# *PAUL & FLORENCE THOMAS MEM. ART SCH., INC. v. ATWELL*

12 CVS 359

NORTH CAROLINA SUPERIOR COURT, ASHE COUNTY

September 11, 2013

**Reporter**
2013 NCBC Motions LEXIS 278 *

THE PAUL AND FLORENCE THOMAS MEMORIAL ART SCHOOL, INC., Plaintiff, vs. J. STANLEY ATWELL, as Successor Trustee for the Florence Thomas Living Trust and PETER PARISH, as Successor Trustee for the Thomas-Plummer Trust established by the Trust Agreement of the Florence Thomas Living Trust as Restated and Amended; BETTY LOU THOMAS PLUMMER, Individually and as Executor of the Estate of Florence Thomas, Defendants and Third-Party Plaintiffs, vs. HELTON UNITED METHODIST CHURCH; HELTON UNITED METHODIST CHURCH CEMETERY; EMORY & HENRY COLLEGE; APPALACHIAN STATE UNIVERSITY; MELBA G. MILLER; ANN GRIFFITTS; PAULINE E. HART; GERALD W. MORTON; BETTY K. MORTON; and PATSY M. DOLINGER, Third-Party Defendants.

**Type:** Motion

## Counsel

**[*1]** Micah D. Ball, State Bar No. 10238, Attorney for Betty Lou Thomas Plummer, Individually and as Executor of the Estate of Florence Thomas, Colombo, Kitchin, Dunn, Ball & Porter, LLP, Greenville, North Carolina; Thomas A. Worth, State Bar No. 10590, Attorney for Betty Lou Thomas Plummer, Executrix of the Estate of Florence Thomas, Greensboro, NC.

## Title

**PLUMMER'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S AMENDED AND RESTATED MOTION TO DISMISS**

## Text

Betty Lou Thomas Plummer ("Plummer"), individually and in her representative capacity as Executor of the Estate of Florence Thomas, submits this Memorandum in Opposition to Plaintiff's Amended and Restated Motion to Dismiss Counterclaims and Cross Claims of Defendant Betty Lou Plummer, as Executor for the Estate of Florence Thomas.

### I. FACTUAL OVERVIEW

Plaintiff, The Paul and Florence Thomas Memorial Art School, Inc. (the "Art School"), was incorporated by attorney Grady Lorton ("Lonon") as a non-profit corporation on April 23, 2007. Lonon also served as the corporation's registered agent until June 2012. From April 2007 through June 2012, the principal office of the Art School was Lotion's office. (Pl.'s Ans. to Helton's Countercl. PP **[*2]** 34- 35, Exh. A-B).

In 2004, Lonon amended a living trust for Florence Thomas (the "2004 purported Amendment"). He prepared the original trust agreement in 1986, attorney James Deal restated and amended it in 2002 and 2003 (the "2003 Trust"). The 2003 Trust directed specific gifts to the following entities and individuals upon Florence Thomas' death: Appalachian State University Art Department, Patsy M. Dolinger, Betty Morton, Gerald Morton, Pauline Hart, Anne Griffitts, Dr. C.E. Miller, Melba Miller, Emory & Henry College, Helton United Methodist Church and Helton United Methodist Church Cemetery (the "Specific Bequests") (Compl. Exh. A, Art. 7).

In the 2003 Trust, after distribution of the Specific Bequests, the trust remainder was to be divided as follows: 1. An amount equal to the federal estate applicable exclusion amount was to be set aside for the Thomas-Plummer Trust, a trust whose beneficiaries were Plummer, Florence Thomas' daughter, and Ms. Plummer's husband, William Plummer; 2. The balance of all remaining trust property was to be distributed to Appalachian State University for the purpose of endowing the "Paul and Florence Thomas Art Center" to be managed by the

Appalachian **[*3]** State University Art Department (Compl., Exh. A, Art. 8).

Lonon drafted the 2004 purported Amendment and it deleted all the Specific Bequests. The Florence Thomas paintings, originally bequeathed to the Appalachian State University Art Department, were instead bequeathed to the Art School. (Compl., Exh. A, 2004 Amendment, Art. 7). The Thomas-Plummer Trust provisions went unchanged. It still received the estate tax applicable exclusion amount on Florence Thomas's death (two million dollars in 2007) however, the 2003 Trust was further amended as follows:

> If both Betty Plummer and William are deceased, or upon the death of both Betty Plummer and William Plummer, then I direct that their remaining trust share [from the Thomas-Plummer Trust] shall be distributed to The Paul and Florence Thomas Memorial Art School to be built in Ashe County. The School is to be managed by Appalachian State University through a Board of Directors for the benefit of Ashe County and surrounding counties. . . . It shall have as its Head or Chair a representative of the Art Department of Appalachian State University. . . (Pl.'s Compl., Exh. A, 2004 Amendment, Art. 8(c)).

All remaining trust property **[*4]** was to be distributed to this art school as described in Article 8(c) (Compl., Exh. A, 2004 Amendment, Art. 8, PP 8.02-03).

The Art School, from its incorporation in 2007 until 2012, held Lonon out as its agent. He incorporated the Art School, acted as its registered agent, closed a real estate purchase as its attorney and listed his law office as the principal office of the Art school for five years. Additionally, Lonon served as Treasurer of the Art School for at least 2009, and signed one Form 990-PF (the information return), required by the Internal Revenue Service, in 2011. (Pl.'s Ans. to Helton's Countercl. PP 34-35, Exh. A-B).

Following Florence Thomas' death on March 30, 2007, Lonon, while simultaneously acting as attorney for the Estate of Florence Thomas, the Florence Thomas Living Trust, the Thomas-Plummer Trust (the "Florence Thomas Entities"), and agent and attorney for the Art School, oversaw the transfer of assets from the various Florence Thomas entities to the Art School. Because of written instructions Lonon gave Plummer, the Thomas-Plummer Trust was over-funded by $ 584,200 (Plummer's Ans. and Countercl. PP 16-17; Pl's. Ans. P 16-17, admitted as to the over-funding). **[*5]** The Estate of Florence Thomas, the Florence Thomas Living Mist and the Thomas-Plummer Trust all allege that this over-funding created estate tax liabilities to the federal government and the states of North Carolina and Virginia. Tax liability is denied by The Art School (*see e.g.*, Plummer's Ans. and Countercl., P 17; Pl.'s Ans., P 17).

Lonon, as attorney for the Florence Thomas Entities and as agent and attorney for the Art School failed to file a United States Estate Tax Return, Form 706, for the Estate of Florence Thomas although such a return was required to be filed within nine months from the date of death. The result is that no estate tax liabilities have been paid to date. (*Id.*, allegations admitted in their entirety).

In addition to the over-funding of the Thomas-Plummer Trust, Lonon, as attorney for the Florence Thomas Entities and agent and attorney for Plaintiff Art School issued a five page letter directing the Trustee, Plummer, to pay all Specific Bequests that had been deleted in the 2004 purported Amendment that he drafted. (Plummer's Ans. and Countercl. P 29; Pl.'s Am. P 29, admitted allegations of payment to improper beneficiaries as directed by Lonon). **[*6]** According to Lonon, the Art School knew of these payments to outside parties and entities as early as 2007. (Emory & Henry's Ans., Exh. A).

At the same time Mr. Lonon was serving as Treasurer of the Art School in 2009, he communicated with Emory & Henry College concerning distributions to be made to Emory & Henry, even though in the 2004 purported Amendment he drafted, the Specific Bequests had been eliminated. (Emory & Henry's Ans., Exh. A; Compl., Exh. A, 2004 Amendment, Art. 7).

Lonon, as attorney for the Florence Thomas Entities and agent and attorney for the Art School failed to identify, collect, account for and distribute real properties belonging to the Estate of Florence Thomas. (Plummer's Ans. and Countercl., P 29; Pl.'s Ans., P 29, admitting that Lonon "failed to properly administer the Estate of Florence Thomas"). This failure creates the basis of the underlying declaratory judgment action, The Art School seeks the distribution of these real properties in preference to any estate tax liabilities owed by the Estate of Florence Thomas, (Compl. PP 17-18).

Lorton, as attorney for the Florence Thomas Entities and

agent and attorney for the Art School failed to probate the **[*7]** Will of Florence Thomas in Ashe County. He retained it in his files until January 18, 2012, when he finally filed it with the Ashe County Clerk of Court. (Plummer's Amended Ans. PP 20 & 37). The Art School denies that its agent and attorney, Lonon, retained, or filed the will, but admits that it was not filed until January 18, 2012. (Pl.'s Ans, PP 20 & 37).

The Art School filed its declaratory judgment action on August 28, 2012 against the Florence Thomas Entities seeking a judgment that it is entitled to all assets remaining in the Estate in preference of payment of any estate tax liabilities. As shown above, all these Defendants contend that the tax liabilities were created by Lonon. Plummer contends that Lonon acted with duplicity and in a multi-agent capacity with multiple conflicts of interest, including as agent and attorney of the Art School.

On November 5, 2012, Plummer answered Plaintiff's Complaint and filed a Counterclaim, and a Third-Party Complaint against all individuals and entities who received distributions contrary to the language of the 2004 purported Amendment. Plummer seeks a declaratory judgment as to the identity of the proper beneficiaries of the Florence **[*8]** Thomas Living Trust and the Estate of Florence Thomas. Plummer further alleges that Lonon, acting on behalf of his principal, the Art School, and contemporaneously with his activities on behalf of the Estate and Plummer, proximately caused damages to the Estate and Plummer and that the Art School, as his principal, bears liability for these damages. Plummer also seeks to recover the monies received by distributees who may not have been entitled to receive such funds, including Emory & Henry College.

On December 10, 2012, the Art School moved to dismiss Plummer's Counterclaim and Cross Claims, and on January 25, 2013, the Art School moved for Judgment on the Pleadings on Plummer's Counterclaim and Cross Claims. On May 7, 2013, this action was designated as exceptional under Rule 2.1 of the General Rules of Practice for the Superior and District Courts and this case was assigned to the North Carolina Business Court. Pursuant to the Case Management Order entered July 18, 2013, the parties were to amend the pleadings by July 31, 2013. On July 31, 2013, the Art School filed an Amended Complaint, beginning another round of responsive pleadings. Plummer filed her Amended Answer on August 30, 2013. Also **[*9]** pursuant to the Case Management Order, the parties had until August 21, 2013 to withdraw or amend pending motions. On August 21, 2013, the Art School filed an Amended and Restated Motion to Dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure, contending Plummer lacks standing to maintain her claims and that the Counterclaims and Cross Claims fail to state a claim upon which relief can be granted. Plummer has filed her Response to the Amended and Restated Motion to Dismiss, and Plummer submits this Memorandum in Opposition to the Amended and Restated Motion to Dismiss.

## II. ARGUMENT

### A. STANDARD FOR MOTION TO DISMISS

The standard to be applied to a Rule 12(b)(6) motion is whether, the allegations, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. At issue is the legal sufficiency of the pleading and whether, on its face, the complaint reveals some insurmountable bar to a recovery. *Marzec v. Nye, 690 S.E.2d 537, 540 (N.C. App. 2010)*; *Carlisle v. Keith, 169 N.C. App. 674, 614 S.E.2d 542, 547 (2005)*. In applying this standard, the complaint is entitled to **[*10]** liberal construction. *Dixon v. Stuart, 85 N.C. App. 338, 354 S.E.2d 757 (1987)*. For purposes of Rule 12 (b)(6) motions, documents attached as exhibits and incorporated by reference are properly considered. *Marzec v. Nye, 690 S.E.2d 537, 540 (N.C. App. 2010)*.

### B. PLUMMER'S DECLARATORY JUDGMENT ACTION IS NOT SUBJECT TO DISMISSAL.

Under *N.C. Gen. Stat § 1-254* (2012), any person interested under a written contract or other writings … may have determined any question of construction or validity of the instrument and obtain a declaration of rights, status, or other legal relations thereunder. Under *N.C. Gen, Stat 1-255* (2012) an executor may bring an action for declaratory judgment to determine any question involving the administration of the estate or trust, or to determine the apportionment of the federal estate tax… Similarly, according to case law, standing exists where a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Mitchell v. Brewer, 705 S.E.2d 757, 765 (N.C. App. 2011)*.

As to Plummer, a justiciable controversy is raised by the pleadings as to the **[*11]** estate tax liabilities imposed by the overfunding of the Thomas-Plummer Trust by $ 584,200 (which has been admitted by all parties), and the source for such payment among beneficiaries who may have erroneously received distributions as directed by Grady Lonon. Plummer, as Executor of the Estate of Florence Thomas, is an interested party to that controversy; therefore, she has standing to bring her claims. (Pl.'s Ans. P 18, 27-28). To the extent that these improper distributions created an estate tax liability for which she might have personal responsibility, Plummer filed a third-party complaint to recoup those sums of money. *See* N.C. Gen. Stat. § 28A-13-10 (2012) regarding liability of a personal representative and N.C. Gen. Stat. § § 28A-27-1 *et seq.* (2012). Therefore, Plummer is an interested party both individually and as Executor of the Estate of Florence Thomas. Ultimately, Plummer's obligation as to from whom to recoup the money hinges on the construction of the 2004 purported Amendment.

Under N.C. Gen. Stat. § 1A-1, Rule 8(e)(2) (2012), a party may set forth alternative or hypothetical claims for relief and a pleading is not made insufficient if one of these alternative **[*12]** or hypothetical claims is insufficient, At the time Plummer filed her Answer on November 5, 2012, no party had contested the validity of the 2004 purported Amendment. On January 25, 2013, Emory & Henry College filed a responsive pleading challenging the validity of the 2004 purported Amendment. As to that issue, now a justiciable controversy exists regarding the identity of the rightful beneficiaries to the Estate of Florence Thomas and the Florence Thomas Living Trust. Because the 2004 purported Amendment has now been challenged, the issue's outcome will determine to whom Plummer looks to for satisfaction of the estate tax liability.

## C. THE THREE-YEAR STATUTE OF LIMITATIONS IN *N. C. GEN. STAT. § 36C* 6-604 (2012) DOES NOT BAR A CONTEST ALLEGING THAT 2004 PURPORTED AMENDED IS INVALID BECAUSE IT WAS PROCURED THROUGH CONSTRUCTIVE FRAUD.

For the first time in North Carolina, the Uniform Trust Code ("UTC") prescribes a statute of limitations for contesting revocable trusts. N.C. Gen. Stat § 36C-6-604 (2012) in pertinent part states:

> (a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the senior's death within the earlier **[*13]** of:
>
> (1) Three years after the senior's death; or
>
> (2) 120 days after the trustee sent the person a copy of the trust instrument and written notice pursuant to G.S. 1A-1, Rule 4 of the Rules of Civil Procedure, informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

The statute itself does not define the word "contest." However, Section 604's Official Comment specifically references Section 406 regarding creation of a trust under fraud, duress, or undue influence as being defined as a "contest." Constructive fraud is not listed. However, the Plaintiff Art School relies upon Section 604 to bar any challenge to the 2004 purported Amendment. Since constructive fraud is not listed in the defined terms as a contest, a reasonable construction is that a trust, or trust provision, procured by constructive fraud makes the trust invalid from its inception, negating the applicability of Chapter 36C. No case appears to have addressed this point (see, however, *Rushing v. Barron, 729 S.E. 2d 730 (N.C. App. 2012)* for a case involving other causes of action). In addition, and as shown below, the North **[*14]** Carolina Uniform Trust Code ("NC UTC") is not fully retroactive as applied to the facts of this case.

*1. The NC UTC is no/fully retroactive.*

*a. The NC UTC and its Comments*

North Carolina adopted the Uniform Trust Code, N.C. Gen. Stat. 36C-1-1 *et seq.* effective on January 1, 2006. Section 36C-11-1106(b) in its second sentence specifically provides that "an act done before January 1, 2006 is not affected by this Chapter." The circumstances surrounding the creation and execution of the purported 2004 Amendment were acts done prior to January 1, 2006. The creation of the purported 2004 Amendment on August 13, 2004, if accomplished by constructive fraud, is an act done on that date for which a ten year statute of limitations applies. The improper act created a vested right at the time of occurrence for which a retroactive application of the statute of limitations in Chapter 36C is in violation of constitutional provisions (see below). In addition, N.C. Gen. Stat. § 36C-11-1106(b) (2012) provides:

> (b) Except as otherwise provided in this Chapter, any rule of construction or presumption provided in this Chapter applies to trust instruments executed before January 1, 2006, unless **[*15]** there is a clear indication of a contrary intent in the terms of the trust *or unless application of that rule of construction or resumption would impair substantial rights of a beneficiary.* (Emphasis added).

Given the allegations of constructive fraud, fraudulent concealment, negligence and breaches of fiduciary duty involved in the duplicitous actions of Lonon, and the taxes and damages created thereby, to apply a statute of limitations to bar a contest to this pre-2006 trust instrument impacts the substantial rights of six individuals, five charitable organizations besides the Art School (ASU, Emory & Henry, Helton Methodist Church, Helton Cemetery and the Ashe County Arts Council), as well as the Estate of Florence Thomas, The Florence Thomas Living Trust and the Thomas-Plummer Trust, all of whom, including the Art School, should have an opportunity in equity to plead and have their respective positions heard in a declaratory judgment action. Accordingly, the ten (10) year statute of limitations under prior law, N.C.G.S. 1-56, would apply to contest the validity of the 2004 purported Amendment.

The Official Comment and North Carolina Comments to N.C. Gen. Stat. § 36C-1-101 and **[*16]** Section 1106 provide that "[t]he Uniform Trust Code is intended to have the widest possible effect *within constitutional limitations*." (Emphasis added). N.C. Gen. Stat. § 36C-1-106 further states that the "common law of trusts and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State." The key language of Section 1106 is found in two portions of the section. First, it is the language about a "right acquired" before January 1, 2006 and an "act done" before January 1, 2006. If the right to a constructive fraud claim began to run when the 2004 purported Amendment was procured on August 13, 2004, it was then a vested right, and the three-year statute of limitation of Section 604 could not be applied retroactively to cut off the vested right.

*b. North Carolina case law on retroactivity of statutes*

The first rule of statutory application is that "ordinarily statutes are presumed to act prospectively only, unless it is clear that the legislature intended that the law be applied retroactively." *Thompson v. Charlotte-Mecklenburg Bd. of Educ. 731 S.E.2d 862 (N.C App. 2012).* While the UTC was **[*17]** clearly intended to apply broadly, it is circumscribed by constitutional limitations and equity. The Official Comment to Section 1106 states: "Mlle Uniform Trust Code is intended to have the widest possible effect *within constitutional limitations*." (Emphasis added).

North Carolina case authority further illustrates this point. A "statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis." *Gardner v. Gardner, 300 N.C. 715, 719 268 S.E.2d 468, 471 (1980).* Further retrospective application of new statutes is not allowed to leave a party without a remedy. *B-C Remedy Co v Unemployment Compensation Comm'n, 226 N.C. 52, 57, 36 S.E.2d 733, 736 (1946).* A statute or amendment will operate prospectively only, "where the effect of giving it a retroactive operation would be to … destroy a vested right." *Smith v. Mercer, 276 N.C. 329, 337, 172 S.E.2d 489, 494 (1970).*

An accrued cause of action can be a vested right. In *Armstrong v. Armstrong, 322 N.C. 396, 402, 368 S.E.2d 595, 598 (1988),* the Court declined to **[*18]** apply the new statute retroactively because its application would broaden the statute of limitations and would destroy the defendant's vested right not to be sued. In an opposite examination regarding retroactive application of a statute of limitations, in *Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982),* the Court held that the legislature did not intend the statute of repose in N.C.G.S. 1-50(6) to be retrospectively applied to causes of action accruing before the effective date of the new statute, October 1, 1979, reasoning because an accrued cause of action is a property interest or a vested right.

In a further examination of retroactivity equity comes into the focus by examining whether "manifest injustice" would occur if statutes are applied retroactively. In *Twaddell v. Anderson, 126 N.C. App. 56, 65, 523 S.E.2d 710, 717 (1999),* the court stated that it is "well settled that legislation that is interpretive, procedural, or remedial must be applied retroactively, while substantive amendments are given only prospective application." *Id.* The court goes on to define substantive statutes as "those which create, confer, define, **[*19]** or destroy rights, liabilities, causes of action, or legal duties." The court defines procedural statutes as describing "methods for

enforcing, processing, administering, or determining rights, liabilities, or status." *Id. Twaddell* looked to three factors from *Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974)* for the analysis of whether there would be manifest injustice if the act were applied retroactively: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Twaddell, 126 N.C. App. at 65*.

Looking at these factors the question is whether applying Section 604 imposes a new cause of action or provides new rights to the parties in this case. The public policy aim of the statute is to provide a certain time limit for contesting revocable trusts. However, the change impacts every revocable North Carolina trust. Even the North Carolina Comment acknowledges there was "no provision in prior law specifying the time in which to contest the validity of a revocable trust after the settlor's death." Applying the Section 604 NC UTC statute of limitations **[*20]** cuts off the prior constructive fraud ten-year statute of limitations and would result in manifest injustice to the beneficiaries disinherited because of the 2004 purported Amendment. By shortening the statute of limitations for a constructive fraud claim involving the creation or procuring of the 2004 Amendment s from ten (10) years to three (3) years, the beneficiaries are deprived of the ten (10) year statute of limitations they would have had prior to the UTC's enactment. They suffer manifest injustice if the statute were applied retroactively to impair their ability to bring suit for constructive fraud.

*c. Other jurisdiction 's case law of retroactivity of UTC*

Other jurisdictions that have adopted some form of the Uniform Trust Code which have looked at similar situations have often focused on the prejudice to the parties to help decide the case. All of these jurisdictions have the same general rules as North Carolina regarding retroactive application of statutes: (1) A statute only has prospective application unless expressly made retroactive; *McCabe v. Duran, 180 P.3d 1098 (Kan. App. 2008)*; and (2) when the law affects a substantive or vested right it **[*21]** will not be retroactive because doing so constitutes a taking of property without due process. *Id.* Cases which found no prejudice but did not involve a statute of limitations issue are: *Butt v. Bank of America, N.A., 477 F.3d 1171 (10th Cir. 2007)*; *Warne v. Warne, 2012 UT 13 (UT 2012)*; *In the Matter of Goodlander, 20 A.3d 199 (N.H. 2011)*; *In re Trust Created by Inman, 693 N.W.2d 514 (Neb. 2005)*. Cases in which the UTC was not applied retroactively because of prejudice to the parties include: *Hemphill v. Shore*, (Kan. App. 2010); *McCabe v. Duran, 180 P.3d 1098 (Kan. App. 2008)*; *In re Wells Revocable Trust, 734 N.W.2d 323 (Neb. 2007)*; and *Godley v. Valley View State Bank, 89 P.3d 595 (Kan. 2004)*.

In *Hemphill*, the Court analyzed two sections of the UTC to hold that the UTC was not applicable and applied prior law as to statutes of limitations for accountings. First, it held that these failures to provide accountings were "acts done before the effective date" of the KUTC, January 1, 2003. (K.S.A. 58A-1106(a)(5) (same as N.C. Gen. Stat. § 36C-11-1106). Second, **[*22]** the court applied the statute of limitations prior to the UTC because Section 1106 also states that if a "right is acquired, extinguished, or barred upon the expiration date of a prescribed period that has commenced to run under any other statute before the effective date of this act, that statute continues to apply to that right even if it has been repealed or superseded." (K.S.A. 58A-11-5(b) (same as N.C. Gen. Stat. § 36C-11-1106).

In *Wells, 734 N.W.2d 323 (Neb. 2007)*, Charles C. Wells created a trust in February 1992. He died in March 1993 and his two sons, Lany and Lee Wells, became co-trustees; their mother, Irene Wells and the two sons became income beneficiaries. Irene died in January 2003. Lee filed a petition on June 27, 2004 for past rental on the trust land, an accounting of the trust, and an order removing Larry as co-trustee. In Larry's response he alleged that Lee's action for accounting was barred by the statute of limitations under the NUTC. The Nebraska UTC was enacted in 2003 but became effective on January 1, 2005. The court acknowledged that it was required to apply the NUTC to judicial proceedings commenced before January 1, 2005 except "in those **[*23]** instances where we determine that such application would 'substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties.'" Nebraska § 30-38,110(3). In looking at the statute of limitations' issue, the Court applied prior law (four-year statute of limitations from date an accounting received as opposed to one year under NUTC) because to apply the NUTC would prejudice the rights of the parties.

In the case at bar, applying the Section 604 UTC statute of limitations cuts off the prior constructive fraud claim and cause of action (an act done prior to the UTC effective date) which involves a ten-year statute of limitations. As in the cases above manifest injustice results to the

beneficiaries disinherited because of the 2004 purported Amendment. By shortening the statute of limitations the beneficiaries are deprived of the ten (10) year statute of limitations they would have had prior to the UTC's enactment. They suffer manifest injustice if the statute were applied retroactively to impair their ability to bring suit for constructive fraud.

**D. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO THE ART SCHOOL'S LIABILITY FOR THEIR [*24] AGENT, LONON, WHILE HE ACTED IN THE COURSE AND SCOPE OF HIS DUTIES ON BEHALF OF THE ART SCHOOL.**

Plummer's counterclaim meets the pleading standard for *respondeat superior*, and the issue is moot since the Art School's own pleadings raise the apparent agency of Lonon. Materials outside of the pleadings create issues of fact as to which parties Lonon was acting for in relation to his various activities, so summary judgment to the Aft School should be denied.

The Art School contends that Plummer failed to properly plead an agency relationship. For purposes of a Rule 12(b)(6) motion, documents attached as exhibits are considered. *Marzec v. Nye, 690 S.E.2d 537, 540 (N.C. App. 2010)*. The Art School attached to its Answer: (1) 2007 Articles of Incorporation in which the principal office of the Art School is stated to be Lonon's address, he is the registered agent, and he signed the document as "attorney at law"; (2) a 2012 Change of Registered Agent, indicating Lonon was the Art School's registered agent until 2012; and (3) a 2012 change of principal office address, indicating Lonon's office was the Art School's principal office up until 2012. (Pl.'s Ans. to Helton's **[*25]** Countercl., Exh. A-B).

In other pleadings, the Art School admitted that Lonon served as its Treasurer in 2009 and signed at least one tax form, Form 990-PF. (Pl.'s Ans. to Helton's Countercl. PP 34-35, Exh. A-B; Parish's Ans. and Countercl. P 17; Pl.'s Mot. to Dismiss and Ans. to Parish P 17: "The allegations contained in Paragraph 17 are admitted.").

Apparent authority "is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses." *Manecke v. Kurtz, 731 S.E. 2d 217, 221-222 (2012)*. The Articles of Incorporation filed with the Secretary of State hold Lonon out as the Art School's incorporator and attorney and his office as the principal office of the corporation for a period of five (5) years. In light of its public representations and its admissions in this lawsuit, the Art School's contention that Plummer failed to "properly plead the existence of an agency relationship" is an attempt "to run with the hare and hunt with the hound [citation omitted]." Whitacre v. *Partnership v. Biosignia, Inc., 358 N.C. 1, 591 S.E.2d 870, 884 (2004)*.

*Respondeat superior* is a **[*26]** doctrine of vicarious, rather than direct liability. The master is liable, not because he authorized tortious activity, but because his agent, acting in the course and scope of his duties, performed these duties in such a manner as to inflict injury. *West v. F.W. Woolworth Co., 215 N.C. 211, 1 S.E.2d 546, 548-549 (1939)*. Hummer pled *respondeat superior* because Lonon incorporated the Art School (Plummer's Amended Ans. and Countercl. P 24). While the Art School reads an inference into this allegation that Lonon did so on behalf of Betty Plummer as Trustee, she was under no legal duty to incorporate this beneficiary. The allegation is just as suggestive of the inference that it was done on the Art School's behalf. On a liberal construction of Plummer's pleading, in conjunction with the Art School's admissions of record, *respondeat superior* is properly pled.

If ratification of Lonon's activities by the Art School were necessary for *respondeat superior*, that ratification also has been pled. In Emory & Henry College's responsive pleading their Exhibit A consists of a fax from Lonon in 2009 in which he tells Emory & Henry College that he presented an attached **[*27]** summary of distributions to members of the Art School Board in 2007. (Emory & Henry's Reply to Countercl. and Third-Party Coml. Exh. A). The Exhibit A distributions are nearly identical to the distributions he directed Plummer to make derogating the 2004 purported Amendment. The inference from Exhibit A is that the Art School ratified those incorrect distributions at their 2007 meeting. In addition, by accepting the assets distributed to them as shown on the Exhibit A, the Art School has ratified and approved the distribution sheet presented by Lonon. See *Honeycutt v. Honeycutt, 701 S.E.2d 689, 695 (2010)* (Affirming summary judgment for defendant based on plaintiff's acceptance of benefits and imputed ratification of distributions).

Finally, Lonon has submitted a sworn statement as to substantial activities on behalf of the Art School. He

signed documents as an attorney for the Art School and as an officer in the time period at issue, March 30, 2007 through 2009. (Def. Lonon's Resp. Pl.'s Interrog., pgs. 8 and 10, Exh. 1-5). Contrary to the Art School's contention in its brief, an employer can be held liable for the intentional conduct of its employee. *See Thrower v. Coble Diary Products Coop., Inc., 249 N.C. 109, 105 S.E.2d 428 (1958)*; **[*28]** *West v. F.W. Woolworth Co., 215 N.C. 211, 1 S.E.2d 546 (1939)*; *White v. Consolidated Planning, Inc., 166 N.C. App. 283, 603 S.E.2d 147 (2004)*. The proper inquiry is not whether the actions were intentional, but whether the tort was committed in the course of activities the employee was authorized to perform. *White, 603 S.E.2d at 158* (Employee authorized to administer customer accounts at the time plaintiffs' accounts were converted).

In terms of the pleadings of this case, injury arose from the misdirection of assets during the period when Lonon was acting with duplicity in furtherance of both the Art School's and Plummer's objectives. According to the fax to Emory & Henry, authored by Lonon, the Art School is implicated in the misdirection of assets as it had received knowledge of them. (Emory & Henry's Reply to Countercl. and Third-Party Comp!. Exh. A).

Outside of the pleadings to this case, Lonon denies he acted as attorney for any of these defendants following Florence Thomas' death, but he states unequivocally that the Art School Board "consented" for him to act "as volunteer unpaid agent" in collecting the Florence Thomas assets. **[*29]** Assuming those facts are true, his misdirection of assets occurred solely in the course and scope of his duties on behalf of the Art School. (Lonon's Ans. PP 38, 43, 51 & 75; Def. Lonon's Ans. to Pl.'s Interrog. pgs. 8 and 10).

The Art School further seeks to dissect Lonon's activities performed on behalf of Plummer from activities he performed on behalf of the Art School. A Rule 12 (b)(6) motion is not the vehicle for that enterprise because the factual allegations of the complaint are deemed to be true for the purpose of the instant motion. Those allegations are that Lonon undertook to act on behalf of all parties in the improper distribution of assets. It is not relevant that the Art School did not direct Lonon's actions. It is of no consequence that his activities did not benefit the Art School. Tortious conduct by an employee may not be expected or desired by the employer, but that circumstance will not absolve it of vicarious liability. *West, 1 S.E.2d at 549*. Contrary to the Art School's contention, Plummer further does not need to plead a fiduciary relationship between the Art School and herself All that is necessary is an allegation to the effect that the **[*30]** agent established a fiduciary relationship with the plaintiff and breached that relationship in the course and scope of his duties. *West, 1 S.E.2d at 548-9*; *White, 603 S.E.2d at 155-6*.

The Art School cites a case on agency decided prior to the enactment of the North Carolina Rules of Civil Procedure for the proposition that a plaintiff cannot sue an agent and principal. By virtue of *N.C. Gen. Stat. § 1A-1 Rule 8(e)(2)*, claims can be pled in the alternative. Therefore, Plummer can plead the liability of both Lonon and his principal the Art School.

*N.C. Gen. Stat. § 1A-1 Rule 12(b)(6)* provides that if matters outside the pleadings are considered, then the motion to dismiss is to be treated as a motion for summary judgment. Plummer contends that the Court cannot ignore the sworn statements and representations in pleadings by Lonon when all parties admit his involvement in the Art School. In light of these materials, the Art School's motion to dismiss all of Plummer's claims relating to agency liability should be treated as a summary judgment motion and should be denied on the existence of a genuine issue of material fact.

**E. THE CLAIM FOR CONSTRUCTIVE [*31] FRAUD DOES STATE A CLAIM FOR RELIEF.**

Elements of a constructive fraud claim are: facts and circumstances (1) that create a relation of trust and confidence and; (2) lead up to and surround the consummation of the transaction in which the defendant is alleged to have taken advantage of his position of trust. *Terry v. Terry, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981)*. An additional requirement is that the defendants sought to benefit themselves. *Capps v. Blondeau, 2010 WL 1552048*. (Denying motion to dismiss by attorney alleged to have abused a confidential relationship in the transfer of assets).

Facts and circumstances pled congruently with these elements meet the particularity requirement of N.R.C.P. Rule 9(b). *Terry, 273 S.E. 2d at p. 679*. The relationship of attorney and client alone is sufficient to create a fiduciary relationship, or a relationship of trust and confidence. *Wilkins v. Safran, 185 N.C. App. 668, 649 S.E.2d 658, 663 (2007)*. The transactions complained of arose out of and were able to occur because of the relationship of trust and

confidence Plummer had in Lonon.

Therefore, Plum-Ler does not **[*32]** concede that her prior pleadings were deficient. In fact, Plummer, in her amended answer filed on August 30, 2013 alleges that a money market account in the amount of $ 7,525.94, actually belonging to her as joint tenant, was directed to be distributed to the Art School by Lonon. In reliance on this instruction, Plummer wrote a check in that amount to the Art School.

Attached to her answer as Exhibit C is a five-page letter allegedly from Lonon. The letter purports to direct distributions, again, to beneficiaries not included in the 2004 purported Amendment. Pertinent language reads:

> Betty [Plummer], I want to explain to you how the assets of your mother's Living Trust need to be distributed and what needs to be done to distribute them. . . To correct the wrong transfers, those two amounts ($ 66,361.30 and $ 7,525.94) need to be written out of the First Citizens Thomas-Plummer Trust checking account to The Paul and Florence Thomas Memorial Art School, Inc. . . . I know this is confusing. . . If you have any questions about any of this, I will be happy to explain it.

It is clear in these instructions that Lonon intended to benefit the Art School by taking money belonging **[*33]** to Betty Plummer, whose joint account was easily discoverable by contacting the bank involved, and directing that it go to his principal. Nowhere in these five pages does Lonon indicate who he is acting for. The clear implication is that he is acting as an attorney for the Estate and the Florence Thomas Living Trust, This letter alone evinces a relationship of trust and confidence. The letter also shows Lonon was inaccurately and wrongfully portraying how assets were owned for the purpose of securing assets for his principal. The letter itself is an abuse of a confidential relationship that resulted in the wrongful transfer of $ 7,525.94 to the Art School. (Plummer's Arks. and Countercl. Exh. A-C). All elements of constructive fraud are met.

**F. PLUMMER'S CLAIMS FOR CONSTRUCTIVE FRAUD, BREACH OF FIDUCIARY DUTY, NEGLIGENT MISREPRESENTATION, AND NEGLIGENCE ARE NOT BARRED BY THE STATUTE OF LIMITATIONS**.

Plummer's Causes of Action for Constructive Fraud, Breach of Fiduciary Duty, Negligent Misrepresentation, and Negligence are not barred by the applicable statute of limitations.

*1. Constructive Fraud*

In this cause of action, Plummer alleges that Lonon, while acting as agent **[*34]** of the Art School and for its benefit, as well as his own, secured a relationship of trust and confidence with Plummer, then Trustee of the Thomas-Plummer Trust and the Florence Thomas Living Trust and named Executrix of the Estate of Florence Thomas, and that such trust and confidence was abused, causing loss to Plummer and the Estate, for which the Art School, as principal, bears liability.

The statute of limitations for constructive fraud is ten years. *Toomer v. Branch Banking & Trust Company, 171 N.C. App. 58, 614 S.E.2d 328, 335 (2005)*. Lonon's last act on behalf Plummer in any of her fiduciary capacities was the filing of Florence Thomas' will on January 18, 2012. (Plummer's Amended Ans. and Countercl. P 17). Such act is within the ten year statute of limitations. Alternatively, in February 2009, Lonon, while acting as agent of the Art School and attorney for Plummer in her fiduciary capacities, wrote a memorandum to Emory & Henry College with an attachment mistakenly stating that the College was entitled to $ 400,000 from the Florence Thomas Living Trust. This act is within the ten year statute.

*2. Breach of Fiduciary Duty and Negligent Misrepresentation* **[*35]** .

In the breach of fiduciary duty cause of action, Plummer alleges that Lonon, while acting as agent of the Art School and for its benefit, assumed a fiduciary duty to Plummer, then Trustee of the Thomas-Plummer Trust and the Florence Thomas Living Trust and named Executrix of the Estate of Florence Thomas, and that breach of this fiduciary duty caused loss to Plummer and the Estate, for which the Art School, as principal, bears liability.

In its negligent misrepresentation cause of action, Plummer alleges that Lorton, while acting as agent of the Art School and for its benefit, owed a duty to Plummer to exercise reasonable care in communicating and disseminating tax and estate administration information and that breach of this duty caused loss to Plummer, for which the Art School, as principal, bears liability.

Both these causes of action are governed by the three year statute of limitations. *Hunter v. Guardian Life Insurance Co., 162 N.C. App. 477, 593 S.E.2d 595, 601 (2004)* (negligent misrepresentation); *Marzec v. Nye, 690 S.E. 2d 537, 541 (2010)* (breach of fiduciary duty). Pursuant to *N.C. Gen. Stat. § 1-52(16)*, causes of action subject to the **[*36]** three year statute of limitations shall not accrue until harm to the claimant or physical damage to his property becomes apparent, or ought reasonably to have become apparent, whichever occurs first. According to the allegations of Plummer in her Counterclaim and Third-Party Complaint, which are deemed to be true, she did not discover damages until 2011 following the investigation of accounting and tax issues. (Plummer's Amended Ans. P 41). Plummer's Counterclaim, first filed a year later, is within the three year statute of limitations.

*3. Negligence*

In her negligence cause of action, Plummer alleges that Lonon, while acting as agent of the Art School and for its benefit, assumed a duty to her to administer the Estate with reasonable care and that breach of this duty caused loss to Plummer and to the Estate, for which the Art School, as principal, bears liability. Lonon is an attorney and was acting as attorney for Plummer and in her capacity as Executrix. Therefore the applicable statute of limitations is *N.C. Gen. Stat. § 1-15(c)* (2012), which governs professional malpractice. Under 1-15(c), the statute of limitations for professional malpractice is three years from the date **[*37]** of the defendant's last act giving rise to the cause of action. If discovery of injury is made two or more years beyond the last act giving rise to the cause of action, the claimant must file suit within one year after the discovery is made, but in no event may a cause of action be brought over four years beyond the defendant's last act. Lonon's last act in relation to the Florence Thomas entities was the filing of Florence Thomas' will on January 18, 2012, at a time when the Art School's principal office was his office. (Plummer's Amended Ans. and Countercl. P 17; Pl.'s Ans. to Helton, PP 34-35, Exh. A-B). Plummer's original counterclaim was filed November 5, 2012.

Alternatively, even if Lonon's last act was his memorandum to Emory & Henry College, dated February 26, 2009, in which he included a schedule of trust assets and represented that Emory & Henry was a beneficiary of the Florence Thomas Living Trust, his negligence was not discovered until 2011 following the investigation of accounting and tax issues. (Emory & Henry's Ans. Exh. A; Plummer's Amended Ans. and Countercl. P 28). Plummer's Counterclaim was filed within the four year statute of repose, if the memorandum to Emory **[*38]** & Henry is construed as Lonon's last act.

**G. IN AGENCY THEORY, IT IS NOT NECESSARY FOR THERE TO BE A FIDUCIARY DUTY BETWEEN THE ART SCHOOL AND PLUMMER**.

For this discussion, please see *supra*, Section II. D.

**H. CONTRIBUTORY NEGLIGENCE HAS NOT BEEN ESTABLISHED AS A MATTER OF LAW**.

In order to obtain the dismissal of a plaintiff's complaint on contributory negligence as a matter of law, the defendant must show that the plaintiff's allegations, treated as true, demonstrate that his or her negligence proximately contributed to their injury so clearly that no other conclusion can be reasonably drawn. *Sharp v. CSX Transportation, Inc., 160 N.C. App. 241, 584 S.E.2d 888, 890 (2003)* (Reversing dismissal of a complaint on contributory negligence grounds where plaintiff had driven around a crossing barricade on to railroad tracks). Plummer's allegations are that Lonon, among other misdeeds, directed Plummer as Trustee to pay individuals and entities who were no longer Florence Thomas beneficiaries. The Art School admitted this allegation. (Plummer's Ans. PP 27-28; Pl.'s Ans. PP 27-28). That alone prevents a conclusion that contributory negligence so clearly **[*39]** contributed to Plummer's injuries that no other conclusion can be reasonably drawn.

Essentially, Plummer's allegations are that Lonon, acting in his multiple capacities as attorney for all parties, took advantage of his fiduciary relationship with Plummer and acquired assets for the Art School in such a manner as to work injury to Plummer. For purpose of this motion, those allegations are taken as true. Based on these allegations, Plummer's negligence as Executor, if any, is incapable of being determined so clearly that no other conclusion can be reasonably drawn.

**I. PLUMMER HAS PLED PLAUSIBLE DAMAGES**.

Please see discussion *supra* in Section II. B, regarding personal representative liability for estates.

## III. CONCLUSION

For the reasons set forth herein, Plaintiffs amended and restated motion to dismiss should be denied as to Plummer.

This the 11th day of September, 2013.

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 15.8 of the Amended General Rules of Practice and Procedure for the North Carolina Business Court, counsel for Plummer certifies that the foregoing brief, which is prepared using a proportional font, is double-spaced and is less than 7500 **[*40]** words as reported by the word-processing software.

/s/ [Signature]
Micah D. Ball
State Bar No. 10238
Attorney for Betty Lou Thomas Plummer,
Individually and as Executor of the Estate of
Florence Thomas
Colombo, Kitchin, Dunn, Ball & Porter, LLP
1698 East Arlington Boulevard
Greenville, North Carolina 27858
Telephone: 252-321-2020
Facsimile: 252-353-1096

/s/ [Signature]
Thomas A. Worth
State Bar No. 10590
Attorney for Betty Lou Thomas Plummer,
Executrix of the Estate of Florence Thomas
The Worth Law Firm
301 South Greene St., Suite 310
Greensboro, NC 27401
Telephone: 336-275-6344
Facsimile: 336-275-6484

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document filed on behalf of Betty Lou Thomas Plummer, Individually and as Executor of the Estate of Florence Thomas, were served upon counsel for the parties by electronic service in accordance with the Case Management Order dated July 18, 2013, and by mailing copies thereof by first-class mail, postage prepaid, to the *pro se* parties, Gerald Morton and Betty Morton, at their addresses listed below.

Jeffrey D. Patton, Esq.
Erin Jones Adams, Esq.

*Attorneys* **[*41]** *for The Paul and Florence Thomas*

*Memorial Art School, Inc.*
Spilman Thomas & Battle, PLLC
110 Oakwood Drive, Suite 500
Winston-Salem, North Carolina 27103

Jamie Lisa Forbes, Esq.

*Attorney for Peter Parish, Successor*

*Trustee of the Thomas-Plummer Trust*
301 South Greene Street, Suite 300
Greensboro, North Carolina 27401

John T. Kilby, Esq.

*Attorney for Ann Griffitts, Patsy M. Dolinger*,

*Pauline E. Hart, and Melba Miller*
Kilby & Hurley Attorneys at Law
Post Office Box 24
West Jefferson, North Carolina 28694

Appalachian State University
c/o North Carolina Attorney General
9001 Mail Service Center
Raleigh, NC 27699-9001

Vance Barron, Jr., Esq.
Attorney for Stanley Atwell,

*Successor Trustee of the Florence*

*Thomas Living Trust*
Barron & Berry, LLP
PO Box 2370
Greensboro, NC 27402

David A. Jolly, Esq.

*Attorney for Helton United Methodist Church*

*and Helton Cemetery Association, Inc.*
1781 Clifton Road
Crumpler, North Carolina 28617

Steve M. Pharr, Esq.
Kristina M. Varady, Esq.

*Attorney for Emmy & Henry College*
Pharr Law, PLLC
Suite 600, 8 West Third Street
Winston-Salem, North Carolina 27101

Mr. **[*42]** Gerald W. Morton, *pro se*
Post Office Box 16353
Bristol, Virginia 24209

Ms. Betty K. Morton, *pro se*
1199 Hayes Forest Drive, Apt. 209
Winston-Salem, NC 27106-3370

This the 11th day of September, 2013.

/s/ [Signature]
Micah D. Ball
State Bar No. 10238
Attorney for Betty Lou Thomas Plummer,
Individually and as Executor of the Estate of
Florence Thomas
Colombo, Kitchin, Dunn, Ball & Porter, LLP
1698 East Arlington Boulevard
Greenville, North Carolina 27858
Telephone: 252-321-2020
Facsimile: 252-353-1096

Thomas A. Worth
State Bar No. 10590
Attorney for Betty Lou Thomas Plummer,
Executrix of the Estate of Florence Thomas
The Worth Law Firm
301 South Greene St., Suite 310
Greensboro, NC 27401
Telephone: 336-275-6344
Facsimile: 336-275-6484

[SEE EXHIBIT A IN ORIGINAL]

End of Document