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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA21-722

Filed 05 July 2023

Durham County, No. 21 CVS 2278

PETRA E. MANZOEILLO, Plaintiff,

v.

PULTEGROUP, INC.; PULTE HOME COMPANY, LLC; CAROLINA ARBORS BY DEL WEBB HOMEOWNERS ASSOCIATION, INC.; ASSOCIATIONS, INC. (D/B/A ASSOCIA); LANDARC, INC.; ASSOCIA CAROLINAS, INC.; H.R.W., INC.; AND CHRISTOPHER D. RAUGHLEY, Defendants.

Appeal by Plaintiff from orders entered 26 August 2021 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 8 June 2022.

Taibi Law Group, PLLC, by Anthony D. Taibi, for plaintiff-appellant.

Davis & Hamrick, L.L.P., by Ann C. Rowe, for defendants-appellees Carolina Arbors by Del Webb Homeowners Association, Inc., Associations, Inc. (d/b/a Associa), LandArc, Inc., Associa Carolinas, Inc., and H.R.W., Inc.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., for defendants-appellees PulteGroup, Inc., Pulte Home Company, LLC, and Christopher D. Raughley.

MURPHY, Judge.

A trial court may only dismiss a complaint under Rule 12(b)(6) where the allegations from the complaint, taken as true, fail to establish an essential element

of the claim or establish a fact that necessitates dismissal. Where, as here, the trial court dismisses a complaint in its entirety despite most of the legal claims being supported by the allegations of the complaint, we must reverse to the extent of the trial court's error.

BACKGROUND

This appeal arises from the trial court's dismissal of Plaintiff Petra E. Manzoeillo's claims against Defendants Carolina Arbors by Del Webb Homeowners Associations, Inc.; Associations, Inc. (d/b/a Associa); LandArc, Inc.; Associa Carolinas, Inc.; and H.R.W., Inc. (collectively "Associa Defendants") and PulteGroup, Inc.; Pulte Home Company, LLC; and Christopher D. Raughley (collectively "Pulte Defendants") for a slip and fall Plaintiff suffered on a greenway in 2018. As Manzoeillo's claims were dismissed under Rule 12(b)(6) of our Rules of Civil Procedure, we summarize the relevant factual information from the allegations of Manzoeillo's *Complaint*. *See Stanback v. Stanback*, 297 N.C. 181, 185 (1979) (citation omitted) ("The motion to dismiss under [Rule] 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted."), *disapproved of on other grounds by Dickens v. Puryear*, 302 N.C. 437 (1981).

When Manzoeillo filed her verified *Complaint*, Manzoeillo had been living with her husband at their home in Carolina Arbors by Del Webb in Durham since 5 July

2014. Plaintiff describes Carolina Arbors as "a 55+ age-restricted active adult community (a/k/a, retirement community or senior living housing development)" with walking trails and several other amenities.

Manzoeillo alleges that, prior to the slip and fall, she was very athletic and active, regularly engaging in outdoor activities such as hiking and running. She claims she "power walk[ed]" the trails at Carolina Arbors on a "daily" basis.

However, Manzoeillo alleges that, on 8 June 2018, she fell "while power walking on a paved, designated walking trail" at Carolina Arbors and suffered severe injuries. According to the *Complaint*, Manzoeillo's fall was caused by

> a seemingly innocuous spot of dirt on the walkway that concealed a buildup of dangerously slippery wet algae which had been allowed to grow thereon due to the poor design of the walkway and an adjacent retaining wall that directed a constant flow of drainage water across the walkway, combined with unreasonably lax inspection and maintenance of the common area walkway and a failure to properly treat the consistently wet concrete surface, or to warn persons using the trail about the latent danger of the spots at issue.

She further alleges that, prior to her fall, the potential hazards due to the algae on the walking trails were known to some Carolina Arbors residents, specifically the Carolina Arbors residents' Landscape Committee. However, while she observed the algae covered walkway as she approached the scene of her fall, Manzoeillo indicated she "was not on notice as to the danger posed by the spot of algae and could not have seen or reasonably appreciated or avoided the danger."

The *Complaint* notes that the unsafe walking condition was not readily apparent or obvious to residents who used the walkways, including to Manzoeillo herself. Plaintiff further alleges that "[a]lgae, if left untreated, creates a very slick surface that is dangerous to walk on" but "can look like ordinary garden dirt" to an untrained observer and that "a microlayer of algae across the middle of a sidewalk is a [] serious hazard because it is hard to discern and avoid[], even if one is wearing sensible sturdy shoes with a non-slip sole, as was [Manzoeillo] here." According to Manzoeillo's *Complaint*, the problem of algae formation on walkways, meanwhile, is "well-known to people in the housing development and community maintenance business in the southern states," and "reasonable people in such businesses are familiar with ways of dealing with it and products to kill [the algae]."

Manzoeillo further alleges that, due to her fall, she sustained physical injuries, as well as "emotional anguish" that was a result of "how her injury-induced pain and disability have caused suffering to her loved ones."

In her *Complaint*, Manzoeillo alleges that the Associa Defendants are responsible for maintenance of the common areas in Carolina Arbors. Moreover, Manzoeillo and her husband were attracted to Carolina Arbors because of Defendants' promises to provide safety, wooded walkways, comprehensive maintenance, and overall peace of mind where Manzoeillo and her family could walk the trails every day. Due to such promises, Manzoeillo claims she reasonably expected upkeep and maintenance of a safe environment.

Manzoeillo also alleges that the Pulte Defendants' design, landscaping, and construction of Carolina Arbors unreasonably failed to account for the interaction of drainage upon the concrete walking trails, leading to a constant presence of water across the walkway at the point in issue here. Finally, the *Complaint* alleges that the Pulte Defendants created a hazardous condition on the paved walking trail by not designing a sufficient drainage system, which could have been prevented or remedied with proper planning or with routine inspection, maintenance, and repair by the property managers at Carolina Arbors.

Manzoeillo filed her *Complaint* on 19 May 2021. The *Complaint* asserts claims of negligence, gross negligence, negligence *per se*, infliction of emotional distress, and premises liability. The Pulte Defendants moved to dismiss Manzoiello's claims against them on 19 July 2021. The Associa Defendants moved to dismiss Manzoeillo's claims against them on 6 August 2021.[1] Defendants alleged, *inter alia*, that the *Complaint* should be dismissed under Rule 12(b)(6) on the basis of contributory negligence; the condition causing the fall being open and obvious; assumption of the risk; the insufficient factual allegations to demonstrate gross negligence; the lack of any public safety statute to support the negligence *per se* claim; the dedication of the greenway on which Manzoeillo fell to the City of Durham that made the city responsible for the maintenance of the greenway; and Manzoeillo's claims being

[1] We note that Carolina Arbors initially moved to dismiss on 1 July 2021 and renewed its motion to dismiss when Associa Defendants filed their motion to dismiss.

barred by N.C.G.S. § 38A-4.

The trial court heard arguments on the motions to dismiss on 23 August 2021. As part of these arguments, Defendants contended that the slip and fall occurred on a specific greenway trail formally dedicated to the City of Durham as a "Variable-Width City of Durham Sanitary Sewer & Greenway Easement."[2] The trial court granted Defendants' motions to dismiss without providing a specific basis for the dismissal and dismissed the case on 26 August 2021. Manzoeillo timely appeals the 26 August 2021 orders.

ANALYSIS

Manzoeillo contends the trial court erred in granting Defendants' Rule 12(b)(6) motions because she adequately alleged facts sufficient to state recognized legal claims and there were no facts alleged that necessarily defeated her claims.[3]

According to our Supreme Court,

> [t]he motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion[,] the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

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[2] The greenway's alleged dedication is evidenced by the plat recorded on 15 February 2013 in the Durham County Registry, Plat Book 191, Page 227.

[3] We note that Manzoeillo does not address her "infliction of emotional distress" claim from her *Complaint* and has therefore abandoned this issue on appeal. *See* N.C. R. App. P. 28(a) (2022) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *see also Norton v. Scotland Mem'l Hosp., Inc.,* 250 N.C. App. 392, 397 (2016) (treating Rule 12(b)(6) grounds that were unchallenged on appeal as abandoned).

Stanback, 297 N.C. at 185 (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, *aff'd per curiam*, 357 N.C. 567 (2003). "Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Carlisle v. Keith*, 169 N.C. App. 674, 681 (2005).

A. Contributory Negligence

"In North Carolina, a finding of contributory negligence poses a complete bar to a plaintiff's negligence claim." *Swain v. Preston Falls East, L.L.C.*, 156 N.C. App. 357, 361, *disc. rev. denied,* 387 N.C. 255 (2003). We have previously summarized our caselaw on contributory negligence:

> It is well established that contributory negligence consists of conduct which fails to conform to an objective standard of behavior—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury. In order to establish contributory negligence, it must be shown (1) that the plaintiff failed to act with due care and (2) such failure proximately caused the injury. In addition, a [trial] court may dismiss a complaint based on contributory negligence pursuant to Rule 12(b)(6) when the allegations of the complaint taken as true show negligence on the plaintiff's part proximately contributing to his injury, so clearly that no other conclusion can be reasonably drawn therefrom.

See Mohr v. Matthews, 237 N.C. App. 448, 451 (2014) (marks and citations omitted), *disc. rev. denied*, 368 N.C. 236 (2015).

Further, in analyzing the defense of contributory negligence of a premises liability case, our Supreme Court stated "[the] rule [of contributory negligence] is closely related to the principle that a defendant has no duty to warn of an open and obvious condition because a plaintiff is negligent if he fails to reasonably adjust his behavior in light of an obvious risk." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 483 (2020) (marks omitted) ("A condition is open and obvious if it would be detected by any ordinarily intelligent person using his eyes in an ordinary manner."). Although this is a distinct legal theory from contributory negligence, in this instance our analysis on contributory negligence applies with equal force to Defendants' contention that the condition was open and obvious, thus eliminating any duty Defendants might have owed due to premises liability.[4]

Here, Defendants argue that Manzoeillo's claims were properly dismissed because the allegations establish the affirmative defense that Manzoeillo was so clearly contributorily negligent that no other reasonable conclusion could be drawn. Defendants rely on caselaw that states:

> In order for contributory negligence to apply, it is not necessary that [a] plaintiff be actually aware of the

[4] We note that our logic here also applies to the affirmative defense of assumption of the risk. Much like the "open and obvious" doctrine, assumption of the risk operates to eliminate any duty a defendant might owe a plaintiff when the condition is also obvious. We have stated that "[t]he two elements of the common law defense of assumption of risk are: (1) actual or constructive knowledge of the risk, and (2) consent by the plaintiff to assume that risk. . . . In North Carolina, the doctrine of assumption of risk has been generally limited to cases where there was a contractual relationship between the parties." *Allred v. Capital Area Soccer League, Inc.,* 194 N.C. App. 280, 287, 290 (2008). Here, there was no actual or constructive knowledge of the risk, and therefore the assumption of risk affirmative defense similarly fails.

> unreasonable danger of injury to which his conduct exposes him. [A] [p]laintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety.

See Smith v. Fiber Controls Corp., 300 N.C. 669, 673 (1980). Defendants point us to allegations in the *Complaint* that Manzoeillo was "a habitually careful and attentive person [who] had been athletic her whole life" and walked the trails daily; that she saw the spot prior to her accident during morning hours without any indication of obstructions to her vision; that the area of the fall had a constant presence of water; that it is well known that algae is common on wet concrete sidewalks; that the climate in southern states makes algae common and growth occurs when a surface is constantly wet; that algae conditions are well known by those in the housing development and community maintenance business in southern states; that algae is a potential slipping hazard requiring avoidance; and lastly that others in the community noticed the condition and realized the hazard it presented.

However, Defendants mischaracterize several of Manzoeillo's allegations. First, the *Complaint* actually alleges that Manzoeillo, "fell as a result of walking over a *seemingly innocuous* spot of dirt on the walkway that *concealed* a buildup of dangerously slippery wet algae"; that "on casual untrained observation, algae growth can look like ordinary garden dirt—as Plaintiff so thought when she approached the spot where she was to fall, not realizing the latent danger thereof"; and, further, that Manzoeillo had "taken a less familiar but more direct path that morning." (Emphasis

added). Thus, while Manzoeillo's *Complaint* may support the inference that she observed the conditions of the pathway before she stepped on the presumed dirt patch, Manzoeillo also alleged that she did not actually know of or observe the concealed algae growth before her fall.

Second, Defendants argue that the conditions of the algae growth were known to residents of Carolina Arbors prior to her fall. While Manzoeillo's *Complaint* alleges that some *other* Carolina Arbors residents had experienced similar slip and falls and reported it to Defendants, there is no allegation to directly support the inference that *Manzoeillo* was aware of the reported injuries of these residents, let alone the cause of their injuries, prior to her fall.

Third, Defendants ignore Manzoeillo's other assertions in her *Complaint* reiterating that the condition leading to her fall was difficult to observe and appreciate:

> [O]n casual, untrained observation, algae growth can look like ordinary garden dirt—as Plaintiff so thought when she approached the spot where she was to fall, not realizing the latent danger thereof.
>
> . . . .
>
> We expect concrete with some dirt on top to have good friction, even if it looks wet, but a microlayer of algae across the middle of a sidewalk is a more serious hazard because it is hard to discern and avoid[], even if one is wearing sensible sturdy shoes with a non-slip sole, as was Plaintiff here.

Accepting the allegations of the *Complaint* as true and considering the

requirement that we must determine that no other reasonable conclusion can be drawn from these allegations prior to finding contributory negligence on a Rule 12(b)(6) motion, we conclude that Manzoeillo was not so clearly contributorily negligent that her claim of negligence against Defendants should be barred as a matter of law. *See Mohr*, 237 N.C. App. at 451 (marks omitted) ("In addition, a [trial] court may dismiss a complaint based on contributory negligence pursuant to Rule 12(b)(6) when the allegations of the complaint taken as true show negligence on the plaintiff's part proximately contributing to his injury, so clearly that no other conclusion can be reasonably drawn therefrom."). Instead, accepting the allegations of the *Complaint* as true, we must accept that the condition leading to Manzoeillo's fall was hidden; and, as alleged, we cannot conclude that an objectively prudent person exercising ordinary care for his own safety would have avoided it. Similarly, we reject the argument that the algae was so "open and obvious [that] it would be detected by any ordinarily intelligent person using [her] eyes in an ordinary manner." *See Droughon*, 374 N.C. at 483 (marks omitted).

To the extent that the trial court granted the Rule 12(b)(6) motion and dismissed Manzoeillo's claims on the basis that she was contributorily negligent or that the risk from the algae was open and obvious as a matter of law, we reverse.

B. Ownership

According to the *Complaint,* the only entity with any ownership interest in the greenway where the fall occurred is the Carolina Arbors Homeowners Association.

However, Defendants contend there was a public sanitary sewer and greenway easement dedicated to the City of Durham that grants Durham an ownership interest in the greenway.

Generally, "in the absence of contract stipulation or prescriptive right to the contrary, the owner of an easement is liable for the costs of maintenance and repairs where it exists and is used and enjoyed for the benefit of the dominant estate alone." *Tanglewood Prop. Owners' Ass'n v. Isenhour*, 254 N.C. App. 823, 831, 832 (2017) (quoting *Lamb v. Lamb*, 177 N.C. 150, 152 (1919)). "[The owner] has a right of entry upon the servient estate for the purpose indicated, and may be held liable for injuries arising from his willful or negligent breach of duty in these matters." *See Lamb*, 117 N.C. at 152. "[T]he owner of the servient tenement is under no duty to maintain or repair [the easement], in the absence of an agreement therefor." *Green v. Duke Power Co.*, 305 N.C. 603, 611 (1982).

Here, the easement at issue would be an easement by dedication. "Dedication is a form of transfer whereby an individual grants to the public rights of use in his or her lands." *Kraft v. Town of Mt. Olive*, 183 N.C. App. 415, 418 (2007) (citing *Spaugh v. Charlotte*, 239 N.C. 149, 159 (1954)). Transfer by dedication requires an intent by the landowner to share use of the land with the public, "though such intention may be shown by deed, by words, or by acts." *Hovey v. Sand Dollar Shores Homeowner's Ass'n, Inc.*, 276 N.C. App. 281, 286 (2021) (citing *Milliken v. Denny*, 141 N.C. 224, 230 (1906)), *disc. rev. denied*, 380 N.C. 678 (2022). "Dedication is an exceptional and

peculiar mode of passing title to an interest in land[] [and] the courts will not lightly declare a dedication to public use." *Metcalf v. Black Dog Realty*, LLC, 200 N.C. App. 619, 631 (2009) (quoting *State Highway Commission v. Thornton*, 271 N.C. 227, 233 (1967)).

Importantly, dedication requires an offer by the owner and *acceptance* "on the part of the public in some recognized legal manner and by a proper public authority." *Kraft*, 183 N.C. App. at (2007) (citations omitted). Intention alone is not adequate to accomplish a dedication; a public authority must also accept the offer. *See, e.g., Tower Development Partners v. Zell*, 120 N.C. App. 136, 140 (1995) ("Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply."). A public authority expressly accepts a dedication by proper adoption or execution of an official act, including "a formal ratification, resolution, or order by proper officials[;] the adoption of an ordinance[;] a town council's vote of approval[;] or the signing of a written instrument by proper authorities." *Bumgarner v. Reneau*, 105 N.C. App. 362, 366-67, *aff'd as modified*, 332 N.C. 624 (1992).

Here, there was an offer by the owner of the property as a formal dedication in the form of the recorded final plat in plat book 191, page 227.[5] *See Zell,* 120 N.C. App.

[5] We refer to this information, despite not appearing in the *Complaint,* due to the trial court having taken judicial notice of it in response to Defendants' arguments regarding the alleged easement by dedication. *See QUB Studios, LLC, v. Marsh*, 262 N.C. App. 251, 260 (2018) (quoting

at 141 ("Generally, where lots are sold and conveyed by reference to a plat which represents the division of a tract into streets and lots, recordation of the plat is an offer to dedicate those streets to the public."). However, even assuming the relevance of this document for Rule 12(b)(6) purposes, we do not see anything in the Record indicating acceptance of this offer by the city of Durham. *Cf. id.* ("The dedication is only complete, however, when the offer is accepted in some proper way by the responsible public authority."); *see also Oliver v. Ernul*, 277 N.C. 591, 598 (1971) (marks and citation omitted) ("A dedication without acceptance is merely a revocable offer and is not complete until accepted, and neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to assume them. An acceptance must be made by some competent public authority, and cannot be established by permissive use.").

Since there is no Record evidence of an acceptance of the dedication and therefore no easement, Defendants' claims that they had no duty to maintain the pathway because it was the responsibility of the city of Durham as part of its duties arising out of the easement fail as a matter of law. *See Tanglewood*, 254 N.C. App. at 831, 832 (marks omitted) ("[T]he owner of the servient tenement is under no duty

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Tellabs, Inc., v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 168 L. Ed. 2d 179, 193 (2007)) (Adopting the rule that "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.").

to maintain or repair it, in the absence of an agreement therefor.").

As a result, to the extent the trial court based its decision to grant Defendants' Rule 12(b)(6) motions on the lack of a responsibility to maintain the property due to the alleged easement, we reverse.

C. Landowner Liability Protection Act

Manzoeillo argues the Landowners' Liability Protection Act, which grants immunity from negligence liability to all landowners who allow the public to use their land for educational or recreational purposes, is inapplicable in this case because the parties here are not owners of the greenway with the possible exception of the Homeowners Association; the property is immediately adjacent to and surrounding a dwelling and is generally used for activities associated with the occupancy of the dwelling as a living space; and the owner of the land does extend the invitation to promote a commercial enterprise. *See* N.C.G.S. § 38A-4 (2022). We conclude that N.C.G.S. § 38A-4 is inapplicable to the facts *sub judice*.

N.C.G.S. § 38A-4 states:

> Except as specifically recognized by or provided for in this Chapter, an owner of land who either directly or indirectly invites or permits without charge any person to use such land for educational or recreational purposes owes the person the same duty of care that he owes a trespasser, except nothing in this Chapter shall be construed to limit or nullify the doctrine of attractive nuisance and the owner shall inform direct invitees of artificial or unusual hazards of which the owner has actual knowledge. This section does not apply to an owner who invites or permits any person to use land for a purpose for which the land is

> regularly used and for which a price or fee is usually charged even if it is not charged in that instance, or to an owner whose purpose in extending an invitation or granting permission is to promote a commercial enterprise.

N.C.G.S. § 38A-4(a) (2022).

Accepting the allegations of the *Complaint* as true, as we must at this stage, we conclude that N.C.G.S. § 38-4(a) does not apply. As Manzoeillo contends, this statute is intended for "owners," which is defined as "any individual or nongovernmental legal entity that has any fee, leasehold interest, or legal possession, and any employee or agent of such individual or nongovernmental legal entity." N.C.G.S. § 38A-2(4) (2022). According to the *Complaint*, "Carolina Arbors Homeowners Association holds title to and is responsible for all common areas of the Carolina Arbors development . . . ." As the other Defendants are not owners, this statute would not apply to them. Additionally, based on the allegations of the *Complaint,* the statute does not apply to Carolina Arbors Homeowners Association. The *Complaint* indicates that Carolina Arbors Homeowners Association granted permission to the public to the trail system to promote the sales and advertising of homes in the area. As a result, we conclude N.C.G.S. § 38A-4 does not apply based on the allegations in the *Complaint*, which indicate that Carolina Arbors Homeowners Association's purpose in extending the invitation or granting permission was to promote a commercial enterprise. N.C.G.S. § 38A-4(a) (2022). To the extent the trial court relied on this statute to limit the duty of Defendants, we

reverse.

D. Negligence Claims

We have stated:

> This Court reviews *de novo* a trial court's dismissal of a complaint for failure to state a claim for relief. This Court must determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. Dismissal of a complaint under Rule 12(b)(6) is proper (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim.

Domingue v. Nehemiah II, Inc., 208 N.C. App. 429, 432 (2010) (marks and citations omitted). Additionally,

> To make out a *prima facie* case of negligence, a plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury.

Parker v. Town of Erwin, 243 N.C. App. 84, 110 (2015) (marks and citations omitted).

1. Pulte Defendants

The *Complaint* alleges that the Pulte Defendants "conceived, planned, developed, built, marketed, established, managed, maintained, and sold" Carolina Arbors by Del Webb. It also alleges:

> At all times at issue in this lawsuit Defendant PulteGroup, Inc., together with Pulte Home Company, LLC, Del Webb,

> and the numerous subsidiaries and affiliates thereof were acting in concert, interchangeably, and/or in reciprocal agency with respect to all matters relevant to this Complaint. Upon information and belief, at all times and in all respects relevant to this Complaint, any individual holding a position as a manager, agent, employee or official of any Pulte Defendant was in fact an agent or employee of the Pulte Defendants and was acting in such capacity at the time such person engaged in any act relevant hereto.

Accepting these allegations as true, if we are to conclude that there is a cognizable claim of negligence toward any of the Pulte Defendants, it would be attributable to all others.

a. PulteGroup, Inc.

According to the *Complaint*, PulteGroup, Inc.

> is one of the largest homebuilders in the United States[.] . . . PulteGroup, Inc., and its subsidiaries engage primarily in the homebuilding business, including the acquisition and development of land primarily for residential purposes within the U.S. and the construction of housing on such land, as well as mortgage banking, title and insurance brokerage operations. . . . PulteGroup typically engages directly in the entire development process, including land and site planning, and constructing roads, sewers, water and drainage facilities, and community amenities, such as parks, pools, and clubhouses.

b. Pulte Home Co., LLC

According to the *Complaint*, "Pulte Home Company, LLC is a wholly owned and controlled subsidiary of Pulte Group, Inc."

c. Christopher D. Raughley

According to the *Complaint*,

> Raughley was President and Director of Defendant Carolina Arbors by Del Webb Homeowners Association, Inc., as well as the Vice President of Land Entitlements and Development for Defendant PulteGroup and an employee and agent of [] Pulte Defendants. [] Raughley is a professional civil engineer and land surveyor by education, training, and experience, and was a manager directly involved in the development and planning of Carolina Arbors by Del Webb.

2. Associa Defendants

The *Complaint* alleges that the Associa Defendants "were acting in concert, interchangeably, and/or in reciprocal agency with respect to all matters relevant to this Complaint." It further alleges "the Pulte Defendants conspired, schemed, and planned with the Associa Defendants to protect the interests of the Pulte Defendants in the management of Carolina Arbors." Accepting these allegations as true, if we are to conclude that there is a cognizable claim of negligence against one of the Associa Defendants, it would be attributable to the others.

a. Carolina Arbors by Del Webb Homeowners Association, Inc.

The *Complaint* claims Carolina Arbors by Del Webb Homeowners Association, Inc. is

> controlled, directed, managed, supervised and run by and for the benefit of the Pulte Defendants[.] [T]he Pulte Defendants voluntarily elected to allow such control to expire on [31 December 2019], at which time the Pulte Defendants' agents resigned from office and Directors elected by member homeowners took office.
>
> . . . .

> [The association also] holds title to and is responsible for all common areas of the Carolina Arbors development . . . .

Further, Manzoeillo alleges that, "[a]t all times at issue in this lawsuit[,] the Associa Defendants were responsible for the maintenance, upkeep, and safety over the common areas of Carolina Arbors by Del Webb . . . ."

b. Association, Inc. (d/b/a, "Associa")

The *Complaint* alleges that Associations, Inc.

> purports to be the worldwide leader in community management . . . . [The entity] maintains that it remains the *developer's* "community management partner." . . . Associa, through its various affiliates and subsidiaries, was working with and chosen by the Pulte Defendants from the beginning of the Carolina Arbors development and has managed Carolina Arbors in the best interests of the Pulte Defendants and not necessarily the actual Carolina Arbors homeowners themselves.

c. LandArc, Inc.

The *Complaint* alleges the "LandArc companies are part of the Associa corporate family and act as agent, and at the behest of [] Associations, Inc.[,] of whom it is a wholly owned and/or effectively controlled subsidiary."

d. Associa Carolinas, Inc.

The *Complaint* describes Associa Carolinas, Inc., as "an agent[] [that] acts at the behest of [] Associations, Inc.[,] of which it is a wholly owned and/or effectively controlled subsidiary."

e. H.R.W., Inc.

According to the *Complaint,* "H.R.W., Inc. (d/b/a, "Associa HRW") is . . . an agent, and acts at the behest of [] Associations, Inc.[,] of which it is a wholly owned and/or effectively controlled subsidiary."

3. Negligence

Manzoeillo alleges the Pulte Defendants had a duty to design and construct the trail at issue so as to avoid the growth of algae that they breached, which led to the algae growth on the trail and proximately caused her fall and injuries.

We have held that "[t]here is a duty to protect third parties where a reasonable person would recognize that if he does not use ordinary care and skill in his own conduct, he will cause damages or injury to the person or property of the other." *Westover Products, Inc. v. Gateway Roofing, Inc.*, 94 N.C. App. 63, 67 (1989). This duty applies to the design and construction of property. *See Oates v. Jag, Inc.,* 314 N.C. 276, 279-80 (1985) (holding that a subsequent owner of a home had a viable claim for negligent construction and adopting the statement that "[t]he duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. The duty exists independent of the contract."). Here, that duty required the Pulte Defendants to use ordinary care and skill to design and construct the trail on which Manzoeillo fell, as a reasonable person would recognize that failing to adequately construct a trail for people 55 years old and older would lead to injuries.

Additionally, we believe that, when accepting the allegations of the *Complaint* as true, the Pulte Defendants breached that duty for the purposes of a Rule 12(b)(6) motion when they failed to employ measures to avoid the constant flow of water over the trail, which proximately caused Manzoeillo's injury and damages.

Similarly, we conclude Manzoeillo's allegation of negligent maintenance by the Associa Defendants is sufficient for the purposes of Rule 12(b)(6). As the Associa Defendants had an ownership interest in the property, they had a duty as a landowner. "A landowner in North Carolina owes to those on its land the duty to exercise reasonable care in the maintenance of [its] premises." *Lampkin v. Housing Mgmt. Res., Inc.*, 220 N.C. App. 457, 459, *disc. rev. denied*, 366 N.C. 242 (2012). "[T]he duty to protect from a condition on property arises from a person's control of the property and/or condition, and in the absence of control, there is no duty." *Id.* at 460. Here, in light of the allegations that the Associa Defendants was informed by other residents of falls on the trails under similar conditions, it was reasonable for the Associa Defendants to inspect and correct the conditions leading to the falls. As they did not, there was sufficient evidence that they breached their duty and proximately caused Manzoeillo's injury and damages for the purposes of a Rule 12(b)(6) motion. Additionally, because "[a] corporate officer can be held personally liable for torts in which he actively participates," *see Wilson v. McLeod Oil Co.,* 327 N.C. 491, 518 (1990), it is appropriate for the negligence claims against Raughley to survive the Rule 12(b)(6) on the same basis as he acted on behalf of Associa Defendants due to

his active role in the negligence. *But see Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 57 (2001) (marks and citations omitted) (emphasis added) ("The general rule is that a director, officer, or agent of a corporation is not, *merely* by virtue of his office, liable for the torts of the corporation . . . .").

To the extent that the trial court dismissed these claims for failure to establish a claim, we reverse the trial court.

4. Gross Negligence

To establish a claim for gross negligence, the elements of ordinary negligence must be proven along with

> a finding that the conduct is willful, wanton, or done with reckless indifference. Willful conduct is done with a deliberate purpose. Conduct is wanton when it is carried out with a wicked purpose or with reckless indifference. Thus, gross negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct.

Sawyer v. Food Lion, Inc., 144 N.C. App. 398, 403 (2001) (marks and citations omitted).

We conclude a claim for gross negligence against the Associa Defendants and Raughley should have survived the Rule 12(b)(6) motion here based on the allegations that they were aware of the drainage hazards on the walking trails, including the specific spot where Manzoeillo fell, by virtue of reports from individuals who had fallen and the Carolina Arbors residents' Landscape Committee. These allegations, in conjunction with Raughley's statement that liability insurance was cheaper than

repairing the drainage and algae problem at a meeting after Manzoeillo's fall, are sufficient to show reckless indifference to the safety of the trails for the residents of the 55 years old and older community. Accordingly, to the extent the trial court granted Defendants' Rule 12(b)(6) motions on the basis of the inadequacy of the facts to support a gross negligence claim, we reverse.

5. Negligence *Per Se*

Manzoeillo contends that her negligence *per se* claim should have survived the motion to dismiss as she adequately pleaded a violation of a public safety statute.

When a statute imposes a duty on a person for the protection of others[,] we have held that it is a public safety statute and a violation of such a statute is negligence per se unless the statute says otherwise." *Hart v. Ivey*, 332 N.C. 299, 303 (1992). "A *member of a class* protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant." *Id.* (emphasis added).

Manzoeillo contends that the *Complaint* alleges that Defendants did not comply with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; the standards for Design and Safety of Pedestrian Facilities by the Institute of Transportation Engineers; Standard Practice for Safe Walking Surfaces by the American Society for Testing and Materials; the Durham, North Carolina, Code of Ordinances, § 62-9; the Durham, North Carolina, Unified Development Ordinance, § 12.4; and the U.S. Department of Transportation, Federal

Highway Administration's Guide for Maintaining Pedestrian Facilities for Enhanced Safety.

Manzoeillo's reference to the Americans with Disabilities Act Accessibility Guidelines fails because Manzoeillo has not alleged that she is disabled, and only "*[a] member of a class protected by a public safety statute* has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant." *Id.* (emphasis added). As a result, Manzoeillo could not have sustained a negligence *per se* claim on this basis.

Although Manzoeillo's brief explicitly cites the North Carolina Building Code, the code is not cited in the *Complaint*. Whether Manzoeillo sufficiently alleged a violation of the North Carolina Building Code in her *Complaint* is crucial, as such a violation has been consistently acknowledged as constituting negligence *per se*. *See e.g., Lassiter v. Cecil*, 145 N.C. App. 679, 683-84, *disc. rev. denied*, 354 N.C. 363 (2001); *Olympic Products Co. v. Roof Systems*, 88 N.C. App. 315, 327-29, *disc. rev. denied,* 321 N.C. 744 (1988); *Lamm v. Bissette Realty,* 327 N.C. 412, 415 (1990).

Manzoeillo's *Complaint* reads:

> 80. At the time and place of the occurrence herein, there was in full force and effect various well-known statutes, rules, industry guidelines and other authoritative standards regarding walkway safety, drainage, property management and maintenance. Such rules and standards include, *but are not limited to the following*: Durham, North Carolina, Code of Ordinances, Chapter 62, § 62-9, *Duty of owner with reference to drainage on or across sidewalks*; Durham, North Carolina, Unified Development Ordinance,

> Sec. 12.4 *Pedestrian and Bicycle Mobility*, (referencing design standards established by law); U.S. Department of Transportation, Federal Highway Administration, *Guide for Maintaining Pedestrian Facilities for Enhanced Safety,* (2013).

(Emphasis added).

We believe this is not adequate to plead the Building Code. Rule 8 of the North Carolina Rules of Civil Procedure provides that a complaint must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C.G.S. § 1A-1, Rule 8(a)(1) (2022). Further, "[e]ach averment of a pleading shall be simple, concise, and direct." N.C.G.S. § 1A-1, Rule 8(e)(1) (2022). Ordinarily, pleadings "need not contain detailed factual allegations to raise issues." *Southern of Rocky Mount v. Woodward Specialty Sales*, 52 N.C. App. 549, 553 (1981). We have explained, "[t]o require plaintiff to describe particular provisions of the rules and regulations would defeat the purpose of simple notice pleadings, i.e., to place the opposing party on notice of all claims and defenses. Further specificity is reserved for the discovery process." *Acosta v. Byrum*, 180 N.C. App. 562, 568 (2006).

Here, the *Complaint* may refer to the North Carolina Building Code in its language regarding the "various well-known statutes, rules, industry guidelines and other authoritative standards regarding walkway safety, drainage, property management and maintenance[,]" so long as the other parties were put on notice as

to the provisions of the code to which the *Complaint* refers. However, as it is unclear what provision to which the *Complaint* refers and Manzoeillo does not point us to one on appeal, we conclude the trial court did not err in dismissing this claim to the extent it was based on the North Carolina Building Code. *See* N.C. R. App. P. 28(a) (2022) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *Jonna v. Yaramada,* 273 N.C. App. 93, 104 (2020) (marks and citations omitted) ("It is not the job of this Court to create an appeal for [an appellant], or to supplement an appellant's brief with legal authority or arguments not contained therein.").

Manzoeillo's *Complaint* cites violations of the Durham, North Carolina, Code of Ordinances, Chapter 62, § 62-9, *Duty of owner with reference to drainage on or across sidewalks*; Durham, North Carolina, Unified Development Ordinance, Sec. 12.4, *Pedestrian and Bicycle Mobility,* (referencing design standards established by law); U.S. Department of Transportation, Federal Highway Administration, *Guide for Maintaining Pedestrian Facilities for Enhanced Safety*, (2013); and other "statutes, rules, industry guidelines and other authoritative standards regarding walkway safety, drainage, property management and maintenance." None of these statutes have been explicitly held to be safety statutes by North Carolina case law; however, we have previously treated the violation of public safety ordinances as a basis for negligence *per se*. *See generally Parker v. Colson,* 266 N.C. App. 182 (2019).

The *Complaint* alleges that Defendants violated Durham, North Carolina, Code of Ordinances § 62-9. The ordinance states:

> Sec. 62-9. - Duty of owner of building with reference to drainage on or across sidewalks.
>
> It shall be unlawful for the *owner* of any building or premises, to allow rainwater or drain water to drain from such building, lot or premises onto a *sidewalk*, or to allow gutters, ditches, leaders, ducts or drainpipes to empty onto the sidewalks. *Such drainpipes or ducts shall be constructed to carry such water across the sidewalk areas to the gutter or a storm sewer, provided such drainpipes or ducts shall be constructed according to specifications prescribed by the city*. Such drainage pipes, ducts and other devices for carrying such drain water or rain water across the sidewalk shall at all times be properly maintained in a safe manner by such property owner from whose property it runs.

Durham, N.C., Code of Ordinances § 62-9 (2022) (emphasis added). This ordinance appears to impose a duty for the protection of people using sidewalks, and would therefore be a public safety ordinance that would implicate negligence *per se* upon violation. *See Funeral Service*, 248 N.C. 146. The term "sidewalk" is defined as "any portion of a street between the curbline and the adjacent property line intended for the use of pedestrians." Durham, N.C., Code of Ordinances § 1-2 (2022). Additionally, "street" is defined as "any public way, road, highway, street, avenue, boulevard, parkway, alley, lane, viaduct, and bridge and the approaches thereto, which has been accepted for maintenance by the state or by the city." *Id.* Based on the definitions of "sidewalk" and "street," even accepting the allegations in the *Complaint,* we conclude this ordinance is inapplicable, as the allegations do not establish the trail was a sidewalk as defined by the ordinance. To the extent the trial court dismissed

Manzoeillo's negligence *per se* claim on the basis of this ordinance, it did so correctly.

Additionally, the *Complaint* explicitly alleges that the Pulte Defendants violated Durham, North Carolina, Unified Development Ordinance, Sec. 12.4 Pedestrian and Bicycle Mobility. This ordinance states:

> Walkways and trails shall be designed to maximize the safety of users and the security of adjoining properties with respect to location, visibility, and landscaping.

N.C. Unif. Dev. Ord. § 12.4.1(B) (2022).

In Manzoeillo's *Complaint*, she alleges that Defendants failed to follow the standards set forth in this statute by not "maximizing the safety of users." *See id.* This ordinance is a public safety ordinance intended to protect the users of trails and walkways, which would include Manzoeillo, and the Pulte Defendants would have committed negligence *per se* by failing to design the trail such as to maximize the safety of the users. Thus, to the extent the trial court dismissed Manzoeillo's negligence *per se* claim on the basis of this ordinance, we reverse the trial court.

Next, the Complaint alleges that Defendants violated the U.S. Department of Transportation, Federal Highway Administration, *Guide for Maintaining Pedestrian Facilities for Enhanced Safety*, (2013). However, this guide is not a statute, and violation of it cannot be used as the basis for a negligence *per se* claim. To the extent the trial court dismissed Manzoeillo's negligence *per se* claim on the basis of this purported public safety statute, we affirm its determination.

Manzoeillo also cites the Institute of Transportation Engineers**,** *Design and*

Safety of Pedestrian Facilities, (1998) for the proposition that "[i]t is elementary that walkways must be graded and placed so that water will not pond upon or sheet across them." However, once again, this is not a statute, and thus does not implicate negligence *per se*. The trial court properly dismissed Manzoeillo's claim of negligence *per se* on the basis of this alleged public safety statute.

Finally, Manzoeillo alleges that "Defendants failed to follow the reasonable standards set forth by . . . the American Society for Testing and Materials 'Standard Practice for Safe Walking Surfaces' F-1637, which apply to all walking surfaces, including those here at issue." However, these standards do not carry the force of law; and, to the extent the trial court dismissed Manzoeillo's negligence *per se* claim on the basis of this purported public safety statute, we affirm its determination.

In summary, Manzoeillo has, for the purposes of a Rule 12(b)(6) motion, sufficiently alleged a violation of Durham, North Carolina, Unified Development Ordinance, § 12.4; and, to the extent it dismissed Manzoeillo's negligence *per se* claim on the basis of this ordinance being inapplicable, we reverse the trial court.

CONCLUSION

We reverse the trial court's dismissal of Manzoeillo's claims under Rule 12(b)(6) to the extent the dismissal was on the basis of contributory negligence, the easement by dedication that was never accepted, or the application of N.C.G.S. § 38A-4 to the property at issue, and we conclude the *Complaint* alleges sufficient facts to overcome a Rule 12(b)(6) motion on Manzoeillo's negligence and gross negligence

claims as well as on two of the grounds of Manzoeillo's negligence *per se* claim. However, we affirm the trial court's dismissal of the remaining grounds of Manzoeillo's negligence *per se* claim and of Manzoeillo's infliction of emotional distress claim.

REVERSED IN PART; AFFIRMED IN PART.

Judge RIGGS concurs.

Judge WOOD concurs in result only.

Report per Rule 30(e).