An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

NO. COA05-1147

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

COLLINA BUILDERS, INC.,

Plaintiff,

v.

Henderson County
No. 04 CVS 86

WILLIAM J. MORGAN and
SUSAN L. MORGAN,

Defendants.

Appeal by defendants from the final judgement entered 3 May 2005 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 8 March 2006.

Ball Barden & Bell, P.A., by Thomas R. Bell, for plaintiff-appellee.

William J. Morgan and Susan L. Morgan, Pro Se, for defendant-appellants.

JACKSON, Judge.

William and Susan Morgan ("defendants") entered into a construction contract with Collina Builders, Inc. ("plaintiff"), pursuant to which plaintiff would construct a home for defendants on their property. The contracted price for construction of the home was the cost of materials and subcontractors, plus fifteen percent (15%). The contract also provided that labor rates for carpenters would be twenty-five dollars ($25.00) per hour, and for

laborers it would be seventeen dollars ($17.00) per hour. John S. Collina ("Collina"), a skilled carpenter, signed the contract as the owner of plaintiff.

At trial, Collina was permitted to testify, over defendants' objection, that following the execution of the written construction contract, defendant William Morgan asked Collina to personally "perform as much labor on this home as possible in order to maintain quality of the home." Collina testified that originally he intended to subcontract out ninety-five percent (95%) of the work in constructing the home. Collina stated he informed defendants that if he personally performed the amount of construction on the home that defendants wanted, then he would be billing his time out at the labor rates plus the fifteen percent (15%). Collina testified that defendants consented to this arrangement, and told him that it was unnecessary to sign an addendum to the contract.

Upon completion of construction, plaintiff submitted a final invoice to defendants. Defendants disputed the amount of the invoice, along with amounts billed previously. On 8 January 2004, defendants submitted a final payment to plaintiff, with an explanation of the billed amounts they disputed. In submitting their final payment, defendants subtracted the disputed amounts from the invoiced amount, and submitted the reduced payment, along with their explanation for the reduction. Specifically, defendants disputed amounts billed for labor rates for work performed by

Collina and his employees, along with various other expenses which are not at issue in this appeal.

On 23 December 2003, plaintiff filed a Claim of Lien for $16,788.19, the unpaid amount it claimed was due pursuant to the contract with defendants, and the lien was attached to defendants' home. On 14 January 2004, plaintiff filed a complaint seeking the invoiced amount that plaintiff alleged was due under his contract with defendants. Plaintiff's subsequent agreement between it and defendant William Morgan, regarding Collina's additional work on the home and the billing for his labor, was neither pled nor alleged in plaintiff's complaint. Defendants answered on 27 January 2004, alleging that plaintiff had billed them for more than actually was due, and that they had, in fact, paid the full amount that was owed pursuant to the contract. Defendants stated that they had deducted plaintiff's overcharges from the invoices and had remitted full payment for the amount due minus the overcharges.

On 3 February 2004, plaintiff submitted a supplement to its complaint, stating the amount due under the contract actually was $7,663.05, and that plaintiff had cancelled its prior claim of lien on defendants' property and had filed a new claim of lien in this lower amount. On 28 February 2005, plaintiff filed a Response to Motion to Compel, Motion for Protective Order, and Notice of Hearing, stating that "the construction contract and further agreements between the parties . . . is the underpinning of plaintiff's action." In an order filed 4 March 2005, defendants were precluded by the trial court from filing further pleadings,

motions or discovery requests without prior *in camera* review. In a letter dated 18 March 2005, and delivered 24 March 2005 by certified mail to the Henderson County Superior Court, defendants submitted a Motion to Preclude Evidence for an *in camera* review by the trial court. Defendants' Motion to Preclude Evidence specifically sought to exclude all evidence of "further agreements between the parties" beyond the written construction contract, as the issue of "further agreements" was not pled in plaintiff's complaint, and defendants had not had an opportunity to conduct discovery on the specifics of the allegation. Defendants' motion subsequently was filed on 22 April 2005.

The parties' case came for trial before a judge sitting without a jury on 21 and 22 April 2005. At the trial, Collina's testimony concerning the "further agreements" between the parties was admitted over defendants' objection. In addition, plaintiff made a motion, pursuant to Rule 15(b) of our Rules of Civil Procedure, to amend the pleadings to conform to the evidence. In a Judgment entered 3 May 2005, the trial court made specific findings of fact and conclusions of law, and granted plaintiff's motion to amend the pleadings to conform to the evidence. The trial court also found that plaintiff had overcharged defendants for some items in the invoices, but that plaintiff was permitted to bill defendants for the cost of his labor plus fifteen percent (15%), as per the parties' agreement. The trial court ordered that plaintiff was entitled to recover $6,341.88 from defendants, and that if the amount was not paid within forty-five days, plaintiff

was entitled to enforce its statutory lien. Defendants appeal from the 3 May 2005 judgment.

We begin by addressing defendants' Motion to Strike the statement of facts in plaintiff's appellate brief. Rule 28(b) of our Rules of Appellate Procedure requires that an appellant's brief contain a "nonargumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits[.]" N.C. R. App. P. 28(b)(5) (2006). Rule 28(c), which governs the contents of an appellee's brief, does not contain this same requirement for a statement of facts. In fact, Rule 28(c) specifically provides that an appellee's brief "need contain no . . . statement of the facts, . . . unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant." N.C. R. App. P. 28(c) (2006). Thus, as plaintiff-appellee was not required to include a statement of facts in its brief, but chose to in order to present additional facts not presented by defendants, we deny defendants' motion to strike.

Rule 15(b) of the North Carolina Rules of Civil Procedure allows a party to amend its pleadings to conform to the evidence presented at trial. Rule 15(b) provides:

> When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

> Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.* The court may grant a continuance to enable the objecting party to meet such evidence.

N.C. Gen. Stat. § 1A-1, Rule 15(b) (2005) (emphasis added). "'The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried[.]'" *Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 85, 268 S.E.2d 567, 569 (1980) (citation omitted). A trial court's ruling on a motion to amend the pleadings is one that lies within the sole discretion of the trial court, and the trial court's ruling will not be disturbed absent a showing of an abuse of discretion. *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185-86, *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001) (citations omitted). "The party objecting to the amendment has the burden of establishing it will be materially prejudiced by the amendment." *North River Ins. Co. v. Young*, 117 N.C. App. 663, 671, 453 S.E.2d 205, 210 (1995) (citing *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986)).

Defendants contend the trial court abused its discretion in allowing plaintiff to amend its complaint to conform to the

evidence presented at trial, in that the trial court's ruling prejudiced defendants' ability to defend against plaintiff's allegations. Defendants contend the motion to amend plaintiff's complaint, which came more than a year after the filing of plaintiff's original complaint and supplement to that complaint, prejudiced defendants in that they did not have the opportunity to conduct discovery on the new allegation and were unprepared to defend against it at trial.

Although defendants were not required to request a continuance upon plaintiff's motion to amend their pleadings, we note that they made no such request of the trial court even though, as defendants stated in their brief, they were unprepared to litigate the issue of "further agreements" between the parties. Defendants state in their brief that they made the conscious decision not to introduce any evidence regarding the unpled issue. Defendants contend on appeal, that they did not contest the unpled issue as they were not prepared to do so and if they had, they were concerned that their efforts would have been viewed by the trial court as though they had been prepared to litigate the issue.

We also note that the record on appeal, and the ten-page partial transcript submitted by defendants, do not contain a complete transcript of the proceedings in the trial court. Although this is permitted by Rule 9(a)(1)e of our Rules of Appellate Procedure, the portion of the transcript submitted as an exhibit contains only a *portion* of the plaintiff's cross-examination of John Collina. The transcript portion before us

includes defendants' initial objection to the trial court's admission of Collina's testimony concerning the "further agreements" between the parties, and defendants' initial argument in favor of precluding the evidence. However, the partial transcript fails to provide this Court with an complete sense of what Collina testified to, and it also fails to provide us with defendant's argument in response to plaintiff's motion to amend the pleadings to conform to the evidence. The partial transcript does not contain plaintiff's motion to amend the pleadings to conform to the evidence, nor does it contain defendant's argument to the trial court on the issue of prejudice, which the trial court stated it would hear from defendant at the close of all evidence. On appeal, our "review is solely upon the record on appeal, [and] the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9[.]" N.C. R. App. P. 9(a) (2006). Without a showing of prejudice by defendants, the trial court has the discretion to grant plaintiff's motion to amend the pleadings to conform to the evidence. N.C. Gen. Stat. § 1A-1, Rule 15(b); *see also Mauney*, 316 N.C. at 72, 340 S.E.2d at 400; *Roberts v. Memorial Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 727 (1972). There is nothing in the record or partial transcript before us to show defendants were prejudiced by not having notice of the unpled issue, or that they were surprised when it arose at trial. Further, there is no showing by defendant of what evidence, if any, they might have introduced in opposition to the unpled allegation. Based on the record and transcript before us, defendants have

failed to show this Court that they met their burden of showing the trial court how they would be prejudiced by the trial court's granting of plaintiff's motion to amend the pleadings to conform to the evidence.

We previously have held that "the fact that additional discovery may be required [does not] amount to prejudice or make the delay 'undue'" and is insufficient to show prejudice to the objecting party. *North River Ins. Co.*, 117 N.C. App. at 671, 453 S.E.2d at 211 (citing *Coffey v. Coffey*, 94 N.C. App. 717, 381 S.E.2d 467 (1989)). Thus, the fact that defendants believed additional discovery would have been necessary in order to address plaintiff's evidence of "further agreements" between the parties is insufficient alone to establish prejudice. Moreover, we believe it to be unlikely that defendants either were surprised or prejudiced by the evidence of "further agreements," in that the record indicates defendants were put on notice of plaintiff's intent to produce evidence of "further agreements" between the parties as early as 28 February 2005, when plaintiff filed its Response to Motion to Compel and Motion for Protective Order and Notice of Hearing. During trial, when defendants objected to the admission of Collina's testimony concerning the "further agreements," defendants stated to the trial court that "this issue of further agreement was first raised by [plaintiff's counsel] in a responsive pleading that he filed on February 21st of this year. . . . It was . . . first mentioned coincident with the closing of discovery and coincident with the [plaintiff's counsel] getting a protective

order that protected from further discovery.” Defendants essentially acknowledged to the trial court their recognition of plaintiff’s intent to introduce evidence of “further agreements” not only at trial, but also in their Motion to Preclude Evidence, which was submitted to the trial court by certified mail on 24 March 2005 for an *in camera* review and subsequently filed on 22 April 2005.

After a review of the record before us, along with the partial transcript, we fail to find any indication that the trial court’s ruling amounted to an abuse of discretion. Therefore, we hold the trial court did not abuse its discretion in allowing plaintiff’s motion to amend its answer to conform to the evidence in light of the circumstances.

Affirmed.

Judges Elmore and Steelman concur.

Report per Rule 30(e).