No. COA 20-305 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

****

DEFENDANT-APPELLANT'S REPLY BRIEF

****

INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Rules:

Other Authorities:

No. COA 20-305 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

****

DEFENDANT-APPELLANT'S REPLY BRIEF

****

INTRODUCTION

The Town's second lawsuit should never have been filed because the central issues in the case are identical to the issues raised by the parties' post-remand motions in the 2015 case. Does the Town get to keep its sewer pipe on Ms. Rubin's property despite the judgment, or must the Town leave because of the judgment? That's what the 2015 case is about, and, unhelpfully, that's what the 2019 case is about, too. That duplication required dismissal of the 2019 case.

ARGUMENT

I. The Trial Court's Orders Are Immediately Appealable Because They Affect Ms. Rubin's Substantial Rights.

The Town uses its response brief to file a reply in support of its motion to dismiss the appeal from the 2019 case. Its arguments, however, ignore the key points of Ms. Rubin's response to the motion to dismiss, and they present mere *ipse dixit* in place of actual legal authority.

First, contrary to the Town's unsupported assertion, it is not "mere speculation" that the 2015 and 2019 cases risk inconsistent results. Resp. Br. at 21. The intertwined merits briefing, and how often the parties make many of the same word-for-word arguments in each appeal, are the best evidence that the Town is wrong. If that is not enough, consider the universe of possible outcomes:

	Judge Collins' Orders in 2015 case are reversed	Judge Collins' Orders in 2015 case are affirmed
Rubin wins in 2019 case	Consistent results	Inconsistent results
Rubin loses in 2019 case	Inconsistent results	Consistent results

Any way it's sliced, 50% of the potential outcomes are inconsistent. The Town impliedly admits as much: each of its merits briefs in these appeals

cross-references major discussions in the other brief. And the trial court's orders in the two cases, all written by the Town, have full passages that are identical.

Second, it is false that the cases are "fundamentally" different because one involves a direct condemnation and the other involves an indirect condemnation. Resp. Br. at 21. As explained in Ms. Rubin's opening briefs and in her reply in the 2015 case, neither case involves an inverse condemnation. Both cases involve just one taking: the Town's quick-take in the 2015 case. The taking occurred because the Town filed a direct-condemnation action and exercised its quick-take powers.

And it is impossible for the 2019 case to involve inverse condemnation. The Town itself admits in its amicus response that only Ms. Rubin could file an inverse condemnation case, and Ms. Rubin didn't file the 2019 lawsuit. *See* Town's Resp. to Brief of Amici Curiae, at 18 ("[T]he Town has not filed an inverse condemnation action in the 2019 case. Inverse condemnation is a claim and action available only to Rubin.").

Third, in response to the motion to dismiss, Ms. Rubin explained that orders affecting title are orders that affect substantial rights, and allow an interlocutory appeal. Rubin's Resp. Mot. Dismiss at 10-15. The Town now concedes the rule, but asserts that, "contrary to what Rubin says, title is not the issue in either appeal." Resp. at 20.

The Town offers nothing to support its assertion, expecting this Court to accept its say-so. In the 2015 case, the Town sought to acquire title to a sewer easement on Ms. Rubin's land. (R pp 46-47, 50.) That effort ended in defeat, with the Town's claim to an easement being "dismissed," and its right to possess her property being extinguished. (R p 13.) Four years later, though, the Town still refuses to allow Ms. Rubin to exercise her title to the land. The Town pretends as if it has an easement, referring throughout its brief to the sewer "easement" it currently owns. Though no easement exists, the Town persuaded the trial court to create a temporary, pseudo-easement through its preliminary injunction order, and the Town plans to seek an easement as its ultimate remedy.[1] (R pp 88, 111.) The re-creation of this easement necessarily

[1] The Town tries to save the preliminary injunction order from reversal by arguing that Ms. Rubin did not object to any of the order's findings of fact. Resp. Br. at 19. That argument goes nowhere. Most of the facts "found" by the trial court are irrelevant; the Town doesn't bother arguing that any of the facts matter. Others are just legal conclusions that Ms. Rubin challenges in her opening brief. (*E.g.*, R p 107 ¶¶ 13 ("Consequently, a genuine legal controversy exists . . . ."), 20 (determining that the Town's quick-take was an "inverse condemnation").) The only real "fact" found by the judgment was the lack of "practical alternatives" for moving the sewer pipe. (R p 109 ¶ 28.) Ms. Rubin challenged this in her opening brief, showing that there were other alternatives, as the prior trial judge already determined at the section 108 hearing. Opening Br. at 8, 39 n.4. That was sufficient because assignments of error are no longer required by the Appellate Rules. *See Bd. of Directors of Queens Towers Homeowners' Ass'n, Inc. v. Rosenstadt*, 214 N.C. App. 162, 168, 714 S.E.2d 765, 769 (2011).

affects Ms. Rubin's title—she has been demoted from a fee-simple owner to a subservient estate. The Town has no response to that.

The Town's "reply" on its motion to dismiss fails to respond to most other points in Ms. Rubin's brief as well:

- interlocutory orders that transfer property rights from one party to another are subject to immediate review, Rubin's Resp. Mot. Dismiss at 13-15;
- orders rejecting a colorable res judicata defense receive immediate review, *id.* at 15-19; and
- orders that reject a prior action pending defense give the loser a categorical right to an interlocutory appeal, *id.* at 19-22.

For any or all of these reasons, this Court has appellate jurisdiction over this case.

II. The Prior Action Remains Pending When There Are Post-Judgment Proceedings.

The Town's only response to the prior action pending doctrine is to claim that the doctrine does not abate a later action when the prior action is being kept alive by post-judgment motions. Resp. Br. at 37-40. No North Carolina

court has ever addressed this question.[2] Ms. Rubin's proposal, however, meets the purpose of the rule, while the Town's proposal undermines the rule's purpose and creates absurdities.

The purpose of the prior action pending doctrine is to allow one court to "dispose of the entire controversy in the prior action." *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990). By abating all later actions, our courts can more efficiently dispatch justice, protecting the limited resources of the judiciary and the parties. A "multiplicity of actions" about substantially the same issues is "wholly unnecessary." *Id.*

The doctrine is more subtle than checking the clerk's date-stamps. Rather, the doctrine looks to the time of the prior action's "final determination." *McFetters v. McFetters*, 219 N.C. 731, 14 S.E.2d 833, 835 (1941). When litigants have asked our Supreme Court to expand the doctrine to new situations, the Court has asked whether expansion would serve or undermine the doctrine. For instance, when asked whether the doctrine would abate a state-court action based on a prior action pending in *federal* court, our Supreme

---

[2] In her opening brief, Ms. Rubin noted that the only court to have addressed this issue, that counsel could locate, resolved it in Ms. Rubin's favor, and none have ever resolved it in the Town's favor. Opening Br. at 34 (citing *Steffens v. Harrison,* No. KNOFA104112694, 2017 WL 3248813, at *3 (Conn. Super. Ct. June 30, 2017)).

Court could not "conceive of any rational reason" not to expand the doctrine. *Eways v. Governor's Island*, 326 N.C. 552, 561, 391 S.E.2d 182, 187 (1990).

So too when that Court expanded the doctrine beyond the entry of a final judgment. In *Clark v. Craven Regional Medical Authority*, the Supreme Court held that a prior action is still pending for purposes of the doctrine even after a final judgment is entered, if that judgment is on appeal. 326 N.C. at 21, 387 S.E.2d at 172 ("We now expressly hold that a prior action which is pending in the appellate division may serve as a prior action pending for the purpose of basing a judgment of abatement in a subsequent action between the same parties upon the same issues."). When a judgment has been challenged, the dispute is still alive. The Court could discern no reason for pretending that the case was over when the parties were still at odds. *See id.*

This case is no different, since—because of the Town's refusal to abide by the judgment—the 2015 case has not been "finally determined." After the Supreme Court remanded the case, Ms. Rubin moved to enforce the judgment and the Town moved for relief from the same judgment. The Town's 2019 action raised the same issues as were in dispute by these post-trial motions. Indeed, the Town continues to argue on appeal that the only reason there is a "genuine controversy" to support the 2019 declaratory-judgment case is that the parties had filed post-judgment motions raising the same issues in the 2015 case. Resp. Br. at 23, 39-40, 43. That admission alone sinks the 2019 lawsuit.

There is nothing to be gained by encouraging the Town's shenanigans. A post-judgment motion, no less than an appeal, unsettles a judgment and keeps the case alive for purposes of the prior action pending doctrine. There should be no daylight between the doctrines of prior action pending and res judicata, but if the Town prevails, then it will have created a gray zone where there are two cases with the same parties and issues, but neither res judicata nor prior action pending apply to bring about judicial efficiency.

The Town's proposal to limit the doctrine will also promote forum shopping. Although here the Town had to file its second lawsuit in the same forum as its first (based on the location of the property and parties), if this Court agrees with the Town, then later litigants will be encouraged to respond to post-judgment motions by filing new lawsuits in different counties, leaving the parties to race to finality in two cases at the same time.

The Town's theory appears to have no limits. Consider this scenario: A party that seeks relief from a judgment can file a Rule 60 motion with the original trial court or it can instead file an "independent action" to do the same. N.C. R. Civ. P. 60(b) ("This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . ."). The Town's theory says that it doesn't have to choose; it can do both at the same time. It doesn't matter that the same parties and issues are involved because the action

in which the Rule 60 motion is filed is not "pending." There's no reason to adopt a rule that will allow absurdities like that.

The Town's proposal promotes nothing but mischief, forum shopping, and inefficiencies. The Court should not adopt it.

III. The Town Cannot Relitigate the 2015 Case.

The Town does not dispute that the 2015 case resulted in a final judgment, and the parties are the same as in the 2019 case. Rather, the Town only says that "things have changed," so that it should be free to relitigate its claim to a sewer easement. Nothing has changed.

When a final judgment is entered in favor of a defendant, that judgment bars a second lawsuit by the losing plaintiff for "all matters, either fact or law, that were *or should have been adjudicated* in the prior action." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) (emphasis added); *accord Orlando Residence, Ltd. v. All. Hosp. Mgmt., LLC*, No. 113A19, 2020 WL 4726611, at *7 (N.C. Aug. 14, 2020) (to be published) [Add. 8] (applying res judicata to dismiss claims that "*could*" have been adjudicated in the prior action "but were not").

The Town asserts that res judicata operates "uniquely" in condemnation cases, but there is no case law to support that claim; the doctrine applies like it normally does. *See* 11A *McQuillen's The Law of Municipal Corporations* § 32:132 (3d ed. Westlaw) [App. 16-24] ("The general principles governing res

judicata and estoppel by judgment apply with respect to the judgment upon the award in condemnation proceedings.").

To justify a departure from settled law, the Town argues for the relaxation of res judicata because of changed circumstances between the 2015 and 2019 cases. *See* Resp. Br. at 25-26. First, the Town says that circumstances have changed because the original judgment does not specially mention the Town's installation of the sewer pipe. *Id.* at 26. But there was no special requirement for the judgment to mention the pipe, and the installation of the pipe was not a "changed circumstance" between the 2015 and 2019 cases. The Town installed the pipe after the Town filed its 2015 case, through the exercise of its quick-take powers. The complaint was filed on 30 April 2005, the construction work began in July 2015, the work was completed on 22 February 2016, the section 108 hearing was held on 8 August 2016, and the final judgment was entered on 18 October 2016. (R pp 8, 46, 84.) During the section 108 hearing, there was testimony about the actual installation of the sewer pipe. (8-1-16 T pp 37, 44) [App. 3-4]. And Ms. Rubin testified that she was challenging the Town's authority to keep the pipe there. (8-1-16 T p 32) [App. 2].

The Town also faults the judgment for not referring to the residents in the new neighborhood, but the residents were not a changed circumstance. *Over Ms. Rubin's objection*, the Town introduced evidence at the section 108 hearing that lots in the new neighborhood, to be served by the sewer pipe, had

already been sold. (8-1-16 T pp 78-79 [App. 11-12]; R S (I) p 235.) The Town's purpose for introducing the evidence, in the words of its counsel, was that the Town's condemnation was "a public project with a public use and public benefit." (8-1-16 T p 79) [App. 12]. Counsel wanted to be clear that the sewer pipe was "owned by Apex to serve, essentially, residents of Apex." (8-1-16 T p 79) [App. 12]. Any "incidental benefit to a private party," the Town argued from this evidence, "does not defeat a public project, a public sewer project." (8-1-16 T p 79) [App. 12].

In its judgment in the 2015 case, the trial court rejected the Town's reliance on the evidence of the new residents. The purpose for the taking was definitively found to be "for a private interest and the public's interest [was] merely incidental." (R p 12 ¶ 6.) The Town took Ms. Rubin's land to benefit a private party, not to meet a public need, and, had the private party not requested the sewer access, there never would have been a taking. (R p 12 ¶ 6.)

In the 2019 case, the Town claims that the residents justify relitigation. It alleges that the sewer pipe is serving its residents, (R p 85 ¶ 17), but that's nothing new. The Town also says that it designed the sewer pipe to "serve yet to be developed properties," (R p 85 ¶ 17), which is not a new circumstance either. At the time of the section 108 hearing in the 2015 case, the Town made the same arguments—that its sewer pipe was serving new residents and would

serve future development. The 2019 case presents nothing new for adjudication. If anything is new, it's just the Town's defiance of the judgment, and the mandate of this Court, by continuing to run sewage across Ms. Rubin's property.[3] In fact, while the 2015 case was on appeal, the Town had continued to sign up new customers to service via its failed claim to the sewer easement for the past four years. The Town cannot immunize its illegal behavior from judicial review through its own recklessness. As the United States Supreme Court stated this summer, "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

Finally, the trial court already rejected the Town's argument about the lack of alternative placements for the sewer line. At the section 108 hearing, Ms. Rubin submitted an affidavit from a retained expert. (8-1-16 T pp 51-54 [App. 5-8]; R S (I) pp 143-46.) The affidavit explained that the Town had *multiple* other options for connecting the new neighborhood to sewer. (R S (I) pp

[3] While this Court's dismissed the Town's appeal from the judgment in the 2015 case as untimely, this Court also explained for the "benefit" of the Town, that no error appeared in the judgment. *Town of Apex v. Rubin*, 262 N.C. App. 148, 153, 821 S.E.2d 613, 617 (2018), *writ denied, review denied*, 372 N.C. 107, 825 S.E.2d 253 (2019).

144-45.) The only reason to condemn anyone's property was because the Town wanted to avoid spending money on a sewer pump. (R S (I) pp 145; 8-1-16 T pp 58-59 [App. 9-10].) Over the Town's objection, the trial court admitted this affidavit as evidence showing that "there is no public benefit to this particular easement because there are multiple different options the town could have and should have used to avoid the drastic measure of condemnation and destroying Ms. Rubin's property by cutting it in half." (8-1-16 T p 53) [App. 7]. The trial court agreed, noting in the judgment that "public need" was not the true reason for the taking. (R p 12 ¶ 6.) It was only after the judgment was entered, when the Town filed its *first* improper Rule 60 motion, that the Town tried to introduce evidence that it had no other alternatives. But the trial court rejected that attempt to relitigate the point. And even then, the Town admitted that a pump station was feasible; it's just contrary to the Town's preferences. (1-5-17 T pp 25-26) [App. 14-15].

Besides being unable to show changed circumstances, the Town's own legal authority undermines its position. The Town relies on *City of Charlotte v. Rousso*, 82 N.C. App. 588, 346 S.E.2d 693 (1986), where the city first tried to take private property for an improper, private purpose. After that failure, the city filed a second direct condemnation action, but for a different purpose. In the first, failed case, the city intended to take private property for the non-public use of leasing it out to various private entities. *Id.* at 589, 346 S.E.2d at

694. In the second condemnation action, the city passed a new resolution, taking the same property, but for use as a public park. *Id.* The purposes behind the two takings, therefore, had nothing in common.

This case couldn't be more different. First, the Town cannot rely on *Russo* because it has not filed a second condemnation action. Second, the Town has not engaged in a *second* taking because it never left after losing the first case, so the purpose for the Town remaining is the same as the purpose for the Town entering.

Finally, in *Russo*, the city rescinded its prior resolution and passed a new resolution changing the purpose; that critical difference showed that the new proposed taking was "free of the illegal taint that caused the earlier case to fail." *Id.* Here, the Town has not changed its alleged purpose for the failed, 2015 taking, nor has it taken any other action to cleanse the first taking. Rather, the Town has flouted the prior judgment, refused to leave, and doubled down on its claim to Ms. Rubin's property. The taint is permanent.

For any of these reasons, the Town's second lawsuit should have been dismissed as res judicata.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Ms. Rubin requests that the Court reverse both of the trial court's orders and order that the 2019 case be dismissed with prejudice. Ms. Rubin also requests the opportunity to present oral argument.

This the 17th day of September, 2020.

FOX ROTHSCHILD LLP

Electronically submitted
Matthew Nis Leerberg
N.C. State Bar No. 35406
mleerberg@foxrothschild.com
434 Fayetteville Street, Suite 2800
Raleigh, NC 27601
Telephone: 919.755.8700
Facsimile: 919.755.8800

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Troy D. Shelton
N.C. State Bar No. 48070
tshelton@foxrothschild.com
434 Fayetteville Street, Suite 2800
Raleigh, NC 27601
Telephone: 919.755.8700
Facsimile: 919.755.8800

HOWARD, STALLINGS, FROM,
ATKINS, ANGELL & DAVIS, P.A

Kenneth C. Haywood
N.C. State Bar No. 19066
khaywood@hsfh.com
B. Joan Davis
N.C. State Bar No. 17379
5410 Trinity Road, Suite 210
Raleigh, NC 27607
Telephone: 919.821.7700
Facsimile: 919.821.7703

Counsel for Defendant Beverly L. Rubin

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, and this Court's order of 10 June 2020, counsel for Ms. Rubin certifies that the foregoing brief contains no more than 3,750 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 17th day of September, 2020.

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion was served on the opposing party by placing a copy, contained in a first-class post-age-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this 17th day of September, 2020, addressed as follows:

David P. Ferrell
Norman W. Shearin
Nexsen Pruet, PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

No. 20-305 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

****

CONTENTS OF APPENDIX

****

Appendix Pages

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE — FILE NO. 15 CVS 5836

TOWN OF APEX, Plaintiff,
v.
BEVERLY L. RUBIN, Defendant.

TRANSCRIPT, Volume I of I
(Pages 1 - 110)

Monday, August 1, 2016

Wake County Criminal Superior Court

Monday, August 1, 2016, Session

The Honorable Elaine O'Neal, Judge Presiding.

Transcript of Proceedings

APPEARANCES:

David P. Ferrell
Vandeventer Black LLP
434 Fayetteville Street, Suite 2000
P.O. Box 2599 (27602)
Raleigh, NC 27601
On behalf of the Plaintiff

Kenneth Haywood
Boxley, Bolton, Garber & Haywood LLP
227 West Martin Street
P.O. Drawer 1429
Raleigh, NC 27602-1385
on behalf of the Defendant

Reported by: Susan K. Gugig, RPR
Official Court Reporter
Post Office Box 351
Raleigh, North Carolina 27602
Office: 919-792-5204
Susan.K.Gugig@nccourts.org

I also wanted to mention that, in addition, I asked her if I could attend the hearing, and she said that it was closed session and I would not have an opportunity to speak.

Q. You have in this particular case -- through the answer that's been filed with the Court today, you're challenging the legal authority of the Town of Apex to use the powers of eminent domain to put a sewer across your property; is that correct?

A. Yes.

Q. Prior -- in all of the things that led up to the lawsuit being filed that you've highlighted today, in terms of your reasons why you did not agree to a voluntary easement, was it at any time about money in terms of how much they were offering?

A. No, there was never -- it was never a question of money. Certainly, at this point, given that we are where we are, I do feel like I have to protect myself.

Q. And after the phone call that you just described with the town's attorney, what sort of happened next? What did you -- what did you learn that occurred that got us to where we are today?

A. I actually called Ms. Hohe because I did not hear the results of that hearing. And I asked her what had happened, and she said the town had condemned my property. And I immediately contacted counsel.

potentially could be torn off. So --

Q. And are these terms and conditions in terms of the town's right to be on your property -- are they limited at all in terms of the hour of the day or times of the week or days of the year?

A. It does indicate that they have the right to do it, but it says, "to the least practical inconvenience." So I will -- I will mention that, during the construction of the easement, people were walking back and forth on my property throughout the working day such that I could not -- I had to stop quite a bit just to get out of my driveway. So I did have that experience, and it was very noisy. But apart from that --

Q. And is this particular easement -- I think you testified before, using the documents that were in front of you, it runs across the entire width of your property; is that correct?

A. Yes.

Q. Does that also involve your driveway?

A. Yes, it does.

Q. Do you have any other means to your house other than through this easement?

A. No, I do not.

MR. HAYWOOD: Your Honor, that's all the questions I have of Ms. Rubin.

A. -- prior to condemning my property, no.
Q. During the construction of the sewer line, isn't it correct that the Town of Apex undertook to bore under your driveway so they did not have to disturb the surface of your driveway?
A. They did go under my driveway, yes.
Q. And isn't it correct that they located bore pits on the properties on either side of your property so they didn't have to actually physically dig on your property to get down to install the sewer pipe?
A. Yes.
Q. So you had testified that you saw individuals walking across your property, but no construction activities disturbed your use of your driveway, did they?
A. I could still drive down my driveway, yes.
Q. You don't have any information that the Town of Apex does not own that sewer pipe and that sewer easement, do you?
A. Given that I am a lawyer, I guess it's hard for me to sit here and not say maybe some of the things that I have read. So I do know that I've read an indemnity agreement from Mr. Zadell to the town in which the town says in that agreement that it may not be an effective condemnation and that he's agreed to pay.
I've also read an agreement between -- the purchase agreement between Brad Zadell and the new owner of the

MR. HAYWOOD: Nothing further.

THE COURT: You may step down.

THE WITNESS: Thank you.

MR. HAYWOOD: Your Honor, that is all the live testimony we have, and I think that we can start moving things forward in terms from that standpoint. Live testimony always takes a little bit of time.

The other evidence that we're going to present here by way of affidavit is in your notebook, and I'd like to file today the affidavit of Donald D'Ambrosi that we have as Tab No. 1, I believe, in the notebook. I have the original here that I'd like to hand to the clerk, if I could, for the purpose of filing.

THE COURT: Yes.

MR. FERRELL: Your Honor, at this point, I would like to be heard on this affidavit. It appears that this affidavit is being offered by a consultant or expert hired by the landowner, and I would just object to this document coming in. This is the first I've seen of it is this morning at the hearing.

You know, this is a -- essentially, a dispositive motion that they've filed. They're basically asking that this condemnation case be dismissed. And so, certainly, we believe that this is -- if this was an affidavit that they intend to rely on, that they should have provided us advance

notice of this. Again, it appears to be from an expert -- what appears to be an expert witness as opposed to a fact witness, which is what Ms. Rubin is and is what Tim Donnelly is, who is the -- was the director of public works, who there should be an affidavit in the file from Mr. Donnelly.

But this is a -- appears to be a third-party consultant expert hired by the plaintiff who is offering some opinions about where this project -- how this could have been constructed. I'm not to my argument yet, Your Honor, so I'll hold the bulk of it, but we believe that it's settled law that the location of an easement by a condemnor like the Town of Apex is not to be second guessed by the courts. I mean, I believe that's accepted law. And I've got a case that I'll be handing up, City of Charlotte v. Heath, at the right time, which relates to a sewer easement.

But, again, this appears to be, I guess, what amounts to expert testimony, and this person, again, was not involved -- based on my quick skim of his affidavit, did not appear to be anybody that was involved in the planning, design, engineering, review, et cetera, for the construction of this sewer easement across Ms. Rubin's property. So, again, I would certainly ask that it be excluded and not considered as part of this case.

MR. HAYWOOD: Your Honor, there's no requirement in a 136-108 hearing that affidavits be tendered ahead of time

like they would be under a Rule 56 summary judgment. The Court hears evidence today of whatever evidence is proffered by either side. There's nothing that I'm aware of that -- anywhere in the law that limits the ability of use of affidavits in 108 hearings. It's customary to be able to use affidavits, and there's nothing in the statutes of Chapter 136 that talk about the timing of when that evidence must be presented to the Court. So for purposes of the fact of its tender today, I don't think there's any law to support that.

With regards to the substance, it's not being offered for the purpose of challenging the town's location of the easement. It is being offered for the purpose of being able to explain our argument today, which this is not a -- there is no public benefit to this particular easement because there are multiple different options the town could have and should have used to avoid the drastic measure of condemnation and destroying Ms. Rubin's property by cutting it in half.

So the purpose of the affidavit is to give information by way of an affidavit to the Court to understand from a land planner that the town had other options, Arcadia East had other options -- strike that -- Arcadia East had other options to be able to put the availability, if it wanted to have sewer to its property.

It's not offered as an expert. As he states in

there, that he has provided expert testimony, but we're not asking for him to be qualified because it's an affidavit. But I don't think there's any reason -- the Court can give it whatever consideration the Court wishes to give when it reviews the affidavit, but I think that it needs to come in as part of the record.

THE COURT: Just one second.

(Brief pause.)

THE COURT: You may have a seat for just one second. I just want to look at this closer.

(Brief pause.)

THE COURT: That objection is overruled. You may proceed.

MR. HAYWOOD: Your Honor, so that's part of the Court file. Other than that, let me just real quickly just sort of talk for a second about the notebook and what we have. I'm going to be referring to some of this in my argument. We obviously have the brief that's in the front of it. We have the affidavit of Mr. D'Ambrosi, which is under Tab No. 1. Tab No. 2 is just the statute we're operating under in terms of 136-108. 3 is the Town of Matthews v. Wright, which I'll be referring to, which I think is one of the cases that is most important to the case before us.

Tab 4 is the State Highway Commission v. Batts, which I've already talked about, which, again, is in support

bought from Ms. Park and from Mr. Evans' family. And so they buy it for -- one transaction is on the excise stamps of $950,000. The other one is $750,000. So they buy it on the cheap because it does not have sewer. They know they don't have sewer. They try to get sewer by asking Ms. Rubin. Ms. Rubin is not interested for all the reasons that she's talked about.

He then basically needs to land bank the site and wait and see at such time as when the Aspnes-Ball property, which is the one to the south of his that does have connection to sewer, sewer main. When it develops someday, he can develop his property. However, events turn in his favor. He's able to buy the property in Arcadia West through one of his companies.

So now he has all the land around Ms. Rubin, as you've heard about, and Arcadia West has sewer along its rear. And so he's got some options now. His options are either he can land bank the site for Arcadia East and wait. He can see whether he can somehow develop it with septics, like the rest of the property in the area. He can -- another option, he can install what's commonly known as a pump station, pump the waste up to Olive Chapel Road, cross the right of way just like the water line already is you've heard they've condemned, head it over Arcadia West. It goes downhill to where their sewer connects into the sewer below

their property. He's got a lot of options. Obviously, some are more costly than others, but he is a private owner and has different options in terms of how to develop it.

Unfortunately, he chooses the one option which is the worst option for Ms. Rubin but the one that the staff allows him to do, and that is to be able to sever her property by running the sewer easement right across her property so that his Arcadia East sewage can then go under her property to the Arcadia West subdivision. And that's what the condemnation lawsuit is all about. There's absolutely no benefit to Ms. Rubin as a result of this easement. There's no benefit to anyone else in the public other than Mr. Zadell.

And as we know from the documents that are tabbed on the chain of title, 17, 18, 19, 20, is that he buys the property from Evans and Park for the prices I've already indicated. He then turns around, after he gets the town to -- the town council met March 3 of 2015 is when they approved the resolution for condemnation across Ms. Rubin's property. He then in June, right after that, then sells the property through Riley's Pond -- to Riley's Pond developers, who is the current owner.

The chain of title is Parkside Builders bought it from Evans and Park. He then transferred the property from Parkside to a related entity called Transom Road Property.

mean, once they're constructed, they're dedicated, and the town owns them. They're town property, town maintained, town serviced. This also is important for the public use and benefit analysis because they're public. So members of the public get to enjoy and have the benefit of this sewer serving their property.

Your Honor, also, if I might approach, this is a -- another document that I obtained this morning. This is a letter to the Town of Apex from someone with Royal Oaks --

MR. HAYWOOD: Your Honor, I'm going to object. We're getting all these documents today that I've never seen before. And I tried very hard in terms of the documents that we proffered to the Court. They're ones that were kept in the business records of the Town of Apex. And we've got something from a Robert Bailey here. The arguments -- if where he's going with his argument is that they can't undo what they've done, I'm glad to have that argument, but for other than that, I'm not sure what the purpose of any of this is.

MR. FERRELL: I'm not arguing we can't undo what we've done. I certainly believe we shouldn't have to undo what we've done. What I'm just trying to establish to the Court is that if there's some confusion about whether this is a residential subdivision in Apex that gets developed like any others, this is evidence. I mean, this is a letter just

acknowledging that, as of 7/27, four lots have been sold in the subdivision, contracts to be closed, to residents, people who are going to live there. And so I'm just trying to make sure the Court is aware that -- and maybe I'll make this point better once I'm getting into the cases, but this is a public project with a public use and public benefit. And if, as they argue, there's some incidental benefit to a private party, that does not defeat a public project, a public sewer project.

So what I'm just trying to establish to the Court is that this is a residential subdivision that's being developed that's going to house residents of Apex in a growing area that needs homes pursuant to the vote of the town council. This is what this shows. So all I'm trying to do is establish that they're actually selling lots out from that that are going to be owned and people are going to live in those homes and obtain public sewer service from the Town of Apex.

THE COURT: I'll allow it.

MR. FERRELL: Thank you, Your Honor.

Again, just wanted the Court clear that this is -- these are facilities owned by Apex to serve, essentially, residents of Apex.

Your Honor, just if I could address some of the arguments related to the effect of the project on the

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 5836

TOWN OF APEX,

Plaintiff,

vs.

BEVERLY L. RUBIN,

Defendant.

T R A N S C R I P T

(Pages 1 - 89)

(Volume I of I)

Transcript of proceedings taken in the General Court of Justice, Superior Court Division, Durham County, North Carolina, on Thursday, January 5, 2017, before the Honorable Elaine M. O'Neal, Judge Presiding.

APPEARANCES

FOR THE PLAINTIFF:

VANDEVENTER BLACK LLP
David P. Ferrell, Esq.
434 Fayetteville Street, Suite 2000
Raleigh, North Carolina 27601

FOR THE DEFENDANT:

BOXLEY, BOLTON, GARBER & HAYWOOD, LLP
Kenneth C. Haywood, Esq.
227 West Martin Street
Raleigh, North Carolina 27601

Judy Runes, CRR, CA CSR
Official Court Reporter
510 South Dillard Street
Durham, North Carolina 27701

I look at a condemnation need as a -- for the town, as the public as a whole. I don't look at it as benefiting a developer. If it does sometimes, that's what it is, but it still benefits the town and the public," is what he testified to.

He also acknowledged another issue -- and this is one of the things that Ms. Rubin put forward at the last hearing. And they did this in the form of an affidavit from a land planner, which, again, we objected to that because we weren't given any notice that they were potentially bringing an affidavit from a potential expert or purported expert to the hearing.

But putting that aside, he said that they could either build a pump station on the property or they could run it through the Welton/Ball property.

And, again, the case law is clear that the courts don't second-guess the location.

But he also acknowledged what -- something that we've included in a page from the town's regulations, that the town discourages pump stations because -- they're ultimately going to own it. I mean, even if somebody else pays to build it, the town would own and operate all the facilities leading to the pump station, so an easement would have to be granted from somebody to build a pump station and

that they discourage it because of the cost of maintenance; and so if it can be done by gravity sewer, that's what they do.

And that's consistent, Your Honor, with a provision from the town's regulations, which I believe is behind Tab E, which is essentially §801 General, and it states:

> "In situations where gravity flow is not feasible, the town will consider the installation of a pump station," and they go on to list the factors.

Again, the key phrase there is "where gravity flow is not feasible." Here, it was feasible. It was 156 feet away, which is the length of the strip across Ms. Rubin's driveway.

Your Honor, also, we talked about this at the last hearing, but behind Tab H is the -- I believe I handed this up at the last hearing, but I included it again. It's what's been recorded on the land records as of February 8, 2016, showing lots that have been subdivided and recorded on the land records, and also included some deeds where lots have been provided.

Your Honor, just -- if I could, I'd like to just show you a map. It's just for illustrative purposes. It's just an aerial photograph because I think it helps orient

11A McQuillin Mun. Corp. § 32:132 (3d ed.)

McQuillin The Law of Municipal Corporations | August 2020 Update

Chapter 32. Eminent Domain

VI. Compensation

§ 32:132. The award, judgment, or decree

West's Key Number Digest

West's Key Number Digest, Eminent Domain 262

Upon the availability of the award, it is usual for the court to render judgment on it,[1] whereupon the award becomes vested and liquidated.[2] The judgment or decree upon the award must, for the most part, have the same requisites as other final court orders, particularly with respect to definiteness, certainty, etc.[3] The award may be apportioned, by the terms of the judgment or decree, among the respective owners.[4] Where a statute authorizes only an easement to be acquired by condemnation, the condemnation judgment cannot vest the municipality with the fee of the land, or with the exclusive use of it, since the statute enters into and forms a part of the judgment, and limits and qualifies the nature of the condemnation ordered by it.[5]

Generally, awards may be set aside upon substantially the same grounds as are invoked to vacate judgments, orders, and decrees.[6] The judgment is not subject to collateral attack,[7] unless it is void on jurisdictional grounds.[8]

An award which is neither excessive,[9] nor inadequate,[10] ordinarily will be confirmed.[11] If the award is excessive, a judgment of confirmation may be modified,[12] or, refused except upon a remittitur of the excess.[13] An inadequate award, however, usually is not subject to alteration, except upon an appeal, or new trial, or similar procedure.[14] The general rules apply, for the most part, to the amendment of the judgment or decree in condemnation proceedings.[15]

The general principles governing res judicata and estoppel by judgment apply with respect to the judgment upon the award in condemnation proceedings.[16] Persons may be estopped to challenge the award of damages.[17]

The usual presumptions indulged in favor of the judgments, orders, and decrees of courts of general jurisdiction, will likewise be indulged to uphold the judgment on an award in condemnation proceedings.[18] The remedies for the enforcement of the judgment entered upon the award are, in the main, identical with those employed for the enforcement of ordinary judgments in civil actions.[19]

Where the amount of a condemnation award is protested by a condemnee on appeal, such award is not finally determined until the disposition of the appeal.[20] A municipal officer with whom condemnation funds are deposited pending appeal is deemed to

be a trustee of such funds so as to preclude his or her retention of income earned on the deposited condemnation award during the pendency of the appeal.[21] A condemnee's right to appeal the sufficiency of a condemnation award is lost upon acceptance of the award, since such acceptance renders moot any sufficiency question.[22]

The damages awarded to landowners in condemnation proceedings stand in place of the land and may be subjected to the payment of incumbrances on it,[23] or may be the subject of a setoff.[24]

The trial court applied the proper standard in considering the doctrine of assemblage, evaluating whether assemblage of the parcels subject to condemnation reasonably would have occurred in the absence of condemnation where the trial court was not required to recite the talismanic phrase "in the absence of condemnation" when reciting the governing law, the court cited the governing case law regarding assemblage, and the court discussed the appraiser's determination that assemblage was reasonably probable and that, "if the city did not take the parcel, the market would respond."[25]

Trial court's explanation for drastically reducing first attorney's requested fees in eminent domain action was inadequate where the court noted that the attorney's expertise should have reduced his time spent on the case, that the trial took only three days and was not complicated, that the jury award was only $300,000 more than the amount deposited by the Department of Transportation, and that it had never awarded as much time for attorney fees. Furthermore, the court reduced 361 claimed hours worked to 100 and appeared to reduce fee request for lack of significant results obtained, as it determined that jury verdict was 18 percent of what the landowner requested in damages and awarded approximately 18 percent of the fee requested for attorney. However, the trial court adequately explained the reason for reducing the second attorney's fee request from 40.2 hours to eight hours where the court reasoned that requested fees included time spent traveling to and from trial and some time duplicating work performed with first attorney, and court noted that second attorney only questioned one witness during the three-day trial for approximately one hour and spent approximately five hours preparing for his witness's testimony.[26]

Footnotes

1 **Cal.**
An unsigned stipulation entered out of court at the time of a deposition and reduced to writing by a certified shorthand reporter was insufficient for a court to enter judgment pursuant to the terms of a settlement where it was not entered into before the court. City of Fresno v. Maroot, 189 Cal. App. 3d 755, 234 Cal. Rptr. 353 (5th Dist. 1987)
Kan.
Miller v. FW Commercial Properties, LLC, 293 Kan. 1099, 272 P.3d 596 (2012)
La.
City of New Orleans v. Crawford, 9 So. 2d 82 (La. Ct. App., Orleans 1942) (power of court to modify jury's award of damages)
Minn.
Peterson v. City of Minneapolis, 175 Minn. 300, 221 N.W. 14 (1928) (damages awarded in gross)
N.M.
State ex rel. City of Albuquerque v. Johnson, 1941-NMSC-043, 45 N.M. 480, 116 P.2d 1021 (1941) (confirmation of appraisal essential before judgment)
N.Y.
Upon a motion to confirm an award by commissioners of appraisal in a condemnation proceeding, the court must either approve or disapprove the award and may not modify it. Department of Public Works of City of Hornell v. Town of Hornellsville, 41 A.D.2d 685, 342 N.Y.S.2d 632 (4th Dep't 1973)
N.D.
Park Dist. of City of Enderlin v. Zech, 56 N.D. 431, 218 N.W. 18 (1928)

2 **Colo.**

Union Exploration Co. v. Moffat Tunnel Imp. Dist., 104 Colo. 109, 89 P.2d 257 (1939) (claim for damages for use unliquidated until final judgment)

Ill.

Commissioners of Lincoln Park v. Schmidt, 379 Ill. 130, 39 N.E.2d 1012 (1942) (judgment final although condemnor had option to dismiss petition within designated time)

Minn.

Benton County by Bd. of Com'rs v. Gruszka, 386 N.W.2d 840 (Minn. Ct. App. 1986)

3 **Ala.**

Hays v. Ingham-Burnett Lumber Co., 217 Ala. 524, 116 So. 689 (1928) (execution or injunction upon failure to pay damage to be recited in judgment)

Cal.

City of Los Angeles v. City of Huntington Park, 32 Cal. App. 2d 253, 89 P.2d 702 (1st Dist. 1939) (judgment in suit between cities that required construction of power line imposing conditions upon plaintiff city)

Conn.

Fourth Congregational Church v. Board of Street Com'rs of City of Hartford, 116 Conn. 341, 164 A. 884 (1933) (easement taken for widening street to be definitely described and defined)

Ill.

People ex rel. Willoughby v. Weaver, 331 Ill. 35, 162 N.E. 208 (1928); s.c. People ex rel. Ruel v. Weaver, 330 Ill. 643, 162 N.E. 205 (1928) (judgment confirming award conditional during period when condemnor could accept or dismiss proceeding)

Ky.

City of Hazard v. Gay, 271 Ky. 818, 113 S.W.2d 467 (1938) (personal judgment against city, mayor, and members of council erroneous)

Mo.

City of St. Louis v. Buselaki, 336 Mo. 693, 80 S.W.2d 853 (1935) (evidence sustained judgment)

N.Y.

Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936) (decree fixing damage for dam construction and granting injunction if not paid); Town of Pittsford v. Sweeney, 34 Misc. 2d 436, 228 N.Y.S.2d 518 (Sup 1962) (appropriate findings in report of appraisal commission involving taking of easement for sewer)

Tex.

Coleman v. Archer County, 16 S.W.2d 942, 947 (Tex. Civ. App. Fort Worth 1929) (application for condemnation to be sufficient to sustain judgment); Parks v. City of Waco, 274 S.W. 1006 (Tex. Civ. App. Waco 1925) (no description of land in pleadings or judgment rendering judgment void)

4 **Kan.**

Miller v. FW Commercial Properties, LLC, 293 Kan. 1099, 272 P.3d 596 (2012) (district court may determine the final distribution of the appraisers' award or amount of the final judgment in an eminent-domain proceeding only when there is a dispute among the parties in interest as to the division of the award or final judgment and any such party in interest files a motion seeking final distribution of the award or final judgment)

Mo.

City of Kirkwood v. Cronin, 259 Mo. 207, 168 S.W. 674 (1914) (record of apportionment)

N.Y.

In re Brooklyn Bridge Southwest Urban Renewal Project (Project No. N.Y. R-67) Borough of Manhattan, City of New York, 46 Misc. 2d 558, 260 N.Y.S.2d 229 (Sup 1965), order aff'd, 24 A.D.2d 710, 262 N.Y.S.2d 1020 (1st Dep't 1965) (contracts with respect to apportionment of awards may be made in accordance with respective interests of multiple owners of parcel condemned, such apportionment being of no concern to condemnor); In re Samuel Gompers Houses, City of New York, 214 N.Y.S.2d 217 (Sup 1961) (settlement of all controversies between parties having interests in condemned property)

Wis.

State ex rel. Sippy v. Nee, 253 Wis. 423, 34 N.W.2d 121 (1948) (award to heirs of deceased owner, as group, as compliance with statute)

See §§ 32:82 to 32:86.

5 **Ill.**
Illinois Cent. R. Co. v. City of Chicago, 141 Ill. 586, 30 N.E. 1044 (1892)
Md.
Kline v. Mayor and Council of Rockville, 245 Md. 625, 227 A.2d 217 (1967)
Okla.
Ramsey v. Leeper, 1933 OK 661, 168 Okla. 43, 31 P.2d 852 (1933), quoting this treatise

6 **Idaho**
Rocky Mountain Power v. Jensen, 154 Idaho 549, 300 P.3d 1037 (2012) (subsequent conflicting appraisals did not constitute new evidence to support the grant of a motion for reconsideration with regards to just compensation paid to property owners in eminent domain case)
Mo.
City of St. Louis v. Senter Commission Co., 335 Mo. 489, 73 S.W.2d 389 (1934) (discretion of trial court to set aside award of benefit)
N.Y.
Niagara Falls Urban Renewal Agency v. Burnside, 41 A.D.2d 886, 342 N.Y.S.2d 704 (4th Dep't 1973) (there is no requirement that commissioners make findings of fact or state conclusions of law to justify their award in condemnation proceeding); City of New Rochelle v. Gucker, 279 A.D. 1096, 112 N.Y.S.2d 701 (2d Dep't 1952), order aff'd, 305 N.Y. 897, 114 N.E.2d 433 (1953) (excessive award as final unless misconduct or mistake); In re East River Drive, Borough of Manhattan, City of New York, 194 Misc. 611, 86 N.Y.S.2d 845 (Sup 1949) (alleged error in computing damage remediable only by appeal not by motion to correct); Application of Gillespie, 172 Misc. 1041, 17 N.Y.S.2d 15 (Sup 1940) (fraud of railroad company in proving value of bridge which it intended to abandon, as ground for setting aside award based on such valuation)

7 **Ill.**
Goodwillie v. City of Lake View, 137 Ill. 51, 27 N.E. 15 (1891)
Mo.
Tremayne v. City of St. Louis, 320 Mo. 120, 6 S.W.2d 935 (1928)
N.Y.
In re Flatbush Ave. Extension-Fourth Ave. Subway, 167 A.D. 908, 151 N.Y.S. 766 (2d Dep't 1915), aff'd, 217 N.Y. 61, 111 N.E. 658 (1916); Klibanoff v. City of New York, 24 Misc. 2d 649, 206 N.Y.S.2d 301 (Sup 1960), judgment aff'd, 17 A.D.2d 725, 232 N.Y.S.2d 391 (1st Dep't 1962)

8 **Fla.**
Carlor Co. v. City of Miami, 62 So. 2d 897 (Fla. 1953) (collateral attack only in cases of fraud or where void for lack of jurisdiction)
Tex.
Hardy v. City of Throckmorton, 62 S.W.2d 1104 (Tex. Civ. App. Eastland 1933)

9 **Cal.**
Frustuck v. City of Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1st Dist. 1963) (award for damage to land caused by enlargement of ditch not excessive)
Ky.
Bowling Green-Warren County Airport Bd. v. Long, 364 S.W.2d 167 (Ky. 1962); City of Winchester v. Spencer, 352 S.W.2d 929 (Ky. 1961)
La.
Louisiana Highway Commission v. Purpera, 187 La. 219, 174 So. 268 (1937); City of Shreveport v. Pedro, 170 La. 351, 127 So. 865 (1930) (land condemned for military purposes); City of New Orleans v. Thieler, 181 So. 2d 56 (La. Ct. App. 4th Cir. 1965)
Mass.
Haven v. Town of Brimfield, 345 Mass. 529, 188 N.E.2d 574 (1963)
Minn.
Where there was evidence that the damages sustained by a landowner exceeded the amount of the verdict, it cannot be said that excessive damages were awarded under the influence of passion and prejudice. Underwood v. Town Bd. of Empire, 217 Minn. 385, 14 N.W.2d 459, 463 (1944)
Mo.

City of St. Louis v. Franklin Bank, 107 S.W.2d 3 (Mo. 1937); City of St. Louis v. Franklin Bank, 340 Mo. 383, 100 S.W.2d 924 (1936) (supported by evidence); City of St. Louis v. Franklin Bank, 108 S.W.2d 636 (Mo. Ct. App. 1937)

Neb.

Timmons v. School Dist. of Omaha, Douglas County, 173 Neb. 574, 114 N.W.2d 386 (1962) (question of adequacy or inadequacy of award to be determined on case-by-case basis)

N.Y.

In re Ford, 24 A.D.2d 806, 263 N.Y.S.2d 831 (3d Dep't 1965) (award for acres having valuable mineral deposits); Cibulas v. Village of Menands, 266 A.D. 895, 42 N.Y.S.2d 787 (3d Dep't 1943)

Okla.

City of McAlester v. Delciello, 1966 OK 58, 412 P.2d 623 (Okla. 1966)

R.I.

Johnson v. Providence Redevelopment Agency, 96 R.I. 139, 189 A.2d 814 (1963)

Tenn.

Rogers v. Murfreesboro Housing Authority, 51 Tenn. App. 163, 365 S.W.2d 441 (1962) (where value evidence ranged from $18,500 to $28,000, award of $15,000 not excessive); Chapman v. Mayor and Bd. of Aldermen of City of Milan, 48 Tenn. App. 196, 344 S.W.2d 773 (1960) (incidental damage award not excessive)

Tex.

City of Lubbock v. Thiel, 352 S.W.2d 799 (Tex. Civ. App. Amarillo 1961), writ refused n.r.e., (Mar. 14, 1962)

Wis.

Lindsay v. Housing Authority of City of Milwaukee, 18 Wis. 2d 624, 119 N.W.2d 357 (1963) (court finding as to property value to stand unless against great weight and clear preponderance of evidence)

10 **Ga.**

King v. Mayor, etc., of Savannah, 105 Ga. App. 701, 125 S.E.2d 552 (1962)

Ill.

City of Chicago v. Exchange Nat. Bank of Chicago, 64 Ill. App. 2d 455, 212 N.E.2d 494 (1st Dist. 1965) (upholding award within range of evidence)

La.

City of New Orleans v. Thieler, 181 So. 2d 56 (La. Ct. App. 4th Cir. 1965)

Mo.

Board of Ed. of Bowling Green School Dist. R-1 v. Harness, 338 S.W.2d 808 (Mo. 1960)

N.Y.

City of Binghamton for and on Behalf of Binghamton Urban Renewal Agency v. Chenango Enterprises, Inc., 48 Misc. 2d 430, 265 N.Y.S.2d 135 (Sup 1965)

Ohio

City of Cleveland v. Grisanti, 26 Ohio Op. 2d 423, 91 Ohio L. Abs. 339, 187 N.E.2d 515 (Ct. App. 8th Dist. Cuyahoga County 1963)

Or.

City of Portland v. Ruggero, 231 Or. 624, 373 P.2d 970 (1962)

Tex.

Holcombe v. City of Houston, 351 S.W.2d 69 (Tex. Civ. App. Houston 1961)

11 **Iowa**

NDA Farms, L.L.C. v. City of Ames through Ames Municipal Electric System, 899 N.W.2d 739 (Iowa Ct. App. 2017)

N.Y.

City of Troy v. Manufacturers Nat. Bank, 30 A.D.2d 889, 291 N.Y.S.2d 434 (3d Dep't 1968) (award confirmed unless so inadequate or excessive that it shocks sense of justice or conscience of court)

12 **Iowa**

NDA Farms, L.L.C. v. City of Ames through Ames Municipal Electric System, 899 N.W.2d 739 (Iowa Ct. App. 2017)

N.Y.

Ford v. Siska, 24 A.D.2d 14, 262 N.Y.S.2d 35 (3d Dep't 1965), order aff'd, 22 N.Y.2d 834, 293 N.Y.S.2d 101, 239 N.E.2d 731 (1968)

13 **Ala.**

Whitman v. Housing Authority of City of Elba, 272 Ala. 245, 130 So. 2d 362 (1961) (some presumption to be indulged in favor of remittitur ruling where trial court saw and heard witnesses and personally viewed premises)

Ark.

Housing Authority of City of Little Rock v. Sparks, 234 Ark. 868, 355 S.W.2d 166 (1962) (reduction of award on trial de novo on appeal); City of Harrison v. Moss, 213 Ark. 721, 212 S.W.2d 334 (1948) (award in excess of amount claimed reversed unless part remitted)

Colo.

Heimbecher v. City and County of Denver, 90 Colo. 346, 9 P.2d 280 (1932)

Iowa

Wheatley v. City of Fairfield, 213 Iowa 1187, 240 N.W. 628 (1932)

Ky.

Petroleum Exploration v. McGeorge, 225 Ky. 131, 7 S.W.2d 821 (1928)

Miss.

State Highway Commission v. Randle, 180 Miss. 834, 179 So. 273 (1938)

N.J.

Moorestown Tp., Burlington County v. Slack, 85 N.J. Super. 109, 204 A.2d 23 (App. Div. 1964) (excessive award requiring reversal and remand)

N.M.

City of Truth or Consequences v. Pietruszka, 1969-NMSC-167, 81 N.M. 3, 462 P.2d 137 (1969) (award exceeding price paid in absence of proof of increase in value)

N.Y.

In re Harrison Ave., Borough of Bronx, City of New York, 267 N.Y. 64, 195 N.E. 685 (1935) (application for reduction of award); In re Real Property in Borough of Bronx, City of New York, 18 A.D.2d 991, 238 N.Y.S.2d 618 (1st Dep't 1963); In re Throgs Neck Expressway, 16 A.D.2d 570, 229 N.Y.S.2d 947 (1st Dep't 1962), order rev'd on other grounds, 13 N.Y.2d 700, 241 N.Y.S.2d 176, 191 N.E.2d 677 (1963)

Tex.

City of Dallas v. McLemee, 378 S.W.2d 393 (Tex. Civ. App. Dallas 1964) (award excessive)

Wis.

Genge v. City of Baraboo, 72 Wis. 2d 531, 241 N.W.2d 183 (1976)

14 **La.**

City of Monroe v. Carso, 179 So. 2d 696 (La. Ct. App. 2d Cir. 1965) (award increased from $21,500 to $61,500); Louisiana Highway Commission v. Watkins, 172 So. 185 (La. Ct. App. 2d Cir. 1937) (award of jury increased under evidence as to value of land taken and damage to land not taken)

Mo.

City of St. Louis v. Vasquez, 341 S.W.2d 839 (Mo. 1960) (no power in trial judge to add to award); City of St. Louis v. Franklin, 324 Mo. 1212, 26 S.W.2d 954 (1930) (new trial)

N.Y.

In re Cadman Plaza Urban Renewal Project, City of New York, 22 A.D.2d 946, 256 N.Y.S.2d 1 (2d Dep't 1964), order aff'd, 16 N.Y.2d 763, 262 N.Y.S.2d 491, 209 N.E.2d 813 (1965) (award of $300,000 increased to $402,000 where property was purchased during depression for $312,000, it was assessed for $400,000, and condemnor's expert valued it at $402,000); Headley v. City of New York, 22 A.D.2d 792, 254 N.Y.S.2d 149 (2d Dep't 1964) (award increased on appeal)

15 **Mo.**

City of St. Louis v. Vasquez, 341 S.W.2d 839 (Mo. 1960) (clerical errors and matters of form amended in trial court)

N.Y.

In re Clarendon Road, 165 Misc. 626, 299 N.Y.S. 997 (Sup 1937), order aff'd, 256 A.D. 998, 11 N.Y.S.2d 545 (2d Dep't 1939) (where award in condemnation proceeding was paid to claimant and its attorney pursuant to decree which was subsequently vacated and nominal award made, attorney was not required to make

restitution of amount received by him, but claimant was required to make restitution of full award); In re Northern Boulevard, City of New York, 242 A.D. 839, 275 N.Y.S. 107 (2d Dep't 1934) (nunc pro tunc amendment)

16 **Mich.**

A.M. Campau Realty Co. v. City of Detroit, 268 Mich. 417, 256 N.W. 357 (1934)

N.Y.

Fiore v. Board of Ed. Retirement System of City of New York, 48 A.D.2d 850, 369 N.Y.S.2d 179 (2d Dep't 1975), order aff'd, 39 N.Y.2d 1016, 387 N.Y.S.2d 245, 355 N.E.2d 300 (1976) (a court is without power, absent a reservation of the right to do so, to reopen a judgment to add additional interest to the award in order to conform to a decision made by the court of appeals in a later unrelated case); In re Brooklyn-Queens Connecting Highway & Parks, Borough of Brooklyn, City of New York, 300 N.Y. 265, 90 N.E.2d 183 (1949) (denial of claim for damage res judicata of subsequent proceeding to enjoin improvement or for damages); In re School Site in Borough of Brooklyn, City of New York, 257 A.D. 860, 12 N.Y.S.2d 663 (2d Dep't 1939) (court not to refund taxes to which condemnee was entitled after final decree); McEwan v. City of New York, 242 A.D. 559, 275 N.Y.S. 763 (1st Dep't 1934)

Okla.

Graham v. City of Duncan, 1960 OK 149, 354 P.2d 458 (Okla. 1960) (res judicata as to all matters that should have been presented)

Tenn.

Fuller v. City of Chattanooga, 22 Tenn. App. 110, 118 S.W.2d 886 (1938) (after compromised damages no power of condemnee to recover against successor municipality)

Tex.

Nagy v. City of Amarillo, 358 S.W.2d 682 (Tex. Civ. App. Amarillo 1962), writ refused n.r.e., (Oct. 6, 1962) (judgment as to status of trade fixtures res judicata); Farmers & Merchants Compress & Warehouse Co. v. City of Dallas, 335 S.W.2d 854 (Tex. Civ. App. Dallas 1960), writ refused n.r.e., (Oct. 19, 1960) (no power of property owner to later assert alleged rights)

17 **Cal.**

South San Francisco Unified School Dist. v. Scopesi, 213 Cal. App. 2d 409, 28 Cal. Rptr. 882 (1st Dist. 1963) (voluntary acceptance of award waiver of right to challenge regularity of proceedings)

Mo.

City of St. Louis v. Koch, 335 Mo. 991, 74 S.W.2d 622 (1934)

See § 32:91.

18 **Cal.**

Newport v. City of Los Angeles, 184 Cal. App. 2d 229, 7 Cal. Rptr. 497 (2d Dist. 1960) (all facts necessary to support judgment presumed)

Ill.

Waukegan Park Dist. v. First Nat. Bank of Lake Forest, 22 Ill. 2d 238, 174 N.E.2d 824 (1961) (must show prejudicial error to reverse judgment)

Iowa

Jury's award of damages to property owners was not wholly unfair and unreasonable, and thus trial court was within its discretion to deny city's motion for new trial based on allegedly excessive damage award, following trial to determine damages property owners incurred as result of permanent easement city acquired across their properties. NDA Farms, L.L.C. v. City of Ames through Ames Municipal Electric System, 899 N.W.2d 739 (Iowa Ct. App. 2017)

Mo.

City of St. Louis v. Union Quarry & Const. Co., 394 S.W.2d 300 (Mo. 1965); City of St. Louis v. Peck, 213 S.W.2d 972 (Mo. 1948) (assignment of error to be supported by proofs)

N.Y.

City of Binghamton for and on Behalf of Binghamton Urban Renewal Agency v. Chenango Enterprises, Inc., 48 Misc. 2d 430, 265 N.Y.S.2d 135 (Sup 1965) (award to be confirmed in absence of misconduct or palpable mistake); Ford v. Siska, 24 A.D.2d 14, 262 N.Y.S.2d 35 (3d Dep't 1965), order aff'd, 22 N.Y.2d 834, 293 N.Y.S.2d 101, 239 N.E.2d 731 (1968) (condemnation award may be rejected on review only for

irregularity in proceedings, or if based on erroneous principle of law, or if it shocks not only one's sense of justice, but one's conscience)

Okla.

City of McAlester v. Delciello, 1966 OK 58, 412 P.2d 623 (Okla. 1966)

Tenn.

Fuller v. City of Chattanooga, 22 Tenn. App. 110, 118 S.W.2d 886 (1938) (all damages presumed covered)

Wash.

City of Seattle v. Harclaon, 56 Wash. 2d 596, 354 P.2d 928 (1960) (prejudicial comments on evidence)

19 **Ala.**

Middleton v. St. Louis & S.F.R. Co., 228 Ala. 323, 153 So. 256 (1934)

Cal.

McPherson v. City of Los Angeles, 8 Cal. 2d 748, 68 P.2d 707 (1937) (mandamus denied where other remedies adequate)

Ga.

Page v. Washington County, 48 Ga. App. 791, 173 S.E. 868 (1934)

Ill.

People ex rel. Wanless v. City of Chicago, 378 Ill. 453, 38 N.E.2d 743, 138 A.L.R. 1298 (1941) (mandamus)

Mo.

City of St. Louis v. Miller, 155 S.W.2d 565 (Mo. Ct. App. 1941) (scire facias to revive judgment for city for benefit assessment allowed during 10-year limitation period)

N.Y.

In re Public Park, Borough of Bronx, City of New York, 262 A.D. 487, 30 N.Y.S.2d 500 (1st Dep't 1941) (statute providing for enforcement and collection of award)

Tex.

Loumparoff v. Housing Authority of City of Dallas, 261 S.W.2d 224 (Tex. Civ. App. Dallas 1953) (public corporations not required to file bond for protection of judgment creditor)

20 **Ill.**

Morton Grove Park Dist. v. American Nat. Bank and Trust Co., 67 Ill. App. 3d 709, 24 Ill. Dec. 356, 385 N.E.2d 123 (1st Dist. 1978), judgment rev'd on other grounds, 78 Ill. 2d 353, 35 Ill. Dec. 767, 399 N.E.2d 1295 (1980) (condemnees were entitled to be reimbursed for full sum of money earned on sum deposited with county treasurer)

Minn.

A trial court hearing an appeal of a commissioner's award in a condemnation action may properly enter judgment for the value of the land taken pursuant to a jury verdict even though the jury's valuation is less than the commissioner's award from which the landowner has appealed. Benton County by Bd. of Com'rs v. Gruszka, 386 N.W.2d 840 (Minn. Ct. App. 1986)

N.Y.

See Matter of Town of Greenburgh, 70 A.D.2d 409, 421 N.Y.S.2d 239 (2d Dep't 1979), order aff'd, 52 N.Y.2d 948, 437 N.Y.S.2d 968, 419 N.E.2d 871 (1981) (compelling county commissioner of finance to turn over to condemnee accrued interest earned on deposit of condemnation award)

21 **Ill.**

Payment of money by condemnor to county treasurer acts as a substitute for condemned property under eminent domain act, such that funds held by county treasurer are private funds belonging to condemnees which condemnees may withdraw at any time as long as they are willing to forego appeal. Morton Grove Park Dist. v. American Nat. Bank and Trust Co., 78 Ill. 2d 353, 35 Ill. Dec. 767, 399 N.E.2d 1295 (1980)

22 **Ill.**

Morton Grove Park Dist. v. American Nat. Bank and Trust Co., 67 Ill. App. 3d 709, 24 Ill. Dec. 356, 385 N.E.2d 123 (1st Dist. 1978), judgment rev'd on other grounds, 78 Ill. 2d 353, 35 Ill. Dec. 767, 399 N.E.2d 1295 (1980)

Tex.

After an award has been made in a condemnation proceeding and the money deposited in the court registry and the landowner has withdrawn the funds, he or she cannot thereafter contend that the taking was unlawful. Zucht v. City of San Antonio, 698 S.W.2d 168 (Tex. App. San Antonio 1984)

23 **Ill.**
City of Chicago v. R. R. Bldg. Corp., 24 Ill. 2d 20, 179 N.E.2d 623 (1962)
Mo.
Cassville School Dist. v. McArtor, 286 S.W. 729 (Mo. Ct. App. 1926)
N.J.
Camden County Park Com'n v. Bigler, 127 N.J. Eq. 4, 11 A.2d 86 (Ct. Err. & App. 1940)
N.Y.
In re Seward Park Slum Clearance Project, Borough of Manhattan, City of New York, 20 A.D.2d 450, 247 N.Y.S.2d 646 (1st Dep't 1964) (a statutory lien on an award, in favor of a condemnor for the value of occupancy by condemnee after title passed to condemnor did not pass to a grantee of the condemnor, since the terms of the statute did not expressly so provide); In re Public Parks at Rockaway Beach, City of New York, 288 N.Y. 51, 41 N.E.2d 454 (1942); Muldoon v. Mid-Bronx Holding Corporation, 287 N.Y. 227, 39 N.E.2d 217 (1942); In re 43D Avenue, Borough of Queens, City of New York, 282 N.Y. 42, 24 N.E.2d 841 (1939)
See also § 32:86.

24 **N.Y.**
In re De Kalb Ave. Reconstruction, Borough of Brooklyn, City of New York, 11 A.D.2d 240, 205 N.Y.S.2d 125, 6 A.F.T.R.2d 5516 (2d Dep't 1960), order aff'd, 12 N.Y.2d 1051, 239 N.Y.S.2d 880, 190 N.E.2d 240, 11 A.F.T.R.2d 1445 (1963)
Wis.
Weeden v. City of Beloit, 29 Wis. 2d 662, 139 N.W.2d 616 (1966) (rent owed city from date of award)
See § 32:124.

25 **Conn.**
City of Hartford v. CBV Parking Hartford, LLC, 330 Conn. 200, 192 A.3d 406 (2018)

26 **N.D.**
North Dakota Department of Transportation v. Rosie Glow, LLC, 2018 ND 123, 911 N.W.2d 334 (N.D. 2018)

End of Document

No. 20-305 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

****

CONTENTS OF ADDENDUM

****

Addendum Pages

2020 WL 4726611
Only the Westlaw citation is currently available.
Supreme Court of North Carolina.

ORLANDO RESIDENCE, LTD.

v.

ALLIANCE HOSPITALITY MANAGEMENT, LLC, Rolf A. Tweeten, Axis Hospitality, Inc., and Kenneth E. Nelson

No. 113A19
|
Filed August 14, 2020

Synopsis

Background: Judgment creditor brought action against judgment debtor, business in which judgment debtor possessed ownership interest, corporation that was majority owner of business, and corporation's owner alleging that business underpaid it by making distributions under charging orders premised on judgment debtor holding 10%, rather than 16.4%, interest in business. Judgment debtor brought cross claims against all other defendants seeking damages and equitable relief. The Superior Court, Wake County, James L. Gale, Senior Business Court Judge, 2018 WL 6728490, dismissed judgment debtor's cross claims. Judgment debtor appealed.

Holdings: The Supreme Court, Davis, J., held that:

[1] as matter of first impression, dismissal of original action does not, by itself, mandate dismissal of a cross claim that meets prerequisites for bringing such a claim;

[2] res judicata barred judgment debtor's cross claims for conversion, wrongful taking, and constructive trust;

[3] as matter of first impression, general rule limiting preclusive effect of declaratory judgments to issue preclusion, as opposed to claim preclusion, applies only if prior action solely sought declaratory relief;

[4] dismissal of all cross claims that were related to subject matter of judgment creditor's original claims required dismissal of all remaining unrelated cross claims; and

[5] trial court did not abuse its discretion in dismissing cross claims with prejudice.

Affirmed as modified.

West Headnotes (11)

[1] **Appeal and Error** 🔑 De novo review

Appeal and Error 🔑 De novo review

The Supreme Court reviews de novo legal conclusions of a trial court, including orders granting or denying a motion to dismiss for failure to state a claim upon which relief can be granted.

[2] **Pleading** 🔑 Cross-complaint in general

With the exception of cross claims that necessarily require the continued litigation of the plaintiff's original claims in order to remain viable, such as claims for indemnity or contribution, the dismissal of the original action does not, by itself, mandate the dismissal of a cross claim so long as the cross claim meets the prerequisites for bringing such a claim. N.C. R. Civ. P. 13(g).

[3] **Appeal and Error** 🔑 Verdict, Findings, Sufficiency of Evidence, and Judgment

Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision.

[4] **Judgment** 🔑 Nature and elements of bar or estoppel by former adjudication

Judgment 🔑 Necessity in general

Res judicata provides that a prior adjudication on the merits in a prior suit bars a subsequent,

identical cause of action between the same parties or their privies, and also prevents relitigation of claims that in the exercise of reasonable diligence, could have been presented for determination in the prior action.

[5] **Judgment** Nature and requisites of former recovery as bar in general

The essential elements of res judicata are: (1) a final judgment on the merits in an earlier suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits.

[6] **Judgment** Nature of Action or Other Proceeding

Judgment Demands within scope of issues or litigation

Declaratory judgment in prior state court action defining judgment debtor's ownership interest in business as ten membership units barred judgment debtor, under doctrine of res judicata, from asserting claims against business and other related entities for conversion, wrongful taking, and constructive trust that were based on theory that judgment debtor owned 16.4%, rather than 10%, of business and was therefore entitled to distributions from business reflecting higher percentage, since declaratory judgment was final judgment, judgment debtor, business, and others were all parties to prior action, and even though prior action only determined total number of judgment debtor's membership units, judgment debtor's percentage ownership interest could have been adjudicated in prior action.

[7] **Judgment** Nature of Action or Other Proceeding

The general rule limiting the preclusive effect of declaratory judgments to issue preclusion, as opposed to claim preclusion, applies only if the prior action solely sought declaratory relief.

[8] **Creditors' Remedies** Proceedings

Dismissal of all of judgment debtor's cross claims that were related to subject matter of judgment creditor's original claims required dismissal of all of judgment debtor's remaining cross claims that were unrelated to judgment creditor's original claims, since ability to join claims required that predicate cross claims survive pleading stage. N.C. R. Civ. P. 13(g), 18(a).

[9] **Pleading** Cross-complaint in general

In order for a cross claimant to be permitted to maintain additional joined cross claims against a co-defendant as provided for under the joinder rule, the predicate cross claim asserted by the cross claimant must survive the pleading stage. N.C. R. Civ. P. 13(g), 18(a).

[10] **Appeal and Error** Abuse of discretion

A discretionary ruling by a trial court will be overturned for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.

[11] **Pretrial Procedure** Dismissal with or without prejudice

Trial court did not abuse its discretion in dismissing judgment debtor's cross claims with prejudice, in judgment creditor's action alleging that business in which judgment debtor had interest underpaid it by making distributions under charging orders premised on judgment debtor holding 10%, rather than 16.4%, interest in business, where judgment debtor, and at times, his wife and business entities he controlled, had been engaged in various legal proceedings involving his debts to judgment creditor for over 30 years, and judgment debtor, business, and other related entities had been engaged in litigation for almost decade over his membership interest and rights with respect to business. N.C. R. Civ. P. 41(b).

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order entered on 20 December 2018 by Judge James L. Gale, Senior Business Court Judge, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 11 December 2019.

Attorneys and Law Firms

No brief for plaintiff Orlando Residence, Ltd.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Gray Wilson and Jackson W. Moore Jr., Raleigh, for defendant-appellees Alliance Hospitality Management, LLC, Rolf A. Tweeten, and Axis Hospitality, Inc.

Kenneth Nelson, defendant-appellant, pro se.

Opinion

DAVIS, Justice.

***1** In this case, we address several issues relating to the ability of a defendant to assert crossclaims against a co-defendant pursuant to the North Carolina Rules of Civil Procedure. Based on our conclusion that the dismissal of the defendant's crossclaims here was proper, albeit on different grounds than those relied upon by the Business Court, we modify and affirm the decision of the Business Court.

Factual and Procedural Background

This appeal arises from the latest lawsuit in protracted litigation between Kenneth Nelson; Alliance Hospitality Management, LLC (Alliance); and Orlando Residence, Ltd. (Orlando). Alliance is a Georgia company that provides hotel management services with its principal place of business in North Carolina. Nelson is a former employee of Alliance who possesses an ownership interest in the company. Axis Hospitality, Inc. (Axis) is an Illinois corporation that is the majority owner of Alliance. Axis is wholly owned and managed by an individual named Rolf Tweeten. Orlando is a judgment creditor of Nelson.[1]

1 Despite the fact that it originally instituted this action, Orlando has not participated in this appeal, which solely involves the dismissal of crossclaims asserted by Nelson against his co-defendants.

In order to fully analyze the issues before us in this appeal, it is necessary to review in some detail the extensive factual and procedural history between the parties.

I. Nelson's Ownership Interest in Alliance

In 2007, Axis purchased a 51% interest in Alliance. Around this same time, Tweeten hired Nelson as a consultant to help him acquire the remainder of Alliance. In 2008, Tweeten reached an oral agreement with Nelson that granted him a limited ownership interest in Alliance. Nelson was also made a director of Alliance and later became Chief Financial Officer of the company. He served in that role until 31 January 2011.

On 25 February 2011, Nelson filed a lawsuit (the Nelson Action) in Superior Court, Wake County, against Alliance, Axis, and Tweeten (collectively, the Alliance Defendants) in which he asserted claims for (1) breach of fiduciary duty; (2) constructive fraud; (3) judicial dissolution of Alliance; (4) a declaratory judgment regarding the extent of Nelson's ownership in Alliance's "membership interest units"; and (5) wrongful termination.[2] All of Nelson's claims were dismissed prior to trial with the exception of the fourth claim seeking a declaratory judgment with regard to Nelson's ownership interest in Alliance. Nelson's declaratory judgment claim asserted that he owned 10 of the existing 61 membership units in Alliance, thereby giving him a 16.4% ownership interest. The Alliance Defendants, conversely, contended that Nelson had been granted only a 10% interest.

2 The matter was designated a complex business case by the Chief Justice on 1 June 2011 and transferred to the North Carolina Business Court.

A trial was held on the declaratory judgment claim beginning on 16 March 2015, and at the close of the evidence, the jury was tasked with answering—along with an additional question not relevant to this appeal—the following question: "Did Alliance's board of directors issue 10 membership units to Kenneth E. Nelson?" The jury answered in the affirmative. The jury was not asked, however, to determine the total number of membership units existing in Alliance, thereby leaving unanswered the precise percentage of Nelson's ownership interest in Alliance. On 27 March 2015, the Business Court entered an order declaring Nelson to be "the holder of 10 membership units in Alliance ...." The Business Court further ordered that Alliance's Board of Directors

"adopt a resolution, or otherwise amend the corporate records, to reflect that Kenneth E. Nelson owns 10 membership units." Nelson appealed the Business Court's pre-trial dismissal of his damages claims, and the Court of Appeals affirmed the Business Court's ruling. *See Nelson v. Alliance Hosp. Mgmt., LLC*, 2016 WL 1566140, 2016 N.C. App. LEXIS 412 (N.C. Ct. App. 2016) (unpublished).

II. Orlando's Enforcement of Foreign Judgments Against Nelson in North Carolina

***2** As a result of a failed business venture dating back to the late 1980s, Orlando secured two money judgments against Nelson[3] during the years preceding the filing of the present lawsuit. The first judgment was issued by the Chancery Court for Davidson County, Tennessee on 7 October 2004 in the amount of $797,615. In an effort to enforce this judgment against Nelson in North Carolina, Orlando filed a motion for a "charging order" in Superior Court, Wake County. On 12 May 2011, the superior court issued such an order, finding that Orlando's judgment had not been completely satisfied and stating, in part, that "any distribution, allocations, or payments in any form otherwise due from Alliance ... to Kenneth E. Nelson up to $121,127.85 ... shall instead be paid to Orlando Residence, Ltd."

3 The first of these judgments was actually entered against Nashville Lodging Company, a corporation controlled by Nelson that he was found to have used to facilitate fraudulent conveyances and avoid Orlando's collection efforts. *See Orlando Residence, Ltd. v. GP Credit Co., LLC*, 553 F.3d 550, 553 (7th Cir. 2009).

The second judgment was entered by a federal court in the District of South Carolina on 15 August 2012 in the amount of $4,000,000. Seeking to enforce this judgment against Nelson in North Carolina, on 11 September 2012 Orlando filed the judgment in Superior Court, Wake County, and once again sought a charging order. On 14 February 2013, the superior court issued a charging order providing that "any distributions, allocations, or payments in any form otherwise due from Alliance Hospitality Management, LLC, to Kenneth E. Nelson up to $4,000,000 plus post judgment interest, shall not be paid to Nelson, but shall instead be paid to Orlando Residence, Ltd. ..."

On 3 September 2015, Orlando filed—under the same case number utilized in the second charging order proceeding—a motion for civil contempt against Alliance in Superior Court, Wake County, for its alleged failure to make distribution payments in the appropriate amounts as required pursuant to the charging orders. In this motion, Orlando asserted that between 12 May 2011—the date of the first charging order—and 1 September 2015, Alliance had paid Orlando only $716,708.61 of the $7,167,086 in total distributions that Alliance had disbursed to its owners during that time frame. Orlando contended that Alliance's calculation of the amounts of Nelson's distributions was based on Alliance's erroneous position that Nelson held only a 10% membership interest in Alliance. Orlando maintained that, in actuality, Alliance had a total of 61 membership units—10 of which were owned by Nelson—and that, as a result, Orlando was entitled to receive 16.4% of past and future Alliance distributions pursuant to the charging orders.

A hearing was held on the motion for contempt on 9 November 2015. The superior court issued an order denying Orlando's motion on 24 November 2015, ruling that "there has been no judicial determination ... that there were 61 total membership units in Alliance or that Nelson owned 16.4% of Alliance .... The only judicial determination that has been made is the jury's verdict that Nelson holds 10 membership units in Alliance." The superior court concluded that "Alliance acted appropriately to distribute the $716,708.62[4] to [Orlando] that corresponded to a 10% ownership interest by Nelson" and that "Alliance has not failed to comply with a court order ...."

4 Orlando's motion asserted that it had been paid $716,708.61, but the trial court's order stated that the amount that had been paid as of that date was $716,708.62.

III. The Present Action

On 15 March 2017, Orlando filed the present lawsuit in Superior Court, Wake County, against the Alliance Defendants and Nelson[5] seeking "recovery of funds Alliance wrongfully transferred to Tweeten and/or Axis in violation of two charging orders previously entered." The complaint alleged that the charging orders required distributions to be calculated on the basis of Nelson holding a 16.4% membership interest in Alliance rather than merely a 10% interest. In its complaint, Orlando asserted claims for (1) civil contempt; (2) violation of the Uniform Fraudulent Transfers Act; (3) constructive trust; (4) conversion; (5) accounting; and (6) a declaratory judgment that "there are 61 units outstanding in Alliance, that Nelson owns 16.4% of Alliance, and that Alliance was and in the future is required to pay 16.4% of all distributions to [Orlando] until such time as

[Orlando's] judgments against Nelson are satisfied." The case was designated a mandatory complex business case and transferred to the Business Court on 16 March 2017.

5 Orlando's complaint did not assert any claims directly against Nelson and instead designated him as a "nominal defendant ... solely for purposes of North Carolina Rule of Civil Procedure 19(a) as a person who may be united in interest with [Orlando]."

***3** On 3 May 2017, the Alliance Defendants filed a motion to dismiss the claims contained in Orlando's complaint based on lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). In this motion, the Alliance Defendants argued that Orlando's claims should be dismissed on the grounds that (1) Orlando lacked standing to pursue claims concerning the internal corporate governance of Alliance; (2) certain claims asserted by Orlando were barred by the doctrines of res judicata and collateral estoppel; and (3) the statute of limitations also served to bar a number of Orlando's claims.

Prior to the filing of a responsive pleading by the Alliance Defendants, on 4 April 2017, Nelson, appearing pro se, filed a document entitled "Answer, Defenses, and Crossclaims of Kenneth E. Nelson," in which he asserted eighteen crossclaims against the Alliance Defendants seeking damages and various forms of equitable relief. Specifically, Nelson asserted claims for (1) conversion against Tweeten, Alliance, and Axis; (2) wrongful taking against Tweeten, Alliance, and Axis; (3) common law conspiracy against Tweeten; (4) statutory conspiracy under Wis. Stat. § 134.01 against Tweeten; (5) conspiracy to slander title against Tweeten; (6) aiding and abetting slander of title against Tweeten; (7) breach of fiduciary duty against Tweeten; (8) constructive fraud against Tweeten and Axis; (9) a constructive trust against Tweeten and Axis; (10) an equitable accounting against Tweeten, Alliance, and Axis; (11) unjust enrichment against Tweeten, Alliance, and Axis; (12) *quantum meruit* against Tweeten, Alliance, and Axis; (13) breach of contract and breach of the duty of good faith and fair dealing against Tweeten; (14) breach of contract and breach of the duty of good faith and fair dealing against Axis; (15) a derivative action for constructive fraud against Tweeten and Axis; (16) a derivative action for breach of fiduciary duty against Tweeten; (17) alternatively, a direct action for breach of fiduciary duty against Tweeten; and (18) alternatively, a direct action for constructive fraud against Tweeten and Axis. In addition, Nelson filed a motion requesting that he not be identified and treated as merely a "nominal defendant."

On 30 May 2017, the Alliance Defendants moved to dismiss Nelson's crossclaims pursuant to Rules 12(b)(1) and (6). In their motion, they contended, in part, that with the exception of his first, second, and ninth crossclaims, Nelson's crossclaims were not related to the subject matter of Orlando's complaint and were therefore procedurally improper. The Alliance Defendants also asserted that Nelson's crossclaims were barred by res judicata, collateral estoppel, and the statute of limitations.

The Business Court entered an order on 20 December 2018 addressing the pending motions. First, the court granted the Alliance Defendants' motion to dismiss the claims asserted by Orlando. The court ruled that Orlando's claims constituted an impermissible collateral attack on the 24 November 2015 order issued by the Superior Court, Wake County, determining that Alliance had complied with the charging orders in making its distributions to Orlando.

Second, the Business Court dismissed with prejudice all of Nelson's crossclaims. Initially, the Business Court expressed its belief that fifteen of Nelson's crossclaims "bear no relation to Orlando's claims and so are not properly brought as crossclaims pursuant to Rule 13(g)" of the North Carolina Rules of Civil Procedure. The Business Court ultimately ruled that *all* of Nelson's crossclaims were subject to dismissal, stating the following:

> ***4** The Court first notes that, in light of the dismissal of Orlando's claims, none of Nelson's crossclaims are properly before this Court. A related underlying transaction or occurrence is a prerequisite to the bringing of crossclaims. *See* N.C. Gen. Stat. § 1A-1, Rule 13(g).
>
> ....
>
> The Court notes that Nelson unsuccessfully sought to interject many of these claims or the facts regarding them into the Nelson Action. However, the Court need not wade into the waters of claim preclusion or estoppel to conclude that Nelson's claims are in any event not proper in this action. *Rather, those claims are not proper because the right to assert them depends on Orlando's Complaint surviving, which it has not.*

(Emphasis added).[6] On 17 January 2019, Nelson gave notice of appeal to this Court pursuant to N.C.G.S. § 7A-27(a)

(2) seeking review of the Business Court's dismissal of his crossclaims against the Alliance Defendants.

6 The Business Court also denied Orlando's motion seeking leave to amend its complaint.

Analysis

The sole issue in this appeal is whether the Business Court properly dismissed Nelson's eighteen crossclaims. For the reasons set out below, we hold that the dismissal of Nelson's crossclaims was appropriate but based on different grounds than those relied upon by the Business Court.

[1] "This Court reviews de novo legal conclusions of a trial court, including orders granting or denying a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6)." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019). In his appeal, Nelson argues that the Business Court incorrectly ruled that a crossclaim asserted by one defendant against a co-defendant automatically ceases to be viable once the plaintiff's original claims against the defendants are dismissed. We agree.

Rule 13(g) of the North Carolina Rules of Civil Procedure sets out the requirements for the filing of crossclaims and states as follows:

> Crossclaim against coparty. — A pleading may state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

N.C.G.S. § 1A-1, Rule 13(g) (2019).

In its order dismissing Nelson's crossclaims, the Business Court—as quoted above—determined that the crossclaims "are not proper because the right to assert them depends on Orlando's Complaint surviving, which it has not." This Court has not previously had occasion to consider whether a defendant's crossclaims against a co-defendant are no longer viable once the plaintiff's original claims against the defendants have been dismissed. However, the Court of Appeals addressed this precise issue 35 years ago in *Jennette Fruit & Produce Co. v. Seafare Corp.*, 75 N.C. App. 478, 331 S.E.2d 305 (1985).

In *Jennette*, the plaintiff sued multiple defendants, including Seafare Corporation (Seafare), two individuals (the Staffords), and Trenor Corporation (Trenor). The plaintiff sought monetary damages from Seafare and further sought to set aside a conveyance of real property from Seafare to the Staffords based on the plaintiff's assertion that the conveyance was made without consideration and with the intent to defraud the plaintiff. Thereafter, the Staffords had conveyed the property to Trenor. Seafare filed crossclaims against the Staffords and Trenor. *Id.* at 479, 331 S.E.2d at 306.

***5** Following the filing of Seafare's crossclaims, the plaintiff voluntarily dismissed its claims against all defendants. The trial court subsequently dismissed Seafare's crossclaims without prejudice based on its determination "that the dismissal of the plaintiff's claims against the crossclaiming defendants requires the dismissal of said crossclaims." *Id.* at 479–480, 331 S.E.2d at 306. Seafare appealed to the Court of Appeals, which held that Seafare could continue to litigate its crossclaims despite the plaintiff's dismissal of the original action. In reaching this conclusion, the Court of Appeals held as follows:

> We perceive no valid or compelling reason to dismiss a crossclaim over which the courts of this state have jurisdiction merely because the plaintiff's original claim against the crossclaiming defendant has been dismissed. To hold otherwise would needlessly force a defendant who has filed a proper crossclaim concerning a matter governed by state law to refile its claim as a new action. This would require additional time and expense, including court costs and counsel fees. Further, absent adoption of "relation-back" principles which could unnecessarily complicate the litigation, it could result in the time-barring of claims once timely filed. Such a holding would elevate form over substance. It would also be inconsistent with the purpose of Rule 13(g) to enlarge the scope of permissible crossclaims, which pre-Rules law permitted only for indemnification in a tort action.
>
> The aim of procedural rules is facilitation, not frustration, of decisions on the merits. The canon of interpretation of the Rules is one of liberality, and the general policy of the Rules is to disregard technicalities and form and determine the rights of litigants on the merits. To allow litigation of properly filed crossclaims to proceed regardless of whether a plaintiff's original claim remains extant will

> facilitate resolution of the crossclaims on their merits, while to disallow such is to regard technicalities and form without serving a substantive purpose. We thus hold that, unless a crossclaim is dependent upon plaintiff's original claim (as would be, e.g., a crossclaim for indemnity or contribution) or is purely defensive, a plaintiff's dismissal of its claims against all defendants does not require dismissal of crossclaims properly filed in the same action.

Id. at 483, 331 S.E.2d at 307–308 (cleaned up) (citations omitted).

[2] We agree with the Court of Appeals' analysis in *Jennette*. Nothing in the plain language of Rule 13(g) expressly states, or otherwise suggests, that a plaintiff's original claims must continue to exist in order for a crossclaimant to obtain an adjudication of the crossclaims that it has properly asserted. The crossclaim is a procedural mechanism crafted "to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court with a minimum of procedural steps." *Selective Ins. Co. v. NCNB Nat'l Bank*, 324 N.C. 560, 565, 380 S.E.2d 521, 525 (1989) (quoting C. Wright & A. Miller, *Federal Practice and Procedure* § 1431 at 161 (1971)). To require the automatic dismissal of a defendant's crossclaims upon the dismissal of the plaintiff's original action would run counter to the objective of efficiently resolving all of the parties' related claims while they are present before the court. Accordingly, we hold that—with the exception of crossclaims such as claims for indemnity or contribution that necessarily require the continued litigation of the plaintiff's original claims in order to remain viable—the dismissal of the original action does not, by itself, mandate the dismissal of a crossclaim so long as the crossclaim meets the Rule 13(g) prerequisites for bringing such a claim.

***6** **[3]** In light of our ruling on this issue, it is clear that the Business Court erred in concluding that Nelson's crossclaims were automatically subject to dismissal simply because Orlando's claims were being dismissed. The Alliance Defendants assert, however, that the Business Court reached the correct result in dismissing Nelson's crossclaims even if its basis for doing so was incorrect. In so contending, they rely on the principle previously recognized by this Court that "[w]here a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990); *see also Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered."). Thus, we must determine whether —as the Alliance Defendants contend—some other valid basis exists for the Business Court's dismissal of Nelson's crossclaims.

In making this determination, we begin by examining whether Nelson's crossclaims met the requirements of Rule 13(g). In so doing, we must first identify the "transaction or occurrence that is the subject matter ... of the original action" and "any property that is the subject matter of the original action." N.C.G.S. § 1A-1, Rule 13(g). Here, the "original action" was Orlando's lawsuit against the Alliance Defendants. This lawsuit was exclusively concerned with the issue of whether Alliance had underpaid Orlando by making distributions under the charging orders premised on Nelson holding a 10% —rather than a 16.4%— interest in Alliance.

Next, we must determine whether Nelson's crossclaims are sufficiently related to Orlando's original action. The Business Court concluded that fifteen of Nelson's crossclaims "bear no relation to Orlando's claims ...." We agree with the Business Court that only three of Nelson's crossclaims relate directly to the claims asserted by Orlando in its complaint. Nelson's first crossclaim asserts that the Alliance Defendants converted 6.4% of his interest in Alliance by failing to issue distributions to him of 16.4% of the total amount of money disbursed to Alliance's owners. Similarly, crossclaim 2 alleges that the Alliance Defendants have engaged in a wrongful taking of Nelson's additional 6.4% interest in Alliance. Finally, crossclaim 9 seeks the imposition of a constructive trust as to 6.4% of the total membership interests in Alliance and 6.4% of all Alliance distributions made since 1 January 2011.

The Alliance Defendants assert that (1) crossclaims 1, 2, and 9 are all subject to dismissal based on the doctrine of res judicata; and (2) because these were the only three of Nelson's eighteen crossclaims that met the requirements of Rule 13(g), the remaining fifteen crossclaims must likewise be dismissed. We address these arguments *seriatim*.

[4] **[5]** Res judicata "provides that a prior adjudication on the merits in a prior suit bars a subsequent, identical cause of action between the same parties or their privies," *State ex rel. Lewis v. Lewis*, 311 N.C. 727, 730, 319 S.E.2d 145, 147–48 (1984), and also prevents relitigation of claims that "in the exercise of reasonable diligence, could have been presented for determination in the prior action." *Smoky*

Mountain Enters. v. Rose, 283 N.C. 373, 378, 196 S.E.2d 189, 192 (1973). This doctrine was "developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). "The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *State ex rel. Utils. Comm'n. v. Thornburg*, 325 N.C. 463, 468, 385 S.E.2d 451, 453–54 (1989) (quoting *State ex rel. Utils. Comm'n. v. Public Staff*, 322 N.C. 689, 692, 370 S.E.2d 567, 569 (1988)).

***7** **[6]** The Alliance Defendants' invocation of res judicata principles here is based upon the Nelson Action. In the Nelson Action, Nelson sued the Alliance Defendants and sought, among other things, a declaratory judgment defining Nelson's ownership interest in Alliance. The jury determined that Alliance "issue[d] 10 membership units to Kenneth E. Nelson," and the trial court entered a judgment declaring Nelson to be an owner of 10 membership units in Alliance.

The first and third elements of res judicata are clearly satisfied. It is undisputed that a final judgment was rendered in the Nelson Action. Moreover, Nelson and the Alliance Defendants were all parties to the action. Nelson argues, however, that the second element of res judicata—an identity of the causes of action in both cases—has not been met because there was no ruling in the Nelson Action as to the total number of membership units in Alliance or as to the specific percentage of Nelson's ownership interest in Alliance. We disagree.

As discussed above, crossclaims 1, 2, and 9 seek relief on the theory that Nelson actually owns 16.4% of Alliance and was therefore entitled to distributions from Alliance reflecting this percentage. The record makes clear that the extent of Nelson's ownership in Alliance was a relevant issue in the Nelson Action based on the parties' contentions in that lawsuit. In his claim for declaratory relief, Nelson expressly sought a judgment that he owned 10 of Alliance's 61 membership units. For reasons that are not clear from the record, however, the jury was not asked to decide the question of what specific percentage ownership interest Nelson held in Alliance or how many total membership units existed.

The record reflects that after the jury rendered its verdict, Nelson's counsel requested that the court's final judgment include a statement that "Axis Hospitality, Inc. owns [the remaining] 51 membership units" in Alliance. The Alliance Defendants responded by noting that it was Nelson's counsel who had drafted the jury issues and that "the jury was [not] asked to, and made no finding concerning, the number of units owned by Axis." The Alliance Defendants argued that the judgment "should reflect the jury's verdict but should not include matters not decided by the jury" and should not "expand on the jury's verdict in the Final Judgment." Ultimately, the Business Court entered a final judgment simply declaring that "Nelson is the holder of 10 membership units in Alliance" without making any reference to the total number of membership units in Alliance or Nelson's percentage ownership interest in the company.

[7] Thus, crossclaims 1, 2, and 9—all of which necessarily require a determination of the total number of membership units in Alliance in order to calculate Nelson's percentage ownership interest—present issues that *could* have been adjudicated in the Nelson Action but were not. As the party seeking the declaratory judgment in the Nelson Action, it was Nelson's obligation to obtain a ruling on those issues, but he failed to do so. Nor does the record reflect that in his appeal in the Nelson Action he made any argument that the Business Court had erred in failing to instruct the jury on those questions or that the court had otherwise committed error by not ruling on those issues itself. Accordingly, we conclude that the second element of res judicata is also satisfied and that crossclaims 1, 2, and 9 were therefore properly dismissed.[7]

7 Although Nelson has not raised this issue, we take this opportunity to note that as a general matter a declaratory judgment action's preclusive effect is limited to issues "actually litigated by the parties and determined by a declaratory judgment" and therefore exists only in the context of *issue* preclusion (collateral estoppel) as opposed to *claim* preclusion (res judicata). 18A Wright & Miller, *Federal Practice and Procedure* § 4446 (2d ed. 2002). However, as our Court of Appeals has correctly noted, "[f]ederal courts ... have consistently held that the general rule limiting the preclusive effect of declaratory judgments to issue preclusion 'applies only if the prior action *solely* sought declaratory relief.' " *Barrow v. D.A.N. Venture Props. of N.C., LLC*, 232 N.C. App. 528, 532, 755 S.E.2d 641 (2014) (emphasis added) (quoting *Laurel Sand and Gravel, Inc. v. Wilson*, 519 F.3d 156, 164 (4th Cir. 2008)). We see no reason why these basic principles should be applied differently in the courts of our state. It is clear that Nelson asserted additional claims seeking different types of relief in the Nelson Action

along with his claim for a declaratory judgment. Thus, we are satisfied that the application of the doctrine of claim preclusion to the Nelson Action is appropriate.

***8** **[8]** Having determined that res judicata bars crossclaims 1, 2, and 9—the only crossclaims asserted by Nelson that met the criteria of Rule 13(g)—we must next determine the effect of that ruling on Nelson's remaining 15 crossclaims. Rule 18(a) of the North Carolina Rules of Civil Procedure states that "[a] party asserting a claim for relief as an original claim, counterclaim, *cross claim*, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party." N.C.G.S. § 1A-1, Rule 18(a) (emphasis added). Nelson contends that because one or more of his crossclaims did, in fact, relate to the subject matter of Orlando's original claims, thereby satisfying Rule 13(g), he was permitted to join all of his other crossclaims as additional claims under Rule 18(a). As a result, he asserts, the remaining fifteen claims should be allowed to go forward even if crossclaims 1, 2, and 9 are dismissed on res judicata grounds.

[9] As quoted above, Rule 18(a)—as a general proposition—allows a party that has properly asserted a claim for relief against another party to join as many additional claims as it has against that other party. We believe, however, that implicit in Rule 18(a) is the notion that in order for a crossclaimant to be permitted to maintain such additional joined claims against a co-defendant as provided for under that Rule, the predicate crossclaim asserted by the crossclaimant in accordance with Rule 13(g) must survive the pleading stage. A leading treatise has noted that pursuant to Rule 18(a) of the Federal Rules of Civil Procedure—the federal rule on joinder—in order to take advantage of the more expansive joinder rules available in federal courts "a party must assert what may be called a 'qualifying claim,' " and "[u]ntil the party does so, the party is not a claimant, and may not invoke the claim joinder provision of Rule 18." 4 Moore's Federal Practice § 18.02[2][a]. (3d ed. 2014).[8] As such, "it follows that if the qualifying claim asserted by a defendant is dismissed, all claims joined under Rule 18 must also be dismissed." *Id.* § 18.02[2][c]; *see, e.g.*, *Friedman v. Hartmann*, 787 F. Supp. 411, 423 (S.D.N.Y. 1992) (dismissing additional claims brought under Rule 18(a) on the basis that the underlying qualifying claim failed to state a claim upon which relief could be granted and therefore could not serve as the basis for the joinder of the unrelated claims).

[8] Federal Rule of Civil Procedure 18(a) is essentially identical to N.C. R. Civ. P. 18(a). We have frequently recognized that although this Court is not bound by the decisions of federal courts with respect to the Rules of Civil Procedure, "[d]ecisions under the federal rules are ... pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules." *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989).

In applying these principles here, we conclude that the dismissal of Nelson's remaining fifteen crossclaims was proper. As discussed above, all three of his crossclaims that met the requirements of Rule 13(g)—his qualifying claims—fail as a matter of law based on res judicata. Although we acknowledge that a purpose of Rule 18(a) is to provide for the liberal joinder of claims, the ability to join claims under this Rule is not limitless. We therefore adopt the federal approach by rejecting an interpretation of Rule 18(a) that would permit claims asserted by a crossclaimant against a co-defendant that are unrelated to the plaintiff's original action to remain viable once the crossclaimant's qualifying claim or claims against the co-defendant as required by Rule 13(g) have been dismissed at the pleading stage. A ruling to the contrary would be inconsistent with the purpose underlying Rule 13(g)'s prerequisite for the assertion of crossclaims in the first place.

***9** **[10]** **[11]** Finally, we address Nelson's contention that even assuming the dismissal of his crossclaims was, in fact, appropriate, the dismissal should have been without prejudice. Rule 41(b) of the North Carolina Rules of Civil Procedure, which governs the involuntary dismissal of actions, states that—subject to three exceptions not applicable here—"[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this section and *any dismissal not provided for in this rule* ... operates as an adjudication upon the merits." N.C.G.S. § 1A-1, Rule 41(b) (emphasis added). This Court has held that this Rule vests trial courts with the discretion to dismiss claims without prejudice. *Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 445 (1985) ("The trial court's authority to order an involuntary dismissal without prejudice is therefore exercised in the broad discretion of the trial court and the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion.") A discretionary ruling by the trial court will be overturned for abuse of discretion "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241, 805 S.E.2d 664, 669 (2017).

Based on our thorough review of the lengthy record in this case, we are unable to say that the Business Court's decision to dismiss Nelson's crossclaims with prejudice constituted an abuse of discretion. For over thirty years, Nelson—and, at times, his wife and business entities that he controlled—has been engaged in various legal proceedings involving his debts to Orlando. *See Orlando Residence LTD v. GP Credit Co., LLC*, 553 F.3d 550, 553–54 (7th Cir. 2009). In 2009, the United States Court of Appeals for the Seventh Circuit stated that "[t]he time has come to put an end to the defendants' stubborn efforts to prevent Orlando from obtaining the relief to which it is entitled." *Id.* at 559. At the suggestion of the Seventh Circuit, the United States District Court for the Eastern District of Wisconsin entered a "bill of peace" order enjoining Nelson, his wife, and a business entity found to be the alter ego of Nelson from filing any further legal actions or claims against Orlando without prior approval of the court given Nelson's "well-established" history of attempts to "evade Orlando's collection efforts." *Orlando Residence LTD v. GP Credit Co.,* 609 F. Supp. 2d 813, 817 (E.D. Wis. 2009).

Moreover, for almost a decade, Nelson and the Alliance Defendants have been engaged in a seemingly never-ending process of litigation over Nelson's membership interests and rights with respect to Alliance. It was not unreasonable for the Business Court to determine that Nelson's crossclaims should be dismissed with prejudice in an effort to bring some measure of finality between the parties. Accordingly, we conclude that the Business Court did not abuse its discretion.

Conclusion

For the reasons set out above, we hold that the dismissal of Nelson's crossclaims was proper.

MODIFIED AND AFFIRMED.

Justice MORGAN took no part in the consideration or decision of this case.

All Citations

--- S.E.2d ----, 2020 WL 4726611

End of Document