

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

12 CVS 359

NORTH CAROLINA SUPERIOR COURT, ASHE COUNTY

January 16, 2014

## **Reporter**

2014 NCBC Motions LEXIS 212 \*

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 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.

## **Title**

---

**PLUMMER'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS OF PLUMMER INDIVIDUALLY**

## **Text**

---

Betty Lou Thomas Plummer ("Plummer"), individually, submits this Memorandum in Opposition to Plaintiff's Motion to Dismiss Counterclaims of Defendant Plummer, individually.

## **I. FACTUAL OVERVIEW**

Plaintiff, The Paul and Florence Thomas Memorial Art School, Inc. (the "Art School"), was incorporated by attorney Grady Lonon ("Lonon") as a non-profit corporation on April 23, 2007 (Plummer's Amended Countercl. P 24). 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 Lonon's office. *Id.*

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 **[\*2]** entities and individuals upon Florence Thomas' death: Appalachian State University Art Department, Patsy M. Dolinger, Betty Morton, Gerald Morton, Pauline Hart, Anne Griffiths, 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 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. **[\*3]** (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 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 **[\*4]** a real estate purchase as its attorney and listed his law office as the principal office of the Art school for five years (Plummer's Amended Countercl. P 24). 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. *Id.*

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 (Plummer's Amended Countercl. PP 24, 29). Because of written instructions Lonon gave Plummer, the Thomas-Plummer Trust was over-funded by \$ 584,200 (*Id.* at P 31). The Estate of Florence Thomas, the Florence Thomas Living Trust 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.

*Id.*

Lonon, as attorney for the Florence Thomas Entities and as agent and attorney for the **[\*5]** 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. *Id.* at P 39. The result is that no estate tax liabilities have been paid to date.

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 Amended Countercl. P 29; Exh. C). According to Lonon, the Art School knew of these payments to outside parties and entities as early as 2007. *Id.*

At the same time Lonon was serving as Treasurer of the Art School in 2009, he communicated by telephone and fax communications 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. (Plummer's Amended Countercl. PP 38-39; Compl. Exh. A, 2004 Amendment, Art. 7).

Lonon, as attorney for the Florence Thomas Entities **[\*6]** 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 Amended Countercl., P 29). 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.

Lonon, as attorney for the Florence Thomas Entities and agent and attorney for the Art School, failed to probate the 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. *Id.* at P 17. Further, as specifically alleged in Plummer's Amended Counterclaim, Lonon was the agent of the Plaintiff Art School; his actions as its agent, comprise the following:

- (1) He was the incorporator for the Plaintiff Art School;
- (2) He was a corporate officer of the Plaintiff Art

School;

(3) He was the registered agent of the Plaintiff Art School;

(4) He acted as an ex-officio board member of the Plaintiff Art School;

(5) His office was the registered office of the [\*7] Plaintiff Art School;

(6) He obtained the tax identification number for the Plaintiff Art School;

(7) He held money in his trust account on behalf of the Plaintiff Art School;

(8) He negotiated and closed real estate transactions for the Plaintiff Art School;

(9) He cashed out certificate of deposits for the Plaintiff Art School that were held in the Florence Thomas Living Trust;

(10) He signed and filed with the Internal Revenue Service the Form 1023 Application for Tax Exempt Status for the Plaintiff Art School, assisted it in acquiring tax exempt status;

(11) He served as Treasurer in 2009 and signed the Form 990-PF on February 15, 2011, as Treasurer. *Id.* at P 24.

After the death of Florence Thomas, some of the actions Lonon purportedly undertook on behalf of Plummer to administer the Estate of Florence Thomas and the lack of instruction in administering the trust entities were actually to the detriment of the Estate and trust entities and to the benefit of the Art School. For example, as alleged in Plummer's amended counterclaim, Lonon distributed numerous valuable paintings produced by Florence Thomas to the Plaintiff Art School, prior to [\*8] the commencement or completion of the administration of the Estate of Florence Thomas and the trust entities. *Id.* at P 26. In addition, other assets, including cash, securities, investment in real estate trusts, and bank accounts, were distributed to the Plaintiff Art School by or at the instruction of Grady Lonon, prior to the commencement of even the first act of the administration of the Estate of Florence Thomas and the trust entities. *Id.* at P 27. Grady Lonon, in his multiple capacities as an agent of the Art School and attorney for the Estate of Florence Thomas, the Florence Thomas Living Trust and the Thomas-Plummer Trust, directed Betty Plummer in a five-page typed letter to distribute the amount of \$ 7,525.94 (the

funds received by the Thomas-Plummer Trust from First Citizens Bank account number XXXXXX6085) to the Art School. At the time of this distribution, Betty Plummer, in her individual capacity, was the rightful owner of these funds by virtue of the contract and signature card with First Citizens Bank when the account was established. *Id.* Exh. A, B. The check for these funds from the Thomas Plummer Trust to the Art School is attached to Plummer's amended [\*9] counterclaim. *Id.* at P 34; Exh. B.

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 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 [\*10] 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,

Counterclaims and Crossclaims on August 30, 2013. Also 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 [\*11] 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 filed her Response to the Amended and Restated Motion to Dismiss, and Memorandum in Opposition to the Amended and Restated Motion to Dismiss, to which the Art School filed a memorandum in reply. In its October 31, 2013 Order, the Court granted Plaintiff's Motion to Dismiss the fourth (constructive fraud), fifth (breach of fiduciary duty), sixth (negligent misrepresentation), seventh (negligence), eighth (conversion), and ninth (violation of the trust code) causes of action as pertaining to claims of the Estate of Florence Thomas and the Thomas-Plummer Trust. On December 27, 2013, the Art School filed its Motion to Dismiss Counterclaims of Defendant Betty Lou Thomas Plummer, individually. Contemporaneously with her Response to this Motion to Dismiss and this memorandum in support of the Response, Plummer has filed a Motion for Reconsideration of the October 31, 2013 Order.

## II. ARGUMENT

### A. STANDARD FOR MOTION TO DISMISS

A complaint may be dismissed for failure to state a claim if it clearly lacks merit. A lack of merit [\*12] may consist of (1) absence of law to support a claim made, (2) lack of sufficient facts to make a good claim, or (3) disclosure of some fact which will necessarily defeat the claim. Sutton v. Duke, 277 N.C. 94, 1020-3, 176 S.E. 2d 161, 166 (1970). ("A complaint should not be dismissed for insufficiency unless it appears *to a certainty* that plaintiff is **not** entitled to relief under any statement of facts which could be provided in support of the claim.") (Emphasis added). It is the function of a motion to dismiss to "test the law of a claim, not the facts which support it." White v. White, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979).

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 (in this case, a counterclaim) 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 [\*13] applying this standard, the complaint is entitled to 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. DISMISSAL OF PLUMMER'S CLAIMS IN HER REPRESENTATIVE CAPACITY WAS PREMISED ON CLEAR ERRORS OF LAW BY THE COURT; THEREFORE, THE SAME CLAIMS BROUGHT IN HER INDIVIDUAL CAPACITY SHOULD NOT BE DISMISSED.**

#### *1. Plummer brings her claims in tort, not contract.*

Plummer's claims of constructive fraud, breach of fiduciary duty, negligent misrepresentation, negligence, conversion, and violation of the North Carolina Uniform Trust Code are based on allegations of vicarious liability in tort, not in contract. In the October 31, 2013 Order, the Court dismissed Plummer's causes of action she had brought in her representative capacity as Executor of the Estate of Florence Thomas, stating that claims arising out of a particular transaction or occurrence must be brought against either the agent or the principal, not both. The Court relied on a case [\*14] cited by the Art School, Frazier v. Beard, 1996 NCBC Lexis 3 at 21-22 (N.C. Super. Ct. Oct. 24, 1996) (dismissing fraud, security fraud, negligent misrepresentation and unjust enrichment claims against principal where the agent was already sued). However, the Frazier case is distinguishable from our case in several respects and its holdings were misapplied to the facts of our case.

In Frazier, the claims of the Plaintiff did not result in vicarious liability because there was not a principal and agency relationship found to exist. In addition, this case commingled theories of tort and contract to reach a result that is inconsistent and inapplicable to claims based solely in tort, as is the case at bar. In Frazier, the Court recognized the existence of an express contract between the parties. Id. at P 17. The Court then apparently applied the contract theory of election of remedies to the tort claims of the case without distinguishing the two causes of

action. As a result, this case should not be authority for an action based solely in tort.

Plummer brings her counterclaims in tort against the Art School under a theory of vicarious liability. [\*15] When suit is brought in tort, it is because no contract exists between the parties; therefore, principal-agent liability is not alternative, but joint and several as set out by statute, under the Uniform Contribution among Tortfeasors Act. N.C. Gen Stat § 1B-1, et seq.; See also Yates v. New South Pizza, Ltd., 330 N.C. 790, 412 S.E.2d 666 (1992). In *Yates*, a passenger, injured when a pizza delivery vehicle struck the car he rode in, filed a personal injury action against the delivery person's employer after he settled with the delivery person. In a case of first impression, the issue in *Yates* was whether the injured plaintiff could proceed against the employer on *respondeat superior* liability after having released the employee. The North Carolina Supreme Court held that the plaintiff could proceed against the employer and the employee under the Uniform Contribution among Tortfeasors Act because the "tortfeasor" under the Act encompassed a vicariously liable master.

In 2003, the North Carolina Court of Appeals extended *Yates* to parties in privity of contract, who also sue in tort. In Jefferson Pilot Financial Ins. Co. v. Marsh USA Inc., 159 N.C. App. 43, 582 S.E.2d 701 (2003), [\*16] the insured (Jefferson Pilot) sued both the insurance broker (Marsh) and the insurer (Hartford) in tort for negligence under a principal/agent theory. The broker and the insured settled without releasing the insurer. The Court let Marsh proceed against the principal, Hartford, for contribution under the Uniform Contribution among Tortfeasors Act. Hartford had no direct negligence, but the jury found that because Marsh acted as an agent of Hartford, Marsh could have contribution. Hartford appealed on as to whether the issue of agency was properly submitted to the jury. The North Carolina Court of Appeals reasoned, "Hartford's lack of direct negligence, as found by the jury, is immaterial. The jury found that Marsh acted as an agent of Hartford." Id. at 51, 582 S.E.2d at 705. Therefore, it held, contribution by the principal was proper.

In our case there are numerous and overwhelming examples of this principal and agency relationship that would establish the responsibility of the agent's action on behalf of and for the benefit of his principal. (see paragraphs 1-11 on Page 3, *infra*). In addition, where there is a consensual relationship between the agent and

principal, [\*17] and where the agent's actions are the type of acts commonly done for a principal, where the parties have a reasonable expectation the acts would be done, the purpose of the acts were to benefit the principal or his business, the acts were reasonably connected to the principal's business, the principal accepted the benefits of the acts and has ratified the acts by such acceptance, then a principal and agency relationship where the principal is responsible for the agent's conduct can be inferred or imputed. The fact that an agent may have served gratuitously will not change this connection.

The cited facts, or the reasonable inferences derived therefrom, clearly establish a principal and agency relationship between Grady Lonon and the Art School for which vicarious liability in tort exists under the applicable law.

2. Even if Plummer's claims are analyzed under contract, the court still made a clear error of law in relying on election of remedy between principal and agent, because when the principal-agent relationship became known to Plummer is a question for the fact finder.

Alternatively, dismissing the claims even under a contract theory due to election of remedy was still [\*18] a clear error of law because it is unclear when Plummer became aware of the principal-agent relationship between Grady Lonon and the Art School, making Lonon an "undisclosed principal" until such knowledge is obtained. In Howell v. Smith, 261 N.C. 256, 134 S.E.2d 381 (1964), the court held that the rules were well-established in the law of agency in a contractual situation: "An agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had *actual knowledge* of the agency and of the principal's identity." Quoting Walston v. R.B. Whitley & Co., 226 N.C. 537, 39 S.E.2d 375, (the case on which *Frazier v. Beard* relies, and this court relied upon in dismissing Plummer's claims). In *Howell*, the court went on to define actual knowledge as being more than "[m]ere suspicion" and "means of knowledge do not amount to actual knowledge." The question in this case and in all cases where the principal is undisclosed is when the plaintiff has actual knowledge of the principal-agent relationship. That is a question for the fact finder and improper to dismiss on a 12(b)(6) motion.

If the plaintiff [\*19] is not aware of the relationship, the plaintiff cannot make an election of which party to sue. The "plaintiff cannot be held to have made an election until the issue resolving the relationship" in which both



the agent and the principal were defendants has been determined. See North Carolina Lumber Co. v. Spear Motor Co., 192 N.C. 377, 135 S.E. 115 (1926). In Carolina Hardware Co. et al. v. Banking Co., et al., 169 N.C. 744, 86 S.E. 706, which *Spear* cites to, the court reasoned "the plaintiffs had the right to hold the undisclosed principal liable when discovered. It is well settled that an undisclosed principal is bound by executory simple contracts made by the agent and by the acts of the agent, done in relation thereto, within the scope of his authority and in the course of his employment." Therefore, *Howell* stands for the proposition that the plaintiff does not have to elect a remedy until the relationship between the parties has been determined. Because it is not clear when Betty Plummer became aware of Lonon's relationship with The Art School, the fact finder should decide (1) when she had actual knowledge of the relationship; and (2) [\*20] whether she must elect a remedy between principal and agent.

### C. PLUMMER PROPERLY PLED AN AGENCY RELATIONSHIP BETWEEN LONON AND THE ART SCHOOL.

Plummer's counterclaim and amended counterclaim meet the pleading standard for *respondeat superior*. The issue is moot anyway, since the Art School's own pleadings raise the apparent agency of Lonon. Therefore, if materials outside of the pleadings create issues of fact as to which parties Lonon acted for in relation to his various activities, granting a motion to dismiss for failure to state a claim would be improper.

However, that point aside, *respondeat superior* is a 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). See also Jones v. Bank of Chapel Hill, 214 N.C. 794, 1 S.E.2d 135, 137 (1939) (Acts performed by the agent beyond the scope of his authority may be ratified by the principal.) Plummer pled *respondeat superior* [\*21] extensively in both her counterclaim and amended counterclaim.

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, invested money, closed a real estate purchase as its attorney and listed his

law office as the principal office of the Art school for five years (Plummer's Amended Countercl. P 24). 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. *Id.*

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 (Plummer's Amended Countercl. PP 24, 29). Because of written instructions Lonon gave Plummer, the Thomas-Plummer Trust was over-funded by \$ 584,200 (*Id. at P 31*). The Estate of Florence Thomas, the Florence Thomas Living Trust and the Thomas-Plummer [\*22] Trust all allege that this over-funding created estate tax liabilities to the federal government and the states of North Carolina and Virginia. *Id.*

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. *Id. at P 39*. The result is that no estate tax liabilities have been paid to date.

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 Amended Countercl. P 29; Exh. C). According to Lonon, the Art School knew of these payments to outside parties and entities as early as 2007. *Id.*

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 [\*23] purported Amendment he drafted, the Specific Bequests had been eliminated. (Plummer's Amended Countercl. PP 38-39; 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 Amended Countercl., P 29). 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.

Lonon, as attorney for the Florence Thomas Entities and agent and attorney for the Art School failed to probate the 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. [\*Id. at P 17.\*](#)

Further, as specifically alleged in Plummer's Amended Counterclaim, Lonon was the agent of the Plaintiff Art School. His actions as its agent, comprise the following: (1) He was the incorporator for the Plaintiff Art School; (2) He was a corporate officer of the Plaintiff Art School; [\*24] (3) He was the registered agent of the Plaintiff Art School; (4) He acted as an ex-officio board member of the Plaintiff Art School; (5) His office was the registered office of the Plaintiff Art School; (6) He obtained the tax identification number for the Plaintiff Art School; (7) He held money in his trust account on behalf of the Plaintiff Art School; (8) He negotiated and closed real estate transactions for the Plaintiff Art School; (9) He signed and filed with the Internal Revenue Service the Form 1023 Application for Tax Exempt Status for the Plaintiff Art School, assisted it in acquiring tax exempt status; (10) He served as Treasurer in 2009 and signed the Form 990-PF on February 15, 2011, as Treasurer. [\*Id. at P 24.\*](#) The Art School contends in its Motion to Dismiss Plummer's Claims that Plummer failed to assert that Lonon was authorized to act for the Art School, failed to assert the Art School had control over Lonon, and fails to allege that Lonon committed these acts in furtherance of the Art School or that the actions were ratified by the Art School. However, because of the scope and substance of the Lonon's action as described above, the inference that can be drawn that [\*25] Lonon was certainly authorized to act for the Art School because his signature appears on the Art School's legal documents. Because of Lonon's actions as described above, the inference that can be drawn the Art School instructed him to perform the tasks. Because of the transfers described above, Lonon furthered the Art School's goals, and it ratified his actions through receipt of the substantial benefits from Lonon's actions.

He also took actions that could be characterized as duplicitous in that he acted for both Plummer and the Art School. Some of the actions Lonon purportedly undertook on behalf of Plummer to administer the Estate of Florence Thomas and the trust entities were actually to the detriment of the Estate and trust entities and to the benefit of the Art School. For example, as alleged in Plummer's amended counterclaim, Lonon distributed numerous valuable paintings produced by Florence Thomas to the Plaintiff Art School, prior to the commencement or completion of the administration of the Estate of Florence Thomas and the trust entities. [\*Id. at P 26.\*](#) He cashed out certificate of deposits for the Plaintiff Art School that were held in the Florence Thomas Living Trust. [\*26] [\*Id. at P 24.\*](#) In addition, other assets, including cash, real estate investment trusts, securities, and bank accounts, were distributed to the Plaintiff Art School by or at the instruction of Grady Lonon, prior to the commencement or completion of the administration of the Estate of Florence Thomas and the trust entities. [\*Id. at P 27.\*](#) Grady Lonon, in his multiple capacities as an agent of the Art School and attorney for the Estate of Florence Thomas, the Florence Thomas Living Trust and the Thomas-Plummer Trust, directed Betty Plummer to distribute the amount of \$ 7,525.94, the funds received by the Thomas-Plummer Trust from First Citizens Bank account number XXXXXX6085 to the Art School. At the time of this distribution, Betty Plummer, in her individual capacity, was the rightful owner of these funds. The check for these funds from the Thomas Plummer Trust to the Art School is attached to Plummer's Amended Counterclaim. *Id. at P 34; Exh. B.* The Art School reads an inference into these allegations that Lonon did these actions on behalf of Plummer. However, the inference is more plausible that these actions were done on the Art School's behalf since the Art School received [\*27] the benefits, both in the structured entity and in funds, from Lonon. The benefits to Plummer were *de minimis*, and in actuality, Plummer has suffered significant detriment from Lonon's actions on behalf of the Art School. Plummer properly pled an agency relationship between Lonon and the Art School, and it is ultimately a question for the fact finder who Lonon was acting for when he damaged Plummer.

#### **D. INTENTIONAL ACTS CAN BE WITHIN THE SCOPE OF A PRINCIPAL AGENCY RELATIONSHIP.**

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 Dairy Products Coop., Inc.*, 249 N.C. 109, 105 S.E.2d 428 (1958); *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 [\*28] were converted).

**E. ASSUMING ARGUENDO, LONON WAS NOT ACTING IN THE COURSE AND SCOPE OF HIS AGENCY ON BEHALF OF THE ART SCHOOL, THE ART SCHOOL RATIFIED HIS CONDUCT BY RECEIVING THE BENEFITS HE TRANSFERRED TO IT.**

An agent's acts do not necessarily depend upon the existence of authority in the agent at the time the act was done. *Jones v. Bank of Chapel Hill*, 214 N.C. 794, 798, 1 S.E.2d 135, 137 (1939). The acts performed by the agent beyond the scope of his authority may be ratified by the principal. *Id.* According to the court in *Jones*, "ratification is the affirmance by a person of a prior act which did not bind him, but which was done or professed to be done on his account, whereby the act is given effect as to some or all persons, as if originally authorized." *Id.* Ratification is shown from any course of conduct which reasonably tends to show an intention to ratify the unauthorized acts. *Snyder v. Freeman*, 300 N.C. 204, 213, 266 S.E.2d 593, 599 (1980) (quoting 3 *Am.Jur.2d Agency* § 162). An acceptance of the benefits resulting from the unauthorized act is ratifying conduct. *Id.* at 213, 266 S.E.2d at 599-600. [\*29] ("The defendant will not be permitted to repudiate the act of its agent as being beyond the scope of his authority, and at the same time accept the benefits arising from what he has done while acting in its behalf.").

If ratification of Lonon's activities by the Art School were necessary for *respondeat superior*, that ratification has been pled in Plummer's counterclaim and amended counterclaim. By accepting and using the assets distributed to it as shown on the Exhibit C to Plummer's Amended Counterclaim, the Art School has ratified and approved the distribution sheet presented by Lonon and has accepted the benefits of his actions. 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). (For further allegations of ratification of Lonon's acts by the Art School in acceptance of benefits, see Amended Countercl. PP 24, 26, 27, and 33, Exh. B.).

**F. THE AGENCY THEORY DOES NOT FAIL AS A MATTER OF LAW.**

The Art School contends in its Motion to Dismiss Plummer's Claims that only one inference can be drawn as to the facts when an agency [\*30] relationship existed between Lonon and the Art School. It further contends that it was not at the same time he acted as Plummer's attorney. However, it is a factual question whether Lonon was the Art School's agent in the course and scope of certain actions that have been alleged. They include, but are not limited to, the following: Numerous valuable paintings produced by Florence Thomas were distributed to the Plaintiff Art School at the instruction of Grady Lonon, and prior to the commencement or completion of the administration of the Estate of Florence Thomas and the trust entities. *Id.* at P 26. Lonon cashed out certificate of deposits for the Plaintiff Art School that were held in the Florence Thomas Living Trust. *Id.* at P 24. In addition, other assets, including cash, securities, and bank accounts, were distributed to the Plaintiff Art School by or at the instruction of Grady Lonon, prior to the commencement or completion of the administration of the Estate of Florence Thomas and the trust entities. *Id.* at P 27. Grady Lonon, in his multiple capacities as an agent of the Art School and attorney for the Estate of Florence Thomas, the Florence Thomas Living Trust and [\*31] the Thomas-Plummer Trust, directed Betty Plummer to distribute the amount of \$ 7,525.94, the funds received by the Thomas-Plummer Trust from First Citizens Bank account number XXXXXX6085 to the Art School. At the time of this distribution, Betty Plummer, in her individual capacity, was the rightful owner of these funds. The check for these funds from the Thomas Plummer Trust to the Art School is attached to Plummer's Amended Counterclaim. *Id.* at P 34; Exh. B.

The Art School reads an inference into these allegations that Lonon did these actions on behalf of Plummer. That inference is just as suggestive that these actions were done on the Art School's behalf. Therefore, the agency theory cannot fail as a matter of law and for whom Lonon was acting and who directed his actions is a question for the fact finder in this case.



### III. CONCLUSION

For the reasons set forth herein, Plaintiff's Motion to dismiss should be denied as to Plummer's claims brought in her individual capacity.

This the 16th day of January, 2014.20

### CERTIFICATE OF COMPLIANCE

Pursuant to Rule 15.8 of the Amended General Rules of Practice and Procedure for the North Carolina Business Court, counsel [\*32] for Plummer certifies that the foregoing brief, which is prepared using a proportional font, is double-spaced and is less than 7500 words as reported by the word-processing software.

/s/ 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: 252-353-109621

### CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document filed on behalf of Betty Lou Thomas Plummer, Individually, 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 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 [\*33] 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 Griffiths, 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

Thomas A. Worth

The Wort5h Law Firm  
301 South Greene Street, Suite 300  
Greensboro, NC 27401

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 Emory & Henry College*  
Pharr Law, PLLC  
Suite 600, 8 West Third Street

Winston-Salem, North Carolina 27101

Mr. Gerald W. Morton, *pro se*

Post Office Box 16353

Bristol, Virginia 24209

Ms. Betty K. Morton, **[\*34]** *pro se*

1199 Hayes Forest Drive, Apt 209

Winston-Salem, NC 27106-3370

This the 16th day of January, 2014.

/s/ 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

---

End of Document