NO. COA06-465

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

LOUISA B. WHITAKER,
Plaintiff,

v.

Forsyth County
No. 02 CVS 1327

JOHN C. WHITAKER, JR.,
ELIZABETH N. WHITAKER, II,
and WILLIAM A. WHITAKER,
Defendants.

Appeal by plaintiff from orders entered 4 October 2005, by Judge Joseph R. John, and 17 January 2006, by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 19 October 2006.

Ross Law Firm, by C. Thomas Ross, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by William K. Davis and Alan M. Ruley, for defendants-appellees.

GEER, Judge.

In 2003, plaintiff Louisa B. Whitaker and her siblings, defendants John C. Whitaker, Jr., Elizabeth N. Whitaker, II, and William A. Whitaker, settled four years of ongoing litigation regarding the administration of their deceased mother's estate. The resulting settlement judgment (the "Settlement Judgment") was affirmed by this Court following an appeal by plaintiff. *Whitaker v. Whitaker*, 169 N.C. App. 256, 611 S.E.2d 899, 2005 N.C. App.

LEXIS 579, 2005 WL 589482 (2005) (unpublished) (hereinafter "*Whitaker I*"). Plaintiff now appeals from two orders of the superior court relating to the enforcement of the Settlement Judgment's provision that allowed plaintiff to remove one-fourth of the "fixtures" from the family home.

On appeal, plaintiff argues that the first of the trial court's orders erred by concluding that the term "fixtures," as used in the Settlement Judgment, did not include the entire house located on the property as well as the living room flooring and paneling. Plaintiff also contends that the trial court's first order improperly concluded that plaintiff had waived her right to seek additional fixtures beyond those she identified at a hearing to construe the Settlement Judgment. As to the second order, plaintiff argues that it erred by holding her in civil contempt of the first order.

We conclude that the trial court, in the first order, properly determined that the house and the living room flooring and paneling were not fixtures, and we agree with the trial court that plaintiff is precluded from seeking additional fixtures beyond those that she specified in the hearing. Moreover, we find no error in the trial court's decision to hold plaintiff in contempt of the first order based on her removal of fixtures from the house without authorization. The orders below are, therefore, affirmed.

Facts

In 1991, the parties' mother named defendant John Whitaker and plaintiff as her attorneys-in-fact. In 1999, defendants filed a

petition alleging various acts of misfeasance by plaintiff and sought to have her removed as an attorney-in-fact (the "Special Proceeding"). The parties' mother died before this dispute was resolved.

An estate file was opened, and the mother's will was admitted to probate (the "Estate Proceeding"). When the parties could not agree on the administration of their mother's estate, they participated in mediation with a retired superior court judge that resulted in a handwritten Memorandum of Mediated Settlement Agreement (the "Memorandum"). Plaintiff later refused to execute any formalized version of the Memorandum.

Krispy Kreme Doughnut Corporation approached the parties about the possibility of building Krispy Kreme's corporate headquarters on a portion of real estate plaintiff and defendants had inherited under their mother's will (the "Homesite"). Defendants and plaintiff executed an Amendment to the Memorandum (the "Amendment"), which provided that defendant John Whitaker would be the sole spokesperson and negotiator for the family with Krispy Kreme and that a vote of three out of the four siblings would be binding on the entire group. Additionally, the Amendment provided that defendants would voluntarily dismiss the Special Proceeding, and the parties would "[t]ake such steps as are necessary" to begin administration of their mother's estate, including appointing both defendant John Whitaker and plaintiff as co-executors.

After extensive negotiations, a tentative agreement was reached between defendant John Whitaker and Krispy Kreme, and

defendants executed the necessary documents for the sale of the Homesite. Despite the Amendment's requirement that plaintiff do the same, she refused, and the sale to Krispy Kreme fell through.

Plaintiff instituted this action in superior court against defendants, asserting three claims for relief: (1) breach of contract, alleging that defendants had breached the Memorandum and the Amendment; (2) breach of a separate trust agreement relating to their mother's estate; and (3) a request for a declaratory judgment that plaintiff was not bound by the terms of the Amendment. Defendants counterclaimed for breach of contract, interference with contract, unfair and deceptive trade practices, fraud, and punitive damages.

The parties filed cross-motions for partial summary judgment that were granted in part and denied in part, and the case proceeded to trial. At the close of plaintiff's evidence, the trial court granted a directed verdict for defendants on all but one of plaintiff's claims. With defendants' counterclaims remaining to be tried, the parties negotiated a settlement in which plaintiff agreed to convey her interest in the Homesite to defendants. The trial court thereafter convened a hearing at which the attorneys read into the record the terms of the settlement, which, among other things, included an agreement that: (1) defendants would pay plaintiff $1.35 million; (2) plaintiff would execute deeds prepared by defendants' counsel; and (3) within 60 days of the closing, plaintiff could remove from the Homesite one-

quarter of the "fixtures" and any shrubs or plants within a 500-foot radius of the house.

Plaintiff, however, ultimately refused to sign a written settlement agreement. On 3 July 2003, defendants moved the trial court for entry of a judgment consistent with the terms of the settlement as stated on the record. The trial court granted the motion, and, on 14 July 2003, Judge Russell G. Walker, Jr. entered the Settlement Judgment, which set forth the terms of the settlement and provided that the closing of the real estate transaction would occur prior to 4 January 2004 unless otherwise agreed. Plaintiff appealed, and this Court affirmed the Settlement Judgment in *Whitaker I*.

The parties waited for this Court's March 2005 decision in *Whitaker I* before closing and, as a result, missed the 4 January 2004 closing date provided for in the Settlement Judgment. Even following *Whitaker I*, however, plaintiff would still not agree to a closing date for the sale of the Homesite. Instead, plaintiff filed a "Motion to Construe" the Settlement Judgment, requesting an interpretation of the term "fixtures." In response, defendants filed a motion seeking to compel plaintiff to close, to hold her in contempt, and for sanctions.[1]

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[1]Also following this Court's decision in *Whitaker I*, plaintiff filed a petition in the Estate Proceeding seeking reimbursement for expenses and attorneys' fees she claimed she incurred as co-executor of her mother's estate. Plaintiff appealed the clerk's decision granting and denying in part her requests, urging the superior court to vacate the clerk's order and also declare both the Settlement Judgment and this Court's decision in *Whitaker I* null and void for lack of subject matter jurisdiction. On 2 June 2005, the trial court entered an order rejecting plaintiff's

A hearing before Judge Joseph R. John was held on both motions on 23 September 2005. At the hearing, Judge John asked plaintiff's counsel if he could "identify specifically what items may be in controversy." Although plaintiff's counsel broadly argued that "the house itself was a fixture," he specifically stated that plaintiff was really only seeking "light fixtures and things like that," as well as the "[f]looring, paneling, cabinets, [and] doors" from the home's living room so plaintiff could "try to recreate that room where she lives now," and "[s]ome cabinets from the kitchen," "doors to the cabinets in the butler's pantry," and two light fixtures in the dining room. Judge John asked whether there was "[a]nything else" and plaintiff's counsel responded, "That is all, Your Honor." Defendants, in turn, argued that there was no ambiguity in the Settlement Judgment and requested that the trial court set a closing date and sanction plaintiff for delaying the process.

On 4 October 2005, Judge John filed an order concluding that plaintiff's counsel's argument at the hearing had limited the court's inquiry to a determination whether the following items were fixtures: (1) the living room flooring, paneling, cabinets, doors, and windows; (2) kitchen cabinets; (3) doors to the cabinets in the butler's pantry; and (4) two light fixtures in the dining room. As to these items, Judge John concluded that the living room flooring

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arguments and affirming the clerk's decision. Plaintiff appealed to this Court during the pendency of the instant appeal, and we affirmed in *In re Estate of Whitaker*, ___ N.C. App. ___, 633 S.E.2d 849 (2006) ("*Whitaker II*").

and paneling were not fixtures, but he was unable to decide whether the remaining items were fixtures without an evidentiary hearing. Judge John specified in his order that either party could request such a hearing. Judge John also determined that plaintiff was precluded from removing any additional fixtures other than those she had identified at the hearing, set the closing on the Homesite for 31 October 2005, and declined to impose any sanctions upon plaintiff.

Neither party requested an evidentiary hearing prior to the 31 October 2005 closing date. Nevertheless, on 31 October 2005, plaintiff declined to close unless defendants provided her with "acknowledgments" that, following delivery of the deeds, plaintiff would retain her rights to obtain property and fixtures from the Homesite under the Settlement Judgment. Defendants declined to do so, and the closing did not occur as scheduled. Plaintiff thereafter appealed Judge John's order and delivered the required deeds to the clerk of superior court "to be held in safe keeping . . . until a final decision by an Appellate Court in North Carolina."

On 2 November 2005, defendants filed a motion seeking delivery of the deeds, an order holding plaintiff in contempt of both the Settlement Judgment and Judge John's order, and the imposition of sanctions. In response to defendants' notice of hearing, plaintiff filed a written objection, arguing that the trial court lacked jurisdiction as a result of plaintiff's appeal of Judge John's order. At the 10 November 2005 hearing on defendants' motion

before Judge William Z. Wood, Jr., plaintiff argued that Judge John's order had impermissibly changed several of the provisions of the Settlement Judgment. Shortly after the hearing, however, the parties completed the closing.

On 14 November 2005, Judge Wood entered an order noting that the deeds had in fact been delivered and that plaintiff would not relinquish any rights she had under the Settlement Judgment to any property or fixtures from the Homesite as a result of her delivery of the deeds. Judge Wood also refused to revisit Judge John's rulings with respect to the Settlement Judgment and declined to find plaintiff in contempt. Judge Wood's order further concluded that the trial court still had jurisdiction to enforce the Settlement Judgment and ordered all parties to comply with Paragraph 1(c) of that judgment, which provided that:

> Within sixty (60) days of closing, Plaintiff shall have the right, at Plaintiff's sole expense, to remove from the main house on the Homesite property one-fourth (1/4), by quantity, of: (1) the fixtures; and (2) any shrubs or plantings within a radius of five hundred feet (500') thereof . . . .

As a result of the 10 November 2005 closing, plaintiff's right to remove property determined to be fixtures was due to expire on 9 January 2006.

On 16 December 2005, plaintiff filed a motion requesting, as provided in Judge John's order, an evidentiary hearing to determine "what are or are not removable fixtures" and seeking an extension of the Settlement Judgment's 60-day deadline. Although plaintiff originally sought to have her motion heard 3 January 2006, she

later filed an amended calendar request seeking a 9 January 2006 hearing — the same day her 60-day window was due to close. The evidentiary hearing, however, never occurred, and plaintiff never obtained an extension or stay of the deadline to remove fixtures.

Instead, plaintiff arrived at the Homesite on 7 and 8 January 2006 and removed numerous items herself. Defendants filed a motion to show cause why plaintiff should not be held in contempt of Judge John's order and, at a 10 January 2006 hearing before Judge Wood, defendants submitted affidavits and photographs showing that plaintiff had taken wrought iron plates from the exterior of the front door; the doors from the cabinets in the dining room, the butler's pantry, and the kitchen; the knobs from the drawers in the butler's pantry and the kitchen; and the hardware from the built-in cabinets in the living room and library. Plaintiff's counsel presented no evidence, explaining only that he had told plaintiff to engage in this self-help remedy because he was "afraid the 60 days was going to run."

On 17 January 2006, Judge Wood filed an order (the "Contempt Order") holding plaintiff in willful contempt of Judge John's order. To purge herself of contempt, Judge Wood ordered plaintiff to return and re-install the items she had removed. Judge Wood also provided that, following the return and re-installation, the parties could again seek the evidentiary hearing originally provided for by Judge John's order. Plaintiff appealed the Contempt Order to this Court and moved the trial court to consolidate her appeals of both the Contempt Order and Judge John's

order. The trial court granted plaintiff's motion on 30 January 2006.

Discussion

We must first determine whether this Court has jurisdiction over plaintiff's appeal. With respect to both orders, a decision that "on its face contemplates further proceedings or which does not fully dispose of the pending stage of the litigation is interlocutory." *Watts v. Hemlock Homes of the Highlands, Inc.*, 160 N.C. App. 81, 84, 584 S.E.2d 97, 99 (2003). There is generally no right to appeal an interlocutory order. *Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996).

Here, Judge John's order declined to resolve the entire controversy and, instead, left it to the parties to seek an evidentiary hearing to address the remaining issues. Similarly, although the Contempt Order resolves the issue of contempt, it likewise allows for further evidentiary hearings. Such orders are plainly interlocutory. *See, e.g.*, *Alexander v. DaimlerChrysler Corp.*, 158 N.C. App. 637, 643, 582 S.E.2d 57, 61 (2003) (trial court's order declining to approve or disapprove a settlement and voluntary dismissal and, instead, concluding that "a review of the dismissal was necessary," was interlocutory); *McGinnis v. McGinnis*, 44 N.C. App. 381, 387, 261 S.E.2d 491, 495 (1980) (trial court's order was interlocutory when it enforced out-of-state judgments and ordered additional evidentiary hearings).

An interlocutory order is subject to immediate appeal only if (1) the order is final as to some but not all of the claims or

parties, and the trial court certifies the case for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, or (2) the trial court's decision deprives the appellant of a substantial right that will be lost absent immediate review. *Howerton*, 124 N.C. App. at 201, 476 S.E.2d at 442. In the present case, however, neither order includes a Rule 54(b) certification and, accordingly, plaintiff must establish that the orders affect a substantial right. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.").

With respect to the Contempt Order, "[t]he appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002). *See also* N.C. Gen. Stat. § 5A-24 (2005) ("A person found in civil contempt may appeal in the manner provided for appeals in civil actions."). Consequently, this Court may consider plaintiff's appeal of the Contempt Order irrespective of the fact that it provides for further proceedings.

As to Judge John's order, plaintiff argues that when and if the evidentiary hearing is held, the trial court may conclude that Judge John's order did not use "the proper standard by which to determine what is a fixture," and, therefore, there is "a very real possibility" of "inconsistent verdicts as to what are 'fixtures.'" It is true that "[a] substantial right is affected when '(1) the

same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.'" *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 328, 612 S.E.2d 664, 668 (2005) (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995)).

Nevertheless, even assuming *arguendo* that such a decision would amount to an inconsistent verdict, plaintiff's argument overlooks the well-settled principle that one superior court judge may not overrule another. *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003). As a subsequent superior court judge could not rule contrary to Judge John's order, there is no possibility of inconsistent verdicts merely because Judge John issued a ruling with which plaintiff disagreed. To hold otherwise would allow interlocutory appeals in all instances. As a result, we conclude that Judge John's order does not impact plaintiff's substantial rights, and, therefore, that plaintiff's appeal as to that order is interlocutory.[2]

Under N.C.R. App. P. 21(a)(1), however, a "writ of certiorari may be issued in appropriate circumstances by [an] appellate court to permit review . . . when no right of appeal from an interlocutory order exists . . . ." This Court, therefore, has

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[2]Plaintiff also contends that, because Judge John's order concluded that plaintiff had "waived all right" to fixtures beyond what she had requested at the evidentiary hearing, it affected her "substantial right[s] in property," and, therefore, she is entitled to take an interlocutory appeal. As plaintiff cites no authority for this novel proposition, we summarily reject it. *See* N.C.R. App. P. 28(b)(6) ("The body of the argument . . . shall contain citations of the authorities upon which the appellant relies.").

discretion under Rule 21 to "treat [a] purported appeal as a petition for writ of certiorari and address the merits." *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). *See also Brown v. City of Winston-Salem*, 171 N.C. App. 266, 269, 614 S.E.2d 599, 601 (reaching merits of interlocutory appeal by granting certiorari under N.C.R. App. P. 21), *cert. denied*, 360 N.C. 60, 621 S.E.2d 176 (2005).

The materials in the record, spanning seven years of litigation, indicate that plaintiff's primary goal in *Whitaker I*, *Whitaker II*, and the present action has been to delay resolution of the issues surrounding her mother's estate, including the sale of the Homesite by defendants. Although plaintiff initially agreed to the terms of the Settlement Judgment in open court, requiring her to sell her interest in the Homesite to defendants, she later reneged on that agreement and appealed the trial court's entry of judgment in accordance with those terms. After this Court rejected her appeal in *Whitaker I*, plaintiff continued to subvert the effect of the Settlement Judgment by refusing to comply with its terms, and engaging in a self-help removal of items from the Homesite. She even attempted to void both the Settlement Judgment and *Whitaker I* altogether by filing a collateral challenge in the Estate Proceeding to the subject matter jurisdiction of the trial court to adjudicate *a lawsuit she originally filed* — an argument this Court later rejected in *Whitaker II*. Now, plaintiff has filed an interlocutory appeal.

Dismissing plaintiff's appeal of Judge John's order would impose a manifest injustice upon defendants by assisting plaintiff with her apparent long-running agenda of delay. Moreover, as dismissal would undoubtedly only result in a future appeal of the same issues, it would also be a waste of judicial resources. Accordingly, under the extraordinary circumstances of this case, we exercise our discretion under Rule 21 to issue a writ of certiorari and consider the merits of plaintiff's appeal of Judge John's order.

I

We turn now to the Contempt Order. Plaintiff first argues that this order must be reversed because the hearing failed to comply with the procedural requirements of N.C. Gen. Stat. § 5A-23(a) (2005), which provides that "notice [of a contempt hearing] must be given at least five days in advance of the hearing . . . ." The contempt hearing in the present case was held only one day after defendants' show cause motion was filed, apparently in place of the evidentiary hearing that plaintiff herself had calendared on 22 December 2005.

Nevertheless, "when the contemnor [comes] into court to answer the charges of the show cause order, [s]he waive[s] procedural requirements." *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 583, 273 S.E.2d 247, 260 (1981). Plaintiff attended the contempt hearing, did not object to the trial court's hearing of defendants' show cause motion, and made no effort to pursue her previously-noticed request for an evidentiary hearing on the disputed

fixtures. Indeed, at the hearing, plaintiff actively disputed defendants' motion and made arguments on the issue to the trial court. We conclude that plaintiff's attendance and participation without objection waived any procedural objections to the contempt hearing.

Plaintiff next argues that, notwithstanding any procedural irregularities, she was not in contempt. Failure to comply with a court order is a continuing civil contempt as long as: (1) the order remains in force; (2) the purpose of the order may still be served by compliance with the order; (3) the noncompliance by the person to whom the order is directed is willful; and (4) the person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order. N.C. Gen. Stat. § 5A-21(a) (2005). "This Court's review of a trial court's finding of contempt is limited to a consideration of 'whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment.'" *Gen. Motors Acceptance Corp. v. Wright*, 154 N.C. App. 672, 677, 573 S.E.2d 226, 229 (2002) (quoting *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 136 (1985)).

Of the elements of contempt, plaintiff challenges only the first and third, arguing that Judge John's order was no longer in force and that, in any event, she did not violate it willfully. With respect to whether the order was still in force, plaintiff contends that her appeal of Judge John's order divested the trial

court of jurisdiction to hold her in contempt. A party may generally not be held in contempt for "violating the very order then being questioned on appeal." *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 389 (1972). *See also* N.C. Gen. Stat. § 1-294 (2005) ("When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]").

When, however, the order being appealed from is interlocutory, the trial court is not divested of jurisdiction and can, therefore, properly hold a party in contempt for violating the order. *See Onslow County v. Moore*, 129 N.C. App. 376, 387-88, 499 S.E.2d 780, 788, *disc. review denied*, 349 N.C. 361, 525 S.E.2d 453 (1998). *See also Bruggeman v. Meditrust Co., LLC*, 165 N.C. App. 790, 794, 600 S.E.2d 507, 510 (2004) ("[I]t is well established that where an appeal is interlocutory, the trial court need not stay its proceedings while an appellate court decides the appeal."). As plaintiff's appeal of Judge John's order was interlocutory, the trial court could properly hold plaintiff in contempt for violations of that order.

With respect to whether plaintiff's non-compliance was willful, "willful" has been defined in the context of contempt as "disobedience which imports knowledge and a stubborn resistance, and as something more than an intention to do a thing. It implies doing the act purposely and deliberately, indicating a purpose to do it, without authority — careless whether [the contemnor] has the right or not — in violation of law . . . ." *Hancock v. Hancock*,

122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996) (alteration and omission in original) (internal quotation marks omitted). Plaintiff does not contest that she willfully removed the items from the Homesite, but, rather, that Judge John's order was so "ambiguous" that plaintiff's non-compliance could not have been willful. *See Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (noting that willfulness may be negated "[i]f the prior order is ambiguous such that a [party] could not understand his respective rights and obligations under that order").

We, however, find no ambiguity in Judge John's order, which specifically provided, among other things, that: (1) plaintiff had waived her right to seek fixtures beyond those she requested at the hearing and (2) that Judge John was unable to determine whether most of the items plaintiff sought were in fact fixtures without an evidentiary hearing. Without a determination, following an evidentiary hearing, that the items were fixtures, plaintiff had no authority to remove them.

As there was no possibility that plaintiff failed to understand her rights and obligations under these rulings, defendants' affidavits and photographs providing evidence of plaintiff's subsequent removal from the Homesite of both items that she had not requested at the hearing (such as the wrought iron plates from the exterior of the front door) and that Judge John had specifically deferred ruling upon without an evidentiary hearing (such as the doors from the cabinets in the butler's pantry) provided ample evidence to support Judge Wood's finding that

plaintiff had willfully violated Judge John's order. *Compare id.* at 101-03, 527 S.E.2d at 670-71 (finding prior order was ambiguous when it could reasonably be interpreted as including prescriptive easement covering either or both of two roads, and, therefore, that the defendants could not be in contempt of that order for behaving as if it included only one). Accordingly, this assignment of error is overruled.

II

We next turn to plaintiff's argument that Judge John erred in his order by not concluding that the Homesite's living room flooring and paneling, and the house itself, were "fixtures" under the Settlement Judgment. We note at the outset that this case presents an unusual scenario. Under the terms of the parties' Settlement Judgment, plaintiff is entitled to remove one-quarter of the "fixtures" located at the Homesite. This reverses the situation presented in most disputes involving fixtures, in which an item is deemed to be a "fixture" specifically because it is *not* removable. *See, e.g.*, *Moore's Ferry Dev. Corp. v. City of Hickory*, 166 N.C. App. 441, 445, 601 S.E.2d 900, 903 (noting the traditional definition of a fixture as being personal property attached to land or a building in such a way as to become an irremovable part of the real property), *disc. review denied*, 359 N.C. 191, 607 S.E.2d 277 (2004). Additionally, unlike more traditional cases applying the general law of fixtures, the present case involves the parties' use of the term "fixtures" in their Settlement Judgment, and,

therefore, presents an issue of interpretation. Accordingly, we limit our holding on this issue to the facts of this case.

Although "[a] court with authority to render a judgment also has power to construe and clarify its own judgments," *Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986), such interpretation is a question of law that is fully reviewable on appeal, *Blevins*, 137 N.C. App. at 101, 527 S.E.2d at 670. Moreover, "'[w]hen a court is called upon to interpret, it seeks to ascertain the intent of the parties at the moment of execution.'" *Cater v. Barker*, 172 N.C. App. 441, 445, 617 S.E.2d 113, 116 (2005) (quoting *Briggs v. Am. & Efird Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960)), *aff'd per curiam*, 360 N.C. 357, 625 S.E.2d 778 (2006). When the plain language is clear, "the original intention of the parties is inferred from its words." *Potter v. Hilemn Labs., Inc.*, 150 N.C. App. 326, 331, 564 S.E.2d 259, 263 (2002).

As to whether the house itself is a "fixture," Paragraph 1(c) of the Settlement Judgment provides:

> Within sixty (60) days of closing, Plaintiff shall have the right . . . *to remove from the main house* on the Homesite property one-fourth . . . *[of] the fixtures* . . . .

(Emphases added.) This wording plainly indicates that the parties did not intend the term "fixture" to encompass the house itself. We decline to adopt plaintiff's interpretation of this provision and refuse to hold that the parties intended the Settlement Judgment to grant plaintiff the authority "to remove from the main house" one-quarter of the house itself. *See Avrett & Ledbetter*

Roofing & Heating Co. v. Phillips, 85 N.C. App. 248, 253, 354 S.E.2d 321, 324 (1987) ("Instruments should receive sensible and reasonable constructions and not ones leading to absurd or unjust results."). Accordingly, Judge John did not err by rejecting plaintiff's argument that the house was not a "fixture" under the Settlement Judgment.

This conclusion also resolves plaintiff's argument regarding the living room flooring and paneling. Judge John made the following finding of fact with respect to the flooring and paneling:

> 7. There was no suggestion by any of the parties that the flooring and paneling in the living room was installed at anytime except at the time of construction of the Homeplace. These items are construction materials and part of the realty. They are not fixtures, as a matter of fact or law, and the Court accordingly so holds. In addition, the Court observes that there is little likelihood that items such as the flooring and paneling could be severed from the realty without causing substantial damage.

Although not specifically assigning error to this finding of fact, plaintiff stated in her first assignment of error that Judge John "erred in holding that flooring and paneling were not fixtures under the factual circumstances existing in May and July 2003, as being contrary to the evidence as to the intent of the parties at these times."

From a review of the transcript, it appears that plaintiff took the position before Judge John that she was entitled to one-fourth of the entire house and that she intended to remove the living room intact — including walls and floors — to recreate it

elsewhere. Defendants' counsel argued in response, and Judge John found, that doing so would destroy the house. Plaintiff has not argued otherwise, but rather continues to argue that destruction of the house was the intent of the parties. Neither at trial nor on appeal has plaintiff offered any other basis for finding that the living room flooring and paneling are "fixtures" within the meaning of the Settlement Judgment. Indeed, she states in her brief: "If an entire home can be removed pursuant to the parties' contractual intent, then the parties in this case could have intended, as Appellant strenuously contends, that the flooring and paneling were removable fixtures, irrespective of the fact that the flooring and paneling were part of the original construction at the time of their installation."

Because we have held that the plain language of the Settlement Judgment precludes plaintiff's contention that the entire house is a fixture, we necessarily must conclude that plaintiff has failed to demonstrate that Judge John erred in concluding that she could

not remove the living room flooring and paneling.[3] Consequently, we overrule these assignments of error.

III

Plaintiff next contends that by concluding she had waived her right to seek additional fixtures, Judge John both exceeded his authority and improperly overruled Judge Walker's Settlement Judgment. As to whether Judge John exceeded his authority by determining that plaintiff could not seek additional fixtures, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request . . ., stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1).

Plaintiff filed her motion to construe the Settlement Judgment because "the parties ha[d] been unable to reach agreement as to the terms of the [Settlement] Judgment . . . having to do with various property and fixtures . . . ." Judge John began the hearing by

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[3]We note in passing that plaintiff's intent argument fails on its own terms. At the time of the Settlement Judgment, the sale to Krispy Kreme had long since fallen through as a result of plaintiff's refusal to comply with the Amendment, a fact that was noted in both *Whitaker I* and *Whitaker II* and is clear from the record in this case. Plaintiff offers no explanation as to why, even if she is correct that the parties' intent could transform everything in the house into a fixture, we should hold that it is the parties' intent at the time of the Amendment — rather than at any other point in history — that is dispositive. *Cf. Brown v. Blake*, 86 Ark. App. 107, 116, 161 S.W.3d 298, 304 (2004) (concluding that building containing a liquor store was not a fixture because, at the time the building was built, the parties intended to tear the building down at the expiration of the lease and, therefore, the building lacked the permanence required of a fixture).

asking plaintiff if she would "identify specifically what items may be in controversy." When plaintiff's counsel responded only generally, Judge John replied:

> You're doing exactly what I asked you not to do. I want to know flooring in what room, light fixtures in what room, and so forth. We need to know what we are talking about here. I suspect — I may be wrong, but I suspect that's been part of the problem with this dispute coming back before the court.

Plaintiff's counsel then specified the property that plaintiff sought to have declared as fixtures. Judge John asked whether there was "[a]nything else," and plaintiff's counsel responded, "That is all, Your Honor." Plaintiff, therefore, limited the scope of Judge John's inquiry only to a consideration of whether the enumerated items were fixtures.

Following Judge John's ruling at the close of the hearing that plaintiff had waived her right to claim any additional fixtures, plaintiff argued — consistent with her general approach of avoiding finality — that she had not meant to surrender her right under the Settlement Judgment to claim, at a later date, that other items were fixtures. In other words, plaintiff had hoped not to be required to identify all of the fixtures she sought, but, rather, to leave open the opportunity for further litigation as to fixtures in the future.

Plaintiff contends that this aspect of Judge John's order effectively overruled the Settlement Judgment's provision that plaintiff could remove one-fourth of the fixtures at the Homesite within 60 days of the closing. "[I]t is well established in our

jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Woolridge*, 357 N.C. at 549, 592 S.E.2d at 194 (internal quotation marks omitted).

Judge John's order did not, however, overrule the Settlement Judgment, which remains in full force and effect. *Compare id.* at 550, 592 S.E.2d at 194 (concluding one superior court judge improperly overruled another when trial court "initially grant[ed] defendant's motion to suppress and, upon reconsideration by a different judge, den[ied] the motion to suppress"). Rather, Judge John merely construed the Settlement Judgment, as requested by plaintiff's motion. As noted above, "[a] court with authority to render a judgment also has power to construe and clarify its own judgments." *Reavis*, 82 N.C. App. at 80, 345 S.E.2d at 462.

Given that plaintiff calendared the hearing so that the court could determine for the parties what properly constituted fixtures within the meaning of the Settlement Judgment, she cannot now complain that Judge John, in deciding her motion, required her to identify what property was at issue. Indeed, this approach is required by N.C.R. App. P. 10(b) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, . . . stating *the specific grounds* for the ruling the party desired the court to make . . . ." (emphasis added)). These assignments of error are overruled.

IV

"A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because . . . the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" N.C.R. App. P. 34(a). As we conclude that plaintiff's appeal was taken for an improper purpose, we remand for the entry of sanctions against both plaintiff and her counsel under N.C.R. App. P. 34(c). *McGowan v. Argo Travel, Inc.*, 131 N.C. App. 694, 695, 507 S.E.2d 601, 602 (1998).

It is apparent from the record that plaintiff's primary goal in the present action — as well as *Whitaker I* and *Whitaker II* — has been to delay resolution of the issues surrounding her mother's estate, including the sale of the Homesite. To accomplish this goal, plaintiff has engaged the courts of this State in extensive and inappropriate legal gamesmanship, including: the refusal to comply with the Amendment; the refusal to comply with the terms of the Settlement Judgment; attempts to void the Settlement Judgment following its affirmance in *Whitaker I*; an attempt to litigate the identity of the Homesite's fixtures on a piecemeal basis; the filing of an improper interlocutory appeal interposed to divest the trial court of jurisdiction; nonetheless calendaring an evidentiary hearing on the day her 60-day window for removal of fixtures was to expire; and, rather than proceeding with that hearing, engaging in

a self-help remedy that apparently defaced the Homesite and was in violation of a court order.

Moreover, in addition to the pattern of conduct set out in the record that suggests an intent to delay, we are troubled by the fact that plaintiff has routinely taken inappropriately inconsistent positions throughout this and the related litigation without ever acknowledging that she has done so. These inconsistent positions likewise appear directed more towards delaying the proceedings than litigating plaintiff's legal interests. *Cf. Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 22, 591 S.E.2d 870, 884 (2004) (noting that, under the doctrine of judicial estoppel, "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position'" (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749, 149 L. Ed. 2d 968, 977, 121 S. Ct. 1808, 1814 (2001))).

Following the collapse of the Krispy Kreme deal, plaintiff filed suit against defendants and appealed certain provisions of the Settlement Judgment. In that appeal, plaintiff did not seek to have the entire judgment reversed — for example, plaintiff did not challenge the Settlement Judgment's provisions relating to her being paid $1.35 million or being allowed to remove fixtures from the Homesite. After this Court rejected plaintiff's appeal in *Whitaker I*, however, plaintiff changed position in *Whitaker II* and argued that the trial court in *Whitaker I* had lacked subject matter

jurisdiction to adjudicate the very lawsuit she had filed and, therefore, that both the entire Settlement Judgment and *Whitaker I* were void. Now, in the present appeal — filed prior to this Court's decision in *Whitaker II* — plaintiff contends that Judge John's order must be reversed because it limits plaintiff's rights under the Settlement Judgment. In other words, while plaintiff argued in *Whitaker II* that the Settlement Judgment was void, plaintiff simultaneously argued in the present appeal that Judge John's order was void as contrary to the Settlement Judgment.

Similarly, although plaintiff argues on this appeal that the Contempt Order is invalid because her appeal of Judge John's order stayed proceedings in the trial court, plaintiff nevertheless, after her appeal, calendared the evidentiary hearing provided for in Judge John's order. Thus, according to plaintiff, although her appeal of Judge John's order stayed the order's effect insofar as holding her in contempt, her appeal did not stay the order with respect to her ability to obtain an evidentiary hearing.

We hold that the conduct of both plaintiff and her counsel, dedicated not to the proper resolution of disputed legal issues but to delay, amounts to the repeated pursuit of an improper purpose and runs afoul of N.C.R. App. P. 34(a). *See, e.g.*, *McGowan*, 131 N.C. App. at 695, 507 S.E.2d at 601 (imposing sanctions when case was "one in a long progeny of cases" involving the same parties and issues). Accordingly, we hold that defendants should be awarded reasonable attorneys' fees for the time spent in defending this appeal. We remand the matter to the trial court for a

determination of reasonable attorneys' fees with the award to be imposed jointly against plaintiff and her counsel. N.C.R. App. P. 34(c).

Affirmed.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).