NO. COA14-253
NO. COA14-254

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

TERRI LYNN ROBERTSON and MARY DIANNE GODWIN DANIEL,
Plaintiffs-Appellants,

v. Brunswick County
No. 07 CVS 106

STERIS CORPORATION, a Delaware Corporation; GE MEDICAL SYSTEMS INFORMATION TECHNOLOGIES, INC., a Wisconsin corporation; BRUNSWICK COMMUNITY HOSPITAL, INC., aka COLUMBIA BRUNSWICK HOSPITAL, a North Carolina corporation; NOVANT HEALTH, INC., a North Carolina corporation; HCA, INC. A Delaware corporation; SEALMASTER CORPORATION aka SEALMASTER, INC., a Minnesota corporation; MICHAEL WILBUR, an Individual; K. BROWN, an Individual; W. GREEN, an Individual; R. MARTIN, an Individual; and JOHN DOE Defendants A,B,C,D, and E,
Defendants.

Appeal by Plaintiffs from orders entered 3 May 2013 and 25 July 2013 by Judge D. Jack Hooks, Jr. in Superior Court, Brunswick County. Heard in the Court of Appeals 9 September 2014. Pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure, these cases were consolidated for hearing as the issues presented to this Court by the appeals of Plaintiffs involve common questions of law.

The Lorant Law Firm, by D. Bree Lorant; and Womble, Carlyle, Sandridge & Rice, LLP, by Burley B. Mitchell, Jr. and Robert T. Numbers, II, for Plaintiffs-Appellants.

Young Moore and Henderson P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for Appellees G. Henry Temple, Jr. and Temple Law Firm.

McGEE, Chief Judge.

Terri Lynn Robertson and Mary Dianne Godwin Daniel ("Plaintiffs") were injured in a work-related accident in 2004. Plaintiffs initially hired G. Henry Temple, Jr. ("Temple") of Temple Law Firm, PLLC to represent them, and Plaintiffs filed their complaint on 18 January 2007. For reasons unclear from the record, Plaintiffs never entered into a written fee agreement with Temple, and the record does not reflect whether Temple discussed his standard fee agreement with Plaintiffs.

Several named defendants were dismissed during the course of the litigation. The case was declared exceptional in July 2009, and "a protracted discovery period with numerous lengthy hearings regarding discoverable materials and sanctions" followed. An initial mediation was conducted, and the remaining defendants Sealmaster, Inc. and Steris Corporation ("Defendants") offered settlement amounts. In an order dated 5 February 2013, the trial court found: "Temple determined more intensive discovery and trial preparation would be necessary for

either an improved settlement position, or for the inevitable trial if the matter would not settle."

Defendant Sealmaster, in March 2011, agreed to settle for an amount slightly higher than its original offer. Following a second mediation in March 2011, Defendant Steris also agreed to settle with Plaintiffs. The settlement agreement Temple obtained from Defendant Steris was more than twice the initial settlement offer. However, Plaintiffs did not follow through on the settlement agreement and Defendant Steris filed a motion to enforce the settlement agreement in June 2011.

Plaintiffs decided to hire a new attorney, and discharged Temple. A letter to this effect was mailed to Temple on 8 September 2011. Temple filed a motion to intervene and a motion in the cause on 5 October 2011, seeking to recover in *quantum meruit* for more than four and one-half years of costs and fees incurred working on Plaintiffs' case.

The trial court conducted a conference call on 13 October 2011 that included Plaintiffs, their new attorney, the remaining Defendants, and Temple. "After discussion as to the positions of the respective parties and counsel, an agreement in principle was reached to provide for final dismissal of this matter between the Plaintiffs and Defendants Seal Master and Steris and for payment of the previously negotiated Worker's Compensation

liens for both Plaintiffs." These agreements included confidentiality agreements concerning the amount of damages Plaintiffs were awarded.

Temple's 5 October 2011 motions were heard on 9 October 2012. In a 7 February 2013 order, the trial court concluded that Temple was "entitled to recover in quantum meruit for legal services rendered and expenses reasonably incurred during representation of [P]laintiffs" because Temple's legal representation "had value to [P]laintiffs" and Temple had represented Plaintiffs with an expectation of payment. The trial court concluded that "[t]o deny the motion by [Temple] would result in a windfall to [P]laintiffs[.]" The trial court then ruled that Temple should receive a certain sum in *quantum meruit* "representing the attorney fees and costs" the trial court had addressed in its findings of fact, which included expenses and one third of the recovery "after common costs."

Plaintiffs appealed on 4 March 2013.[1] Temple filed a "Motion to Correct Judgment" on 25 March 2013, requesting that the trial court correct the 7 February 2013 order by including "interest on the quantum meruit award, which pre- and post-judgment interest would accrue pursuant to G.S. 24-5(a)." This

[1] This Court ultimately affirmed the trial court's *quantum meruit* award in *Robertson v. Steris Corp.*, __ N.C. App. __, 760 S.E.2d 313 (2014) ("*Robertson I*").

matter was heard on 17 April 2013. Judge D. Jack Hooks, Jr. signed a written order, dated 19 April 2013, ruling that Temple was entitled to interest on the *quantum meruit* award pursuant to N.C. Gen. Stat. § 24-5(b), and awarded interest at the legal rate from 5 October 2011, the date Temple filed motions in the cause and to intervene. Temple served Plaintiffs with the order on 26 April 2013. Judge Hooks resigned from office, which was effective 30 April 2013. The order was filed with the Brunswick County Clerk of Superior Court on 3 May 2013.

Plaintiffs filed a "Motion to Amend Order and Alternative Motion for Relief From Order" on 10 May 2013, seeking to have the trial court reverse its ruling granting Temple interest on the "quantum meruit award." Judge Hooks was sworn in as an Emergency Judge of the Superior Court on 31 May 2013, and was assigned to hear Plaintiffs' motions. The trial court denied Plaintiffs 10 May 2013 motions by order filed 25 July 2013. Plaintiffs then filed notices of appeal from the 3 May 2013 and 25 July 2013 orders on 23 August 2013. Plaintiffs docketed separate appeals from the two orders. Appeal from the 3 May 2013 order is before us in COA14-253, and appeal from the 25 July 2013 order is before us in COA14-254.[2] We address both

[2] We note that it was unnecessary for Plaintiffs to file separate appeals, as both orders could have been argued in a single appeal. Further, as the merits of COA14-254 deal solely with

appeals in this opinion. Additional facts may be found in *Robertson I*.

Appeal COA14-254

Plaintiffs appeal from the trial court's 25 July 2013 order, which, in relevant part, denied Plaintiffs' motion to set aside the 3 May 2013 order on the basis of lack of subject matter jurisdiction. Plaintiffs argue that the trial court lacked jurisdiction to enter the 3 May 2013 order because the order was filed after Judge Hooks had resigned.

Judge Hooks signed the written order on 19 April 2013. Temple's attorneys served Plaintiffs with this written and signed order on 26 April 2013. Judge Hooks' resignation was effective 30 April 2013. The Brunswick County Clerk of Superior Court filed this written and signed order on 3 May 2013. It is clear this order was not entered until it was filed on 3 May 2013, three days after Judge Hooks' resignation became effective. The question before us is whether the Clerk of Court was divested of jurisdiction to properly enter the order following Judge Hooks' resignation.

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the issue of subject matter jurisdiction, they could have been addressed along with the issues in COA14-253 in a single appeal, even though this issue was not argued prior to entry of the 3 May 2013 order. *Burgess v. Burgess*, 205 N.C. App. 325, 328, 698 S.E.2d 666, 669 (2010) (citation omitted) ("the issue of subject matter jurisdiction may be raised for the first time on appeal").

According to the relevant portion of Rule 58 of the North Carolina Rules of Civil Procedure,

> a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. . . . . If service is by mail, three days shall be added to the time periods prescribed[.]

N.C. Gen. Stat. § 1A-1, Rule 58 (2013). "[T]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered." *Durling v. King*, 146 N.C. App. 483, 494, 554 S.E.2d 1, 7 (2001) (citations omitted).

> Before the adoption of Rule 58, our statutes expressly required a detailed entry in the court minutes in order to constitute entry of judgment. N.C.G.S. § 1-205 provided:
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> > Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction is not given by the court, the clerk must enter judgment in conformity with the verdict. N.C.G.S. § 1-205 (1953) (repealed by 1967 N.C. Sess. Laws ch. 957, § 4).

Reed v. Abrahamson, 331 N.C. 249, 253, 415 S.E.2d 549, 551 (1992). "In 1967, the General Assembly repealed the entry of judgment provision of section 1-205 and enacted the North Carolina Rules of Civil Procedure, including Rule 58[.]" *Id.* at 254, 415 S.E.2d at 551. Rule 58 was more complicated at the time *Reed* was decided, requiring:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
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> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

Reed, 331 N.C. at 251-52, 415 S.E.2d at 550 (quoting N.C. Gen. Stat. § 1A-1, Rule 58 (1990)).

With respect to abuse, neglect, and dependency orders, our Supreme Court has stated: "When the trial court fails to enter its order or to call the subsequent hearing pursuant to N.C.G.S. § 7B–807(b), that failure is a ministerial action subject to mandamus."

In re T.H.T., 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008). Failure to enter an order at the appropriate time without legitimate reason has been referred to as a "bureaucratic failure." *Id.* at 457, 665 S.E.2d at 61. Further, a judgment may be filed outside the session of court in which the matter was decided "so long as the hearing to which the order relates was held in term." *Pinckney v. Van Damme*, 116 N.C. App. 139, 155, 447 S.E.2d 825, 835 (1994) (citations omitted). Filing of an order or judgment has traditionally been the province of the clerk, not the judge. The current version of Rule 58 has simplified identifying the time of entry by tying entry of an order or judgment to the time the order or judgment is file-stamped by the clerk, a process which neither requires nor invites participation by the trial judge.

Though we find no authority directly on point, we hold that where, as in the matter before us, a judge signs an otherwise

valid written order or judgment prior to leaving office, the trial court, through the proper county clerk of court, retains jurisdiction to file that judgment, even after the trial judge retires, and thereby completes the steps required for entry. Our holding is not in conflict with the purpose of Rule 58, and we can conceive of no public policy interests counseling a different outcome. Plaintiffs in the present case were provided timely notice and a definite date of entry for the 3 May 2013 order. *King*, 146 N.C. App. at 494, 554 S.E.2d at 7.

Appeal COA14-253

Motion to Dismiss

Temple filed a motion to dismiss Plaintiffs' appeal in COA14-253 on 1 May 2014, arguing that Plaintiffs failed to timely file their notice of appeal in that matter. We make no decision on the merits of Temple's argument. Assuming, *arguendo*, Plaintiffs' notice of appeal was untimely, we treat Plaintiffs' appeal as a petition for writ of *certiorari*, and grant it. *See State v. SanMiguel*, 74 N.C. App. 276, 277–78, 328 S.E.2d 326, 328 (1985) (citations omitted) ("[T]he record does not contain a copy of the notice of appeal or an appeal entry showing that appeal was taken orally. In our discretion we treat the purported appeal as a petition for writ of certiorari and pass upon the merits of the questions raised."). We deny

Temple's 1 May 2014 motion to dismiss, and reach the merits of Plaintiffs' appeal in COA14-253.

Analysis

I.

Plaintiffs first argue that "the trial court lacked subject matter jurisdiction to hear Temple's motion for interest because Plaintiffs' appeal of the trial court's final order divested the trial court of authority to hear that motion."

"'As a general rule, an appeal takes a case out of the jurisdiction of the trial court.'" *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975) (citation omitted). However, "Rule 60(a) specifically permits the trial court to correct *clerical mistakes* before the appeal is docketed in the appellate court, and thereafter while the appeal is pending with leave of the appellate court[.]" *Id.* at 199, 217 S.E.2d at 542.

The trial court entered its order awarding Temple recovery in *quantum meruit* on 7 February 2013. Plaintiffs filed notice of appeal from this order on 4 March 2013. Temple filed a "Motion to Correct Judgment" pursuant to Rule 60(a) on 25 March 2013. The matter was heard, and the trial court entered an order on 3 May 2013 providing that "interest at the legal rate be added to the award of . . . attorney fees and necessary costs" that had been awarded in the 7 February 2013 order.

Plaintiffs' appeal from the 7 February 2013 order was finally docketed on 20 November 2013. Plaintiffs' Rule 60(a) motion and the resolution of that motion occurred before Plaintiffs' appeal in COA14-253 was docketed.

Therefore, the trial court, in response to Temple's Rule 60(a) motion, had jurisdiction in its 3 May 2013 order to correct any clerical errors in its 7 February 2013 order. N.C. Gen. Stat. § 1A-1, Rule 60(a) (2013) ("Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division."); *Sink*, 288 N.C. at 199, 217 S.E.2d at 542.

II.

In Plaintiffs' second argument, they contend "Temple's post-trial claim for interest is not a correction of a 'clerical mistake' that falls within the ambit of [Rule] 60(a)." We disagree.

> "While Rule 60 allows the trial court to correct clerical mistakes in its order, it

> does not grant the trial court the authority to make substantive modifications to an entered judgment." "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order."

In re C.N.C.B., 197 N.C. App. 553, 556, 678 S.E.2d 240, 242 (2009) (citations omitted).

Plaintiffs argue that, by its 3 May 2013 order, the trial court created an additional obligation of "nearly fifty thousand dollars[.]" Plaintiffs further argue: "For Plaintiffs, both of whom are disabled and unable to work as a result of the events that gave rise to their underlying action, this new additional financial obligation is clearly a substantive change in the court's original order." However, the substantive change addressed in *C.N.C.B.* has nothing to do with a party's physical condition or ability to pay. A change is only substantive if it changes the underlying order in a substantive way. "'[T]he amount of money involved is not what creates a substantive right[.]'" *Lee v. Lee*, 167 N.C. App. 250, 254, 605 S.E.2d 222, 225 (2004) (citation omitted). Instead, "it is the source from which this money is derived" that determines whether a change in the amount owed is substantive for the purposes of Rule 60(a). *Id.*

> In *Ice v. Ice*, this Court found that an award of interest on a distributive award was not a substantive change, as "[t]he

> subject of the litigation . . . was the amount of the distributive award; interest was only incidental and tangential[.]" *Ice*, 136 N.C. App. 787, 792, 525 S.E.2d 843, 847 (2000).

Id. In the present case, the value of Temple's services rendered in support of Plaintiffs' action was the subject of the litigation. Pursuant to *Lee* and *Ice*, the interest owed pursuant to the award in *quantum meruit* "was only incidental and tangential[.]" *Id.*; *see also Ward v. Taylor*, 68 N.C. App. 74, 80, 314 S.E.2d 814, 820 (1984).

N.C. Gen. Stat. § 24-5(b) states in part: "In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied." N.C. Gen. Stat. § 24-5(b) (2013). Pursuant to N.C. Gen. Stat. § 24-5(b), monetary awards other than costs bear interest as a matter of law. *Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 138, 463 S.E.2d 199, 202 (1995). The trial court determined that its "[f]ailure to address said award of interest was an error arising by oversight. As such, it may and should be corrected pursuant to [Rule] 60(a)." We hold that failure to include interest mandated by N.C. Gen. Stat. § 24-5(b) constitutes a clerical mistake for the purposes of Rule 60(a).

III.

In Plaintiffs' third argument, they contend that the trial court erred in granting Temple interest on the *quantum meruit* award pursuant to N.C. Gen. Stat. § 24-5(b). We disagree.

Plaintiffs argue that Temple only requested interest pursuant to N.C. Gen. Stat. § 24-5(a), not N.C. Gen. Stat. § 24-5(b), and that Temple is therefore limited to recovery, if any, pursuant to N.C. Gen. Stat. § 24-5(a). Temple was awarded *quantum meruit* based upon quasi-contract, not contract. "'*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy based upon a quasi contract or a contract implied in law.'" *Watson Elec. Constr. Co. v. Summit Cos.*, 160 N.C. App. 647, 652, 587 S.E.2d 87, 92 (2003) (citation omitted). N.C. Gen. Stat. § 24-5(a) concerns amounts awarded for actions in contract, not quasi-contract. *Farmah v. Farmah*, 348 N.C. 586, 588, 500 S.E.2d 662, 663 (1998). The trial court was correct to look to N.C. Gen. Stat. § 24-5(b) when deciding Temple's Rule 60(a) motion for interest. *Id.* The fact that Temple mistakenly requested relief pursuant to N.C. Gen. Stat. § 24-5(a) is not determinative. "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may

be corrected by the judge at any time *on his own initiative* or on the motion of any party[.]" N.C. Gen. Stat. § 1A-1, Rule 60(a) (emphasis added). The trial court had the authority to address and correct its oversight regardless of the arguments Temple made in his Rule 60(a) motion and the related hearing.

Plaintiffs further argue that N.C. Gen. Stat. § 24-5(b) does not allow for interest on equitable remedies, such as quasi-contract, that involve monetary awards. Plaintiffs cite *Medical Mut. Ins. Co. of N.C. v. Mauldin*, 157 N.C. App. 136, 139, 577 S.E.2d 680, 682 (2003) ("This court has held repeatedly that equitable remedies which require the payment of money do not constitute compensatory damages as set forth in N.C. Gen. Stat. § 24-5(b)."). First, we note the two cases cited in *Mauldin*: *Hieb v. Lowery*, 134 N.C. App. 1, 516 S.E.2d 621 (1999) and *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985), do not hold that equitable remedies requiring money awards cannot constitute compensatory damages. This Court in *Hieb* held:

> St. Paul's workers' compensation lien on the Hartford proceeds is neither derived from an action in contract nor from an amount "designated by the fact-finder as compensatory damages." *See* G.S. § 24-5; *cf. Bartell v. Sawyer*, 132 N.C. App. 484, 487, 512 S.E.2d 93, 95 (1999) (G.S. § 97-10.2(f)(1)(c) provides for reimbursement to defendant insurance company "for all benefits . . . paid or to be paid by the

> employer under award of the Industrial Commission" and "does not state that [insurance company is] entitled to any prejudgment interest").

Hieb, 134 N.C. App. at 19, 516 S.E.2d at 632. We held in *Appelbe* that the plaintiff's equitable distribution award was "neither due plaintiff by contract, nor [wa]s it compensatory damages." *Appelbe*, 76 N.C. App. at 394, 333 S.E.2d at 313. Neither of these opinions attempts to broaden its holding beyond the particular facts involved.

Second, our Supreme Court has held that N.C. Gen. Stat. § 24-5(b) does control the award of interest in quasi-contract actions:

> Defendants argue essentially that this is not a contract action governed by N.C.G.S. § 24-5(a), that N.C.G.S. § 24-5(b) applies, and that interest should have been awarded only from the date the action was instituted. We agree. Plaintiffs' claims were grounded in the equitable principles of quasi-contract which are different from the legal principles of contract law. The instant action is not one for breach of contract; it is an action other than contract. Therefore the awarding of interest is controlled by N.C.G.S. § 24-5(b) rather than (a).

Farmah, 348 N.C. at 588, 500 S.E.2d at 663, *reversing Farmah v. Farmah*, 126 N.C. App. 210, 484 S.E.2d 96 (1997) (the plaintiff recovered pre-judgment interest on claim for unjust enrichment); *see also Medlin v. FYCO, Inc.*, 139 N.C. App. 534, 543-44, 534

S.E.2d 622, 629 (2000) (interest on actions in quasi-contract governed by N.C. Gen. Stat. § 24-5(b)). To the extent, if any, that the holding in *Mauldin* conflicts with *Farmah*, we are bound by *Farmah*. The trial court properly ruled that interest on Temple's quasi-contract claim for *quantum meruit* was controlled by N.C. Gen. Stat. § 24-5(b). Though the trial court did not expressly designate the award in *quantum meruit* as "compensatory damages," we hold that that designation is clearly inferred in the 3 May 2013 order.

Plaintiffs further argue that Temple "never commenced an action thus a date from which pre-judgment interest would begin to run could not be determined." We disagree.

"[A]n attorney may properly bring a claim for fees in *quantum meruit* against a former client by the filing of a motion in the underlying action to be resolved by the trial court via a bench trial." *Robertson v. Steris Corp.*, __ N.C. App. __, __, 760 S.E.2d 313, 318 (2014). Plaintiffs, in a one-page argument including no authority directly on point, state that "the [trial] court cannot determine a date from which interest would begin to run." Plaintiffs contend this is because Temple never initiated an action against them, but merely brought a claim by filing a motion in their underlying action. Plaintiffs then invite this Court to peruse two of this Court's opinions "for

analysis of when an action is deemed to commence for purposes of determining § 24-5(b) interest." "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Plaintiffs have not properly argued this issue as required by Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. Therefore, we do not address this argument. The date determined by the trial court as the date from which calculation of pre-judgment interest would begin stands. Because we affirm the trial court's award of pre-judgment interest, we do not address Plaintiffs' argument concerning post-judgment interest.

Affirmed.

Judges BRYANT and STROUD concur.