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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-666

Filed 07 February 2023

Harnett County, No. 21 CVS 1883

MARISELA GONZALEZ LIRA and JANET INFANTE VEGA, Plaintiffs,

v.

ROBIN DAWN FELTON and GHOSTDOG FELTON, Defendants.

Appeal by plaintiffs from order entered 25 March 2022 by Judge Dawn M. Layton in Harnett County Superior Court. Heard in the Court of Appeals 16 November 2022.

*Barba Law Firm, PLLC, by Milton E. Barba, for plaintiffs-appellants.*

*Law Office of Robert E. Ruegger, by Robert E. Ruegger, for defendants-appellees Robin Dawn Felton and Ghostdog Felton.*

*No brief filed for defendant-appellee National General Insurance, Inc.*

ZACHARY, Judge.

Plaintiffs Marisela Gonzalez Lira (“Lira”) and Janet Infante Vega (“Infante”) (collectively, “Plaintiffs”) appeal from the trial court’s order granting Defendants Robin Felton (“Robin”) and Ghostdog Felton’s (collectively, “the Feltons”) motion to dismiss the unfair and deceptive trade practices claim against Defendant National

General Insurance, Inc., (“National General”) pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and motion to strike National General as a named defendant pursuant to Rule 21 of the North Carolina Rules of Civil Procedure. After careful review, we affirm.

### ***Background***

The relevant factual allegations of Plaintiffs’ complaint, which for purposes of this appeal are taken as true, are as follows: On the evening of 27 September 2020, a 2020 Toyota RAV4 owned by Lira was being driven north<sup>1</sup> on N.C. Highway 210 in Harnett County. The driver was accompanied by Infante, the front seat passenger. At the same time, Robin Felton was operating her 2003 Ford south on the same stretch of Highway 210. As Robin attempted to pass a tractor trailer in a “sharp curve” of the highway, Robin’s vehicle crossed over the center line. Although the driver of Lira’s Toyota moved to the shoulder of the road and came to a complete stop in order to avoid a collision, Robin’s vehicle collided with Lira’s. Infante experienced “severe pain in her chest and abdomen” as a result of the accident, and Lira’s Toyota was seriously damaged. The trooper who responded to the scene ticketed Robin for reckless driving with wanton disregard, in violation of N.C. Gen. Stat. § 20-140(a) (2021).

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<sup>1</sup> The record on appeal does not specify the identity of the driver.

National General, the Feltons' insurer, accepted liability for the accident and began settlement negotiations with Infante and Lira. Lira demanded that her vehicle "be repaired to its pre-accident condition and that National General pay for the diminished value claim" in exchange for a waiver of her right to sue. National General agreed, and on 16 October 2020, it issued Lira a check for \$7,015.47. There was some dispute over whether the check was in payment of Lira's diminished value claim, as she believed, or whether the funds were to cover the costs of labor and parts to repair Lira's vehicle.

On or about 29 October 2020, an employee of the autobody repair shop contacted Lira to inquire as to "why she was putting used parts on her brand-new car." Lira then "asked National General why they misled her" into believing that it would pay for new parts to repair her vehicle "back to its pre-accident condition[.]" A representative from National General informed Lira that the company's policy for repairs "is to utilize used parts[.]" and advised her that if she wanted the vehicle repaired with new parts, she would "need to pay out of pocket for the difference or she could contact her insurance carrier and have them handle the damages to her vehicle." (Alternations and internal quotations marks omitted). On 4 November 2020, National General notified Lira that it was declaring her car a total loss.

During settlement negotiations, National General agreed to provide Lira with a rental car through Enterprise Rent-A-Car for the period during which Lira's car was being repaired. On 9 November 2020, a National General representative called

Lira and left a voicemail asking Lira to call her back. The representative did not disclose the reason for the call, but subsequent communications revealed that she called to notify Lira that the rental car was due to be returned that day. Lira returned National General's call on the evening of 9 November, but she was unable to speak with a representative. The next day, an Enterprise Rent-A-Car employee informed Lira that National General ceased paying for her rental car and that beginning 9 November, Lira would be responsible for the rental payments. Although a National General representative initially maintained that she had notified Lira on 5 November about the 9 November rental car return date, the representative later admitted that she had failed to provide Lira with adequate notice. However, National General refused to reimburse Lira for the rental fees.

On 1 September 2021, Plaintiffs filed a complaint against Robin Felton and her husband, Ghostdog Felton, asserting claims for negligence and gross negligence and seeking punitive damages. Plaintiffs also named National General as a defendant and asserted an unfair and deceptive trade practices ("UDTP") claim against it, seeking treble damages and attorney's fees.

On 19 October 2021, the Feltons filed an answer and several motions, including a Rule 12(b)(6) motion to dismiss the claims against them, a Rule 12(b)(6) motion to dismiss the claims against National General, and a Rule 21 motion to strike National General as a named defendant. On 21 October 2021, National General filed a motion to dismiss pursuant to Rule 12(b)(4), (5), (6), and (7).

The Feltons' motions came on for hearing in Harnett County Superior Court on 18 January 2022. On 25 March 2022, the trial court entered an order granting the motion to dismiss the claims against National General and the motion to strike National General as a named defendant and denying the motion to dismiss the claims against the Feltons. Although there remained claims pending against the Feltons, the trial court certified the order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Plaintiffs timely appealed. *See* N.C.R. App. P. 3(c)(2).

### ***Grounds for Appellate Review***

This Court primarily entertains appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2). “A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Conversely, “[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Id.* at 362, 57 S.E.2d at 381. Because an interlocutory order is not yet final, with few exceptions, “no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]” *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

However, an interlocutory order disposing of fewer than all claims in an action may be immediately appealed if “the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment[.]” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted); *see also* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a), or if “the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal[.]” *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009); *see also* N.C. Gen. Stat. § 1A-1, Rule 54(b).

It is well settled that a trial court’s “[c]ertification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties.” *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013). Rule 54(b) provides, in relevant part, that

[w]hen more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C. Gen. Stat. § 1A-1, Rule 54(b). Stated differently, proper certification of an interlocutory order pursuant to Rule 54(b) requires:

(1) that the case involve multiple parties or multiple claims; (2) that the challenged order finally resolve at least one claim against at least one party; (3) that the trial court certify that there is no just reason for delaying an appeal of the order; and (4) that the challenged order itself contain

this certification.

*Asher v. Huneycutt*, 284 N.C. App. 583, 587, 876 S.E.2d 660, 665 (2022).

In the present case, the trial court's order granting the Feltons' motions to dismiss the claims against National General and to strike National General as a named defendant is interlocutory, as it does not resolve all matters before the court. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Nonetheless, the trial court's Rule 54(b) certification sufficiently creates jurisdiction in this Court: the case involved multiple parties (Plaintiffs, National General, and the Feltons) with multiple claims; the order on appeal finally resolved all claims against National General (granting the motions to dismiss the UDTP claim and to strike National General as a named defendant); the trial court certified that "there is no just reason for delay"; and the order from which Plaintiffs appeal contains this certification.

We therefore conclude that this Court has jurisdiction over this matter and proceed to the merits of Plaintiffs' appeal.

### ***Discussion***

On appeal, Plaintiffs argue that the trial court erred by granting the Feltons' motion to dismiss Plaintiffs' UDTP claim against National General pursuant to Rule 12(b)(6) and motion to strike National General as a named defendant pursuant to Rule 21.

#### *I. Standard of Review*

In considering a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, appellate courts “must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.” *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (citation and internal quotation marks omitted). Dismissal pursuant to Rule 12(b)(6) is proper “when (1) the complaint, on its face, reveals that no law supports the plaintiff’s claim; (2) the complaint, on its face, reveals an absence of facts sufficient to make a good claim; or (3) some fact disclosed in the complaint necessarily defeats the plaintiff’s claim.” *Blow v. DSM Pharms., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009), *disc. review denied*, 363 N.C. 853, 693 S.E.2d 917 (2010). On appeal, we review de novo a trial court’s grant of a motion to dismiss pursuant to Rule 12(b)(6). *CommScope*, 369 N.C. at 51, 790 S.E.2d at 659.

## *II. Motion to Dismiss*

Plaintiffs advance a UDTP claim against National General, the Feltons’ insurer, pursuant to N.C. Gen. Stat § 75-1.1, which “declare[s] unlawful” any “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce[.]” N.C. Gen. Stat § 75-1.1(a). Defendants contend that Plaintiffs have no standing to assert this claim because they lack contractual privity with National General. Plaintiffs argue that Lira was “in contractual privity with National General[.]” in that the two had “entered into a settlement agreement”



regarding the repairs to her vehicle,<sup>2</sup> and that Plaintiffs' damages resulted from National General's breach of this contract.

To successfully assert a UDTP claim, generally a plaintiff must show that: "(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

Defendants correctly point out that, with limited exception, "North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices under" N.C. Gen. Stat. § 75-1.1.

In *Wilson v. Wilson*, this Court concluded that the plaintiff, as a stranger to the contract lacking privity, did not have standing to bring a pre-trial UDTP claim against both the insurer and the insured. 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996).

The first exception to the *Wilson* rule was carved out in *Murray v. Nationwide Mutual Insurance Co.*, 123 N.C. App. 1, 472 S.E.2d 358 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 173 (1997). In *Murray*, the plaintiff was seriously injured in

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<sup>2</sup> Although Plaintiffs' complaint arises out of National General's interactions with both Lira and Infante, Plaintiffs' arguments on appeal only concern National General's conduct toward Lira. Accordingly, the issues pertaining to National General's interactions with Infante are abandoned. *See* N.C.R. App. P. 28(b)(6); *see also, e.g., Wilson v. Pershing, LLC*, 253 N.C. App. 643, 650, 801 S.E.2d 150, 156 (2017) (concluding that where an appellant's "brief does not contain any substantive arguments on [an issue presented], this issue has been abandoned").

an automobile accident with the defendants-insurers' insured driver. 123 N.C. App. at 4, 472 S.E.2d at 359. Although the plaintiff had obtained a judgment against the insured driver, the defendants-insurers refused to fully satisfy the judgment. *Id.* at 4–5, 472 S.E.2d at 359–60. Consequently, the plaintiff initiated an action, asserting, *inter alia*, a UDTP claim against the insurers of the driver. *Id.* at 5, 472 S.E.2d at 360. On appeal, this Court determined that “[t]he *Wilson* rule [wa]s not applicable to defendants[-insurers] under the instant facts[,]” reasoning that it is well settled that “[t]he injured party in an automobile accident is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party” under North Carolina’s statutorily required liability insurance coverage, which clearly inures to the benefit of other motorists. *Id.* at 15, 472 S.E.2d at 366. The *Murray* plaintiff was “an intended third-party beneficiary to the insurance contract[,]” in which case “the law implies privity of contract.” *Id.* (citation omitted). Thus, the plaintiff could pursue the UDTP claim directly against the insurer.

Subsequently, this Court concluded that a third-party claimant must first obtain a judgment against the insured before pursuing a direct UDTP claim against the insurer. *Craven v. Demidovich*, 172 N.C. App. 340, 342, 615 S.E.2d 722, 724, *disc. review denied*, 360 N.C. 289, 623 S.E.2d 581 (2005). Obtaining a judgment against the insured, however, does not in and of itself establish the third-party claimant’s contractual privity with the insurer. *USA Trouser, S.A. de C.V. v. Williams*, 258 N.C.

App. 192, 197, 812 S.E.2d 373, 377, *disc. review denied*, 371 N.C. 448, 817 S.E.2d 199 (2018).

“This Court has further recognized the imposition of privity between third parties and insurers sufficient to support a UDTP claim” when the insurer operates under a statutory obligation, similar to that present in *Murray*, which creates “statutory privity[.]” *Seguro-Suarez ex rel. Connette v. Key Risk Ins. Co.*, 261 N.C. App. 200, 214–15, 819 S.E.2d 741, 752 (2018) (concluding that the injured employee could bring a direct UDTP claim as a third-party claimant against a workers’ compensation insurance company); *see also Nash Hosps., Inc. v. State Farm Mut. Auto. Ins. Co.*, 254 N.C. App. 726, 734, 803 S.E.2d 256, 263 (2017), *disc. review denied*, 370 N.C. 578, 809 S.E.2d 869 (2018) (concluding that the third-party claimant medical provider could bring a direct UDTP claim against the insurance company for payment practices violating the statutory subrogation rights of medical providers).

In the present case, Plaintiffs maintain that the trial court erred by dismissing their UDTP claim against National General because the *Wilson* rule is inapplicable in this instance, as Plaintiffs were in actual contractual privity with National General. Plaintiffs argue that Lira and National General had reached a settlement agreement in which National General agreed to pay Lira “for three damages: diminished value, loss of use, and labor and parts to repair her brand-new car back to its pre-accident condition.” Plaintiffs contend that National General’s conduct—sending Lira “a check to cover the replacement parts and the labor cost” and providing

Lira “with a rental reservation number” for the rental car—evinces this agreement.<sup>3</sup> However, Plaintiffs’ contractual privity argument misses the mark, as the allegations of their complaint fail to establish the formation of a contract with National General.

In order for a valid contract to exist between two parties, “an offer and acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms.” *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E.2d 820, 823–24 (1960) (citation omitted). “Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu*, and their minds must meet as to all the terms.” *Id.* at 828, 114 S.E.2d at 824 (citation omitted); *see also Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) (“If the terms of the offer are changed or any new ones added by the acceptance, there is no meeting of the minds and, consequently, no contract.” (citation omitted)).

Here, Plaintiffs’ complaint establishes that National General made an offer of settlement to Lira in the form of the check for \$7,015.47. However, Plaintiffs failed to sufficiently plead another essential element of contract formation: a “meeting of the minds[.]” *Normile*, 313 N.C. at 103, 326 S.E.2d at 15 (citation omitted). The pleadings

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<sup>3</sup> Our case law establishes that “[s]imple breach of contract . . . do[es] not qualify as unfair or deceptive acts, but rather must be characterized by some type of egregious or aggravating circumstances before the statute applies.” *Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998). Breach of contract accompanied by fraud or deception, on the other hand, may constitute an unfair or deceptive trade practice. *Unifour Constr. Servs., Inc. v. Bellsouth Telecomms., Inc.*, 163 N.C. App. 657, 666, 594 S.E.2d 802, 808, *disc. review denied*, 358 N.C. 550, 600 S.E.2d 468 (2004).

demonstrate that the parties were not in full agreement concerning the repair of Lira's car to its "pre-accident condition." The allegation that "Lira asked National General why they misled her into thinking that National General was going to repair her new Toyota 2020 back to its pre-accident condition when they knew that they were going to repair it with used parts" is indicative of Lira's belief that the vehicle would be repaired with new parts. By contrast, the allegation that "National General responded that their policy is to utilize used parts" shows that National General never intended to use new parts and sought to solely utilize used parts. Indeed, Plaintiffs acknowledge this lack of agreement in their appellate brief, stating that "Lira was unaware that National General intended to fix her brand-new car with used parts." The allegation that "National General attempted to commit fraud" by failing to expressly signal that the check was for the cost of labor and parts rather than for Lira's diminished value claim further demonstrates that Lira and National General did not share the same understanding of the terms of the settlement.

The complaint's allegations manifestly demonstrate the absence of a "[m]utuality of agreement" between the parties regarding National General's restoration of Lira's car to its "pre-accident condition[.]" *Yeager*, 252 N.C. at 828, 114 S.E.2d at 824 (citation omitted). Lira believed that National General would repair her car with new parts, while National General intended to utilize used parts, in accordance with its standard policy. In that "the parties must assent to the same thing in the same sense . . . and their minds must meet as to *all* the terms" for a valid

contract to exist, Plaintiffs did not adequately plead the existence of a settlement agreement with National General. *Id.* (emphasis added) (citation omitted).

Furthermore, Plaintiffs' complaint failed to establish Lira's acceptance of National General's offer. Although Plaintiffs alleged that "Lira decided to cash the check" from National General and that "National General encouraged [her] to cash the check[.]" nowhere in the complaint did Plaintiffs assert that Lira actually cashed the check. In fact, they attached to their complaint the unendorsed check, and alleged that endorsing the check would have discharged Lira's claim against National General, which would have precluded her from initiating the underlying action. Plaintiffs also alleged that "National General attempted to settle this claim without reimbursing . . . Lira the amount that Enterprise Rent-A-Car charged her credit card[.]" further indicating that Lira never accepted National General's offer. As such, because the allegations of the complaint do not demonstrate the acceptance of an offer, Plaintiffs failed to establish the formation of a contract with National General on this ground as well. *Id.* at 828, 114 S.E.2d at 823–24.

Because Plaintiffs did not sufficiently allege the formation of a contract with National General, they failed to establish that they were in actual contractual privity with the insurance company. *Murray*, 123 N.C. App. at 15, 472 S.E.2d at 366. Therefore, under *Wilson* they lacked standing to bring a UDTP claim against National General directly. *Wilson*, 121 N.C. App. at 665, 468 S.E.2d at 497; *see also USA Trousers*, 258 N.C. App. at 197, 812 S.E.2d at 377.

Moreover, even if Plaintiffs were proceeding in the absence of a settlement agreement as third-party claimants with implied contractual privity seeking UDTP damages from the insurer, they do not satisfy the *Murray* requirement that they first “obtain[ ] a judgment against the . . . insurance company’s insured[,]” the Feltons, prior to initiating the UDTP claim against National General. *USA Trouser*, 258 N.C. App. at 197, 812 S.E.2d at 377; *see also Murray*, 123 N.C. App. at 15, 472 S.E.2d at 366. Instead, as their complaint demonstrates, Plaintiffs sought simultaneous judgments against the Feltons and National General. In the absence of a judgment in their favor against the Feltons, Plaintiffs lacked “standing to sue the insurer directly” as third-party beneficiaries. *USA Trouser*, 258 N.C. App. at 197, 812 S.E.2d at 377.

Taking the allegations of the complaint as true, as we must, *CommScope*, 369 N.C. at 51, 790 S.E.2d at 659, Plaintiffs’ UDTP claim against National General fails. Because Plaintiffs (1) did not sufficiently allege the formation of a settlement agreement between Lira and National General and (2) did not obtain a judgment against the Feltons prior to bringing the UDTP claim against National General, they failed to establish their standing to bring the claim. *USA Trouser*, 258 N.C. App. at 197, 812 S.E.2d at 377.

“[T]he complaint, on its face, reveals that no law supports [Plaintiffs’] claim . . . .” *Blow*, 197 N.C. App. at 588, 678 S.E.2d at 248. The trial court therefore

appropriately dismissed Plaintiffs' UDTP claim against National General pursuant to Rule 12(b)(6).

*III. Motion to Strike*

The totality of Plaintiffs' argument regarding the trial court's grant of the Feltons' motion to strike National General as a named defendant is as follows: "Plaintiffs argued National General is a proper named Defendant in this case." Plaintiffs fail to furnish this Court with a legitimate argument as to why the trial court erred by granting the motion to strike. Nor do they set forth any argument or cite any case law in support of this assertion.

"It is not the job of this Court to create an appeal for Plaintiff[s, or] to supplement an appellant's brief with legal authority or arguments not contained therein." *Lasecki v. Lasecki*, 257 N.C. App. 24, 47, 809 S.E.2d 296, 312 (2017) (citation and internal quotation marks omitted); *see* N.C.R. App. P. 28(b)(6). Thus, this argument is abandoned.

***Conclusion***

Plaintiffs lacked standing to sue National General directly. In addition, Plaintiffs have abandoned on appeal their argument regarding the motion to strike. Accordingly, we affirm the trial court's order granting the Feltons' motion to dismiss all claims against National General and striking National General as a named defendant.

AFFIRMED.



LIRA V. FELTON

*Opinion of the Court*

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).