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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-334

Filed 31 December 2024

Cumberland County, No. 20 CVS 2804

JEFFERY S. CAMBRE and  
GLORIA CAMBRE, Plaintiffs,

v.

THE MEDICAL IMAGING CENTER,  
LLC d/b/a VALLEY REGIONAL  
IMAGING, Defendant.

Appeal by Jeffery S. Cambre and Gloria Cambre from orders entered 16 October 2020 by Judge Mary Ann Tally and 11 December 2023 by Judge G. Bryan Collins, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 23 October 2024.

*Anderson, Johnson, Lawrence & Butler, LLP, by Attorneys J. Stewart Butler III and Charles R. Smith, and Smith, Dickey & Dempster, P.A., by Attorney Allen D. Smith, for plaintiffs-appellees.*

*Michael Best & Friedrich, LLP, by Attorneys Carrie E. Meigs and Michael G. Schietzelt, and Adams and Reese LLP, by Timothy J. Anzenberger, for defendant-appellant.*

THOMPSON, Judge.

The Medical Imaging Center, LLC (TMIC or defendant) appeals the two

Cumberland County Superior Courts’ (collectively, the trial court) orders respectively denying its motion to dismiss and entering a jury verdict for Jeffery S. Cambre and Gloria Cambre (plaintiffs). After careful review of the record and briefs, we affirm in full the first trial court’s denial of defendant’s motion to dismiss; however, we affirm in part, reverse in part, and remand the second trial court’s entry of judgment for a new trial solely on the issue of economic damages owed to plaintiffs.

### **I. Factual Background and Procedural History**


Defendant and plaintiffs dispute defendant’s vicarious liability for spinal cord injuries suffered by Mr. Cambre because defendant’s employee, Dr. David A. Fisher, M.D. (Fisher), administered an unnecessarily harmful medical procedure. Plaintiffs allege that, on 13 June 2017, Fisher negligently approved a second magnetic resonance imaging (MRI) scan of Mr. Cambre despite a metallic neurostimulator installed in his spine that dangerously overheated mid-scan to cause permanent disability. Defendant responds that plaintiffs filed their claim outside the applicable three-year statute of limitations, that the trial court abused its discretion in *sua sponte* correcting plaintiffs’ prior clerical error in discovery, that plaintiffs’ voluntary dismissal of Fisher in his personal capacity negated defendant’s vicarious liability as a matter of law, and that the trial court erroneously instructed the jury on the proper computation of economic damages owed to plaintiffs.

Prior to serving defendant, plaintiffs performed due diligence in their research of the properly identifiable defendant. They inquired of any possible registered Valley

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Regional Imaging, P.A. (VRI) corporate aliases on the North Carolina Secretary of State’s Business Registry. They also found a “Certificate of Assumed Name for a Limited Liability Company” authorized by TMIC’s member-manager, Dr. Michael Nagowski, M.D. (Nagowski), listing TMIC as a d/b/a alias of VRI (Alias Certificate); however, TMIC did not appear as a distinct corporate entity in the online registry. On 28 May 2020—two weeks before N.C. Gen. Stat. § 1-15(c)’s three-year statute of limitations ended on 13 June 2020—plaintiffs filed their initial complaint (VRI Complaint) against defendant. It named four defendants in the action: (1) “Regional Imaging, P.A. d/b/a Valley Regional Imaging”; (2) “Valley Radiology Associates, P.A.” (VRA); (3) “Valley Radiology, P.A.” (VR); and (4) “David Fisher, M.D., individually and as owner and/or authorized agent/employee of” these three entities. That same day, the Cumberland County Clerk of Court issued summonses for the same four defendants reflected in the same manner, as shown in relevant part for Fisher:

<b>STATE OF NORTH CAROLINA</b>		 <i>File No.</i> <b>20CVS2804</b>
<u>CUMBERLAND</u> County		In The General Court Of Justice <input type="checkbox"/> District <input checked="" type="checkbox"/> Superior Court Division
<i>Name Of Plaintiff</i> <b>Jeffery S. Cambre and Gloria Cambre</b>	<b>CIVIL SUMMONS</b> <input type="checkbox"/> ALIAS AND PLURIES SUMMONS (ASSESS FEE)  G.S. 1A-1, Rules 3 and 4	
<i>Address</i> <b>c/o J. Stewart Butler, III, attorney of record, P. O. Box 53945</b>		
<i>City, State, Zip</i> <b>Fayetteville, NC 28305</b>		
<b>VERSUS</b>		
<i>Name Of Defendant(s)</i> <b>Regional Imaging, P.A. d/b/a Valley Regional Imaging; . . . David Fisher, M.D., individually and as owner and/or authorized agent/employee of Regional Imaging, P.A. d/b/a Valley Regional Imaging . . .</b>	<i>Date Original Summons Issued</i>	
	<i>Date(s) Subsequent Summons(es) Issued</i>	
<b>To Each Of The Defendant(s) Named Below:</b>		

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<i>Name And Address Of Defendant 1</i>	<i>Name And Address Of Defendant 2</i>
David Fisher, M.D. Valley Regional Imaging 3186 Village Drive, Suite 101 Fayetteville, NC 28304	

Plaintiffs timely served this original summons and complaint on the four defendants between 29 June 2020 and 22 July 2020. Defendant filed its first motion to dismiss for lack of personal jurisdiction on 19 August 2020, claiming in relevant part that plaintiffs failed to file their complaint against specifically TMIC within the three-year statute of limitations. Plaintiffs then filed a motion to amend the VRI complaint to replace “Regional Imaging, P.A. d/b/a Valley Regional Imaging” with “The Medical Imaging Center, LLC d/b/a Valley Regional Imaging” (TMIC Complaint).

On 12 October 2020, Judge Tally heard the parties’ arguments for their respective motions. On 16 October 2020, she denied defendant’s motion to dismiss and granted plaintiffs’ motion to amend, holding that the TMIC Complaint’s claim properly related back to the VRI Complaint’s claim under North Carolina law. After receiving this order but before filing the TMIC Complaint on 27 October 2020, plaintiffs filed notice on 23 October 2020 to voluntarily dismiss “David Fisher, MD, [i]ndividually only” for strategic reasons of litigation. The TMIC Complaint matched the VRI Complaint in all material respects, save for the replacement throughout of “Valley Regional Imaging” with “The Medical Imaging Center” and identification of Fisher in only his TMIC-ownership capacity. Defendant then filed its answer to the

TMIC Complaint on 5 January 2022, and discovery continued between the parties prior to trial.

On 18 March 2022, defendant timely served plaintiffs with certain requests for interrogatories, document productions, and admissions. Three days later, plaintiffs filed a motion for extension of time to respond to the requests (Motion for Extension). The motion specified in relevant part that:

Plaintiff, Jeffery S. Cambre, . . . pursuant to Rules 33 and 34 of the [N.C.] Rules of Civil Procedure . . . hereby moves the [trial c]ourt for a[ thirty-day] extension . . . to answer or otherwise respond to [d]efendant’s Interrogatories and Request for Production of Documents on the grounds that . . . [he] need[s] . . . additional time . . . to confer with his attorney and investigate the appropriate information and documents necessary to respond . . . .

Plaintiffs . . . w[ere] served with [d]efendant’s Interrogatories on [18 March] 2022. . . . [They] ask[ ] the Court for a thirty (30) day extension up to and including [18 April] 2022 to reply . . . .

This Motion for Extension neither identified the circumstantially accurate date for extension under North Carolina’s Rules of Civil Procedure (Rules)—18 May 2022—nor specified a requested extension to also respond to the *admissions*. See N.C. Gen. Stat. § 1A-1, Rule 36(a) (2023) (“within 30 days after service of the request”). On 22 May 2022 and without further comment from either party, the Cumberland County Clerk of Superior Court approved the request “for an extension of time to answer or otherwise respond to [d]efendant’s First Set of Interrogatories.” Within sixty days, on 18 May 2022, plaintiffs filed their responses to all three of defendant’s

original discovery requests.

The following year, Judge Collins presided over the parties’ civil trial from 31 October 2023 to 14 November 2023. Several days into trial, however, defendant raised the issue of the inaccurate Motion for Extension for the first time and orally moved for summary judgment. Defendant asserted that, because plaintiffs “failed” to respond to discovery admissions before their original 18 April 2022 deadline, the trial court must deem the questions “admitted for the purposes of” evidence under Rule 36. The trial court denied defendant’s attempted “sandbagging” of plaintiff and *sua sponte* “retroactively allow[ed plaintiffs] request for more time to answer [the requests for admission] up through and including [18 May] 2022.”

In the 13 November 2023 jury charge conference, defendant objected to plaintiffs’ inclusion of jury instructions regarding the quantum of testimonial evidence required to prove the “reasonabl[e] necess[ity]” of Mr. Cambre’s incurred medical expenses. N.C.P.I.—810.04D. Defendant reasoned that plaintiff’s proffered expert witnesses, Drs. Cynthia L. Wilhelm, Ph.D. (Wilhelm) and Andrew C. Brod, M.D. (Brod), failed to testify as to whether the treatment rendered to Mr. Cambre was reasonable and necessary to treat his injuries, as required by North Carolina law. *See* N.C. Gen. Stat. § 8-58.1 (2023). The trial court overruled the objection for fear of “confus[ing] the jury” as to “future medical expenses” while acknowledging the lack of “evidence that . . . the [past] treatment[s were] reasonably necessary.” On 14 November 2023, the jury returned a verdict of \$750,000 in noneconomic damages and

\$1 million in economic damages (\$1.75 million in total) for plaintiffs. After the trial court accordingly entered judgment on 11 December 2023, defendant timely appealed both that entry and the prior 19 August 2020 motion to dismiss for lack of personal jurisdiction.

## **II. Jurisdiction**

Under N.C. Gen. Stat. § 7A-27(b), this Court has jurisdiction to review the trial courts' respective orders denying defendant's motion to dismiss for lack of personal jurisdiction and entering plaintiffs' favorable jury verdict because they constitute final judgments. N.C. Gen. Stat. § 7A-27(b)(1).

## **III. Discussion**

Defendant raises four issues for our consideration on appeal, specifically (1) whether the trial court erred in holding that the TMIC Complaint's claim related back to the VRI Complaint's claim under N.C. Gen. Stat. § 1-52's three-year statute of limitations; (2) whether the trial court erred in retroactively extending the Rule 36 deadline *sua sponte* for plaintiffs to respond to certain pre-trial discovery requests; (3) whether the trial court erred in denying defendant's motion for directed verdict because plaintiffs' voluntary dismissal of Fisher in his personal capacity legally negated defendant's vicarious liability; and (4) whether the trial court erred in instructing the jury on the issue of past medical expenses legally unsupported by plaintiffs at trial. For the reasons below, this Court holds that the trial court erred only when it issued its medical expense jury instructions but did not otherwise err

regarding the other three issues. Thus, this Court affirms in part, reverses in part, and remands for a new trial limited solely to the issue of economic damages awarded to plaintiffs.

**A. Motion to Strike**

As an initial matter, plaintiffs have filed a motion to strike portions of defendant's reply brief which we now address. Because we conclude that defendant's reply brief does not comply with N.C.R. App. P. 28(h), we allow plaintiffs' motion to strike "paragraphs citing *Crawford* and the last paragraph of the fifteenth page through the entire sixteenth page[.]"

**B. Statute of Limitations**

First, defendant argues that the applicable three-year statute of limitations bars plaintiffs' claims against TMIC because plaintiffs sued VRI, a corporate entity unrelated to defendant. Defendant points to distinct corporate labels and plaintiff's allegedly improper service in attacking the relation of the TMIC Complaint back to the VRI Complaint. Both parties identify N.C. Gen. Stat. § 1-52 as the applicable three-year statute of limitations.<sup>1</sup> N.C. Gen. Stat. § 1-52(16) ("personal injury or physical damage to claimant's property"). After reviewing de novo this "mixed

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<sup>1</sup> At the outset, we note that neither party addresses N.C. Gen. Stat. § 1-15(c)'s more flexible limitation period for "a cause of action for malpractice arising out of the performance of or failure to perform professional services." N.C. Gen. Stat. § 1-15(c). Alleged Section 90-21.12 medical malpractice cited in plaintiffs' Complaint typically falls under Section 1-15's limitation period of no less than three years and no greater than four years from the date of injury accrual—a period that would otherwise moot this dispute. *See id.* Because both parties concede that only Section 1-15(c)'s three-year limitation period applies here, however, this Court restricts itself to the facts and law alleged *sub judice*.



question of law and fact[.]” we disagree. *Reece v. Smith*, 188 N.C. App. 605, 607, 655 S.E.2d 911, 913 (2008) (citation omitted).

### **1. Relation-Back Standard**

Rule 15 allows a plaintiff to relate back a “claim asserted in an amended pleading” to an “original pleading” that already provided a defendant notice of that amended claim. N.C.R. Civ. P. 15(c). Unlike most jurisdictions modeled on the Federal Rules of Civil Procedure (Federal Test), North Carolina draws its relation-back doctrine from the New York Civil Practice Law and Rules (New York Test). *See Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995). Because of this similarity, New York’s case law may “provide guidance for relation back in North Carolina.” *Stevens v. Nimocks*, 82 N.C. App. 350, 354, 346 S.E.2d 180, 182 (1986).

Our state courts generally distinguish between an amendment of an incorrect name and “a misnomer for purposes of the relation-back rule.” *Piland v. Hertford Cty. Bd. of Comm’rs*, 141 N.C. App. 293, 300, 539 S.E.2d 669, 674 (2000). More specifically, unlike a name change that effectively “add[s] a new party-defendant,” *id.* at 300, 539 S.E.2d at 673, a misnomer is merely “[a] mistake in naming a person, place, or thing, esp[ecially] in a legal instrument.” *Misnomer*, *Black’s Law Dictionary* (12th ed. 2024).

Defendant incorrectly relies on *Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 450 S.E.2d 24 (1994), *aff’d per curiam mem.*, 342 N.C. 404, 464 S.E.2d 46 (1995), to argue that plaintiffs’ subsequent TMIC Complaint addressed an entirely different corporate entity. In *Franklin*, the plaintiff filed his original complaint

alleging injuries from a fall inside the store of a defendant identified as “Winn Dixie Stores, Inc.”—his original summons also identified the defendant by the same name. *Id.* at 30–31, 450 S.E.2d at 26. The plaintiff actually slipped and fell in a Winn-Dixie store operated by “Winn Dixie *Raleigh*, Inc.”—a distinct corporate entity independently owned and operated under the larger Winn-Dixie brand-name franchise. *Id.* (emphasis added). Unlike plaintiffs here with VRI, the *Franklin* plaintiff attempted to sue a nonexistent corporation entirely unrecorded in and unrecognized by the North Carolina Secretary of State’s Business Registry. TMIC instead filed there its Alias Certificate that expressly identified VRI as one of its “assumed name[s].”

Based on the Alias Certificate, we instead find *Taylor v. Hospice of Henderson Cty., Inc.*, 194 N.C. App. 179, 668 S.E.2d 923 (2008), more apposite to the facts here. In *Taylor*, the plaintiff filed an original complaint labeling the defendant as “Four Seasons Hospice & Palliative Care, Inc[.]” *Id.* at 180, 668 S.E.2d at 924. He filed this initial complaint the day the applicable limitations period expired. *Id.* at 185, 668 S.E.2d at 926. Three weeks later, he filed an amended complaint correctly identifying the intended defendant as “Hospice of Henderson County, Inc., *d/b/a* Four Seasons Hospice & Palliative Care.” *Id.* at 180, 668 S.E.2d at 924 (emphasis added). Reasoning that “no North Carolina[-]chartered legal entity known as ‘Four Seasons Hospice & Palliative Care, Inc.’” existed to legally sue in the first place—much like “Valley Regional Imaging”—this Court held that the plaintiff’s amendment corrected only a

misnomer that “did not amount to a substitution or entire change of parties[.]” *Id.* at 183, 668 S.E.2d at 926 (internal quotation marks, brackets, and citation omitted).

Here, the VRI Complaint clearly identifies VRI as a misnomer of TMIC, not an incorrect name that would amount to a different party-defendant. On behalf of TMIC’s Board of Managers—including Fisher—Nagowski affirmed that VRI held itself out as TMIC through the Alias Certificate with the Cumberland County Register of Deeds. Neither the record *sub judice* nor the North Carolina Secretary of State’s contemporaneous records indicate that VRI is incorporated beyond TMIC’s alias. *Cf. Taylor*, 194 N.C. App. at 183–84, 668 S.E.2d at 926. Under these circumstances, the replacement of “*Regional Imaging, P.A.* d/b/a Valley Regional Imaging” with “*The Medical Imaging Center, LLC* d/b/a Valley Regional Imaging” (emphases added) was merely “a correction in the description of the party . . . actually served” and was not a “substitution of new parties.” *Harris v. Maready*, 311 N.C. 536, 547, 319 S.E.2d 912, 919 (1984) (citation omitted). Because Nagowski “act[ed] on behalf of the LLC in the ordinary course of the LLC’s business” by filing as much, this Court holds that the misidentification of TMIC in the VRI Complaint amounts to a mere misnomer. N.C. Gen. Stat. § 57D-3-20(c).

## **2. Liss v. Seamark Application**

The now-applicable two-part checklist of *Liss v. Seamark Foods*, 147 N.C. App. 281, 555 S.E.2d 365 (2001), draws a bright—but fact-intensive—line between amendments to correct misnomers (permissible) and names (impermissible). *See id.*

at 283–84, 555 S.E.2d at 367 (discussing *Crossman*, 341 N.C. 185, 459 S.E.2d 715). Since the *Crossman* Court’s recognition of Rule 15’s New York Test, this Court has since interpreted its subsection (c) to allow an “amendment to correct [only] a misnomer in the description of a party defendant” if the plaintiff can show that the “intended defendant” (1) was already “properly served” and (2) “would not be prejudiced by the amendment.” *Liss*, 147 N.C. App. at 286, 555 S.E.2d at 369 (citation omitted). A plaintiff properly serves “a defendant by the issuance of summons and service of process [through] one of” several methods specified in N.C. Gen. Stat. § 1A-1, Rule 4(j). *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998). This same summons and service of process also avoids prejudicing a defendant by allowing the defendant sufficient time and notice to “prepare[ ] an adequate defense” against “the adverse claim since the date of service[.]” *Pierce v. Johnson*, 154 N.C. App. 34, 42, 571 S.E.2d 661, 666 (2002).

*a. Service*

*Liss*’s first element requires a plaintiff to actually and properly serve the intended defendant. *Id.* at 39, 571 S.E.2d at 665. Here, plaintiffs properly served defendant with process by serving its registered manager, Fisher, whom they initially allege to have caused the underlying injury in both his individual and ownership capacities of VRI—a mere alias of TMIC. The 28 May 2020 civil summons expressly identifies “David Fisher, M.D.” as both an “individual[ ]” and “owner . . . of Regional Imaging, P.A. d/b/a Valley Regional Imaging.” The registration attached to plaintiffs’

standard affidavit of service confirms defendant's receipt of this summons through Fisher's authorized agent; *i.e.*, an unchallenged presumption. *See Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 490–92, 586 S.E.2d 791, 796–97 (2003). Assessed in light of both Rule 4 and VRI's TMIC alias, these facts show that plaintiffs actually and properly served Fisher in both of his party-defendant capacities by “mailing a copy of the summons and of the complaint . . . addressed to” him as TMIC's “officer . . . to be served,” N.C.R. Civ. P. 4(j)(6)(c), and as the individual “party to be served.” *Id.* 4(j)(1)(c). Thus, plaintiffs meet the first *Liss* element.

*b. Prejudice*

*Liss*'s second element disallows a related-back claim that would otherwise prejudice the intended defendant in its defense at trial. *See Pierce*, 154 N.C. App. at 39, 571 S.E.2d at 665. In the context of prejudicial relation back, this Court looks to whether the original claim put the defendant on notice of the amended complaint's claim. *E.g.*, *Pierce*, 154 N.C. App. at 42, 571 S.E.2d at 666 (no prejudice because of notice); *Reece*, 188 N.C. App. at 609–10, 655 S.E.2d at 914 (prejudice because of no notice); *Langley v. Baughman*, 195 N.C. App. 123, 126, 670 S.E.2d 913, 915 (2009) (no prejudice because of notice). Adequate notice is a fact-specific inquiry that accounts for multiple non-dispositive defendant behaviors, particularly whether defendant remains the same between the complaints, continues to participate in pre-trial proceedings prior to the amending motion, or maintains the same counsel throughout litigation. *See Liss*, 147 N.C. App. at 285–86, 555 S.E.2d at 368 (first citing *Ober v.*

*Rye Town Hilton*, 159 A.D.2d 16, 557 N.Y.S.2d 937 (1990); then citing *Perrin v. McKenzie*, 266 A.D.2d 269, 698 N.Y.S.2d 41 (1999); then citing *Bracken v. Niagara Frontier Transp. Auth.*, 251 A.D.2d 1068, 674 N.Y.S.2d 221 (1998); and then citing *Pugliese v. Paneorama Italian Bakery Corp.*, 243 A.D.2d 548, 664 N.Y.S.2d 602 (1997).

Here, defendant suffers no material prejudice from plaintiffs' relation of the TMIC Complaint back to their original claim because defendant clearly meets all of these criteria at minimum. It is true that plaintiffs eventually "strategically . . . dismiss[ed]" Fisher as an individual defendant, but his inclusion as an initial party-defendant already put VRI's d/b/a aliases on notice of plaintiffs' claims for the reasons discussed above. Both the VRI Complaint and the TMIC Complaint share the common alias of then-defendant VRI that marks each former entity as mutual misnomers of the latter. Fisher also appears as an owner-defendant of the two incorporated entities on plaintiffs' VRI and TMIC Complaints, respectively, further demonstrating defendant continuity. Defendant exercised its right to initially contest plaintiff's first motion to amend then continued to participate in the litigation all the way through the jury verdict. And though it enlisted distinct law firms at different points throughout the litigation, the record shows that the same lawyer, Carrie E. Meigs, represented defendant from its first motion to dismiss through its briefings here on appeal. Based on both the proper service and these multiple supporting factors, plaintiffs meet the second *Liss* element. Their VRI Complaint's claim relates

back to their TMIC Complaint's claim. Thus, this Court holds that the original claim relates back to within N.C. Gen. Stat. § 1-52's limitations period.

**C. *Sua Sponte* Extension**

Second, defendant argues that the trial court abused its discretion by retroactively extending the deadline *sua sponte* for plaintiffs to respond to defendant's pre-trial requests for admission through 18 May 2022. We disagree.

This Court reviews a trial court's decision to grant an extension of time for abuse of discretion. *In re Est. of Lowe*, 156 N.C. App. 616, 618, 577 S.E.2d 315, 317 (2003). Because we believe that defendant's pre-trial conduct instead judicially estops it from first asserting that claim more than four days into trial, we do not reach the question of whether Rule 36 itself expressly or impliedly permits a *sua sponte* filing extension of the sort here.

Under Rule 36, a defendant may "serve upon [a plaintiff] a written request for the admission . . . of the truth of any matters . . . that relate to statements or opinions of fact" applicable to "the pending action." N.C. Gen. Stat. § 1A-1, Rule 36(a). Generally, a trial court judicially admits any requested matter as conclusive evidence unless the plaintiff responds to it "within 30 days after service of the request," *id.*; however, it may equitably "lengthen or shorten the [response] time when special situations require it." *Id.* § (1) cmt. Our courts have long recognized this discretionary positive right to amend pleadings and filings *sua sponte* "unless prohibited by some statute or unless vested rights are interfered with." *Johnson v. Johnson*, 14 N.C. App.

40, 42 187 S.E.2d 420, 421 (1972).

This equitable power inheres in certain longstanding common law doctrines in North Carolina—here, judicial estoppel. *See Whitacre P’ship v. BioSignia, Inc.*, 358 N.C. 1, 26, 591 S.E.2d 870, 887 (2004) (describing judicial estoppel’s “gap-filler” role in “protect[ing] the integrity of judicial proceedings”). “Because judicial estoppel protects the courts rather than the litigants, a court, even an appellate court, may raise judicial estoppel on its own motion[.]” *Old Republic Nat’l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 506–07, 797 S.E.2d 264, 269 (2017) (internal quotation marks, ellipsis, brackets, and citation omitted), to prevent either “party from acting in a way that is inconsistent with its earlier position before the court.” *Powell v. City of Newton*, 364 N.C. 562, 569, 703 S.E.2d 723, 728 (2010). This “inherently flexible” doctrine draws upon multiple factors, chief among them are whether:

(1) the party’s subsequent position is clearly inconsistent with its earlier position; (2) judicial acceptance of a party’s position might threaten judicial integrity because a court has previously accepted that party’s earlier inconsistent position; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party as a result.

*Id.* at 569, 703 S.E.2d at 728–29 (internal quotation marks and citations omitted).

Based on these factors, we believe that defendant’s late-stage objection to plaintiffs’ admission responses encroaches on the vital role of fair dealing in the pre-trial discovery process. *See Johnson*, 14 N.C. App. at 42, 187 S.E.2d at 421 (“[T]he general



policy of the Rules is to disregard technicalities and form and determine the rights of litigants on the merits.”).

Even considering the first *Powell* factor, defendant correctly points out several clerical errors in plaintiffs’ Motion for Extension that would otherwise merit either a timely objection or judicial admission. The Motion explicitly requests extended deadlines for “[d]efendant’s Interrogatories and Request for Production of Documents” but omits any reference to the concurrently served Requests for Admission. The Motion then “asks the Court for a thirty[-]day extension up to and including [18 April 2022] to reply” to the requests—the pre-existing thirty-day default deadline already codified in Rule 36. *See* N.C. Gen. Stat. § 1A-1, Rule 36(a). Neither does the Clerk of Court’s order granting this request appear to catch these errors; indeed, it seems to ignore defendant’s request for production of documents entirely. Defendant could have reasonably *and timely* objected to any one (or all) of “[p]laintiffs’ clerical error[s].” But the record’s “Certificate of Service” shows that defendant accepted service on 18 May 2022 of all “three different discovery devices” without further issue or comment. Because defendant does not contest the rebuttable presumption of valid service raised by this certification, we infer its “earlier position” of a valid deadline extension is “clearly inconsistent with” its fresh objection raised at trial. *Powell*, 364 N.C. at 569, 703 S.E.2d at 728.

In assessing the second *Powell* factor, we consider the possible impact of accepting defendant’s contention that it never accepted plaintiffs’ admission

responses as valid. As already noted above, defendant accepted plaintiffs’ “late” responses to its admission requests without pre-trial protest. Moreover, defendant did not raise any objection in the 14 October 2020 motions hearing convened by Judge Tally to hear any remaining “dispositive motions” prior to trial. Our acceptance of defendant’s attempted “sandbagging” here would almost certainly “misle[a]d the first court into believing [defendant] had” not accepted plaintiffs’ original admission responses. *Powell*, 364 N.C. at 570, 703 S.E.2d at 729. Defendant “had ample opportunity to litigate” this procedural question but “elected not to do so[ ]” in the eighteen months prior to trial, much less in a hearing convened for precisely this sort of issue. *Old Republic Title Ins. Co.*, 369 N.C. at 508, 797 S.E.2d at 270. Thus, we believe that allowance of such an ill-timed objection might “threaten [the] judicial integrity” of the prior court proceedings. *Powell*, 364 N.C. at 569, 703 S.E.2d at 729.

Defendant’s subsequent position also meets the third *Powell* factor here because it would negate plaintiffs’ ability to present their case before a jury and court convened for precisely that purpose. Although plaintiffs may have committed certain “clerical error[s]” in their original Motion for Extension, all parties—judge and counsel alike—continued to proceed towards a “resol[ution of these] controversies on the merits rather than on technicalities of” their filings. *M.E. v. T.J.*, 380 N.C. 539, 556, 869 S.E.2d 624, 635 (2022) (citation omitted). Allowing defendant to “revers[e its] position” so late into trial would give it “unfair power to extract additional [settlement] concessions” from plaintiffs, *Powell*, 364 N.C. at 570, 703 S.E.2d at 729,

in a jurisdiction with a longstanding preference “that decisions be had on the merits” at trial. *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972). Thus, this Court holds that the trial court did not err by retroactively extending plaintiffs’ response deadline *sua sponte* because its decision fully implicates *Powell’s* judicial estoppel principles.

#### **D. Vicarious Liability**

Third, defendant argues that the trial court erred by denying its motion to dismiss at the close of evidence for lack of provably vicarious liability through Fisher. Defendant asserts that plaintiff’s pre-trial voluntary dismissal of Fisher in only his personal capacity amounted to a final adjudication on the merits that precludes defendant’s own vicarious liability as a matter of law. Defendant also suggests that this *de jure* adjudication simultaneously negates any liability in Fisher’s professional capacity as defendant’s agent. Because plaintiff’s voluntary dismissal of Fisher (in any capacity) does not favorably or unfavorably adjudicate the question of defendant’s vicarious liability, we need not reach the question of defendant’s secondary personal-professional distinction here.

##### **1. Voluntary Dismissal**

Rule 41 allows a plaintiff to voluntarily dismiss without prejudice “an action or any claim” against a defendant “by filing a notice of dismissal at any time before plaintiff rests his case[.]” N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). The plaintiff may refile “a new action based on the same claim” against that defendant “within one year after

such dismissal,” at which point it “operates as an adjudication upon the merits” without trial. *Id.* Subsequent amendments to this Rule have sought to clarify “that the right to bring a new action within one year, after either a voluntary or involuntary dismissal, is dependent on the original action having been commenced *before* the relevant statute of limitations has run.” *Id.* cmt. 1969 amend. (emphasis added).

So long as a plaintiff timely files his original complaint (or it properly relates back), this additional year-long grace period merely complements the applicable statute of limitations. *See Whitehurst v. Va. Dare Transp. Co.*, 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973) (“[Rule 41(a)(1)] is an extension of time *beyond* . . . rather than a restriction *upon* the general statute of limitation.” (Emphases added)). Mindful of this distinction, our courts permit a plaintiff to refile a voluntarily dismissed action so long as it was originally filed within the statute of limitations, even if the limitation period has since passed. *Vaughan v. Mashburn*, 371 N.C. 428, 436, 817 S.E.2d 370, 375 (2018).

## ***2. Superseding Complaint***

The complementary relationship between those deadlines implicates our longstanding rule of superseding amended complaints. Under North Carolina law, a properly amended complaint supersedes the original complaint in almost all substantive and procedural respects. *See Hyder v. Dergance*, 76 N.C. App. 317, 319–20, 332 S.E.2d 713, 714 (1985). Unlike the New York Test of relation back or North Carolina’s one-year savings provision, though, this rule adheres to its federal

counterpart. Thus, the latter’s case law for superseding complaints instead informs our own.<sup>2</sup> Compare *Hyder*, 76 N.C. App. at 319–20, 332 S.E.2d at 714, with 6 Fed. Prac. & Proc. Civ., *Effect of an Amended Pleading* § 1476 (“A pleading . . . amended under [Fed. R. Civ. P.] 15(a) supersedes the [original] pleading . . . . Once an amended pleading is interposed, the original pleading no longer performs any function in the case.” (footnote omitted)) [hereinafter FPPC, *Amended Pleadings*]. With that in mind, we also logically recognize that *only* the original complaint’s filing date “continues to be relevant because it . . . control[s] if the amended pleading relates back under” North Carolina’s superseded-complaint doctrine. FPPC, *Amended Pleadings* § 1476.

### **3. Inter Alia Filings**

Here, Fisher’s personal-capacity dismissal does not disconnect defendant from vicarious liability as a matter of law because its dismissal and refiling falls within any feasible timeline of a Rule 4 voluntary dismissal and Rule 15 relation back. Defendant misunderstands the impact of a superseding complaint on a claim that relates back to a statute of limitations. A superseded complaint is more than just a “theory.” The TMIC Complaint’s claim relates back to the VRI Complaint’s claim; as a result, the former entirely replaces the latter save for “[o]nly the date” of original filing that now “control[s]” the ongoing litigation: 28 May 2020. FPPC, *Amended*

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<sup>2</sup> For the sake of analytical clarity, we express here an implied distinction between the New York Test for relation back itself and North Carolina’s *subsequent application of* a related-back complaint to the superseded-complaint doctrine in accordance with the Federal Test. The latter question only arises *after* determining that a claim relates back under the New York Test, at which point our state civil procedures realign with analogous federal standards (unless otherwise noted).

*Pleadings* § 1476. Because the three-year statute of limitations thus no longer matters to our analysis, *see* N.C. Gen. Stat. § 1-15(c), we look only to whether plaintiffs may still avail themselves of Rule 4’s complementary one-year saving provision at this point.

We believe that they could and did. Both parties concede that, once plaintiffs voluntarily dismissed Fisher in his individual capacity on 23 October 2020, plaintiffs had the statutory right to refile the same claim against him regardless of his “capacity” until 23 October 2021. Plaintiffs promptly did so four days later when they filed their TMIC Complaint that preserved Fisher as an “authorized agent/employee of” defendant in the same manner as in the VRI Complaint. Defendant correctly notes that “a suit against a defendant in his capacity as an agent of an organization is a suit against *the organization itself*” but incorrectly neglects the effect of an amended *qua* superseding complaint. Plaintiffs refiled the pre-existing claim as part of a complaint that related back to the 28 May 2020 filing and thus exercised their “right to bring a new action within one year” of 23 October 2020 because the original action commenced before N.C. Gen. Stat. § 1-52(16)’s limitation period (now related back) legally ended. N.C. Gen. Stat. § 1A-1, Rule 41 cmt. 1969 amend. The Rule 41(a)(1) refiling occurred before the one-year savings provision would have otherwise “act[ed] as a final adjudication” on the merits. *Robinson v. Gen’l Mills Rest., Inc.*, 110 N.C. App. 633, 637, 430 S.E.2d 696, 698 (1993). Plaintiffs exercised their complementary—again, not mutually exclusive—statutory rights to refile the same negligence claim

against Fisher in his professional capacity as part of the TMIC Complaint's claim that both superseded *and* related back to the VRI Complaint's claim. Thus, this Court holds that the trial court did not err by denying defendant's motion to dismiss at the close of evidence for lack of provably vicarious liability through Fisher as its employee. Because plaintiffs preserved their original claim by refileing it against the same defendant-employee within Rule 41's saving provision, we need not address defendant's secondary argument regarding Fisher's individual-professional distinction.

#### **E. Jury Instructions**

Fourth, defendant argues that the trial court erred in instructing the jury on the issue of past medical expenses unsupported by plaintiffs' evidence at trial. Defendant points to the trial court's implicit acknowledgement that plaintiffs failed to adduce sufficient evidence of the reasonable necessity of the expenses. After reviewing the jury instructions de novo, we agree. *See Littleton v. Willis*, 205 N.C. App. 224, 228, 695 S.E.2d 468, 471 (2010).

##### **1. Reasonable Necessity**

To recover damages for incurred medical expenses under North Carolina law, a plaintiff must show in relevant part that they were both "reasonable in amount" and "reasonably necessary." *Chamberlain v. Thames*, 131 N.C. App. 705, 717, 509 S.E.2d 443 (1998). N.C. Gen. Stat. § 8-58.1 further bifurcates the lay and expert evidence that establishes presumptive proof of these respective elements. N.C. Gen.

Stat. § 8-58.1 (2023). Subsections (a) and (b) permit a lay plaintiff to “give evidence regarding the amount paid” for incurred medical expenses so long as he can support them with “records or copies of such charges showing” their payment. *Id.* § 8-58.1(a). If the plaintiff can meet this requirement, then he “establishes a rebuttable presumption of the reasonableness of the amount paid . . . in full satisfaction of the charges.” *Id.* § 8-58.1(b). By contrast, subsection (c) further requires evidence that a medical “provider charged for services provided to the injured [plaintiff to] establish[ ] a permissive presumption that the services provided were reasonably necessary[.]” *Id.* § 8-58.1(c). The former addresses only a numerical calculation; the latter implicates specialized evidence of causation beyond the knowledge of “a layman of average intelligence[.]” *Graves v. Harrington*, 6 N.C. App. 717, 721, 171 S.E.2d 218, 221 (1969).

Here, neither of plaintiffs’ two medical expert witnesses, Wilhelm and Brod, spoke to “treatment of an injury that was causally related to” defendant’s negligence. *Daniels v. Hetrick*, 164 N.C. App. 197, 201, 595 S.E.2d 700, 703 (2004). Wilhelm testified only to the “cost associated with th[e] items” and “cost[-]projection methodology” that Mr. Cambre needed for his post-injury rehabilitation, not to whether defendant’s negligence proximately caused those necessary purchases in the first place. Brod similarly focused his testimony on the plaintiffs’ “economic status” and their “different categories of economic loss” incurred as a proximate result of the MRI injuries. These testimonies may adequately support a reasonable *amount of*



expenses, but our statutes and precedents require a higher evidentiary standard to prove a reasonable *necessity for* those expenses. *See* N.C. Gen. Stat. § 8-58.1(c). Plaintiffs showed sufficient evidence to bring the alleged claim to the jury through their pre-trial depositions and medical reports. But they must further buttress those claims at trial with direct expert testimony. *See Daniels*, 164 N.C. App. at 201, 595 S.E.2d at 703. Thus, this Court holds that the trial court erred in instructing the jury on the issue of past medical expenses not supported by plaintiffs' evidence at trial.

## **2. *Partial New Trial***

When faced with reversible error on appeal, we may discretionarily remand for a new trial on a single issue if (1) the issue is separate and distinct from those already resolved and (2) the new trial would not disturb other matters relevant to the case. *See Fortune v. First Union Nat'l Bank*, 323 N.C. 146, 151, 371 S.E.2d 146, 486 (1988); *see also Smith v. Childs*, 112 N.C. App. 672, 437 S.E.2d 500 (1993) ("Ordinarily, where the issue of damages is affected by prejudicial error, we would remand for a new trial on solely the issue of damages."). Here, the trial court's erroneous jury instruction as to the proper measure of incurred damages merits a new trial solely on that still-unresolved issue. Plaintiffs' evidence adduced at trial still legally supports their respective *noneconomic* damages of \$500,000 (Mr. Cambre) and \$250,000 (Mrs. Cambre). We also consider the issues of the amended claim's relation back, *sua sponte* deadline extension, and vicarious liability to be settled in plaintiffs' favor on remand for all the reasons set forth above. Thus, this Court remands this case for a partial

new trial solely on the issue of any economic damages beyond that \$750,000 in noneconomic damages awarded to plaintiffs as a proximate result of defendant's adduced negligence.

#### **IV. Conclusion**

Based on the reasons discussed above, this Court holds that the trial court erred by issuing its medical expense jury instructions; however, it did not err in holding that the TMIC Complaint's claim related back to the VRI Complaint's claim, that plaintiffs retroactively met the N.C. Gen. Stat. § 1A-1, Rule 36 deadline for plaintiffs to respond to certain pre-trial discovery requests, and that plaintiffs' voluntary dismissal of Fisher in his personal capacity did not legally negate defendant's vicarious liability as a matter of law.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL SOLELY ON ISSUE OF ECONOMIC DAMAGES.

Judges GORE and STADING concur in result only.

Report per Rule 30(e).