NO. COA 12-1457
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

MUSE MOORE JAMES, individually; as Executrix of the Estate of Walton Burton James, Sr.; as Co-Trustee of the Trust of Walton Burton James, Sr.; and WALTON BURTON JAMES, JR., individually and on behalf of unknown and unborn issue of Muse Moore James,
Plaintiffs,

v. Wake County
No. 10-CVS-3120

SUE ANNE SCHOONDERWOERD, PATRICK JAMES HENDERSON, individually; and as Co-Trustee of the Trust of Walton Burton James, Jr., and MICHAEL HAMPTON HENDERSON,
Defendants.

Appeal by plaintiffs from order entered 14 August 2012 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 23 April 2013.

Ward and Smith, P.A., by Joseph A. Schouten and Gary J. Rickner, for plaintiff-appellants.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, and John Hemphill Law, P.C., by John R. Hemphill, for defendant-appellees.

HUNTER JR., Robert N., Judge.

Muse Moore James ("Muse") and Walton Burton James, Jr. ("Walton Jr.") (collectively, "Plaintiffs"), appeal from a trial court order granting summary judgment in favor of defendants. On appeal, Plaintiffs argue the trial court erred by: (i) applying a 3-year statute of limitations to Plaintiffs' constructive fraud claim; (ii) applying a 3-year statute of limitations to Plaintiffs' termination and modification of trust claims; and (iii) finding there was no genuine issue of material fact as to when Muse knew or should have known about the alleged fraud. Upon review, we affirm.

I. Facts & Procedural History

Muse and Walton Burton James, Sr. ("Walton Sr.") were married for more than 63 years until Walton Sr.'s death on 27 July 2003. During their marriage, Muse and Walton Sr. had two children: (i) Sue Anne Schoonderwoerd ("Sue Anne"), born on 25 August 1942; and (ii) Walton Jr., born on 8 January 1951. Sue Anne, in turn, had two children: (i) Patrick James Henderson ("Patrick"); and (ii) Michael Hampton Henderson ("Michael"). Walton Jr. does not have any children.

While married, Muse and Walton Sr. purchased four tracts of real property: (i) a home on Wildwood Street in Raleigh (the

"Wildwood Home"); (ii) a beach condominium in Atlantic Beach (the "Atlantic Beach Condo"); (iii) a commercial property on Glenwood Avenue in Raleigh (the "Glenwood Property"); and (iv) a lot in Harnett County (the "Harnett Lot"). They owned all four properties as tenants by the entirety. In 1999, Muse and Walton Sr. executed separate wills (the "1999 Wills"). Each will provided that upon the death of one spouse, all four properties would pass to the other spouse in fee simple.

Subsequently, Muse was diagnosed with non-Hodgkin's lymphoma. In early June 2001, Muse received inpatient treatment at UNC Hospital. Additionally, Walton Sr. was diabetic and had suffered strokes. Given their medical problems, Muse and Walton Sr. decided to move into Sunrise Assisted Living ("Sunrise") in Raleigh.

On 31 May 2001, Sue Anne contacted attorney Terry Carlton ("Carlton") to draft powers of attorney for her parents. On 5 June 2001, immediately before their move to Sunrise, Muse and Walton Sr. each signed powers of attorney naming Sue Anne as their general attorney-in-fact. Muse and Walton Sr. then moved to Sunrise in June 2001. At Sunrise, Sue Anne assisted them with various day-to-day tasks like stocking their refrigerator and

filling their medical prescriptions. Sue Anne also gave her parents financial advice and wrote their checks for them.

Sue Anne continued meeting independently with Carlton. On 12 June 2001, Sue Anne met with Carlton to discuss the "potential completion of estate planning documents for [her] parents." The following day, Carlton met with Muse and Walton Sr. to discuss "issues and options regarding potential completion of credit shelter wills." In explaining how credit shelter wills worked, Carlton indicated Muse and Walton Sr. would have to place their real estate in a trust. Carlton further explained that this plan would require dissolution of the tenancies by the entirety in favor of tenancies-in-common.

On 15 June 2001, Muse called Carlton to tell him: (i) she wanted to leave the Atlantic Beach Condo to Patrick and Michael in equal shares; (ii) she wanted Walton Sr. to be her primary executor and trustee; and (iii) she wanted Patrick to be her alternate executor and trustee.

On 18 June 2001, Sue Anne called Carlton to "discuss . . . [the] proposed wills for [her] parents." Later that day, Muse called Carlton "to review [the] issues/terms of [their] proposed last will and testament." During that conversation, Muse told Carlton she and Walton Sr. already conveyed the Wildwood Home to

Walton Jr. as a gift on 20 March 2001. However, Muse and Walton Sr. retained a life estate in the Wildwood Home. Muse instructed Carlton not to tell Sue Anne they had given the Wildwood Home to Walton Jr. When Carlton inquired further, Muse told him to "butt out." Carlton and Muse spoke again on 19 June 2001. Carlton again suggested telling Sue Anne about giving the Wildwood Home to Walton Jr., but Muse refused.

On 25 June 2001, Muse and Walton Sr. executed new wills (the "2001 Wills") replacing the 1999 Wills. The 2001 Wills created a testamentary trust (the "Trust") upon the death of either spouse. Under the terms of the 2001 Wills, the deceased spouse's half-interest in the Atlantic Beach Condo, Glenwood Property, and Harnett Lot would become Trust assets. The surviving spouse would retain his or her half-interest as a tenant-in-common. The surviving spouse and Patrick would be co-trustees of the Trust assets. The record does not indicate why the final 2001 Wills listed Patrick as co-trustee rather than alternate trustee. The 2001 Wills listed Sue Anne, Walton Jr., Patrick, and Michael as the Trust's beneficiaries.

On 25 June 2001, Muse and Walton Sr. executed a special warranty deed for the Glenwood Property creating a tenancy-in-common. On 10 July 2001, Muse and Walton Sr. executed similar

special warranty deeds for the Atlantic Beach Condo and the Harnett Lot. Muse testified she does not remember signing her 2001 Will or these special warranty deeds. The 2001 Wills were notarized and signed by two witnesses, and all three special warranty deeds were notarized.

Around 13 July 2001, Patrick became attorney-in-fact for Muse and Walton Sr., rather than Sue Anne. The record does not indicate why Muse and Walton Sr. chose Patrick to become their attorney-in-fact.

On 15 August 2002, Muse told Carlton she and Walton Sr. wanted to amend the 2001 Wills by codicil. Specifically, they wanted to reduce the trust's beneficiaries from four (their children and grandchildren), to two (their children). Muse said she did not want to change anything else in the 2001 Wills. Carlton prepared the codicils. Muse and Walton Sr. executed the codicils on 20 August 2002. Muse testified she does not remember signing her codicil. Both codicils were notarized and signed by three witnesses.

On 27 July 2003, Walton Sr. died. On 24 September 2003, Muse went to Carlton's office to probate Walton Sr.'s estate. On 18 December 2003, Muse filed a final account of Walton Sr.'s estate, and presumably the estate account was closed.

On 25 September 2003, Muse sold the Atlantic Beach Condo for $169,000. Muse received half this amount based on her one-half interest as a tenant-in-common. She signed the deed of sale three times: (i) individually; (ii) as Executrix of the Estate of Walton Sr.; and (iii) as co-trustee of the Trust. Patrick did not sign the deed of sale.[1]

In summer 2004, Muse met with attorney Daniel Brady ("Brady") to gain a better understanding of her 2001 Will. Muse testified she first learned she could not sell the Glenwood Property without Patrick's consent at this meeting. Specifically, Muse elaborated that:

> [Brady] explained to me this trust thing and that's why I went to see him, and he wanted to make up a will at the time for me. I was flabbergasted when [Brady] explained the trust to me. I had no powers whatsoever. . . . When he told me what was the results of the trust, well, then I said I don't want to leave Sue Anne anything.

As a result, Muse asked Brady to prepare a new will. On 12 August 2004, Muse executed a new will (the "2004 Will") leaving all her property to Walton Jr. While the 2004 Will does not

[1] Although nothing in the record indicates Patrick consented to this sale as co-trustee, Defendants do not raise any counterclaims regarding this sale.

address the Trust, it purports to "revoke all Wills and Codicils heretofore made by me."

Subsequently, Muse tried to gain fee simple in the Trust assets. For instance, on 26 May 2005 Muse drafted, signed and recorded a deed professing to transfer the Trust's one-half interest in the Glenwood Property to herself. She signed the deed as co-trustee. Furthermore, in January 2008 Muse tried to sell the entire Harnett Lot to a contractor. When Patrick did not consent to the sale, Muse asked him to resign as co-trustee. However, he refused. On 31 March 2008, Muse conveyed her one-half individual interest in the Glenwood Property to Walton Jr. She retained a life estate.

On 22 February 2010, Muse and Walton Jr. filed a complaint against Sue Anne, Patrick, and Michael[2] (collectively, "Defendants") in Wake County Superior Court. The complaint alleged: (i) constructive fraud; (ii) fraud; (iii) termination of trust; (iv) modification of trust; and (v) bad faith/punitive damages. On 15 September 2010, Defendants filed seven counterclaims: (i) continuing breach of fiduciary duty; (ii) constructive fraud; (iii) conversion; (iv) self-dealing and

[2] Plaintiffs included Patrick and Michael in their complaint because they were remainder beneficiaries of the Trust.

breach of duty of loyalty; (v) breach of N.C. Gen. Stat. § 36C-7-703;[3] (vi) action to quiet title/set aside deeds; and (vii) declaratory judgment. Defendants based these claims on Muse's attempts to unilaterally exercise ownership over the Trust's assets.

From 2011 to 2012, Muse, Sue Anne, and Carlton gave depositions. During her deposition, Muse testified that in 2001 she was terminally ill and taking seventeen different medications. She further testified:

> A: So I don't know anything that happened between those times.
>
> Q: Between what times?
>
> A: Well, 2000 until about 2004.
>
> Q: You mean you don't remember anything for those four years?
>
> A: That's right, until I came home and got off of some of that medication. But I was appalled when I read the records that I was taking 17 daily.
>
> Q: Okay. So you don't have any memory of events between 2000 to 2004? Is that what you're saying?
>
> A: 2001.
>
> Q: 2001 to 2004?

[3] N.C. Gen. Stat. § 36C-7-703 prohibits co-trustees from taking unilateral actions with trust assets.

A: Yes.

Muse testified she did not remember ever meeting Carlton in 2001 and stated she "didn't even know him when [she] saw him" at the deposition.

Walton Sr.'s neurologist Dr. Michael Bowman ("Dr. Bowman") also gave a deposition. During his deposition, Dr. Bowman testified that Walton Sr. suffered from vascular dementia at the end of his life. Dr. Bowman testified he expected Walton Sr. "to have significant cognitive impairment" that would not permit him to execute legal documents. Given their alleged mental incapacity, Muse claims she and Walton Sr. were not able to understand the 2001 Wills and special warranty deeds they executed.

During Carlton's deposition, he testified Sue Anne told him in 2001 that her parents were "very competent." Carlton also testified that he "found Muse to be very competent" when she signed the 2001 Will.

On 4 May 2012, Defendants filed a motion for summary judgment for all of Plaintiffs' claims and their counterclaim that Muse breached N.C. Gen. Stat. § 36C-7-703. On 14 August 2012, the trial court entered an order granting Defendants' motion as to Plaintiffs' claims. The order does not address

Defendants' counterclaim. On 14 August 2012, Plaintiffs filed timely notice of appeal.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 7A-27(d) (2011). Since Defendants' counterclaims remain outstanding, this appeal is interlocutory. However, according to N.C. R. Civ. P. 54(b):

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

N.C. R. Civ. P. 54(b). Here, the trial court issued a Rule 54(b) certification. *See id.* Upon review, we determine we have jurisdiction to hear the instant case.

This Court's "standard of review of an appeal from summary judgment is de novo." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

On *de novo* review of a trial court order granting summary judgment, we must determine whether "the trial court properly concluded that the moving party showed, through pleadings and affidavits, that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law." *Daniel v. Wray*, 158 N.C. App. 161, 168, 580 S.E.2d 711, 716 (2003). We must "view all evidence in the light most favorable to the non-movant and draw all reasonable inferences in his favor." *Campbell v. Anderson*, 156 N.C. App. 371, 374, 576 S.E.2d 726, 729 (2003).

III. Analysis

On appeal, Plaintiffs argue the trial court erred by: (i) applying a 3-year statute of limitations to their constructive fraud claim; (ii) applying a 3-year statute of limitations to their termination and modification of trust claims; and (iii) determining there was no genuine issue of material fact as to when Muse knew or should have known about the alleged fraud. Upon review, we affirm.

A. Constructive Fraud

Plaintiffs first argue the trial court erred by granting summary judgment in favor of Defendants for their constructive fraud claim. We disagree.

In North Carolina, the applicable statute of limitations depends on whether plaintiffs bring: (i) a breach of fiduciary duty claim; or (ii) a constructive fraud claim based on breach of fiduciary duty.

> Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1) (2003). However, a claim of constructive fraud based upon a breach of fiduciary duty falls under the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56 (2003).

Babb v. Graham, 190 N.C. App. 463, 480, 660 S.E.2d 626, 637 (2008) (quotation marks and citations omitted).

To survive summary judgment, "a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (citation omitted); *see also Fakhoury v. Fakhoury*, 171 N.C. App. 104, 110, 613 S.E.2d 729, 733 (2005); *Orr v. Calvert*, __ N.C. App. __, __, 713 S.E.2d 39, 49 (Hunter, Jr., J., dissenting), *rev'd for reasons stated in dissent*, 365 N.C. 320, 720 S.E.2d 387 (2011) (citation and quotation marks omitted).

Certain legal relationships create a rebuttable presumption that the relationship is one in which the plaintiff put trust and confidence in the defendant as a matter of law.[4] If plaintiffs establish the existence of a presumptive fiduciary relationship, the burden then shifts to the defendant to show he or she "act[ed] openly, fairly and honestly in bringing about [the transaction]." N.C.P.I.—Civ. 800.06 (2011); *see also Collier v. Bryant*, __ N.C. App. __, __, 719 S.E.2d 70, 81 (2011). "This means that the defendant must prove, by the greater weight of the evidence, that, with regard to [the transaction], the defendant made a full, open disclosure of material facts, that [s]he dealt with the plaintiff fairly, without oppression, imposition or fraud, and that [s]he acted honestly." N.C.P.I.—Civ. 800.06 (2011).

A fiduciary relationship can also arise based on the facts. In this circumstance, plaintiffs must allege facts showing "a

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[4] These presumptive fiduciary relationships include, but are not limited to, the following: "(1) trustee and cestui que trust dealing in reference to the trust fund, (2) attorney and client, in respect of the matter wherein the relationship exists, (3) mortgagor and mortgagee in transactions affecting the mortgaged property, (4) guardian and ward, just after the ward arrives of age, and (5) principal and agent, where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant." *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (1943) (citation omitted).

relationship of trust and confidence." *Fakhoury*, 171 N.C. App. at 110, 613 S.E.2d at 733 (citation omitted). Our Supreme Court has explained:

> The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. It . . . extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Hinton v. West, 207 N.C. 708, 716, 178 S.E. 356, 360 (1935) (quotation marks and citation omitted). A fiduciary relationship based on the facts "need not be legal; it may be moral, social, domestic or merely personal." *Id.* (quotation marks and citation omitted).

In 1997, our Supreme Court distinguished constructive fraud claims from breach of fiduciary duty claims by adding the additional requirement that constructive fraud claims contain an allegation that the defendant benefitted himself. *See Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) ("Implicit in the requirement that a defendant [take] advantage of his position of trust to the hurt of plaintiff is the notion that the defendant must seek his own advantage in the

transaction; that is, the defendant must seek to benefit himself." (alteration in original)(citation and quotation marks omitted)); *see also White*, 166 N.C. App. at 294, 603 S.E.2d at 156 ("The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself.").

In the present case, Plaintiffs argue the trial court erred by failing to apply a 10-year statute of limitations to their constructive fraud claim. We disagree.

Here, Plaintiffs issued a summons on 22 February 2010. Therefore, this Court examines transactions in which Defendants participated during the ten-year period prior to this date. *See* N.C. Gen. Stat. § 1-56 (2011). Upon examination of the record, it appears that three relevant transactions are in question involving any of Defendants: (i) Sue Anne's power of attorney executed on 5 June 2001; (ii) the power of attorney naming Patrick as attorney-in-fact rather than Sue Anne, executed on 13 July 2001; and (iii) the special warranty deeds destroying the tenancies by the entirety for the Atlantic Beach Condo, the Glenwood Property, and the Harnett Lot.

To the extent that Plaintiffs' constructive fraud claim challenges Walton Sr.'s 2001 Will, it is clear that his Will cannot be the subject of a constructive fraud claim because this type of action may only be brought by caveat. *See* N.C. Gen. Stat. § 31-32 (2011). Caveat actions must be brought within three years of the decedent's death. *See id.* Because of the unique nature of caveat proceedings, since Walton Sr.'s 2001 Will was not challenged within this time, the final probate report terminates any claims by any party or executrix of the Will who takes under the Will.

With regard to the powers of attorney, in no instance does it appear that either Patrick or Sue Ann signed any instruments transferring property of their principal. It is difficult to comprehend how these powers of attorney can be the subject of Plaintiffs' constructive fraud claim. A power of attorney does presumptively establish a fiduciary relationship but it is not, standing alone, a transaction in which the agent of the principal benefits.

Therefore, the only remaining challenge is that the execution of the special warranty deeds destroying the tenancies by the entirety and creating tenancies-in-common may have been subject to constructive fraud. If this transaction had been the

subject of constructive fraud, the trial court would apply the above traditional three-part test for constructive fraud claims.

First, the trial court must consider whether Plaintiffs allege facts indicating a fiduciary relationship between Muse and either Sue Anne or Patrick. Here, Plaintiffs allege a presumptive fiduciary relationship based on their role as attorneys-in-fact. *See Albert v. Cowart*, __ N.C. App. __, __, 727 S.E.2d 564, 570 (2012) ("The relationship created by a power of attorney between the principal and the attorney-in-fact is fiduciary in nature. . . . [A]n attorney-in-fact is presumed to act in the best interests of the principal." (quotation marks and citation omitted)).

Second, the trial court must consider whether "the defendant took advantage of that position of trust in order to benefit himself." *White*, 166 N.C. App. at 294, 603 S.E.2d at 156 (citation omitted). Here, Plaintiffs did not allege "specific facts creating a triable issue that defendants participated in a transaction through which they sought to benefit themselves." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 54 (2009). Specifically, we do not see any evidence indicating how the conversion of the Atlantic Beach Condo, Glenwood Property, and Harnett Lot to tenancies-in-common

benefits either Sue Anne or Patrick. Thus, the only remaining challenged transaction (the execution of the special warranty deeds) does not state a claim for relief based on constructive fraud.

It is clear that decedent Walton Sr. intended to benefit both of his children by creating the Trust. Although Muse may alter her Will as she wishes, she may not alter the intentions behind her deceased husband's Will. To transfer Trust assets to only some of the beneficiaries in unequal shares is not in compliance with the Trust. To do so would be to the detriment of all the beneficiaries of Patrick's grandfather's Trust. This action is not a transaction which under these facts can be the subject of the tort of constructive fraud.

Consequently, Plaintiffs fail to allege facts supporting a constructive fraud claim. Even if the 10-year statute of limitations for constructive fraud claims were used, no claim has been stated.

B. Termination/Modification of Trust

Plaintiffs next contend that the trial court erred by applying a 3-year statute of limitations to their termination and modification of trust claims. We disagree.

N.C. Gen. Stat. §§ 36C-4-411 and 36C-4-412 address termination and modification of trusts, respectively. Specifically, these two statutes allow for: (i) "[m]odification or termination of noncharitable irrevocable trust by consent;" and (ii) "[m]odification or termination because of unanticipated circumstances or inability to administer trust effectively." *See* N.C. Gen. Stat. § 36C-4-411 (2011); N.C. Gen. Stat. § 36C-4-412 (2011). Since neither statute contains a statute of limitations, they are governed by the ten-year statute of limitations in N.C. Gen. Stat. § 1-56. *See id.*; *see also* N.C. Gen. Stat. § 1-56 (2011).

Caveat actions, on the other hand, are governed by N.C. Gen. Stat. § 31-32.

> In general, the purpose of a caveat is to determine whether the paperwriting purporting to be a will is in fact the last will and testament of the person for whom it is propounded. The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form. An attack upon a will offered for probate must be direct and by *caveat; a collateral attack is not permitted*.

Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 419, 558 S.E.2d 871, 878 (2002) (quotation marks and citation omitted) (emphasis added). Overall, "a caveat is a proceeding *in rem* to

attack the validity of a will." *Casstevens v. Wagoner*, 99 N.C. App. 337, 338, 392 S.E.2d 776, 777 (1990).

Our case law clearly prohibits collateral attacks on wills outside of caveat proceedings. *See Baars*, 148 N.C. App. 408, 558 S.E.2d 871; *Casstevens*, 99 N.C. App. 337, 392 S.E.2d 776. For instance, in *Baars* we held the trial court did not have subject matter jurisdiction to hear the plaintiff's action challenging both an *inter vivos* property transfer and a will. *Baars*, 148 N.C. App. at 417, 558 S.E.2d at 877. There, the plaintiffs' aunt originally executed a will leaving the majority of her assets to the plaintiffs, but later executed codicils and *inter vivos* transfers giving her assets to the defendant. *Id.* at 410–11, 558 S.E.2d at 872–73. Following the aunt's death, the plaintiffs initiated: (i) a caveat action for the will; and (ii) a civil complaint challenging the *inter vivos* transfers. *Id.* at 411, 558 S.E.2d at 873.

There, since the civil complaint regarding the *inter vivos* transfers addressed the same issues as the caveat action, we determined the plaintiffs should have only filed a caveat action because the civil complaint was an impermissible collateral attack on the will's validity. *Id.* at 419, 558 S.E.2d at 878. Consequently, we affirmed the trial court's dismissal of the

civil complaint based on lack of subject matter jurisdiction. *Id.* at 414, 417, 558 S.E.2d at 874, 877.

In the present case, Plaintiffs contend their termination and modification of trust claims are not caveat actions and should be governed by a 10-year statute of limitations rather than the 3-year statute of limitations for caveat actions. We disagree.

Like the plaintiffs in *Baars*, Plaintiffs here use § 36C-4-411 and § 36C-4-412 to collaterally attack the 2001 Wills. In the instant case, the Trust encompasses the bulk of the 2001 Will. Thus, termination or modification of the Trust would also terminate or modify the bulk of the 2001 Will. Like in *Baars*, Plaintiffs should have raised their claim in a caveat action because "such relief is predicated upon the provisions of [the decedent's] will." *Id.* at 419, 558 S.E.2d at 878.

Since North Carolina precedent prohibits collateral attacks on wills outside of caveat actions, we affirm the lower court's application of the 3-year statute of limitations for caveat actions.

C. Fraud

Lastly, Plaintiffs argue the trial court erred by finding there was no genuine issue of material fact as to when Muse knew

or should have known of the alleged fraud. Upon review, we affirm.

In North Carolina, fraud claims have a 3-year statute of limitations. N.C. Gen. Stat. § 1-52(9) (2011). The statute further clarifies that "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2011).

"'[D]iscovery' means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396 (2003). Circumstances dictate whether this determination falls to the trial court or jury. Specifically, the decision "is ordinarily for the jury [to decide] when the evidence is not conclusive or is conflicting." *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976). However, the trial court may grant summary judgment "as a matter of law where it was clear that there was both capacity and opportunity to discover the mistake." *Id.*; *see also Grubb Properties, Inc. v. Simms Inv. Co.*, 101 N.C. App. 498, 501, 400 S.E.2d 85, 88 (1991) ("[W]here the evidence is clear and shows without conflict that the claimant had both the capacity and

opportunity to discover the mistake or discrepancy but failed to do so the absence of reasonable diligence is established as a matter of law.").

In the present case, Plaintiffs argue the trial court erred by granting summary judgment for their fraud claim when there was a genuine issue of material fact as to when Muse discovered or should have discovered Sue Anne's alleged fraud. We disagree.

After reviewing the evidence in the light most favorable to Plaintiffs, we conclude the latest point at which Muse knew or should have known about the alleged fraud was after her 2004 meeting with Dan Brady. During her deposition, Muse testified about that meeting as follows:

> A: [Brady] explained to me this trust thing and that's why I went to see him, and he wanted to make up a will at the time for me. I was flabbergasted when he explained the trust to me. I had no powers whatsoever. Everything had been taken away from me and I would have had to have been on welfare or somewhere because that was my income, everything.

The following exchange later occurred:

> I thought, well, I need somebody to -- when I found the trust, I need somebody to explain it to me. So I called [Brady] and he saw me. When he told me what was the results of the trust, well, and I said I don't want to leave Sue Anne anything. That's the way I felt at that time. But, you know, you

> change. Your mind changes through the years. But I did. I went to see him.
>
> Q: Okay. So you said you took the trust to him.
>
> A: Yes, he explained it to me and he said, "You don't have any powers at all. Everything is taken away from you." He said Patrick was the one that had it all. I didn't have any.
>
> Q: And that was the trust that was created by the will --
>
> A: Yes.

These statements demonstrate Muse knew or should have known about the alleged fraud after her 2004 meeting with Dan Brady. However, Plaintiffs did not file a complaint until 22 February 2010, after the three-year statute of limitations for fraud had run. Since Muse either knew or "had both the capacity and opportunity to discover" the alleged fraud after her 2004 meeting with Brady, we determine the trial court did not err in granting summary judgment based on the 3-year statute of limitations for fraud. *Grubb Properties, Inc.*, 101 N.C. App. at 501, 400 S.E.2d at 88.

IV. Conclusion

For the forgoing reasons, we conclude the trial court did not err in granting summary judgment for Plaintiffs' claims. Consequently, the trial court's summary judgment order is

AFFIRMED.

Judges McGEE and STEPHENS concur.

Report per Rule 30(e).