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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-202

Filed 17 October 2023

Mitchell County, No. 22 CVS 135

EDDIE FOXX, P.K. FOXX AND MARY HONEYCUTT, Plaintiffs,

v.

CRYSTAL HALL LEDFORD FOXX RAMSEY, DONALD W. STREET, and NCACC JOINT RISK MANAGEMENT AGENCY, ET AL., Defendants.

Appeal by plaintiffs from order entered 19 October 2022 by Judge Gregory R. Hayes in Mitchell County Superior Court. Heard in the Court of Appeals 23 August 2023.

*Eddie Foxx, P.K. Foxx, and Mary Honeycutt, pro se.*

*No brief filed on behalf of defendant-appellee Crystal Hall Ledford Foxx Ramsey.*

*Womble Bond Dickinson (U.S.) LLP, by Sean F. Perrin, for defendants-appellees Donald Street, NCACC Joint Risk Management Company, Rickey Wiseman, Cecil Hobson, Jr., Stacey Hughes, Lloyd Hise, Jr., Timothy Greene, Mitchell County, and Allen Cook.*

ZACHARY, Judge.

Shortly after having their initial set of civil actions in this matter dismissed, which this Court affirmed on appeal, *see Foxx v. Street* (“*Foxx I*”), \_\_\_ N.C. App. \_\_\_,

888 S.E.2d 411, 2023 WL 4346018, at \*1 (2023) (unpublished), Plaintiffs Eddie Foxx, P.K. Foxx, and Mary Honeycutt filed a new civil action against Defendants County of Mitchell, Donald Street, NCACC Joint Risk Management Agency, Rickey Wiseman, Cecil Hobson, Jr., Stacey Hughes, Lloyd Hise, Jr., Timothy Greene, and Allen Cook (collectively, “the County Defendants”), together with Crystal Hall Ledford Foxx Ramsey (“Defendant Ramsey”).<sup>1</sup> The trial court dismissed this action as well, and Plaintiffs now return to this Court. After careful review, we dismiss Plaintiffs’ appeal in part as to the trial court’s grant of Defendant Ramsey’s motion to dismiss, and affirm the trial court’s order granting the County Defendants’ motion to dismiss.

### **I. Background**

The full background of this matter can be found in this Court’s prior opinion in *Foxx I*, at \*1, as well as its companion cases *Walsh v. Street*, \_\_\_ N.C. App. \_\_\_, 888 S.E.2d 416, 2023 WL 4347824 (2023) (unpublished), and *Foxx v. Street*, \_\_\_ N.C. App. \_\_\_, 888 S.E.2d 415, 2023 WL 4347363 (2023) (unpublished). In essence, as in those prior cases, Plaintiffs have alleged a conspiracy by Defendants to defraud them of a proper investigation into the death of their relative, Gregory Allen Foxx. *Foxx I*, at \*1.

Following the trial court’s dismissal of their initial civil actions, Plaintiffs filed a new complaint against Defendants on 18 August 2022, and then filed an amended

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<sup>1</sup> The parties in this case are not identical to those in *Foxx I* and its companion cases; nonetheless, the parties, underlying matter, and claims are substantially related.

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complaint on 12 September 2022. As in *Foxx I* and its companion cases, “Plaintiff[s] advanced a raft of constitutional and statutory claims against Defendants.” *Foxx I*, at \*2. Plaintiffs’ claims included, *inter alia*, wrongful death, conspiracy to fabricate evidence, breach of contractual policy and duty, conspiracy to interfere with constitutional rights, and misfeasance.

The County Defendants filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The County Defendants also cited the doctrines of res judicata and collateral estoppel in their motion, contending that the trial court had previously “dismissed [the] identical case” in *Foxx I* and its companion cases. Plaintiffs filed a responsive brief in opposition to the County Defendants’ motion to dismiss on 27 September 2022. This matter, including the County Defendants’ motion to dismiss, was set to be heard on 10 October 2022.

On 3 October 2022, Plaintiffs filed a motion for a continuance on the ground that Mary Honeycutt was “experiencing a very slow recovery” from COVID-19. On 5 October 2022, Defendant Ramsey filed her own motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), as well as a motion for sanctions pursuant to Rule 11.

This matter came on for hearing in Mitchell County Superior Court on 10 October 2022. At the outset, the trial court denied Plaintiffs’ motion for a continuance because it was filed “after the deadline for the filing of a motion to continue in any

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action here before the Court.” The court then proceeded to hear the motions to dismiss.

Acknowledging that the Plaintiffs had appealed the trial court’s orders granting the motions to dismiss *Foxx I* and its companion cases, counsel for the County Defendants informed the trial court that they would not be proceeding on the grounds of res judicata or collateral estoppel. Instead, the County Defendants argued that Plaintiffs had failed to state a claim because they (1) had “no right outside of the estate to bring a wrongful death claim,” and (2) had “no right to bring an action demanding a criminal prosecution or that someone be charged with a crime.” Defendant Ramsey argued that Plaintiffs “failed to plead the requisite elements to support any of the[ir] claims[.]” Plaintiffs P.K. Foxx and Eddie Foxx also addressed the court.

After hearing the arguments of counsel for the County Defendants and Defendant Ramsey, as well as those of Plaintiffs P.K. Foxx and Eddie Foxx, the trial court granted both motions to dismiss. The trial court instructed defense counsel to draft orders on their respective motions to dismiss. The court declined the County Defendants’ request to consider their motion for sanctions, and determined that the County Defendants’ request for a gatekeeper order was properly a matter for the consideration of the senior resident Superior Court judge.

On 19 October 2022, the trial court entered its order granting the County Defendants’ motion to dismiss, which counsel for the County Defendants served upon

Plaintiffs the next day. With regard to Defendant Ramsey’s motion to dismiss, the record on appeal does not contain a file-stamped order. Only an incomplete, proposed order appears in the record; the proposed order contains no date, is not signed by the trial judge, and is not file-stamped. On 9 November 2022, Plaintiffs filed notice of appeal from the order granting the County Defendants’ motion to dismiss, as well as from “the Judgment entered on October 10, 2022” granting Defendant Ramsey’s motion to dismiss.

## **II. Appellate Jurisdiction**

We first address that portion of this appeal concerning Defendant Ramsey’s motion to dismiss. One of Plaintiffs’ arguments on appeal concerns the trial court’s grant of this particular motion. Yet, as previously stated, no entered order granting this motion appears in the record. Accordingly, we must dismiss this argument.

“This Court is without authority to entertain appeal of a case which lacks entry of judgment.” *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997). The “entry” of a judgment is distinct from the “rendering” of a judgment. *See id.* (“Announcement of judgment in open court merely constitutes ‘rendering’ of judgment, not entry of judgment.”). “[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court . . . .” N.C. Gen. Stat. § 1A-1, Rule 58 (2021). “This Court has previously held that Rule 58 applies to orders, as well as judgments, such that an order is likewise entered when it is reduced to writing, signed by the judge, and filed

with the clerk of court.” *McKinney v. Duncan*, 256 N.C. App. 717, 719–20, 808 S.E.2d 509, 511–12 (2017) (citation omitted). The trial court’s oral ruling on Defendant Ramsey’s motion to dismiss was thus a rendering of the order; however, it does not constitute entry of the order.

“[A]lthough appeal of a rendered order . . . may be timely filed, jurisdiction will not vest with this Court if [an order] in substantial compliance with the [order] rendered is not subsequently entered.” *Abels*, 126 N.C. App. at 804, 486 S.E.2d at 738. “[T]his Court will dismiss an appeal if the . . . order does not appear in the record on appeal.” *Id.* No such order appears in the record here; indeed, the record before us is silent as to whether an order on Defendant Ramsey’s motion to dismiss has ever been entered.

“The appellate courts can judicially know only what appears of record.” *Jackson v. Hous. Auth. of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988). “It is the duty of the appellant to provide the Court with the materials necessary to decide the issue on appeal.” *Id.* As appellants, Plaintiffs bore this burden, but they did not carry it. We therefore must dismiss Plaintiffs’ appeal insofar as it concerns Defendant Ramsey’s motion to dismiss.

Plaintiffs’ appeal from the trial court’s order granting the County Defendants’ motion to dismiss is properly before us, however. Consequently, we review Plaintiffs’ remaining arguments inasmuch as they concern that order.

### **III. Discussion**

Three of Plaintiffs' objections remain. First, Plaintiffs argue that the trial court erred by denying their motion for a continuance. Then, Plaintiffs assert that the trial court erred by granting the County Defendants' motion to dismiss because it "allow[ed] defense counsel to present new issues, other than the res judicata and collateral claims raised in [the County] Defendants' Rule 12(b)(6) Motion[.]" Finally, Plaintiffs contend that "[t]he trial court erred by depriving [them] of their procedural due process rights to be heard on the merits of their motions and claims, and the right to receive the fair and equal administration of justice as pro se litigants[.]" We disagree.

## **A. Motion to Continue**

### **1. Standard of Review**

"Continuances are not favored and the party seeking one has the burden of showing sufficient grounds for it." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 349, 631 S.E.2d 174, 179 (2006) (cleaned up). "A motion for continuance is ordinarily addressed to the sound discretion of the trial judge and not subject to review on appeal absent an abuse of that discretion." *Griffith v. N.C. Dep't of Correction*, 210 N.C. App. 544, 552–53, 709 S.E.2d 412, 419 (cleaned up), *appeal dismissed and disc. review denied*, 365 N.C. 332, 717 S.E.2d 559 (2011). "This Court will find such an abuse of discretion only if the decision was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 553, 709 S.E.2d at 419 (cleaned up).

### **2. Analysis**

Plaintiffs argue that the trial court erred by denying their motion for a continuance “in consideration of the extraordinary circumstances, including the issue that Plaintiffs are pro se litigants.” Plaintiffs also raise several other contentions, including that “the trial court allowed the [County] Defendants to proceed with new issues, rather than res judicata” and “the trial court allowed the nature of the hearing to be abruptly changed without question,” but these allegations turn on a decision by counsel for the County Defendants of which the trial court had not yet been informed when it ruled on Plaintiffs’ motion.

Local Rule 16.1 provides, in pertinent part: “Except in extraordinary circumstances, any continuance motion regarding a civil superior matter shall be in writing and filed not later than ten (10) days prior to the scheduled trial date for which rescheduling is requested.” Local Rules of Civil Procedure for the Superior Court, 24th Judicial District, Rule 16.1 (2022). Plaintiffs acknowledge this rule and that their motion for a continuance was not timely filed, in that it was filed only seven days before the 10 October hearing.

Nevertheless, Plaintiffs home in on the “extraordinary circumstances” exception to Local Rule 16.1. Plaintiffs assert that they “faced extraordinary circumstances beyond their control with the medical status of Mary Honeycutt,” and contend that “good cause was shown by the Motion and supporting documents confirming the medical report and Covid testing results as ‘positive[.]’ ” No supporting documents appear in the record on appeal, however, and Plaintiffs’ motion states that



“[a] medical statement is unavailable at the current time, but will become available for the Court’s examination and verification.”

On this appellate record, we cannot accept Plaintiffs’ argument that extraordinary circumstances existed sufficient to authorize the trial court under Local Rule 16.1 to grant their motion for a continuance. Lacking such authority, the trial court did not abuse its discretion. *See Hammel*, 178 N.C. App. at 350, 631 S.E.2d at 179.

## **B. Motion to Dismiss**

Plaintiffs next argue that “the trial court abused its discretion . . . by allowing [the County Defendants] to present new issues, other than the res judicata and collateral claims raised in [their] Rule 12(b)(6) Motion, . . . based on other grounds than those scheduled for the motion hearing without proper notice or otherwise amending the scheduling order.”

### **1. Standard of Review**

“When reviewing a motion to dismiss, an appellate court considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.” *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 412, 858 S.E.2d 788, 792–93 (2021) (cleaned up). Our appellate courts review a trial court’s order on a motion to dismiss de novo. *Id.* at 412, 858 S.E.2d at 792.

### **2. Analysis**

Plaintiffs allege that counsel for the County Defendants “ambush[ed]” them when he “chose . . . to present new issues, other than those in” their motion to dismiss. Plaintiffs assert that this “was unprofessional, unbecoming, shocking, intimidating, and emotionally ‘overwhelming,’ as well as being in alleged violation of numerous rules,” and claim that they were “caught totally off-guard at the proceeding[.]” This argument is rooted in Plaintiffs’ misapprehension of the grounds upon which the County Defendants moved to dismiss.

The County Defendants raised two grounds for dismissal in their motion: (1) on the basis of Plaintiffs’ “failure to state a claim for which relief can be granted” pursuant to Rule 12(b)(6), and (2) “on the basis of res judicata and collateral estoppel” in light of the trial court’s previous dismissals of the *Foxx I* cases. However, Plaintiffs suggest that they were “ambushed and left in a state of sudden shock and dismay by the element of unfair surprise, since the nature of the hearing in which they were prepared to argue was based on grounds of res judicata, etc.,” as raised in the County Defendants’ Motion. (Emphasis omitted). Plaintiffs’ accusations notwithstanding, the County Defendants’ motion to dismiss put Plaintiffs on notice that the “failure to state a claim for which relief can be granted” would be a ground for dismissal of their action.

“A Rule 12(b)(6) motion focuses on the legal sufficiency of the allegations in the complaint.” *Blue v. Bhiro*, 381 N.C. 1, 5, 871 S.E.2d 691, 694 (2022). A motion to dismiss pursuant to Rule 12(b)(6) “is proper (1) when the complaint on its face reveals

that no law supports the plaintiff's claim; (2) when the complaint reveals on its face the absence of facts sufficient to make a claim; or (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Broad St. Clinic Found. v. Weeks*, 273 N.C. App. 1, 5, 848 S.E.2d 224, 228 (cleaned up), *disc. review denied*, 376 N.C. 550, 851 S.E.2d 614 (2020).

Notably, Plaintiffs do not raise any arguments as to the merits of the trial court's ruling on the motion. Instead, they contend that the County Defendants were "allowed . . . to proceed with new evidence by altering the nature of the scheduled hearing itself," although they do not identify in their appellate brief any "new evidence" with which they take issue. If they are referring to the arguments of counsel concerning the legal sufficiency of the allegations in their complaint, "it is axiomatic that the arguments of counsel are not evidence." *Blue*, 381 N.C. at 6, 871 S.E.2d at 695.

Moreover, their assertions of prejudice are belied by their conduct at the hearing itself. Plaintiffs claim they "were more than 'stigmatized' by the court's activity" and were left "speechless, while struggling to deal with the sudden and abrupt change of events." Yet, after Plaintiff P.K. Foxx presented arguments at the hearing, Plaintiff Eddie Foxx "endorse[d] what she has spoken because we worked on it together" and declared that he thought that "she has done a good job[.]"

Lastly, Plaintiffs argue that the trial court violated their constitutional right to procedural due process, by which they mean to include their "rights to be heard on

the merits of their motions and claims, and . . . to receive the fair and equal administration of justice as pro se litigants[.]” This argument sounds, in part, upon Plaintiffs’ arguments concerning the trial court’s denial of their motion for a continuance, which we have already discussed. This argument also addresses, in part, their arguments concerning Defendant Ramsey’s motion to dismiss, which we have already determined is not properly before us. The remainder of the procedural due process argument was already considered and rejected in *Foxx I*. See *Foxx I*, at \*4 (“Instead of a violation of constitutional rights, dismissal pursuant to Rule 12(b)(6) is a longstanding procedural remedy that serves to address the sufficiency of complaints in the courts of this state.”); see also *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (“The motion to dismiss under Rule 12(b)(6) performs substantially the same function as the old common law general demurrer. A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint.” (citation omitted)).

Accordingly, Defendants’ arguments concerning the County Defendants’ motion to dismiss are without merit. The trial court’s order granting the County Defendants’ motion to dismiss is properly affirmed.

#### **IV. Conclusion**

For the foregoing reasons, we dismiss Plaintiffs’ appeal, in part, as it relates to Defendant Ramsey’s motion to dismiss. We affirm the trial court’s order granting the County Defendants’ motion to dismiss.

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DISMISSED IN PART; AFFIRMED IN PART.

Judges DILLON and WOOD concur.

Report per Rule 30(e).