial court correctly denied Defendant's motion for judgment notwithstanding the verdict. Therefore, Defendant's arguments on this issue are overruled.

III. Remittitur and New Trial

[4] Defendant next argues that it should also be granted a new trial because the jury's verdict indicates that they ignored the trial court's instructions on damages. It further argues that even the trial court's remittitur of damages was insufficient to uphold the verdict because it is unclear whether the jury's verdict included punitive damages and because the trial court's remittitur included items which were not recoverable as damages. Again, we disagree.

Defendant asserts that the trial court should have granted its motion for a new trial pursuant to Rules 59(a)(5)-(7) of the North Carolina Rules of Civil Procedure which provide as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> . . . .
>
> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]

"Denial of a motion for a new trial pursuant to N.C.R. Civ. P. 59(a)(5) and (6) is reviewed for an abuse of discretion, while the sufficiency of the evidence to justify the verdict is reviewed under a de novo standard." *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 160, 683 S.E.2d 728, 742 (2009).

"A jury is presumed to follow the court's instructions[,]" and we must therefore presume that the jury based its verdict on these instructions. *Nunn v. Allen*, 154 N.C. App. 523, 541, 574 S.E.2d 35, 46 (2002). Defendant has presented no evidence, aside from the amount of the jury award, to show that the jury did not follow the instructions of the trial court. While "[t]he party seeking damages bears the burden of proving them in a manner that allows the fact-finder to calculate the amount of damages to a reasonable certainty . . . proof to an absolute mathematical certainty is not required." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002).

Here, Plaintiff presented evidence regarding the cost incurred for the storage of his damaged vehicle, his loss of the use of his vehicle, and the cost of renting a vehicle while his was unsafe to drive. Certainly Plaintiff should not recover a windfall of excess recovery, but, if fraud is proved — as the verdict here indicates — he must be allowed "a complete remedy." *Tradewinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 841, 733 S.E.2d 162, 169 (2012) (citation omitted). " '[I]t is elementary that a plaintiff in a fraud suit has a right to recover an amount in damages which will put him in the same position as if the fraud had not been practiced on him.' " *Id.* (quoting *Godfrey v. Res-Care*,

Inc., 165 N.C. App. 68, 79, 598 S.E.2d 396, 404 (2004)). " 'Damages are compensation in money, in an amount so far is possible, to restore a respective plaintiff to his or her original condition or position[.]' " *Id.* (quoting *Godfrey*, 165 N.C. App. at 78-79, 598 S.E.2d at 404). We are satisfied here that the trial court properly calculated the remittitur of damages to put Plaintiff in the same position he would have been in had he not been the victim of fraud, and, as a result, we affirm the trial court's denial of Defendant's motion for a new trial on this ground.

IV. Attorneys' Fees

[5] In its final argument on appeal, Defendant asserts that the trial court erred in awarding attorneys' fees to Plaintiff pursuant to N.C. Gen. Stat. § 20-354.9 (2015) for violation of the North Carolina Motor Vehicle Repair Act. This case was not tried under this Act and the jury was neither given instructions on nor asked to render a verdict on any cause of action related to this Act. Therefore, we reverse the trial court's award of attorneys' fees.

"Because statutes awarding an attorney's fee to the prevailing party are in derogation of the common law, [these statutes] must be strictly construed." *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991). Here, the statute under which the trial court awarded attorneys' fees states, in pertinent part: "Any customer injured by a violation of this Article may bring an action in the appropriate court for relief. The prevailing party in *that action* may be entitled to damages plus court costs and reasonable attorneys' fees." N.C. Gen. Stat. § 20-354.9 (emphasis added).

Rule 54(c) of the North Carolina Rules of Civil Procedure states, in pertinent part, that "[e]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

> [I]t is well-settled that adherence to the particular legal theories that are suggested by the pleadings is subordinate to the court's duty to grant the relief to which the prevailing party is entitled. It is equally well-settled, however, that the relief granted must be consistent with the claims pleaded and embraced within the issues determined at trial, which presumably the opposing party had the opportunity to challenge. Simply put, the scope of a lawsuit is measured by the allegations of the pleadings and the evidence before the court and not by what is demanded. Hence, relief under Rule 54(c) is always proper when it

> does not operate to the substantial prejudice of the opposing party. Such relief should, therefore, be denied when the relief demanded was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial.

N.C. Nat. Bank v. Carter, 71 N.C. App. 118, 121-22, 322 S.E.2d 180, 183 (1984) (internal citations omitted).

Here, Plaintiff brought his case without reference to, or reliance upon, the North Carolina Motor Vehicle Repair Act. Neither his pleadings nor his evidence at trial gave any indication that he was relying on this Act to remedy his loss. It is thus axiomatic that he may not recover any remedy provided for by this Act. Therefore, the trial court's grant of attorneys' fees based upon the Motor Vehicle Repair Act must be reversed.

Conclusion

In conclusion, the trial court properly allowed Plaintiff's expert witness to testify at trial. Furthermore, the trial court did not err in finding unfair and deceptive trade practices or in denying Defendant's motion for a new trial. These rulings of the trial court are consequently affirmed. The granting of attorneys' fees based upon the North Carolina Motor Vehicle Repair Act, however, is reversed.

AFFIRMED IN PART; REVERSED IN PART.

Chief Judge McGEE and Judge BRYANT concur.

STATE v. LAIL

[251 N.C. App. 463 (2016)]

STATE OF NORTH CAROLINA
v.
AVERY JOE LAIL, JR.

No. COA16-608

Filed 30 December 2016

1. Homicide—second-degree murder—depraved heart malice

Amended N.C.G.S. § 14-17 does not require the jury to specify in every instance whether depraved heart malice supports its verdict finding an accused guilty of second-degree murder. However, there is no language indicating an intent to limit depraved heart malice as statutorily defined to only instances involving the reckless driving of an impaired driver.

2. Sentencing—second-degree murder—special verdict—malice theory—depraved heart

The trial court did not err in a second-degree murder case by sentencing defendant as a B1 felon based on the jury's general verdict. Although trial courts for sentencing purposes should require the jury by special verdict to designate under which available malice theory it found defendant guilty of second-degree murder, there was no evidence presented in this case that would support a finding of B2 depraved-heart malice.

Appeal by defendant from judgment entered 28 September 2015 by Judge J. Thomas Davis in Gaston County Superior Court. Heard in the Court of Appeals 30 November 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General David J. Adinolfi, II, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

ELMORE, Judge.

Avery Joe Lail, Jr. (defendant) appeals from a judgment entered after a jury returned a general verdict finding him guilty of second-degree murder. Defendant argues the trial judge improperly sentenced him as a Class B1 felon based on a verdict failing to specify whether the jury found him guilty of Class B1 or B2 second-degree murder, which depends, in part, on which malice theory supported the conviction. We conclude defendant received a fair trial and a proper sentence.

During defendant's murder trial, the State proceeded under a deadly weapon implied malice theory arising from defendant's alleged use of a butcher knife to slash the victim's throat. After the presentation of evidence, the judge instructed the jury on the definitions of express malice and deadly weapon implied malice (B1 second-degree murder) but not on depraved-heart malice (B2 second-degree murder). The judge charged the jury on first-degree murder, second-degree murder, and voluntary manslaughter. The jury returned a general verdict of guilty of second-degree murder.

At sentencing, an issue arose about whether defendant should be sentenced as a B1 or B2 felon based on the jury's general verdict. Under our State's previous murder statute, all second-degree murders were B2 felonies. Under an applicable amendment to that statute, second-degree murder was reclassified as a B1 or a B2 felony based, in part, on whether depraved-heart malice supported the conviction. Over defendant's objection, the trial judge ruled that, based on the evidence presented and the jury instruction, the verdict supported sentencing defendant as a B1 felon.

On appeal, defendant argues that since depraved-heart malice may have supported his conviction, the jury's general verdict did not support B1 punishment and requires he be resentenced as a B2 felon. We hold that since the jury was not presented with evidence supporting a finding of depraved-heart malice, its general verdict was unambiguous and his B1 sentence proper. Where, however, the jury is presented with both B2 depraved-heart malice and a B1 malice theory, a general verdict would be ambiguous and a B2 sentence would be proper. In this situation, trial judges for sentencing purposes should frame a special verdict requiring the jury to specify which malice theory supported its second-degree murder verdict.

I. Background

Just before 10:00 p.m. on 23 March 2014, Brian Dale Jones was found dead on a driveway located on Old Dowd Road in Mecklenburg County. His head and face had been beaten and bruised, his neck cut and stabbed repeatedly by a knife, and his right internal jugular vein severed. The autopsy on Brian's body revealed that he was extremely intoxicated at the time of his death, his blood alcohol level registering at .43 on the breathalyzer scale, but that he died of blood loss from his knife wounds.

On 11 April 2014, Mark Huntley, defendant, and Joyce Delia Rick were arrested in connection with Brian's death. The three had been living together in Joyce's home for a few weeks before Brian arrived

uninvited at Joyce's door on the night he died. During interviews with police, the three gave statements concerning the events surrounding Brian's homicide. On 21 April 2014, defendant was indicted on one count of first-degree murder. From 14 to 25 September 2015, defendant was tried in Gaston County Superior Court. The State's evidence generally established the following facts relevant to which malice theory supported the jury's verdict.

Mark testified that he witnessed defendant murder Brian with a butcher knife. According to Mark's testimony, on 23 March 2014, he, defendant, and Joyce were in Joyce's living room watching a NASCAR race on television. Around 1:00 p.m., defendant and Mark began drinking. A few hours later that evening, Brian arrived at Joyce's home driving a green car belonging to Brian's girlfriend, Susan Braddy. Mark had previously dated Susan. Mark had met Brian a few times before and the two had gotten into an altercation about Susan once before at a convenience store. Brian brought with him a Duke's Mayonnaise jar full of moonshine, which he shared with defendant and Mark. Over the next hour or so, the four of them hung out and talked. Joyce did not drink. Mark took a few swigs of the moonshine, but defendant and Brian drank most of it. Defendant and Brian also smoked crack together.

Once the moonshine was finished, Brian, heavily intoxicated, slurring his words and barely able to stand, started to leave Joyce's home in an attempt to drive home. Defendant tried to persuade Brian to sleep on the couch and sober up before driving but Brian refused. Defendant then helped Brian stumble outside to Susan's car and crawl into the vehicle. Mark followed. From outside the car, defendant continued to encourage Brian not to drive. Mark remained outside for a few minutes but then went back inside Joyce's home.

When Mark returned outside a few minutes later, he noticed that Brian had backed Susan's car into the driveway and defendant was standing at the driver's side window continuing to argue with Brian. The argument turned into a fight, and defendant began punching Brian through the car window. Defendant then opened the driver's side door, pulled Brian out of the vehicle, and began punching, kicking, and stomping him. Mark grabbed defendant from behind and tried to stop defendant from beating Brian, but defendant hit Mark in the head and then continued to beat a defenseless Brian. Defendant, standing on Brian's chest, stopped hitting Brian and then declared that he would be right back. Defendant went inside Joyce's home and returned outside wielding a butcher knife with an eight-inch stainless steel blade. Defendant got back on top of Brian's chest. Mark asked defendant what he was doing.

Defendant replied: "I'm gonna kill him" and then cut Brian's throat two or three times with the butcher knife.

Defendant threatened to kill Mark if he did not help dispose of Brian's body. At this point, Brian was still alive but bleeding profusely, and the only sound Mark heard from Brian was "the gurgling of the blood in his throat and lungs." After an unsuccessful attempt to load Brian's body into Susan's vehicle, defendant and Mark loaded him into the back of Joyce's minivan. Defendant drove the minivan, and Mark followed in Susan's vehicle. At one point, Mark noticed Brian's arm dangling out of the back window and got defendant's attention. The two pulled over, loaded Brian's arm back into the minivan, and then continued driving. Brian was eventually dropped on Old Dowd Road in Mecklenburg County.

Defendant and Mark then returned to Joyce's home, changed clothes, and started for South Carolina in Susan's car, leaving the minivan and without cleaning any of the blood. Over the next few days, defendant and Mark drove to South Carolina, and then to West Virginia, before returning to Charlotte and ditching Susan's car on a road near the U.S. Whitewater Center. Defendant called Joyce to come pick them up and then the three proceeded home, where they returned to sitting around watching television as if nothing ever happened until Mark was arrested a few days later.

Joyce testified that she did not witness Brian's murder. According to Joyce's testimony, on 23 March 2014, she, defendant, and Mark were hanging around watching television in her home when she heard an unexpected knock on her door around 8:00 or 9:00 p.m. When she opened the door, she saw Brian standing there. Joyce had known Brian for about four or five years and had introduced Brian and Susan, Joyce's friend of nearly forty years, to each other about a year earlier. Brian and Susan were currently living together and dating.

Joyce invited Brian into her home. Brian returned briefly to Susan's car and retrieved a jar of moonshine before coming inside and sitting down. He shared the moonshine with defendant and Mark, and the three passed it back and forth among them as they talked. Joyce did not sip any of the moonshine but took her nightly sleeping medicine that diminishes her mental faculties. Joyce was watching television when she heard an argument develop. She was unaware who was arguing or what they were arguing about but the men started to get loud. Joyce glanced over and saw Brian slam his fist into her glass coffee table. She told Brian to leave. Brian stood up and defendant said, "Let's go outside." All three men went outside.

A few minutes later, defendant came back inside, looking angry and drunk, and told Joyce that "Brian slapped him and he kicked [Brian's] ass." Joyce thought defendant was bluffing and went down the hall to the bathroom. When she came out, defendant was no longer in her home. Joyce never saw Mark come back inside, and she never saw Brian again. Approximately twenty minutes later, defendant came back inside and told her that he was going to put gas into her minivan. About an hour after that, Mark and defendant returned to Joyce's home, their clothes appearing wet, and the two went down the hall to change. Joyce started the washing machine and Mark and defendant put in their clothes. About thirty to forty-five minutes later, Mark and defendant left again, and Joyce did not see them for several days.

Defendant's evidence generally corroborated most of the State's evidence except for one major difference—that it was Mark who had cut Brian's neck.

Defendant testified that he witnessed Mark murder Brian with a steak knife. According to defendant's testimony, during the evening of 23 March 2014, he returned from a trip to the bathroom to find Mark and Joyce arguing with someone at the door. Joyce introduced this person as Brian, Susan's boyfriend. Brian looked angry. Defendant had never met Brian before and did not know Susan. Right after they met, Brian asked defendant if he drank moonshine. Defendant replied that he did, and Brian got the moonshine from Susan's car. Defendant returned to the couch and continued watching television as Brian and Mark started bickering. The more moonshine Brian drank, the more Brian and Mark argued about Susan. Eventually, Brian slammed his fist into the coffee table. The slam woke up Joyce, who told Brian to leave.

Mark escorted Brian outside and defendant followed. When they got to Susan's car, Mark and Brian started bickering again about Susan. Defendant stepped in between them to break up the fight. Brian backhanded defendant in the mouth, breaking defendant's artificial teeth. Defendant lost his temper and "beat the shit out of [Brian]," knocking him out and then kicking him in the face for good measure. Defendant then left Mark and Brian outside and went back inside Joyce's home. He saw Joyce and told her that he beat up Brian. About five minutes later, defendant returned outside and saw Mark kneeling beside Brian, giving the appearance that Mark was robbing Brian. When defendant grabbed Mark by the arm and pulled him back, he saw that Brian was covered in blood and that Mark had a knife. Defendant asked Mark why he had murdered Brian, and Mark responded that he had to do it for Susan.

Mark then asked defendant to help him dispose of Brian's body, which he did.

After the presentation of evidence, the trial court charged the jury on first-degree murder, second-degree murder, and manslaughter, and instructed on express malice and deadly weapon implied malice but not depraved-heart malice. On 25 September 2015, the jury returned a verdict finding defendant guilty of second-degree murder, not guilty of first-degree murder, and not guilty of manslaughter.

At sentencing, an issue arose as to whether defendant should be sentenced as a Class B1 or B2 felon under recently amended N.C. Gen. Stat. § 14-17(b), which reclassified second-degree murder as either a Class B1 or B2 felony, based, in part, on whether depraved-heart malice supported the conviction. Both parties argued about which Class defendant should be sentenced under based on the jury's general verdict. Over defendant's objection, the trial judge ruled that the jury's verdict, properly interpreted, found defendant guilty of Class B1 second-degree murder. The trial judge reasoned:

> [R]eading the statute . . . there would have to be some evidence that would allow some reckless and wanton manner theory to have been addressed by the jury in this case. The jury was given malice in the form of . . . the use of a deadly weapon, which is certainly not a reckless and wanton manner-type argument. So . . . the Court is going to find . . . based on the evidence in this particular case that there was not any evidence to suggest that this act, while it may be based on an inherently dangerous act, was done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberate mental mischief. So . . . the Court is going to conclude that based on the evidence in this case, the jury instructions that were given and the findings of the jury. . . , that this is a B-1 second-degree murder.

Accordingly, the trial court sentenced defendant as a Class B1 felon to 483–592 months of imprisonment. Defendant gave timely oral notice of appeal.

II. Analysis

A. 2012 Amendment

[1] Defendant contends that amended N.C. Gen. Stat. § 14-17 requires the jury to specify in every instance whether depraved-heart malice

supported its verdict finding an accused guilty of second-degree murder. We disagree. Additionally, defendant contends that contrary to the parties and the trial judge's interpretation, depraved-heart malice as contemplated by section (b)(1) of the statute is not limited to driving while intoxicated homicide cases. We agree.

Issues of statutory construction are questions of law reviewed *de novo*. *In re Ernst & Young, L.L.P.*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted). " 'The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.' " *Id.* (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)). "When construing statutes, this Court first determines whether the statutory language is clear and unambiguous." *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (citation omitted). If it is, "we will apply the plain meaning of the words, with no need to resort to judicial construction." *Id.* (citation omitted). Additionally, the " '[l]egislature is presumed to know the existing law and to legislate with reference to it.' " *State v. Davis*, 198 N.C. App. 443, 451–52, 680 S.E.2d 239, 246 (2009) (quoting *State v. Southern R. Co.*, 145 N.C. 495, 542, 59 S.E. 570, 587 (1907)).

Malice is an essential element of second-degree murder. *See, e.g.*, *State v. Thomas*, 325 N.C. 583, 604, 386 S.E.2d 555, 567 (1989). North Carolina recognizes at least three malice theories:

> (1) "express hatred, ill-will or spite"; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to "manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) a "condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

State v. Coble, 351 N.C. 448, 450–51, 527 S.E.2d 45, 47 (2000) (quoting *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982)). "The second type of malice [is] commonly referred to as 'depraved-heart' malice[.]" *State v. Fuller*, 138 N.C. App. 481, 484, 531 S.E.2d 861, 864 (2000) (citing *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000)). This type of malice is frequently used to support second-degree murder convictions based on drunk driving. *See, e.g.*, *Rich*, 351 N.C. at 395, 527 S.E.2d at 304 (upholding second-degree murder conviction under depraved-heart malice theory where an intoxicated driver "inten[ed] to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind"). However,

it is not limited only to situations involving drunk driving. *See, e.g.*, *State v. Bethea*, 167 N.C. App. 215, 219–20, 605 S.E.2d 173, 177 (2004) (upholding second-degree murder conviction under depraved-heart malice theory based on a sober driver's "reckless and wanton attempt to elude law enforcement"); *State v. Qualls*, 130 N.C. App. 1, 10–11, 502 S.E.2d 31, 37 (1998) (upholding second-degree murder conviction under depraved-heart malice theory based on a defendant's severe shaking of an infant-victim, causing his death), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999); *see also State v. Lilliston*, 141 N.C. 650, 651, 54 S.E. 427, 427 (1906) (upholding murder conviction under depraved-heart malice theory where the defendant in the crowded reception room of a railroad station engaged in a shootout, causing the death of an innocent bystander).

N.C. Gen. Stat. § 14-17 previously classified all second-degree murders, regardless of malice theory, as Class B2 felonies. *See* N.C. Gen. Stat. § 14-17(b) (2011) ("[A]ny person who commits [second-degree] murder shall be punished as a Class B2 felon."). In 2012, our General Assembly amended this statute, reclassifying second-degree murder as a Class B1 felony, except under two situations where it would remain a Class B2 felony. N.C. Gen. Stat. § 14-17(b) (2015) now provides in pertinent part:

> (b) . . . . Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> > (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.
> >
> > (2) The murder is one that was proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, and the ingestion of such substance caused the death of the user.

The plain language of this amendment, that persons convicted of second-degree murder "shall be punished as a Class B1 felon, *except*," indicates clearly that the legislature intended to increase the sentence for second-degree murder to Class B1 and to retain Class B2 punishment only where either statutorily defined situation exists. Since only the second malice form recognized by judicial law, depraved-heart malice, was

codified as mandating B2 punishment, it is clear the legislature intended a conviction based on the first or third malice forms to be treated as B1 second-degree murder. Logically, then, in a situation where no evidence is presented that would support a finding that an accused acted with depraved-heart malice, specification of malice theory would not provide clarity for sentencing purposes; it would be inferred from a general verdict that the jury found the accused guilty of B1 second-degree murder. Therefore, we conclude that amended N.C. Gen. Stat. § 14-17(b) does not always require a jury to specify whether depraved-heart malice theory supported its conviction.

Additionally, section (b)(1) was drafted in a way virtually identical to the language developed by our case law and the pattern jury instruction used to describe depraved-heart malice. *See Rich*, 351 N.C. at 396, 527 S.E.2d at 304 (approving jury instruction describing depraved-heart malice as acts "inherently dangerous to human life . . . done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"). There is no language indicating an intent to limit depraved-heart malice as statutorily defined to only instances involving the reckless driving of an impaired driver. Thus, we interpret section (b)(1) as contemplating all forms of depraved-heart malice.

B. Malice Theory Supporting the Jury's Verdict

[2] Defendant contends the trial court improperly sentenced him as a B1 felon based on the jury's general verdict, since the evidence presented may have supported a finding that he acted with depraved-heart malice. Therefore, defendant argues, the jury's verdict failing to specify whether depraved-heart malice theory supported its conviction did not authorize the trial judge to sentence him as a B1 felon but requires that he be resentenced as a B2 felon. We disagree.

"When a judge inflicts punishment that the jury's verdict alone does not allow . . . the judge exceeds his proper authority." *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (internal citation omitted); *State v. Norris*, 360 N.C. 507, 516, 630 S.E.2d 915, 921 ("[T]rial courts are limited to whatever punishment the jury's verdict authorizes."), *cert. denied*, 549 U.S. 1064 (2006). We review *de novo* whether the sentence imposed was authorized by the jury's verdict. *See, e.g.*, *State v. Silhan*, 302 N.C. 223, 261–62, 275 S.E.2d 450, 477–78 (1981) (reviewing *de novo* whether the defendant's sentence for an underlying felony was supported by a general verdict failing to specify which theory presented, (1) premeditation and deliberation or (2) felony murder, supported the jury's finding

that the defendant was guilty of first-degree murder), *abrogated on other grounds by State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997).

Additionally, "[w]here the jury is presented with more than one theory upon which to convict a defendant and does not specify which one it relied upon to reach its verdict, '[s]uch a verdict is ambiguous and should be construed in favor of [the] defendant.' " *State v. Daniels*, 189 N.C. App. 705, 709, 659 S.E.2d 22, 25 (2008) (quoting *State v. Whittington*, 318 N.C. 114, 123, 347 S.E.2d 403, 408 (1986) (citation omitted)). " 'This Court is not free to speculate as to the basis of a jury's verdict.' " *Id.* (quoting *Whittington*, 318 N.C. at 123, 347 S.E.2d at 408). However, "[a] verdict may be given . . . a proper interpretation by reference to the indictment, the evidence, and the instructions of the court." *State v. Abraham*, 338 N.C. 315, 359, 451 S.E.2d 131, 155 (1994) (quoting *State v. Hampton*, 294 N.C. 242, 247–48, 239 S.E.2d 835, 839 (1977)).

Defendant argues that the evidence presented may have supported a finding by the jury that he acted with B2 depraved-heart malice. Defendant cites to *State v. Lilliston* support his position that depraved-heart malice has been established where the reckless use of a deadly weapon caused another's death and points to the evidence presented at trial that (1) defendant and Brian had neither a prior relationship nor previous animosity between each other; and (2) defendant and Brian were extremely intoxicated. Defendant argues:

> Taking all of this evidence together, a reasonable juror could conclude that Brian['s] death from the knife wounds to his neck . . . were . . . the product of reckless and wanton acts by a man whose mind and judgment was so impaired by alcohol that he engaged in extremely dangerous acts with [a] knife in complete disregard for human life, acts which manifested a depraved mind deliberately bent on mischief.

We disagree.

In *Lilliston*, our Supreme Court held that the reckless use of a deadly weapon constituted a depraved-heart malice theory supporting a murder conviction. 141 N.C. at 651, 54 S.E. at 427. In that case, the defendant and another man "were at a house of ill fame engaged in gambling and drinking" when "a difficulty sprung up . . . between th[em] over charges of cheating." *Id.* The next day at the railroad station "in the crowded reception room they engaged in shooting at each other; the next room, separated only by a glass partition, being occupied by ladies and children." *Id.*

> [The other man] fired two shots, and then ran out of the east door, [the defendant] fired five shots; and these two men, who showed this contemptuous defiance of law, and of the lives of so many peaceable people who were entitled to the protection of the law in their lives and persons, escaped unharmed, while one bystander was killed, another seriously wounded, and others narrowly escaped.

Id. Based on those facts, the *Lilliston* Court concluded that the men acted with depraved-heart implied malice sufficient to support murder by willingly engaging in a shootout in a crowded place when it was highly probable someone would be injured:

> The homicide occurred in a crowded waiting room. The doctrine is well settled that malice is implied when an act dangerous to others is done so recklessly or wantonly as to evince depravity of mind and disregard of human life, and, if the death of any person is caused by such an act, it is murder. The most frequent instance of this species of murder is where death is caused by the reckless discharge of firearms under such circumstances that some one would probably be injured, and even where the discharge was accidental, resulting from handling the weapon in a threatening manner it was held murder.

Id. (citations and internal quotation marks omitted).

Here, there is simply no evidence which would have supported a finding of depraved-heart malice or an instruction on that theory. Unlike in *Lilliston*, where the defendant was convicted of second-degree murder of an innocent bystander, no evidence was presented that defendant intended to kill someone other than Brian but slashed his neck by accident. The evidence neither suggested that defendant slashed around a knife so recklessly or wantonly that he inadvertently killed someone nor that defendant used an imprecise weapon or aimed so indiscriminately as to manifest a mind utterly without regard for human life and social duty. The evidence here showed that the repeated knife cuts were deliberately aimed at Brian's neck.

In this case, defendant was indicted for first-degree murder. The State proceeded under a deadly weapon implied malice theory, which falls into the third malice category: That " 'condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.' " *Coble*, 351 N.C. at 451, 527 S.E.2d at 47 (quoting *Reynolds*, 307 N.C. at 191, 297 S.E.2d at 536).

"[T]he third type of malice is established by 'intentional infliction of a wound with a deadly weapon which results in death.' " *Id.* (quoting *Reynolds*, 307 N.C. at 191, 297 S.E.2d at 536). "[M]alice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death." *State v. McNeill*, 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997) (citation omitted), *cert. denied*, 522 U.S. 1053 (1998). A butcher knife is a deadly weapon. *See, e.g.*, *State v. Uvalle*, 151 N.C. App. 446, 455, 565 S.E.2d 727, 733 (2002) (citations omitted). However, deadly weapon implied malice is "not a conclusive, irrebuttable presumption." *State v. Debiase*, 211 N.C. App. 497, 509–10, 711 S.E.2d 436, 444–45 (2011) (citations omitted) (holding that the mandatory presumption of deadly weapon malice was converted to a permissible inference when the defendant presented "evidence concerning the reason for which, manner in which, and circumstances under which he used" the deadly weapon).

At trial, the State introduced evidence of deadly weapon implied malice by showing that defendant repeatedly slashed Brian's neck with a butcher knife, one large cut severing Brian's right internal jugular vein, proximately causing his death. Defendant wholly denied cutting Brian's neck with a knife and blamed Mark. Defendant never specifically rebutted deadly weapon implied malice nor advanced a depraved-heart malice theory argument. Nor did defendant request that the judge instruct the jury on depraved-heart malice. Accordingly, the trial judge submitted the charge under an express malice and deadly weapon implied malice theory and elected not to instruct on a depraved-heart malice theory. The judge instructed:

> For you to find the defendant guilty of first-degree murder the State must prove . . . that the defendant intentionally and with malice killed the victim with a deadly weapon. Malice means not only hatred, ill will, or spite, as it is ordinarily understood to be sure that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict serious bodily harm which proximately results in another's death without just cause, excuse, or justification.
>
> If the State proves beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon, or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death you may infer first that the killing was unlawful, and second, that it was done with malice, but you are not

> compelled to do so. You may consider this, along with all other facts and circumstances, in determining whether the killing was unlawful and whether it was done with malice.
>
> A deadly weapon is a weapon which is likely to cause death or serious injury. In determining whether the instrument involved was a deadly weapon you should consider its nature, the manner in which it was used, and the size and strength of the defendant as compared to the victim. A knife is a deadly weapon.
>
> . . . .
>
> If you find from the evidence beyond a reasonable doubt that . . . the defendant, acting either by himself or acting together with other persons, intentionally and with malice wounded the victim with a deadly weapon thereby proximately causing the victim's death it would be your duty to return a verdict of guilty of second-degree murder.

When considering the evidence presented and the instruction given, we conclude that there was no ambiguity in the jury's general verdict. No evidence presented would have supported a finding that defendant acted with B2 depraved-heart malice. The evidence presented supported only B1 theories of malice and the jury was instructed only on those theories. Therefore, although the jury was not instructed to answer under what malice theory it convicted defendant of second-degree murder, it is readily apparent from the evidence presented and instructions given that the jury, by their verdict, found defendant guilty of B1 second-degree murder. *See*, *e.g.*, *State v. Wiggins*, 161 N.C. App. 583, 593, 589 S.E.2d 402, 409 (2003) ("[T]he verdict sheets did not lack the required degree of specificity needed for a unanimous verdict if they could be properly understood by the jury based on the evidence presented at trial." (citation omitted)). Therefore, we hold that the trial judge properly sentenced defendant as a B1 felon.

However, we note that a general verdict would be ambiguous for sentencing purposes where the jury is charged on second-degree murder and presented with evidence that may allow them to find that either B2 depraved-heart malice or another B1 malice theory existed. In such a situation, courts cannot speculate as to which malice theory the jury used to support its conviction of second-degree murder. *See State v. Goodman*, 298 N.C. 1, 16, 257 S.E.2d 569, 580 (1979) ("If the jury's verdict were general, not specifying the theory upon which guilt was found, the court would have no way of knowing what theory the jury used

and would not have proper basis for passing judgment."). As a practical matter, where a general verdict would be ambiguous for sentencing purposes, trial courts should frame a special verdict requiring the jury to specify under which available malice theory it found the defendant guilty of second-degree murder. *See State v. Blackwell*, 361 N.C. 41, 46–49, 638 S.E.2d 452, 456–58 (2006) (encouraging the use of special verdicts in criminal cases where appropriate and recognizing that "special verdicts are a widely accepted method of preventing *Blakely* error"); *State v. Sargeant*, 206 N.C. App. 1, 10, 696 S.E.2d 786, 793 (2010) ("[A] jury's specification of its theory . . . is for purposes of sentencing proceedings."), *writ allowed*, 364 N.C. 331, 700 S.E.2d 743 (2010), and *aff'd as modified*, 365 N.C. 58, 707 S.E.2d 192 (2011).

III. Conclusion

N.C. Gen. Stat. § 14-17(b) reclassified second-degree murder into a Class B2 or a Class B1 felony based, in part, on whether depraved-heart malice supported the conviction. Where a jury is charged on second-degree murder and presented with evidence that may support a finding that an accused acted with B2 depraved-heart malice, trial courts for sentencing purposes should require the jury by special verdict to designate under which available malice theory it found the defendant guilty of second-degree murder. However, where, as here, no evidence presented would support a finding of B2 depraved-heart malice, a trial court may properly deduce from a general verdict that the jury found the defendant guilty of B1 second-degree murder. Accordingly, we find no error below and hold that the trial court properly sentenced defendant as a B1 felon.

NO ERROR.

Judges HUNTER, JR. and ENOCHS concur.

STATE v. ZUBIENA

[251 N.C. App. 477 (2016)]

STATE OF NORTH CAROLINA
v.
ASHLEY MEREDITH ZUBIENA

No. COA16-316

Filed 30 December 2016

1. Appeal and Error—appealability—guilty plea

The Court of Appeals (COA) had jurisdiction to hear defendant's appeal of her guilty plea. The COA was bound by the Supreme Court's decision in *Dickens*, and thus, defendant had a direct right of appeal pursuant to N.C.G.S. § 15A-1444(e).

2. Pleadings—motion to withdraw guilty plea—failure to meet burden

The trial court did not err by denying defendant's motion to withdraw her guilty plea. Defendant failed to meet her burden of showing that the trial court violated N.C.G.S. § 15A-1024 or that it was manifestly unjust.

3. Penalties, Fines, and Forfeitures—fine—modest amount compared to seriousness of offense

The trial court did not abuse its discretion by imposing a $1,000 fine. The fine was a relatively modest amount compared with the seriousness of the offense of strangulation of defendant's two-year-old daughter.

Judge ENOCHS dissenting.

Appeal by defendant from judgment entered 2 November 2015 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 5 October 2016.

Roy Cooper, Attorney General, by Alesia Balshakova, Assistant Attorney General, for the State.

Linda B. Weisel for defendant-appellant.

DAVIS, Judge.

Ashley Meredith Zubiena ("Defendant") appeals from her conviction for assault by strangulation. On appeal, she contends that the trial

court erred in (1) denying her post-sentencing motion to withdraw her guilty plea; and (2) ordering her to pay a $1,000 fine as part of her sentence. After careful review, we affirm.

Factual and Procedural Background

On 30 October 2015, a bill of information was filed charging Defendant with assault by strangulation of her two-year-old daughter.[1] Defendant subsequently entered into a plea agreement with the State, which was set forth in a transcript of plea. The "Plea Arrangement" section of that document provided as follows:

> Defendant shall plead guilty to one count of assault by strangulation. Pursuant to plea, the State shall dismiss the remaining charges delineated hereafter in this transcript.
>
> Parties stipulate Defendant is a level III for felony sentencing with 6 points.

On 2 November 2015, a plea hearing was held before the Honorable William H. Coward in Buncombe County Superior Court. At the hearing, the trial court conducted a plea colloquy pursuant to N.C. Gen. Stat. § 15A-1022, which included the following:

> THE COURT: All right. Miss Zubiena, have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you and your lawyer discussed the possible defenses, if any, to the charges?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you satisfied with your lawyer's legal services?
>
> THE DEFENDANT: Yes, your Honor.
>
> . . . .
>
> THE COURT: Do you understand that you're pleading guilty to the charge of assault by strangulation which

1. Although not all of the pertinent charging documents are included in the record, it appears from the transcript of plea that Defendant was also charged with misdemeanor child abuse and driving with a revoked drivers' license.

occurred on May 22, 2014 which is a Class H felony for which the maximum punishment is 39 months?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you now personally plead guilty to the charge that I just described?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you, in fact, guilty?

THE DEFENDANT: Yes, your Honor.

. . . .

THE COURT: You understand that the Courts have approved the practice of plea arrangements, and you can discuss your plea arrangement with me without fearing my disapproval?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you agreed to plead guilty as part of a plea arrangement?

THE DEFENDANT: Yes, your Honor.

THE COURT: The Prosecutor and your lawyer have informed the Court these are all the terms and conditions of your plea. *Defendant shall plead guilty to one count of assault by strangulation. Pursuant to plea, the State shall dismiss the remaining charges delineated hereafter in this transcript. Parties stipulate that Defendant is a Level Three for felony sentencing with six points. Charges to be dismissed are misdemeanor child abuse and driving while license revoked not impaired revocation*. So is the plea arrangement as set forth within this transcript and as I've just described it to you correct as being your full plea arrangement?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you now personally accept this arrangement?

THE DEFENDANT: Yes, your Honor.

THE COURT: Other than the plea arrangement has anyone promised you anything or has anyone threatened

> you in any way to cause you to enter this plea against your wishes?
>
> THE DEFENDANT: No, your Honor.
>
> THE COURT: Do you enter this plea of your own free will, fully understanding what you're doing?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: Do you agree that there are facts to support your plea and do you consent to the Court hearing a summary of the evidence?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: All right. Miss Zubiena, do you have any questions about what I've just said to you or about anything else connected to your case?
>
> THE DEFENDANT: No, your Honor.

(Emphasis added.)

After conducting a sentencing hearing, the trial court sentenced Defendant to 10-21 months imprisonment, suspended the sentence, placed her on 36 months supervised probation, imposed as special probation a five-month active term of imprisonment, and imposed a $1,000 fine. Defendant was also ordered to pay court costs and miscellaneous fees.

After the trial court announced its sentence in open court, the following exchange took place:

> [DEFENSE COUNSEL]: Your Honor, the client would motion to strike her plea.
>
> THE COURT: Denied. You have any grounds? You don't like the sentence?
>
> [DEFENSE COUNSEL]: We like [sic] to take it to trial.
>
> THE COURT: I don't think that's a grounds [sic] for striking a plea.
>
> [DEFENSE COUNSEL]: Yes, sir.

Defendant gave timely notice of appeal.

Analysis

Defendant makes two arguments on appeal. First, she argues that the trial court erred in denying her motion to withdraw her guilty plea given that the plea agreement and plea colloquy contained no indication that a fine could be imposed as part of her punishment. Second, she contends that the fine violated the excessive fines clauses of the federal and state constitutions or, in the alternative, that the trial court abused its discretion in imposing the fine.

I. Appellate Jurisdiction

[1] We must first determine whether this Court has jurisdiction to hear Defendant's appeal. N.C. Gen. Stat. § 15A-1444(e) provides, in pertinent part, the following:

> Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and *except when a motion to withdraw a plea of guilty or no contest has been denied*, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of *certiorari*.

N.C. Gen. Stat. § 15A-1444(e) (2015) (emphasis added). Our Supreme Court has explained that this portion of N.C. Gen. Stat. § 15A-1444(e) means "that when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court." *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980).

In *Dickens*, the defendant pled guilty to various charges and was sentenced to a term of imprisonment. On the following day, he moved to withdraw his guilty pleas on the ground that his attorney had told him that he would receive a punishment consisting solely of restitution rather than a prison sentence. The trial court denied the motion, and the defendant appealed. *Id.* at 77, 261 S.E.2d at 184.

The Supreme Court held that the defendant was "entitled to appeal as a matter of right since his motion to withdraw his pleas of guilty, made during the term and on the day following pronouncement of judgment, was denied." *Id.* at 79, 261 S.E.2d at 185. *Dickens* has not been overturned by the Supreme Court and is thus binding on our Court. *See Mahoney v. Ronnie's Rd. Serv.*, 122 N.C. App. 150, 153, 468 S.E.2d 279,

281 (1996) ("[I]t is elementary that we are bound by the rulings of our Supreme Court."), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997). Moreover, the General Assembly has not subsequently revised the relevant portion of N.C. Gen. Stat. § 15A-1444 upon which *Dickens* relied.

The present case is analytically indistinguishable from *Dickens*. Here too Defendant pled guilty, was sentenced, unsuccessfully moved to withdraw her guilty plea, and argued on appeal that the sentence imposed was different from that contained in her plea agreement. Therefore, as in *Dickens*, Defendant has an appeal as of right to this Court pursuant to N.C. Gen. Stat. § 15A-1444(e) to challenge the denial of her motion to withdraw her guilty plea. *See Dickens*, 299 N.C. at 79, 261 S.E.2d at 185.

Our dissenting colleague reaches a different conclusion, relying principally on this Court's decision in *State v. Carriker*, 180 N.C. App. 470, 637 S.E.2d 557 (2006), for the proposition that Defendant was required to file a petition for *certiorari* in order to appeal the denial of her motion to withdraw her guilty plea.[2] In *Carriker*, the defendant entered into a plea agreement that stated she would receive a suspended sentence and pay a fine and court costs. She pled guilty, was given a suspended sentence, and was also ordered to surrender her nursing license. She then moved to withdraw her guilty plea on the ground that her plea agreement had not mentioned the surrender of her nursing license. The trial court denied the motion, and she appealed. *Id.* at 470, 637 S.E.2d at 558.

On appeal, this Court stated the following with regard to its jurisdiction to hear the appeal:

> We begin by noting that "a challenge to the procedures followed in accepting a guilty plea does not fall within the scope of N.C. Gen. Stat. § 15A–1444 (2003), specifying the grounds giving rise to an appeal as of right." *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004). Defendants seeking appellate review of this issue must obtain grant of a writ of *certiorari*.

Id. at 471, 637 S.E.2d at 558. We then proceeded to address the merits of the appeal after noting that the defendant had, in fact, filed a petition for *certiorari*. *Id.*

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2. We note that the State has not asserted that Defendant lacks an appeal as of right or that this Court otherwise lacks jurisdiction.

Carriker failed to acknowledge *Dickens* and instead relied upon our prior decision in *Rhodes*. However, *Rhodes* did not involve a defendant who had moved to withdraw his guilty plea in the trial court. In *Rhodes*, the defendant entered into a plea agreement providing that he would be sentenced in the intermediate range. *Rhodes*, 163 N.C. App. at 192, 592 S.E.2d at 732. The trial court accepted his plea and imposed a suspended sentence. After a recess, the trial court reopened the case *sua sponte* based on new information and proceeded to resentence the defendant to an active term of imprisonment. The defendant did not move to withdraw his guilty plea in the trial court but nevertheless filed an appeal based, in part, on his contention that the court had imposed a sentence that was inconsistent with his plea agreement when it resentenced him. *Id.* at 192-94, 592 S.E.2d at 732-33.

The State argued on appeal that the defendant was not entitled to an appeal as of right and was instead required to petition for a writ of *certiorari*. We agreed with the State's argument but elected to treat Defendant's appeal as a *certiorari* petition. *Id.* at 193, 592 S.E.2d at 732.

In analyzing the jurisdictional issue in *Rhodes*, we cited *State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987). In *Bolinger*, after pleading guilty and being sentenced by the trial court, the defendant did not move to withdraw his guilty plea. On appeal, however, one of his arguments was that the trial court erred in accepting his guilty plea because it did not make a proper determination that he had knowingly pled guilty. The Supreme Court held that the defendant was not entitled to an appeal as of right on this issue because none of the grounds set out in N.C. Gen. Stat. § 15A-1444 providing for an appeal as of right were applicable. In so holding, the Supreme Court expressly noted that the "*defendant has made no motion to withdraw the plea.*" *Id.* at 601, 359 S.E.2d at 462 (emphasis added).

Similarly, the defendant in *State v. Blount*, 209 N.C. App. 340, 703 S.E.2d 921 (2011) — a case that is relied upon by the dissent — never moved to withdraw his guilty plea in the trial court. The defendant in *Blount* argued on appeal that the trial court erred in imposing a sentence that differed from the sentence specified in his plea agreement. We explained that because no provision of N.C. Gen. Stat. § 15A-1444 provided him with an appeal as of right on that issue, he was required to — and did — petition for a writ of *certiorari*. *Id.* at 345, 703 S.E.2d at 925.

Thus, unlike the present case and *Dickens*, the defendants in *Bolinger*, *Rhodes*, and *Blount* never made a motion in the trial court to withdraw their guilty pleas. For this reason, those defendants were

required to file a petition for a writ of *certiorari* because they lacked an appeal as of right under N.C. Gen. Stat. § 15A-1444(e). Conversely, where a defendant *does* move to withdraw her guilty plea in the trial court, she has an appeal as of right pursuant to N.C. Gen. Stat. § 15A-1444(e). *See Dickens*, 299 N.C. at 79, 261 S.E.2d at 185.

Notably, the dissent fails to differentiate between those cases where the defendant actually moved to withdraw a guilty plea in the trial court and those in which the defendant did not. Yet that question is crucial for jurisdictional purposes, as N.C. Gen. Stat. § 15A-1444(e) — by its express terms — provides an appeal as of right "when a motion to withdraw a plea of guilty or no contest *has been denied* . . . ." N.C. Gen. Stat. § 15A-1444(e) (emphasis added). *Carriker* appears to be the only reported case in which a North Carolina court has stated that a petition for *certiorari* was necessary for appellate review even where the defendant made a timely motion to withdraw his guilty plea in the trial court. In asserting this proposition, however, *Carriker* is in direct conflict with *Dickens*.

State v. Shropshire, 210 N.C. App. 478, 708 S.E.2d 181, *disc. review denied*, 365 N.C. 204, 710 S.E.2d 28 (2011), serves as an example of our Court properly following *Dickens*. In *Shropshire*, the defendant pled guilty pursuant to a plea agreement and was sentenced to a term of imprisonment. After his sentence was announced, the defendant immediately moved to withdraw his guilty plea. The trial court denied the motion, and the defendant gave notice of appeal. *Id.* at 479-80, 708 S.E.2d at 182. On appeal, we explained that

> [a]lthough Shropshire pled guilty in the trial court, Shropshire may properly appeal to this Court pursuant to N.C. Gen. Stat. § 15A–1444(e) (2009) ("[E]xcept when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court.") and *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980) ("[W]hen a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court.").

Id. at 480 n.2, 708 S.E.2d at 182 n.2.

The dissent attempts to distinguish *Dickens* from the present case by asserting that *Dickens* "present[ed] a *substantive* legal issue concerning whether a proper factual basis existed to support a defendant's guilty plea" whereas the present appeal deals with "a *procedural* challenge involving the acceptance of a guilty plea." In actuality, however, although the Supreme Court in *Dickens* briefly addressed whether a factual basis for the defendant's pleas existed, the Court explicitly stated that the "defendant's motion to withdraw his pleas of guilty is based on his assertion that he was told by his attorney . . . that he would be allowed to make restitution in lieu of a prison sentence[,]" yet the trial court nevertheless imposed a prison sentence. *Dickens*, 299 N.C. at 83, 261 S.E.2d at 187.

Thus, the principal issue in *Dickens* was not whether a factual basis existed to support the plea but rather whether the defendant received the sentence he thought had been agreed to as part of his guilty plea, which is the same issue Defendant raises here. Therefore, we cannot agree with the dissent's attempt to distinguish *Dickens* from the present case based on a "procedural" versus "substantive" distinction. Neither *Dickens* nor the statute recognize such a distinction for purposes of determining whether a defendant has an appeal as of right under N.C. Gen. Stat. § 15A-1444(e) from the denial of a motion to withdraw a plea after sentencing.

Accordingly, because we are bound by the Supreme Court's decision in *Dickens*, we conclude that Defendant has a direct right of appeal pursuant to N.C. Gen. Stat. § 15A-1444(e). Under the circumstances presented here, the language from *Carriker* relied upon by the dissent is in conflict with *Dickens* and therefore does not control. *See Employment Staffing Grp., Inc. v. Little*, __ N.C. App. __, __ n.3, 777 S.E.2d 309, 313 n.3 (2015) ("[W]here there is a conflict between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court's opinion.").

II. Denial of Motion to Withdraw Guilty Plea

[2] We now turn to the merits of Defendant's appeal. Her primary argument is that the trial court's denial of her motion to withdraw her guilty plea constituted error because she was given a sentence that was inconsistent with her plea agreement. This argument is based on the fact that although the plea agreement and plea colloquy were silent as to the possibility of a fine, the trial court nevertheless imposed a $1,000 fine as a part of her sentence.

Pursuant to N.C. Gen. Stat. § 15A-1024,

> [i]f at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2015).

Thus, if the sentence imposed by a court is "other than provided for in" the defendant's plea agreement, "[u]nder the express provisions of [N.C. Gen. Stat. § 15A-1024] a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term." *State v. Williams*, 291 N.C. 442, 446-47, 230 S.E.2d 515, 518 (1976) (emphasis omitted); *see also State v. Wall*, 167 N.C. App. 312, 314, 605 S.E.2d 205, 207 (2004) ("Our General Assembly has created a clear right for a defendant to withdraw a plea at the time sentence is imposed if that sentence differs from that contained in the plea agreement[.]"). If, conversely, "the sentence imposed is *consistent* with the plea agreement, the defendant is entitled to withdraw his plea upon a showing of manifest injustice." *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) (citation omitted and emphasis added).

Accordingly, we must first determine whether the sentence imposed in this case was inconsistent with Defendant's plea agreement. The applicable section of the transcript of plea states as follows:

> Defendant shall plead guilty to one count of assault by strangulation. Pursuant to plea, the State shall dismiss the remaining charges delineated hereafter in this transcript.
>
> Parties stipulate Defendant is a level III for felony sentencing with 6 points.

Thus, the plea agreement specified only three things: (1) the crime to which Defendant would plead guilty; (2) the charges that would be dismissed; and (3) Defendant's prior record level and number of prior record points for sentencing purposes. During the plea colloquy, Defendant confirmed in open court that these provisions constituted her "full plea agreement." While the transcript of plea and the plea colloquy reflected the fact that the statutory maximum term of imprisonment for assault by strangulation is 39 months, it is clear that her plea agreement did not contain specific terms regarding her sentence.

As such, this case is distinguishable from *Carriker*. There, the plea agreement stipulated that the defendant "would receive a suspended sentence and pay a fine and costs." *Carriker*, 180 N.C. App. at 470, 637 S.E.2d at 558. Given that the plea agreement in *Carriker* specified the punishments that the defendant would receive, the fact that the trial court's actual sentence included an additional punishment — surrender of her nursing license — rendered it inconsistent with the plea agreement and, therefore, subject to N.C. Gen. Stat. § 15A-1024. *Id.* at 471, 637 S.E.2d at 558.

Similarly, in other cases in which our appellate courts have granted relief to defendants pursuant to N.C. Gen Stat. § 15A-1024, the sentence imposed was different than that agreed to in the defendant's plea agreement. *See, e.g.*, *State v. Puckett*, 299 N.C. 727, 730, 264 S.E.2d 96, 98 (1980) (while plea agreement stipulated that defendant's convictions would be consolidated for sentencing purposes, trial court declined to consolidate convictions and instead imposed consecutive sentences); *Wall*, 167 N.C. App. at 317, 605 S.E.2d at 209 (trial court imposed sentence different than that set forth in plea agreement); *Rhodes*, 163 N.C. App. at 195, 592 S.E.2d at 733 (trial court imposed longer prison sentence than that provided for in plea agreement).

In the present case, however, we cannot conclude that the trial court "impose[d] a sentence other than provided for in [the] plea arrangement," N.C. Gen Stat. § 15A-1024, given that Defendant's plea agreement did not specify a sentence at all. Accordingly, Defendant is not entitled to relief under N.C. Gen Stat. § 15A-1024.

Having determined that Defendant's sentence was not inconsistent with her plea agreement, we must next consider whether it was manifestly unjust for the trial court to deny her motion to withdraw her guilty plea. *See Russell*, 153 N.C. App. at 509, 570 S.E.2d at 247 ("If the sentence imposed is consistent with the plea agreement, the defendant is entitled to withdraw his plea upon a showing of manifest injustice." (citation omitted)). "Factors to be considered in determining the existence of manifest injustice include whether: defendant was represented by competent counsel; defendant is asserting innocence; and defendant's plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion." *Shropshire*, 210 N.C. App. at 481, 708 S.E.2d at 183 (citation, quotation marks, and brackets omitted).

Initially, we observe that Defendant provided no specific reason to the trial court in support of her motion to withdraw her plea. Upon the trial court's inquiry as to the grounds for her motion, Defendant's

counsel simply stated: "We like [sic] to take it to trial." When the trial court then indicated that it did not think this was a sufficient reason to withdraw a guilty plea, Defendant's counsel once again failed to articulate a specific ground.

With regard to the above-quoted factors from *Shropshire*, Defendant does not argue that she (1) received ineffective assistance of counsel; (2) was innocent; or (3) pled guilty involuntarily or due to haste, coercion, or confusion. Defendant has failed to persuade us that the trial court's refusal to allow her to withdraw her plea was manifestly unjust simply because she was not made aware at the time she entered her plea that she could be subject to a fine. Indeed, we have previously observed that N.C. Gen. Stat. § 15A-1022(a) — the statute setting forth the steps a trial court must take to ensure that a defendant's decision to plead guilty is the result of an informed choice — "contains no provision requiring a defendant to be informed of any potential fines prior to acceptance of a guilty plea." *State v. Bozeman*, 115 N.C. App. 658, 663, 446 S.E.2d 140, 144 (1994).

It is likewise clear that mere dissatisfaction with one's sentence does not give rise to manifest injustice in this context. *See Shropshire*, 210 N.C. App. at 481, 708 S.E.2d at 183 (holding there was no manifest injustice where it was apparent that the "only reason for moving to withdraw [the defendant's] plea was his dissatisfaction with his sentence").

Accordingly, we conclude that Defendant has failed to meet her burden of showing that the trial court violated N.C. Gen. Stat. § 15A-1024 or that it was manifestly unjust for the trial court to deny her motion to withdraw her guilty plea. Therefore, we affirm the trial court's denial of her motion.

III. Legality of Fine

[3] Plaintiff's final argument is that the imposition of a $1,000 fine in this case constituted an abuse of discretion or, alternatively, a violation of the federal and state constitutions. We disagree.

N.C. Gen. Stat. § 15A-1361 provides that "[a] person who has been convicted of a criminal offense may be ordered to pay a fine as provided by law." N.C. Gen. Stat. § 15A-1361 (2015). "Any judgment that includes a sentence of imprisonment may also include a fine. . . . Unless otherwise provided, the amount of the fine is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.17 (2015). There is no statutory provision that specifically addresses the amount of a fine that may be imposed upon a conviction for assault by strangulation. Accordingly, the amount of the fine is left to the trial court's discretion. *See id.*

In exercising its discretion to impose a fine, a "trial court must take into account the nature of the crime, the level of the offense, and the aggravating and mitigating factors, just as it would in setting the length of imprisonment for a defendant." *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 557, 553 S.E.2d 217, 218 (2001), *disc. review denied*, 355 N.C. 221, 560 S.E.2d 359 (2002). It is well established that "trial judges have broad discretion in determining the proper punishment for crime, and . . . their judgment will not be disturbed unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, or circumstances which manifest inherent unfairness." *Id.* (citation, quotation marks, and brackets omitted). Here, we are unable to identify any basis for determining that the trial court's imposition of the $1,000 fine against Defendant constituted an abuse of discretion or was otherwise unlawful.

We are also unpersuaded by Defendant's argument that the trial court erred by failing to consider her resources when it imposed the fine. The statute Defendant cites for this proposition, N.C. Gen. Stat. § 15A-1362, states that "[i]n determining the *method of payment* of a fine, the court should consider the burden that payment will impose in view of the financial resources of the defendant." N.C. Gen. Stat. § 15A-1362(a) (2015) (emphasis added). As its plain language indicates, this statute relates to the method of payment of the fine rather than its amount.

Finally, we reject Defendant's argument that her fine violated the prohibition on excessive fines under the Eighth Amendment to the United States Constitution or Article 1, Section 27 of the North Carolina Constitution. "As the wording of the clause [prohibiting excessive fines] under our North Carolina Constitution is identical to that of the United States Constitution, our analysis is the same under both provisions." *Sanford Video & News, Inc.*, 146 N.C. App. at 557, 553 S.E.2d at 219. A fine "violates the Excessive Fines Clause if it is *grossly disproportional* to the gravity of a defendant's offense." *Id.* at 558, 553 S.E.2d at 219 (citation and quotation marks omitted). We have previously held that a $50,000 fine was not grossly disproportionate to the offense of distributing obscene materials. *See id.* at 559, 553 S.E.2d at 219.

Here, given the relatively modest amount of the fine as compared with the seriousness of the offense — strangulation of Defendant's two-year-old daughter — we have no difficulty concluding that the fine was not "grossly disproportional to the gravity of [D]efendant's offense . . . ." *Id.* at 558, 553 S.E.2d at 219 (emphasis omitted). Accordingly, Defendant has failed to show that the fine imposed in this case was unconstitutional.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judge INMAN concurs.

Judge ENOCHS dissents by separate opinion.

ENOCHS, Judge, dissenting.

Because I would find that Defendant failed to establish appellate jurisdiction, I respectfully dissent from the majority opinion reaching the merits of Defendant's appeal.

Defendant argues on appeal that the trial court erred by denying her post-sentencing motion to withdraw her guilty plea. Defendant is correct as a general proposition that

> [i]f at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2015).

This Court has plainly and unambiguously held that "a defendant seeking review of the trial court's compliance with N.C. Gen. Stat. § 15A-1024 *must* obtain grant of a writ of certiorari." *State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011) (citation omitted and emphasis added). This is so because "a challenge to the procedures followed in accepting a guilty plea *does not fall within the scope of N.C. Gen. Stat. § 15A-1444 (2003)*, specifying the grounds giving rise to an appeal as of right. Defendants seeking appellate review of this issue *must* obtain grant of a writ of certiorari." *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (internal citation omitted and emphasis added).

Defendant's appeal identifies no substantive challenge to the guilty plea she sought to withdraw. Nor did Defendant's counsel present any substantive argument before the trial court. Because her appeal raises only a procedural issue, in the absence of a writ of *certiorari*, this Court is without jurisdiction.

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008). Furthermore, it is fundamental that " '[i]n North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute' " *State v. Tinney*, 229 N.C. App. 616, 619, 748 S.E.2d 730, 733 (2013) (quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002)). Here, Defendant has not filed a petition for writ of *certiorari*. As a result, Defendant is not entitled to appellate review of the denial of her motion to withdraw her post-sentencing guilty plea and, as such, her appeal must be dismissed.

In *Carriker*, a defendant charged with felony possession of cocaine entered into a plea agreement in which she acquiesced to plead guilty to possession of drug paraphernalia and, in turn, receive a suspended sentence and pay a fine and court costs. *Carriker*, 180 N.C. App. at 470, 637 S.E.2d at 558. After pleading guilty, however, the trial court sentenced her to forty-five days imprisonment, suspended that sentence, and ordered her to surrender her nursing license. The defendant moved to withdraw her guilty plea, and the trial court denied her motion. *Id.*

On appeal, the defendant argued that the trial court erred in ordering her to surrender her nursing license because that portion of her sentence was not contemplated under the terms of her plea agreement, and further asserted that the trial court compounded its error by denying her post-sentencing motion to withdraw her guilty plea. *Id.* at 470-71, 637 S.E.2d at 558. The defendant, recognizing that our caselaw unambiguously requires that a petition for writ of *certiorari* must be filed when challenging the procedures followed in accepting a guilty plea under N.C. Gen. Stat. § 15A-1024, correctly filed a petition for writ of *certiorari* contemporaneously with her appeal. *Id.* at 471, 637 S.E.2d at 558.

This Court went on to expressly hold that

> a challenge to the procedures followed in accepting a guilty plea *does not fall within the scope of N.C. Gen. Stat. § 15A–1444 (2003)*, specifying the grounds giving rise to an appeal as of right. Defendants seeking appellate review of this issue *must* obtain grant of a writ of certiorari. Defendant here filed a petition with this Court for a writ of certiorari, and we hereby allow the petition. Thus, we will review the merits of her contentions.

Id. (internal citation and quotation marks omitted and emphasis added). *Carriker* has been cited in subsequent cases by this Court including

Blount, wherein we reaffirmed our holding in *Carriker* by once more unambiguously providing that "a challenge to the procedures followed in accepting a guilty plea does not come within the scope of N.C. Gen. Stat. § 15A-1444 (2009), which specifies the grounds for appeals as of right. *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006); *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004). Consequently, a defendant seeking review of the trial court's compliance with N.C. Gen. Stat. § 15A-1024 " 'must obtain grant of a writ of certiorari.' *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558." *Blount*, 209 N.C. App. at 345, 703 S.E.2d at 925.

Carriker's holding is thus distinguishable from *State v. Dickens*, 299 N.C. 76, 261 S.E.2d 183 (1980), cited to by Defendant and the majority. In that case, the defendant's appeal was predicated N.C. Gen. Stat. § 15A-1022 — which presents a *substantive* legal issue concerning whether a proper factual basis existed to support a defendant's guilty plea. *Id.* at 82-83, 261 S.E.2d at 187. This is a wholly separate and distinct ground for an appeal of a post-sentencing motion to withdraw a guilty plea than one brought pursuant to on N.C. Gen. Stat. § 15A-1024 which, as in the present case, deals with a *procedural* challenge involving the acceptance of a guilty plea. Indeed, § 15A-1024 is not addressed, discussed, or even mentioned in passing in *Dickens* given that the defendant's arguments in that case were wholly based upon his comprehension of his plea and whether a factual basis existed to support it rather than the procedures involved with accepting it. *See also State v. Salvetti*, 202 N.C. App. 18, 25, 687 S.E.2d 698, 703 (2010) (finding appeal as of right under 15A-1444(e) for appeal concerning post-sentencing motion to withdraw guilty plea premised upon N.C. Gen. Stat. § 15A-1022, but not discussing or addressing N.C. Gen. Stat. § 15A-1024 as that statute was never in issue).

Therefore, it is clear that *Carriker*, *Blount*, and *Dickens* are all in accord in that *Carriker* and *Blount* mandate that a petition for writ of *certiorari* is required when a *procedural* challenge is brought under § 15A-1444(e) — as "the *procedures* followed in accepting a guilty plea *do[ ] not fall within the scope of N.C. Gen. Stat. § 15A–1444*[,]" *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558 (internal citation and quotation marks omitted and emphasis added) —, whereas a *substantive* legal challenge brought under § 15A-1444(e) creates an appeal as of right, such as was the case in *Dickens* where the defendant's appeal was predicated on N.C. Gen. Stat. § 15A-1022. Defendant cannot establish appellate jurisdiction by attempting to camouflage her appeal as a substantive legal challenge by citing to inapplicable caselaw

concerning separate and distinct statutory provisions where it is clear that her appeal is plainly procedural in nature — indeed, Defendant does not argue otherwise — and predicated upon a separate and distinct statute concerning challenges to the procedures utilized by trial courts in denying post-sentencing motions to withdraw guilty pleas. It is axiomatic that simply because a defendant claims appellate jurisdiction exists by citing to certain statutes and caselaw, this does not make it so. *See State v. Sale*, 232 N.C. App. 662, 664, 754 S.E.2d 474, 477 (2014) ("Defendant purports to have a right to appeal the trial court's imposition of a special condition of probation pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a2) (2013). However, neither statute confers a right to appeal here."). To hold otherwise would needlessly and unnecessarily create a conflict in our caselaw that simply does not exist when *Blount*, *Carriker*, and *Dickens* are read carefully and *in pari materia*.

Consequently, because Defendant's attempted appeal is a procedural challenge concerning the trial court's acceptance of her post-sentencing motion to withdraw her guilty plea under § 1024, and "a challenge to the procedures followed in accepting a guilty plea *does not fall within the scope of N.C. Gen. Stat. § 15A–1444 (2003)*, specifying the grounds giving rise to an appeal as of right[,]" *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558 (internal citation and quotation marks omitted and emphasis added), I would hold that her appeal must be dismissed in accord with the clear and immutable precedents established by this Court.

VAUGHAN v. MASHBURN

[251 N.C. App. 494 (2016)]

MARIA VAUGHAN, PLAINTIFF
v.
LINDSAY MASHBURN, M.D., AND LAKESHORE WOMEN'S SPECIALISTS, PC, DEFENDANTS

No. COA15-1230

Filed 30 December 2016

Medical Malpractice—Rule 9(j) certification—amendment to correct wording—statute of limitations

The trial court did not abuse its discretion in a medical malpractice case by concluding that an amendment to the complaint to correct the Rule 9(j) certification would be futile. Where a medical malpractice plaintiff does not file a complaint with a proper certification pursuant to N.C.G.S. § 1A-1, Rule 9(j) before the running of the statute of limitations, the action cannot be deemed to have commenced within the statute of limitations.

Appeal by Plaintiff from order entered 27 August 2015 by Judge Stanley L. Allen in Iredell County Superior Court. Heard in the Court of Appeals 29 March 2016 and opinion filed by this Court on 21 June 2016. By order entered 1 July 2016, this Court allowed Plaintiff's Motion to Withdraw Opinion and Stay Mandate.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors; Shapiro, Appleton & Duffan, P.C., by Kevin M. Duffan; and Collum & Perry, PLLC, by Travis E. Collum, for Plaintiff.

Parker Poe Adams & Bernstein, LLP, by Chip Holmes and John D. Branson, for Defendants.

STEPHENS, Judge.

This appeal presents the issue of whether a trial court abused its discretion in denying Plaintiff's motion to amend a timely-filed complaint alleging medical malpractice in order to clarify a defective Rule 9(j) certification where (1) the motion to amend is made after the statute of limitations has expired, but (2) the evidence is undisputed that the actual Rule 9(j) review took place before the complaint was filed. Because Plaintiff's amended complaint would not relate back to the filing date of the original complaint, making the amendment futile, we are constrained to affirm the trial court's denial of Plaintiff's motion to amend.

Factual and Procedural Background

On 3 May 2012, Plaintiff Maria Vaughan underwent a hysterectomy performed by Defendant Lindsay Mashburn, M.D., a physician practicing obstetrics and gynecology as an employee of Defendant Lakeshore Women's Specialists, PC. Vaughan alleges that, during the procedure, Mashburn inappropriately inflicted a surgical wound to Vaughan's right uterer. In preparation for filing a medical malpractice claim against Defendants, in mid-October 2014, Vaughan's trial counsel contacted Nathan Hirsch, M.D., a specialist in obstetrics and gynecology who had performed more than one hundred hysterectomies. Counsel sent Hirsch all medical records related to Defendants' alleged negligence for Hirsch's review as required by Rule 9(j) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2015) (requiring that a medical malpractice "pleading specifically assert[] that the *medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry* have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care") (emphasis added). On 31 October 2014, Hirsch informed Vaughan's counsel that he had formed the opinion that the care and treatment provided to Vaughan by Defendants was a violation of the applicable standard of care and that he would testify to that opinion. Thus, the pre-suit review in Vaughan's case complied in all respects with the requirements of Rule 9(j).

However, the medical malpractice complaint Vaughan filed on 20 April 2015 stated "the Plaintiff avers that *the medical care* received by Maria Vaugh[a]n complained of herein *has been reviewed* . . . ." (Emphasis added). This certification language comes from a prior version of Rule 9(j):[1]

> The *medical care* in this action has been reviewed by persons reasonably expected to qualify as expert witnesses pursuant to Rule 702 of the North Carolina Rules of Evidence and are willing to testify that the medical care

1. In 2011, our General Assembly amended Rule 9(j) to, *inter alia*, substitute "medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed" for "medical care has been reviewed" in subsections (j)(1) and (j)(2). *See* Session Law 2011-400, s. 3. This amendment thus created an additional requirement that plaintiffs certify the review of their medical *records*, as well as their medical *care*, by "persons reasonably expected to qualify as expert witnesses . . . ." *See* N.C. Gen. Stat. § 1A-1, Rule 9(j)(1).

> in this case did not comply with the applicable standard of care.

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2009) (emphasis added). As Vaughan concedes, her certification omitted the required assertion that "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" were reviewed by the medical expert.

On 10 June 2015, Mashburn filed a motion to dismiss pursuant to Rule of Civil Procedure 12(b)(6), asserting that the complaint failed to state a claim upon which relief can be granted. On 12 June 2015, Defendants filed an answer, incorporating Mashburn's motion to dismiss by reference. On 30 June 2015, Vaughan filed a motion for leave to file an amended complaint, seeking to amend the wording of the Rule 9(j) certification to clarify that "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" were reviewed by the medical expert. Attached to the motion to amend were an affidavit of Vaughan's trial counsel, an affidavit of Hirsch, and Vaughan's responses to Defendants' Rule 9(j) interrogatories, each of which indicated that Hirsch, who reasonably expected to qualify as an expert witness pursuant to Rule 702, had reviewed Vaughan's medical records before the complaint was filed.

Following a hearing on 10 August 2015, on 27 August 2015, the trial court entered an order granting Defendants' motion to dismiss and denying Vaughan's motion to amend, stating two bases for its ruling:

> 1. Plaintiff's Original Complaint, filed April 20, 2015, did not comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, as amended effective October 1, 2011, in that the pleading did not specifically assert that the Plaintiff's medical expert reviewed all medical records pertaining to the alleged negligence that are available to the Plaintiff after reasonably inquiry [and]
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> 2. Plaintiff's Motion for Leave to File an Amended Complaint, filed on June 30, 2015, is . . . futile because the proposed amendment to Plaintiff's Original Complaint does not relate back to the filing date of Plaintiff's Original Complaint, and the statute of limitations ran on May 3, 2015.[][2]

2. Medical malpractice claims must be brought within three years of the last allegedly negligent act of the physician or medical care provider. *See* N.C. Gen. Stat. § 1-15(c) (2015).

(Emphasis in original). From that order, Vaughan gave written notice of appeal on 5 September 2015.

Discussion

Vaughan argues that the trial court erred in concluding that her proposed amendment was futile, and that, as a result, the court abused its discretion in denying her motion to amend and erred in dismissing the action. Specifically, Vaughan contends that the trial court was acting under a misapprehension of law, to wit, that Vaughan's proposed amended complaint did not relate back to the date of the filing of the original complaint even though "uncontroverted evidence showed that an appropriate expert review occurred before the filing of the original complaint." We are constrained by recent precedent to reject this argument.

> Motions to amend are governed by N.C. Gen. Stat. § 1A-1, Rule 15. Rule 15(a) provides that:
>
> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.
>
> Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced. Our standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion.

Fintchre v. Duke Univ., __ N.C. App. __, __, 773 S.E.2d 318, 322-23 (2015) (citations and brackets omitted). Futility of amendment is one reason that may justify a denial of a motion to amend. *Id.* at __, 773 S.E.2d at 323. However, "[w]hen discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Rutherford Elec. Mbrshp. Corp. v. 130 of Chatham, LLC*, __ N.C. App. __, __, 763 S.E.2d 296, 299 (2014) (citations and internal quotation marks omitted), *appeal dismissed and disc. review denied*, __ N.C. __, 769 S.E.2d 192 (2015).

Here, the trial court concluded that allowing Vaughan's motion to amend would be futile because the amended complaint would not relate back to the filing date of her original complaint, a matter controlled by subsection (c) of Rule 15:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2015). In the two decades since Rule 9(j) was enacted, our State's appellate courts have frequently considered the interplay between its certification requirements and the amendment and "relate back" provisions of Rule 15(a) and (c).

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action. Rule 9(j) thus operates as a preliminary qualifier to control pleadings rather than to act as a general mechanism to exclude expert testimony." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (citation and internal quotation marks omitted; emphasis in original). Soon after Rule 9(j) was enacted, this Court held that "a medical malpractice complaint that fails to include [*any*] Rule 9(j) certification [cannot] be subsequently amended pursuant to Rule 15 to include the Rule 9(j) certification." *Keith v. N. Hosp. Dist.*, 129 N.C. App. 402, 404, 499 S.E.2d 200, 202, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 646 (1998). More recently, our Supreme Court held that "permitting amendment of a complaint to add the expert certification where the expert review occurred *after* the suit was filed would conflict directly with the clear intent of the legislature." *Thigpen v. Ngo*, 355 N.C. 198, 204, 558 S.E.2d 162, 166 (2002) (emphasis added). Vaughan cites *Thigpen* as controlling the outcome of her appeal and "establish[ing] that a medical malpractice plaintiff may amend [her] Rule 9(j) certification and receive benefit of relation back under Rule 15 so long as there is evidence 'the review occurred before the filing of the original complaint' in the form of an affidavit or otherwise," such as the evidence presented to the trial court by Vaughan.

We believe that *Thigpen* differs factually and procedurally from Vaughan's case in several respects, including that Thigpen actually filed an amended medical malpractice complaint to cure her failure to include *any* Rule 9(j) certification in her original complaint. *Id.* at 200,

558 S.E.2d at 164. "[S]ix days after the statute of limitations expired, [the] plaintiff filed an amended complaint including a certification that the 'medical care has been reviewed' by someone who would qualify as an expert." *Id.* The plaintiff's case was dismissed by the trial court for failure to comply with the requirements of Rule 9(j). *Id.* Thus, among other issues, the Supreme Court considered whether

> an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j). We hold it does not. . . . In light of the plain language of the rule, the title of the act, and the legislative intent previously discussed, it appears review must occur *before* filing to withstand dismissal. Here, in her amended complaint, [the] plaintiff simply alleged that [the] plaintiff's medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness. There is no evidence in the record that plaintiff alleged the review occurred *before* the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing that the review took place before the statute of limitations expired. Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j).

Id. at 204, 558 S.E.2d at 166-67 (citation, internal quotation marks, and some brackets omitted; some emphasis added). In other words, the Court held that, where an amended complaint is allowed to correct a flawed Rule 9(j) certification, the amendment must specify that the required review occurred before the *original complaint was filed* in order to satisfy the requirements of Rule 9(j). However, contrary to Vaughan's assertion on appeal, the above-quoted language does not stand for the proposition that the inclusion of an "affirmative affidavit or date showing that the review took place before the statute of limitations expired" will entitle a plaintiff to (1) amend her Rule 9(j) certification or (2) receive benefit of relation back under Rule 15. In *Thigpen*, our Supreme Court simply did not address those questions, as it noted in holding that discretionary review had been improvidently allowed as to the issue "of whether a plaintiff who files a complaint without expert certification pursuant to Rule 9(j) can cure that defect after the applicable statute of limitations expires by amending the complaint as a matter of right and having that amendment relate back to the date of the

original complaint." *Id.* at 204-05, 558 S.E.2d at 167. Thus, *Thigpen* is inapposite to Vaughan's appeal.

Instead, we conclude that this Court's recent decisions in *Alston v. Hueske*, __ N.C. App. __, 781 S.E.2d 305 (2016) and *Fintchre*, *supra*, are dispositive and require that we affirm the decision of the trial court in Vaughan's case.

In *Alston*, as here, we reviewed a trial court's denial of a plaintiff's motion to amend her medical malpractice complaint to comply with the Rule 9(j) certification requirement and the court's resulting dismissal of the plaintiff's entire action. *Id.* at __, 781 S.E.2d at 307. The *Alston* plaintiff's original complaint alleged compliance with Rule 9(j) as follows:

> 29. Prior to commencing this action, *the medical records were reviewed and evaluated by a duly Board Certified* [sic] who opined that the care rendered to Decedent was below the applicable standard of care.
>
> 30. . . . The medical care referred to in this complaint has been reviewed by person(s) who are reasonably expected to qualify as expert witnesses, or whom the plaintiff will seek to have qualified as expert witnesses under Rule 702 of the Rules of Evidence, and who is willing to testify that the medical care rendered [to the] plaintiff by the defendant(s) did not comply with the applicable standard of care.

Id. (emphasis added). This Rule 9(j) certification, like that in Vaughan's original complaint, did not track the statutory language. Like Vaughan, alerted to this defect by the defendant's answer and motion to dismiss *after* the expiration of the statute of limitations, the plaintiff "requested leave to amend the pleadings in order to clearly comply with Rule 9(j) . . . ." *Id.* "[T]he trial court denied the [plaintiff's] request under Rule 15(a). . . . reason[ing that] the legislature intended 9(j) be satisfied from the beginning, at the time the complaint was filed." *Id.*

On appeal, the plaintiff first argued that the trial court erred in dismissing the complaint under "a hyper-technical reading of the rule [that] conflicts with the purpose of Rule 9(j), to prevent frivolous malpractice claims [because a] reading of the whole record show[ed] that [the plaintiff's] claim is not frivolous." *Id.* at __, 781 S.E.2d at 310. We rejected this contention, noting that

> Rule 9(j) requires "the medical care and all medical records" be reviewed by a person reasonably expected to

> qualify as an expert witness and who is willing to testify the applicable standard of care was not met. According to the complaint, the medical care was reviewed by someone reasonably expected to qualify as an expert witness who is willing to testify that [the] defendants did not comply with the applicable standard of care. However, the complaint alleges medical records were reviewed by a "Board Certified" that said the care was below the applicable standard of care. Thus, the complaint does not properly allege the medical records were reviewed by a person reasonably expected to qualify as an expert witness.

Id. In so holding, this Court noted that, due to the imprecise language of the certification in the original complaint, the Court did "not have enough information to evaluate whether this witness could reasonably be expected to qualify as an expert in this case." *Id.*

The *Alston* Court then considered the trial court's denial of the plaintiff's motion to amend her original complaint so as to clarify her compliance with the requirements of Rule 9(j). Citing *Keith*, the Court observed that, "[b]ecause the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a)[,]" and that, further, "[b]ecause th[e] plaintiff did not file the complaint with the proper Rule 9(j) certification before the running of the statute of limitation, the complaint cannot have been deemed to have commenced within the statute." *Id.* at __, 781 S.E.2d at 310, 311.

Vaughan attempts to distinguish *Alston* from her own case by noting that, unlike in *Alston* where the Court did "not have enough information to evaluate whether th[e] witness could reasonably be expected to qualify as an expert[,]" *id.* at __, 781 S.E.2d at 310, here the evidence is undisputed that Vaughan fully complied with the review requirements of Rule 9(j) *before* the complaint was filed. However, in affirming the trial court's denial of the plaintiff's motion to amend, the *Alston* Court did not discuss or even mention the lack of clarity regarding whether the review required by Rule 9(j) had actually been completed before the original complaint was filed. *See id.* at __, 781 S.E.2d at 310-11. Likewise, the Court did not qualify its holding that, where a "plaintiff did not file the complaint with the proper Rule 9(j) certification before the running of the statute of limitation, the complaint cannot have been deemed to have commenced within the statute." *Id.* at __, 781 S.E.2d at 311.

In *Fintchre*, this Court also considered the interplay of Rule 9(j) and Rule 15. In that matter, as in Vaughan's case,

> the trial court concluded that [the] plaintiff had failed to file a complaint containing the required Rule 9(j) certification within three years of the acts that caused her alleged injuries based on [the] plaintiff's failure to allege that all medical records pertaining to the alleged negligence were reviewed by a person who [the] plaintiff reasonably expected to qualify as an expert witness. The trial court further concluded that [the] plaintiff's motion to amend the 9(j) certification in her second complaint . . . was futile because the statute of limitations elapsed.

__ N.C. App. at __, 773 S.E.2d at 323 (internal quotation marks omitted). The plaintiff conceded that the language of the Rule 9(j) certification was deficient, but argued that,

> because she complied with the substantive requirements of Rule 9(j) before she filed her first action, filed her first action within the statute of limitations, and filed her second action within one year of taking a voluntary dismissal of her first action, the trial court should have granted her motion to amend the Rule 9(j) certification in her second complaint.

Id. The *Fintchre* Court affirmed the trial court's dismissal of that plaintiff's action based on the futility of her motion to amend:

> Both complaints failed to allege that a person reasonably expected to qualify as an expert had reviewed all available medical records pertaining to the alleged negligence. Because the second complaint was filed following the expiration of the statute of limitations, [the] plaintiff must rely on the first complaint in order to have timely filed her medical malpractice action. We hold that *where* [*the*] *plaintiff failed to file a complaint including a valid Rule 9(j) certification within the statute of limitations*, *granting [the] plaintiff's motion to amend her second complaint would have been futile*, as the trial court found.

Fintchre, __ N.C. App. at __, 773 S.E.2d at 325 (emphasis added). As with *Alston*, Vaughan draws our attention to distinctions between her case and *Fintchre*, namely: (1) that *Fintchre* concerned the amendment of a complaint after a voluntary dismissal pursuant to Rule 41(a); and (2)

that Vaughan, unlike the plaintiff in *Fintchre*, did not file *two* complaints with non-conforming Rule 9(j) certifications, the second of which was filed after notice of the first certification's deficiency. As with the distinctions Vaughan notes from *Alston*, we are not persuaded that these distinctions with *Fintchre* played a meaningful role in the Court's reasoning or holding. Indeed, as noted in the concurring opinion in *Fintchre*, in that matter, as here, it was clear that the plaintiff had actually complied with the substance of Rule 9(j) and that her certification failure did not violate the intent of the rule:

> [I]t is undisputed that [the] plaintiff complied with the requirement that her medical care and records be reviewed by a medical expert before her first complaint was filed and that [the] defendants had notice of that fact. Thus, the *intent* of Rule 9(j), to wit, requiring expert review of medical malpractice claims to prevent frivolous lawsuits, was plainly met before [the] plaintiff filed her first complaint. The obvious failure of [the] plaintiff's trial counsel to word the Rule 9(j) certification of compliance as specified in the statute is a highly technical failure which here results in the dismissal of a medical malpractice case which is *not* frivolous for the reasons Rule 9(j) is designed to prevent. I am thus sympathetic with the position of [the] plaintiff, who is thereby denied any opportunity to prove her claims before a finder of fact. I question whether such a harsh and pointless outcome was intended by our General Assembly in enacting Rule 9(j).

Fintchre, __ N.C. App. at __, 773 S.E.2d at 327 (Stephens, J., concurring) (emphasis in original).

Nonetheless, in this appeal, Vaughan argues that the recent decision of this Court in *Boyd v. Rekuc*, __ N.C. App. __, 782 S.E.2d 916, *disc. review denied*, __ N.C. __, __ S.E.2d __ (2016), controls the outcome of her case and mandates that we reverse the trial court's dismissal. Because the opinion in *Boyd* addressed a different issue than that presented in Vaughan's appeal, we disagree.

In *Boyd*, this Court addressed the interplay between Rule 9(j) and Rule of Civil Procedure 41(a), which

> allows a plaintiff to dismiss any action voluntarily prior to resting his case. . . . [and], where the dismissed action was filed within the applicable statute of limitations, . . . [to] commence a new action (based on the same claim)

> outside of the applicable statute of limitations so long as the new action is commenced within one year after the original action was dismissed.

Id. at __, 782 S.E.2d at 917 (citation and emphasis omitted). After "the trial court granted [the d]efendants' motion to dismiss [the p]laintiff's [second] complaint, concluding that [it] was not filed within the applicable statute of limitations[,]" the plaintiff timely appealed. *Id.* This Court reversed the trial court's dismissal, holding that

> where a plaintiff voluntarily dismisses a medical malpractice complaint which was timely filed in good faith but which lacked a required Rule 9(j) certification, said plaintiff may re-file the action after the expiration of the applicable statute of limitations provided that (1) he files his second action within the time allowed under Rule 41 and (2) the new complaint asserts that the Rule 9(j) expert review of the medical history and medical care occurred prior to the filing of the original timely-filed complaint.

Id. (emphasis omitted). The Court reached this result after concluding that the "case involve[d] the interplay between Rule 9(j) and Rule 41(a)(1) of our Rules of Civil Procedure" and was "essentially 'on all fours' with our Supreme Court's 2000 opinion in *Brisson v. Santoriello*, 351 N.C. 589, 528 S.E.2d 568 (2000)." *Id.*

In her motion, Plaintiff specifically cites the following language in *Boyd*, purporting to summarize the holding of *Brisson*:

> A medical malpractice complaint which fails to include the required Rule 9(j) certification is subject to dismissal with prejudice pursuant to Rule 9(j). Prior to any such dismissal, however, said plaintiff may amend or refile (pursuant to Rules 15 or 41, respectively) the complaint with the proper Rule 9(j) certification. Further, if such subsequent complaint is filed after the applicable statute of limitations has expired but which otherwise complies with Rule 15 or 41, the subsequent complaint is not time-barred if it asserts that the Rule 9(j) expert review occurred before the original complaint was filed.

Id. at __, 782 S.E.2d at 918. This language in *Boyd* is both dictum and erroneous in regard to the holding in *Brisson*. First, as noted *supra*, no issue regarding a Rule 15(a) amendment was before this Court in *Boyd*. Second, the Supreme Court did not consider the interplay of Rules 9(j)

and 15(a) in *Brisson*. The plaintiff in *Brisson* filed a complaint lacking a proper Rule 9(j) certification, and the defendant moved to dismiss on that basis. 351 N.C. at 591, 528 S.E.2d at 569. The plaintiff then filed a motion to amend the complaint per Rule 15(a), or in the alternative, to take a voluntary dismissal per Rule 41(a). *Id.* at 592, 528 S.E.2d at 570. The trial court denied the motion to amend, and the plaintiff subsequently took a voluntary dismissal and later filed a second complaint with the proper Rule 9(j) certification. *Id.* After the trial court dismissed the second complaint as barred by the statute of limitations, the plaintiff appealed. *Id.* In its opinion, the Supreme Court stated:

> We note at the outset that the Court of Appeals, in its opinion, addressed at length the effects of [the] plaintiffs' proposed amended complaint. We find that [the] *plaintiffs' motion to amend, which was denied, is neither dispositive nor relevant to the outcome of this case.* Whether the proposed amended complaint related back to and superceded the original complaint has no bearing on this case once [the] plaintiffs took their voluntary dismissal on 6 October 1997. . . .
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> *The only issue for us to review on appeal is whether [the] plaintiffs' voluntary dismissal pursuant to N.C.R. Civ. P. 41(a)(1) effectively extended the statute of limitations by allowing [the] plaintiffs to refile their complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification. We hold that it does.*

Id. at 593, 528 S.E.2d at 570 (emphasis added).[3]

Therefore, we must reject Vaughan's assertion in her motion that

> *Boyd* unequivocally holds that a plaintiff may amend a medical malpractice complaint outside of the applicable statute of limitations in order to truthfully allege compliance with Rule 9(j) where the requisite review occurred prior to the filing of the first complaint. Further, *Boyd* establishes that it is error for the trial court to deny such an amendment based on futility.

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3. The *Fintchre* Court also noted this critical difference in distinguishing *Brisson*, upon which the plaintiff in that case heavily relied with regard to her Rule 15(a) argument. *See Fintchre*, __ N.C. App. at __, 773 S.E.2d at 323-24.

The issue of amending complaints was simply not before this Court in *Boyd*, and thus the opinion in that matter neither held nor established the points urged by Vaughan.

For the reasons discussed above, we are again compelled by precedent to reach "a harsh and pointless outcome" as a result of "a highly technical failure" by Vaughan's trial counsel—the dismissal of a nonfrivolous medical malpractice claim and the "den[ial of] any opportunity to prove her claims before a finder of fact." *Fintchre*, __ N.C. App. at __, 773 S.E.2d at 327 (Stephens, J., concurring).

Conclusion

In sum, our case law establishes that, where a medical malpractice "plaintiff did not file the complaint with the *proper* Rule 9(j) certification *before the running of the statute of limitation*, the complaint cannot have been deemed to have commenced within the statute." *Alston*, __ N.C. App. at __, 781 S.E.2d at 311 (emphasis added). Thus, "where [a] plaintiff failed to file a complaint including a *valid* Rule 9(j) certification *within the statute of limitations*, granting [the] plaintiff's motion to amend her second complaint would have been futile . . . ." *Fintchre*, __ N.C. App. at __, 773 S.E.2d at 325 (emphasis added). The trial court's conclusion that Vaughan's amendment would be futile was therefore correct under our established precedent and not a misapprehension of law. As a result, we cannot conclude that the trial court's denial of Vaughan's motion to amend was an abuse of discretion. Accordingly, the trial court's order denying that motion and dismissing Vaughan's medical malpractice complaint must be affirmed. While we are sympathetic to the arguments of Vaughan's able appellate counsel and appreciate the highly technical nature of our decision here, we are bound by our existing precedent. This Court simply does not have the authority to rule otherwise.

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

WATTS-ROBINSON v. SHELTON

[251 N.C. App. 507 (2016)]

LENA WATTS-ROBINSON, PLAINTIFF
v.
BRANDON SHELTON, DEFENDANT

No. COA16-599

Filed 30 December 2016

1. Attorneys—legal malpractice—disciplinary hearing—defamation—privileged testimony

The trial court did not err by granting defendant attorney's motion to dismiss under Rule 12(b)(6) a defamation action for failure to state a claim. Defendant's testimony, during a disciplinary hearing investigating allegations that plaintiff attorney mismanaged entrusted client funds and engaged in professional misconduct, was absolutely privileged.

2. Evidence—attorney disbarment order—probative value outweighed unfair prejudice

The trial court did not err in a defamation case by admitting over plaintiff attorney's objection her disbarment order. The disbarment order's probative value was not substantially outweighed by unfair prejudice and was relevant to whether defendant attorney's testimony during the disciplinary hearing was absolutely privileged.

Appeal by plaintiff from order entered 11 January 2016 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 November 2016.

Lena Watts-Robinson, plaintiff-appellant, pro se.

Robinson Bradshaw & Hinson P.A., by R. Steven DeGeorge, for defendant-appellee.

ELMORE, Judge.

Lena Watts-Robinson appeals from an order dismissing her defamation action against Brandon Shelton, opposing counsel in an employment discrimination case (the "*Billips* action"). In her complaint, Watts-Robinson alleged that Shelton defamed her while testifying before the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC") during a hearing investigating allegations that Watts-Robinson, *inter alia*, mismanaged entrusted client funds and engaged

in professional misconduct while representing the plaintiff-employee in the *Billips* action. Shelton moved to dismiss Watts-Robinson's defamation action for failure to state a claim on the basis that his testimony during the disciplinary hearing was absolutely privileged, since it was made in the course of a judicial proceeding and was sufficiently relevant to that proceeding. After a dismissal hearing, the superior court granted Shelton's motion and dismissed Watts-Robinson's defamation action.

Two issues are presented in this appeal: whether Shelton's allegedly defamatory statements made during the disciplinary hearing before the DHC were absolutely privileged from civil action, and whether the trial court erred by refusing to exclude the resulting discipline order disbarring Watts-Robinson from practicing law ("disbarment order") on the basis that its prejudice outweighed its probative value. We hold Shelton's challenged statement was absolutely privileged and the superior court properly refused to exclude the disbarment order. Accordingly, we affirm.

I. Background

Watts-Robinson was disbarred from the practice of law on 2 December 2014. According to the disbarment order, Watts-Robinson deposited entrusted client funds into a bank account that accrued interest and paid herself the earned interest, rather than disbursing it to her clients or to the North Carolina Interest on Lawyers Trust Account Program ("IOLTA") as required by law. Additionally, Watts-Robinson engaged in other egregious acts of professional misconduct while representing at least two of her clients, Billips and N. Burton, including, *inter alia*, mismanaging entrusted funds by merging client funds with her own, failing to promptly notify Billips when she received his settlement proceeds, failing to respond to Billips' request for his settlement proceeds, and using entrusted client funds for her own personal benefit by reimbursing herself from Billips' settlement proceeds for court sanctions imposed against her personally.

During Watts-Robinson's disciplinary hearing, Shelton was called to testify about his dealings with her as to the settlement proceeds from the *Billips* action. Specifically, Shelton was questioned about Watts-Robinson's objection to a $96,011.92 settlement check made payable directly to Billips. Shelton explained that Watts-Robinson notified him that Shelton's client needed to reissue the check because Billips owed Watts-Robinson expenses and she was concerned that he would not reimburse her. When counsel for the State Bar asked Shelton to expand on his stated concern about Watts-Robinson's request that the check

made payable to Billips be reissued made payable in a manner she could deposit into her own bank account, Shelton responded: "My concern was that Ms. Watts-Robinson was potentially trying to run some kind of scam on Mr. Billips and I did not want my client to be in the middle of a dispute with Mr. Billips and Ms. Watts-Robinson." After the disciplinary hearing, on 4 December 2014 the DHC entered an order of discipline, the disbarment order, disbarring Watts-Robinson from practicing law.

On 10 November 2015, Watts-Robinson filed an action against Shelton, alleging, *inter alia*, that his "scam" claim defamed her and caused her emotional distress. Shelton moved to dismiss the action for failure to state a claim under Rule 12(b)(6), attaching the disbarment order to his motion, and arguing that his statement was absolutely privileged because it was made during the course of a judicial proceeding and was sufficiently relevant to its subject matter.

On 7 January 2016, the trial court heard Shelton's motion to dismiss. During the dismissal hearing, Watts-Robinson objected to the trial court considering the disbarment order because it was more prejudicial than probative. The trial court never ruled on her motion, but did consider the disbarment order in reaching its decision effectively refusing to exclude it. On 11 January 2016, the trial court entered an order dismissing Watts-Robinson's defamation action. Watts-Robinson appeals.

II. Analysis

A. Rule 12(b)(6) Dismissal was Proper

[1] Watts-Robinson contends the trial court erred by granting Shelton's Rule 12(b)(6) dismissal because it applied the improper "palpably irrelevant" standard, not the proper "sufficiently relevant" standard, when determining whether Shelton's statements were absolutely privileged under North Carolina's defamation law. Watts-Robinson further contends that Shelton's statement was not "sufficiently relevant" to the proceeding and, therefore, should not be absolutely privileged. Shelton retorts that Watts-Robinson's assertion there exist two relevance standards is merely two sides of the same coin, and, no matter the flip, his statement made during the disciplinary hearing lands on the side of absolute privilege against a civil action. We agree with Shelton.

We review *de novo* a trial court's ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 352, 768 S.E.2d 23, 24 (2014) (citation omitted). A Rule 12(b)(6) dismissal is proper when

> (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Izydore v. Tokuta, __ N.C. App. __, __, 775 S.E.2d 341, 345 (citation omitted), *disc. review denied*, 368 N.C. 430, 778 S.E.2d 92 (2015).

"[A] defamatory statement made in due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice," *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954) (citations omitted), unless the statement is "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety," *Harman v. Belk*, 165 N.C. App. 819, 825, 600 S.E.2d 43, 48 (2004) (citation and quotation marks omitted). "In deciding whether a statement is absolutely privileged, a court must determine (1) whether the statement was made in the course of a judicial proceeding; and (2) whether it was sufficiently relevant to that proceeding." *Id.* at 824, 600 S.E.2d at 47 (citing *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 672, 355 S.E.2d 838, 841 (1987)). Because Watts-Robinson concedes Shelton's challenged statement was made during the course of a judicial proceeding, our review is limited to its relevancy.

During the disciplinary hearing, counsel for the State Bar and Shelton engaged in the following exchange:

> Q Would you tell the [DHC] panel basically about the substance of [Watts-Robinson's] communications with you after receiving the settlement checks [in the *Billips* action]?
>
> A Yes, ma'am. Ms. Watts-Robinson was upset or she disputed the manner in which the payments were made. The check to her was fine, but the check that was made payable to Mr. Billips she said was not satisfactory. She was -- first of all she was upset that we did not deposit them. I explained why we didn't deposit them, why we sent them, and she indicated that the check to Mr. Billips was incorrect. It should have been made payable to her or Mr. Billips or deposited directly into her account.
>
> . . . .

Q And once you sent her the check again, did she deposit it into her account?

A She deposited the check that was made payable to her. She did not deposit the check that was made payable to Mr. Billips.

Q Did she send it back to you a second time?

A She did.

Q And how did you respond at that point?

A I believe we had a phone conversation to discuss what the underlying problem was in terms of the way the payments were issued.

Q What's your understanding or what did Ms. Watts-Robinson state about the reason why there was an issue with the check made payable to Mr. Billips?

A She state [sic] that Mr. Billips owed her expenses out of the payments that were made to him and her concern was . . . that he would cash his check and not reimburse her the expenses that are owed to her.

Q At that point, did you then have the checks reissued as she was requesting?

A Not immediately, no.

Q What did you do after learning what Ms. Watts-Robinson described as the issue with the check?

A There were concerns on my part in terms of making -- changing the check in the way that Ms. Watts-Robinson wanted, so we ultimately ended up drafting an addendum to the original settlement agreement to clearly kind of delineate and outline the reasons for and how the checks to Mr. Billips were ultimately going to be paid.

Q *What were your concerns?*

A *My concern was that Ms. Watts-Robinson was potentially trying to run some kind of scam on Mr. Billips* and I did not want my client to be in the middle of a dispute with Mr. Billips and Ms. Watts-Robinson.

> Q I note that in her letter, Plaintiff's Exhibit 26, she gives two options for payment "Law Office of Lena Watts-Robinson or Louis Billips"; and then in the alternative reissuing the check "Law Office of Lena Watts-Robinson on behalf of Louis Billips." Did you choose to reissue the check in accord with either of these suggested options?
>
> A I believe after the addendum was signed off on by both parties, including Mr. Billips, that we ended up issuing the check to Ms. Watts-Robinson on behalf of Mr. Billips.

(Emphasis added.)

Watts-Robinson argues that since the disciplinary hearing was not focused on any alleged scam she ran, Shelton's "scam" claim was not "sufficiently relevant to the proceeding" but was "palpably irrelevant to [its] subject matter."

To the contrary, central to the subject matter of Watts-Robinson's disciplinary hearing was her alleged mismanagement of entrusted client funds, including the settlement proceeds from the *Billips* action. Considering the entire exchange in context, Shelton's response to questioning that he was concerned "Watts-Robinson was potentially trying to run some kind of scam on Mr. Billips" after she requested the settlement check be reissued in a manner that would permit her to deposit the check into her own bank account, because she was concerned Billips would not reimburse her for some expense, was sufficiently relevant such that it was not palpably irrelevant to the subject matter of the disciplinary proceeding.

Accordingly, Shelton's testimony during the disciplinary hearing was absolutely privileged, and the trial court properly granted his motion to dismiss under Rule 12(b)(6) for failure to state a claim.

B. No Error Under Rule 403's "Unfair Prejudice" Balance

[2] Watts-Robinson next contends the trial court erred by admitting over objection the disbarment order in violation of Rule 403 of the North Carolina Rules of Evidence. We disagree.

During the dismissal hearing, Watts-Robinson moved to exclude the disbarment order on the basis that it was more prejudicial than probative. Although the trial court never explicitly ruled on her motion, *see* N.C. R. App. P. 10(a)(1) (2016) ("It is . . . necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."), it refused to exclude the disbarment order and considered it in reaching its decision to grant Shelton's motion to dismiss.

We apply an abuse-of-discretion standard when reviewing a trial court's Rule 403 decision. *Wolgin v. Wolgin*, 217 N.C. App. 278, 283, 719 S.E.2d 196, 200 (2011). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139–40, 694 S.E.2d 738, 742 (2010) (citations, quotation marks, and brackets omitted).

Under Rule 403, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2015). " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* § 8C-1, Rule 403 official cmt.

However, excluding evidence under Rule 403's weighing of probative value against prejudice has no logical application to bench trials, such as this dismissal hearing, since we presume trial judges can consider relevant evidence, weigh its probative value, and reject improper inferences in reaching a decision. *See, e.g.*, *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) ("[T]he trial court in a bench trial 'is presumed to have disregarded any incompetent evidence.' " (citation omitted)); *see also In re Oghenekevebe*, 123 N.C. App. 434, 438, 473 S.E.2d 393, 397 (1996) ("In a nonjury trial, if incompetent evidence is admitted and there is no showing that the judge acted on it, the trial court is presumed to have disregarded it." (citation omitted)). Indeed, here the trial court explained: "The Court is not using the order to determine whether or not you had wrong doings. The Court is simply trying to determine the relevance of the testimony of the person that appeared before the State Bar."

Nonetheless, the disbarment order's probative value was not substantially outweighed by unfair prejudice. The disbarment order was relevant to whether Shelton's testimony during the disciplinary hearing was absolutely privileged. It showed that Watts-Robinson was disciplined, in large part, for misconduct arising from her representation of Billips (57 of the DHC's 105 factual findings) and, specifically, for mismanaging Billips's settlement proceeds. Although the disbarment order was prejudicial, Watts-Robinson has not demonstrated that the trial court was improperly biased by it in reaching its decision. Contrarily, the trial transcript positively demonstrates otherwise. Accordingly, we hold that the trial court did not violate Rule 403 by refusing to exclude the disbarment order. *See N. Carolina State Bar v. Adams*, __ N.C. App. __, __, 769 S.E.2d 406, 411 (2015) (holding that the DHC did not violate Rule

403 in admitting evidence when the defendant had not demonstrated an improper basis on which DHC may have considered it).

III. Conclusion

Shelton's response to the request by counsel for the State Bar to expand on his concern about reissuing the settlement check was absolutely privileged. Thus, the trial court properly dismissed Watts-Robinson's defamation action under Rule 12(b)(6). The trial court also did not violate Rule 403 by refusing to exclude the disbarment order during this nonjury dismissal hearing. Accordingly, we affirm.

AFFIRMED.

Judges STEPHENS and DIETZ concur.

EDWARD F. WILKIE AND DEBRA T. WILKIE, PLAINTIFFS
v.
CITY OF BOILING SPRING LAKES, DEFENDANT

No. COA16-652

Filed 30 December 2016

1. Appeal and Error—interlocutory order—inverse condemnation—substantial right

An order in an inverse condemnation case was interlocutory but was properly before the Court of Appeals because it affected a substantial right.

2. Eminent Domain—inverse condemnation—private use

A trial court's order in an inverse condemnation case was reversed where the drainage pipes at a city-owned lake were changed, the water level of the lake changed, and plaintiffs alleged that their lake-side property was taken by inverse condemnation. The trial court concluded that the property was taken for a private use, and there was no remedy through inverse condemnation.

3. Constitutional Law—inverse condemnation—claims remaining—no adequate remedy

A holding that a trial court order erroneously found for plaintiffs on an inverse condemnation claim did not dispose of the case where plaintiffs had also brought constitutional claims that were not addressed.

WILKIE v. CITY OF BOILING SPRING LAKES

[251 N.C. App. 514 (2016)]

Appeal by Defendant from order entered 5 November 2015 by Judge Ebern T. Watson, III, in Brunswick County Superior Court. Heard in the Court of Appeals 16 November 2016.

Kurt B. Fryar for Plaintiffs.

Cauley Pridgen, P.A., by James P. Cauley, III, David M. Rief, and Geneva L. Yourse, and North State Strategies, by Jack Cozort, for Defendant.

STEPHENS, Judge.

Defendant City of Boiling Spring Lakes ("the City") appeals from an order issued pursuant to N.C. Gen. Stat. § 40A-47[1] determining all issues other than compensation. The City argues that the trial court erred by concluding that an inverse condemnation occurred, because (1) the City's actions were not for a public use or benefit, (2) the flooding of the Wilkies' property was temporary and not subject to recurrence, (3) the City was not able to foresee encroachment onto or damage to the Wilkies' property, (4) the trial court misapplied the balancing test enumerated by the United States Supreme Court, (5) the trial court failed to address the City's defense of estoppel, and (6) the trial court failed to determine the boundary line and area of the property taken. We agree that the trial court erred in finding that there was a taking of the Wilkies' property by inverse condemnation when the City's actions were not for the public use or benefit.

Factual and Procedural Background

The Wilkies own two lots that border Spring Lake in the city of Boiling Spring Lakes. The City owns Spring Lake. The lake is fed by natural, underground springs in the lake and surface runoff. Excess water drains from the lake through two pipes at the west end of the lake. The City replaced those two pipes in 2006.

On 25 June 2013, the Board of Commissioners of Boiling Spring Lakes held a workshop meeting. At that meeting, the Board was presented with a petition signed by twenty-one residents of the City who owned property bordering the north side of Spring Lake. The petition asserted that the lake level was lowered by the 2006 pipe replacement,

1. Section 40A-47 provides that a trial judge in a condemnation proceeding, upon motion of either party and ten days' notice, shall determine "all issues raised by the pleadings other than the issue of compensation." N.C. Gen. Stat. § 40A-47 (2015).

and asked that the Board take action to raise the lake level to restore it to its level before 2006. No action was taken on the petition at this meeting, but it was decided to discuss the issue again at the Board's July meeting.

The names of both Mr. and Mrs. Wilkie appeared on the petition to raise the lake level. Mrs. Wilkie signed both names to the petition. She testified that she "thought [the petition] was a joke."

On 2 July 2013, at the Board's regular meeting, the petition and the issue of the Spring Lake water level were again discussed. All five commissioners, the mayor, and property owner Jane Falor took part in the discussion. Several commissioners had been to the lake to examine the water level and the drainage pipes. In addition, three commissioners had spoken with Larry Modlin, Director of Public Works for the City at that time, and one commissioner spoke with the city manager to discuss the lake level and possible ways to raise it. Commissioner Caster stated that Modlin advised him that one simple way to restore the lake level would be to install an "elbow" on each drainage pipe for approximately two hundred dollars, which could be easily removed if it did not work or to prevent flooding in the event of a storm. In addition, it was noted that one of the existing pipes was clogged, which needed to be fixed. Following the discussion, the Board voted 5-0 to "return Spring Lake to its original shore line as quickly as can be done."

On 11 July 2013, the City installed the elbows on the drainage pipes in Spring Lake. The elbows increased the height of the drainage pipes by six inches. The intent of this action was to maintain the lake level where it was on 2 July 2013.

On 6 August 2013, the Board held another regular meeting. Several property owners whose lots abut Spring Lake attended the meeting, including Mr. Wilkie. One property owner presented the Board with a second petition signed by twenty property owners, five of whom had signed the initial petition to raise the lake level. This second petition complained that the lake level was too high, and requested that it be restored to the level it had been prior to the installation of the elbows. Mr. Wilkie signed this petition. In addition, several of the property owners spoke at the meeting. Mr. Wilkie and two other property owners spoke to complain about the flooding on their property that they attributed to the installation of the elbows. One property owner attributed the flooding to increased rainfall and slow drainage of excess water from the lake, and asked the Board to give the lake time to "stabilize to more normal conditions."

Commissioner Glidden read a statement acknowledging the flooding problem, but differentiating the flooding due to problems with drainage speed from problems with the lake level, which the elbows were installed to maintain. She explained that the elbows "did accomplish what we thought we were going to accomplish," but that once they were installed, "Mother Nature played her trick on us and started raining." The Board voted to hold a workshop and special meeting on 17 August 2013 to address the Spring Lake water level, and to lower the lake level by three inches for the eleven days prior to the special meeting to alleviate flooding.

The City sent out a notice of the special meeting to the property owners whose lots bordered on Spring Lake, and invited them to address the Board regarding the lake level. On 17 August 2013, the Board held the special meeting. Ten property owners spoke and addressed their concerns to the Board regarding the lake level. Some, including Mr. Wilkie, complained that their property was flooded as a result of the Board's action to raise the lake level. Mr. Wilkie stated that he had "lost about 20' to 30' of property which is under water now." Other property owners urged that the flooding was not due to the elbows, but rather due to substantial rainfall, and the inability of the lake to drain as quickly as the runoff accumulated. Still other owners asked that the lake level be raised further. One property owner, David Crawford, pointed out that only five people who had signed the petition to raise the lake level had now changed their minds.

The city manager stated that he had met with a representative from the North Carolina Department of Environment and Natural Resources, Water Management Division, who had come down to inspect the situation, but was unable to determine the proper water level for the lake. Multiple commissioners expressed concern that the high levels of rainfall were complicating the issue, and urged waiting until the water level stabilized before taking further action. A motion to reduce the lake level by two inches to alleviate the flooding that did exist was defeated. The Board ultimately adjourned, taking no action, but advising property owners to continue to monitor the lake level.

The level of Spring Lake was discussed again at the September and October Board meetings, with residents speaking both for and against lowering the lake level. At the 1 October 2013 meeting, Mr. Wilkie indicated that the Eldridge Law Firm had sent a letter to the Board, that he had given information to the Board on inverse condemnation, and that the City would "be sued over the elbow on the Lake." Motions to remove the elbows were defeated at both meetings.

Only one property owner spoke at the 12 November 2013 meeting, and she urged the Board to continue to evaluate the facts regarding the lake level. The Board did not discuss the issue. At the 7 January 2014 meeting, two property owners, including Mr. Wilkie, spoke about the flooding still being caused by the high water level of Spring Lake. A motion to remove the elbows was again defeated.

On 13 January 2014, the Board held another special meeting to discuss Spring Lake. Two property owners spoke, and requested that the water level be raised back to the level of 2 July 2013. After discussion of the lake level and the related issue of whether Spring Lake had enough drainage pipes to allow it to drain excess water fast enough, the Board voted to have an engineering study done to determine the proper lake level.

On 4 February 2014, Mr. Wilkie spoke briefly at the Board's regular meeting, again requesting that the elbows be removed. The Board voted to have SunGate Design Group ("SunGate"), an engineering firm, address the Board to explain the work they proposed to do involving the Spring Lake water level. The Board held a workshop on 26 March 2014 to hear SunGate's proposal. At the workshop, Henry Wells, vice president of SunGate, spoke regarding the methodology his firm would use to determine the appropriate lake level for Spring Lake. Wells indicated that the preliminary study would take about a month to complete, and that following the study, adjustments could be made so that the lake could drain at the correct speed. Several property owners also spoke, including Mr. Wilkie, who asserted that the elbows caused the flooding.

On 1 April 2014, Mr. Wilkie again spoke at the Board's regular meeting. He urged the City to "address the problem with the residents that have low lake levels and those of us who have flooding issues." Also at this meeting, the Board unanimously approved entering into a contract with SunGate to determine the correct lake level for Spring Lake.

On 10 June 2014, the Board held a workshop and special meeting for SunGate to discuss the results of the preliminary engineering report on the Spring Lake water level. Henry Wells again spoke on behalf of SunGate. He explained that SunGate's recommendation was to reduce the lake level to where it was before the elbows were installed, and to add a pipe to help the excess water drain more efficiently. Several property owners then spoke, both in favor of and against taking action in accordance with SunGate's recommendation.

SunGate subsequently submitted an engineering report to the Board dated 10 July 2014. The report included in its summary and conclusions

that SunGate had looked at the deeds transferring Spring Lake to the City, and could not find authority for the City to increase the level beyond the lake as it was shown on a 1960 plat.

On 16 June 2014, the Board reconvened its special meeting from 10 June 2014. At the meeting, the Board voted 3-2 to reduce the level of Spring Lake by three inches and to monitor the effect on the lake which Spring Lake drained into. On 1 July 2014, at its regular meeting, the Board voted to reduce the lake level an additional two and a half inches to meet the recommendation of SunGate. On 30 July 2014, the elbows were removed.

Mr. and Mrs. Wilkie filed this action alleging inverse condemnation by the City on 23 May 2014, prior to the removal of the elbows. On 20 April 2015, the City moved to dismiss the complaint, or in the alternative for the trial court to determine all issues other than damages pursuant to N.C. Gen. Stat. § 40A-47. The City simultaneously filed a request for the trial court to consider matters outside the pleadings and to treat the motion to dismiss as a motion for summary judgment. On 4 May 2015, the City answered the complaint. The trial court denied the City's motion for summary judgment by order entered 1 July 2015. On 5 November 2015, the trial court entered an order purportedly determining all of the issues other than damages. The trial court concluded in its order that:

> 1. The actions taken by the City as set forth in the findings of fact amount to a taking of the Wilkies' property without just compensation . . . under the provisions of Chapter 40A of the North Carolina General Statutes and the 5th and 14th Amendments to the Constitution of the United States of America.
>
> . . . .
>
> 4. The City's intention in maintaining Spring Lake at elevated levels was for the benefit of private land owners abutting the Lake. Thus, the City's taking of the Wilkies' property was for a private use.
>
> . . . .
>
> 9. The City has taken the Wilkies' property by inverse condemnation.
>
> 10. The Wilkies have proven their [N.C. Gen. Stat] §[]40A-51 cause of action.

> 11. The City, by inverse condemnation, took a temporary easement interest in 1,120 square feet of the Wilkies' property for a period of 1 year and 20 days and has also taken a portion of the topsoil and centipede grass that was located on the same 1,120 square feet without adequate notice or compensation.

The trial court then ordered a trial to be conducted to determine the damages to which the Wilkies were entitled for the City's taking of the easement in the Wilkies' property. The City filed a notice of appeal from the trial court's order, which was received by the Brunswick County Clerk's office prior to 7 December 2015, and entered on 8 December 2015.

Discussion

On appeal, the City argues that the trial court erred in concluding that the City took the Wilkies' property by inverse condemnation. We agree.

1. Interlocutory nature of the appeal

[1] Initially, we note that this appeal is interlocutory. "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). "If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011). "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. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (citations omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

"[I]mmediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation and internal quotation marks omitted). Orders issued pursuant to N.C. Gen. Stat. § 40A-47 concerning title and the area of property taken affect a substantial right and are immediately appealable. *Mecklenburg County v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 667, 704 S.E.2d 48, 51 (2010) (citations omitted); *see also Town of Apex v. Whitehurst*, 213 N.C. App. 579, 582-83, 712 S.E.2d 898, 901 (2011) ("[O]rders from a condemnation hearing concerning title and area taken are vital preliminary issues that must

be immediately appealed pursuant to N.C. [Gen. Stat.] § 1-277, which permits interlocutory appeals of determinations affecting substantial rights." (citation omitted)).

The trial court's 5 November 2015 order is interlocutory, because it does not dispose of all of the issues in the case. The trial court specifically did not determine the issue of damages. However, because the order was issued pursuant to N.C. Gen. Stat. § 40A-47 and addressed the area taken by the City, the order affects a substantial right and is properly before this Court.

2. Standard of review

[2] At a hearing conducted pursuant to N.C. Gen. Stat. § 40A-47, the trial court determines all issues other than compensation. § 40A-47. A review of North Carolina case law reveals two standards which this Court has used in review of orders issued pursuant to section 40A-47.

In *Town of Matthews v. Wright*, this Court stated:

> Our Supreme Court has held *de novo* review is appropriate when reviewing decisions of the trial court on all issues other than damages in eminent domain cases. *See Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001). We review eminent domain issues *de novo* because of the well-settled principle that *de novo* review is required where constitutional rights are implicated. *See id.*

__N.C. App. __, __, 771 S.E.2d 328, 333 (2015).

In contrast, in *L&S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.*, the Court stated:

> This Court is bound by factual findings of the trial court, as long as the findings are supported by competent evidence. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 111, 338 S.E.2d 794, 799 (1986). We review the trial court's conclusions of law *de novo* on appeal. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

211 N.C. App. 148, 151, 712 S.E.2d 146, 149 (2011), *disc. review improvidently allowed*, 366 N.C. 324, 736 S.E.2d 484 (2012).

The issue on appeal is whether the trial court's legal conclusion that the City took the Wilkies' property by inverse condemnation was error.

Thus, regardless of the standard used, we review this legal conclusion *de novo*.

3. Inverse condemnation

The City argues that the trial court erred in concluding that the City took the Wilkies' property by inverse condemnation for several reasons. The City's first argument is that the trial court erred, because there can be no inverse condemnation when property is not taken for a public use. We agree.

"Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *City of Greensboro v. Pearce*, 121 N.C. App. 582, 587, 468 S.E.2d 416, 420 (1996) (citation and internal quotation marks omitted). The North Carolina General Statutes provide the remedy of an inverse condemnation action "[i]f property has been taken by an act or omission of a condemnor listed in [N.C. Gen. Stat §] 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed." N.C. Gen. Stat § 40A-51 (2015). Section 40A-3(b) states:

> (b) Local Public Condemnors — Standard Provision. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.
>
> (1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.
>
> (2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.
>
> (3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.
>
> (4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

> (5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.
>
> (6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.
>
> (7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.
>
> (8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.
>
> (9) Opening, widening, extending, or improving public wharves.
>
> The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by Chapter 115C of the General Statutes.
>
> The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

N.C. Gen. Stat. § 40A-3(b) (2015). Section 40A-3 sets out "the exclusive uses for which the authority to exercise the power of eminent domain is granted to . . . local public condemnors." N.C. Gen. Stat. § 40A-1(a) (2015). An exercise of the power of eminent domain occurs when "the government takes property *for public use* because such action is advantageous or beneficial to the public." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 854, 786 S.E.2d 919, 924 (2016) (citation omitted; emphasis omitted and added). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted).

The plain language of section 40A-51 defines when the remedy of an inverse condemnation action is available against a public condemnor. The statute limits the availability of this remedy to instances in which property is taken by a condemnor pursuant to one of the enumerated acts or omissions in section 40A-3(b). § 40A-51. Section 40A-3(b) begins by stating that the governing body of a municipality possesses the power of eminent domain to perform each of its enumerated acts "[f]or the public use or benefit." § 40A-3(b); *see also Stout v. City of Durham*, 121 N.C. App. 716, 718, 468 S.E.2d 254, 256-67, *disc. review granted*, 344 N.C. 637, 477 S.E.2d 54 (1996), *motion for disc. review withdrawn*, 345 N.C. 353, 484 S.E.2d 93 (1997). Thus, the plain language of section 40A-51 limits its application to action taken by a municipality "for the public use or benefit." As a result, there is no remedy of inverse condemnation under the statute when property is not taken "for the public use or benefit."

The trial court concluded that "the City's taking of the Wilkies' property was for a private use," because it was intended to benefit the property owners whose lots bordered Spring Lake.[2] Applying the plain language of section 40A-51, there is no remedy through an inverse condemnation action for the Wilkies, because their property was not taken "for the public use or benefit." Therefore, we reverse the trial court's order concluding that the City took the Wilkies' property by inverse condemnation. Because we reverse the trial court's order based on the City's first argument, it is unnecessary for us to reach the City's remaining arguments that the trial court erred.

[3] However, this holding does not dispose of the case. North Carolina case law is clear that an aggrieved person has a direct claim under the North Carolina Constitution for violation of his or her constitutional rights when no adequate state law remedy exists. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 ("[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution."), *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992); *Midgett v. N.C. State Highway Comm'n*, 260

2. The Wilkies argue that the City took their property for a public use despite urging this Court to affirm the trial court's order. To the extent that this argument was intended as a challenge to the trial court's legal conclusion that the City took the Wilkies' property for a private use, all of the evidence from the Board's meeting minutes supports finding of fact 8 and the legal conclusion that the Board took action to increase the lake level in response to the petition from the group of private landowners. There is no evidence that the Board considered any benefit to the public in its discussions about the lake level.

N.C. 241, 132 S.E.2d 599 (1963) (holding that the plaintiff could directly pursue a claim for just compensation under the Law of the Land clause of the North Carolina Constitution where the statutory inverse condemnation remedy, which was ordinarily exclusive, was not adequate under the facts of the case), *overruled in part on other grounds*, *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983); *see also Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 14-15, 745 S.E.2d 316, 326-27 (applying the holding in Corum and reversing the trial court's dismissal of the plaintiffs' claims under the North Carolina Constitution against the Town of Chapel Hill), *disc. review denied*, 367 N.C. 223, 747 S.E.2d 543 (2013); *Patterson v. City of Gastonia*, 220 N.C. App. 233, 239, 725 S.E.2d 82, 88 (applying the holding in Corum and reversing the trial court's dismissal of the plaintiffs' claims under the North Carolina Constitution against the City of Gastonia), *disc. review denied*, 366 N.C. 406, 759 S.E.2d 82 (2012).

Mr. and Mrs. Wilkie alleged in their complaint that "the City . . . caused the [Wilkies] damages, [took] property belonging to the [Wilkies] and affected the [Wilkies]' property rights in violation of their Constitutional rights contained within the 5th and 14th Amendments to the Constitution of the United States of America as well as Article 1, Sec. 19, of the Constitution of the State of North Carolina." The trial court's order did not address the Wilkies' claim under the North Carolina Constitution. Accordingly, we remand this matter to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JUNE 2016)

BUFFA v. CYGNATURE CONSTR. & DEV., INC. No. 16-237	Watauga (14CVS134)	Affirmed in part; reversed and remanded in part
CHERRY CMTY. ORG. v. STONEHUNT, LLC No. 16-615	Mecklenburg (15CVS16825)	Affirmed in part; Reversed in part
GRENNAN v. GRENNAN No. 16-531	New Hanover (14CVD235)	Vacated and Remanded
HARRELL v. MIDLAND BD. OF ADJUST. No. 16-646	Cabarrus (14CVS2649)	Affirmed
HERNDON v. HERNDON No. 15-28-2	Durham (14CVD3144)	Affirmed
JOHNSON v. JOHNSONOW No. 16-528	Orange (13CVS1222)	Affirmed
LARSEN v. ARLINGTON CONDO. OWNERS ASS'N, INC. No. 16-618	Mecklenburg (14CVS17863)	No Error
MYLES v. LMS, INC. No. 16-548	N.C. Industrial Commission (289378)	Affirmed
NECKLES v. HARRIS TEETER No. 16-569	N.C. Industrial Commission (W55950)	Reversed and Remanded
PASS v. BROWN No. 16-300	Davidson (14CVS1540)	Affirmed in part; dismissed in part
PITTSBORO MATTERS, INC. v. TOWN OF PITTSBORO No. 16-323	Chatham (15CVS767)	Affirmed in part; dismissed in part
QUALITY BUILT HOMES INC. v. TOWN OF CARTHAGE No. 15-115-2	Moore (13CVS1264)	Reversed and Remanded
REECE v. SODEXO, INC. No. 16-508	N.C. Industrial Commission (13-750965)	Affirmed and Remanded

STATE v. MARTINEZ No. 16-374	Mecklenburg (14CRS217434-36) (14CRS217439) (14CRS217441) (14CRS217447) (14CRS217448) (14CRS217453) (14CRS217456) (14CRS217458-59)	Vacated and Remanded in Part, No Prejudicial Error in Part.
STATE v. REEGER No. 16-342	Gaston (13CRS57314)	No prejudicial error
STATE v. RICHARDSON No. 16-534	Durham (13CRS58222)	No Error
STATE v. RIGGSBEE No. 16-498	Forsyth (13CRS62622)	Affirmed
STATE v. SULLIVAN No. 16-609	Mecklenburg (13CRS47595-602) (13CRS47605-06)	No error in part; dismissed in part
STATE v. VO No. 16-553	Catawba (14CRS51818)	Affirmed
WILLIS v. HAMILTON No. 16-148	Onslow (15CVD1226)	Dismissed

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