An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-859

Filed: 7 August 2018

Currituck County, No. 15 CVS 386

TAMMY L. BYBEE, Plaintiff,

v.

ISLAND HAVEN, INC.; QUALITY HOMES OF CURRITUCK LLC; and JUSTIN MATTHEW OLD, Defendants.

Appeal by Plaintiff from order entered 20 October 2016 by Judge James C. Cole and judgment entered 10 March 2017 by Judge Milton F. Fitch, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 11 January 2018.

William G. Goldston for Plaintiff-Appellant.

Ragsdale Liggett PLLC, by Amie C. Sivon and William W. Pollock, for Defendants-Appellees Quality Homes of Currituck LLC and Justin Matthew Old.

INMAN, Judge.

When a plaintiff asserts two claims—breach of warranty and negligence—seeking the same redress for the same injury, and judgment is entered in the plaintiff's favor on the warranty claim, satisfaction of that judgment renders moot the appeal of a dismissal of the negligence claim. Furthermore, a claim for fraud in

a complaint that omits any reference to a day, month, or year is properly dismissed for violation of Rule 9 of the North Carolina Rules of Civil Procedure. Finally, a claim of unfair and deceptive trade practices ("UDTP") may survive dismissal of a fatally deficient fraud claim.

Plaintiff Tammy L. Bybee ("Plaintiff") filed suit against Island Haven, Inc. ("Island Haven"), Quality Homes of Currituck LLC ("Quality Homes") and Quality Homes' principal Justin Matthew Old ("Mr. Old," together with Quality Homes as the "Quality Defendants") arising from alleged defects in the construction of her home. Plaintiff alleged claims for breach of warranty against Quality Homes and Island Haven, negligence against Mr. Old, and claims for fraud and UDTP against all defendants. Plaintiff also sought punitive damages.

The trial court dismissed Plaintiff's claims for negligence, fraud, UDTP, and punitive damages against Quality Homes and Mr. Old pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The action proceeded to trial on Plaintiff's claims against Quality Homes and Island Haven for breach of warranty and Island Haven for fraud. The jury returned a verdict for breach of warranty against Quality Homes only, and the trial court entered judgment in Plaintiff's favor on that claim. Plaintiff now appeals the dismissal of the other claims against both Quality Defendants. After careful review, we dismiss a portion of Plaintiff's appeal

as moot, affirm the trial court's dismissal of the fraud and punitive damages claims, and reverse dismissal of the UDTP claim.

I. Factual and Procedural History

The record discloses the following:

At some indeterminate time, Island Haven and Quality Homes developed a residential subdivision in Currituck County, North Carolina. Quality Homes built the homes and Island Haven sold them to interested purchasers, including Plaintiff. Quality Homes provided Plaintiff with an express warranty at purchase. Some unknown time later, Plaintiff noticed that the home had settled, resulting in cracks and other damage inside and outside the house.

Plaintiff filed suit on 3 August 2015 in Wake County Superior Court against Island Haven and the Quality Defendants as a result of the damages to the home. Plaintiff's complaint alleged that all defendants were engaged in a joint venture to construct and sell homes, including the one sold to Plaintiff. It further alleged that:

(1) Island Haven and Quality Homes breached the implied and express warranties provided to Plaintiff at the unspecified date of purchase;

(2) Mr. Old was negligent by, among other things, failing to properly evaluate the soil on which the home was built, using improper fill materials, building on shallow foundations where deep foundations were necessary, and violating unspecified provisions of the North Carolina Building Code;

(3) all defendants committed fraud in failing to disclose that the home was defectively constructed and located in a flood plain;

(4) all defendants' actions alleged in the complaint violated the UDTP statute, N.C. Gen. Stat. § 75-1, *et seq.*; and

(5) Plaintiff was entitled to punitive damages pursuant to N.C. Gen. Stat. § 1D-15.

Although the complaint's claim for fraud alleges all defendants failed to disclose material facts and defects "[p]rior to and at the time of [P]laintiff's purchase of the home," it alleges no specific date or period of time when Plaintiff first began negotiating with the defendants, when Plaintiff purchased the home, or when Plaintiff discovered the alleged defects. Indeed, other than the signature block setting forth the date complaint was signed and filed, the pleading makes no reference to any day, month, or year.

On 6 October 2015, the action was transferred from Wake County to Currituck County Superior Court. On 2 November 2015, the Quality Defendants filed their answer and motion to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 20 October 2016, the trial court granted the Quality Defendants' motion to dismiss all claims against them except the breach of warranty claim against Quality Homes.

The breach of warranty claim proceeded to jury trial alongside Plaintiff's claims for breach of warranty and fraud against Island Haven and, on 10 March 2017, a judgment was entered against Quality Homes in the amount of $55,000.00 for breach of warranty. On 7 April 2017, Plaintiff filed her notice of appeal from both the judgment and the order granting in part the Quality Defendants' motion to dismiss.[1] On 27 June 2017, Quality Homes satisfied the judgment for breach of warranty.

II. Analysis

A. Jurisdiction and Mootness

We first address and reject the Quality Defendants' argument that we are without jurisdiction to hear Plaintiff's appeal due to defects in her notice of appeal.[2]

Plaintiff's notice of appeal describes the order appealed from as an order "dated October 20, 2016 dismissing plaintiff's claims against [Mr.] Old." The notice does not mention that the same order also dismissed claims against Quality Homes. The Quality Defendants argue that this omission is a fatal defect. We disagree.

---

[1] None of the claims appealed impact the rights of or claim against Island Haven, and Plaintiff and the Quality Defendants have stipulated that no issues relating to Island Haven have been raised by this appeal. Thus, this opinion concerns only the dismissal of Plaintiff's claims against the Quality Defendants.

[2] The Quality Defendants title their first two arguments in their appellee brief as a "Motion to Dismiss Appellant's Appeal Against Quality Homes." However, no party filed such a motion consistent with the procedural requirements of Rule 37 of the North Carolina Rules of Appellate Procedure. We therefore consider it not as a motion to dismiss, but as a substantive argument asserting a jurisdictional defect under Rule 3 of the North Carolina Rules of Civil Procedure. *See, e.g., Dogwood Dev. And Mgmt. Co. v. White Oak Transp. Co.,* 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (noting that Rule 3 is jurisdictional and "[a] jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal" (citation omitted)).

Rule 3(d) of the North Carolina Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party . . . taking the appeal . . . ." N.C. R. App. P. 3(d) (2015). The notice of appeal filed by Plaintiff: (1) designates Plaintiff as the appealing party; (2) identifies the order that dismissed claims as to Mr. Old and Quality Homes as the order appealed from; (3) identifies this Court as the court to which the appeal is taken; and (4) is signed by counsel for Plaintiff. In short, it complies with the Rule's requirements. N.C. R. App. P. 3(d).

Despite the notice's compliance with Rule 3, the Quality Defendants nevertheless contend that they were without notice that Plaintiff intended to appeal the trial court's rulings pertaining to Quality Homes because the notice of appeal did not specifically reference Quality Homes. However, it is the appellant's proposed issues on appeal required by Rule 10 that "facilitate the preparation of the record on appeal" and allow the parties to craft the record necessary to resolve any arguments concerning the order identified in the notice of appeal. N.C. R. App. P. 10(b) (2015). Plaintiff's compliance with both Rule 3 and Rule 10 protected appellees from the prejudice they now claim.

Both Quality Defendants were served on 7 April 2017 with the notice of appeal identifying the order from which Plaintiff appealed. Quality Homes was then served

on 9 June 2017 with a proposed record on appeal containing Plaintiff's proposed issues on appeal, which explicitly ask whether "the trial court err[ed] in dismissing Plaintiff's [c]laims . . . against Defendant Quality Homes . . . ." Having already received notice that the order dismissing certain claims against it was being appealed, Quality Homes received notice from the proposed issues on appeal that Plaintiff was seeking to reverse the dismissal of those specific claims. Quality Homes' interest in having a full and complete record necessary to argue against such reversal was apparently vindicated, as it served Plaintiff with objections to her proposed record, filed a Rule 11(c) supplement to the printed record on appeal, and ultimately settled the record by stipulation. As a result, the Quality Defendants' argument on this point is without merit.

The Quality Defendants further argue that dismissal of the appeal in its entirety is necessary because Quality Homes has satisfied the judgment entered against it for breach of warranty. We agree with the Quality Defendants as to the negligence claim against Mr. Old and dismiss that portion of Plaintiff's appeal.

Our Court dealt with a similar mootness argument in *Ipock v. Gilmore*, 73 N.C. App. 182, 326 S.E.2d 271 (1985). There, a woman suffered severe brain damage as a result of a mishap in the course of surgery, and her guardian ad litem and family members brought suit against her obstetrician-gynecologist ("OB/GYN"), an anesthesiologist, a nurse anesthetist, and the hospital for negligence and loss of

consortium. *Id.* at 183, 326 S.E.2d at 273. Prior to trial, the trial court entered summary judgment in favor of the OB/GYN. *Id.* at 185, 326 S.E.2d at 274. The plaintiffs settled their claims against the anesthesiologist, and the case against the nurse anesthetist and hospital proceeded to trial and resulted in judgment for plaintiffs. *Id.* at 185, 326 S.E.2d at 274. The nurse and the hospital satisfied the judgment, and plaintiffs appealed the summary judgment order in favor of the OB/GYN. *Id.* at 185, 326 S.E.2d at 274.

On appeal, the OB/GYN contended that the appeal was moot, as the judgment against the nurse anesthetist and hospital had been satisfied. *Id.* at 185, 326 S.E.2d at 274. Recognizing that, "[a]lthough an injured party may pursue and obtain judgments against all joint tort-feasors for a single injury, he may have only one satisfaction[,]" *Id.* at 186, 326 S.E.2d at 275 (citation omitted), this Court resolved the mootness question by asking "whether the[ ] Complaint sufficiently alleges only a single injury . . . or, in addition, separate and distinct injuries caused by the defendant [OB/GYN] alone." *Id.* at 187, 275-76 (citation omitted). Applying the notice pleading standard to the plaintiffs' complaint and examining the factual allegations and claims for relief, we determined that the complaint alleged "separate and distinct injuries resulting from his negligen[ce]" than those injuries satisfied by the judgments against the nurse anesthetist and hospital. *Id.* at 188, 326 S.E.2d at 276.

Here, Plaintiff's complaint alleged that Quality Homes breached its express warranty by constructing and selling to Plaintiff a home "contain[ing] numerous major structural defects, building code violations and [that] otherwise was not constructed in a good and workmanlike manner." She then alleged the following damages in connection with the breach of warranty:

> 14. As a proximate result of defendants' breach of warranty, plaintiff has sustained general and special damages in excess of ten thousand dollars ($10,000.00)[.]
>
> 15. That among plaintiff's special damages are expenses incurred by Plaintiff for engineers, contractors and others to assess and repair the damage to plaintiff's Home, living expenses to be incurred by Plaintiff while the home is being repaired, loss of use of the home, possible mold remediation, diminution in the value of the home resulting from Defendants' breach of warranty, cost of flood insurance to be paid by plaintiff for the life of the home and other special damages to be revealed during discovery and at the trial of this action.

Plaintiff alleged that Mr. Old's negligence led to "major structural defects, building code violations[,]" and the failure to construct the home "in a good and workmanlike manner"—as alleged in her breach of warranty claim—and further alleged that those "acts and omissions of defendant [Mr.] Old set forth above were the proximate cause of the general and special damages incurred by plaintiff more particularly set forth in paragraphs 14 and 15 of [the breach of warranty claim in] this complaint."

Applying the test set forth in *Ipock*, we hold that Plaintiff's appeal of the dismissal of her negligence claim against Mr. Old is moot. The acts complained of in

both the breach of warranty claim and the negligence claim are, though explained in somewhat greater detail in the latter, substantially identical. Further, both claims allege exactly the same damages. Plaintiff's complaint alleges "only a single injury," and Quality Homes satisfied that injury when it paid the judgment for breach of warranty. We therefore hold that the Plaintiff's appeal of the negligence claim against Mr. Old is moot.

Plaintiff's appeal concerns more than the dismissal of her negligence claim, however, and we agree with her argument that her fraud, UDTP, and punitive damages claims were not rendered moot by satisfaction of the judgment against Quality Homes. Those allegations are not predicated on the Quality Defendants' negligence and resulting breach of a warranty, but instead on their failure to disclose the defective construction. The fraudulent failure to disclose a defect is a separate compensable act from the negligent creation of the defect itself. *Cf., Estate of Smith v. Underwood*, 127 N.C. App. 1, 19, 487 S.E.2d 807, 819 (1997) ("The issues of professional negligence and constructive fraud were completely distinct."). And, beyond the difference in injury, "[d]amages on a [UDTP] claim are not necessarily limited to those that might be had for breach of contract." *Poor v. Hill*, 138 N.C. App. 19, 34, 530 S.E.2d 838, 848 (2000). Because Plaintiff's fraud, UDTP, and punitive damages claims allege injury distinct from that satisfied by Quality Homes on the

judgment for breach of warranty, we reach Plaintiff's appeal of those issues on the merits. *Ipock*, 73 N.C. App. at 188, 326 S.E.2d at 276.

B. Plaintiff's Fraud Claim

We review an order granting a motion to dismiss pursuant to Rule 12(b)(6) *de novo*. *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013). In engaging in such review, "the complaint's material factual allegations are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (citing *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001)). A motion to dismiss tests "whether the complaint states a claim for which relief can be granted under some legal theory[,]" *Id.* at 512, 640 S.E.2d at 428, and a complaint fails if any one of three conditions is met: "(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." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). This Court will affirm the ruling of a trial court on *de novo* review " 'if it is correct upon any theory of law[,]' " regardless of the basis below. *N.C. Dep't of Health and Human Servs. v. Parker Home Care, LLC*, 246 N.C. App. 551, 556, 784 S.E.2d 552, 556 (2016) (quoting *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010)).

Because Plaintiff's complaint on its face reveals the absence of facts sufficient to make a fraud claim against the Quality Defendants, we affirm the trial court's dismissal order in that respect.

Rule 9(b) of the North Carolina Rules of Civil Procedure requires that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2015). Rule 9 further provides that "[f]or the purpose of testing the sufficiency of a pleading, averments of time and place are material . . . ." N.C. Gen. Stat. § 1A-1, Rule 9(f) (2015). Our Supreme Court has interpreted Rule 9(b)'s particularity requirement to require a plaintiff to allege "the time, place and contents of the fraudulent representation, the identity of the person making the representation and what was obtained by the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). Rule 9 exists in part because "fraud embraces such a wide variety of potential conduct that the defendant needs particularity of [the] allegation in order to meet the charges." *Terry* at 85, 273 S.E.2d at 678.

Plaintiff's allegations pertaining to the Quality Defendants fail to allege the time and place of any fraudulent representation with the requisite particularity to satisfy the mandate of Rule 9. Her complaint contains only two allegations as to time: (1) that the Quality Defendants' fraud occurred "prior to and at the time of [P]laintiff's purchase of the home[;]" and (2) that the "complaint has been filed within the time

prescribed by all applicable statutes of limitation and statutes of repose." Although the first allegation is couched in temporal language, the absence of any allegation as to when the house was purchased or when Plaintiff first engaged with the Quality Defendants leaves it completely unmoored from any identifiable timeframe or date. Thus, "the allegation of the time [of the] fraud is too indefinite [as it] conveys no precise idea as to time, and no dates are given[.]" *McDowell v. Simms*, 45 N.C. (Busb. Eq.) 130, 137 (1852). Plaintiff's allegation that her complaint was timely filed is even more vague. "Mere generalities and conclusory allegations of fraud will not suffice." *Moore v. Wachovia Bank and Trust Co.*, 30 N.C. App. 390, 391, 226 S.E.2d 833, 835 (1976) (citation omitted). Finally, Plaintiff's complaint contains no reference to any place where Plaintiff spoke or negotiated with the Quality Defendants and at which any material omission constituting fraud could have occurred. We therefore hold that the trial court did not err in dismissing Plaintiff's claim for fraud against the Quality Defendants.

Because Plaintiff may recover punitive damages under N.C. Gen. Stat. § 1D-15 only for fraud, malice, or willful or wanton conduct, and Plaintiff's complaint alleges only fraud, our decision affirming dismissal of her fraud claim also compels us to affirm the dismissal of her claim for punitive damages.

C. Plaintiff's UDTP Claim

The Quality Defendants argue that if Plaintiff's fraud claim fails, her claim for UDTP must also fail. This is not so, as "[f]raud is a separate and distinct legal claim and is not a required element for an unfair and deceptive trade practices claim." *Estate of Hurst ex rel. Cherry v. Moorehead I, LLC*, 228 N.C. App. 571, 584, 748 S.E.2d 568, 578 (2013); *see also Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 910-11 (2002) (holding that dismissal of a fraud claim did not require dismissal of UDTP claim where fraud allegations were re-alleged in the UDTP claim).

In a strikingly similar case, *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979), we addressed this exact argument. 42 N.C. App. at 450-51, 257 S.E.2d at 65. There, a couple brought suit against the sellers of a home and the sellers' real estate agent for fraud, breach of contract, and UDTP in the sale of a home without disclosing the existence of flooding issues. *Id.* at 452-54, 257 S.E.2d at 66-67. The trial court dismissed all of the plaintiffs' claims pursuant to Rule 12(b)(6), and this Court affirmed the dismissal of the breach of contract and fraud claims, with the latter dismissal upheld under Rule 9(b). *Id.* at 453-54, 257 S.E.2d 66-67. However, we reversed the trial court's dismissal of the UDTP claim against the real estate agent[3] and expressly rejected the defendants' argument that the absence of a valid

[3] The *Rosenthal* court affirmed dismissal of the UDTP claim against the sellers under the theory that private homeowners selling their private homes do not fall within the statutory requirement that the unfair or deceptive conduct be "in or affecting commerce." 42 N.C. App. at 454, 257 S.E.2d at 67. Our Supreme Court limited the *Rosenthal* "homeowners exception" in *Bhatti v. Buckland*, 328 N.C. 240, 246, 400 S.E.2d 440, 444 (1991); the Supreme Court did not, however,

fraud claim precluded suit under the UDTP statute. *Id.* at 454-55, 257 S.E.2d at 67. Instead, we held that:

> fraud is [not] a necessary element in the violation of the Unfair Trade Practices Act. . . . The declared purpose of the Act . . . does not imply that the [conduct complained of] . . . must rise to the level of fraud, or that unethical and unfair trade practices must constitute fraudulent trade practices."

Id. at 455, 257 S.E.2d at 67. The holding reached in *Rosenthal* has been mirrored in more recent decisions. *See, e.g., Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 910 (2002) ("Even without the claim for fraud, plaintiff's complaint sufficiently alleges a claim under the [UDTP] Act.")[4]

In light of *Rosenthal*, we now consider whether Plaintiff's complaint sufficiently alleges the necessary elements of an UDTP claim, namely that: "(1) the defendants committed an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiffs or to the plaintiffs' business." *Walker v. Sloan*, 137 N.C. App. 387, 395, 529 S.E.2d 236, 243 (2000) (citation omitted).

---

otherwise overrule *Rosenthal* or address that decision's holding that the UDTP claim against the real estate agent survived Rule 12(b)(6) without an underlying fraud claim.

[4] Beyond the context of Rule 12(b)(6), we note that this Court has upheld a jury verdict for UDTP where the jury found breach of contract but rejected the claim for fraud. *Estate of Hurst*, 228 N.C. App. at 578-85, 748 S.E.2d at 575-78 (2013); s*ee also Warfield v. Hicks*, 91 N.C. App. 1, 8, 370 S.E.2d 689, 693 (1988) ("We next consider [on review of a jury verdict awarding damages on an UDTP claim] whether, absent fraud, the evidence . . . is otherwise adequate to support a conclusion that he violated N.C. Gen. Stat. [§] 75-1.1(a) . . . .").

Plaintiff's claim for unfair and deceptive trade practices consists of two paragraphs; the first reincorporates all prior paragraphs in the complaint, and the second alleges that "[t]he fraud *and other acts and omissions* of defendants set forth herein, constitute unfair and deceptive trade practices . . . ." (emphasis added).[5] The gravamen of Plaintiff's UDTP claim, then, is that the Quality Defendants, as part of a joint venture with Island Haven: (1) negligently constructed Plaintiff's home, leading to certain undiscoverable and material defective conditions; (2) knew of the negligent construction and defective conditions; (3) did not disclose the negligent construction and defective conditions despite a duty to make such a disclosure; (4) sold the home through a joint venture to Plaintiff anyway; and (5) expressly warranted that the home was free from said material defects. We hold these allegations sufficient to support a UDTP claim.

As recognized *supra*, this Court has held that a UDTP claim similar to that asserted here is sufficient to survive a motion to dismiss under Rule 12(b)(6). *Rosenthal*, 42 N.C. App. at 454-56, 257 S.E.2d at 67.

---

[5] In reaching the holding that dismissal of Plaintiff's fraud claim does not mandate dismissal of her UDTP claim, we are mindful of our Supreme Court's recent decision in *Krawiec v. Manly*, 370 N.C. 602, 811 S.E.2d 542 (2018), upholding the dismissal of tortious interference, misappropriation of trade secrets, and UDTP claims. *Id.* at 607-611, 811 S.E.2d at 547-49. The UDTP claim in that case was expressly premised solely on the tortious interference and misappropriation of trade secrets claims; because no other basis for UDTP was alleged, the Supreme Court reasoned, dismissal of the latter two claims mandated the dismissal of the former. *Id.* at 613, 811 S.E.2d at 550. Given that the UDTP claim in *Krawiec* was not premised on fraudulent or deceptive conduct and that Plaintiff in this action premised her UDTP claim not only on the Quality Defendants' fraud but also all "other acts and omissions" alleged in the complaint, *Krawiec* is distinguishable.

A *prima facie* claim for UDTP does not require " 'the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception,' but 'plaintiff must . . . show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception.' " *Gress v. Rowboat Co.*, 190 N.C. App. 773, 776, 661 S.E.2d 278, 281 (2008) (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452-53, 279 S.E.2d 1, 7 (1981)). Further, the deceptiveness of the acts in question is measured by "its effect on the average consumer . . . ." *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 69, 344 S.E.2d 68, 76 (1986) (internal quotation marks and citation omitted). Here, Plaintiff's complaint asserts deceptive conduct by a licensed, professional builder in the sale of a home to a private homebuyer that, while perhaps not constituting fraud, could nonetheless constitute an unfair or deceptive trade practice. *Rosenthal*, 42 N.C. App. at 454-56, 257 S.E.2d at 67. Plaintiff's complaint establishes the first element of a UDTP claim.

Plaintiff's complaint also establishes that the Quality Defendants' conduct was in or affecting commerce. Plaintiff alleges that the Quality Defendants and Island Haven were in a joint venture to build and sell homes, and such an arrangement makes the Quality Defendants and Island Haven both principals and agents of one another. *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 327, 572 S.E.2d 200, 204-05 (2002). An agency relationship may give rise to UDTP liability in a real estate transaction. *Lee v. Keck*, 68 N.C. App. 320, 324-25, 315 S.E.2d 323, 327 (1984); *see*

also Poor v. Hill, 138 N.C. App. 19, 30-31, 530 S.E.2d 838, 846 (2000) ("Mr. Hill acted as the agent of Mrs. Hill throughout his [real estate] dealings with plaintiffs, thereby implicating her in any violation of Chapter 75."). Further, the sale of residential property by a non-resident owner and motivated solely by profit is "in or affecting commerce" within the meaning of the UDTP statute. *Willen v. Hewson*, 174 N.C. App. 714, 720-21, 622 S.E.2d 187, 192 (2005). Thus, by asserting that the alleged unfair or deceptive acts by the Quality Defendants were in the furtherance of the joint venture between the Quality Defendants and Island Haven, Plaintiff has sufficiently pleaded the second element of an UDTP claim.

Finally, a liberal reading of Plaintiff's complaint discloses allegations that the Quality Defendants' unfair and deceptive acts were the proximate cause of the alleged damages. For each of the counts asserted as the basis of her UDTP claim, Plaintiff alleges her damages were the proximate result of the Quality Defendants' actions. Plaintiff's UDTP claim incorporated those allegations by reference and sought to treble her actual damages proximately caused by the "fraud and other acts and omissions of defendants set forth herein[.]" *See* N.C. R. Civ. P. 10(c) (2017) ("Statements in a pleading may be adopted by reference in a different part of the same pleading . . . ."). As such, Plaintiff's UDTP claim is minimally sufficient, and we reverse its dismissal.

III. CONCLUSION

Plaintiff's breach of warranty claim has been satisfied; because her negligence claim sought the same redress for the same injury and alleged conduct set forth in her breach of warranty claim, her appeal from the negligence claim's dismissal is moot. We affirm the trial court's dismissal of Plaintiff's fraud and punitive damages claims because Plaintiff failed to allege fraud with the requisite specificity under Rule 9. We reverse the trial court's dismissal of Plaintiff's UDTP claim at the pleading stage, however, because she alleged all necessary elements of the claim against the Quality Defendants. On remand, the parties and the trial court should be mindful of issues pertaining to collateral estoppel and *res judicata* in light of the jury verdict in this action, as we leave the entirety of that verdict undisturbed, including the finding and conclusion on the absence of recoverable fraud by Island Haven.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

Judges STROUD and DILLON concur.

Report per Rule 30(e).