NORTH CAROLINA

FRANKLIN COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILE NO: 06CVS839

HEALTH MANAGEMENT ASSOCIATES, INC., LOUISBURG H.M.A., INC., D/B/A/ FRANKLIN REGIONAL MEDICAL CENTER,

Plaintiffs

v.

LEMUEL G. YERBY, III, M.D., ET AL.

Defendants

Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment

STATEMENT OF THE CASE

On April 1, 2003, original Plaintiffs, Joan M. Faulkner and her husband, John Faulkner, filed a complaint in Franklin County Superior Court alleging that the Plaintiffs were injured and damaged by the medical negligence of Defendants Health Management Associates, Inc., Louisburg HMA, Inc. d/b/a Franklin Regional Medical Center, Steven Schwam, M.D., Lemuel G. Yerby, III, M.D., and Triangle Surgical Associates, P.A. All of the Defendants filed appropriate responsive pleadings denying negligence and asserting various defenses.

On June 2, 2003, the original Plaintiffs filed an Amended Complaint in Franklin County Superior Court against the same Defendants named in the original complaint, expanding and modifying the allegations in the original complaint. All parties filed appropriate responsive pleadings.

On November 1, 2004, the original Plaintiffs filed a Second Amended Complaint against the same Defendants. In this second Amended Complaint the Plaintiffs asserted that "Defendant HMA owns, operates, manages, and controls Defendant Louisburg HMA, Inc., as a wholly owned subsidiary that HMA operates as a mere instrumentality." The Plaintiff also alleged in their Fifth Claim for Relief that despite specific knowledge of previous surgical fires within the Health Management Associates, Inc. system of hospitals, "Defendant HMA negligently failed to provide adequate training to its employees and medical staff members in anticipation and

prevention of surgical fires, and negligently failed to promulgate policies and procedures to reduce the risk of surgical fires at HMA hospitals, including, FRMC before and including June 25, 2002." In its responsive pleading HMA admitted the existence and its knowledge of the previous surgical fires.

Prior to trial and at a time when none of the Plaintiffs' allegations of negligence and liability had been resolved by dispositive motions, the original Plaintiffs, the Faulkners entered into an agreement with Health Management Associates, Inc. to settle all claims against all Defendants, except Steven Schwam, M.D. who had separately completed a settlement agreement and release previously. The Settlement Agreement and Release provided for a full release of all remaining Defendants, including Lemuel Yerby, III, M.D. and Triangle Surgical Associates, P.A. The total settlement amount was [for a confidential amount] of which [the initial amount] was paid by insurance and [the remaining amount] was paid to the Faulkners by Health Management Associates, Inc. Subsequently, a dismissal with prejudice was filed as to all Defendants. Defendants Yerby and Triangle Surgical Associates, P.A. accepted their releases and dismissals and did not assert their right to proceed to trial.

On August 24, 2006, the Plaintiffs filed a complaint against Defendants asserting claims for relief for contribution, indemnity or unjust enrichment. This case was assigned to the North Carolina Business Court. Extensive documentary and deposition discovery has been completed. On January 26, 2009 Defendant filed a Motion for Summary Judgment. On February 4, 2009, Defendant filed an Amended Motion for Summary Judgment, which was withdrawn. This Court has scheduled a hearing on dispositive motions for February 25, 2009.

STATEMENT OF FACTS

Health Management Associates, Inc. (hereinafter HMA) is a Delaware Corporation with its principal place of business in Naples, Florida. Louisburg H.M.A., Inc. (hereinafter Louisburg HMA) is a wholly-owned subsidiary of HMA which operates Franklin Regional Medical Center in Louisburg, North Carolina.

At the time of the events in the underlying action which gave rise to this action, on June 25, 2002, HMA owned all of the stock of Lousiburg HMA. (Farnham Depo. at p. 17, lines 16-19). The members of the

Board of Directors of Louisburg HMA were employees of HMA. (Parry Depo. at p. 7, line 2-19; Farnham Depo. at p. 8, line 24 through p. 9, line 14). The Chief Executive Officer and the Hospital Administrator were employees of HMA. (Farnham Depo. at p. 19, line 19 through p. 20, line 5). The Chief Financial Officer of Louisburg HMA was an employee of HMA. (Dunning Depo. at p. 10, line 16-17).

HMA and Louisburg HMA had a particularly unique relationship regarding the funding of Louisburg HMA, and, in total disregard of corporate formalities, HMA, the parent corporation, had unfettered discretion over the funds of Louisburg HMA. As Robert Farnham, the Senior Vice President of Finance and Chief Financial Officer of HMA, and former director of Louisburg HMA, explained the financial relationship between HMA and Louisburg HMA:

> Each hospital has three bank accounts, if you will. Each local hospital has a depository account, a payroll account, and a payables account. Now, on a daily basis, the monies that are collected on accounts receivable for the rendering of patient care get deposited into that local depository bank account, and on a daily basis those monies are swept to a concentration account that the corporate office has.
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> The other two accounts I mentioned, the payroll account and the payables account, for each of those hospitals, those hospitals write checks on those accounts for the local hospital employees and also -- that's for the payroll account, and then also write checks to pay vendors for goods and services that the hospital utilizes. And so money flows back out of the concentration account on a day-to-day basis to cover the checks that are presented in the payroll account and also the payables account.
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> So the money flows back and forth, and it's tracked through inner company accounts on the general ledger of the facility. But basically if the facility is operating at a profit, the receipts that flow up to the corporate entity will exceed the disbursements that go back to the local hospital to cover the payroll and the payables for goods and services that are purchased at the hospital. So in a sense the excess of revenues over expenses is how the company is paid for its services and reports a consolidated income, if you will, for the company.

(Farnham Depo. at p. 23, line 12 through p. 24, line 15). Essentially, Lousiburg HMA did not manage its own finances, had very little cash or deposits, and on a daily basis transferred its collections to HMA and then received money back from HMA to cover the checks and the like that were presented against the accounts held in the name of Louisburg HMA. (Farnham Depo. at p. 27, lines 7-16).

In yet greater disregard for corporate formalities, and exhibiting the domination and control of Louisburg HMA by HMA, there were no contracts, agreements, or the like which memorialized or insured the

operation of Louisburg HMA as a separate and distinct entity. (Farnham Depo. at p. 27, line 17 through p. 28, line 4). Additionally, HMA had the final authority on all hiring and firing of the employees of Louisburg HMA and the power to establish procedures, protocols, and policies for the operation of the hospital.

In their complaint, the Faulkners alleged that HMA operated Louisburg HMA as a mere instrumentality, (*See* Second Amended Complaint at p. 2) and as such HMA would be a joint tortfeasor. The Faulkner's Second Amended Complaint alleged that HMA owned and controlled hospitals that had experienced two fires similar to the June 25, 2002 fire. The Faulkners further alleged that HMA employees connected with Louisburg HMA in June of 2002 were aware of the fires. (*See* Second Amended Complaint p. 14-16). The evidence of HMA's knowledge of similar fires and the failure to provide preventive training and policies constituted negligence concurring with that of the other Defendants named in the complaint. This issue of negligence and proximate cause was resolved by the settlement HMA entered into with the original Plaintiffs and avoided a potential judgment against HMA and Yerby as joint tortfeasors.

HMA recognized the risks of "piercing the corporate veil" and potential direct liability on the part of HMA and Louisburg HMA, as well as the other named Defendants in the *Faulkner* action. (Parry Depo. at p. 14, line 22 through p. 16, line 21). HMA and Louisburg HMA reached a settlement agreement with the Faulkners pursuant to which the Doctor's Company paid $[an intial amount] and HMA paid $[the remainder of the settlement] to the original Plaintiffs. Louisburg HMA had previously entered into a self-insurance "program" in which funds were contributed at the beginning of each fiscal year by Louisburg HMA to a funding pool administered by HMA to cover "expected losses that weren't covered by third-party insurance." Then, those funds "would have to be paid out over the year for the benefit of all the entities, including Louisburg HMA. Proceeds from this fund were utilized in the Faulkner settlement. (Parry Depo. at p. 19, line 12 through p. 20, line 23). Releases and dismissals were secured to the benefit of all Defendants; including Lemuel Yerby, III, M.D. and Triangle Surgical Associates, P.A.

ARGUMENT

As its title implies, Rule 56 provides a summary procedure for the disposition of cases on the merits. Rule 56 is designed to penetrate a groundless claim or defense before trial and allow summary disposition for any party when a fatal weakness in a claim or defense is exposed. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). Summary judgment is a drastic remedy that should be granted cautiously, if at all. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972); *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *Anderson v. Canipe*, 69 N.C. App. 534, 317 S.E.2d 44 (1984); *Headley v. Williams*, 150 N.C. App. 590, 563 S.E.2d 630 (2002). A motion under this rule should be allowed only where the truth is quite clear, and when the moving party is clearly entitled to judgment in his favor as a matter of law. *Warren v. Rosso & Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985); *Volkman v. DP Assocs.*, 48 N.C. App. 155, 268 S.E.2d 265 (1980). Where the slightest doubt exists as to the propriety of the motion, it should be denied. *Id*.

Under North Carolina law, the test for summary judgment is whether, on the record before the court, there is any genuine issue as to a material fact. *Lowe v. Murchison*, 44 N.C. App. 488, 261 S.E.2d 255 (1980). Summary judgment is appropriate only where it is perfectly clear that no genuine issue of fact is involved. *Dendy v. Watkins*, 288 N.C. 447, 219 S.E.2d 214 (1975) (reversed in negligence action); *Carlton v. Carlton*, 74 N.C. App. 690, 329 S.E.2d 682 (1985). The moving party's burden is to establish that there is no genuine issue as to any material fact, and that he is entitled to judgment as a matter of law. *Steel Creek Dev. Corp. v. Jones*, 300 N.C. 631, 268 S.E.2d 205 (1980); *Branks v. Kerrn*, 320 N.C. 621, 359 S.E.2d 780 (1987). Defendant has not and cannot do so on the facts and on the record, here.

Rule 56(c) provides that summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Westover Prods., Inc. v. Gateway Roofing, Inc.*, 84 N.C. App. 163, 380 S.E.2d 375 (1989); *Kent v. Humphries*, 303 N.C. 675, 281 S.E.2d 43 (1981). If different conclusions can be drawn from the record before the court, summary judgment

should be denied even though the evidence is uncontroverted. *Maddox v. Friday's, Inc.*, 82 N.C. App. 145, 345 S.E.2d 690 (1986).

Where, as here, the opposing party submits evidence that raises doubt about the existence of a material fact or the credibility of a witness, or if doubt attaches to the movant's own showing, summary judgment should be denied. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 390 (1976). Summary judgment is not available where the moving party's own evidence discloses that the nature of the controversy presents a genuine, as opposed to formal, dispute on a material issue. *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 249 S.E.2d 375 (1978); *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972).

The burden is on the moving party to establish that there is no genuine issue as to any material fact, and that he is entitled to judgment as a matter of law. *Pembee v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985); *Moore v. Crumpton*, 306 N.C. 618, 295 S.E.2d 436 (1986). The burden must be met on the basis of the materials properly before the court. *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E.2d 117 (1980); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980). In recognition of this burden, the papers of the moving party are scrutinized carefully, while those of the opposing party are regarded indulgently. *Dendy v. Watkins*, 288 N.C. 447, 219 S.E.2d 214 (1975); *Almond Grading Co. v. Shaver*, 74 N.C. App. 576, 329 S.E.2d 417 (1985). All inferences are resolved against the movant. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 390 (1976); *Boyce v. Meade*, 71 N.C. App. 592, 322 S.E.2d 605 (1984), *cert. denied*, 313 N.C. 506, 329 S.E.2d 390 (1985). The moving party must establish his claim beyond any doubt with respect to any material facts.

On a summary judgment motion, the burden rests with the moving party irrespective of who has the burden of proof at trial on any issues. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972); *In re Will of Edgerton*, 29 N.C. App. 60, 223 S.E.2d 524, *cert. denied*, 290 N.C. 308, 225 S.E.2d 832 (1976). Hence, the moving party must carry the burden of proof even though he would not have the same burden at trial. *Norfolk & W. Ry. v. Werner Indus., Inc.*, 286 N.C. 89, 209 S.E.2d 734 (1974). If defendant moves for summary judgment, he assumes the burden of producing sufficient evidence

to disprove plaintiff's claims; therefore, the burden of proof is the reverse of what it would be at trial. *Clodfelter v. Bates*, 44 N.C. App. 107, 260 S.E.2d 672 (1979), *cert. denied*, 299 N.C. 329, 265 S.E.2d 394 (1980).

I. Contribution.

While Defendants concede that Plaintiff HMA has pled a series of events, transactions, or occurrences, whether hypothetically pled or otherwise, which allege that HMA is a joint tortfeasor with Defendants, Defendants attempt to avoid the facts supporting the pleading, but Defendants can neither force Plaintiffs to elect remedies at the summary judgment stage nor negate claims which are alternative, or even cumulative, based on common allegations of fact which Defendants dispute (which, of course, such dispute, in and of itself, prohibits summary judgment). *See Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 249 S.E.2d 375 (1978) (Summary judgment not available where the moving party's own evidence discloses that the nature of the controversy presents dispute on a material issue). *See also, Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 97, 331 S.E.2d 677, 681 (1985) (proof of fraud necessarily constitutes proof of a violation of the statutory prohibition against unfair and deceptive acts and practices). *See accord, Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975).

The proffered evidence, here, establishes that there are questions of fact which must be determined as to whether the corporate form of the defendants in the *Faulkner* action could or should have been ignored and, even absent that, whether there were sufficient facts to present a material question as to whether HMA was negligent and a joint tortfeasor. Should the corporate form of the defendants in the *Faulkner* matter have been disregarded, of it is determined that it should be disregarded for purposes of this action, Defendants, here, concede, and, therefore, affirmatively establish, that HMA would be entitled to contribution in the current action should the other, additional elements of a claim for contribution be proved (Defendants' Memorandum 10-11). Defendants' concession is mandated by North Carolina law holding that, when piercing the corporate veil, the controlling entity is jointly and severally liable with the controlled entity, and, by extension, with any other joint tortfeasor. *Postell v. B & D Constr. Co.*, 105 N.C.App. 1, 411 S.E.2d 413, *disc. review denied*, 331 N.C. 286, 417 S.E.2d 253 (1992).

"North Carolina courts use the 'instrumentality rule' to determine whether to disregard the corporate entity and hold parent or affiliated corporations or shareholders liable for the acts of a corporation." *East Market Street Square, Inc. v. Tycorp Pizza IV, Inc.*, 175 N.C.App. 628, 633, 625 S.E.2d 191, 196 (2006). Under this rule, "[a] corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded." *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E.2d 570, 575 (1966) (quoting 19 Am. Jur 2d., Corporations 717).

The instrumentality rule is a three-pronged approach consisting of the following elements: "1. the domination and control of the corporate entity; 2. the use of that domination and control to perpetrate a fraud or wrong; 3. the proximate causation of the wrong complained of by the domination and control." *Atlantic Tobacco Co. v. Honeycutt*, 101 N.C. App. 160, 164, 398 S.E.2d 641, 643 (1990). Because each of these elements is present, the corporate entity can be disregarded. *See id*.

On summary judgment, Defendants contend that the first element of piercing the corporate veil cannot be established in this case, while abandoning, for purposes of Defendants' motion for summary judgment, any argument as to the other two elements of the instrumentality rule (Defendants' Memorandum at 12-15). In relying on the first prong of the instrumentality rule (the domination and control of the corporate entity) to establish grounds for summary judgment in this action, Defendants assert that Plaintiff must prove that HMA had "[c]ontrol, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to **the transaction attacked** so that the corporate entity as to **this transaction** had at the time no separate mind, will or existence of its own (Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 12, *citing B-W Acceptance Corp. v. Spencer* (emphasis in memorandum)). Yet, Defendants fail to consider or to present for the Court's consideration the current and correct standard regarding this element of the instrumentality rule, which abandoned the *B-W Acceptance Corp.* formulation, and, for that reason, Defendants' motion for summary judgment must be denied.

In the seminal case of *Glenn v. Wagner*, 313 N.C. 450, 329 S.E.2d 326 (1985), the North Carolina Supreme Court specifically modified the ruling in *B-W Acceptance Corp.*, holding that "[t[he rule of law as formulated in *Acceptance Corp.*, *Huski-Bilt* and *Henderson* was particularly suited to the facts of those cases. We hold in this case, however, that domination sufficient to pierce the corporate veil need not be limited to the particular transaction attacked." *Glenn v. Wagner*, 313 N.C. at 456, 329 S.E.2d at 331.

Because piercing the corporate veil is, at its core, an equitable doctrine, the *Glenn* court explained that the prior limitation of the instrumentality rule – to apply it only where the domination and control touched the particular transaction attacked – was not in keeping with the purpose of the theory of liability. *Glenn v. Wagner*, 313 N.C. at 458, 329 S.E.2d at 332. "It is well recognized that courts will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to . . . achieve equity." *Glenn v. Wagner*, 313 N.C. at 454, 329 S.E.2d at 330 (1985). Clearly, the equitable remedy of contribution brings these principles to bear.

While Defendants, here, assert that the provision of medical care to Mrs. Faulkner in the underlying *Faulkner* action must be examined to determine whether the corporate identities of HMA and Louisburg HMA should be, or should have been, disregarded in attributing liability, the North Carolina courts have rejected Defendants' proposed standard. "Where an affiliated corporation is without a separate and distinct corporate identity and is operated as a mere shell, created to perform a function for an affiliated corporation or its common shareholders, we do not believe an analysis of domination need be narrowly limited to control over the *particular* transaction attacked – here, [the provision of medical care to Mrs. Faulkner]." *Glenn v. Wagner*, 313 N.C. at 457, 329 S.E.2d at 331 (emphasis in original).

Rather than exclusively examining the transaction attacked, the North Carolina courts "have previously considered the following factors in determining the level of control a corporate or individual defendant exercises over a corporation:

1. Inadequate capitalization ("thin incorporation").
2. Non-compliance with corporate formalities.
3. Complete domination and control of the corporation so that it has no independent identity.

4. Excessive fragmentation of a single enterprise into separate corporations.

East Market Street Square, Inc. v. Tycorp Pizza IV, Inc., 175 N.C.App. 628, 636, 625 S.E.2d 191, 198 (2006) (*citing Glenn*, 313 N.C. at 455, 329 S.E.2d at 330-31) (internal citations omitted). Yet, "courts have recognized numerous other factors which may be considered inherent in the instrumentality rule. These include: non-payment of dividends, insolvency of the debtor corporation, siphoning of funds by the dominant shareholder, non-functioning of other officers or directors, absence of corporate records. *Glenn v. Wagner*, 313 N.C. 450, 458, 329 S.E.2d 326, 332 (1985) (*citing DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir.1976)).

"As stated in *DeWitt Truck Brokers, Inc., v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 684 (4th Cir. 1976):

> The circumstances which have been considered significant by the courts in actions to disregard the corporate fiction have been "rarely articulated with any clarity." Perhaps this is true because the circumstances "necessarily vary according to the circumstances of each case," and every case where the issue is raised is to be regarded as "sui generis [to] * * * be decided in accordance with its own underlying facts."

Glenn v. Wagner, 313 N.C. at 459, 329 S.E.2d at 333. Thus, "[w]hether the corporate veil should be pierced is necessarily a factual inquiry to be conducted on a case-by-case basis." *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60, 64 (4th Cir. 1989) (*citing DeWitt Truck Brokers*, 540 F.2d at 685-87).

For example, to make out a case of piercing the corporate veil, Plaintiffs need only present a proffer which tends to show that: (1) Louisburg HMA had limited capital, its funds being swept to the controlling parent and the parent supplying the thinly capitalized hospital with payroll and other funds as necessary for the subsidiary to function; (2) Louisburg HMA did not observe corporate formalities, for example, the vice president in charge rarely even entered the hospital or actually attended meetings, and the contracts between the subsidiary and parent, and the resolutions involving them, were not reduced to writing or separately maintained; (3) the parent corporation completely dominated the HMA subsidiary, for example, the CEO, chief administrator, and chief financial officer were HMA employees; (4) the HMA operations were fragmented into various corporations, for example, although the hospitals which HMA managed and operated were

substantially the same, regardless of location or mission, each was set up as a separate corporation, and the services provided were done by separate divisions and individual agents who, because of segmentation or fragmentation, knew little or nothing at the subsidiary level, with control coming from the parent. In addition, the management was done in part through another fragment of the company, Kentucky corporation, which had no Kentucky *locus*, and all control for the company as a whole (including the subsidiaries) was actually localized in the parent corporation, HMA, Inc., a Delaware corporation, with all its offices and operations centered in a single hub in Naples, Florida.

While Defendants point out that "mere fact that one corporation owns all of the capital stock of another corporation and that members of board of directors of both corporations are the same, notwithstanding anything else, is insufficient to render the parent corporation liable for contracts of its subsidiary," (Defendants' Memorandum at p. 11), where as here, far more than mere ownership of all of the stock appears and there is other evidence of complete control, thin capitalization, movement of all of the funds of the subsidiary to the parent, the subsidiary's inability to pay for its own payables, daily transfer of its receivables, the partents appointment of the directors as well as the chief operating and financial as well as other officers of the subsidiary, along with operation of the company as a single entity, facts exist warranting a jury determination of whether the hospital management company operated the subsidiary in such a way as to warrant imposition of a single liability for the parent's operationof the subsidiary as an instrumentality.

Moreover, the instrumentality theory has led the North Carolina appellate courts to hold that only a single award of damages may be returned against a local subsidiary hospital and the managing parent corporation. *Muse v. Charter Hosp. of Winston-Salem, Inc.*, 117 N.C.App. 468, 452 S.E.2d 589 (1995), *affirmed*, 342 N.C. 403, 464 S.E.2d 44 (1995).

In *Muse*, the parents of a teenaged child who committed suicide shortly after being discharged from hospital where he had been admitted for treatment of emotional problems and severe depression brought wrongful death action against the treating physician, hospital, and the hospital corporation which owned the

hospital. The Superior Court entered judgment on jury verdict which awarded the parents compensatory damages of $1,000,000 and punitive damages of $2,000,000 against the hospital and $4,000,000 against the hospital corporation. The Hospital and the hospital management corporation appealed.

On appeal, the Court of Appeals, held that: trial court committed reversible error in submitting separate issues of punitive damages as to both the hospital and the parent corporation where the liability of the corporation was premised on an instrumentality theory due to its control of hospital.

> The instrumentality theory, upon which Charter Medical's liability was based, holds: " 'A corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary ... may be disregarded.' " *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E.2d 570, 575 (1966) (quoting 19 Am.Jur.2d Corporations § 717). That is, the parent and the subsidiary are treated as "one and the same person." *Henderson v. Security Mort. & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). Our research has disclosed no case in which more than one sum has been awarded against two defendants under the instrumentality theory. *Cf. Postell v. B & D Constr. Co.*, 105 N.C.App. 1, 411 S.E.2d 413 (holding that the controlling individual was jointly and severally liable with the controlled corporation), *disc. review denied*, 331 N.C. 286, 417 S.E.2d 253 (1992). We conclude that the result of finding a corporation to be a mere instrumentality of another is that the two are treated as one for purposes of assessing liability for the alleged wrong, and are jointly and severally liable. Accordingly, submitting separate issues of punitive damages as to each defendant was error.
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> *Muse* , 117 N.C.App. at 473, 452 S.E.2d at 594 .

The holding of the North Carolina Court of Appeals in *Becker v. Graber Builders, Inc.*, 149 N.C.App. 787, 561 S.E.2d 905 (2002), is also instructive as to the issue before the Court. In *Becker*, the plaintiff entered into a contract with Graber Builders, Inc., which was controlled by its sole shareholder Dwight E. Graber , to build a house. *Id.* at 788, 561 S.E.2d at 907. As part of its contract with the plaintiff, Graber Builders was required to install an adequate septic system, which it failed to do, in violation of North Carolina law. *Id.* at 788-89, 561 S.E.2d at 907. Sometime after the plaintiff had entered into the contract with Graber Builders, the company was administratively dissolved. *Id.* at 788, 561 S.E.2d at 907. The plaintiff did not discover Graber Builders' failure to install an adequate septic system until over a year later when she sought to sell the house. *Id.* at 789, 561 S.E.2d at 907. The Court of Appeals found the allegations in the plaintiff's complaint sufficient to pierce Graber Builders' corporate veil because the plaintiff alleged that Graber (1) exercised 'complete

domination and control' over Graber Builders, Inc.; (2) that such control was used to violate a duty under North Carolina law; and (3) that this control and the violation of the law proximately caused damages to plaintiff involving the installation of a new septic system." *Id*. at 791, 561 S.E.2d at 908-09.

Here, HMA had utter and complete exercises actual control over another, operating the latter as a mere instrumentality or tool. It was or could have been held liable for the torts of the corporation thus controlled.

II. Standing

Defendants erroneously argue that the Plaintiffs do not have standing to maintain this action seeking direct contribution or, alternatively, indemnity through equitable subrogation, or damages for unjust enrichment. Because Plaintiffs are entitled to these remedies, and have shown a *prima facie* case entitling Plaintiffs to these remedies, Defendants' motion should be denied.

Plaintiffs are entitled to bring and to maintain this action for contribution. Despite Defendants' assertions to the contrary, Plaintiffs have standing.

As the North Carolina Court of Appeals has articulated it, to establish standing a plaintiff need only allege or show an interest affected by the litigation. *Texfi Industries v. City of Fayetteville*, 44 N.C.App. 268, 269-70, 261 S.E.2d 21, 23 (1979) *aff'd on other grounds*, 301 N.C. 1, 269 S.E.2d 142 (1980) ("The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court.") *See generally, Massachusetts v. EPA*, 549 U.S. 497, 517, 127 S.Ct. 1438, 1453 (2007) ("At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness" (internal quotation marks omitted)). *See also, Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691(1962).

The Uniform Contribution Among Joint Tortfeasor's Act, as adopted in North Carolina, provides, with respect to the right to contribution:

> where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

N.C. Gen. Stat. § 1B-1(a).

Clearly, the admissions in the pleadings establish that Defendants and Plaintiffs have become jointly and severally liable for the same injury to the person of Janice Faulkner and they are liable for the injuries inflicted on her and her husband, the plaintiffs in the underlying action. Accordingly, "there is a right of contribution among them even though judgment has not been recovered against all or any of them." *Id.*

In the present case, the liability alleged in the underlying case and asserted in this case was and is that of joint and several liability. Material issues of fact remain as to exactly how the fault is to be apportioned, jointly and severally, but as the North Carolina Court of Appeals has specifically stated, "it is well established that the term 'jointly and severally' implies that one tortfeasor could pay for all of plaintiff's damages: it only opens the potential for contribution in a subsequent suit brought by the indemnifying tortfeasor against the other tortfeasor." *Sheppard v. Zep Mfg. Co.*, 114 N.C.App. 25, 35, 441 S.E.2d 161, 167 (1994).

The absence of a judgment or of any other determination apportioning the damages is not a bar to this action, and is not a defense to it. *Id.* The United States Supreme Court has spoken to the issue of standing where a party, an aggregator, advanced funds to pay for the injuries that workers had suffered, and brought suit to recover for contribution even though the plaintiff had promised to remit the proceeds of the litigation to the worker. *Sprint Communications Co., L.P. v. APCC Services, Inc.*, — U.S. — , 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008). Although in *Sprint Communications*, an assignee of a legal claim rather than a joint tortfeasor sought to recover, the Court concluded that the assignee did have standing. — U.S. at — , 128 S.Ct. 2533.

Further, Defendants' argument that Louisburg HMA has not advanced payment somehow prevents Louisburg HMA from bringing or maintaining the action is not supported under the facts or under North Carolina law. *Cf.,Heath v. Board of Com'rs of Guilford County*, 292 N.C. 369, 375 , 233 S.E.2d 889,

893,(1977) ("It is, therefore, no longer true that an indemnitee cannot sue the party ultimately liable to him until after the indemnitee has paid the claim.").

In a case involving an actual insurance policy as opposed to a commitment for "self-insurance," the North Carolina Supreme Court articulated principles which control in this case. In *Pittman v. Snedeker*, 264 N.C. 55, 140 S.E.2d 740 (1965), a passenger in her grandmother's automobile sued for the injuries she sustained in a collision with the defendant's motor vehicle. The defendant filed a cross action against the grandmother. The jury returned a verdict as to the amount of the passenger's damage and found that concurrent negligence of the defendant and the grandmother caused the collision.

The defendant's insurer then furnished the money for the payment of the judgment. The defendant caused execution to issue against the grandmother. The grandmother sought to enjoin collection of the execution. The Superior Court refused to enjoin collection.

On appeal, the North Carolina Supreme Court held that defendant could recover of the grandmother through contribution one-half of the damage paid on behalf of the defendant to the passenger. The Court reasoned that

> [the grandmother] seeks to escape her obligation because an insurance company made the payment as required by its contract with the original defendant. The insurance company was not a volunteer. If Snedeker had borrowed the money from someone under no obligation to make a loan, and, as security for the loan, assigned his judgment in favor of the additional defendant, no one would question the right of the assignee to enforce the judgment against the additional defendant. No sound reason appears why the insurance carrier should be penalized for performing its contractual obligation.
>
> *Pittman*, 264 N.C. at 58, 140 S.E.2d at 744 .

Similarly, here, "[i]f . . . [Louisburg HMA] had borrowed the money from [another corporation] . . . under no obligation to make a loan, and, as security for the loan, . . . [pledged its right to collect contribution from] the additional defendant, no one would question . . . [that company 's rights to proceed against] the additional defendant. No sound reason appears why [the parent company operating as it did] should be penalized for performing its contractual obligation. *Id.*

Moreover, the Defendants' assertion that Plaintiff Louisburg HMA did not pay any of the amount paid to settle the *Faulkner* case is unfounded. First, the payment of $[**redacted**] by The Doctor's Company was for the benefit of HMA and its subsidiaries, specifically, in that instance, Louisburg HMA. The Defendants cannot avoid liability for contribution or "escape her obligation because an insurance company made the payment as required by its contract with the original defendant" by asserting that payment came from a collateral source. *Pittman*, 264 N.C. at 58, 140 S.E.2d at 744. Secondly, the payment which HMA caused to be delivered by wire transfer was derived from Loiusburg HMA in a manner not susceptible of tracing and in a manner which its factor, HMA, was obligated to do: by participating in and making contributions to the self-insurance pool, Loiusburg HMA's funds were held in the pool and essentially paid to settle the *Faulkner* case. Third, the substantial identity and single entity or mere instrumentality form of operation of Louisburg HMA as a wholly-owned subsidiary of HMA demonstrates that the payment was made by and for that entity and instrumentality.

Accordingly, Louisburg HMA has paid or caused to be paid the entire amount of the settlement. As such, its payment far exceeds it proportionate share of the settlement. While the exact extent of the *pro rata* share is a factual issue to be determined, Defendants cannot overcome this presentation and forecast of evidence, and summary judgment could be granted in favor of Plaintiffs, but-for the aliquot apportionment of the reasonable value of the settlement.

III. Self-Insurance

Despite all of Defendants efforts to do so, Defendants fail to bring HMA's self insurance program within the meaning of the term insurance, under the North Carolina statutory or common law. Self insurance is not insurance at all as contemplated under Chapter 58 of the North Carolina General Statutes, and it does not constitute insurance under the applicable appellate decisions within this sate. *See Cone Mills Corp. v. Allstate Ins. Co.*,114 N.C.App. 684, 443 S.E.2d 357 (1994).

> Additional support for this position exists. '"I]nsurance has been defined as a contract through which one party indemnifies another against loss due to certain specified contingencies, but the term 'self-insurance' has no precise legal meaning."

Cone Mills Corp.,114 N.C.App. at 689, 443 S.E.2d at 360-361 (1994) (quoting from Annot., *Self-insurance Against Liability as Other Insurance Within the Meaning of Liability Insurance Policy*, 46 A.L.R.4th 707, 710 (1986).

In *Wake County Hosp. System v. National Cas. Co.*, 804 F.Supp. 768 (E.D.N.C.1992), *affirmed,* 996 F.2d 1213 (4th Cir.1993), the United States District Court held that the self insurance retention for a hospital did not constitute "other insurance" as the Defendants, here, attempt to assert. *Id.* at 777. The Court agreed with the Plaintiff Hospital System's contention that self-insurance is not insurance at all . 804 F.Supp. at 770. As the Court described it, " a self-insured retention, as the argument goes, does not fall within the plain and ordinary meaning of the term 'insurance' – an insurance policy issued by a licensed insurer in exchange for a premium charged." *Id.* at 771.

Pointing out that at the time of that decision in 1993, the North Carolina Courts had not directly addressed the issue (although later decisions, such as *Cone Mills*, have expressly agreed and held in accord that self insurance retention amounts are not insurance), the Federal Court examined decisions of other state Courts.

> [A] majority of these courts have ruled that self-insurance is not insurance at all. *See Aetna Casualty & Surety Co. v. World Wide Rent-A-Car Inc.*, 28 A.D.2d 286, 284 N.Y.S.2d 807 (1967) (self-insurance is not insurance in automobile liability insurance context); *Allstate Insurance Company v. Zellars*, 462 S.W.2d 550 (Tex.1970) (automobile liability self-insurance is not insurance); *American Family Mutual Insurance Co. v. Missouri Power & Light Co.*, 517 S.W.2d 110 (Mo.1974) (*en banc*) (automobile liability self-insurance is not insurance); *Eakin v. Indiana Intergovernmental Risk Management Auth.*, 557 N.E.2d 1095 (Ind.Ct.App.1990) ("self-insurance is not insurance at all"); *Glens Falls Insurance Co. v. Consolidated Freightways*, 242 Cal.App.2d 774, 51 Cal.Rptr. 789 (1966) (automobile liability insurance); *Iowa Contractors Workers' Compensation Group v. Iowa Insurance Guaranty Ass'n.*, 437 N.W.2d 909 (Iowa 1989) (self-insured worker's compensation group not insurer); *State Farm Mut. Auto Ins. Co. v. Bogart*, 149 Ariz. 145, 717 P.2d 449 (1986) (automobile self-insurance is not "other insurance"); *State Farm Mut. Auto Ins. Co. v. Universal Atlas Cement Co.*, 406 So.2d 1184, (Fla.Dist.Ct.App.1981) (automobile self-insurance is not "other collectible insurance"); *United Nat. Ins. Co. v. Philadelphia Gas Works, etc.*, 221 Pa.Super. 161, 289 A.2d 179 (1972) (certificate of self-insurance is not an "insurance policy"); *Universal Underwriters Insurance Co. v. Marriott Homes Inc.*, 286 Ala. 231, 238 So.2d 730 (1970) (workmen's compensation self-insurance scheme is not insurance). *But see Carolina Casualty Insurance Co. v. Belford Trucking Co., Inc.* 121 N.J.Super. 583, 298 A.2d 288 (App.Div.1972), *cert. denied*, 63 N.J. 502, 308 A.2d 667 (1973) (self-insured trucking company primarily liable); *Southern Home Insurance Company v. Burdette's Leasing Service, Inc.*, 268 S.C. 472,

> 234 S.E.2d 870 (1977) (compulsory automobile self-insurance is insurance); White v. Howard, 240 N.J.Super. 427, 573 A.2d 513 (Ct.App.Div.1990) (compulsory automobile self-insurance is "other collectible insurance"); *State Farm Mut. Auto Ins. Co. v. Budget Rent-A-Car Systems Inc.*, 359 N.W.2d 673 (Minn.Ct.App.1984) (automobile liability self-insurer is insurer). Furthermore, both a state supreme court and a state appellate court have ruled that self-insurance is not insurance on relatively similar facts. *American Nurses Ass'n v. Passaic Gen. Hosp.*, 98 N.J. 83, 484 A.2d 670 (1984); *Physicians Insurance Company v. Grandview Hospital and Medical Center*, 44 Ohio App.3d 157, 542 N.E.2d 706 (1988)."
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> *Wake County Hosp. System* , 804 F.Supp. at 774.

In a slightly different context, the North Carolina Court of Appeals has similarly held that self insurance is not insurance for purposes of Chapter 58 or for other purposes. In *Magana v. Charlotte-Mecklenburg Board of Education*, 183 N.C.App. 146, 148-49, 645 S.E.2d 91, 92-93 (2007), the North Carolina Court of Appeals held that a local governmental entity had not waived its immunity through the purchase of excess liability insurance. The court found that the insurance contract expressly conditioned coverage on the municipality's payment of a *self-insured* amount of less than $1 million for which the entity was immune, thus rendering coverage inapplicable in that case. The Court reasoned that self-insurance was not insurance at all, and having a self-insurance program was not an acquisition of insurance through an insurer participating in the sale of insurance and required to be licensed under law, and, accordingly, there was no waiver of sovereign immunity to that extent. *See also, Wilhelm v. City of Fayetteville*, 121 N.C.App. 87, 89, 464 S.E.2d 299, 300 (1995) (holding there was no waiver of governmental immunity by the city in being self-insured for claims up to $250,000.00, although immunity was waived for amounts in excess thereof because of purchase of liability insurance policies covering such amounts).

Even participating in a risk pool where funds are transferred for the purpose of being held until needed to defray risk costs and settlements does not constitute insurance. *See Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992) (organizing risk acceptance management corporation to handle claims against city of $1 million or less, city did not waive its governmental immunity for those claims; corporation was not "local government risk pool" which would be deemed purchase of liability insurance under applicable statute).

Defendants' arguments are neither premised upon nor consistent with applicable law. Accordingly, although, at best Defendants can only be said to be attempting to raise a factual issue, Defendants cannot be said to be entitled to judgment as a matter of settled law. Indeed, that settled body of law mandates a decision in favor of Plaintiffs.

IV. Indemnity

Defendants, misreading the North Caroina Court of Appeals decision in *Sullivan v. Smith*, 56 N.C. App. 525 (1982), erroneously state that North Carolina law permits indemnity only to be obtained in a *respondeat superior* context and no other. On the contrary, the North Carolina Supreme Court has held, however, the right of indemnity between tort-feasors is not based solely on a theory of subrogation to the rights of an injured party, but is based on a contract implied-in-law from circumstances that a passively negligent tort-feasor has discharged an obligation for which an actively negligent tort-feasor was primarily liable. There exists in North Carolina a common law right to indemnification for a passively negligent tort-feasor from an actively negligent tort-feasor for injuries caused to third parties. *See Edwards v. Hamill*, 262 N.C. 528, 138 S.E.2d 151 (1964). This action for indemnity, though often brought by means of a third-party complaint, is maintained in equity. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E.2d 182, 187 (1982).

This right of indemnity, while not subrogation in its technical sense, arises in equity to give a "subrogation" right of indemnity. It is "a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it" and "arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable." *Beam v. Wright*, 224 N.C. 677, 683, 32 S.E.2d 213, 218 (1944).

In North Carolina, a party's rights to indemnity can rest on three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law. *See McDonald v. Scarboro*, 91 N.C.App. 13, 370 S.E.2d 680, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988). As to equitable, implied-in-law indemnification, the North Carolina Court

of Appeals explained in *Kaleel Builders, Inc. v. Ashby*, 161 N.C.App. 34, 587 S.E.2d 470 (2003), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004):

> While contractual indemnity implied-in-law is a rather discrete legal fiction, North Carolina appellate courts have been consistent as to the elements required which warrant a right of indemnity on this theory. Specifically, the indemnity implied-in-law arises from an underlying tort, where a passive tort-feasor pays the judgment owed by an active tort-feasor to the injured third party. The Supreme Court set this out clearly:
>
> > The old-time judges said that the duty imposed by law upon the actively negligent tort-feasor to reimburse the passively negligent tort-feasor for the damages paid by him to the victim of their joint tort was based on an implied contract, meaning a contract implied in law from the circumstance that the passively negligent tort-feasor had discharged an obligation for which the actively negligent tort-feasor was primarily liable. And this is all the courts mean today when they declare that the right of the passively negligent tort-feasor to indemnity from the actively negligent tort-feasor rests upon an implied contract. There is, of course, in such case no contract implied in fact. This is necessarily so because contracts implied in fact are true contracts based on consent.
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> > *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 563-64, 75 S.E.2d 768, 771 (1953) (citing *Queen v. DeHart*, 209 N.C. 414, 184 S.E. 7 (1936)); *Montgomery v. Lewis*, 187 N.C. 577, 122 S.E. 374 (1924); *see also Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956); and *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).
>
> *Kaleel Builders, Inc. v. Ashby*, 161 N.C.App.at 39, 587 S.E.2d 474.

Here, Plaintiffs have asserted a claim for indemnity, as an alternative claim to the claim for contribution. The claim is premised on an equitable theory implied-in-law contract, where, the active tort feasor, Yerby, was using the Plaintiffs' facilities in such an active manner that he caused Mrs. Faulkner to be severely burned because of his wilful and wanton actions displaying an active lack of care. Yet, Yerby has denied that Plaintiffs are joint tortfeasors, and he has maintained that they are not entitled to contribution. Anticipating such allegation, Plaintiffs asserted another claim for relief: if Yerby is correct and the parties are not joint tortfeasors, they are still equitably entitled to some relief.

"To make persons joint tort feasors they must actively participate in the act which causes the injury." *Brown v. Louisburg*, 126 N.C. 701, 703, 36 S.E. 166, 167 (1900). In *Bowen v. Iowa Nat. Mut.Ins. Co.*, 270 N.C. 486, 491-92, 155 S.E.2d 238, 242-43 (1967), the North Carolina Supreme Court reasoned that with "joint

tort-feasors, although there is a single damage done, there are several wrongdoers. The act inflicting injury may be single, but back of that, and essential to liability, lies some wrong done by each tort-feasor contributing in some way to the wrong complained of." In *White v. Keller*, 242 N.C. 97, 100, 86 S.E.2d 795, 797 (1955), the Court held that "[j]oint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury."

> [T]he right to contribution does not exist unless two or more parties are joint tort-feasors. Two or more parties are joint tortfeasors when their negligent or wrongful acts are united in time or circumstance such that the two acts constitute one transaction or when two separate acts concur in point of time and place to cause a single injury.

State Farm Mut. Ins. Co. v. Holland, 324 N.C. 466, 470, 380 S.E.2d 100, 102-03 (1989) (citations omitted).

There is, therefore, ample evidence that either these parties were joint tortfeasors, or that one active tortfeasor caused the harm for which the passive party has paid, and is entitled to indemnification. Election of remedies is not required at this stage of the proceedings, and, therefore, the Defendants' motion for summary judgment must be denied.

V. Unjust Enrichment

Defendant applies a misnomer to Plaintiffs' claim with respect to the equitable doctrine of unjust enrichment. As the North Carolina Court of Appeals has pointed out, "unjust enrichment"" is not, in and of itself, a proper cause of action. *Hinson v. United Financial Services, Inc.*, 123 N.C.App. 469, 472-473, 473 S.E.2d 382, 385 (1996). "It seems obvious that the cause of action plaintiff intended was for restitution based on unjust enrichment." *Id. (citing Clark Trucking of Hope Mills v. Lee Paving Co.*, 109 N.C.App. 71, 74, 426 S.E.2d 288, 289 (1993)).

> Unjust enrichment is "based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another." *Atlantic Coast Line R.R. v. Highway Commission*, 268 N.C. 92, 96, 150 S.E.2d 70, 73 (1966). " '[A] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' " *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56, (citation omitted), *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). "A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law." *Id.* at 570, 369 S.E.2d at 556.
>
> *Hinson* , 123 N.C.App. at, 472-473, 473 S.E.2d at 385.

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[1]The cases which Defendants cite do not support Defendants' contentions. For example, though citing the admittedly general principle that "Not every enrichment of one by the voluntary act of another is unjust. "Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched, the Supreme Court's decision in *Wright v. Wright* , reversed the Court of Appeals refusal to grant an unjust enrichment award. 305 N.C. 345, 289 S.E.2d 347 (1982) reversing 47 N.C.App. 367, 267 S.E.2d 61 (1980). The Court noted that the general rule in unjust enrichment cases is that that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor. 305 N.C. at 354, n.6, 289 S.E.2d at 353, n. 6 *, citing Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966); *Dean v. Mattox*, 250 N.C. 246, 108 S.E.2d 541(1959). Further, the court carefully defined its context, a circumstance involving oral unenforceable promises between husband and wife and pointed out that [t]he recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value." *Rhyne v. Sheppard,* 224 N.C. 734, 737, 32 S.E.2d 316, 318 (1944). This rule is particularly applicable where a husband makes improvements to his wife's land because of the presumption that the improvements constitute a gift. " *Wright*, 305 N.C. at 350, 289 S.E.2d 351.

In unjust enrichment cases, though, the Court continued, "[t]he action is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. However, the rule does not apply when the services are rendered gratuitously or in discharge of some obligation [owed to the recipient]. *Twiford v. Waterfield*, 240 N.C. 582, 83 S.E.2d 548; *Allen v. Seay*, 248 N.C. 321, 103 S.E.2d 332; *Johnson v. Sanders*, 260 N.C. 291, 132 S.E.2d 582. " *Wright,* 305 N.C. at 354, n.6, 289 S.E.2d at 353, n. 6.

Even in the husband and wife context presented in *Wright,* however, the Court affirmed the recovery under and unjust enrichment theory. The fact that there may be some evidence as in the context of the husband and wife, that there may have been an intent to provide shelter to the wife and to the husband as well, simply supported the trial court's decision to submit the question to the jury.

Where, as here, Plaintiffs as defendants in the underlying action did not simply act gratuitously. While there may be some evidence that there was an intent to provide protection against an adverse verdiict aginst HMA, the purpose of paying the settlement was not simply to intervene and avoid a verdict against the other defendants, although the settlement inured to the benefit of the other tortfeasor who took no action to avoid the effect of the settlement, who took advantage of it, did not demand that his case go to trial or that there was any impropriety or illegality in the settlement itself or the consideration paid.

The Court of Appeals decision in *Collins v. Davis*, 68 N.C.App. 588, 315 S.E.2d 759 (1984), rather than supporting a ruling as a matter of law, instead supports the position that unjust enrichment claims are fact intensive and present factual questions and issues to be determined by a jury. In *Collins* , the plaintiff, a married man, who cohabited with the female defendant prior to his own divorce, brought action to recover $10,000 for money and labor which he allegedly

by an interference in the affairs of the defendant. *See Southeastern Shelter Corp. v. BTU, Inc.*, 154 N.C.App. 321, 330, 572 S.E.2d 200, 206 (2002). *Accord, Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56.

Here, Plaintiffs have established a *prima facie* case requiring submission of the case to the jury. Plaintiffs, in order to protect themselves, conferred a benefit on the other party, Dr. Yerby. The benefit must not have been conferred officiously, that is it was not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The clearly measurable benefit of money was not gratuitous and the defendant, Yerby, consciously accepted the benefit. Without taking any action to avoid the settlement and release, to vacate the dismissal or to demand that his case proceed to trial. Accordingly, all of the undisputed evidence in this case establishes that Plaintiffs are entitled to restitution based on the implied in law obligation derived from Defendant's unjust enrichment.[2]

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expended on real property titled in female cohabitant's name. The Superior Court directed a verdict against the male cohabitant on all claims, and he appealed. On appeal, the Court of Appeals, held that the evidence as to the Plaintiff's unjust enrichment theory required submission of the case to the jury. There, as here, the question loomed as to whether the payment was made for joint benefit or for a proper purpose based on a legal and legitimate reason. "[T]he question was one of fact for the jury, rather than one of law for the court." 68 N.C.App. at 592, 315 S.E.2d at 762.

[2] The North Carolina Supreme Court has clearly explained the elements, which Plaintiffs have met in this case, establishing that

> "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable. *See Britt v. Britt*, 320 N.C. 573, 359 S.E.2d 467 (1987) and E. Allan Farnsworth, Contracts § 2.20. In *Wells v. Foreman*, 236 N.C. 351, 72 S.E.2d 765 (1952), we said that the defendant must have consciously accepted the benefit. A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law. A quasi contract or a contract implied in law is not a contract. The claim is not based on a promise but is imposed by law to prevent an unjust enrichment.

Booe v. Shadrick, 322 N.C. at, 570, 369 S.E.2d at 555-656.

Conclusion

Because of the existence of material factual questions, the Defendants' motion for summary judgment should be denied. Moreover, the law does not warrant a ruling in Defendants' favor.

Dated: February 18, 2009.

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(facsimile transmittal and mail)

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February 18, 2009

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