NO. COA11-921
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

KIMBERLEY CULLEN and
WILLIAM G. HARRISON, SR.,
Plaintiffs,

v.

Columbus County
No. 11 CVS 20

EMANUEL & DUNN, PLLC, a North Carolina professional limited liability and NCGS § 75D-3(a) association-in-fact; LEE W. BETTIS, JR., Esq.; ROBERT L. EMANUEL, Esq.; RAYMOND E. DUNN, Esq.; and STEPHEN A. DUNN, Esq.,
Defendants.

Appeal by plaintiffs from order entered on or about 22 February 2011 by Judge Thomas H. Lock in Columbus County Superior Court. Heard in the Court of Appeals 11 January 2012.

Christopher W. Livingston for plaintiffs-appellants.

Bailey & Dixon, L.L.P., by Philip A. Collins and David S. Coats, for defendants-appellees.

GEER, Judge.

Plaintiffs Kimberley Cullen and William G. Harrison, Sr. appeal from an order granting defendants' motion for judgment on

the pleadings under Rule 12(c) of the Rules of Civil Procedure. Stripped to its essence, this action is an attack on defense counsel in a prior proceeding who was successful in having that proceeding dismissed without prejudice for lack of personal jurisdiction. Because plaintiffs' claims either constitute an impermissible collateral attack on the court's dismissal order in that separate proceeding or they fail to allege sufficient facts to support the cause of action, we affirm.

Facts

On 12 September 2008, Mr. Harrison filed a class action in Bladen County District Court, alleging that Credit Collections Defense Network ("CCDN") had engaged in a scam involving promises to assist individuals in legally avoiding credit card debt for a fee. *Lucas v. R.K. Lock & Assocs.*, ___ N.C. App. ___, 710 S.E.2d 707, 2011 WL 721289, *1-2, 2011 N.C. App. LEXIS 357, *1-7 (March 1, 2011) (unpublished), *disc. review denied*, 365 N.C. 347, 719 S.E.2d 17 (2011). Two other plaintiffs filed individual actions asserting the same allegations. Plaintiffs' counsel in this case, Christopher W. Livingston, represented Mr. Harrison in the class action and the plaintiffs in the other two individual actions.[1]

[1]The complaint in this action alleges only that Ms. Cullen qualified for membership in Mr. Harrison's purported class.

In those class actions, the plaintiffs contended that CCDN's actions constituted unfair and deceptive trade practices, fraud, breach of contract, gross and willful legal malpractice, violations of the "North Carolina Racketeer and Corrupt Organizations Act," violations of the "Credit Repair Organizations Act," and violations of the federal "Racketeer Influenced and Corrupt Organizations Act." *Id.* The defendants in the class actions were, as relevant to this case, R.K. Lock & Associates "d/b/a Credit Collections Defense Network or CCDN," Robert K. Lock Esq., Colleen Lock, Philip M. Manger Esq., and Tracy Webster. The individual defendants were associated with CCDN. A full description of the procedural history of those cases is set forth in this Court's opinion in those apparently consolidated cases.

In that proceeding, the *Lucas* defendants filed a motion to dismiss, arguing, among other things, a lack of personal jurisdiction and a failure to join a necessary party. *Id.*, 2011 WL 721289, at *2, 2011 N.C. App. LEXIS 357, at *4-5. During the hearing on the motion, the *Lucas* defendants argued that they did not have minimum contacts with the State of North Carolina other than through their association with CCDN, LLC. *Id.*[2] They

[2]The complaint in this case incorporated by reference the transcript, record on appeal, and various exhibits in Mr. Harrison's class action, describing them as "an integral part of

further argued that since CCDN, LLC had not been named in the complaint as a party, the defendants had no minimum contacts with the State, and the trial court lacked personal jurisdiction over them. *Id.*

In support of this argument, the *Lucas* defendants presented the trial court with affidavits from Robert Lock and Phillip Manger, the managers of CCDN, LLC, asserting that Mr. Livingston, the *Lucas* plaintiffs' counsel, had previously entered into an Associate Attorney Agreement with CCDN, LLC pursuant to which he had agreed to receive referrals from CCDN. *Id.*, 2011 WL 721289, at *1, 2011 N.C. App. LEXIS 357, at *3. From a review of the transcript of that hearing, it appears the trial judge, upon reviewing the affidavits, stopped the hearing and called the State Bar. After conferring with the State Bar, the trial judge removed Mr. Livingston as counsel on the grounds that he had a conflict of interest based on the contract that he had signed with CCDN, LLC. The trial judge then continued the hearing to allow the *Lucas* plaintiffs to find other counsel. *Id.*, 2011 WL 721289, at *2, 2011 N.C. App. LEXIS 357, at *5.

The plaintiffs moved for reconsideration of the disqualification order. *Id.* On 27 April 2009, the trial court set aside the order disqualifying Mr. Livingston based on the

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this Complaint."

fact that CCDN, LLC was not a party to the actions. *Id.*, 2011 WL 721289, at *2, 2011 N.C. App. LEXIS 357, at *5-6. The court then addressed the still pending motions to dismiss. The court granted the motions based on a lack of personal jurisdiction and based on the plaintiffs' failure to join a necessary party, CCDN, LLC. The trial court, in orders entered 19 May 2009, specified that the dismissals in each of the actions were without prejudice to the plaintiffs' refiling the actions with CCDN, LLC as a named defendant. *Id.*

During the *Lucas* proceedings, Lee W. Bettis, Jr., an associate with Emanuel & Dunn, represented the defendants as well as CCDN, LLC. On 13 May 2009, acting on behalf of CCDN, LLC, he filed motions for Rule 11 sanctions against Mr. Livingston. *Id.*, 2011 WL 721289, at *2, 2011 N.C. App. LEXIS 357, at *6-7. The plaintiffs in turn, on 22 May 2009, filed motions to reconsider the trial court's 19 May 2009 orders. *Id.* On 29 October 2009, the trial court entered orders denying the *Lucas* plaintiffs' motions for reconsideration and imposing Rule 11 sanctions against Mr. Livingston and plaintiffs jointly and severally. *Id.*

The *Lucas* plaintiffs and Mr. Livingston appealed. On appeal, this Court pointed out that while the plaintiffs' brief argued that the trial court erred in granting the motion to

dismiss, the notice of appeal only appealed from the order denying the motion to reconsider the dismissal order and from the order imposing Rule 11 sanctions. Because the Court lacked jurisdiction to review the order granting the motion to dismiss and because the plaintiffs included no argument in their brief regarding the order denying the motion for reconsideration, the Court dismissed the appeal in part. *Id.* The Court, however, vacated the Rule 11 sanctions on the ground that the trial court lacked jurisdiction to enter Rule 11 sanctions on behalf of CCDN, LLC when it was not a party to the action. *Id.*, 2011 WL 721289, at *3, *6, 2011 N.C. App. LEXIS 357, at *8-9, *16.

On 6 January 2011, two months *before* this Court's opinion was filed, Ms. Cullen and Mr. Harrison filed this lawsuit, naming as defendants Emanuel & Dunn, PLLC; the firm's associate, Mr. Bettis; and the members of the firm, Robert L. Emanuel, Raymond E. Dunn, and Stephen A. Dunn. The complaint asserted claims for (1) negligent supervision, (2) tortious interference with prospective economic advantage, (3) statutory attorney fraud, and (4) North Carolina's Racketeering Influenced and Corrupt Organizations Act ("NC RICO").

The majority of plaintiffs' claims are based entirely on the conduct of Mr. Bettis while representing the *Lucas* defendants and CCDN, LLC in the *Lucas* litigation. The complaint

alleges that Mr. Bettis acted with an improper purpose, made knowingly fraudulent arguments, and sought to delay any recovery for the plaintiffs until CCDN, LLC could go out of business, rendering any recovery against it impossible.

After filing an answer and motion to dismiss, defendants filed a motion for judgment on the pleadings. As grounds for the motion, defendants asserted that Mr. Harrison had filed a class action in federal court in November 2009 against the same defendants and alleging the same causes of action and that, in any event, plaintiffs had failed to allege sufficient facts in their complaint to support their claims for relief. It appears that during the oral argument on that motion, defendants expressly abandoned their prior action pending argument and argued only the sufficiency of the allegations of the complaint. In an order dated 22 February 2011, the trial court granted defendants' motion for judgment on the pleadings. Plaintiffs timely appealed to this Court.

I

As an initial matter, we address plaintiffs' contention that their due process rights were violated when the trial court denied their motion to continue the hearing on defendants' motion for judgment on the pleadings. Plaintiffs asked the trial court to limit the hearing to defendants' prior action

pending argument and to reserve ruling on the sufficiency of the complaint's allegations "for the next available opportunity." It is well established that "a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001).

Plaintiffs' entire contention regarding their motion for a continuance is:

> Whatever substantial justice is, it is *not* giving Appellees a month from filing (06 January to 10 February 2011 . . .) to compose a 24-page brief . . ., then giving Appellants four days to respond. It is not due process under the Fourteenth Amendment . . . because the "notice" part of "notice and a hearing" is too short on a complex case like this. The best Appellants could do between 10 and 14 February . . . was summarize the facts and address the "prior action pending" claim (which Appellees appear to have abandoned anyway . . .), leaving the substance of the case for oral argument. This is no way to run a court system. Nobody would have suffered the slightest prejudice from waiting until the next motion calendar to hear a brand new case. Obviously if judgment on the pleadings is reversed, then this issue is moot, but otherwise, the case should be remanded for further development.

From a review of the record, the motion setting out the specific bases for the motion for judgment on the pleadings and the notice of hearing was served by hand delivery on 7 February

2011. The brief was served by email -- by stipulation of the parties -- as well as by mail on 10 February 2011. The hearing was then conducted on 14 February 2011.

Plaintiffs make no claim in this case that the service of the motion or brief violated any of the Rules of Civil Procedure. *See* N.C.R. Civ. P. 5(a1) (requiring that briefs on dispositive motions "shall be served upon each of the parties at least two days before the hearing on the motion"). Plaintiffs had a week's notice that they would be required to show the trial court that the allegations of the complaint were sufficient to support each claim for relief. Plaintiffs have pointed to nothing in defendants' brief that was a surprise to them, and they have offered no explanation why they needed more time other than an assertion that the amount of time specified in the Rules of Civil Procedure is inadequate.

While plaintiffs argue that this is a particularly complex case, we do not agree. Moreover, the record indicates that plaintiffs' counsel is prosecuting multiple actions involving these facts and would have been familiar with the case law he believed supported plaintiffs' causes of action. Prior to filing the complaint in this case and the federal action, plaintiffs' counsel would have needed to determine that the claims were supported by existing law or that there was a good

faith argument for extending, modifying, or reversing existing law. That pre-filing research should have lessened the time needed to respond to the motion for judgment on the pleadings.

Plaintiffs' assertion that the "case should be remanded for further development" is not a justification for continuing a hearing on a motion to dismiss or a motion for judgment on the pleadings. Plaintiffs must first show that they have adequately stated claims for relief before being entitled to "further develop[]" their case, as through discovery. Plaintiffs have, therefore, failed to demonstrate that the trial court abused its discretion in refusing to continue the hearing on the motion for judgment on the pleadings.

II

We next address plaintiffs' contention that the trial court erred in granting defendants' motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure. On appeal, a trial court's ruling on a motion for judgment on the pleadings is reviewed de novo. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court].'" *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (2005)

(quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

While defendants' motion sought dismissal both because of a prior pending action and for failure to state a claim for relief, defendants, at the trial level, ultimately argued only the sufficiency of the complaint's allegations. On appeal, the sole issue before the Court is the sufficiency of the allegations. We address each cause of action in turn.

A. Negligent Supervision

Plaintiffs first allege that Emanuel & Dunn and its members are liable for negligent supervision of Mr. Bettis during his representation of the *Lucas* defendants. Plaintiffs argue that the lawyers had a legal duty to stop Mr. Bettis' conduct and that plaintiffs were injured because of the lawyers' failure to do so despite having been given actual notice of that conduct.

As with any claim for negligence, a party seeking recovery for negligent supervision "'must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach.'" *Mozingo v. Pitt Cnty. Mem'l Hosp., Inc.*, 331 N.C. 182, 187, 415 S.E.2d 341, 344 (1992) (quoting *Waltz v. Wake Cnty. Bd. of Educ.*, 104 N.C. App. 302, 304, 409 S.E.2d 106, 107 (1991)). Here, plaintiffs' complaint fails to demonstrate that Emanuel & Dunn and its members owed any duty to plaintiffs.

Petrou v. Hale, 43 N.C. App. 655, 260 S.E.2d 130 (1979), is controlling. In *Petrou*, a doctor had prevailed in a medical malpractice action. He subsequently sued his former patient's attorney in the malpractice action for, among other claims, "negligent violation of a duty of care required of attorneys in the performance of their professional duties." *Id.* at 656, 260 S.E.2d at 132. In concluding that the attorney owed no duty for negligence purposes to the doctor the attorney's client had sued, this Court explained:

> If an attorney whose primary duty is to promote the cause of his client in a light most favorable to him within the bounds of the law is also required to protect the rights of an adverse party, he will be caught in the midst of a conflict of interest. More importantly, if mere negligence in protecting the rights of an adverse party becomes the standard of liability, attorneys will be fearful of instituting lawsuits on behalf of their clients. The end result would be the limitation of free access to the courts.

Id. at 661, 260 S.E.2d at 135.

The Court upheld the trial court's grant of summary judgment to the attorney, emphasizing: "Today, the trying of lawsuits is a conventional form of warfare. Ready remedies for the institution of frivolous lawsuits are presently available. While it is true that an attorney has a duty to refrain from instituting frivolous or malicious lawsuits at the behest of his

clients, ample means exist to provide appropriate relief for violation of this duty, *i.e.*, institution of disciplinary proceedings and malicious prosecution actions." *Id.* at 661-62, 260 S.E.2d at 135.

Petrou bars plaintiffs' claims for negligent supervision. As *Petrou* holds, Emanuel & Dunn and its members owed no duty, for negligence purposes, to the parties who were adverse to the firm's clients. Plaintiffs should have sought recourse for any misconduct by Mr. Bettis or the firm for which he worked by seeking sanctions from the trial court in the *Lucas* action or by initiating a disciplinary proceeding with the State Bar.

B. Tortious Interference

Plaintiffs next contend the trial court erred in entering judgment on their claim for tortious interference with prospective economic advantage. "To establish tortious interference with prospective economic advantage, a plaintiff must show that the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff, which would have been made absent the defendant's interference." *MLC Auto., LLC v. Town of Southern Pines*, ___ N.C. App. ___, ___, 702 S.E.2d 68, 79 (2010), *disc. review denied*, 365 N.C. 211, 710 S.E.2d 23 (2011).

In their complaint, plaintiffs allege in support of this claim for relief:

> Mr. Harrison had a reasonable expectation of recovering damages to which he was legally entitled in Bladen County file numbers 08 CVD 885, and Ms. Cullen had a reasonable expectation of participating in the Class recovery, but Defendants prevented, reduced, or delayed Mr. Harrison's recovery and the certification of a class, not in the legitimate exercise of any Defendant's own rights, but with design to injure Plaintiffs by means of sham litigation, willfully and maliciously misrepresenting facts and law to Bladen County District Court to win in the absence of reasonable expectation of a favorable ruling, and willfully and maliciously depriving Plaintiffs of Counsel's services, as evidenced by Mr. Bettis's unprovoked personal malice and hostility toward Plaintiffs and Counsel . . . .

On appeal, however, plaintiffs assert that "Mr. Harrison had a contract with Counsel (1), which Appellees knew of (2) and prevented Counsel from fulfilling by getting him knocked off the case (3) without justification (4), [sic] resulting in months of delay that contributed to dismissal of his case and his and prospective class member Mrs. Cullen's recovery." Plaintiffs have, therefore, sensibly abandoned their apparent claim that they should be able to sue the opposing counsel in *Lucas* for interfering with their ability to prevail in the *Lucas* action by obtaining dismissal of the action. Instead, plaintiffs appear

to be focusing solely on the trial court's disqualification order.

We fail to see how obtaining disqualification of an attorney in a lawsuit qualifies as tortious interference with plaintiffs' prospective economic advantage. The complaint contains no allegation that defendants induced a third party, such as their attorney, to refrain from entering into a contract with plaintiffs. Although plaintiffs, on appeal, contrary to their complaint, appear to argue tortious interference with contract, that claim requires similar proof that defendants "'intentionally induce[d] the third person not to perform the contract[.]'" *Bloch v. Paul Revere Life Ins. Co.*, 143 N.C. App. 228, 239, 547 S.E.2d 51, 59 (2001) (quoting *Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992)). Plaintiffs do not, however, allege that defendants induced their attorney not to perform his contract. Plaintiffs cite no authority from this State or any other jurisdiction suggesting that a successful motion for disqualification can give rise to a claim for tortious interference with contract.

Any disqualification of Mr. Livingston was an act of the trial court. Even if Mr. Bettis' actions in submitting the affidavits regarding Mr. Livingston's contract with CCDN, LLC could be considered as inducing the non-performance of Mr.

Livingston's contract, the trial court by ordering Mr. Livingston's disqualification after consulting the State Bar means that the trial court, in the *Lucas* case, found Mr. Bettis' actions as to the affidavits legally justified.

Plaintiffs' argument is, therefore, a collateral attack on the disqualification order. "'A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid.'" *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (2005) (quoting *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969)). Here, plaintiffs cannot prevail on their tortious interference claim without a determination that the trial court erroneously disqualified Mr. Livingston as counsel for the *Lucas* plaintiffs.

Even assuming that the tortious interference claim could be equated to an argument that defendants obtained Mr. Livingston's disqualification through fraud, "[i]t is well settled in this jurisdiction 'that in order to sustain a collateral attack on a judgment for fraud it is necessary that the allegations of the complaint set forth facts constituting extrinsic or collateral fraud in the procurement of the judgment, and not merely intrinsic fraud, that is, arising within the proceeding itself and concerning some matter necessarily under the consideration

of the court upon the merits.'" *Caswell Realty Assocs. I v. Andrews Co.*, 121 N.C. App. 483, 486, 466 S.E.2d 310, 312 (1996) (quoting *Scott v. Farmers Coop. Exch., Inc.*, 274 N.C. 179, 182, 161 S.E.2d 473, 476 (1968)).

Extrinsic fraud "'deprives the unsuccessful party of an opportunity to present his case to the court.'" *Hooks v. Eckman*, 159 N.C. App. 681, 684, 587 S.E.2d 352, 354 (2003) (quoting *Stokley v. Stokley*, 30 N.C. App. 351, 354, 227 S.E.2d 131, 134 (1976)). Intrinsic fraud "occurs when a party (1) has proper notice of an action, (2) has not been prevented from full participation in the action, and (3) has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary." *Id.*

Phrased differently, "intrinsic fraud describes matters that are involved in the determination of a cause on its merits. In contrast, extrinsic fraud prevents a court from making a judgment on the merits of a case." *Id.* at 684-85, 587 S.E.2d at 354. When the fraud is characterized as intrinsic, then relief is possible only through a motion in the cause pursuant to Rule 60(b)(3). *Id.* at 685, 587 S.E.2d at 354.

Plaintiffs' complaint makes no allegation that they were deprived of the ability to participate in the proceedings, to present their arguments, or show that the representations by Mr.

Bettis were false. They were, in fact, able to persuade the trial judge to reinstate Mr. Livingston because CCDN, LLC was not a party to the action and, the trial court found, no conflict, therefore, existed. Their fraud allegations involve matters related to the determination on the merits and, therefore, involve intrinsic fraud. If plaintiffs sustained injury from the brief disqualification, they should have sought relief in the *Lucas* trial court, such as sanctions. Plaintiffs cannot pursue that relief in a separate action and, therefore, judgment on the pleadings was proper.

C. Statutory Attorney Fraud

Plaintiffs next allege that Mr. Bettis' actions in the *Lucas* litigation violated N.C. Gen. Stat. § 84-13 (2011). That statute provides:

> If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages.

Id.

Plaintiffs' claim of fraud is also based on the events in the *Lucas* action:

> Mr. Bettis, while in E&D's employ and for its benefit, committed the fraudulent practices of filing factually false affidavits with the Clerk of Superior Court and misrepresenting facts and law in open court with the intent and effect of

> deceiving Bladen County District Court into issuing relief to which his clients were not entitled, to wit, dismissal of Mr. Harrison's putative class action, and also did this in furtherance of CCDN's wholly fraudulent and criminal enterprise, depriving both Mr. Harrison and Mrs. Cullen of recompense for the losses they suffered, entitling Plaintiffs to double their actual damages per NCGS § 84-13.

Plaintiffs have cited no authority -- and we have found none -- even suggesting that a claim may be brought under N.C. Gen. Stat. § 84-13 for alleged fraud by an opposing counsel in a wholly separate action. In any event, this argument again constitutes a collateral attack on the dismissal order in the *Lucas* case. To prevail on this claim, plaintiffs, in this case, would have to obtain a ruling that the dismissal in the *Lucas* case was not warranted. The alleged fraud relates to a determination of the merits of the motion to dismiss and, therefore, is intrinsic fraud. Consequently, the collateral attack is invalid, and the trial court properly granted judgment to defendants on this cause of action.

D. NC RICO

Finally, plaintiffs contend that defendants violated NC RICO. NC RICO forbids in relevant part any person's "engag[ing] in a pattern of racketeering activity[,]" conducting or participating in a pattern of racketeering activity "whether indirectly, or employed by or associated with such

enterprise[,]" or conspiring to do either of the aforementioned activities. N.C. Gen. Stat. § 75D-4(a) (2011). N.C. Gen. Stat. § 75D-8(c) (2011) provides, in pertinent part, that "[a]ny innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees."

A "'[p]attern of racketeering activity'" is defined in relevant part as "engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents." N.C. Gen. Stat. § 75D-3(b) (2011). "Racketeering activity" in turn means "to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under . . . Chapter 14 of the General Statutes . . . [and] . . . [a]ny conduct involved in a 'money laundering' activity . . . ." N.C. Gen. Stat. § 75D-3(c)(1).

In their complaint, plaintiffs alleged that Mr. Bettis' actions during the *Lucas* litigation constituted "two or more offenses of obtaining property by false pretenses in violation of NCGS § 14-100(a)." In addition, the complaint alleges that when defendants accepted payment from CCDN in the amount of $7,500.00, they committed "at least one count of receiving stolen property, NCGS § 14-70 . . ., which also is 'money laundering' per NCGS § 75D-3(c)(1)c." Plaintiffs contended that these acts constituted a pattern of racketeering activity that "proximately caused actual economic loss to Plaintiffs," thus entitling them to treble damages and attorneys' fees under N.C. Gen. Stat. § 75D-8.

Plaintiffs have cited no authority from any jurisdiction holding that a pattern of racketeering exists for purposes of a private RICO suit based on (1) a law firm's accepting a retainer to represent a party defending against allegations of fraud by the client and (2) an attorney's making allegedly false statements in order to cause his client to prevail in litigation. As an initial matter, plaintiffs' "obtaining property by false pretenses" argument constitutes another collateral attack on the dismissal order in the *Lucas* litigation. Mr. Bettis' actions leading up to the dismissal of

the *Lucas* litigation cannot be a basis for an independent NC RICO action.

With respect to the acceptance of a retainer, we first look to the "[f]indings and intent of [the] General Assembly" in enacting NC RICO, as set out in N.C. Gen. Stat. § 75D-2 (2011). After specifying the purposes of the NC RICO chapter, the General Assembly expressly stated: "It is not the intent of the General Assembly to in any way interfere with the attorney-client relationship." N.C. Gen. Stat. § 75D-2(b). *See also* N.C. Gen. Stat. § 75D-5(i) (2011) (providing with respect to civil forfeiture proceedings that may be brought by State of North Carolina that "[t]he interest of an innocent party in the property shall not be subject to forfeiture" and "[a]n attorney who is paid a fee for representing any person subject to this act, shall be rebuttably presumed to be an innocent party as to that fee transaction").

Setting aside the fact that the single act of accepting a retainer does not constitute a "pattern" of racketeering activity, plaintiffs have not provided any basis or authority for holding, despite the General Assembly's statement of contrary intent, that an attorney's acceptance of a retainer to represent a defendant in a fraud action, without more, is sufficient to subject the attorney to liability under NC RICO.

Effectively, plaintiffs' argument would subject any attorney defending a fraud case arguably involving mail or wire fraud to suit by the plaintiffs simply for agreeing to provide representation. We cannot conceive of a greater intrusion into the attorney-client relationship. And, plaintiffs have offered no justification for an intrusion that is contrary to the General Assembly's very specific expression of intent.

Moreover, plaintiffs have failed to sufficiently allege, as required by N.C. Gen. Stat. § 75D-4, that they were "damaged in [their] business or property" by virtue of the alleged illegal activity. N.C. Gen. Stat. § 75D-8(c). In arguing that this requirement was met, plaintiffs assert: "If not for Mr. Bettis, and the support and approval he got from all other Appellees, and if not for Appellees' acceptance of CCDN's dirty money, Mr. Harrison would have gotten a judgment for tens of thousands at least, and would have represented a class of CCDN victims including Mrs. Cullen, who then would have recovered at least some of the $4,500 she lost." Plaintiffs contend that "[t]his was the foreseeable and intended outcome, constituting proximate cause."

The potential for plaintiffs to have recovered some indeterminate portion of their losses is not the concrete loss to business or property necessary for a NC RICO cause of action.

In *Kaplan v. Prolife Action League of Greensboro*, 123 N.C. App. 720, 726, 475 S.E.2d 247, 252 (1996), this Court addressed for the first time the showing required "to demonstrate any injury or damage to property cognizable under NC RICO."[3] The *Kaplan* panel looked to federal cases and noted that "'[w]hile [federal] RICO is to be "liberally construed," it is well established that not all injuries are compensable under this section.'" *Id.* at 727, 475 S.E.2d at 252 (quoting *Oscar v. Univ. Students Co-op Ass'n*, 965 F.2d 783, 787-88 (9th Cir. 1992)). The Court then adopted, in pertinent part, a federal test providing that "'a showing of "injury" [under RICO] requires proof of concrete financial loss, and not mere injury to a valuable intangible property interest.'" *Id.*, 475 S.E.2d at 252-53 (quoting *Oscar*, 965 F.2d at 787-88).

Here, plaintiffs have made no showing of any concrete financial loss resulting from defendants' actions. They have merely pointed to the possibility of a verdict in their favor had defendants not been successful in having Mr. Harrison's class action dismissed. Such a mere expectancy is far too intangible to constitute an injury to property sufficient to support a claim under NC RICO. *See Strates Shows, Inc. v. Amusements of Am., Inc.*, 379 F. Supp. 2d 817, 825 (E.D.N.C.

[3]Like *Kaplan*, this case involves only allegations of injury to property and not allegations of injury to business.

2005) (holding that "'[i]njury to mere expectancy interests or to an "intangible property interest" [was] not sufficient to confer [federal] RICO standing'" (quoting *Regions Bank v. J.R. Oil Co.*, 387 F.3d 721, 730 (8th Cir. 2004))). *See also Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990) (holding claims for future commissions too speculative to warrant standing for federal RICO claim "because Hecht only alleges that he would have lost commissions in the future, and not that he had lost any yet").

Thus, we hold that plaintiffs have also failed to sufficiently allege a pattern of racketeering and an injury cognizable under NC RICO. The trial court, therefore, properly granted judgment on the pleadings for the NC RICO cause of action as well as each of the other causes of action.

Affirmed.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).