Laura Budd

Media Report

Draft

June 7, 2022

Part I Introduction

This report reviews electronically available news stories on Laura Budd, candidate for NC House, District 103. This also includes descriptions of some of her lawsuits.

The Table of Contents in **Part II** of the report is a useful guide to the entire report and can be used as a stand-alone summary. In one section, it surveys the bulk of the news file, through the headlines we have assigned to each item.

Part III, the **Greatest Hits** section, identifies key points taken from available media articles.

Parts IV, The News File, contain edited copies of the most relevant electronically available stories.

We hope you find this useful.

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Part III Budd: Greatest Hits from Media Review

Law Firm Site Bio

This is taken from her profile at the website of her law firm.

Background

Laura H. Budd is the managing attorney of Weaver & Budd Law with over 15 years of experience in practicing law. She concentrates primarily on business litigation and contract law, which accounts for over 60 percent of her practice. Laura has extensive experience in the areas of appellate law, construction law, negligence, defamation, as well as estates and trusts.

Laura approaches each case with a focus on the individual client's needs and their specified desired outcomes. Laura personally works with each client to develop a strategy designed to effectively and efficiently address the relevant legal issues in each case. Laura's work ethic and drive for excellence is reflected in her relationships with her clients and their return for repeated representation when they have further legal issues to resolve.

Laura is married to Chuck Budd and has three children. She is a member of Matthews United Methodist Church and enjoys reading, running, and travelling around the world.

Areas of Practice

- Business Litigation and Contract Law
- Corporate Counsel to Small and Mid-Size Companies
- Construction Litigation, including architectural malpractice
- Defamation
- Estates and Trusts
- Appellate Law
- Personal Injury
- Alienation of Affection and Criminal Conversation

Bar Admissions

- North Carolina: Fall 2002
- U.S. District Court Western District of North Carolina: Fall 2002
- North Carolina Certified Superior Court Mediator: February 2009 - May 2016

Education

- Ohio University cum laude, Bachelor's Degree: May 1999
- Hong Kong City University: Summer 2001
- Wake Forest University School of Law Juris Doctorate: June 2002
- Wake Forest Law London Program: Summer 2000
- Hong Kong Baptist University - International Business Law: Fall 2001

Community Involvement

- Member of Board of Directors, MARA: 2016 - Present
- Commissioner (2015-Present) and Cheer and Dance Coach (2012-Present), MARA
- National Advisory Board Member, ARAG Group: 2013-2016
- Past Chairman of Board of Directors, Peace & Justice Immigration Clinic
- Past Board Member, Matthews Health Clinic
- Chair of Board of Directors, The Girls Foundation: 2016 - Present
- Soccer Coach, Charlotte Soccer Academy: 2015 - Present
- Member of Construction Professionals Network: 2016 – Present (https://weaverbuddlaw.com/about/our-team/laura-huntingdon-budd/)

Legal Cases Found

Media files provided some of Budd's cases spanning 2008-2021. These are brief summaries:

2008 - ELDER BROACH PROPERTIES, INC. vs. SARAH MCNEEL AND SCOTT MCNEEL

- Budd represented the defendants. They had lived in a property provided by a church and then had been sued for failure to pay rent. They had claimed problems in the house that made it unlivable that weren't addressed. The plaintiffs prevailed in court and had also been awarded attorneys fees. On appeal, the judgment was upheld save for the awarding of attorney fees.

2009 - Baltzell vs. Dowdy

- Budd represented plaintiffs. They had sued the people who sold them their house six years earlier for doing below standard work on renovations prior to sale that now made it impossible for them to sell it. Mecklenburg County had also been sued because they hadn't verified the work done to insure it was up to code. The County had been dismissed of responsibility on immunity grounds. This appeal by the plaintiffs saw the decision upheld and the appeal dismissed.

2012 - N.C. State Bar v. Barrett

- On appeal, Budd successfully reversed disbarment of attorney Sylvia Barrett by the State Bar

2015 - Speer v. Great Western Bank

- Unsuccessful appeal of client Speer over summary judgment for defendant, Great Western Bank. Concerned Speer's default on promissory note. Speer after being foreclosed on had sued charging "deceptive trade practices."

2021 - Simmons v. Wiles (In re Wiles)

Appeals hearing on summary judgment for plaintiff Simmons regarding punitive damages stemming from shooting incident a decade earlier by defendant Wiles. Budd represented Wiles. Judgment was "affirmed in part, denied in part."

Campaign for State House, 2022

Budd is running for the vacant seat held by Rachel Hunt who flipped it to the Democrats in 2018. She is facing former GOP Rep. Bill Brawley who lost the seat in 2018 and failed to win it back in 2020.

- Attorney Laura Budd plans to campaign for Rachel Hunt's District 103 seat in the N.C. House. The seat represents Matthews, Mint Hill and parts of south Charlotte. Hunt asked Budd if she would consider running for her seat as the two-term representative has her sights set on becoming a state senator. Sensing the time was right, Budd agreed to run.

- She likes the idea of someone representing the Matthews-Mint Hill area who lives and works here as well as someone who is connected to the community. She is also aware of the infrastructure and housing issues both towns are facing. Budd works as managing partner for Weaver | Budd Attorneys at Law in Matthews. She specializes in business litigation and contract law. (Charlotte Observer, 11/30/21)

Observer Interview

An interview with the *Observer* (who endorsed her in the primary that she won easily) outlines her philosophy. She totally avoided the question of whether there was anything she disagreed with the Democratic Party on, refusing to cite a single policy issue.

- Please list your highlights of civic involvement:
    - Currently, I serve as the president of the Matthews Athletic Recreation Assoc., vice-president of Piedmont Gymnastics Association, and am a member of the Mecklenburg County Bar, the Matthews Chamber of Commerce and Women in the Profession for the North Carolina Bar Assoc. I am also a Boy Scout Leader. Previously, I have served on the Board of Directors for the Peace & Justice Immigration Clinic and Matthews Free Medical Clinic and been a longtime volunteer with Room in the Inn.
- If you're a member of the minority party, how will you be an effective legislator as a member of the minority party?
    - I practice civil litigation. On the surface my job looks combative. When I started, I was often the youngest attorney and one of the only women in court. I learned early that a well-researched and well-reasoned approach seeking common ground will often lay the foundation to reaching a resolution to the conflict. As a legislator, whether serving in the minority or majority party, a consistent collaborative approach to the issues will be the most effective to serving the people of North Carolina.
- School test scores dropped during the COVID-19 pandemic. What should North Carolina do to improve student performance?
    - To improve performance and fulfill our duty to our children and families, we need to fund the Leandro Plan. Along with competitive teacher salaries to make North Carolina a contender in competing for the best educators in the nation, we need to increase funding for social workers to help struggling families connect with local resources, and increase the number of educational psychologists to test for learning difficulties to prevent and reduce achievement gaps.
- What do you want to happen in North Carolina if Roe v. Wade is overturned?
    - North Carolina should codify Roe v. Wade affirming a woman's right to make her own healthcare decisions without the interference of the government. The decision whether to bear a child is between the woman, her doctor, and if she is religious, her God. To limit a woman's autonomy and control of her body is to treat her as less than a full citizen entitled to all the protections of the Constitution.
- What should North Carolina do to reduce violent crime?
    - I support a two-pronged approach. Increased funding for law enforcement is critical to enable officers to perform. Parallel with this a focused effort to strengthen housing and food security, strong afterschool/summer programs for K-8, and vocational training opportunities in high school are necessary to reduce the school to prison pipeline numbers. The prison system reforms need to make mental health, addiction treatment, and re-entry training into society the priorities over punishment.

- Should medical marijuana be legalized in North Carolina?

  - Yes. Medical marijuana should be legalized and dispensed under the care of a licensed physician for those patients who would benefit from the treatment of diseases and health conditions it has been shown beneficial in treating. The legislation legalizing it should be drafted to also benefit local businesses and farmers who would participate in the program.

- What should the state's minimum wage be? What policies would you support to help struggling North Carolinians?

  - The minimum wage should be a living wage, at a minimum $15.00. I also support paid parental leave, Medicaid expansion, and allocating more control of resources to local towns and municipalities who are in better position to define how to use them to help struggling North Carolinians in their communities.

- Should North Carolina expand Medicaid, and how?

  - I support the expansion of Medicaid for those North Carolinians who cannot afford health insurance by accepting the federal funds allocated. This would cover a large portion of the population currently without health insurance, bring approximately $4 billion taxpayer dollars into NC each year, and which would create thousands of jobs as well as help rural hospitals remain open.

- Is there an area where you disagree with your party? Why?

  - There are and will continue to be areas I disagree with the Democratic Party on. However, it is less about "a party" and more about collaborating with others to think critically about how to best meet and serve the needs of all North Carolinians. (Charlotte Observer, 5/11/22)

Part IV Budd: The News File, 2008-22

2008

DEC 2008 Appeals Decision In Case Where She Was Attorney For Defendants

RALEIGH, N.C., Dec. 16 -- The North Carolina Court of Appeals issued the following opinion:

ELDER BROACH PROPERTIES, INC. AND ROBINSON PRESBYTERIAN CHURCH, Plaintiffs

v.

SARAH MCNEEL AND SCOTT MCNEEL, Defendants

Mecklenburg County No. 05 CVD 006956

Appeal by defendants from judgment entered 12 September 2006 and order entered 25 July 2007 by Judge Hugh B. Campbell, Jr. in District Court, Mecklenburg County. Heard in the Court of Appeals 7 October 2008.

Robinson, Bradshaw & Hinson, P.A., by Jonathan C. Krisko, for plaintiffs-appellees.

Laura H. Budd, for defendants-appellants.

WYNN, Judge.

A tenant's obligation to pay rent is mutually dependent with a landlord's obligation to provide and maintain the premises in a fit and habitable condition. [See footnote 1] Here, Defendants Sarah and Scott McNeel ("the McNeels") argue that they were entitled to terminate their lease early because Plaintiffs Elder Broach Properties, Inc. and Robinson Presbyterian Church (collectively "Elder Broach") failed to maintain the premises in a habitable condition. TheMcNeels also argue that the findings of fact in the District Court's order do not support its award of attorneys' fees. Because sufficient evidence supports the District Court's finding that Elder Broach maintained the premises in a fit and habitable condition, and that finding supports the conclusion that the McNeels were not entitled to terminate their lease early, we affirm that part of the court's judgment. However, we reverse the award of attorneys' fees because it is not supported by sufficient findings of fact.

The McNeels are former tenants of a house owned by Robinson Presbyterian Church and managed by Elder Broach Properties, Inc. The McNeels executed a lease agreement after inspecting the exterior of the house and viewing pictures of the house's interior. The term of the lease ran from 8 July 2004 to 30 June 2005.

When they moved into the house, the McNeels noted several unsatisfactory conditions on the Move-In Inspection Report Elder Broach provided. The McNeels did not insist that Elder Broach correct the unsatisfactory conditions; instead Mr. McNeel, a handyman operating a sole proprietorship, proposed that

he would perform the repairs and maintenance for a fee. Mr. McNeel also proposed that Elder Broach could hire him for repairs on other properties it managed. Elder Broach agreed to Mr. McNeel's proposals, and the McNeels began corresponding with Elder Broach maintenance manager Jennifer Henke regarding repair work.

After Mr. McNeel completed the repair work, the McNeels became aware of excess moisture and mold spores in their new home. Theynotified Elder Broach and requested an investigation in writing on 13 September 2004. On 11 October 2004, Mr. McNeel faxed to Ms. Henke a request that Elder Broach provide a dehumidifier to deal with the moisture problems. In response, Ms. Henke notified Tom Pruitt, a church elder and general contractor, who hired Accudry's Tim Hodges to help investigate the moisture in the house.

During the investigation, Mr. Hodges and Mr. Pruitt noticed condensation on the windows and walls, and concluded that it probably formed because the McNeels were not using the air conditioning and ventilation system. Mr. Pruitt advised Mr. McNeel to try using the air conditioning and ventilation, and to call him back if the problem was not resolved.

Thereafter, the McNeels continued communication with Ms. Henke about the moisture and mold problems. On 9 November 2004, Mr. McNeel sent Ms. Henke an email with attached photographs showing evidence of mold on the windows, under beds, on furniture, linens, and on their infant daughter's items. The email stated, "[i]t's just getting bad. This is completely unacceptable and unhealthy." In response to this email, Ms. Henke contacted Mr. Pruitt's successor, Marc Chavaree, who dispatched certified mold inspector Shane Boshears to do another investigation. Mr. Boshears inspected the house on 11 November 2004, and concluded in an email addressed to Ms. Henke: "Yes they have a severe mold problem. . . . The mold is all over there [sic] furniture, clothing, windows, baby stuff, etc. etc. . . . In all seriousness the Church needs to do something before the whole house is ruined." Mr. Boshears recommended thatthe Church provide one or more dehumidifiers to deal with the problem. The Church provided a dehumidifier on 22 November 2004.

At trial, the McNeels testified that they began using the dehumidifier, but it did not solve the moisture and mold problems. They made further oral requests of Ms. Henke for solutions to the moisture problem and attendance to other maintenance requests. Also, the McNeels made the first documented request to be let out of their lease in an email to Ms. Henke on 21 December 2004. However, Mr. Chavaree testified at trial that the McNeels indicated to him more than once that the dehumidifier was working well and there were no further mold issues.

During their correspondence with Ms. Henke and Mr. Chavaree, the McNeels mentioned another house they had found and were hoping to purchase. The McNeels made an offer to purchase that house on 30 December 2004, and asked Ms. Henke about the consequences of breaking their lease with Elder Broach in January 2005. On 2 February 2005, the McNeels sent a thirty-day notice of intent to vacate to Elder Broach expressing that they had "enjoyed the [Elder Broach property]," and offering to perform a number of maintenance tasks free of charge prior to moving out. The notice made no mention of the moisture, mold, or alleged non-responsiveness to maintenance requests.

The McNeels moved out of the Elder Broach property on 28 February 2005. Elder Broach demanded rent on 1 March 2005; the McNeels responded in an 11 March 2005 letter that they would not pay the

remainder of the lease because of damage to personalproperty caused by moisture and mold. In turn, Elder Broach filed a complaint in summary ejectment in the Small Claims Division of the District Court, and obtained favorable judgment for unpaid rent. Elder Broach President Ken Elder conducted a move-out inspection report of the house on 15 March 2005 on which he noted, inter alia, that mildew was present. At trial, he testified that the house was in very poor condition, with trash and personal items left behind.

At some point after they moved out, the McNeels requested an inspection of the Elder Broach property from the City of Charlotte. Code Enforcement Inspector Charles Hitsman did an inspection on 3 April 2005 and found numerous violations, including mold spores in the attic and interior of the house. A hearing on the violations was held before the City of Charlotte's Neighborhood Development Department on 5 May 2005. The Department issued Findings of Fact and an Order on 19 May 2005 directing the Church to make repairs.

The McNeels appealed the Small Claims Division judgment to the District Court, with Ms. McNeel asserting counterclaims for breach of implied warranty of habitability, unfair and deceptive trade practices, and attorneys' fees. [See footnote 2] The Church intervened as Plaintiff, also alleging breach of contract. After a bench trial, the District Court found that the McNeels owed damages for unpaid rent, physical damage to the house, and maintenance work chargedbut unperformed by Mr. McNeel. The District Court largely discredited the McNeels' testimony and found that Ms. McNeel's unfair and deceptive trade practices (”UDTP”) claim lacked a basis in fact and was malicious; therefore, the court awarded attorneys' fees to Elder Broach. After the District Court entered its judgment on 12 September 2006, the McNeels discovered the Neighborhood Development Department's 19 May 2005 order and moved for a new trial on the basis of newly discovered evidence. The District Court denied the motion in an order entered on 25 July 2007.

On appeal from the District Court's 12 September 2006 judgment and 25 July 2007 order, the McNeels argue that the District Court erred: (I) to the extent it concluded that the McNeels did not provide notice of uninhabitable conditions in the house; (II) by concluding that Ms. McNeel had not proved her UDTP claim; (III) by concluding that Ms. McNeel's UDTP claim was frivolous and awarding attorneys' fees on that basis; and (IV) by denying their motion for a new trial on the basis of newly discovered evidence.

I. In their first assignment of error, the McNeels argue that the trial court applied the wrong legal standard, in effect requiring them to show that they provided notice to Elder Broach of uninhabitable conditions at the Elder Broach property. Furthermore, the McNeels argue that the findings of fact in the District Court's 12 September 2006 judgment do not support the legal conclusions that they breached their lease and failed toprove their breach of implied warranty of habitability counterclaim.

This Court reviews whether a trial court applied the correct legal standard de novo, and the trial court's findings of fact are conclusive on appeal "if there is competent evidence to support them, even though there may be evidence that would support findings to the contrary." Biemann & Rowell Co. v. Donohoe Cos., 147 N.C. App. 239, 242, 556 S.E.2d 1, 4 (2001) (citations omitted). The Residential Rental Act mandates that landlords must provide premises fit for human habitation, and that the tenant's obligation to pay rent and the landlord's obligation to keep the premises in a fit and habitable condition are mutually dependent. N.C. Gen. Stat. Sections 42-41 to -42 (2007); see also Creekside Apartments v. Poteat, 116 N.C. App. 26, 33-34, 446 S.E.2d 826, 831 (1994).

The McNeels argue that the District Court erred by requiring them to give Elder Broach notice of uninhabitable conditions at the Elder Broach property. However, notice only becomes relevant under N.C. Gen. Stat. Sec. 42-42(a)(4) concerning the enumerated "facilities and appliances supplied or required to be supplied" by the landlord. Where those "facilities" or "appliances" are involved, the tenant must give the landlord written notice that they are in disrepair; the tenant is not required to give written notice "where the conditions enumerated in G.S. 42-42(a)(4) are the same conditions which render the premises unfit and uninhabitable . . . ." Surratt v. Newton, 99 N.C. App. 396, 405-06, 393 S.E.2d 554, 559 (1990). Accordingly, notice is immaterial in this case becausethe District Court determined that Elder Broach delivered and maintained the Elder Broach property in a fit and habitable condition. Therefore, the question for this Court is whether competent evidence supports the District Court's finding of fact. See Donohoe Cos., 147 N.C. App. at 242, 556 S.E.2d at 4.

There is ample evidence in the record to sustain the District Court's finding that Elder Broach delivered and maintained the house in a fit and habitable condition. After reviewing pictures of the house's interior and touring the exterior with Mr. Elder, the McNeels apparently found the house habitable because they moved in. Furthermore, the McNeels occupied the house for more than two months before they first complained about mold or moisture. Accordingly, competent evidence existed that the house was delivered in a fit and habitable condition.

Likewise, there was competent evidence that Elder Broach maintained the house in a fit and habitable condition. Albeit relatively slow at times, Elder Broach answered each of the McNeels' requests for investigation of the mold and moisture. When the McNeels emailed Ms. Henke on 13 September 2004, Mr. Hodges and Mr. Pruitt investigated on 11 October 2004. In response to the McNeels' 9 November 2004 email, Shane Boshears investigated and recommended a dehumidifier, which Elder Broach provided. Mr. Chavaree testified that the McNeels indicated more than once that the dehumidifier had corrected the problem. Therefore, competent evidence supports the District Court's findings that the house was delivered and maintained in a fit and habitable condition. Thosefindings, in turn, support the District Court's conclusions that the McNeels were not entitled to terminate their lease and failed to prove their breach of implied warranty of habitability claim. This assignment of error is overruled.

II. In their next assignment of error, the McNeels argue that the District Court erred by concluding that Ms. McNeel did not prove her UDTP claim, particularly for the period after they vacated the house, from 1 March 2005 to 30 June 2005. They contend that even if Elder Broach did not have notice of uninhabitable conditions in the house prior to 5 April 2005, it was notified on that date by the Neighborhood Development Inspector's citation, but continued to charge the McNeels for rent through the end of the lease term in June 2005.

A landlord commits an unfair or deceptive trade practice by charging a tenant rent for a dwelling the landlord knows is uninhabitable. Whether a landlord has committed an unfair or deceptive trade practice is a case by case inquiry; a violation is marked by immoral, unethical, oppressive, unscrupulous, or substantially injurious conduct. N.C. Gen. Stat. Sec. 75-1.1 (2007); Dean v. Hill, 171 N.C. App. 479, 486, 615 S.E.2d 699, 703 (2005). "Upon properly submitted issues the jury is to determine the facts and the trial court is to determine, as a matter of law, whether the landlord engaged in unfair or deceptive trade practices." Foy v. Spinks, 105 N.C. App. 534, 540, 414 S.E.2d 87, 90 (1992) (citations omitted). Here, the trial judge was the trier of fact and found that the house was fit and habitable during the McNeels' occupancy. As noted above, that finding is supported by competent evidence. We need go no further

because a landlord is entitled to charge rent for a fit and habitable premises. Accordingly, this assignment of error is also overruled.

III. Next, the McNeels assign error to the District Court's conclusion that Ms. McNeel "knew or should have known that her unfair trade practices claim was frivolous and malicious." See N.C. Gen. Stat. Sec. 75-16.1(2) (2007). The McNeels contend that this conclusion constitutes an abuse of discretion because it is unsupported by sufficient findings of fact. We agree.

"The decision whether or not to award attorney fees under section 75-16.1 rests within the sole discretion of the trial judge. And if fees are awarded, the amount also rests within the discretion of the trial court and we review such awards for abuse of discretion. . . ." Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc., 180 N.C. App. 70, 81, 637 S.E.2d 230, 236 (2006), aff'd, 361 N.C. 347, 643 S.E.2d 586, 586-87 (2007) (citations omitted). Before the trial court may award attorneys' fees against a party asserting a UDTP claim, it must make findings of fact sufficient to support the conclusion that the party "knew, or should have known, the action was frivolous and malicious." N.C. Gen. Stat. Sec. 75-16.1(2). The District Court made the following relevant findings of fact before concluding that attorneys' fees should be awarded against Ms. McNeel:

15. Based on the testimony offered at trial, including the specific testimony of the Defendant-Counterclaimant Sarah McNeel and Defendant Scott McNeel, the Court finds that the allegations made by Defendant- Counterclaimant in support of her claims for breach of the landlord's implied warranty of habitability and unfair trade practices under N.C.G.S. Sec. 75-1.1 et seq. lack a basis in fact and the Defendants' testimony offered at trial concerning material facts in this case was simply not true. Further, the Court finds that the purpose of Defendant- Counterclaimant's unfair trade practices counterclaim was to gain a financial advantage.

16. The Court finds that the Defendant- Counterclaimant's unfair trade practices claim is frivolous in that it lacks a reasonable basis in fact and malicious in that it constitutes an abuse of the legal process. Additionally, the Court finds that Defendant- Counterclaimant knew or should have known that her unfair trade practices claim was frivolous and malicious.

Thus, in paragraph 15, the District Court found that the McNeels' allegations and trial testimony lacked credibility, and that Ms. McNeel instituted her UDTP claim to gain a financial advantage. To the extent that paragraph 16 can be construed to contain any additional findings of fact, the District Court found that Ms. McNeel's claim "constitutes an abuse of the legal process."

Although the District Court discredited the McNeels' allegations and trial testimony, it was still required to make findings of fact sufficient to support the conclusion that Ms. McNeel "knew or should have known" that her UDTP claim wasfrivolous and malicious. See Pierce v. Reichard, 163 N.C. App. 294, 300, 593 S.E.2d 787, 791 (2004) (trial court must make findings of fact sufficient to support one of the two enumerations under N.C. Gen. Stat. Sec. 75-16.1). While the District Court's findings_that Ms. McNeel instituted her UDTP claim to gain a financial advantage and that her claim abused the legal process_ would support the conclusion that her claim was frivolous and malicious, the court's judgment mentions no evidence in support of those findings. Nor does Elder Broach, urging this Court to uphold the award of attorneys' fees, cite any evidence tending to show that Ms. McNeel asserted her UDTP claim to gain a financial advantage.

In contrast, the record reflects that the McNeels in fact experienced mold and moisture problems during their tenancy, and that extensive correspondence took place between the McNeels and Elder Broach to remedy the problem. Without evidence showing that Ms. McNeel merely sought to gain a financial advantage by filing her UDTP claim, these findings constitute an abuse of the District Court's discretion. Accordingly, the District Court's award of attorneys' fees is reversed.

IV. In their final assignment of error, the McNeels argue that the trial court erred by refusing to grant their motion for a new trial after they discovered the Charlotte Neighborhood Development Committee's 19 May 2005 Findings of Fact and Order ("committee's order"). Elder Broach contends that the committee's order wasmerely cumulative and discoverable by the McNeels if they had exercised due diligence prior to trial.

The decision whether to grant a motion for a new trial based on newly discovered evidence is left to the trial judge's discretion and is reviewable only for an abuse of discretion. State v. Beaver, 291 N.C. 137, 143, 229 S.E.2d 179, 182-83 (1976) (citations omitted). Seven prerequisites must appear by affidavit before a new trial should be granted because of newly discovered evidence:

(1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

Id.

Here, Elder Broach argues persuasively that the committee's order is merely cumulative. The committee's order contains little factual information, but it lists as a finding of fact that the "[Elder Broach property] is in violation of one or more of the minimum standards of fitness." However, Inspector Hitsman testified at trial regarding his inspection of the house, issuance of the Complaint and Notice of Hearing, and the committee's order. The record does not reflect that Inspector Hitsman specifically testified that the house was "unfit" or "uninhabitable," but he testified in detail to the Code violations and other unsatisfactoryconditions. Therefore, any information in the committee's order was either testified to by Inspector Hitsman, or was a fair inference from his trial testimony. The committee's order is merely cumulative to Inspector Hitsman's trial testimony. Accordingly, this assignment of error is without merit.

Affirmed in part, reversed in part. Judges BRYANT and ARROWOOD concur. Report per Rule 30(e). (US State News, 12/16/08)

2009

AUG 2009 Baltzell v. Dowdy

Court of Appeals of North Carolina
August 19, 2009, Heard in the Court of Appeals; January 19, 2010, Filed
NO. COA09-94

Reporter
2010 N.C. App. LEXIS 69 *
JOHNATHAN BALTZELL and TRACY BALTZELL, Plaintiffs, v. PAUL DOWDY, LADELLE M. DOWDY, NEIL TAFT, MECKLENBURG COUNTY, AMERISPEC UNIVERSAL HOME INSPECTIONS, INC., and RICHARD KETTLE, Defendants.
Notice: PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD.
THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.
Subsequent History: Reported at Baltzell v. Dowdy, 690 S.E.2d 558, 2010 N.C. App. LEXIS 108 (N.C. Ct. App., Jan. 19, 2010)
Prior History: [*1] Mecklenburg County. No. 07 CVS 12352.
Disposition: DISMISSED.
Core Terms

governmental immunity, summary judgment, plaintiffs', trial court, inspection, purchase of insurance, funded, waived, summary judgment hearing, constitutional claim, home inspection
Counsel: Law Office of Laura H. Budd, PLLC, by Laura H. Budd, for plaintiff-appellants.
Ruff, Bond, Cobb, Wade & Bethune, LLP, by Robert S. Adden, Jr., for defendant-appellee Mecklenburg County.
Judges: STEELMAN, Judge. Judges HUNTER, Robert C. and GEER concur.
Opinion by: STEELMAN
Opinion

Appeal by plaintiffs from order entered 29 September 2008 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 August 2009.
STEELMAN, Judge.

Where plaintiffs failed to allege Mecklenburg County had waived governmental immunity by purchasing insurance in their complaint and failed to obtain a ruling on their motion to amend at the summary judgment hearing, this issue is not properly preserved for appellate review. Even if waiver had been properly alleged, plaintiffs are barred from asserting negligent inspection against Mecklenburg County because there was no evidence before the trial court that the Mecklenburg County Board of Commissioners had passed a resolution deeming the funded reserve to be the same as the purchase of insurance pursuant to N.C. Gen. Stat. § 153A-435(a). Plaintiffs' constitutional contentions will not be ruled upon for the [*2] first time on appeal.

I. Factual and Procedural Background
In late March or early April 2001, Johnathan and Tracy Baltzell (plaintiffs) entered into negotiations with Paul and Ladelle Dowdy (the Dowdys) for the sale and purchase of the residence located on 1424 Hamorton Place in Charlotte. The purchase price of the residence was $ 175,000.00 and it was to be sold in "as is" condition. Plaintiffs informed the Dowdys that they planned to construct a new kitchen, master bedroom and bathroom, and an exterior deck (the addition) onto the residence. In response, the Dowdys offered to improve the residence by constructing the addition onto the residence before the sale for an increased purchase price of $ 240,000.00. A contract was executed by the parties on 7 April 2001. The Dowdys subsequently entered into an agreement with Neil Taft (Taft), a licensed general contractor, who obtained the building permit required for the addition. Construction commenced in early April and concluded on 23 June 2001. Mecklenburg County inspected the construction at various times to verify that it met the requirements of the applicable residential building code. The work passed each inspection conducted before [*3] 15 June 2001. The work failed a final inspection on 15 June 2001. 1 On 22 June 2001, the work passed a second final inspection. On 23 June 2001, Richard Kettle, on behalf of Amerispec Universal Home Inspections, Inc., performed a home inspection that did not identify any defects in the construction of the addition.
On 26 April 2007, approximately six years later, plaintiffs entered into a contract for the sale of the residence to a buyer for the price of $ 425,000.00. On 9 May 2007, the buyer had an inspection performed by South Charlotte Inspection Services, Inc., which revealed multiple defects in the addition:
The defects identified by South Charlotte Home Inspections included, but are not limited to; a lack of flashing between the interior portions of the Addition and the exterior portions of the Addition; loose foundation bricks resting upon undersized support girders under the kitchen; exposed framing members along the rear wall of the kitchen; high moisture readings due to lack of proper flashing; improper grading; termite damage from past infestation(s); decay and deterioration in the deck, crawlspace, [*4] and the master bedroom entryway floor corners; four layers of shingles on the older pre-existing roof; and staining and fungus growth.
On 11 May 2007, the buyer terminated its contract for the sale and purchase of the residence as a result of these deficiencies. Plaintiffs subsequently hired a contractor to confirm South Charlotte Home Inspections, Inc.'s report and to estimate the cost of repairs. The entire addition, except for the wall framing and roof, had to be demolished and treated for mold. The cost of repairs totaled $ 129,000.00.
On 20 July 2007, plaintiffs filed a complaint against the Dowdys, Taft, Mecklenburg County, Amerispec Universal Home Inspections, Inc., and Richard Kettle alleging various causes of action. As to Mecklenburg County, plaintiffs alleged that it was negligent in its inspection of the addition and further asserted: (1) the County had a duty to inspect the residence and assure that it complied with the residential building code and (2) the County "failed to discharge and perform that duty to the Plaintiffs by allowing the home to pass inspections when numerous material construction defects existed and the Defendants knew or should have known were violations [*5] of the applicable residential building code."
On 20 August 2007, Mecklenburg County filed an answer, which denied the material allegations of plaintiffs' complaint and asserted the affirmative defenses of governmental immunity pursuant to N.C. Gen. Stat. § 153A-435 and the statute of limitations pursuant to N.C. Gen. Stat. §§ 1-50(a)(5), -52, et seq.
On 2 April 2008, Mecklenburg County filed a motion for summary judgment based upon governmental immunity. In their response to Mecklenburg County's motion for summary judgment, plaintiffs asserted that Mecklenburg County's participation in an Insurance and Risk Management Joint Undertaking Agreement was the functional equivalent of the purchase of insurance and thus a waiver of governmental immunity. This contention was not contained in any of the pleadings filed in this matter.

On 29 September 2008, the trial court granted summary judgment in favor of Mecklenburg County on the basis of governmental immunity. Plaintiffs appeal.

II. Summary Judgment
Plaintiffs argue the trial court erred by granting summary judgment in favor of Mecklenburg County. We disagree.

A. Standard of Review
The standard of review on a trial court's ruling on a motion [*6] for summary judgment is de novo. Forbis v. Neal, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). The entry of summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." Collingwood v. G.E. Real Estate Equities, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). Summary judgment is proper when "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . ." Dobson v. Harris, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted).

B. Analysis
At the hearing on Mecklenburg County's motion for summary judgment, plaintiffs' attorney made an oral motion to amend the complaint to include the allegation that Mecklenburg County had waived the defense of governmental immunity by purchasing [*7] insurance. The trial court never ruled on that motion. Plaintiffs' attorney also for the first time contended that Mecklenburg County had violated plaintiffs' due process and equal protection rights by not having objective standards for evaluating claims asserted against the County and its Self-Funded Loss Program.

1. Governmental Immunity
"Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity. When a county purchases liability insurance, however, it waives governmental immunity to the extent it is covered by that insurance." McCoy v. Coker, 174 N.C. App. 311, 313, 620 S.E.2d 691, 693 (2005) (quotation and citation omitted). It is well-established that "[i]n order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." Paquette v. County of Durham, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citations omitted), disc. review denied, 357 N.C. 165, 580 S.E.2d 695 (2003); see also Fields v. Board of Education, 251 N.C. 699, 701, 111 S.E.2d 910, 912 (1960); [*8] Ingram v. Kerr, 120 N.C. App. 493, 495-96, 462 S.E.2d 698, 700 (1995); Mullins v. Friend, 116 N.C. App. 676, 681, 449 S.E.2d 227, 230 (1994); Clark v. Burke County, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994). In the instant case, it is undisputed that plaintiffs' complaint failed to allege that Mecklenburg County had waived governmental immunity through the purchase of insurance pursuant to N.C. Gen. Stat. § 153A-435(a). At the summary judgment hearing, plaintiffs' attorney orally moved to amend the complaint to include that allegation. The trial court did not rule on this motion and granted Mecklenburg County's motion for summary judgment based upon governmental immunity. N.C.R. App. P. 10(b)(1) (2009) provides that "In order to preserve an issue for appellate review, . . . [i]t is . . . necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." This Court has held

that where a party does not obtain a ruling on their request or motion before the trial court, the party has failed to preserve the issue for appellate review. Gilreath v. N.C. Dep't of Health & Human Servs., 177 N.C. App. 499, 501, 629 S.E.2d 293, 294, aff'd per curiam, [*9] 361 N.C. 109, 637 S.E.2d 537 (2006); Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 738, 594 S.E.2d 227, 230 (2004); Electronic World, Inc. v. Barefoot, 153 N.C. App. 387, 395-96, 570 S.E.2d 225, 231 (2002).

Even assuming arguendo that plaintiffs had properly alleged a waiver of governmental immunity in their complaint, plaintiffs' claim is barred because the evidence before the trial court on summary judgment established that while Mecklenburg County had a funded reserve from which it paid out claims asserted against the County, there had been no resolution passed by the county board of commissioners deeming this program to be the equivalent of the purchase of insurance.

N.C. Gen. Stat. § 153A-435(a) (2007) provides, in part, that if the county uses a funded reserve instead of purchasing insurance,

the county board of commissioners may adopt a resolution that deems the creation of a funded reserve to be the same as the purchase of insurance under this section. Adoption of such a resolution waives the county's governmental immunity only to the extent specified in the board's resolution, [*10] but in no event greater than funds available in the funded reserve for the payment of claims.

(Emphasis added). It is undisputed that Mecklenburg County's Self-Funded Loss Program is a funded reserve pursuant to N.C. Gen. Stat. § 153A-435. The record in the instant case is devoid of any resolution adopted by Mecklenburg County deeming the creation of a funded reserve to be the same as the purchase of insurance under N.C. Gen. Stat. § 153A-435(a). In fact, the affidavits before the trial court affirmatively showed that Mecklenburg County had not adopted such a resolution.

By its express terms, the Self-Funded Loss Program was not intended to waive the defense of governmental immunity for negligence claims against the County for the performance of governmental functions: (1) "The Program will not apply to Claims or Losses resulting from the following: . . . 8. Those tort claims asserted against the County with respect to which the County would be entitled to assert as a defense the doctrine of governmental or sovereign immunity;" and (2) "The establishment of this Program shall not be deemed to be a waiver of immunity through the purchase of insurance within the meaning of N.C. Gen. Stat. § 153A-435 [*11] . . . ." There were no genuine issues of material fact as to whether Mecklenburg County waived the defense of governmental immunity pursuant to N.C. Gen. Stat. § 153A-435. Plaintiffs' cause of action for negligent inspection is barred by governmental immunity. 2

2. Constitutional Claims

Plaintiffs now argue that "a lack of objective criteria set forth within the Self-Funded Loss Program which results in an arbitrary selection process of which claims, losses, and occurrences are paid from the Self-Funded Loss Program render [Mecklenburg County's] actions a violation of due process and the equal protection clause[.]"

Plaintiffs failed to allege any violations of their due process or equal protection rights in their complaint or in their response to Mecklenburg County's motion for summary judgment. Plaintiffs' response to Mecklenburg County's summary judgment motion contended that the actions of Mecklenburg County in adopting and administering the Insurance and Risk Management Joint Undertaking [*12] Agreement was the equivalent of "the purchase of insurance pursuant to [N.C. Gen. Stat.] § 153A-435 and therefore a waiver of governmental immunity." This argument has not been brought forward on appeal.

Plaintiffs argue on appeal that this case is controlled by Dobrowolska v. Wall, 138 N.C. App. 1, 530 S.E.2d 590 (2000), which reversed the trial court's grant of summary judgment for the City of Greensboro based upon their equal protection and substantive due process rights. Id. at 19, 530 S.E.2d at 602. We note

that in Dobrowolska, these constitutional claims were specifically set forth in plaintiffs' third, fourth, and fifth claims for relief. Id. No such claims are contained in the amended complaint filed in this case.
At the summary judgment hearing, counsel for defendant at one point argued that there was no objective criteria for determining what claims would be paid and at another point argued that Mecklenburg County's discretion as to the payment of claims was a violation of the equal protection clause of both the United States and the North Carolina Constitution. These arguments were made orally, and for the first time, at the summary judgment hearing.

A violation of a person's [*13] constitutional rights is a separate cause of action from a claim of negligence against a governmental entity. Constitutional claims must be pled in the complaint, Oakwood Acceptance Corp. v. Massengill, 162 N.C. App. 199, 214, 590 S.E.2d 412, 423 (2004), and the trial court must rule upon these claims, City of Durham v. Manson, 285 N.C. 741, 743, 208 S.E.2d 662, 664 (1974). "Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court." Id. (quotation omitted). This Court has held that where a constitutional argument was made during a summary judgment hearing, but the record contained no allegations of such a violation and it did not appear that the trial court considered this argument in its ruling, the issue was not properly before this Court. See Barber v. Continental Grain Co., 124 N.C. App. 310, 319-20, 477 S.E.2d 77, 82 (1996). In Barber, this Court stated:

No constitutional claim, state or federal, appears in plaintiffs' pleadings or in any other documentation filed with the trial court prior to its ruling. While the argument of plaintiffs' counsel at pages 81 and 82 of [*14] the transcript of the summary judgment hearing does mention the phrase "unconstitutional," neither the trial court's "Order Granting Defendants' Motions for Summary Judgment" nor "the record . . . indicate that the trial court considered the issue in granting summary judgment." Nelson, 108 N.C. App. at 646, 425 S.E.2d at 7. Accordingly, we do not address plaintiffs' constitutional arguments.

Id.
In the instant case, there were no constitutional claims raised in plaintiffs' pleadings or any other document in the record. Plaintiffs assert, in passing, that it submitted a brief to the trial court that raised these constitutional issues. However, this brief is not included in the record on appeal. The trial court's order does not indicate that it considered this issue in granting Mecklenburg County's motion for summary judgment. Based upon our holding in Barber, plaintiffs have failed to properly bring these claims before this Court.

We further note that in order to establish that a governmental entity has acted arbitrarily and capriciously in asserting the defense of governmental immunity in violation of the due process and equal protection clause, a plaintiff must establish "(1) the government [*15] (2) arbitrarily (3) treated them differently (4) than those similarly situated." Jones v. City of Durham, 183 N.C. App. 57, 61, 643 S.E.2d 631, 634 (2007); see also Dobrowolska, 138 N.C. App. at 14, 530 S.E.2d at 599. There are no documents or other materials in the record that tend to show similarly situated persons have been paid claims from Mecklenburg County's Self-Funded Loss Program. Therefore, plaintiffs' bald assertion that the claims paid are done so in an arbitrary and capricious manner is without merit.
DISMISSED.
Judges HUNTER, Robert C. and GEER concur.
Report per Rule 30(e).

2012

FEB 2012 N.C. State Bar v. Barrett

Court of Appeals of North Carolina
February 7, 2012, Heard in the Court of Appeals; March 20, 2012, Filed
NO. COA11-1274

Reporter
219 N.C. App. 481 *; 724 S.E.2d 126 **; 2012 N.C. App. LEXIS 380 ***; 2012 WL 924840
THE NORTH CAROLINA STATE BAR, Plaintiff, v. SYBIL H. BARRETT, ATTORNEY, Defendant.
Prior History: [***1] From the Disciplinary Hearing Commission of the North Carolina State Bar. No. 10 DHC 18.
Disposition: REVERSED.
Core Terms

seller, buyer, lender, down payment, conclusions of law, documents, misrepresentation, fact finding, sanctions, false representation, due process right, due process, discipline, discovery, grievance, notice, fax, Settlement, disbarment, knowingly, signature, vacate
Case Summary

Overview
The disbarment of an attorney for violating N.C. R. Prof. Conduct 8.4(b) and 8.4(c) by the North Carolina Disciplinary Hearing Commission was reversed. The attorney's due process rights were violated as the complaint alleged a single false representation by the attorney by entering a $ 7,400 loan as a down payment on the PJ HUD statement, while evidence presented at the hearing involved an MG HUD statement, which contained different financial information and included a forged signature purporting to be the seller's. There was no evidence that the attorney knew of the MG HUD statement.
Outcome
Judgment reversed.
LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection
Legal Ethics > Sanctions > Disbarments
Legal Ethics > Sanctions > General Overview
HN1[ ] Procedural Due Process, Scope of Protection
Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment, U.S. Const. amend. XIV. Accordingly, prior to the imposition of sanctions, a party has a due process right to notice both: (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions. An attorney facing disbarment is entitled to procedural due process, which includes fair notice of the charge made against her.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint
Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
HN2[ ] Complaints, Requirements for Complaint
The rules of the North Carolina State Bar provide that pleadings and proceedings before a hearing panel of the Disciplinary Hearing Commission will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein. 27 N.C. Admin. Code ch. 1, sub. B.0114(n). The North Carolina Rules of Civil Procedure, in turn, require a complaint to include 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. Gen. Stat. § 1A-1, N.C. R. Civ. P. 8(a)(1) (2011). Further, the State Bar's own rules state that complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint. ch. 1, sub. B.0114(c).

Legal Ethics > Professional Conduct > Illegal Conduct
HN3[ ] Professional Conduct, Illegal Conduct
N.C. R. Prof. Conduct 8.4(b) prohibits an attorney from committing a criminal act, and Rule 8.4(c) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.
Counsel: Deputy Counsel David R. Johnson and Counsel Katherine Jean for Plaintiff.
Law Office of Laura H. Budd, PLLC, by Laura H. Budd, for Defendant.
Judges: STEPHENS, Judge. Chief Judge MARTIN and Judge ROBERT C. HUNTER, concur.
Opinion by: STEPHENS
Opinion

[*481] [**127] Appeal by Defendant from orders filed 23 February 2011 and 29 April 2011 by the Disciplinary Hearing Commission. Heard in the Court of Appeals 7 February 2012.
[*482] STEPHENS, Judge.

Procedural History and Factual Background
This case arises from a grievance filed with Plaintiff, the North Carolina State Bar ("the State Bar"), concerning Defendant Sybil H. Barrett's participation as an attorney in a residential real estate closing in July 2007. On 30 October 2008, the State Bar received a grievance from the seller involved in the closing. The grievance alleged that Defendant had misrepresented the source of the buyer's down payment on a HUD-1 settlement statement at closing in order to prevent the lender from learning that the seller had loaned the buyer part of the down payment funds. The buyer and seller had entered into an agreement concerning repayment of the loan. However, the [***2] buyer had apparently not made payments expected by the seller, who expressed concerns about his ability to collect on the loan. In correspondence sent to Defendant before filing the grievance, the seller had claimed that this misrepresentation had made the buyer appear to be a better credit risk in the eyes of the lender, permitting the buyer to finance purchase of the residence to the seller's detriment.
The State Bar sent Defendant a notice of grievance, and Defendant responded by letter dated 6 March 2009, asserting that she had received approval of the HUD-1 statement from the lender, Chase Bank, and had not made any misrepresentations in connection with the closing. Defendant further asserted that the

buyer and the seller had agreed to a five-year, no interest $7,400 loan of the down payment funds with a balloon payoff, but that the buyer had later (post-closing) told the seller he was planning to refinance the home in order to pay off the loan at an earlier date. Defendant suggested that the refinance had not occurred, angering the seller, who had filed the grievance out of a desire "to punish everyone associated with the [closing]."

[**128] On 13 April 2010, the State Bar filed a complaint [***3] with the Disciplinary Hearing Commission ("the DHC") alleging Defendant had knowingly misrepresented the seller's $7,400 loan to the buyer as a down payment on the HUD-1 statement. After Defendant refused to respond to the State Bar's October 2010 discovery requests, The State Bar moved to compel her response on 4 January 2011. On 13 January 2011, the DHC entered an order allowing the motion to compel. On [*483] the same date, Defendant sent an email response to the chair of the DHC hearing committee stating:

I reviewed your bogus Order to Compel. I will not be producing anything. In fact, I will not be in communication with any of you people ever again.

I will not be at the February hearing.

I am moving on with my life. You have no power over me. You are mistaken to think that you do. You are fully aware that Mrs. [Leanor] Hodge [the attorney handling the matter for the State Bar] is lying. Apparently, this is the status quo.

Defendant did not comply with the order and the State Bar moved for sanctions against her. In her objection to the motion for sanctions, Defendant asserted that the State Bar's "continued requests for documents . . . are duplicitous and harassing in nature." The DHC denied [***4] the State Bar's motion for sanctions by order entered 23 February 2011.

At a hearing before a three-member DHC panel on 3 February 2011, the State Bar presented evidence that, in the July 2007 closing, Defendant represented the buyer and his lender. Paul Johnson, the lender's closing officer handling the loan, first sent Defendant instructions calling for a down payment of $22,700 and prohibiting secondary financing without the lender's written approval. However, the buyer had received two loans toward the down payment: $14,800 dollars from National Home and $9,400 1 from the seller. On 17 July 2007, the day of the closing, Defendant prepared a draft HUD-1 statement for the closing showing "Down Payment [of] $7,400" as a credit to the buyer, debited $7,400 from the proceeds due to the seller, showed "Commission earned [of] $14,800" from National Home as a contribution from the buyer, and showed a deduction from the proceeds due to the seller of $14,800 as a seller fee to National Home. Defendant testified that Johnson had instructed her via phone call and fax to record the amounts in this manner. Defendant transmitted [*484] the draft to Johnson, who stamped it "APPROVED" and initialed it "PJ" [***5] with the date "7-17" before returning it to Defendant. 2

Defendant, the buyer and his agent, and the seller's agent were present in Defendant's office for the closing, while the seller participated by teleconference, email, and fax. Defendant testified that the HUD statement signed by herself, the buyer, and the seller was the PJ HUD statement, which showed entries regarding the $7,400 and $14,800 amounts as approved by the closing agent. The final PJ HUD statement was three pages instead of the [***6] standard two pages because the seller participated by fax. Thus, the first two pages were identical except that the buyer had signed the first and the seller had signed the second, receiving and returning it via fax. Defendant testified that, after the closing was concluded, she sent the signed PJ HUD statement along with other closing documents to the lender via FedEx. At the hearing, Defendant produced a fax from Johnson, dated two days after the closing, requesting that Defendant correct some wording on the title commitment, one of the documents Defendant had sent to the lender in the package of closing documents. Defendant also produced a copy [**129] of the PJ HUD statement from her files at the hearing.

The State Bar offered testimony from an employee of the lender 3 that the lender's file contained a substantially different HUD statement ("the MG HUD statement") than that produced by Defendant. The MG HUD statement was only two pages long, showed the initials "MG" instead of "PJ," and had the buyer's and seller's signatures together on the first page. The seller's signature was forged. In addition, the MG HUD statement lacked the $7,400 and $14,800 entries contained on the PJ HUD statement [***7] and instead showed a $22,700 down payment by the buyer. The lender's representative testified that the PJ HUD statement was not part of the lender's file. Defendant testified that she had never seen the MG HUD statement prior to the hearing, had not prepared it, and knew nothing about the seller's forged signature.
At the close of the hearing, the DHC panel made oral findings that Defendant had committed fraud and criminal violations, and ordered Defendant's disbarment. In its written order filed 23 February 2011, [*485] the DHC made detailed findings of fact and conclusions of law, again ordering disbarment. Specifically, conclusion of law 2 states that Defendant violated the Rules of Professional Conduct:
a. By falsely representing on the HUD-1 Settlement Statement that she provided to the buyer and seller . . . that the proceeds of the National Home loan were a "Commission Earned" and the seller's loan was a "Down Payment" and by providing the lender with a HUD-1 Settlement [***8] Statement that failed to disclose these loans, Defendant committed a criminal act that reflects adversely on her honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); and
b. By concealing from the lender the fact that the buyer obtained subordinate financing for his purchase of [the real property], defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).
On 29 March 2011, Defendant moved the DHC to reconsider; the DHC denied the motion. Defendant appeals from the 23 February 2011 order and from the denial of her motion to reconsider.

Discussion
Defendant makes four arguments: that the DHC denied her due process by conducting the hearing on the basis of allegations of fraud materially different from those alleged in the complaint; that the evidence did not support the finding of fact that Defendant was the source of the MG HUD statement; that the evidence did not support the finding of fact and conclusion of law that Defendant knowingly misrepresented the source of the buyer's down payment; and that [***9] the DHC imposed a disproportionate and unwarranted discipline on Defendant. For the reasons discussed herein, we reverse the DHC's order.

Due Process Claim
Defendant first argues that the DHC denied her due process by conducting the hearing on the basis of allegations of fraud which materially differ from those alleged in the complaint. We agree.
HN1[ ] Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution. Accordingly, prior to the imposition of [*486] sanctions, a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions.
In re Small, 201 N.C. App. 390, 395, 689 S.E.2d 482, 485-86 (2009) (quotation marks and citations omitted), disc. review denied, 364 N.C. 240, 698 S.E.2d 654 (2010). An attorney facing disbarment is entitled to "procedural due process, which includes fair [**130] notice of the charge" made against her. In re Ruffalo, 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117, 122 (1968). HN2[ ] The rules of the State Bar provide that "[p]leadings and proceedings before a hearing [***10] panel [of the DHC] will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for

trials of nonjury civil causes in the superior courts except as otherwise provided herein." 27 N.C.A.C. Ch. 1, Sub. B .0114(n). The North Carolina Rules of Civil Procedure, in turn, require a complaint to include 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.R. Civ. P., Rule 8(a)(1) (2011). Further, the State Bar's own rules state that "[c]omplaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint." 27 N.C.A.C. Ch. 1, Sub. B .0114(c). Here, the complaint contains only one allegation of misconduct: that "Defendant purposefully represented on the HUD-1 Settlement Statement [of the relevant closing] that the proceeds of the seller's loan to the buyer were a down payment made by the buyer [knowing this] was a false representation." As noted [***11] supra, the PJ HUD statement listed the seller's loan to the buyer as "Down Payment [of] $7,400[.]" The complaint further alleges this action to be in violation of HN3[ ] Rule 8.4 of the Rules of Professional Conduct, subsections (b) ("commi[ssion] of a criminal act") and (c) ("engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation"). Thus, the complaint alleged a single false representation by Defendant in violation of the Rules: the entry of the $7,400 loan as a "Down Payment" on the PJ HUD statement.

However, at the hearing, the State Bar presented evidence of different alleged acts of fraud and additional alleged misrepresentations, to wit, that Defendant had produced and submitted to the lender the MG HUD statement, which contained different financial information and included a forged signature purporting to be the [*487] seller's. Because these allegations were not contained in the complaint, Defendant was not prepared to refute or defend against them. Indeed, nothing in the record suggests that Defendant was aware that the MG HUD statement existed. When the State Bar sought to introduce the MG HUD statement at the hearing, Defendant objected, stating that she had never [***12] seen it before and had not prepared it. At the close of the hearing, Defendant noted that the complaint only alleged misrepresentations about the source of the down payment listed on the PJ HUD statement and, as a result, "my understanding is that was the only issue that required me to formulate a defense for today."

The State Bar first contends that, because Defendant was properly served with a copy of the subpoena to the lender requesting its account records from the loan closing at issue, she also received sufficient notice of any additional allegation which might arise from review of those documents. Thus, the State Bar asserts that Defendant cannot argue a lack of due process because she did not ask to examine the documents produced by the lender before the hearing. However, as the State Bar concedes, it never informed Defendant that the documents had been obtained, in violation of Rule 45(d1) of the North Carolina Rules of Civil Procedure. It can be reasonably inferred that the State Bar's violation of Rule 45(d1) would have indicated to Defendant that no documents had been received from the lender. We decline to hold that a party waives her due process rights by failing to request [***13] documents which the opposing party has implied do not exist and will not be part of the case against her.

Moreover, per the complaint, Defendant believed she need only prepare a defense to the allegation that the $7,400 entry on the PJ HUD statement was a false representation. She brought to the hearing the materials she apparently believed would constitute a defense against that allegation: her testimony that Johnson instructed her to list the $7,400 loan as a down payment on the HUD statement, a copy of the PJ HUD statement showing that the lender's agent had approved [**131] it, and the fax from Johnson sent two days after closing which suggested the lender had received the closing documents. We see no way that Defendant could have anticipated the addition of the allegations against her regarding the MG HUD statement, much less prepare a defense against them.

We likewise reject the State Bar's assertion that Defendant's due process rights were protected because "evidence of [Defendant's] additional falsification of documents was cumulative and did not contradict the

misconduct identified in the complaint that [she] had [*488] knowingly falsified information on the HUD-1 settlement statement" and [***14] because the DHC concluded that Defendant had violated the same two Rules of Professional Conduct cited in the complaint. As the State Bar notes, the hearing and subsequent order dealt with "additional falsification of documents[.]" These additional alleged falsifications were far more than simply cumulative. Rather, they were different both in kind and in fact. The complaint advanced the theory that Defendant made false representations about the $7,400 loan on the PJ HUD statement. The theory advanced by the State Bar at the hearing was that Defendant created an entirely different HUD statement (the MG HUD statement) which did not list a $7,400 down payment, but rather listed a down payment of $22,700, and further contained a forgery of the seller's signature. The allegations in the complaint did not "allege [these] charges with sufficient precision to clearly apprise" Defendant of the conduct which she would have to defend at the hearing. 27 N.C.A.C. Ch. 1, Sub. B .0114(c). As such, the State Bar violated its own rules as well as Defendant's due process rights.
The State Bar also contends that Defendant waived her due process rights and consented to consideration of the additional [***15] issues by failing to object to admission of the MG HUD statement or testimony about it. However, waiver of the right to due process must be made voluntarily, knowingly, and intelligently. Estate of Barber v. Guilford Cty. Sheriff's Dept., 161 N.C. App. 658, 664, 589 S.E.2d 433, 437 (2003). As noted supra, Defendant stated during the hearing that "my understanding is that [the misrepresentation alleged in the complaint] was the only issue that required me to formulate a defense for today." This statement indicates Defendant believed she was facing only the allegation in the complaint and was not prepared to defend any others; it does not suggest that she was voluntarily, knowingly, and intelligently waiving her right to due process.
Thus, the DHC erred in making findings of fact and conclusions of law about any alleged wrongdoing by Defendant beyond the listing of the $7,400 loan from the seller to the buyer as a down payment on the PJ HUD statement. Accordingly, we vacate the following portions of the DHC order on due process grounds: findings of fact 11-13, 17-19, and the parts of findings of fact 21-23 and conclusion of law 2(a) which refer to the $14,800 "Commission Earned" from [***16] National Home or the MG HUD statement received by the lender. 4 We also [*489] vacate the entirety of conclusion of law 2(b), which states that Defendant concealed the buyer's subordinate financing from the lender. To the extent this portion of conclusion of law 2 refers to information contained in the MG HUD statement, it violates Defendant's due process rights. To the extent it refers to information contained in the PJ HUD statement, it is not supported by competent evidence, as explained infra.

Sufficiency of the Evidence
We must also vacate findings of fact 24 and 27 in their entirety, and the remaining portions of findings of fact 22-23 and conclusion of law 2(a) as not supported by competent evidence.
These findings and conclusions relate to Defendant's alleged misrepresentations about the source of the $7,400 "down payment" listed on the PJ HUD statement, a matter alleged [***17] in the complaint and thus properly before the DHC at the hearing. [**132] The State Bar's complaint did not specify to whom this false representation was supposedly made. However, it could not have been the buyer or the seller since both were fully aware that the $7,400 "down payment" was actually a loan from the seller to the buyer. 5 Nor could the $7,400 "down payment" have been a false representation to the lender, since the State Bar's theory was that Defendant never sent the signed PJ HUD statement to the lender, instead creating and submitting the fraudulent MG HUD statement in its place. The uncontradicted testimony of the lender's representative was that the lender's file contained only the MG HUD statement. The lender can hardly have been misled or deceived by information contained in a document which it never received.

Likewise, to the extent conclusion of law 2(b) refers to information contained in the PJ HUD statement, it is not supported by competent evidence and is vacated.

Having vacated the findings of fact noted above and the entirety of conclusion of law 2, [***18] there is no support for the DHC's "Additional Findings of Fact Regarding Discipline" 2 or "Conclusions of Law Regarding Discipline" 1, 2(a), 3-4, and 6. The only remaining additional finding of fact and conclusion of law regarding discipline state that Defendant refused to comply with a 13 January 2011 order ("the [*490] discovery order") from the DHC compelling her response to discovery requests by the State Bar which interfered with the State Bar's ability to regulate attorneys to the detriment of the legal profession. However, Defendant's failure to comply with the discovery order was also the subject of an order ("the sanctions order") filed by the same DHC panel on the same date as the order of discipline (23 February 2011). In the sanctions order, the DHC found that Defendant had failed to comply with the discovery order, but denied the State Bar's motion for sanctions against Defendant because her noncompliance "did not unduly prejudice the State Bar's case[.]" In other words, the DHC panel had already determined that Defendant's failure to comply with the discovery order was not sanctionable. Thus, that misconduct, standing alone, cannot serve as the basis for Defendant's disbarment [***19] or imposition of any other sanction. Accordingly, the order of discipline disbarring Defendant is

REVERSED.

Chief Judge MARTIN and Judge HUNTER, ROBERT C., concur.

2015

NOV 2015 Speer v. Great Western Bank

Court of Appeals of North Carolina
November 4, 2015, Heard in the Court of Appeals; March 1, 2016, Filed
No. COA15-553

Reporter
2016 N.C. App. LEXIS 214 *; 246 N.C. App. 189; 782 S.E.2d 925; 2016 WL 791203
AXEL D. SPEER, Plaintiff, v. GREAT WESTERN BANK (f/k/a TIERONE BANK) and TIERONE BANK, Defendants.
Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.
PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.
PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.
Prior History: [*1] Mecklenburg County, No. 13 CVS 11722.
Disposition: AFFIRMED.
Core Terms

default, summary judgment motion, deceptive trade practices, maturity date, unfair, buyer, trial court, monthly, seller, waived, summary judgment, written notice, terms, foreclosure proceeding, breach of contract, attorney's fees, closing date, argues
Counsel: The Budd Law Group, PLLC, by Laura H. Budd, for Plaintiff.
Bell, Davis & Pitt, P.A., by Adam T. Duke and Alan M. Ruley, for Defendants.
Judges: STEPHENS, Judge. Judges STROUD and DAVIS concur.
Opinion by: STEPHENS
Opinion

Appeal by Plaintiff from orders entered 11 December 2013 and 16 October 2014 by Judge James W. Morgan, and from order entered 27 October 2014 by Judge W. Robert Bell, all in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 November 2015.
STEPHENS, Judge.
Plaintiff Axel D. Speer appeals from the trial court's order denying his motion for summary judgment and granting summary judgment to Defendant Great Western Bank in an action for, inter alia, breach of contract. Speer argues that the court erred in its ruling on the parties' respective motions for summary judgment. Speer also contends that the court erred in granting Great Western's motion to dismiss his claim for unfair and deceptive trade practices. After due deliberation, we hold that the trial court did not err, and we consequently affirm its orders.

Factual Background
On 6 June 2006, Speer executed and delivered a promissory note ("the Note") to TierOne Bank in exchange for a one-year [*2] commercial loan in the amount of $550,000.00 to provide operating capital for Speer's custom home-building business. Speer is a licensed general contractor in the business of

buying and renovating luxury homes, and his loan from TierOne was secured by a Deed of Trust encumbering certain real property in Mecklenburg County on which a luxury home Speer had gutted and remodeled was located ("the Property"). The Note's terms required Speer to make monthly interest-only payments to TierOne on the principal, with payment in full due on a maturity date of 1 June 2007. The Note also provided that in the event of default, TierOne could send written notice to Speer that if he did not pay the overdue amount by a certain date—"at least 30 days after the date on which the notice is mailed"—TierOne could require Speer to immediately pay the principal in full, plus any accrued interest, and Speer would be liable "for all of [TierOne's] costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorney[] fees." On 1 June 2007, the parties agreed to extend the Note's maturity date to 1 November 2007. Although Speer did [*3] not pay the balance on the Note when it came due on 1 November 2007, TierOne did not declare him to be in default at that time, and Speer continued to make the required monthly interest payments for approximately the next three years, until December 2010.

On 1 March 2010, TierOne offered to modify the terms of the Note to extend the maturity date to 1 June 2010. Speer declined this offer, and on 13 April 2010, TierOne sent written notice informing Speer that he was in default because the Note had matured on 1 November 2007. TierOne explained that the Note would not be renewed, and that it would commence litigation if the full balance was not paid within 90 days. On 4 June 2010, TierOne was closed by the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver. The FDIC subsequently assigned all of its rights, title, and interest in and to the Note and the Deed of Trust securing it to Great Western Bank. On 29 November 2010, Great Western sent written notice to Speer advising him that "the covenants contained in the Deed of Trust securing the [Note] have been breached by your failure to pay the loan in full at maturity on November [*4] 1, 2007" and threatening to initiate foreclosure proceedings on the Property if Speer did not pay the principal, plus interest and reasonable attorney fees as provided under the Note's terms, within 30 days. Thereafter, Great Western refused to accept any further monthly interest payments from Speer.

On 3 February 2011, Speer offered to pay Great Western $400,000.00 "in full satisfaction of the outstanding balance due under the Note." This offer was for less than the full amount due under the Note, and Great Western rejected it on 7 February 2011. On 8 February 2011, Great Western again sent written notice to Speer advising him that he was in default because he had failed to pay the loan in full by the Note's maturity date on 1 November 2007. Great Western demanded that he pay the full outstanding balance of $527,917.43, plus interest and reasonable attorney fees within 45 days or face foreclosure on the Property, which Speer had previously listed with a licensed real estate broker for a sale price of $1,300,000.00.

On 19 April 2011, after Speer failed to pay the Note in full in response to Great Western's demand letters, Great Western requested the substitute trustee under the Deed [*5] of Trust to file a foreclosure special proceeding in Mecklenburg County, and a hearing date was set for 28 June 2011. On 16 June 2011, the hearing was continued until 11 July 2011 after Speer reported that he had found a buyer willing to purchase the Property for $1,050,000.00, with a closing date set for 5 July 2011. On 29 June 2011, after Speer inquired as to the amount necessary to pay off the Note in full, Great Western sent written notice that full payment of the Note would require a total of $557,864.60, consisting of principal in the amount of $527,917.43, plus accrued interest in the amount of $23,779.39, plus lender fees in the amount of $6,167.78. At the closing, Great Western also demanded, pursuant to the terms of the Note, that Speer pay the $7,864.00 in attorney fees Great Western had incurred in conjunction with the foreclosure special proceeding. Speer objected to this demand but ultimately complied with it after completing the sale of the Property for $1,050,000.00 and paying off the Note in full. In addition, Speer was required to pay a sum of

$20,000.00 to compensate the Property's tenants for the early termination of their lease, which did not expire until 31 August [*6] 2011.

Procedural History

On 28 June 2013, nearly two years after the sale of the Property and payment of the Note, Speer filed a complaint in Mecklenburg County Superior Court alleging claims against TierOne and Great Western for breach of contract, breach of contract implied in law, breach of contract implied in fact, and unfair and deceptive trade practices. On 27 August 2013, Great Western filed an answer denying any liability to Speer and a motion to dismiss his complaint. After a hearing on the motion held 13 November 2013, the trial court, the Honorable James W. Morgan, Judge presiding, entered an order on 11 December 2013 granting Great Western's motion to dismiss Speer's claim for unfair and deceptive trade practices but denying the motion with regard to Speer's breach of contract claims. On 15 May 2014, Speer filed a motion to voluntarily dismiss TierOne from the lawsuit.

After Great Western filed a motion for summary judgment on Speer's remaining breach of contract claims on 26 September 2014, Speer filed a motion for summary judgment in his favor on 29 September 2014. On 2 October 2014, Speer filed a motion for reconsideration of the court's 11 December 2013 order dismissing [*7] his claim for unfair and deceptive trade practices. On 9 October 2014, a hearing was held on the parties' cross-motions for summary judgment. On 16 October 2014, Judge Morgan entered an order denying Speer's motion for reconsideration, and on 27 October 2014, the court, the Honorable W. Robert Bell, Judge presiding, entered an order granting Great Western's motion for summary judgment and denying Speer's motion for summary judgment. Speer filed notice of appeal to this Court on 21 November 2014.

Analysis

A. Breach of contract

Speer argues first that the trial court erred in granting Great Western's motion for summary judgment on his breach of contract claims. We disagree.

"The standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." Hyatt v. Mini Storage on Green, 236 N.C. App. 278, 281, 763 S.E.2d 166, 169 (2014) (citation, internal quotation marks, and brackets omitted). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." [*8] Id. (quoting N.C. Gen. Stat. § 1A-1, Rule 56). This Court applies a de novo standard of review to orders granting or denying a motion for summary judgment. Id.

In the present case, Speer contends the trial court erred in granting Great Western's motion for summary judgment because the evidentiary forecast demonstrated that genuine issues of material fact remained in dispute as to whether Great Western breached its contract with Speer when it demanded payment in full and instituted foreclosure proceedings. Specifically, Speer argues that by declining to enforce the Note's 1 November 2007 maturity date and continuing to accept Speer's monthly interest payments for approximately three years after he failed to pay the principal in full when it came due, Great Western (through its predecessor in interest, TierOne) waived its rights under the Note to demand payment or declare him in default. Speer argues further that Great Western could have sought to recover the balance remaining on the Note only after establishing a new due date that was reasonable under the circumstances. Speer also complains that the amount of time Great Western gave him to pay the Note in its 8 February

2011 demand letter—45 days—was not reasonable [*9] under the circumstances, in light of the five-month extension of the Note's maturity date TierOne provided in 2007.
In support of his argument, Speer relies on a line of cases in which our State's appellate courts have held that when a seller of real property repeatedly reassures the buyer that closing will occur after the expiration of the deadline set for closing in the purchase agreement, the seller waives the original closing date and must allow the buyer to perform his obligations under the agreement within a reasonable period of time. See, e.g., Fletcher v. Jones, 314 N.C. 389, 395, 333 S.E.2d 731, 736 (1985) (holding that because the seller's conduct and assurances to the buyer before and after the original closing date demonstrated the seller's continued willingness to perform, the seller had waived the original closing date and was required to allow the buyer to tender performance within a reasonable time); Phoenix Ltd. P'ship of Raleigh v. Simpson, 201 N.C. App. 493, 504, 688 S.E.2d 717, 725 (2009) (holding, based on Fletcher, that by its conduct and assurances to the buyer, the seller waived both the closing date and a "time is of the essence" clause included in an option to purchase real property, and thus the seller was required to notify the buyer that it was ready and able to perform under the contract and allow the buyer [*10] a reasonable period of time to tender performance).
Speer's reliance on Fletcher and Phoenix Ltd. P'ship of Raleigh is misplaced. Although Speer highlights superficial similarities shared between those cases and the present facts, the crucial distinction here is that this lawsuit does not involve a contract between the parties for the sale of real property. Instead, the contract between Speer and Great Western was for a loan, secured by a promissory note and the Deed of Trust to the Property. Our case law makes clear that under circumstances like those presented here, the holder of a promissory note who repeatedly accepts monthly installment payments after their respective due dates "will be held to have waived the right to insist on punctual payment unless prior to the late payment the noteholder notifie[s] the payor that prompt payment is again required." Driftwood Manor Investors v. City Federal Sav. & Loan Ass'n, 63 N.C. App. 459, 464, 305 S.E.2d 204, 207 (1983). However, while a noteholder's acceptance of late payments "precludes the noteholder from accelerating for the past defaults [such action] does not waive the [noteholder's] option to accelerate for future defaults." Barker v. Agee, 93 N.C. App. 537, 541, 378 S.E.2d 566, 569 (1989), affirmed in part and reversed in part on other grounds, 326 N.C. 470, 389 S.E.2d 803 (1990).1
Thus, while Speer may be correct that Great Western's continued acceptance of monthly payments following Speer's failure to pay off the Note in full on its maturity date of 1 November 2007 constituted a waiver of Great Western's right to demand payment in full for that specific default, such waiver certainly did not render the Note unenforceable for all time. Consistent with the holdings of Driftwood Manor Investors and Barker, Great Western ceased accepting Speer's monthly payments after November 2010, then provided written notice to Speer in its 8 February 2011 demand letter that he was in default and would be required to pay off the Note's balance in full within 45 days—a period of time greater than the 30-day minimum expressly provided by the terms of the Note—or face foreclosure proceedings against the Property. On these facts, we conclude that Great Western acted within its rights under the Note, the Deed of Trust, and [*12] North Carolina law to enforce the terms of the Note and Deed of Trust by initiating foreclosure in April 2011 when Speer failed to make the requested payment. Speer's argument to the contrary depends entirely on a misapplication of unrelated case law. Accordingly, we hold that the trial court did not err in granting Great Western's motion for summary judgment against Speer's claims for breach of contract.

B. Unfair and deceptive trade practices
Speer also argues that the trial court erred in granting Great Western's motion to dismiss his claim for unfair and deceptive trade practices. Specifically, Speer contends that because Great Western waived the

Note's 1 November 2007 maturity date and failed to establish a new due date that was reasonable under the circumstances pursuant to Fletcher and Phoenix Ltd. P'ship of Raleigh, Great Western had no contractual right to initiate foreclosure proceedings. Speer therefore asserts that by demanding that he pay its attorney fees at the closing on the Property, Great Western unlawfully engaged in coercive and oppressive conduct. However, as Speer concedes in his appellant brief, "the correctness of the trial court's dismissal of [his] claim under [*13] North Carolina's Unfair and Deceptive Trade Practices Act . . . depends on whether [Great Western] breached the loan contract by declaring Speer in default for not having paid off the loan and start[ing] foreclosure proceedings." Having already concluded that the trial court did not err in granting summary judgment in favor of Great Western on Speer's breach of contract claim, we conclude further that Speer's argument regarding the dismissal of his unfair and deceptive trade practices claim is without merit. Accordingly, the trial court's order is
AFFIRMED.
Judges STROUD and DAVIS concur.
Report per Rule 30(e).

2016

OCT 2016 Part of ARAG Network

When Mark Smith's teenage son was arrested along with some friends for stealing a dollar's worth of candy from a Walmart in Texas, dad had a lifeline at the ready.

Smith turned to a legal insurance plan that he had taken out for situations just like this.

With the help of an attorney, a settlement was negotiated with the district attorney's office to get the misdemeanor dismissed upon the 16-year-old's completion of community service hours.

And thanks to the legal plan with ARAG, Smith figures he saved more than $2,000 in attorney fees and a lot of time, not to mention avoiding stress.

The coverage "saved us from having to pay a lot of money," said Smith, a police officer in Austin, Texas, "and it saved my son's reputation. He wants to go to college, and having any kind of a record would have made it difficult."

Companies like ARAG, U.S. Legal Services and others have designed legal insurance plans that are offered as part of employer-sponsored benefit plans or sold directly to consumers. And insurers are seeing a growing number of parents purchasing the coverage.

Parents can purchase the protection for a range of legal matters, ranging from traffic violations and apartment leases to more serious problems, such as theft and personal injury claims.

The cost? Premiums are typically less than $20 a month and carry a deductible of about $250.

For some parents, legal insurance can provide peace of mind in the event their teenager or college-age child gets into trouble. And let's face it, even the best kids sometimes do stupid things.

Here's how ARAG's standard policy works: When a policyholder has a legal problem, he or she contacts the company and explains the problem. Once the legal issue is identified, the insurer provides the policyholder with a list of qualified attorneys who practice nearby. The policyholder then picks the attorney and makes the contact.

ARAG has a network of about 11,000 attorneys with different specialties. The company generally aims to provide attorneys who practice within a 30-mile radius of the policyholder.

Smith is a believer in the protection. The father of six pays about $14 a month, or $168 a year, for his legal plan, which is offered through the police department.

While having the policy lessened the impact of the candy theft on Smith's son, the outcome was far different for his son's best friend, who wasn't covered through legal insurance. The teen was fined, had to perform twice as much community service work and still has the misdemeanor on his record, which eventually might require the help of an attorney to have it removed when he becomes an adult.

Laura Budd, an attorney near Charlotte, N.C., who has been in the ARAG network since 2004, has handled multiple cases involving kids who got into trouble. Having immediate access to an attorney, Budd said, “keeps kids out of the (legal) system.”

Still, is legal insurance the answer? Certainly, the benefits may not be worth the price for some. Do the math and factor in the deductible.

Moreover, when reviewing these policies, pay attention to what is covered and what is not. Some policies will broaden the coverage but at a higher price. And some serious legal problems won’t be covered at all.

Like other types of insurance, you’re also paying for some peace of mind just in case your son or daughter gets into a jam.

Backing this legal protection up with stern advice to your kids is also key. There needs to be a discussion about responsible behavior, owning a mistake and the consequences for getting into trouble. No legal insurance plan will cover all those bases for you. (Chicago Tribune, 10/10/16)

2021

OCT 2021 Simmons v. Wiles (In re Wiles)

United States Bankruptcy Court for the Eastern District of North Carolina, Wilmington Division
October 13, 2021, Decided; October 13, 2021, Filed
CASE NO. 19-02972-5-SWH, CHAPTER 11, ADVERSARY PROCEEDING NO. 19-00147-5-SWH

Reporter
2021 Bankr. LEXIS 2837 *; 2021 WL 4782677
IN RE: JOHN LEE WILES, DEBTORTONY RAY SIMMONS, JR., Plaintiff, v. JOHN LEE WILES, Defendant.
Core Terms

Overview
HOLDINGS: [1]-The state court directed verdict awarding $1 million in compensatory damages for civil battery satisfied the nondischargeability standard of being debts for willful injury under 11 U.S.C.S. § 523(a)(6) because the intentional discharge of a firearm directed toward the body of another compelled the conclusion that the injury was intended, and thus willful; [2]-The jury verdict awarding $2 million for punitive damages did not necessarily determine that the debt was for an injury that was both willful and malicious because, if the jury's award was not conclusively based on malice, then collateral estoppel did not apply.

Outcome
Plaintiff's motion for summary judgment allowed in part and denied in part.
LexisNexis® Headnotes

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review
Evidence > Burdens of Proof > Clear & Convincing Proof
HN4[ ] Damages, Punitive Damages
The standard of review applied by the court is two-fold. First, as to whether to uphold or disturb the finding by the jury as to the defendant's liability for punitive damages, the standard of review applied by the court is (1) whether plaintiff produced clear and convincing evidence from which the jury reasonably could find one or more of the statutory aggravating factors required by N.C. Gen. Stat. § 1D-15(a); and (2) whether the plaintiff produced more than a scintilla of evidence that the aggravating factor(s) so proven (by clear and convincing evidence) was/were related to the injury to the plaintiff, and that the defendant participated in the conduct constituting the aggravating factor(s) so proven. Second, as to whether to uphold or disturb the jury's decision to award punitive damages and the amount of that award, the standard of review is whether the jury abused its discretion in making the award, and in the amount of that award.

Counsel: [*1] For Tony Ray Simmons, Jr., Plaintiff (19-00147-5-SWH): Lucas T. Baker, Law Offices of L. T. Baker, P.A., Concord, NC; Kathleen O'Malley, Janvier Law Firm, Raleigh, NC.

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For Internal Revenue Service, Creditor (5:19bk02972): Lauren A. Golden, Raleigh, NC.
For NC Dept Of Revenue, Creditor (5:19bk02972): Ronald D. Williams, II, NC Attorney General's Office, Raleigh, NC.
For North Carolina Department of Revenue, Creditor (5:19bk02972): David D. Lennon, LEAD ATTORNEY, Assistant Attorney General, Raleigh, NC.
For Tony Ray Simmons, Creditor (5:19bk02972): William P Janvier, Kathleen O'Malley, Janvier Law Firm, PLLC, Raleigh, NC.
For Tony Ray Simmons, Jr., Creditor (5:19bk02972): John Mark Olsen, Olsen Law Offices, PLLC, Charlotte, NC.
For Arnold & Smith, PLLC, Special Counsel (5:19bk02972): Kevin L. Sink, Waldrep Wall Babcock & Bailey, Raleigh, NC.
For John Lee Wiles, Debtor (5:19bk02972): Laura Budd, Weaver & Budd, Attorney at Law, PLLC, Matthews, NC; Nicholls [*2] & Crampton, PA, LEAD ATTORNEY, Raleigh, NC; Kevin L. Sink, Waldrep Wall Babcock & Bailey, Raleigh, NC; Paul A. Tharp, Arnold & Smith, PLLC, Charlotte, NC.
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For Steven A. Grossman, Interested Party (5:19bk02972): Matthew P. Weiner, Poyner Spruill LLP, Raleigh, NC.
For George Lambert, Accountant (5:19bk02972): Kevin L. Sink, Waldrep Wall Babcock & Bailey, Raleigh, NC.
For Law Offices of L.T. Baker, P.A., Interested Party (5:19bk02972): George F. Sanderson, III, The Sanderson Law Firm, PLLC, Raleigh, NC.
Judges: Stephani W. Humrickhouse, United States Bankruptcy Judge.
Opinion by: Stephani W. Humrickhouse
Opinion

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT
The matter before the court in this adversary proceeding is the plaintiff's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (made applicable in bankruptcy proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure) on grounds that the debt owed by the debtor/defendant John Lee Wiles to plaintiff Tony Ray Simmons, Jr. should be deemed nondischargeable as a matter of law. (Dkt. 22) The defendant filed a response in opposition to the motion (Dkt. 24), and a hearing was held on September 1, 2021, in Raleigh, [*3] North Carolina. The court took the matter under advisement and invited the parties to submit additional authority in support of their positions, which both plaintiff and defendant elected to do. On October 7, 2021, the court entered a short order which allowed the motion in part and denied it in part, for reasons to be set forth in a supplemental opinion. (Dkt. 34) Those reasons are set forth below.

BACKGROUND AND PROCEDURAL HISTORY
There is no dispute that in September 2009, defendant John Lee Wiles shot plaintiff Tony Ray Simmons, Jr. in the parking lot of Northern Tool in Concord, North Carolina. In 2017, Simmons filed a complaint asserting a civil claim of common law battery against Wiles in the Cabarrus County Superior Court, and a

jury trial was held in December 2018. Following the presentation of the evidence, plaintiff moved for a directed verdict on his claim for common law battery, which the state court granted. Judgment and Opinion of the Court Pursuant to N.C.G.S. § 1D-50 (Dkt. 23, Ex. A) at 1 ("the Judgment"). In the Judgment, which was entered by that court on January 23, 2019, the state court acknowledged that it ordinarily would not direct a verdict in favor of a party with the burden [*4] of proof, but that granting the motion was appropriate "'where the non-movant establishes proponent's case by admitting the truth of the basic facts on which the claim of proponent rests'" or "'where there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradictions.'" Id. (internal citation omitted). Here, the court noted, there was "no genuine dispute at trial that Defendant shot the Plaintiff and that Plaintiff sustained some damage or injury as a result; and further the element of non-consent was established as a matter of law." Id. Accordingly, the state court granted plaintiff's motion for directed verdict on the affirmative claim of common law battery. Id. With respect to the four issues that were left to be put to the jury, its unanimous verdict established that 1) the defendant's commission of a battery upon plaintiff was not in self defense, or in the defense of another; 2) plaintiff was entitled to recovery for personal injury in the amount of $1 million dollars; 3) that the defendant was liable to plaintiff for punitive damages; and 4) that the jury in its discretion awarded [*5] $2 million dollars to plaintiff in punitive damages. Id. at 1-2.

Because the defendant made post-verdict motions for judgment notwithstanding the verdict on issues 3 and 4, those being whether, and if so to what extent, plaintiff was entitled to punitive damages, the court noted its statutory obligation to enter a written opinion stating its reasons for either upholding or disturbing the jury's findings on punitive damages. Id. at 2, citing N.C.G.S. § 1D-50. The standard of review applied by that court is essential to this court's disposition of the matter at hand, and is discussed infra, but it suffices to say for background purposes that the court upheld the jury's verdict and it remains undisturbed notwithstanding defendant's subsequent appeals.

Defendant filed a petition under chapter 11 of the Bankruptcy Code on June 28, 2019, and on October 14, 2019, plaintiff filed an amended proof of claim in the amount of $3,253,117.38. The motion for summary judgment was filed on August 7, 2021, and in it, plaintiff asserts that based upon application of the doctrine of collateral estoppel to the state court determinations by both the jury and the judge, the entire debt should be deemed nondischargeable under [*6] 11 U.S.C. § 523(a)(6) as being a debt "for willful and malicious injury by the debtor" to the plaintiff. Dkt. Nos. 22, 23. In response, defendant initially countered that plaintiff could not "satisfy the first prong of issue preclusion as neither 'willful' nor 'malicious' was actually litigated and a necessary element of either the Battery Debt or the Punitive Damages Debt." Dkt. 24 at 5. At the hearing, defendant focused1 primarily on the issue of whether the jury verdict established that the injury and related debt are from "malice." For the reasons set out below, the court concludes that the issue of willfulness was determined by the state court's entry of a directed verdict on the battery claim at the close of evidence, and that collateral estoppel does not apply with respect to the issue of malice.

DISCUSSION

Distilled to its essence, the issue before the court turns on whether the jury verdict awarding $1 million in compensatory damages for civil battery and $2 million for punitive damages (which, under North Carolina state law, may be based upon actions that are willful or wanton or malicious) must be found, as a matter of law, to satisfy the nondischargeability standard of being debts for willful [*7] and malicious injury. HN1[ ] Section 523(a)(6) excepts from judgment those debts that are "for willful and malicious injury by the debtor" to the person or property of another entity.

HN2[ ] In plaintiff's motion for summary judgment, plaintiff bears the burden of proof and must establish an exception to discharge by the preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); Farouki v. Emirates Bank Int'l., Ltd., 14 F.3d 244, 249 (4th Cir. 1994). Non-dischargeability provisions are "to be interpreted narrowly." Ballard v. Thoennes (In re Thoennes), 536 B.R. 680, 697 (Bankr. D.S.C. 2015), citing Kawaauhau v. Geiger, 523 U.S. 57, 62, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) (noting the "'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed'" (internal citation omitted)); see also Thomas v. Causey (In re Causey), 519 B.R. 144, 154 (Bankr. M.D.N.C. 2014) ("If this Court were to interpret Section 523(a) as allowing equitable exceptions to discharge under general common law principles, such a holding would impermissibly widen the scope of these provisions of the Code and, in effect, swallow-up or render superfluous those exceptions enumerated in Section 523(a).").

At issue is whether the doctrine of collateral estoppel, also known as issue preclusion, applies to the directed verdict, jury verdict, and the state court judgment and opinion2 issued in the underlying litigation to preclude further litigation of whether the resulting debt rests upon a previous determination that defendant inflicted an injury upon plaintiff that [*8] was both willful and malicious, as is necessary for the debt to be nondischargeable as a matter of law. HN3[ ] In North Carolina, for collateral estoppel to apply in this matter, plaintiff must show that the issue in question is "'identical to an issue actually litigated and necessary to the judgment, that the prior action resulted in a final judgment on the merits, and that the present parties are the same as, or in privity with, the parties to the earlier action." Sartin v. Macik, 535 F.3d 284, 289 (4th Cir. 2008) (emphasis added). More comprehensively, the issues must be the same as those involved in the prior action, must have been "raised and actually litigated" in that action, and must have been "material and relevant to the disposition of the prior action." Id., quoting State v. Summers, 351 N.C. 620, 528 S.E.2d 17, 20 (N.C. 2000); see also Musselwhite v. Mid-Atlantic Rest. Corp., 809 Fed. Appx. 122, 127-28 (4th Cir. 2020); Sykes v. Blue Cross & Blue Shield of N.C., 372 N.C. 318, 828 S.E.2d 489, 494 (N.C. 2019); Thomas M. McInnis & Assocs., Inc. v. Hall, 318 N.C. 421, 349 S.E.2d 552, 557 (N.C. 1986). Here, the question is whether the "willful" and "malicious" aspects of injury to plaintiff were not only litigated but also "necessary to" the judgment.

The court considers that question with reference to the state court's entry of directed verdict on the civil battery claim and with the tremendous benefit of having the state court's thorough review of the bases upon which the jury's verdict could have been supported. As to the jury issues of self-defense, [*9] compensatory damages, and punitive damages, this court is bound by the jury's verdict and necessarily underlying findings of fact, and not the state court judge's analysis or summary of the evidence, however detailed and thoughtful that summary may be. Accordingly, before turning to the specifics of whether the directed verdict and/or the jury's verdict established the willful and/or malicious nature of the injury to plaintiff such that the debt is nondischargeable, this court looks to the Judgment issued by the state court, in which it articulated the bases for its directed verdict and, as to the jury's punitive damages award, clarified precisely what that review was — and was not — intended to do. In announcing its standard of review, the state court explained:

At the outset, the Court notes that what follows is the opinion of the Court on the existence and sufficiency of evidence regarding the Jury's decision on Defendant's liability for punitive damages and the Jury's decision to award punitive damages and the amount thereof. See Scarborough v. Dillards, Inc., 363 N.C. 715, 722-23, 693 S.E.2d 640, 644-45 (2009), cert. denied, 563 U.S. 988, 131 S. Ct. 2456, 179 L. Ed. 2d 1211 (2011); Hayes v. Waltz, 246 N.C. App. 438, 784 S.E.2d 607 (2016). What follows is not the court's

opinion of the truth or falsity of the evidence or the court's opinion of the weight of the evidence. [*10] HN4[ ] Id.

The standard of review applied by the Court is two-fold.
First, as to whether to uphold or disturb the finding by the jury as to the Defendant's liability for punitive damages, the standard of review applied by the Court is (1) whether Plaintiff produced clear and convincing evidence from which the jury reasonably could find one or more of the statutory aggravating factors required by N.C.G.S. § 1D-15(a), Id.; and (2) whether the Plaintiff produced more than a scintilla of evidence that the aggravating factor(s) so proven (by clear and convincing evidence) was/were related to the injury to the Plaintiff, and that the Defendant participated in the conduct constituting the aggravating factor(s) so proven. See id.

Second, as to whether to uphold or disturb the jury's decision to award punitive damages and the amount of that award, the standard of review is whether the jury abused its discretion in making the award, and in the amount of that award. (Citation omitted)

For the forgoing reasons, the Court upholds the Jury's answers to the third and fourth issues and leaves the Jury's verdict on the same undisturbed.

Judgment at 3 (emphasis in original) (set out at Dkt. 23, Ex. A at 14). That court went on to [*11] address, with specificity, the evidence bearing on plaintiff's liability for and the amount of punitive damages. See N.C.G.S. § 1D-50. The complicating factor here is that unlike this court's review of a state court's written decision setting out its own findings, here, with respect to the punitive damages, the state court reviewed and articulated the bases on which the jury, based on the evidence presented, could have reached its verdict and awarded those damages. In other words, the state court approached that review from a decisional and statutory remove, and this court is distanced one step further. With those limitations acknowledged, the court turns to the matter at hand.

I. Directed Verdict Necessarily Establishes the Debts are for Willful Injury
There is no remaining material factual dispute before the court as to whether the injury inflicted by Wiles upon Simmons was intentional. The standard pattern jury instruction for civil battery require that a plaintiff "prove, by the greater weight of evidence, three things," which are:
First, that the defendant intentionally caused bodily contact with the plaintiff[;]
Second, that such bodily contact ... [caused physical pain or injury][;]
And Third, that [*12] such bodily contact occurred without the plaintiff's consent. N.C.P.I. § 800.51. The trial court entered the directed verdict on this claim, and the inquiry now is whether the that court's determination that a civil battery occurred as a matter of law and the jury's award of compensatory damages rest upon and thus establish, for purposes of nondischargeability, that the injury to plaintiff was intentional and willful within the meaning of § 523(a)(6).
After full review of the parties' filings and arguments, this court can readily conclude that the directed verdict, and the jury's award of compensatory damages, established that defendant's debt to plaintiff is based upon a willful injury to plaintiff as that term is used in both N.C. Gen. Stat. § 1D-15(a)(3) and 11 U.S.C. § 523(a)(6). See Kawaauhau, 523 U.S. at 61 ("The word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury."). The Kawaauhau Court's holding turns on the distinctions arising in "a wide range of situations in which an act is intentional, but injury is unintended, i.e., neither desired nor

in fact anticipated by the debtor." Kawaauhau, 523 U.S. at 62. As that Court explained: "Every traffic accident stemming from an initial [*13] intentional act—for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic—could fit the description." Id. at 62. HN5[ ] As noted earlier, a common law battery claim under North Carolina law requires intent to cause bodily contact, but does not require an intent to cause physical pain or injury as a result of that contact, meaning a battery claim could be brought for pranks gone awry (such as pushing someone into a swimming pool, resulting in unintended pain and injury), so long as the contact was intentional, and the injured party did not consent to that contact. See N.C.P.I. § 800.51.

Here, the very nature of defendant's conduct — the intentional discharge of a firearm directed toward the body of another, as opposed to some more innocuous conduct — compels the conclusion that the injury was intended, and thus willful. The defendant did not discharge his weapon into the air; the firearm did not discharge during a struggle. There is no dispute whatsoever that defendant intentionally shot plaintiff in the abdomen, and defendant's intentional discharge of a firearm into plaintiff's body constitutes an intent to injure plaintiff. For the foregoing reasons, [*14] and as stated in this court's order of October 7, 2021, the court will apply the doctrine of collateral estoppel with respect to the state court's directed verdict on the claim of common law battery coupled with this court's determination that defendant necessarily intended the injurious consequences of the act of shooting plaintiff by virtue of the undisputed evidence of the nature of the battery. This determination is further buttressed by defendant's counsel's acknowledgment that such a finding would be appropriate, and the court notes that in defendant's appeal of the state court's judgment, the appellate court upheld the directed verdict in this case where there was "uncontroverted evidence from Defendant's own sworn testimony on direct examination that Defendant intended bodily contact to occur." Simmons v. Wiles, 271 N.C. App. 665, 845 S.E.2d 112, 116 (N.C. App 2020) (emphasis added). An intentional bodily contact with a bullet is an intent to injure. The issue of whether the injury inflicted upon plaintiff by defendant was willful within the meaning of § 523(a)(6) has been determined.

II. Jury's Verdict Does Not Necessarily Establish that Debt is for Malicious Injury

Plaintiff argues that the jury's award of punitive damages, which was upheld and discussed [*15] in thorough detail by the state court judge, necessarily also determined that the debt is for an injury that was both willful and malicious. If so, then that factual and legal finding would have preclusive effect before this court. If not, it would remain for plaintiff to prove, in a trial before this court, facts sufficient to establish the "malicious" element with respect to his injuries and the resulting debt.

In support of his motion, plaintiff argued at the hearing that not only is the willful aspect of the injury clear, given that the injury resulted from an intentional shooting, but there also is no possible "benign" reason for the shooting. According to plaintiff, because the jury reached a verdict of "No" on the question of whether the shooting was in self defense or the defense of another, a conclusion that the shooting was malicious is essentially inescapable. Plaintiff maintains that these findings "establish that Defendant's action was willful and malicious, and thus his debt to Mr. Simmons is nondischargeable under § 523(a)(6)." Dkt. 23 at 3-4 (emphasis added). Put more plainly still, plaintiff extrapolates that by virtue of having excluded any acceptable reason for the shooting [*16] and resulting injury, that lack of justification is the "equivalent" of malice: "The issue of whether Defendant was justified in shooting Mr. Simmons is the same issue as whether he shot Mr. Simmons with malice." Id. at 9 (emphasis added).

Defendant counters that the jury instructions themselves provided that the jury could award punitive damages if they found that one of the three aggravating factors were present and related to the injury for which compensatory damages were awarded. For that reason alone, defendant argues, given that this court cannot determine with any certainty whether the jury based the punitive damages award in whole or in part

on any "malice" in defendant's underlying conduct, there is no basis upon which collateral estoppel could apply. Dkt. 24 at 10. Defendant argues further that whether the shooting was a matter of defense of self or another is an affirmative defense to the common law battery claim, such that his failure to establish that defense, in that context, cannot properly be equated to the plaintiff establishing malice.

After full review and with regard to whether the verdict awarding compensatory and punitive damages necessarily establishes that the [*17] debt or any part of it is for an injury that the jury found to be "malicious," the court concludes that it does not. Returning to the elements of civil common law battery, as just discussed, it is undisputed that malice is not an essential element of such a claim. The state court judge, in entering a directed verdict on this specific claim, would by definition have no basis upon which to assess whether the evidence as presented had established that defendant acted with malice in inflicting an injury upon plaintiff. Intending an injury, as discussed above, does not supply the answer as to "why?" A determination of malice involves the reasons for the conduct.

It also is undisputed that the jury awarded substantial punitive damages, which the state court declined to disturb on grounds that the damages were reasonable and supported by the evidence. HN6[ ] Such an award must comport with the standard for recovery of punitive damages as set forth in N.C.G.S. § 1D-15(a), which provides:

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory [*18] damages were awarded:

(1) Fraud.

(2) Malice.

(3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

N.C.G.S. § 1D-15(a) (emphasis added). Here, obviously, is the classic "and" versus "or" problem. The jury could have based its award of punitive damages on any of three alternatives, and need not have found all of them. If the jury's award was not conclusively based on malice, then collateral estoppel does not apply.

Turning to the specifics of the jury's award, there is no dispute that the jury's verdict sheet awarding punitive damages does not identify the aggravating factor, or factors, on which it based the award. See In re Cobham, 528 B.R. 283, 289 n.2 (Bankr. E.D.N.C. 2015) (discussing inapplicability of collateral estoppel when multiple possible grounds for decision preclude a determination of which issue or issues have been decided), aff'd on other grounds, 551 B.R. 181 (E.D.N.C. 2016), aff'd, 669 Fed. Appx. 171 (4th Cir. 2016). The state court's opinion makes perfectly clear that there was clear and convincing evidence on which the jury could have determined that defendant acted with malice, and also that there was clear and convincing evidence from which the jury could have determined that defendant's commission of a battery upon plaintiff [*19] was willful or wanton. Dkt. 23 at 17-18. "Could have" is no equivalent of "did."

The court also agrees with defendant that the jury's rejection of defendant's self-defense argument simply cannot be equated to a determination that defendant acted with malice, and it seems to the court that plaintiff erroneously conflates the two. Plaintiff's argument is both overly simplistic, in insisting that "if it's not this, then it must be that," and overly broad, in asking this court to reach a specific determination that the state court itself could not, and did not, make.

The state court also reviewed an additional aggravating factor that the jury could have considered in setting the amount of punitive damages, which was the fifth factor: whether defendant "concealed the truth of the shooting with the story of the assault by Plaintiff in an effort to avoid responsibility for his egregiously wrongful conduct." Id. at 20 (addressing statutory requirement that in setting amount of

punitive damages, a jury may consider only evidence related to factors listed in N.C.G.S. § 1D-35(2)). As to that factor, the state court made the following observation:
[R]egarding the statutory factors eluded to above, 1-4 relate directly to the [*20] wrongful conduct of the Defendant's commission of a battery on the Plaintiff, Defendant's state of mind, knowledge and awareness, and the harm that resulted from the wrong. The fifth factor, however, deals with a separate and distinct wrong, which is nevertheless related to the original wrong. Therefore, the jury did not abuse its discretion in awarding two time the amount of actual damages for punitive damages. The jury could have reasonably found that it was appropriate to award 1 million in punitive damages for the egregiously wrongful act of shooting the Plaintiff in the first place, and an additional 1 million for the additional wrong of concealment. Whether this was in fact of the reasoning of the jury is not known to the Court. But whatever the reasoning was, it was not an abuse of the Jury's discretion.
Judgment (Dkt. 23) at 20 (emphasis added). Again, and as reviewed at the outset of this order, the state court took great care to not overstep the bounds of its statutory and limited obligation, which was to assess whether the jury's verdict was appropriately supported by the evidence and to then set forth "the opinion of the Court on the existence and sufficiency of evidence [*21] regarding the Jury's decision on Defendant's liability for punitive damages and the Jury's decision to award punitive damages and the amount thereof." Id. at 14. On appeal of the underlying Judgment and the Restated Opinion, the appellate court affirmed, concluding that "the evidence was clear and convincing to support the jury's finding that Defendant's actions were willful and wanton or malicious." Simmons, 845 S.E.2d at 117 (emphasis added). Given that the jury could have but was not required to find satisfaction of the "malicious" element, and because there is no way this court can discern whether it did so find, the court cannot apply issue preclusion to the question of whether the injury inflicted by plaintiff upon defendant was malicious, such that the corresponding debt must be deemed nondischargeable under § 523(a)(6) as a matter of law.
In practical terms, this determination results in the need for a trial which has one focused issue, and nothing more: whether the defendant shot the plaintiff with malice. Without pre-adjudicating this question of fact, the court acknowledges that the state court's summaries of the evidence, as well as the evidentiary recitation set forth by the North Carolina Court of Appeals, [*22] are wholly consistent with and supportive of a jury determination that the defendant did so. Even so, the proper application of collateral estoppel results in that issue remaining unresolved in the context of nondischargeability prior to trial.

CONCLUSION
For the foregoing reasons, plaintiff Simmons' motion for summary judgment was, by order entered on October 7, 2021, allowed in part and denied in part.
SO ORDERED.
SIGNED this 13 day of October, 2021.
/s/ Stephani W. Humrickhouse
Stephani W. Humrickhouse
United States Bankruptcy Judge

NOV 2021 Running For NC House

Attorney Laura Budd plans to campaign for Rachel Hunt's District 103 seat in the N.C. House. The seat represents Matthews, Mint Hill and parts of south Charlotte.

Hunt asked Budd if she would consider running for her seat as the two-term representative has her sights set on becoming a state senator. Sensing the time was right, Budd agreed to run.

She likes the idea of someone representing the Matthews-Mint Hill area who lives and works here as well as someone who is connected to the community. She is also aware of the infrastructure and housing issues both towns are facing,

Budd works as managing partner for Weaver | Budd Attorneys at Law in Matthews. She specializes in business litigation and contract law.

“Because I do contract law, I'm just not intimidated by the fine print,” Budd said.

Aside from local and state bar associations, Budd is involved in the Matthews Athletic & Recreation Association, the Matthews Chamber of Commerce and the Boy Scouts.

Hunt won the District 103 seat from incumbent Bill Brawley in 2018 as part of a “blue wave” that saw Democratic candidates flip Republican seats. She defeated Brawley again in 2020. (Charlotte Weekly, 11/30/21)

2022

APR 2022 Watauga Watch Blog

NC House District 103 in Mecklenburg County (Matthews and Mint Hill) was won in the 2018 Blue Wave by former Gov. Jim Hunt’s daughter Rachel, and she won reelection there in 2020. This year she’s leaving the seat to run for the NC Senate in an overlapping district. This district has also been redrawn to improve Democratic prospects. Dave’s Redistricting rates it 49.9% Democratic v. 47.6% Republican. The Republican in the race, Bill Brawley, was the former incumbent whom Rachel Hunt beat in 2018 (and again in 2020). He’s determined to get back to Raleigh this year and thinks a Red Wave will get him there.

These two Democratic women are vying to be the spoiler who disappoints Bill Brawley again.

Laura Budd

She's a lawyer who was recruited by Rachel Hunt . She holds her law degree from Wake Forest School of Law and is the managing partner at Weaver Budd law firm, specializing in business litigation and contract law. She says she hopes to attract moderate voters.

From her announcement: "In addition to practicing law, Budd has an extensive history of community involvement. She currently serves as the President of Matthews Athletic & Recreation Association, Vice-President of the Piedmont Gymnastics Club, and [is] involved with the Matthews Chamber of Commerce, Boy Scout Troop 39 as well as the North Carolina and Mecklenburg County Bar Associations."

She's been endorsed by Lillian's List and targeted for contributions. (Watauga Watch Blog, 4/12/22)

MAY 2022 Observer Endorsement

NC House 103

Two Democrats are running to fill this swing seat vacated by Rep. Rachel Hunt, who is running for N.C. Senate. The winner will face former Rep. Bill Brawley, who narrowly lost his re-election bid to Hunt in 2018.

Attorney Laura Budd, a first-time candidate, is a steady and well-reasoned Democrat who can appeal to the more moderate voters in Matthews and south Charlotte. She's sharp and has a strong grasp on issues including public education and health care access.

Her opponent is Ann Harlan, a progressive community college instructor who has run a quieter campaign.

We recommend Budd, who is the better fit for a suburban district that just barely leans Democratic. (Charlotte Observer, 5/2/22)

MAY 2022 Charlotte Observer Interview

Have you run for elected office before?

No

Please list your highlights of civic involvement:

Currently, I serve as the president of the Matthews Athletic Recreation Assoc., vice-president of Piedmont Gymnastics Association, and am a member of the Mecklenburg County Bar, the Matthews Chamber of Commerce and Women in the Profession for the North Carolina Bar Assoc. I am also a Boy Scout Leader. Previously, I have served on the Board of Directors for the Peace & Justice Immigration Clinic and Matthews Free Medical Clinic and been a longtime volunteer with Room in the Inn.

If you're a member of the minority party, how will you be an effective legislator as a member of the minority party?

I practice civil litigation. On the surface my job looks combative. When I started, I was often the youngest attorney and one of the only women in court. I learned early that a well-researched and well-reasoned approach seeking common ground will often lay the foundation to reaching a resolution to the conflict. As a legislator, whether serving in the minority or majority party, a consistent collaborative approach to the issues will be the most effective to serving the people of North Carolina.

School test scores dropped during the COVID-19 pandemic. What should North Carolina do to improve student performance?

To improve performance and fulfill our duty to our children and families, we need to fund the Leandro Plan. Along with competitive teacher salaries to make North Carolina a contender in competing for the best educators in the nation, we need to increase funding for social workers to help struggling families connect with local resources, and increase the number of educational psychologists to test for learning difficulties to prevent and reduce achievement gaps.

What do you want to happen in North Carolina if Roe v. Wade is overturned?

North Carolina should codify Roe v. Wade affirming a woman's right to make her own healthcare decisions without the interference of the government. The decision whether to bear a child is between the woman, her doctor, and if she is religious, her God. To limit a woman's autonomy and control of her body is to treat her as less than a full citizen entitled to all the protections of the Constitution.

What should North Carolina do to reduce violent crime?

I support a two-pronged approach. Increased funding for law enforcement is critical to enable officers to perform. Parallel with this a focused effort to strengthen housing and food security, strong afterschool/summer programs for K-8, and vocational training opportunities in high school are necessary to reduce the school to prison pipeline numbers. The prison system reforms need to make mental health, addiction treatment, and re-entry training into society the priorities over punishment.

Should medical marijuana be legalized in North Carolina?

Yes. Medical marijuana should be legalized and dispensed under the care of a licensed physician for those patients who would benefit from the treatment of diseases and health conditions it has been shown beneficial in treating. The legislation legalizing it should be drafted to also benefit local businesses and farmers who would participate in the program.

What should the state's minimum wage be? What policies would you support to help struggling North Carolinians?

The minimum wage should be a living wage, at a minimum $15.00. I also support paid parental leave, Medicaid expansion, and allocating more control of resources to local towns and municipalities who are in better position to define how to use them to help struggling North Carolinians in their communities.

Should North Carolina expand Medicaid, and how?

I support the expansion of Medicaid for those North Carolinians who cannot afford health insurance by accepting the federal funds allocated. This would cover a large portion of the population currently without health insurance, bring approximately $4 billion taxpayer dollars into NC each year, and which would create thousands of jobs as well as help rural hospitals remain open.

Is there an area where you disagree with your party? Why?

There are and will continue to be areas I disagree with the Democratic Party on. However, it is less about "a party" and more about collaborating with others to think critically about how to best meet and serve the needs of all North Carolinians. (Charlotte Observer, 5/11/22)

MAY 2022 Wins Primary

House District 103:

Democrat:

Laura Budd (56.93%)Ann Harlan (43.07%) (JD Supra Blog, 5/23/22)