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NO. COA11-775  
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

SECURITY CREDIT CORPORATION,  
DAVID LEE, AND KATHY CONWAY,  
Plaintiffs,

v.

Johnston County  
No. 10 CVS 3936

MID/EAST ACCEPTANCE  
CORPORATION OF N.C., INC., AND  
RUBY NETHERCUTT,  
Defendants.

Appeal by plaintiffs from order entered 29 March 2011 by  
Judge Ola M. Lewis in Johnston County Superior Court. Heard in  
the Court of Appeals 16 November 2011.

*Armstrong and Armstrong, P.A., by L. Lamar Armstrong, Jr.,  
and LEDOLAW, by Michele A. Ledo, for plaintiffs-appellants.*

*Nigle B. Barrow, Jr., Hairston Lane Brannon, P.A., by James  
E. Hairston, and Woodruff Reece & Fortner, by Gordon C.  
Woodruff, for defendants-appellees.*

BRYANT, Judge.

Where plaintiffs' complaint failed to state a claim for  
Unfair and Deceptive Trade Practices, malicious prosecution,  
obstruction of justice, and punitive damages, we affirm the  
trial court's Rule 12(b)(6) dismissal.

*Facts and Procedural History*

On 4 November 2010, Security Credit Corporation (Security Credit), David Lee, and Kathy Conway (collectively "plaintiffs") filed a complaint against Mid-East Acceptance Corporation of N.C., Inc. (Mid-East) and Ruby Nethercutt (collectively "defendants"). Plaintiffs alleged claims of champerty and maintenance and unfair and deceptive trade practices (UDTP) against all defendants, as well as obstruction of justice and malicious prosecution/wrongful institution of civil proceedings against Nethercutt. Plaintiffs also asserted that they were entitled to recovery of punitive damages from defendants.

On 12 January 2011, defendants responded with a motion to dismiss plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2)-(6). Defendants stated that if their Rule 12(b)(3) motion was denied, they moved alternatively pursuant to N.C.G.S. § 1-83, for a change of venue to Pitt County. On 18 February 2011, defendants filed separate answers. Defendant Nethercutt filed counterclaims: against plaintiff Conway for intentional infliction of emotional distress, assault, and punitive damages; and against all plaintiffs for commercial defamation, punitive damages, and UDTP. Defendant Mid-East

filed counterclaims against plaintiffs for commercial defamation, UDTF, and punitive damages.

The trial court heard defendants' various motions on 21 February 2011, including the motions to dismiss pursuant to Rule 12(b)(2)-(6), the motion to change venue pursuant to N.C.G.S. § 1-83, and plaintiff's newly filed Motion to Strike defendant's Motion to Dismiss for failure to comply with the Judicial District 11-B Local Rules. At the call of the matter for hearing, defendants withdrew their Rule 12(b)(2), (4), and (5) motions to dismiss. On 29 March 2011, the trial court denied the motion to dismiss pursuant to Rule 12(b)(3) and motion to transfer pursuant to N.C.G.S. § 1-83. The trial court also denied defendants' Rule 12(b)(6) motion to dismiss plaintiffs' claim for champerty and maintenance, but granted the 12(b)(6) motion as to plaintiffs' remaining claims of UDTF, obstruction of justice, malicious prosecution/wrongful institution of civil proceedings, and punitive damages. Pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the trial court found that there was no just reason for delay and certified this order for appellate review. From the 29 March 2011 order, plaintiffs appeal.

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Before we reach the merits of plaintiffs' arguments, we must determine whether this interlocutory appeal is properly before our Court.

Because the issues of champerty and maintenance remain for resolution in the trial court, this order is not a final judgment. Since "[a] final judgment disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court[,] . . . [an] order which does not do so is interlocutory." *Tands, Inc. v. Coastal Plains Realty, Inc.*, 201 N.C. App. 139, 141, 686 S.E.2d 164, 166 (2009) (internal quotation marks and citations omitted). Generally, an interlocutory order is not immediately appealable unless it falls under one of two exceptions in which an appeal of right lies from an interlocutory order. *Atkins v. Peek*, 193 N.C. App. 606, 609, 668 S.E.2d 63, 65 (2008) (citations omitted).

The first exception applies where the order represents a final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal. Secondly, a party may appeal an interlocutory order where delaying the appeal will irreparably impair a substantial right of the party.

*Id.* (internal quotation marks and citations omitted).

It is clear the trial court's order does not resolve all the issues between plaintiffs and defendants, as plaintiffs' champerty and maintenance claims remain pending before the trial court. In addition, to be successful on a "substantial right" basis, "the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff[s] if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990).

We note that in the instant case, the trial court did certify the order under Rule 54(b) as being immediately appealable. We agree with the trial court that this matter, although interlocutory, should be reviewed on appeal.

"The Supreme Court has previously held that plaintiffs have a substantial right in having their 'claim for punitive damages determined, if at all, before the same judge and jury which heard the claim for compensatory damages.'" *Foster v. Crandall*, 181 N.C. App. 152, 161-62, 638 S.E.2d 526, 533 (2007) (citation omitted). Because plaintiffs' claim for champerty and maintenance, which calls for compensatory damages, and because their claim for punitive damages is based upon the champerty and maintenance claim, plaintiffs should have the same judge and

jury hear both claims. Therefore, we will address the merits of this appeal.

On appeal, plaintiffs argue that their complaint stated a claim for (I) UDTP; (II) malicious prosecution; (III) obstruction of justice; and, (IV) punitive damages.

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

*Ventriglia v. Deese*, 194 N.C. App. 344, 347, 669 S.E.2d 817, 819 (2008) (citation omitted).

*I*

First, plaintiffs assert that their complaint sufficiently states a claim that defendants engaged in UDTP. We disagree.

In order to establish a successful UDTP claim, a plaintiff must prove that defendant's "conduct falls within the statutory framework allowing recovery." *White v. Thompson*, 364 N.C. 47,

51, 691 S.E.2d 676, 679 (2010) (citation omitted). "[A] plaintiff must prove, *inter alia*, that a defendant's unfair or deceptive action was 'in or affecting commerce[.]'" *Id.* (citation omitted). Commerce is defined as "business activities" and "business activities" "connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *Id.* at 52, 691 S.E.2d at 682.

Plaintiffs' complaint alleged that defendants set out to destroy Security Credit by lending money in the regular course of Mid-East's business to Michael Barefoot (Barefoot) who was a partner of Security Auto Sales (SAS), a competitor of Security Credit. Plaintiffs alleged that defendant Nethercutt knew that legal claims would be brought by and between SAS and Security Credit based on SAS's wrongful failure to account for cars and funds owed to Security Credit. Based on this knowledge, plaintiffs argue that defendant Nethercutt "injected herself" into the lawsuit by reviewing and evaluating SAS's files and lending money to SAS to maintain lawsuits against plaintiffs. In addition, plaintiffs allege that defendant Mid-East

"participated [in] and/or condoned the conduct at issue by adopting, endorsing and/or ratifying [Nethercutt's] conduct."

Defendants' alleged conduct is not a business activity, but rather consists of extraordinary events that do not fit within the General Assembly's intended meaning of "in of affecting commerce." See *Id.* Plaintiffs have failed to show how defendants' conduct, taking all the allegations contained in the complaint as true, relates to the manner in which defendants conduct their regular, day-to-day activities or affairs. For the reasons stated above, the trial court did not err by dismissing plaintiffs' UDTP claim pursuant to Rule 12(b)(6).

## II

Next, plaintiffs contend that the complaint stated a claim for malicious prosecution.

Plaintiffs alleged the following in her complaint (hereinafter known as the "Pitt County lawsuit"): In 2008, Eddie Snead (Snead), a fellow partner of Barefoot at SAS, claimed to have a recording of Conway attempting to hire an individual to kill Nethercutt. Nethercutt paid \$5,000.00 for the alleged recording which was never produced and which Conway claims does not exist. After prosecuting Snead for taking her \$5,000.00 without giving her the promised recording, Nethercutt filed a

lawsuit against Conway in March 2009 seeking a restraining order based on the alleged "murder-for-hire" plot and bringing claims of intentional infliction of emotional distress and assault. Conway filed a motion for summary judgment as to all of Nethercutt's claims and the trial court denied her motion. On 25 October 2010, this lawsuit was called for trial. However, after jury selection, Nethercutt voluntarily dismissed the lawsuit.

Plaintiffs' claim for malicious prosecution fails because the elements of malicious prosecution have not been met. The elements of malicious prosecution are: "(1) the proceeding was instituted maliciously; (2) without probable cause; and (3) has terminated in favor of the person against whom it was initiated." *Gilbert v. N.C. State Bar*, 363 N.C. 70, 85, 678 S.E.2d 602, 612 (2009) (citation omitted). Plaintiffs cannot establish that the Pitt County lawsuit was initiated without probable cause where it survived a motion for summary judgment by Conway, thereby establishing that there were genuine issues of fact as to Nethercutt's claims. Accordingly, the trial court did not err by dismissing the malicious prosecution claim pursuant to Rule 12(b)(6).

### III

Next, plaintiffs claim that the trial court erred by dismissing their claim for obstruction of justice. We disagree.

Plaintiffs' complaint alleges the following:

108. Upon information and belief, Nethercutt's filing of the Pitt County lawsuit was not based upon any fear of Conway or any alleged threat on Nethercutt's life. Rather, it was an additional effort to secure some advantage for Barefoot in the lawsuits and thereby hurt Conway.

109. Neithercutt's offer to pay an individual for untruthful testimony constitutes civil obstruction of justice as it was intended to obstruct, impede or hinder the administration of justice.

110. Conway is entitled to recover from Nethercutt compensatory damages in an amount in excess of \$10,000, as well as punitive damages as set forth below.

In North Carolina, "[p]erjured testimony and the subornation of perjured testimony are criminal offenses . . . but neither are torts supporting a civil action for damages." *Gillikin v. Springle*, 254 N.C. 240, 243, 118 S.E.2d 611, 614 (1961) (citation omitted). "[I]t seems to be the general rule that a civil action in tort cannot be maintained upon the ground that a defendant gave false testimony or procured other persons to give false or perjured testimony." *Brewer v. Carolina Coach Co.*, 253 N.C. 257, 260, 116 S.E.2d 725, 727 (1960). Based on

the foregoing, the trial court did not err in dismissing this complaint.

*IV*

Last, plaintiffs argue that pursuant to N.C. Gen. Stat. § 1D-15, punitive damages may be awarded if plaintiffs prove that defendants are liable for maintenance and that they acted with malice or engaged in willful or wanton conduct. Plaintiffs assert that the complaint alleged "with specificity *how* defendants' conduct was malicious and willful or wanton." We disagree.

Under N.C.G.S. § 1D-15(a) (2009), punitive damages may be awarded "only if the complaint proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct." In order to recover for punitive damages, the claimant must also prove the existence of an aggravating factor by clear and convincing evidence. N.C.G.S. § 1D-15(b).

The trial court determined that plaintiffs' stated a claim for champerty and maintenance in their complaint. Maintenance, which is the claim most applicable to the case before us, is

defined as "an officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it." *Wright v. Commercial Union Ins. Co*, 63 N.C. App. 465, 469, 305 S.E.2d 190, 192 (1983) (citation omitted).

'Champerty' is a form of maintenance whereby a stranger makes a 'bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense.' . . . [I]t has come to be generally accepted that an agreement will not be held to be within the condemnation of the principles 'unless the interference is clearly officious and for the purpose of stirring up 'strife and continuing litigation.'

*Id.* at 469, 305 S.E.2d at 192-93.

Plaintiffs argue that they have alleged with specificity how defendants' conduct was willful and wanton by referring to defendant's alleged conduct of lending money and services to SAS to aid in its lawsuits against Security Credit. Because the conduct plaintiffs allege as willful and wanton is the same conduct plaintiffs rely on in support of their UDTF claim, and because we have already held that the trial court did not err in dismissing the UDTF claim, the claim for punitive damages must necessarily fail. Taking all the allegations as true in the

instant case, plaintiff's complaint fails to state a claim for punitive damages.

Affirmed.

Judge CALABRIA and STROUD concur.

Report per Rule 30(e).