No. 102A20-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLEY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	From Mecklenburg County

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DEFENDANT-APPELLANT'S REPLY BRIEF

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DEFENDANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Hon. Lisa C. Bell, assigned to preside over this case in the Superior Court, applied well-settled principles of law to the allegations pled in Plaintiffs' Complaint and dismissed their claims on statute-of-limitations and *res judicata* grounds. R pp 655–56.

A panel of the Court of Appeals did the same, affirmed the dismissal, and held that (i) "[w]here plaintiffs' complaint, on its face, demonstrated that the statute of limitations had expired, and failed to demonstrate a basis for tolling the statute, the trial court did not err in granting defendant's motion to dismiss on the basis of the statute of limitations," and (ii) that "[w]here at least some of plaintiffs' allegations stemmed from purportedly wrongful foreclosures, the trial court did not err in granting defendant's motion to dismiss such claims on the bases of *res judicata* and collateral estoppel." *Taylor v. Bank of Am., N.A.*, No. COA20-160, slip op. at 1–2 (N.C. App. Dec 31, 2020) ("*Taylor I*").

Then a second Court of Appeals panel, reconstituted when Judges Young and Berger left that court, vacated the first panel's ruling over the dissent of the lone remaining member of the original panel. *See Taylor v. Bank of Am., N.A.*, 2021-NCCOA-556 (N.C. App. Oct. 5, 2021) ("*Taylor II*"). It deemed itself unequipped, as a reviewing court, to do what the prior panel and Judge Bell had done without difficulty: conduct a *de novo* analysis of "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* ¶ 8. It then remanded the case to the Superior

Court with instructions to make what neither party had asked for (and what no party *could* ask for on a Rule 12(b)(6) motion): "findings of fact and conclusions of law." *Id.* ¶ 1. Bank of America respectfully submits that this result was erroneous, and, as Judge Dillon wrote in dissent, the judgment of the Superior Court should have been affirmed because "Judge Bell got it right." *Id.* ¶ 12 (Dillon, J., dissenting).

This appeal presents two main issues—one procedural, one substantive. The procedural issue is whether a reviewing court in North Carolina needs "findings of fact and conclusions of law" from the court below to review *de novo* whether a complaint's allegations state a claim upon which relief can be granted. But that's not a difficult question. The answer is plainly "no," because a court conducting a *de novo* review is supposed to "consider[] the matter anew" without regard for the "judgment . . . of the lower tribunal," *State v. Williams*, 362 N.C. 628, 632–33 (2008). It thus has no *need* to "determine the reason behind" the judgment below, as the new panel's opinion supposed. *Taylor II*, slip op., ¶ 10.

And the Rules of Civil Procedure expressly provide that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or

order . . . only when requested by a party." N.C.G.S. § 1A-1, N.C. R. CIV. P. 52(a)(2). No such request was made here, nor would such a request make sense, because findings of fact are improper on a Rule 12(b)(6) motion where the Court is required "to accept one party's version of the facts as true."[1]

The second and substantive issue is how the *de novo* review should turn out. The original panel correctly ruled that the allegations of the Complaint precluded any attempt to evade the applicable statutes of limitation, because the Plaintiffs had affirmatively alleged facts establishing that they were on notice of their claims years before their untimely lawsuit. Plaintiffs' arguments to the contrary expressly rest on the proposition that no claim can *ever* be dismissed on limitations grounds at the Rule 12(b)(6) stage so long as a complaint makes the rote allegation that the plaintiffs are entitled to invoke a tolling doctrine. Pls.' New Br. at 20–21.

But that is not the law in North Carolina, or the other jurisdictions whose laws apply to the out-of-state Plaintiffs. Ample precedents of this

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[1] Hon. Paul C. Ridgeway, Findings of Fact & Conclusions of Law, Presented at Orientation for New Super. Ct. Judges 1 (Jan. 28, 2021).

Court and the Court of Appeals reject tolling arguments as a matter of law at the Rule 12(b)(6) stage.[2] So the substantive question presented by this appeal is not difficult, either. The Court can, and should, reaffirm Judge Bell and the original Court of Appeals panel for the reasons stated in Judge Dillon's dissent.

This Court should not be sidetracked by the many reversals of previous positions contained in Plaintiffs' New Brief in this Court. Plaintiffs initially appealed based on their insistence that Judge Bell had "usurped the role of the . . . fact-finder." Pls.' New Br. at 6. Then they turned around 180 degrees to insist that instead there is a "need" for Judge Bell to make "additional factual findings"—a contention they never made in either the Superior Court or Court of Appeals until the second panel's ruling to that effect. *Id*. at 17.

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[2] *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 338–41 (2011); *accord*, *e.g.*, *Button v. McKnight*, 211 N.C.App. 197, 2011 WL 1483433, at *4 (N.C. App. Apr. 19, 2011) (same); *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 654 (2017) (affirming dismissal because plaintiff "fails to allege" inability to discover claims); *DePalma v. Roman Cath. Diocese of Raleigh*, 167 N.C.App. 370, 2004 WL 2793377, at *4 (N.C. App. Dec. 7, 2004) (affirming dismissal based on when plaintiff's "injury" was "apparent"); *In re Will of Evans*, 46 N.C. App. 72, 75–77 (1980) ("where the facts are admitted or established the question of the bar of the applicable statute [of limitations] becomes a question of law").

Additionally, back in 2020, Plaintiffs had filed a bypass Petition for Discretionary Review seeking to skip the Court of Appeals and obtain immediate adjudication of the limitations issue by this Court (again, without suggesting factual findings by the Superior Court were needed).[3]

Now that the case actually *is* before this Court, Plaintiffs insist that the Court has no jurisdiction to "decide[] the issue of statute of limitations." Pls.' New Br. at 17. The tension between these contradictory positions suggests Plaintiffs prefer to prolong *indefinitely* the requisite *de novo* review of whether "Judge Bell got it right" the first time, apparently hoping that a remand for unspecified and unnecessary findings of fact on a Rule 12(b)(6) motion to dismiss will provoke some actual reversible error the second time.

Plaintiffs' tactic is opportunistic, but improper. This Court should, as the original Court of Appeals panel did, affirm the Superior Court based on an appropriate *de novo* review of the judgment actually entered. It can readily do so by reversing the Court of Appeals and adopting the reasoning of Judge Dillon's dissenting opinion.

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[3] Pls.' Pet. for Disc. Rev. Prior to Determination by the Ct. of App., *Taylor v. Bank of Am., N.A.*, No. 102P20, 2020 WL 1288909 (N.C. filed Mar. 6, 2020).

ARGUMENT

I.

This Court May Review Any Issue Set Out in Judge Dillon's Dissenting Opinion.

Plaintiffs misstate the scope of review authorized by N.C.G.S. §7A-30(2) and Rule 16(b) in arguing that the merits of this case "are not before this Court," because "the Panel never decided" them. Pls.' New Br. at 17. The scope of the appeal here is established by the dissenting opinion and cannot be constrained or impeded by the majority opinion.

Under Rule 16(b), this Court can consider any issue "(1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1). . . ." This standard squarely puts the merits of the statute-of-limitations and *res judicata* issues before this Court.

First, Judge Dillon's dissent specifically states: "I continue to believe that Judge Bell got it right," referencing the previous panel opinion affirming the Superior Court's dismissal ruling, and, "My vote continues to be to affirm the order of the trial court." The dissent thus embraces the entire previous panel opinion, its reasoning, and its conclusion, as well as the Superior Court's dismissal. Second, Bank of

America's Notice of Appeal to this Court states that the new panel majority erred (1) in reversing the Superior Court's decision and (2) by remanding the case for findings of fact and conclusions of law. Third, those same issues are properly presented in its New Brief. Under Rule 16(b), those issues may now be reviewed by this Court. Additional arguments identifying legal errors made by the majority opinion to avoid the issue set out in the dissent, and in this case in the prior panel opinion, are likewise permissible under Rule 16(b).

The statutory right of appeal under §7A-30(2) "gives each Court of Appeals judge the enormous power to send any issue in a case to the Supreme Court for review." Elizabeth Brooks Scherer & Matthew Nils Leerberg, N.C. Appellate Practice & Procedure, § 19.02[1] (2019). The scope of appeal based on a dissenting opinion cannot be constrained by the majority opinion, even if it ignores or evades the issues set out in the dissenting opinion.

Plaintiffs cite no authority for their contention that the majority opinion can constrain or prevent review of issues raised by the dissent by remanding the case or otherwise refusing to "make a determination on the merits." Pls.' New Br. at 17. No such authority exists because Rule

16(b) specifies otherwise. Under §7A-30(2) and Rule 16(b), this Court can therefore consider any basis for dismissal set forth in the first unanimous panel opinion and any argument in Bank of America's New Brief supporting that outcome.

II.

The New Court of Appeals Panel Erred By Ordering Findings of Fact No Party Asked for on a Motion Where They Are Improper.

Plaintiffs likewise cite no law for their assertion that the new Court of Appeals panel has "broad discretion" to require the Superior Court to enter factual findings to support its Rule 12(b)(6) dismissal order. Pls.' New Br. at 18–19. The requirement imposed by the new panel contradicts the Rules of Civil Procedure, this Court's precedents, and the time-honored practice of the Superior Court bench. It was not within the "discretion" of the new panel to depart from the Rules. It was an error of law.[4]

[4] One commentator also pondered the propriety of the new panel's ruling given the longstanding rule that one appeals court panel cannot reverse another panel. *See* Matthew Nis Leerberg, "The Panel of Theseus," N.C. Appellate Prac. Blog (Oct. 25, 2021), available at *https://ncapb.foxrothschild.com/2021/10/25/the-panel-of-theseus/*.

It is well-settled, and explicit in the Rules, that "findings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party. . . ." *Watkins v. Hellings*, 321 N.C. 78, 82 (1987) (citing N.C. R. CIV. P. 52(a)(2)). But no party requested findings and conclusions here, so the Superior Court cannot be required to make them. Moreover, *even if* a party requests findings of fact on a Rule 12(b)(6) motion, it would be improper for the trial court to provide them—because, after all, a Rule 12(b)(6) ruling is "based only on plaintiff's pleadings." *G & S Bus. Servs., Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 490 (1989). The new Court of Appeals panel deviated from that well-settled rule.

This was erroneous on at least three levels. First, it is improper as a matter of law to order the Superior Court to do something that the Rules and precedents of this Court expressly find "unnecessary" for the Superior Court to do. The new panel had no "discretion" to do so.

Second, apart from what the Rules have to say about it, there is no sound *rationale* to order a Superior Court to make findings and conclusions in deciding a motion for which the appellate standard of review is *de novo*. On a *de novo* review, the Court of Appeals should "disregard[] any findings of fact or conclusions of law drafted by the trial

court." *Helm v. Appalachian State Univ.*, 194 N.C. App. 239, 250 (2008), *rev'd on other grounds*, 363 N.C. 366 (2009). It makes little sense to suggest that the new Court of Appeals panel is hampered in "conduct[ing] a meaningful review" (Slip op. ¶ 10) by the lack of findings and conclusions the Court would be obliged to "disregard" and set aside in performing that *de novo* review. The new panel set aside the first panel's opinion, then simply refused to undertake the prescribed *de novo* review.

Third, the new panel's approach would create a cascade of problems for Superior Court practice. If every ruling on a Rule 12(b)(6) or Rule 12(c) motion required findings of fact and conclusions of law, every order would be the subject of prolonged wrangling between counsel about its form, wording, and detail. Superior Court judges with no law clerks, limited resources, and busy caseloads would have to take on the additional burden of drafting findings and conclusions amid an incoming barrage of email and post-hearing advocacy from those counsel. The time between the hearing date and the entry of an order would inevitably stretch out, delaying further proceedings.

These are the reasons why the Superior Court Judges' Benchbook teaches that findings of fact and conclusions of law should not be made

in orders on Rule 12(b)(6) motions. Def.'s New Br. at 41. The new panel's *ad hoc* decision to depart from precedent and ignore the text of Rule 52 was improper and not within its discretion.

III.

The Superior Court Correctly Dismissed Plaintiffs' Claims on Limitations and *Res Judicata* Grounds.

As Judge Dillon opined, the Superior Court "got it right." *Taylor II*, slip op. ¶ 12 (Dillon, J., dissenting). This Court should reinstate its judgment.

A. The Superior Court's straightforward application of the applicable statutes of limitations was correct.

As set forth in Bank of America's New Brief and in Judge Dillon's dissent, the law in North Carolina is that a statute of limitations begins to run when a plaintiff is on notice of his injury. *See id.* ¶ 17 (Dillon, J., dissenting); Def.'s New Br. at 21–22, 25–37 (citing, *e.g.*, *Christenbury Eye Ctr. v. Medflow*, 370 N.C. 1 (2017)); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493 (1985) (cause of action accrues when "the injured party becomes aware or should reasonably have become aware of the existence of the injury"). At that point, the plaintiff is obliged to investigate diligently whether that injury gives rise to a claim, and to

bring it timely if so. *See*, *e.g.*, *Christenbury*, 370 N.C. at 5; *Thorpe v. DeMent*, 69 N.C. App. 355, 362–63 (1984).

The law in North Carolina is *also* that no plaintiff can bring a claim here if it is time-barred where it arose. *See* Def.'s New Br. at 23–24 (citing N.C.G.S. § 1-21; *Little v. Stevens*, 267 N.C. 328, 334 (1966) ("No action barred in the state of origin may be litigated here.")). So, to survive dismissal, Plaintiffs must plead some basis for tolling the statute of limitations not solely under North Carolina law, but under the laws of the ten out-of-state Plaintiffs' home states. Their failure to do so is ample grounds on its own to affirm the dismissal of the out-of-state Plaintiffs' claims.

To the limited extent to which North Carolina law applies (*i.e.*, just one Plaintiff, Taylor), the only questions the Court needs to answer to adjudicate the limitations issue are, (i) *What do Plaintiffs say their injuries were?* and (ii) *What do Plaintiffs allege about what they knew, and when they knew it?* Both can be answered by reference to Plaintiffs' Complaint. Again, neither question is a difficult one.

As to their alleged injuries, Plaintiffs alleged that "BOA's unlawful conduct has resulted in injury to the Plaintiffs including payment of

improper fees and charges, unreasonable delays and expenses to obtain loss mitigation relief, improper denial of loss mitigation relief, and loss of homes due to improper, unlawful, or undocumented foreclosures." R p 287. Plaintiffs dated these alleged harms back to 2009 and 2010 (R pp 216, 225, 231, 233, 240, 242, 248, 250, 255, 257, 263, 265, 271, 273), and *all* of them allegedly culminated by 2012, with the sole exception of Plaintiff Perry's final judgment of foreclosure, entered January 2014. R pp 213, 216, 222, 225, 228, 231, 233, 237, 240, 242, 245, 248, 250, 253, 257, 260, 263, 265, 268, 271, 273, 276.

As to their knowledge, Plaintiffs do not (and, of course, cannot) plead any facts to suggest they were *unaware* their homes were foreclosed upon as of the dates of those foreclosures. Thus, all of their causes of action accrued no later 2012, or in Perry's case, January 2014. *See* Slip op. ¶ 17 (Dillon, J., dissenting) (concluding "that the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place"). Nor do they claim to have been unaware of their *earlier* alleged injuries, such as the "denial of loss mitigation relief." R p 287. To the contrary, they allege they were promised permanent loan modifications within three months of trial plans they allege receiving in

2009 and 2010 (R pp 199, 212, 221, 227, 236, 244, 252, 259, 267, 275), then had those permanent loan modifications denied.

The theory Plaintiffs pressed in the Complaint, in the Superior Court, and again in the Court of Appeals, was that the applicable statutes of limitations should be tolled *despite* their awareness of their alleged injuries because it did not occur to Plaintiffs to contend the foreclosures or denials of loan modifications were unlawful until their current lawyers advised them to accuse Bank of America of fraud. *See*, *e.g.*, R pp 209, 211, 214, 215, 218, 220, 222, 224, 226, 229, 230, 233, 235, 237, 239, 241, 243, 246, 247, 249, 251, 254, 256, 258, 260, 262, 264, 266, 269, 270, 273, 275, 277, 278, 279, 280. That theory fails as a matter of law, because even if it were true that Plaintiffs needed the advice of an attorney to determine whether their concededly-known harms could furnish grounds to sue—a dubious inference to which Plaintiffs are not actually entitled—that is still advice they were, as a matter of law, obliged to seek when they incurred their claimed injuries. *See. e.g., Christenbury,* 370 N.C. at 6; Def.'s Br. at 27–37 (collecting cases).

Plaintiffs do not even try to argue otherwise in their New Brief. Instead, they introduce a brazen new revision of their legal theories and claimed injury. They argue:

> [T]he Bank's brief tries to reframe the issues so that the injury in question is the foreclosure. Not so. The Plaintiffs/Appellees have made clear all along that their injury was the fraudulent concealment of the Bank's deceptive HAMP practices. As such, any argument that the Statute of Limitations should have run from the date of foreclosure is misleading.

Pls.' New Br. at 25 (citations omitted). It is not Bank of America that is trying to "reframe the issues" here, but Plaintiffs. As already shown, the notion "that the injury in question is the foreclosure" comes from Plaintiffs' own Complaint. *See* R p 287 (alleging "injury to the Plaintiffs" in the form of "improper . . . foreclosures").[5] The notion that "the injury in question" "was the fraudulent concealment" is not sustainable, and does not even make sense. Fraudulent concealment, *by definition*, is the concealment of an *underlying* injury. *See*, *e.g.*, *Douglas v. Sandoz Pharms. Corp.*, No. 98-0911, 2000 U.S. Dist. LEXIS 23021, at *19 (M.D.N.C. July 18, 2000) ("a statute of limitations is tolled by a

[5] Of course, the foreclosures were not the only injuries Plaintiffs alleged in their Complaint (*see supra* at 13–14), but they were the last-in-time injuries that Plaintiffs alleged, so they mark the *latest* point in time each Plaintiff's claim could have accrued.

defendant's fraudulent concealment of a plaintiff's injury"). Thus, to claim fraudulent concealment of "deceptive HAMP practices," Plaintiffs must claim an underlying injury from deceptive HAMP practices. If they are no longer claiming their foreclosures and loan modification denials as such an injury, then they are not claiming any injury at all, and their suit can be dismissed on that basis alone. *See*, *e.g.*, *Ghormley v. Hyatt*, 208 N.C. 478, 481 (1935) ("injury" is an "essential element of a[n] actionable fraud" claim). But the allegations of the Complaint are that Plaintiffs were injured by their HAMP denials and foreclosures and were aware of these significant events when they happened.

A plaintiff on notice of an alleged harm (as Plaintiffs allege they were) is under a duty of reasonable inquiry into the cause of the harm and is constructively "charged with the knowledge" of all facts "that a reasonable inquiry would have disclosed." *Thorpe*, 69 N.C. App. at 362–63. And, once again, the Court need not go beyond the Complaint itself to discern what "a reasonable inquiry would have disclosed" (*id.*), because the Complaint goes into explicit detail about what Plaintiffs discovered when they finally did initiate their inquiry. *See* Pls.' New Br. at 29–30. What the Complaint lacks is any allegation justifying the inference

Plaintiffs require that they were incapable of doing this sooner. To the contrary, the Complaint's allegations preclude such an inference. All the material Plaintiffs say they "discovered" after retaining their current counsel had been in the public domain since 2012 and 2013. *See id.* Plaintiffs' HAMP denials could have prompted investigation, and they could have sought legal advice at the time of their foreclosures, and "discovered" this material sooner.

The dispositive principle is that the running of the statute of limitations does not turn on when Plaintiffs retained their current counsel and thus "discovered" the public materials those counsel curated for them. Rather, it turns on when they discovered their own injuries or any other facts and circumstances capable of arousing suspicion of wrongdoing, such as Plaintiffs' allegations of being so "frustrate[d]" in the HAMP application process that they felt compelled to make "frequent phone calls to ensure proper compliance with HAMP." *See id.* at 26–27 (citing *Doe v. Roman Cath. Diocese of Charlotte*, 242 N.C. App. 538, 543–44 (2015)); R pp 211, 214, 220, 226, 229, 235, 243, 246, 251, 254, 258, 266, 269, 275, 277.

Plaintiffs' only counter to this is to argue that when a plaintiff is put on inquiry notice of a claim is *always* "a question of fact to be resolved by the jury." Pls.' New Br. at 23. That is wrong. The question "may either be a matter of fact or a matter of law depending on the circumstances of the underlying case." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 548 (2003). And it is a matter of law when there is no question to be resolved by a jury because the dispositive facts are all affirmatively pleaded on the face of the Complaint. *Id.*

The laws of California, Minnesota, Arizona, and Michigan that govern the out-of-state Plaintiffs' claims do not suggest any different result. *See* Def.'s New Br. at 14, 24, 31 (citing *Boyle v. GMC*, 661 N.W.2d 557, 558, 560 (Mich. 2003); *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 237 (8th Cir. 1996) (collecting Minnesota precedents); *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 928 (Cal. 1988); *Richards v. Powercraft Homes, Inc.*, 678 P.2d 449, 451 (Ariz. Ct. App. 1983)). Nor do the cases cited in Plaintiffs' New Brief.

B. The case law cited in Plaintiffs' response brief is inapposite.

This case is not "quite similar" to *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294 (1980), a case involving a "collapse[d] . . . warehouse . . .

caused by the subterranean erosion of soil around and above an improperly installed drainage pipe . . . buried deep in the ground." *Id*. at 296, 305. The plaintiff in that case sued the builder for fraud, and the court held that the claim accrued upon the cave-in, when the "damage" was "apparent." *Id*. at 305. Plaintiffs offer no explanation why this fact pattern or holding is analogous to this case.

Presumably, the alleged mishandling of their HAMP applications is supposed to be the equivalent of the improperly installed drainage pipe. *See* Pls.' New Br. at 23–24. But Plaintiffs do not identify the analogue to the building collapse. The building collapse was the "injury" in *Feibus*, and the plaintiff promptly sued when that injury occurred. The Plaintiffs' "injury" here consists of the HAMP modification denials and property foreclosures that occurred years before this suit, triggering the applicable limitations periods. *See infra* Part I.A. The version of *Feibus* that would be analogous to this case would have been if the plaintiffs waited six years after the cave-in to sue the builder, claiming they believed the builder's "assurances that it was well constructed and 'nothing to worry about'" (301 N.C. at 305) even after the building caved in, and thus had no reason to inquire whether the builder was at fault

until seeing their lawyer's ad on a billboard six years later promising big recoveries for building-collapse victims. *Compare id. with* Pls.' New Br. at 23–24; *see also*, *e.g.*, *Pembee*, 313 N.C. at 494 (reviewing case law holding plaintiffs on notice of "defects" under a duty to pursue their claims notwithstanding "[t]he fact that defendants claimed that nothing was wrong").

N.C. Nat'l Bank v. Carter, 71 N.C. App. 118 (1984), is not "similar," either. Pls.' New Br. at 24. There, the plaintiff sued NCNB for misrepresenting the boundaries of a parcel of land NCNB sold him, which he "did not become aware of" until "the property was surveyed." 71 N.C. App. at 124. Thus, it was a case about a plaintiff unaware of his injury, not a case about a plaintiff aware of his injury but unaware of the defendant's culpability, the situation Plaintiffs allege here. That is a material difference: the difference between a plaintiff under a duty of reasonable inquiry, and a plaintiff under no such duty. *See supra* Part A.

The squarely analogous cases are those discussed in Bank of America's New Brief. The *most* analogous cases, of course, are the ones actually based on the same, identically worded template complaint as Plaintiffs', which have been repeatedly dismissed on statute of

limitations grounds by courts across the country—although Plaintiffs do not even acknowledge them in their brief. *See* Def.'s New Br. at 9–13, 26–27, 33 (citing, *e.g.*, *Mandosia v. Bank of Am., N.A.*, No. 17-8153, 2018 U.S. Dist. LEXIS 45237 (C.D. Cal. Mar. 15, 2018), *aff'd*, 794 F. App'x 623 (9th Cir. 2020); *Clavelo v. Bank of Am., N.A.*, No. 17-2644, 2018 U.S. Dist. LEXIS 178789 (M.D. Fla. Sept. 13, 2018); *Cantrell v. Bank of Am., N.A.*, No. 16-3122, 2017 WL 1246356 (W.D. Ark. Apr. 3, 2017)).

And in North Carolina, the best analogy is to cases like *Doe* and *Christenbury*. *Doe* involved a plaintiff well aware of his injury, attempting to justify an untimely fraud claim by professing ignorance that it was part of a wider "pattern" until "other victims . . . came forward." 242 N.C. App. at 543. The Court of Appeals correctly held that he was obliged to investigate this claim upon his injury, *see id.*, just as Plaintiffs here were obliged to inquire and pursue potential claims upon *their* alleged injuries and not to wait for a lawyer to advise them they were victims of a wider "scheme." R pp 198, 200, 205–06. Likewise, in *Christenbury*, this Court held that a plaintiff on "notice of its injury" "must timely bring an action upon discovery of [the] injury to avoid dismissal." 370 N.C. at 2, 6. Since Plaintiffs' Complaint affirmatively

pleads their failure to bring their actions timely, the Superior Court was correct to dismiss them on statute-of-limitations grounds.

Indeed, this case exemplifies *why* statutes of limitations exist. Time bars embody a strong public policy "to afford security against stale claims," *Estrada v. Burnham*, 316 N.C. 318, 327 (1986), "and to prevent the problems inherent in litigating claims in which evidence has been lost, memories have faded, and witnesses have disappeared." *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538 (2014). These concerns are especially salient in a case claiming fraud based on what various customer-service representatives said (or didn't say) to Plaintiffs in telephone calls over a decade ago. R pp 208, 216–17, 225, 231, 240, 248, 255, 263, 286.

C. The Superior Court's *res judicata* ruling was also correct.

Plaintiffs do not contest that the claims they assert in this lawsuit could all have been asserted as defenses or counterclaims in their foreclosure cases—which bars them under principles of *res judicata* and collateral estoppel. Def.'s New Br. at 37–39 (citing, *e.g.*, *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93 (1988) (*res judicata* "bars every ground of recovery or defense which . . . could have been presented in [a] previous

action."); *Espey v. Select Portfolio Servs., Inc.*, 240 N.C. App. 293 (2015) (*res judicata* bars any "collateral attack on an order … which authorized defendants to proceed with a foreclosure")).

Instead, Plaintiffs argue that *res judicata* does not apply because they are accusing Bank of America of fraud. Pls.' New Br. at 28–29. They base this argument on a distinction they try to draw between "extrinsic fraud" and "intrinsic fraud," but they get the distinction backwards. "Extrinsic fraud," they say, "involves fraudulent acts that are collateral to the action" and can be used to defeat *res judicata*. *Id.* at 28. But Plaintiffs do not allege any fraud "collateral to the action"—Plaintiffs' claims of fraud *are* the action. Their own case says that a judgment can only be attacked based on fraud "in the procurement of the judgment" itself, but not "fraud in the cause of action." *Scott v. Farmers Co-Op Exch., Inc.*, 274 N.C. 179, 183 (1968); *see also*, *e.g.*, *Whitworth v. Estate of Whitworth*, 222 N.C.App. 783, 2012 WL 3791714, at *8 (N.C. App. Sept. 4, 2012) (extrinsic fraud is "fraud in the management of the cause of action"). Here, Plaintiffs allege fraud in the course of Plaintiffs' "HAMP applications," a textbook "fraud in the cause of action." Pls.' New Br. at 28. In seeking rehearing, they previously disclaimed any claim of

extrinsic fraud in the procurement of the foreclosure judgments. *See* Pls.' Pet. for Rehearing at 13–14 (denying any allegation of "fraud in foreclosing on [Plaintiffs'] properties," but incorrectly labeling this intrinsic fraud instead of extrinsic fraud).

In the alternative, Plaintiffs fall back on the same meritless argument they made in the limitations context, that *res judicata* should not apply because Plaintiffs could not have "discover[ed]" their claims during their foreclosure proceedings. Pls.' New Br. at 29. That is irrelevant, because "knowledge of a potential claim is not a requirement for application of the [] bar. . . . [I]t is the existence of the present claim, not party awareness of it, that controls." *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986). Ancient dicta Plaintiffs cite from *Gaither Corp. v. Skinner*, 241 N.C. 532, 536 (1955), suggesting that a party with "no knowledge or means of knowledge" of an "item" of damages might avoid *res judicata*, does not help them: as described previously, Plaintiffs did not lack for "means of knowledge," and are thus "charged" with the knowledge they seek to disclaim. *Thorpe*, 69 N.C. App. at 362.

In the specific context of HAMP denial claims, at least two courts have repudiated attempts to profess exactly the same unawareness to

avoid claim preclusion. *See Traber v. Bank of Am.,* No. COA 14-1028, 2015 WL 4620203, at *5 (N.C. App. Aug. 4, 2015) (rejecting argument plaintiffs could relitigate fraud claims against Bank of America because they were previously "unaware" of the HAMP MDL declarations); *King v. U.S. Bank, N.A.*, No. 325927, 2016 WL 2731118, at *4 (Mich. Ct. App. May 10, 2016) (rejecting attempt to raise new claims alleging "fraud with regard to plaintiff's HAMP application" because plaintiff was unaware of a "fraudulent scheme" until hearing about the HAMP MDL declarations). The same result is appropriate here.

CONCLUSION

For the reasons set forth above, in Defendant-Appellant's New Brief, and in the record, Bank of America respectfully urges this Court to reverse the legally erroneous and substantively unsound Court of Appeals decision for the reasons stated in the dissenting opinion of Judge Dillon, and to reaffirm the ruling of the Superior Court and the analysis of the original Court of Appeals panel.

Respectfully submitted this 5th day of May, 2022,

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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.

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CERTIFICATE OF SERVICE

I hereby certify that on 5 May 2022 the foregoing **Defendant-Appellant's Reply Brief** was electronically filed and served upon each of the parties in this action by email and by mailing a copy by First Class mail, addressed as follows:

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211 N.C.App. 197
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of North Carolina.

John M. BUTTON, Jr., Plaintiff,
v.
John Edward McKNIGHT, John N. McClain, Jr., and Hatch, Little & Bunn, L.L.P., Defendants.

No. COA10–858.
|
April 19, 2011.

***1** Appeal by plaintiff from order entered 15 April 2010 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 15 December 2010.

Attorneys and Law Firms

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Opinion

STEELMAN, Judge.

Where plaintiff failed to file his complaint against McKnight within three years of the last act of negligence, and within one year of the discovery of the alleged negligence, plaintiff's action against McKnight was properly dismissed based upon the statute of limitations set forth in N.C. Gen.Stat. § 1–15(c).

I. Factual and Procedural Background

In 2005, John M. Button, Jr. (plaintiff) hired the law firm of Hatch, Little & Bunn, L.L.P. (HLB) to obtain an absolute divorce from his then wife, Shelby Jean Button (Shelby). On 15 July 2005, John McKnight (McKnight), an attorney with HLB, filed a complaint on behalf of plaintiff seeking an absolute divorce. On 2 August 2005, service was obtained upon Shelby. On 19 August 2005, a judgment of absolute divorce was entered by summary judgment. Almost three years later, on 17 April 2008, Shelby filed a motion for relief from judgment and requested that the divorce judgment be set aside. On 16 May 2008, John McClain (McClain), an attorney with HLB, filed an answer on behalf of plaintiff.

After being served with Shelby's motion, plaintiff advised McClain that he had plans to remarry and inquired about the validity of the 19 August 2005 divorce judgment. McClain allegedly advised plaintiff that his divorce was valid and that he could proceed with his wedding. On 26 May 2008, plaintiff remarried. On 3 December 2008, the trial court granted Shelby's motion for relief from judgment and set aside the divorce judgment.

On 18 August 2009, plaintiff filed a complaint against defendants and alleged: (1) McKnight was negligent in filing and calendaring a motion for summary judgment less than 30 days after Shelby was served with the complaint; and (2) McClain was negligent in advising plaintiff that his divorce was valid and that he could legally remarry. Plaintiff asserted that HLB was vicariously liable for the actions of its employees under the doctrine of *respondeat superior* .

On 14 September 2009, McKnight filed motions to dismiss pursuant to N.C. Gen.Stat. § 1A–1, Rule 12(b)(2) and (b)(4)-(6). On 20 October 2009, McClain and HLB filed a motion to dismiss and an answer denying the material allegations of plaintiff's complaint. On 15 April 2010, the trial court entered an order granting McKnight's motion to dismiss on the basis that the applicable statute of limitations under N.C. Gen.Stat. § 1–15(c) expired prior to the filing of this action. The trial court denied McClain and HLB's motion to dismiss.

Plaintiff appeals.

II. Standard of Review

A motion to dismiss pursuant to Rule 12(b)(6) is the usual and proper method of testing the legal sufficiency of the complaint. *Sutton v. Duke,* 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

> ***2** On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be

> granted. *Isenhour v. Hutto,* 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999). Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. *Oates v. JAG, Inc.,* 314 N.C. 276, 278, 333 S .E.2d 222, 224 (1985).

Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). "A statute of limitation or repose may be the basis of a 12(b)(6) dismissal if on its face the complaint reveals the claim is barred by the statute." *Cage v. Colonial Building Co.,* 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994) (citations omitted).

III. Statute of Limitations

In his only argument, plaintiff contends that the trial court erred in granting McKnight's motion to dismiss because the applicable statute of limitations had not expired at the time plaintiff filed his complaint. We disagree.

The applicable statute of limitations is set forth in N.C. Gen.Stat. § 1–15(c):

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action....

N.C. Gen.Stat. § 1–15(c) (2009). "As enacted, G.S. 1–15(c) provides for a minimum three-year period from occurrence of the last act; [and] an additional one-year-from-discovery period for injuries 'not readily apparent' subject to a four-year period of repose commencing with defendant's last act giving rise to the cause of action ...." *Black v. Littlejohn,* 312 N.C. 626, 634, 325 S.E .2d 469, 475 (1985) (footnote omitted).

McKnight's last act which gave rise to plaintiff's claim of negligence occurred on 19 August 2005 when he obtained the divorce judgment that was subsequently vacated. *See Hargett v. Holland,* 337 N.C. 651, 653, 447 S.E.2d 784, 786 (holding that the attorney's last act that gave rise to the claim was his supervision of the execution of the will), *reh'g denied,* 338 N.C. 672, 453 S.E.2d 177 (1994). Plaintiff filed his complaint against McKnight on 18 August 2009. Thus, plaintiff filed this action outside of the three-year statute of limitations. We must therefore determine whether plaintiff was entitled to the additional one-year-from-discovery period to file his complaint.

***3** The "one-year-from-discovery exception contained within the second provision of G.S. 1–15(c) is subject to a four-year absolute or outer time limit within which plaintiff must bring an action for malpractice. This outer time limit begins with the last act of the defendant giving rise to the cause of action." *Black,* 312 N.C. at 629, 325 S.E.2d at 472. In order for the one-year-from-discovery exception to

be applicable, the plaintiff must establish the following four factors:

> (1) the injury or economic loss originated under circumstances making the injury or loss not readily apparent at the time of its origin;
>
> (2) the injury or loss was discovered or should reasonably have been discovered by the plaintiff two or more years after the occurrence of the last act of the defendant giving rise to the cause of action;
>
> (3) suit was commenced within one year from the date discovery was made; and
>
> (4) the statute of limitations may not, in any case, have been reduced to below three years or extended beyond four years.

Thorpe v. DeMent, 69 N.C.App. 355, 358–59, 317 S.E.2d 692, 694–95, *aff'd per curiam,* 312 N.C. 488, 322 S.E.2d 777 (1984).

For purposes of our review, we presume that the injury originated under circumstances making the injury or loss not readily apparent to plaintiff at the time of its occurrence. Plaintiff filed this action against McKnight on 18 August 2009, just before the absolute four-year period expired.

Plaintiff argues that "he didn't know he'd suffered any invasion of a legally protected right—that any negligence had occurred—until December 3, 2008 [,]" the date the trial court set aside the divorce judgment. Plaintiff asserts that this is the date of discovery under N.C. Gen.Stat. § 1–15(c). Defendants contend that the trial court correctly determined that plaintiff discovered or should reasonably have discovered his injury by 16 May 2008, the date his attorney responded to Shelby's motion to set aside the divorce judgment. We hold that the issue presented in this case is identical to that in *Thorpe v. DeMent, supra,* and that our ruling in that case is determinative in the instant case.

In *Thorpe,* Shirley Thorpe died in an automobile collision that occurred between her vehicle and that of Robert Wilson on 16 April 1976. 69 N.C.App. at 355, 317 S.E.2d at 693. Wilson also died as a result of the accident. *Id.* Approximately two weeks later, the plaintiffs hired the defendants to represent them in initiating an action for the wrongful death of Thorpe. *Id.* Notice of the plaintiffs' claim for wrongful death was required to be given to the Wilson estate by 16 October 1976 pursuant to N.C. Gen.Stat. § 28A–19–3. *Id.* at 357, 317 S.E.2d at 694. No notice of a claim for the plaintiffs' wrongful death claim was given to the Wilson estate until the complaint seeking damages for wrongful death was filed on 11 May 1977. *Id.* at 356, 317 S.E.2d at 693. On 17 November 1977, the defendants informed the plaintiffs that they had failed to timely present the plaintiffs' wrongful death claim to the Wilson estate. *Id.* The plaintiffs obtained new counsel and proceeded with the wrongful death action. *Id.* On 16 August 1979, the trial court granted summary judgment, limiting plaintiffs' recovery to any applicable insurance coverage and barring recovery from the Wilson estate. *Id.*

***4** On 31 October 1979, the plaintiffs filed a complaint against the defendants for negligence in failing to provide proper notice to the Wilson estate. *Id.* Summary judgment was granted in favor of the defendants on the basis that the action was barred by the statute of limitations provided in N.C. Gen.Stat. § 1–15(c). *Id.* at 357, 317 S.E.2d at 694. The plaintiffs appealed and argued that they had not discovered any loss until the trial court entered the order on 16 August 1979 barring their recovery from the Wilson estate. *Id.* at 360, 317 S.E.2d at 695. This Court rejected this contention and held that the plaintiffs' injury occurred when the defendants failed to make a timely presentment of their claim to the Wilson estate pursuant to N.C. Gen.Stat. § 28A–19–3. *Id.* at 361, 317 S.E.2d at 696. The plaintiffs were informed of the negligent conduct on 17 November 1977. *Id.* at 362, 317 S.E.2d at 696. We held the following:

> By virtue of the fact that defendant DeMent informed plaintiffs of his omission on or about 17 November 1977, the plaintiffs were at the very least put on inquiry notice of their possible cause of action for legal malpractice. At that point in time, plaintiffs had before them the facts, or access to the facts, necessary for them to "discover" both their attorney's negligence and the consequent loss of their legal rights against the Wilson estate. In other words, plaintiffs had constructive knowledge of all of

> the essential elements of a complete malpractice cause of action.

Id. at 362, 317 S.E.2d at 696–97 (citations omitted). We held that the plaintiffs "should have discovered their loss on or shortly after 17 November 1977." *Id.* at 363, 317 S.E.2d at 697.

The rationale of *Thorpe* is controlling. On 17 April 2008, Shelby filed a motion to set aside the divorce judgment. After being served with the motion, plaintiff inquired about the validity of the 19 August 2005 divorce judgment. On 16 May 2008, McClain filed an answer on behalf of plaintiff. We hold that plaintiff was put on notice of a possible cause of action for legal malpractice at the latest on 16 May 2008. As of that time, plaintiff had before him "the facts, or access to the facts, necessary for [him] to 'discover' " McKnight's alleged negligence and the invalidity of the divorce judgment. *Id.* at 362, 317 S.E.2d at 697. Plaintiff "had constructive knowledge of all of the essential elements of a complete malpractice cause of action." *Id.* Plaintiff should have discovered his injury on or before 16 May 2008.

Plaintiff filed his complaint against defendants on 18 August 2009, more than one year after the discovery of McKnight's alleged negligence. Thus, plaintiff has failed to demonstrate that he timely filed his complaint against McKnight under the one-year-from-discovery provision pursuant to N.C. Gen.Stat. § 1–15(c). The trial court properly dismissed plaintiff's complaint against McKnight.

***5** AFFIRMED.

Judges STEPHENS and HUNTER, JR., ROBERT N. concur. Report per Rule 30(e).

All Citations

211 N.C.App. 197, 711 S.E.2d 877 (Table), 2011 WL 1483433

167 N.C.App. 370
Unpublished Disposition
NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of North Carolina.

Marcus J. DePALMA, Arlene M. DePalma, and Philip N. DePalma, Plaintiffs,
v.
ROMAN CATHOLIC DIOCESE OF RALEIGH, Cardinal Gibbons High School, Brother Michel Bettigole, Troy Davis, David Mills, Dean Monroe, and Wayne Stewart, Defendants.

No. COA04-206.
|
Dec. 7, 2004.

***1** Appeal by plaintiffs from order entered 7 October 2003 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 21 October 2004.

Attorneys and Law Firms

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Opinion

LEVINSON, Judge.

Plaintiffs appeal from an order granting defendants' motion to dismiss their complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) (2003), for failure to state a claim for relief and as barred by the applicable statute of limitations. We affirm.

In October 1999, plaintiff Marcus DePalma was enrolled as a student at defendant Cardinal Gibbons High School ("the school"), in Raleigh, North Carolina, and played on the school's footballteam. On 15 October 1999 Marcus injured his knee and ankle while playing in a school football game. On 31 May 2003 plaintiffs filed suit against the Diocese, the school, and several individual school personnel. On 15 July 2003 defendants moved to dismiss plaintiffs' complaint under N.C.G.S. § 1A-1, Rule 12(b)(6), as barred by the applicable statute of limitations, and also for failure to comply with the Rules of Civil Procedure. On 7 October 2003 the trial court granted defendants' motion and ordered plaintiffs' complaint dismissed with prejudice. From this order, plaintiffs appeal.

Standard of Review

A motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) (2003), challenges the legal sufficiency of a plaintiff's pleadings:

A Rule 12(b)(6) motion will be granted '(1) when the face of the complaint reveals that no law supports plaintiff's claim; (2) when the face of the complaint reveals that some fact essential to plaintiff's claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiff's claim.' We treat all factual allegations of the pleading as true but not conclusions of law.

Sterner v. Penn, 159 N.C.App. 626, 628, 583 S.E.2d 670, 672 (2003) (quoting *Walker v. Sloan,* 137 N.C.App. 387, 392, 529 S.E .2d 236, 241 (2000)) (other citations omitted). On appeal, our standard of review " 'is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.' " *Bowman v. Alan Vester Ford Lincoln Mercury,* 151 N.C.App. 603, 606, 566 S.E.2d 818, 821 (2002)(quoting *Holloman v. Harrelson,* 149 N.C.App. 861, 864, 561 S.E.2d 351, 353, *disc. review denied,* 355 N.C. 748, 565 S.E.2d 665 (2002)).

If, in its ruling on a Rule 12(b)(6) motion, the trial court considers evidence outside the pleadings, the motion is converted to one for summary judgment. *See Silvers v. Horace Mann Ins. Co.,* 324 N.C. 289, 292, 378 S.E.2d 21, 24 (1989) ("court considered matters outside the pleadings and thus treated the motions to dismiss as motions for summary judgment"). However, "where, as here, the matters outside the pleading considered by the trial court consist only of briefs and arguments of counsel, the trial court need not 'convert the Rule 12 motion into one for summary judgment under Rule 56 [.]' " *Governor's Club Inc. v. Governors Club Ltd. P'ship,* 152 N.C.App. 240, 246, 567 S.E.2d 781, 785 (2002), *aff'd,* 357 N.C. 46, 577 S.E.2d 620 (2003) (quoting *Privette v. University of North Carolina,* 96 N.C.App. 124, 132, 385 S.E.2d 185, 189 (1989)).

***2** In the instant case, the court's order states in pertinent part that "[a]fter reviewing the pleadings and hearing argument

from counsel and the DePalmas, the Court finds that the motion should be granted." We conclude that the trial court did not consider evidence outside the pleadings; therefore, this Court will confine its review to the pleadings.

The dispositive issue in this case is whether plaintiffs' claim is barred by the applicable statute of limitations. "A statute of limitations defense may properly be asserted in a Rule12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp,* 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Id.* (citations omitted).

Plaintiffs' *pro se* complaint was captioned "Tort-Negligent Supervision." The body of the complaint alleges that defendants were negligent in failing to inform Marcus of the seriousness of his October 1999 knee injury, failing to properly treat his knee injury, failing to properly supervise Marcus, and failing to properly hire, train, and supervise certain school personnel. Plaintiffs also asserted an individual claim against defendant David Mills, in his capacity as athletic trainer, for "breach [of] his duty as a paramedical professional." Plaintiffs sought compensatory and punitive damages from defendants "jointly and/or severally for their negligent acts and omissions herein set forth[.]" We conclude that plaintiffs' complaint asserts claims against defendants for negligence.

"Claims based on negligence are governed by [N.C.G.S.] § 1-52(5)," *White v. Consol. Planning, Inc.,* 166 N.C.App. 283, ----, 603 S.E.2d 147, 147 (2004), which provides that a claim must be brought within three years on an action for "any other injury to the person or rights of another, not arising on contract and not here after enumerated." Thus, the general statute of limitations for negligence claims is three years. *See Johnson v. Raleigh,* 98 N.C.App. 147, 148, 389 S.E.2d 849, 850 (1990) ("statute of limitations for personal injury allegedly due to negligence is three years").

In the instant case, plaintiffs' complaint asserts claims for negligence arising "[o]n or about October 15, 1999 and for a time thereabout[.]" The complaint generally asserts that defendants were negligent in their response to Marcus's knee injury, including their treatment of Marcus's 15 October 1999 knee injury, their subsequent supervision of Marcus, and their failure to inform Marcus of the seriousness of the 15 October 1999 injury. Plaintiffs' claim against Mills individually also arises from the 15 October 1999 knee injury and Mills' alleged failure to "attend to the needs of an injured student athlete" and "intercede and protect the Plaintiff from a known or potential harm[.]" Finally, plaintiffs' complaint expressly asserts that defendants' negligence occurred "[d]uring the time period between October, 1999 through December 2000[.]" Thus, the factual allegations of plaintiffs' complaint uniformly assert that defendants' negligence arose on 15 October 1999 and continued for some period of time thereafter. We conclude that the complaint clearly establishes that plaintiffs' alleged cause of action accrued on 15 October 1999. Consequently, because plaintiffs' complaint was not filed until 31 May 2003, it was barred by the applicable three-year statute of limitations.

***3** Plaintiffs, however, argue on appeal that "the events which lead up to the injury complained of did not occur until August 2000through November 2000"; that "the facts of the injury were never revealed by the Defendants"; and that the "date of discovery of this deception was November 17 2000 and should be the controlling date for the court to determine the issue of the Statute of Limitations." We reject plaintiffs' argument for several reasons.

First, plaintiffs' arguments are based in part on documents outside the complaint. Plaintiffs' brief cites an affidavit executed by plaintiff Arlene DePalma and a medical record kept by a Dr. Szura as proof of a "pattern of deceit" and of the date of its discovery. However, neither the affidavit nor the medical record referenced in plaintiffs' brief were part of the complaint. Therefore, these are not considered in our review of the trial court's order. As discussed above, the factual allegations in the complaint unequivocally assert that defendants' negligence began on the date of Marcus's 15 October 1999 injury, and the complaint fails to allege any negligent actions by the defendants between August and November 2000.

For the same reason, we do not consider certain of plaintiffs' assertions, made for the first time on appeal and not contained in their complaint. These include allegations that defendants violated certain specifically identified provisions of the General Statutes or of the North Carolina Administrative Code; that a Dr. Szura performed a test on 15 October 1999 diagnosing Marcus's knee condition; that the defendants intentionally concealed this "diagnosis" from plaintiffs; and

that defendants conspired to prevent plaintiffs from learning the extent of Marcus's knee injury. None of these assertions are contained in plaintiffs' complaint, which is based on allegations of negligence, contains only a generalized conclusory allegation that defendants' actions were "contrary to State Law and/or Administrative Regulation," and which does not mention Dr. Szura.

Secondly, we reject plaintiffs' argument that their complaint states a basis to extend the statute of limitations. Plaintiffs argue on appeal that they did not learn of defendants' negligence until November 2000. On this basis, plaintiffs contend that the statute of limitations was tolled until their belated "discovery" of the extent of Marcus's injuries. It is true that an exception to the three year statute of limitations is found in N.C.G.S. § 1-52(16), which provides in relevant part that in an action for personal injury "[u]nless otherwise provided by statute, ... the cause of action ... shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs[.]" However, the statute "serves to delay the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, not until he is aware of the full extent of the damages suffered." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.,* 69 N.C.App. 505, 509, 317 S.E.2d 41, 43 (1984), *aff'd,* 313 N.C. 488, 329 S.E.2d 350 (1985). Accordingly, "as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only aggravation of the original injury." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.,* 313 N.C. at 493, 329 S.E.2d at 354 (1985) (citing *Matthieu v. Gas Co.,* 269 N.C. 212, 152 S.E.2d 336 (1967)).

***4** "In applying the discovery rule, it must be determined when [plaintiff] knew or should have known the cause of action accrued. Under common law, 'when the right of the party is once violated, even in ever so small a degree, the injury ... at once springs into existence and the cause of action is complete.' " *McCarver v. Blythe,* 147 N.C.App. 496, 499, 555 S.E.2d 680, 683 (2001) (quoting *Mast v. Sapp,* 140 N.C. 533, 540, 53 S.E. 350, 352 (1906). Thus, "where plaintiffs clearly know more than three years prior to bringing suit about damages, yet take no legal action ... the fact that further damage is caused does not bring about a new cause of action." *Robertson v. City of High Point,* 129 N.C.App. 88, 91, 497 S.E.2d 300, 302 (1998) (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.,* 313 N.C. 488, 329 S.E.2d 350 (1985)).

In the instant case, the complaint asserts that defendants were negligent in their treatment of and response to Marcus's October 1999 injury. By its own terms, plaintiffs' complaint alleges that defendants' negligence began on 15 October 1999. It is undisputed that on 15 October 1999 plaintiffs knew Marcus had been injured. Thus, "plaintiff's injuries were apparent to plaintiff and his [condition] could have been generally recognized and diagnosed by a medical professional ... plaintiff's injuries and [condition] were not latent; thus, § 1-52(16) is inapplicable to the facts of this case." *Soderlund v. Kuch,* 143 N.C.App. 361, 370, 546 S.E.2d 632, 638 (2001). Moreover, defendants' "supervision" of Marcus in relation to his football injury also arose on 15 October 1999. Finally, the allegations of plaintiffs' complaint do not support their arguments on appeal that plaintiffs (1) were unaware of defendants' negligence or of the nature of Marcus's injury until November 2000, (2) were prevented by defendants from determining the extent of Marcus's injury, or (3) could not reasonably have learned of defendants' negligence or the extent of Marcus's injury at some time within three years of his 15 October 1999 injury. We conclude that plaintiffs' complaint fails to include any allegations that would toll the applicable statute of limitations.

We also reject plaintiffs' argument that the "continuing supervision" of Marcus by defendants between 15 October 1999 and December 2000 is the equivalent, for purposes of the statute of limitations, of a medical "continuing course of treatment." Plaintiffs cite no authority to support this proposition, and we find none. Moreover, "[o]ur Supreme Court has adopted the 'continuing course of treatment doctrine' with regard to malpractice by hospitals and other health care providers." *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.,* 132 N.C.App. 160, 169, 510 S.E.2d 690, 696 (1999) (citing *Horton v. Carolina Medicorp, Inc.,* 344 N.C. 133, 472 S.E.2d 778 (1996)). This Court has not extended the doctrine to situations outside of the medical malpractice arena. *See Delta, id.* at 170, 510 S.E.2d at 697 ("inlight of the holding in *Horton,* which narrowly defines the 'continuing course of treatment doctrine,' we elect not to expand the doctrine's breadth"). Plaintiffs herein argue vehemently that they have **not** filed a medical malpractice

claim, making the "continuing course of treatment" exception inapplicable.

***5** For the reasons discussed above, we conclude that plaintiffs' claim was barred by the statute of limitations, and was properly dismissed by the trial court. Having reached this conclusion, we have no need to address the parties' arguments regarding the special requirements for filing a medical malpractice claim. The trial court's order is

Affirmed.

Judges TYSON and BRYANT, concur.
Report per Rule 30(e).

All Citations

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222 N.C.App. 783
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.
Court of Appeals of North Carolina.

Marie Wyatt WHITWORTH, Plaintiff,
v.
ESTATE OF Wesley Todd WHITWORTH; Tammy Whitworth, individually and as Executor of the Estate of Wesley Todd Whitworth; and Window World, Inc., Defendants.

No. COA11–989.
|
Sept. 4, 2012.

***1** Appeal by plaintiff from order entered 4 April 2011 by Judge A. Moses Massey in Wilkes County Superior Court. Heard in the Court of Appeals 25 January 2012.

Attorneys and Law Firms

Robinson & Lawing, L.L.P., by Michael L. Robinson, Kevin L. Miller, and H. Stephen Robinson; and The McElwee Firm, by William H. McElwee, III, for plaintiff-appellant.

Sigmon, Clark, Mackie, Hanvey & Ferrell, PA, by Forrest A. Ferrell and Matthew J. Middleton, for defendants-appellees.

Opinion

GEER, Judge.

Plaintiff Marie Wyatt Whitworth appeals from an order granting defendants' motion to dismiss for lack of subject matter jurisdiction. Defendants—the Estate of Wesley Todd Whitworth ("the Estate"), Tammy Whitworth, and Window World, Inc.—argue that because plaintiff's claims arise out of agreements and orders entered in an equitable distribution action, plaintiff was required to proceed in district court, and the superior court, therefore, lacked subject matter jurisdiction.

Because we find the superior court had jurisdiction over plaintiff's claims against the Estate and Tammy Whitworth, we reverse as to those defendants. We also hold, based on N.C. Gen.Stat. § 75D–8 (2011), that the superior court has jurisdiction over plaintiff's claims against all defendants under the North Carolina RICO Act. We agree with the trial court, however, that the remaining claims asserted against Window World had to be brought in the district court. We, therefore, affirm in part and reverse in part.

Facts

Plaintiff and Ruben Leon Whitworth, her husband at that time, incorporated Window World in 1995. Their son, Todd, was appointed president in 2002. The business grew to have gross sales in excess of $250 million in 2006. Todd managed day-to-day operations, while Leon served as CEO and director and plaintiff served as corporate secretary and director.

Plaintiff and Leon Whitworth separated on 23 May 2007. On 6 August 2007, plaintiff filed an action in district court against Leon, seeking equitable distribution, injunctive relief, and an interim distribution. Window World moved to intervene in the equitable distribution action on 8 August 2007. Although the trial judge indicated during the hearing on the motion to intervene that she was allowing the motion, no order was signed until after the case was concluded with a final equitable distribution judgment.

On or about 11 September 2007, plaintiff, Leon, and Window World entered into a Redemption Agreement. That agreement noted that plaintiff and Leon each owned 29,885 shares of Window World stock. Under the agreement, Window World was required to purchase Leon's shares at a price of $33,000,000.00 plus interest at the rate of 2% per annum, with $3,000,000.00 paid as a down payment and the remainder paid in equal monthly installments of $276,040.36 per year over a 10–year period. Window World was required to purchase plaintiff's shares for "the principal sum of $1,000,000 per year plus interest at the rate of 2% per annum for the remainder of her natural life. This sum shall be paid in equal monthly installments of $106,336.89...."

***2** On 6 November 2007, the district court entered a consent order (the "Window World Consent Order") signed by plaintiff, Leon, and Window World "resolv[ing] all pending issues, claims, and contentions of each party in [the district court action] which relate specifically to Window World, Inc." The order further stated that "[n]othing in this Consent Order shall be deemed to waive any rights the Plaintiff or Defendant have to any issues, claims, or contentions in [the district court

action] other than those specifically set forth in this Consent Order."

The Window World Consent Order provided that Leon would give plaintiff 5,000 shares of Window World stock, with the effect that each spouse would then own 30,000 shares of stock. Plaintiff and Leon were then required to each transfer to their son Todd 115 shares of stock. Following the transfer of the stock, plaintiff and Leon were required to enter into a Redemption Agreement pursuant to which Window World would redeem all the stock held by plaintiff and Leon. The order recited the same terms set forth in the Redemption Agreement that had already been signed. The order further provided that upon execution of the Redemption Agreement, plaintiff and Leon would resign their positions as officers and directors of Window World and would give up rights to various pieces of property.

At some point after the signing of the Window World Consent Order, plaintiff and Leon signed a document entitled "CONSENT TO REPRESENTATION." That document stated that attorney Jay Vannoy had represented Window World in the district court action and had acted as Window World's corporate counsel prior to the filing of the district court action. Nevertheless, plaintiff and Leon agreed to have Mr. Vannoy represent plaintiff, who had discharged her attorney, in finally resolving the equitable distribution issues still pending through a consent order.

On 24 January 2008, the district court entered a consent order/judgment "[i]n full, final and complete Equitable Distribution of marital property" between plaintiff and Leon. Among the property distributed to plaintiff and to Leon was "[a]ll property or rights to property as set out in that Consent Order filed in this cause November 6, 2007." The terms of the consent order (the "final Equitable Distribution Consent Order/Judgment") were "in total, absolute and complete satisfaction of the rights of either party under and pursuant to the provision of the Equitable Distribution statute of the State of North Carolina, N.C.G.S. § 50–20, et seq., as well as all other issues raised by the pleadings, and that neither party shall hereafter assert any claim, action or cause of action whatsoever arising out of or through said statute or otherwise arising out of any claims raised by the pleadings...." The order closed by stating: "This settles and resolves all claims raised by the pleadings."

On 5 February 2010, Todd Whitworth died. On 22 June 2010, plaintiff filed this action against (1) Todd's Estate, (2) Todd's wife Tammy, individually and as executrix of the Estate, and (3) Window World. The complaint asserted claims for breach of fiduciary duty, constructive fraud, fraud, rescission, breach of contract, conversion, and violation of the North Carolina RICO Act. These claims were based on allegations that, beginning in 2007, Todd "embarked with his wife Tammy, upon a course of conduct which was calculated to, and in fact did, place unbearable mental and emotional duress upon Marie in order to wrest Marie's ownership of [Window World] from Marie." The complaint alleged that the Redemption Agreement and Window World Consent Order were part of a "Takeover Scheme" and that plaintiff and Leon signed the documents under duress due to threats by Todd that he would otherwise commit suicide and threats by Tammy that plaintiff and Leon would never see their grandchildren again.

***3** On 12 August 2010, more than two years following entry of the final Equitable Distribution Order/Judgment and without notice to plaintiff or Leon, Window World returned to district court and had the district court judge enter an order allowing Window World's motion to intervene *nunc pro tunc* to 14 August 2007. The district court subsequently denied plaintiff's motion pursuant to Rule 60 of the Rules of Civil Procedure to set aside the intervention order. Plaintiff appealed that denial. In an opinion filed simultaneously with this opinion, this Court has reversed the trial court's order denying the Rule 60 motion and has vacated the 12 August 2010 order. *See Whitworth v. Whitworth,* —— N.C.App. ——, —— S.E.2d —— (Sept. 4, 2012).

On 10 September 2010, after obtaining the district court intervention order, defendants filed an answer denying the material allegations of the complaint and asserting numerous affirmative defenses based on the Redemption Agreement and the Window World Consent Order. Defendants also counterclaimed for unjust enrichment. On 4 March 2011, defendants filed a motion to dismiss pursuant to Rule 12(b)(1) of the Rules of Civil Procedure for lack of subject matter jurisdiction, attaching plaintiff's district court equitable distribution complaint, Window World's motion to intervene in the equitable distribution action, the 12 August 2010 order granting the motion to intervene, the Redemption Agreement, the Window World Consent Order, the Consent to Representation, the Final Equitable Distribution Consent Order/Judgment, and plaintiff's responses to defendants' first request for admissions.

On 4 April 2011, the trial court, after reviewing all of the exhibits, concluded "that the district court action filed by

the Plaintiff on August 6, 2007, in Wilkes County District Court, whereby the Plaintiff invoked the subject matter jurisdiction over her claim for equitable distribution of her marital property, which she identifies as all of her Window World stock and her interest in Window World, deprives the superior court from exercising jurisdiction over the subject matter raised by the Plaintiff's Complaint filed June 22, 2010." The court further concluded that, for the same reasons, the superior court lacked subject matter jurisdiction over defendants' counterclaim. The trial court, therefore, dismissed this action. Plaintiff timely appealed to this Court.

Discussion

Subject matter jurisdiction is a "threshold requirement for a court to hear and adjudicate a controversy brought before it." *In re M.B.,* 179 N.C.App. 572, 574, 635 S.E.2d 8, 10 (2006). Subject matter jurisdiction " 'is conferred upon the courts by either the North Carolina Constitution or by statute.' " *In re McKinney,* 158 N.C.App. 441, 443, 581 S.E.2d 793, 795 (2003) (quoting *Harris v. Pembaur,* 84 N.C.App. 666, 667, 353 S.E.2d 673, 675 (1987)). In this opinion, we address only whether the trial court had subject matter jurisdiction. We do not address whether any of the claims asserted by plaintiff are sufficient under Rule 12(b)(6) or Rule 12(c) of the Rules of Civil Procedure. Nor do we address defendants' affirmative defenses.

***4** Defendants have argued that the superior court lacked jurisdiction because plaintiff, by filing her equitable distribution action in district court, invoked the district court's jurisdiction pursuant to N.C. Gen.Stat. § 7A–244 (2011), which provides:

> The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.

While there is no question that plaintiff invoked the jurisdiction of the district court for her equitable distribution claim, that fact is not dispositive regarding the superior court's jurisdiction over plaintiff's claims.

In support of the trial court's dismissal of the superior court action, defendants rely on *Hudson Int'l, Inc. v. Hudson,* 145 N.C.App. 631, 550 S.E.2d 571 (2001), and *Garrison v. Garrison,* 90 N .C.App. 670, 369 S.E.2d 628 (1988). These decisions establish that when "an action listed in section 7A244 has been previously filed in district court and another action relating to the subject matter of the previously filed action is then filed in superior court, the district court's jurisdiction over the subject matter has already been invoked by the parties to the first action. It follows that the superior court does not have jurisdiction in the subsequently filed action, irrespective of the parties to the first action." *Hudson Int'l, Inc.,* 145 N.C.App. at 637, 550 S.E.2d at 575. *See also* *Garrison,* 90 N.C.App. at 672, 369 S.E.2d at 629 ("The superior court has no authority to partition marital property ... where, as here, the jurisdiction of the district court has been properly invoked to equitably distribute such marital property.").

We first note that defendants have not cited any case in which, as here, the district court action is no longer pending. In *Sparks v. Peacock,* 129 N.C.App. 640, 641, 500 S.E.2d 116, 117 (1998), this Court suggested that the principles set out in *Garrison* and *Hudson* may not be applicable in the absence of a pending district court action when the Court noted that "[i]t is of critical importance to this case that there is not an equitable distribution action currently pending between the parties." We need not, however, resolve this question given more recent decisions of this Court.

In *Burgess v. Burgess,* 205 N.C.App. 325, 328–29, 698 S.E.2d 666, 669 (2010), this Court explained that "[a]t the core of *Garrison* and *Hudson* were two principles: (1) the same property was the subject of both the superior and district court actions, and (2) the relief sought and available was similar in each suit." The Court stressed, in its analysis, that "[i]n an equitable distribution action, the district court is empowered to 'determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section.' " *Id.* at

330, 698 S.E.2d at 670 (quoting N.C. Gen.Stat. § 50–20(a) (2009)).

***5** In *Burgess,* the Court addressed whether the superior court had jurisdiction over a shareholder derivative action brought by one spouse on behalf of a company jointly owned by the two spouses—the ownership of the company was at issue in the parties' equitable distribution action. *Id.* at 326, 698 S.E.2d at 677. The Court analyzed each of the plaintiff's superior court claims separately. The Court concluded that the superior court had no jurisdiction over the plaintiff's equitable claim for divestiture of her former husband's shares in the company because that claim was "squarely addressed in her equitable distribution action." *Id.* at 330, 698 S.E.2d at 670.

The Court, however, reached a different conclusion with respect to the plaintiff's shareholder derivative action based on breach of fiduciary duty, as well as her accompanying request for an inspection and an accounting. As to those claims, the Court concluded that the superior court had jurisdiction notwithstanding the pending district court action because (1) "plaintiff's derivative claim in her shareholder suit does not concern the division of marital property"; (2) "she asserts a separate claim for relief, outside the scope of section 50–20" in superior court; (3) even if the company "was added as a party to the equitable distribution action, plaintiff's right to relief would not be expanded to include the type of relief sought in the derivative suit"; and (4) "[t]he district court in this case does not, and more importantly, cannot, obtain jurisdiction over plaintiff's shareholder derivative suit by statute." *Id.* at 331–32, 698 S.E .2d at 670–71.

As in *Burgess,* we address each of plaintiff's claims in this case individually. We first note that plaintiff's complaint does not identify which claims relate to which defendants. With respect to the claims against the Estate and against Tammy Whitworth, neither Todd nor Tammy were parties to the district court proceeding, the Redemption Agreement, or the Window World Consent Order. It is undisputed that Todd signed the Redemption Agreement and the Window World Consent Order in his capacity as President of Window World.

Plaintiff's causes of action for rescission, breach of contract, and conversion all relate to the Redemption Agreement. As Todd and Tammy were not parties to that agreement or any of the consent orders at issue in this case, those causes of action cannot be applicable to them. *See Barrow v. Murphrey,* 95 N.C.App. 738, 741, 383 S.E.2d 684, 686 (1989) (" 'It is a fundamental principle of contract law that parties to a contract may bind only themselves and ... *may not bind a third person who is not a party to the contract in absence of his consent to be bound.*' " (quoting *Nationwide Mut. Ins. Co. v. Chantos,* 293 N.C. 431, 438, 238 S.E.2d 597, 602–03 (1977))).

With respect to the claims for breach of fiduciary duty, constructive fraud, fraud, and the North Carolina RICO Act, plaintiff seeks damages from the Estate and Tammy. While the dispute over Window World and plaintiff's previous stock ownership provide the context for plaintiff's dispute in this case, that property (Window World and the stock) is not the subject of her superior court tort claims for damages asserted against the Estate and Tammy. *See Jessee v. Jessee,* —— N.C.App. ——, ——, 713 S .E.2d 28, 36 (2011) (in holding that superior court had jurisdiction over tort claims, "the extent to which Defendants utilized impermissibly obtained funds to obtain clear title to and then fraudulently transferred the unencumbered former marital residence to Defendant Jessee Family Trust has little, if anything, to do with claims between Plaintiff and Defendant as to the value of that asset and the extent to which and manner in which it is subject to distribution between the parties pursuant to N.C. Gen.Stat. § 50–20"). Thus, the first prong of *Burgess*—that the same property be the subject of the superior and district court actions—is not met. *Burgess,* 205 N.C.App. at 328–29, 698 S.E.2d at 669.

***6** In addition, plaintiff would not have been able to obtain damages from the Estate and Tammy, including the punitive damages and treble damages she seeks, in the equitable distribution action. We note that because the action is no longer pending, plaintiff could not join the Estate and Tammy in the district court proceeding. *Compare Hudson Int'l, Inc.,* 145 N.C.App. at 638, 550 S.E.2d at 575 (holding that dismissal of action without prejudice under Rule 12(b)(1) allowed plaintiff to become party to district court action and obtain relief sought in superior court). In any event, even if joinder were still possible, plaintiff's damages claims do not involve the classification of marital property or its distribution —the relief available in an equitable distribution action. *See Burgess,* 205 N.C.App. at 332, 698 S.E.2d at 671 ("Moreover, if Burgess & Associates was added as a party to the equitable distribution action, plaintiff's right to relief would not be expanded to include the type of relief sought in the derivative suit."). Consequently, the second prong of *Burgess* also is not met. *Id.*

In summary, just as in *Burgess,* plaintiff's claims against the Estate and Tammy do not concern the division of marital property; she asserts claims for relief against those two defendants outside the scope of N.C. Gen.Stat. § 50–20 (2011); and even if the Estate and Tammy could be added as parties to the equitable distribution proceeding, the relief plaintiff seeks would not be available. We also fail to see how a RICO claim could be asserted in an equitable distribution action. Consequently, the trial court erred in dismissing under Rule 12(b)(1) the claims against the Estate and Tammy for breach of fiduciary duty, constructive fraud, fraud, and the North Carolina RICO Act (except to the extent those claims seek rescission). *See Burgess,* 205 N.C.App. at 332, 698 S.E.2d at 671.

Turning to the claims against Window World, the parties vigorously debate whether Window World was a party to the equitable distribution action. While this Court has vacated the intervention order entered in the district court in 2010, *see Whitworth v. Whitworth,* —— N.C.App. ——, —— S.E.2d —— (Sept. 4, 2012), we hold that the Window World Consent Order was sufficient to make Window World a party to the equitable distribution action. The Consent Order includes Window World in the caption identified as an intervenor and the portion of the order reciting the parties notes that "Intervenor, Window World, Inc., is represented by Attorney Jay Vannoy." The Order states that "Window World, Inc. wishes to redeem all the shares of stock currently owned by the Plaintiff and Defendant" and that "[a]ll the parties wish to enter this Consent Order to resolve all the issues, claims, and contentions pending between them that relate specifically to Window World, Inc."

Significantly, the decretal portion of the Consent Order not only addresses what plaintiff and Leon Whitworth must do, but also expressly orders Window World to take specified actions. The Consent Order then provides that "[t]his Consent Order shall resolve all pending issues, claims, and contentions of each party in 07 CVD 1179 which relate specifically to Window World, Inc." Plaintiff, Leon, and Todd, as president for Window World, all signed the Consent Order. While the better practice would have been to enter a timely written order expressly allowing the motion to intervene, we hold that the Window World Consent Order—in which the district court exercised its jurisdiction over Window World—was sufficient to make Window World a party to the equitable distribution action.

***7** None of the case law cited by the parties regarding whether the district court had exclusive jurisdiction over claims against Window World addresses the situation in which a party successfully invoked the jurisdiction of the district court in an equitable distribution action, a final disposition of that action was entered, and, therefore, no action was pending at the time the superior court action was filed. Even assuming, without deciding, that *Hudson* and *Garrison* have no application when the district court action is no longer pending, we hold that the superior court properly dismissed the claims against Window World for breach of fiduciary duty, constructive fraud, fraud, and rescission as an improper collateral attack on the judgment in the equitable distribution action.

Plaintiff argues that she may proceed with her claims in superior court because the Window World Consent Order is void and a party may seek to set aside a void order either by a motion in the cause pursuant to Rule 60(b) or by collateral attack in a separate proceeding. " 'A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid.' " *Clayton v. N.C. State Bar,* 168 N.C.App. 717, 719, 608 S.E.2d 821, 822 (2005) (quoting *Thrasher v. Thrasher,* 4 N.C.App. 534, 540, 167 S.E.2d 549, 553 (1969)).

Here, to the extent plaintiff's complaint can be read as asserting claims against Window World for breach of fiduciary duty, constructive fraud, fraud, and rescission, those claims all would require that the superior court find that plaintiff entered into the Redemption Agreement and Window World Consent Order involuntarily and as a result of fraud, duress, and undue influence. However, the Window World Consent Order, which required the parties to enter into the Redemption Agreement, provided:

> 10. This Consent Order shall resolve all pending issues, claims, and contentions of each party in 07 CVD 1179 which relate specifically to Window World, Inc.
>
> ....
>
> 12. The parties stipulate and agree that this Consent Order is entered freely and voluntarily fully understanding what each party is doing. The parties stipulate and agree that no one has promised them anything or threatened or coerced them in any way to cause them to enter into this Consent Order against their wishes. The parties further stipulate and agree that each party has read this Consent Order in

its entirety and has reviewed the contents of this Consent Order in its entirety with the party's attorneys, accountants, or other advisors.

In addition, the final Equitable Distribution Consent Order/Judgment, which finally resolved all of the equitable distribution issues and distributed the marital property, incorporated by reference the Window World Consent Order. For both plaintiff and Leon, the final Equitable Distribution Consent Order/Judgment specified that "[i]n full, final and complete Equitable Distribution of marital property," each party would have, among other property, "[a]ll property or rights to property as set out in that Consent Order filed in this cause November 6, 2007." Plaintiff's claims against Window World, which would rescind the Window World Consent Order and the Redemption Agreement, would, therefore, also require undoing the final Equitable Distribution Consent Order/Judgment.

***8** Plaintiff appears to argue, however, that she is entitled to bring an independent action collaterally attacking the Window World Consent Order because that order was obtained through fraud, duress, and undue influence. It is, however, "well settled in this jurisdiction 'that in order to sustain a collateral attack on a judgment for fraud it is necessary that the allegations of the complaint set forth facts constituting extrinsic or collateral fraud in the procurement of the judgment, and not merely intrinsic fraud, that is, arising within the proceeding itself and concerning some matter necessarily under the consideration of the court upon the merits.' " *Caswell Realty Assocs. I v. Andrews Co.,* 121 N.C.App. 483, 486, 466 S.E.2d 310, 312 (1996) (quoting *Scott v. Farmers Coop. Exch., Inc.,* 274 N.C. 179, 182, 161 S.E.2d 473, 476 (1968)).

Extrinsic fraud " 'deprives the unsuccessful party of an opportunity to present his case to the court.' " *Hooks v. Eckman,* 159 N.C.App. 681, 684, 587 S.E.2d 352, 354 (2003) (quoting *Stokley v. Stokley,* 30 N.C.App. 351, 354, 227 S.E.2d 131, 134 (1976)). Intrinsic fraud "occurs when a party (1) has proper notice of an action, (2) has not been prevented from full participation in the action, and (3) has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary." *Id.* Phrased differently, "intrinsic fraud describes matters that are involved in the determination of a cause on its merits. In contrast, extrinsic fraud prevents a court from making a judgment on the merits of a case." *Id.* at 684–85, 587 S.E.2d at 354. When the fraud is characterized as intrinsic, then relief is possible only through a motion in the cause pursuant to Rule 60(b)(3). *Id.* at 685, 587 S.E.2d at 354.

Here, plaintiff argues only intrinsic fraud. Therefore, in order to have the Window World Consent Order set aside, she was required to proceed by way of a motion in the cause under Rule 60 of the Rules of Civil Procedure. While plaintiff also argues that because Window World was a non-party to the equitable distribution action, she was required to proceed in an independent action, we have concluded that Window World was a party. Therefore, plaintiff was required to proceed by way of a motion in the cause.

With respect to plaintiff's claims of duress and undue influence, plaintiff cites no cases, and we have found none, suggesting that a party has the right to bring an independent action collaterally attacking an order alleged to have been obtained by duress or undue influence. Plaintiff cites *Coppley v. Coppley,* 128 N.C.App. 658, 666–67, 496 S.E.2d 611, 618 (1998), as being "on point" because the Court concluded that a party was entitled to have a consent order set aside because it was obtained by threats. In *Coppley,* however, the plaintiff sought relief through a motion in the cause pursuant to Rule 60(b). Nothing in *Coppley* suggests that a party may collaterally attack an order in an independent action based on duress or undue influence. *See also Yurek v. Shaffer,* 198 N.C.App. 67, 79, 678 S.E.2d 738, 746 (2009) (discussing impact of duress and undue influence on consent order in context of Rule 60(b) motion).

***9** Accordingly, we hold that the trial court properly dismissed the claims against Window World for breach of fiduciary duty, constructive fraud, fraud, and rescission. Plaintiff, however, also asserted claims for breach of contract, arguing that Window World failed to comply with the terms of the Redemption Agreement, and for conversion of her stock based on that breach of contract.

As to these claims, the final Equitable Distribution Consent Order/Judgment provided that "this Decree is enforceable by the contempt powers of the Court should any party not comply with its terms...." Plaintiff appears to argue that she was nonetheless entitled to proceed in a separate superior court action because Window World was not a party to the equitable distribution action, an argument we have rejected, and because the provisions at issue in the Redemption Agreement were not set out in the Window World Consent Order.

As for this latter argument, the final Equitable Distribution Consent Order/Judgment specifically incorporated by reference the Window World Consent Order and the Window World Consent Order in turn incorporated by reference the Redemption Agreement. We hold, therefore, that to the extent Window World has failed to comply with the Redemption Agreement, plaintiff should enforce that agreement in the district court. *See* *Walters v. Walters,* 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) ("These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case."). The trial court, therefore, also properly dismissed the contract and conversion claims asserted against Window World.

Finally, with respect to the North Carolina RICO claim, defendants have acknowledged that jurisdiction lies within the superior court. Defendants appear to argue that dismissal was proper based on res judicata and collateral estoppel and because the claim potentially may amount to a collateral attack. We cannot determine from the complaint whether the North Carolina RICO claim will necessarily amount to a collateral attack, and defendants' affirmative defenses are not before this Court in this appeal. Consequently, we hold that the trial court erred in dismissing plaintiff's claim against Window World under the North Carolina RICO Act for lack of subject matter jurisdiction.

Conclusion

We hold that the trial court erred in dismissing plaintiff's damages claims against the Estate and Tammy Whitworth based on breach of fiduciary duty, constructive fraud, fraud, and the North Carolina RICO Act. We also hold that the trial court erred in dismissing plaintiff's claim against Window World under the North Carolina RICO Act. We hold that the trial court properly dismissed the remaining claims.

Affirmed in part; reversed in part.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur. Report per Rule 30(e).

All Citations

222 N.C.App. 783, 731 S.E.2d 721 (Table), 2012 WL 3791714

Contents of Appendix

North Carolina Appellate Practice Blog

Fox Rothschild's blog about practicing law in North Carolina state and federal appellate courts

The Panel of Theseus

By Matthew Nis Leerberg on October 25, 2021

Generally, you can ask a judge to change her mind, but you can't ask her to change a *different* judge's mind. For example, at the trial-court level, a judge can revise her own interlocutory order under Rule 54(b), but one superior court judge may not overrule another. Likewise, at the appellate level, a Court of Appeals panel can grant a petition for rehearing and issue a revised or different opinion, but one panel may *not* decide the same issue differently than an earlier panel in the same (or a different) case.

What happens, though, when the composition of a panel changes after the opinion is issued? After all, judges retire. Their terms end. They move across the street to the Supreme Court. Can the remnant of the original panel change its mind? Can additional judges be added to fill the panel's open seats, and can that reconstituted panel change its mind? Does it matter if it's one substitution, or two, or three?

These are not hypothetical questions. In *Taylor v. Bank of America*, the trial court dismissed plaintiffs' complaint because the statute of limitations had run on their claims. On 31 December 2020, a Court of Appeals panel consisting of Judges Young, Dillon, and Berger unanimously affirmed in **an opinion** authored by Judge Young, holding that the fatal limitations defect was plain on the face of the complaint.

It was not a coincidence that the opinion was issued on the last day of the calendar year, as that was Judge Young's and Judge (now Justice) Berger's last day in office. But, as a result, when plaintiffs then filed a petition for rehearing under Appellate Rule 31, there was only one member of the original panel left on the Court of Appeals.

Two replacement jurists were added to the panel. The reconstituted panel **promptly granted** the petition for rehearing. And earlier this month, the panel issued **an opinion** reaching a different result than did the first panel, reversing and remanding with instructions for the trial court to enter further findings of fact and conclusions of law supporting its decision. The sole remaining member of the original panel—Judge Dillon—dissented, setting forth a similar analysis to that employed by Judge Young in the original opinion.

So: did the "panel" change its mind, which is certainly allowed, or did a separate panel overrule the first one, which may not be allowed? I'm not aware of any case that answers this question directly. Of course, under ***In re Civil Penalty***, "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." That rule, though, applies to panels in *different* cases.

Lesser known is a related case that *In re Civil Penalty* itself cites: ***North Carolina National Bank v. Virginia Carolina Builders***. In that case, the trial court set aside a default judgment—a classically non-immediately-appealable interlocutory order. The plaintiff appealed anyway, and also filed a pre-docketing petition for writ of certiorari. A panel of the Court of Appeals denied the petition. But once the appeal "of right" was

fully briefed, the merits panel reached a different result, exercising its discretion to review and reverse the order setting aside the default judgment.

On appeal from a dissent, the Supreme Court held that the merits panel had improperly overruled the petitions panel *in the same case*. The Court's reasoning warrants quoting in full:

> **[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case. Thus the second panel in the instant case had no authority to exercise its discretion in favor of reviewing the trial court's order when a preceding panel had earlier decided to the contrary.**
>
> **Our decision on this point in no way impinges on the power of this Court or the Court of Appeals to change its ruling upon a motion to rehear, or on the court's own motion, if the court determines that its former ruling was clearly erroneous. In the case of the Court of Appeals, however, such a change must be made, if at all, by the same panel which initially decided the matter. Otherwise, a party against whom a decision was made by one panel of the Court of Appeals could simply continue to press a point in that court hoping that some other panel would eventually decide it favorably, as indeed the plaintiff did in this case; and we would not have that orderly administration of the law by the courts.**

Of course, the Supreme Court's opinion does not directly answer the question of whether and when one panel becomes another. It also leaves open the possibility that the original petitions panel could have overruled itself. In the *Taylor* case, though, the original merits panel *could not* have changed its mind, because two of the judges no longer held the same office. If the Court of Appeals is powerless to reconstitute a panel when a judge or judges leave, then parties would appear to have no way to obtain relief via a Rule 31 petition for rehearing.

There's also one more tidbit to consider: the word "panel" *never appears* in Rule 31. Rather, the Rule speaks to "the court's" power to rehear a case. And here, the court plainly *did* believe it had this power.

In the end, this question is a bit of a Rorschach test. What do you see when you look at the reconstituted panel? Is it the same ship with a few planks restored? Or is it a new ship altogether?

–Matt Leerberg