

NO. COA14-688

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

MARY LACEY and JONATHAN LUCAS,  
Plaintiffs

v.

Alamance County  
No. 12 CVS 1982

BONNIE KIRK, Individually and as  
Attorney-in-Fact, BONNIE KIRK as  
Trustee of the Mary Frances Cochran  
Longest Testamentary Trust, and BONNIE  
KIRK as Executrix of the Estate of  
Mary Frances Cochran Longest,  
Defendant

Appeal by defendant from judgment entered 24 February 2014  
and orders entered 10 March 2014 by Judge G. Wayne Abernathy in  
Alamance County Superior Court and cross-appeal by plaintiffs  
from order entered 10 March 2014 by Judge G. Wayne Abernathy in  
Alamance County Superior Court. Heard in the Court of Appeals 5  
November 2014.

*Wishart Norris Henninger & Pittman, PA, by Molly A.  
Whitlatch and Pamela S. Duffy, for Plaintiffs.*

*Robert A. Hassell Attorney At Law, P.A., by Robert A.  
Hassell, for Defendant.*

ERVIN, Judge.

Defendant Bonnie Kirk appeals from a judgment awarding  
compensatory and punitive damages to Plaintiffs based on  
Plaintiffs' claim for breach of fiduciary duty and awarding  
Plaintiff Lacey compensatory and punitive damages for

defamation, from an order denying Defendant's post-trial motions, and from an order awarding attorneys' fees and costs to Plaintiffs. On appeal, Defendant argues that this Court should order a new trial on the grounds that the trial court made inappropriate remarks to Defendant and Defendant's counsel that violated her right to a fair trial and that the trial court's decision to award compensatory and punitive damages for breach of fiduciary duty and compensatory damages for defamation lacked adequate record support and was contrary to law. Plaintiffs Mary Lacey and Jonathan Lucas cross-appeal from an order awarding attorneys' fees and costs to Plaintiffs. On appeal, Plaintiffs argue that the trial court erred by reducing the amount of the attorneys' fee award based on the jury's decision to award punitive damages in Plaintiffs' favor. After careful consideration of the parties' challenges to the trial court's judgment and orders in light of the record and the applicable law, we conclude that the trial court's judgment awarding damages based on Plaintiffs' claims for breach of fiduciary duty and defamation should be affirmed, that the trial court's order denying Defendant's post-trial motions should be affirmed, and that the trial court's order awarding attorneys' fees should be vacated and that this case should be remanded to the Alamance

County Superior Court for further proceedings not inconsistent with this opinion.

### I. Factual Background

On 24 June 2011, Mary Frances C. Longest died in Alamance County. Ms. Longest's last will and testament was admitted to probate in common form on or about 6 July 2011. Ms. Longest's will devised fifty percent of her estate to her daughter, Defendant Bonnie Kirk, and fifty percent of her estate to Plaintiffs, who were her grandchildren, with one-third of the fifty percent share allotted to the grandchildren having been devised to Plaintiff Lacey and the remaining two-thirds of the fifty percent share allotted to the grandchildren having been devised to Plaintiff Lucas. Defendant was named executrix in Ms. Longest's will.

On 18 September 2012, Plaintiffs filed a complaint, petition for partition, petition for declaratory judgment, and motion for preliminary injunction against Defendant, individually and as attorney-in-fact for Ms. Longest, as trustee of the Mary Frances Cochran Longest Testamentary Trust, and as executrix of the estate of Mary Frances Cochran Longest. In their complaint, Plaintiffs asserted a number of claims for relief, including claims for breach of the fiduciary duty that Defendant owed to Plaintiffs as executrix of Ms. Longest's

estate and for defamation of Plaintiff Lacey based on Defendant's assertion that Plaintiff Lacey had murdered Ms. Longest.<sup>1</sup> On 19 November 2012, Defendant filed an answer in which she denied that she was liable to Plaintiffs for breach of fiduciary duty and defamation and asserted that Plaintiffs had stolen from Ms. Longest and that Plaintiff Lacey had murdered Ms. Longest.

On 5 June 2013, following a mediated settlement conference, the parties entered into and signed a memorandum of settlement. On 25 July 2013, Plaintiffs filed a motion to enforce the settlement agreement. At a hearing held on 6 August 2013, Defendant stated that she would not comply with the terms of the settlement agreement. As a result, Plaintiffs withdrew their motion to enforce the settlement agreement, indicated that they would seek a trial on the merits in this case, and announced their intention to prosecute a petition before the Clerk of Superior Court seeking to have the letters testamentary that had been issued to Defendant revoked. On 29 August 2013, the Clerk of Superior Court entered an order revoking the letters testamentary that had been issued to Defendant.

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<sup>1</sup>Plaintiffs voluntarily dismissed a number of the other claims asserted in their complaint without prejudice on 11 February 2013.

On 7 January 2014, the trial court granted summary judgment in favor of Plaintiff Lacey with respect to the defamation claim.<sup>2</sup> The issue of liability for breach of fiduciary duty and the issue of the amount of compensatory and punitive damages that should be awarded to Plaintiffs for breach of fiduciary duty and defamation came on for trial before the trial court and a jury at the 7 January 2014 civil session of Alamance County Superior Court. On 10 January 2014, the jury returned a verdict finding that Defendant had breached her fiduciary duty to Plaintiffs in the course of administering Ms. Longest's estate and awarding each Plaintiff \$6,569.02 in compensatory damages and \$300,000 in punitive damages. In addition, the jury awarded Plaintiff Lacey \$50,000 in compensatory damages and \$100,000 in punitive damages based upon her defamation claim.

At the conclusion of the trial, Defendant made oral motions to set aside the verdict and for a new trial, both of which the trial court indicated would be denied. On 23 January 2014, Plaintiffs filed a motion seeking an award of attorneys' fees and costs that was accompanied by a number of supporting affidavits. On 24 February 2014, the trial court entered a

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<sup>2</sup>Defendant did not contest her liability to Plaintiff Lacey on defamation-related grounds at the summary judgment hearing.

written judgment based upon the jury's verdict.<sup>3</sup> On 10 March 2014, the trial court entered orders granting Plaintiffs' motion for an award of attorneys' fees, in part, and an order denying Defendant's post-trial motions. Defendant noted an appeal to this Court from the trial court's judgment, the order denying Defendant's post-trial motions, and the order awarding attorneys' fees and costs. On 28 March 2014, Plaintiffs filed a notice of cross-appeal from the trial court's attorneys' fee order.

## II. Substantive Legal Analysis

Although Defendant noted an appeal from the denial of the post-trial motions that she made pursuant to N.C. Gen. Stat. § 1A-1, Rules 50, 59, and 60, the arguments advanced in Defendant's brief before this Court are directed solely at the denial of the motion for a new trial that she made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. As a result, Defendant's appeal from the denial of her other post-trial motions is deemed abandoned. N.C. R. App. P. 28(b)(6) (stating that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned").

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<sup>3</sup>The trial court reduced the \$300,000 punitive damage amount awarded to each Plaintiff by the jury based upon their breach of fiduciary duty claim as required by N.C. Gen. Stat. § 1D-25.

"[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). As a result, "a trial judge's discretionary order pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 59 for or against a new trial upon any ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Id.* at 484, 290 S.E.2d at 603 (emphasis omitted). An abuse of discretion has occurred in the event that a trial court's discretionary decision is "manifestly unsupported by reason," a standard that requires the party seeking appellate relief to "show[] that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "'However, where the motion [made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59] involves a question of law or legal inference, our standard of review is *de novo*.'" *N.C. Alliance for Transportation Reform, Inc. v. N.C. Dept. of Transp.*, 183 N.C. App. 466, 469, 645 S.E.2d 105, 107 (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (citation omitted)), *disc. review denied*, 361 N.C. 569,

650 S.E.2d 812 (2007). “‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

#### A. Conduct of Trial Judge

In her initial challenge to the trial court’s order, Defendant argues that she is entitled to a new trial on the grounds that the trial court made inappropriate remarks to and about Defendant and her counsel which deprived Defendant of her right to a fair trial. More specifically, Defendant argues that the trial court’s repeated expressions of impatience with the manner in which Defendant and her counsel participated in the trial and expressions of opinions indicating that the trial court had a low opinion of Defendant’s truthfulness unfairly prejudiced her chances for a more favorable outcome at trial. Defendant is not entitled to relief from the trial court’s judgment on the basis of this set of arguments.

#### 1. Relevant Legal Principles

“It is fundamental to due process that every defendant be tried ‘before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.’” *State v. Brinkley*, 159 N.C. App.



446, 450, 583 S.E.2d 335, 338 (2003) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). In view of the fact that "jurors entertain great respect for [a judge's] opinion, and are easily influenced by any suggestion coming from him," a trial judge "must abstain from conduct or language which tends to discredit or prejudice' any litigant in his courtroom." *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 429, 368 S.E.2d 619, 622 (1988) (quoting *Carter*, 233 N.C. at 583, 65 S.E.2d at 10). Put another way, "[t]he expression of opinion by the trial court on an issue of fact to be submitted to a jury . . . is a legal error." *Nowell v. Neal*, 249 N.C. 516, 520, 107 S.E.2d 107, 110 (1959) (citations omitted). A trial court's "duty of impartiality extends [from the litigant] to [her] counsel," so that a trial judge "should refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in [the party's] behalf." *State v. Coleman*, 65 N.C. App. 23, 29, 308 S.E.2d 742, 746 (1983), *cert. denied*, 311 N.C. 404, 319 S.E.2d 275 (1984). However, a trial judge is permitted to "question a witness for the purpose of clarifying his [or her] testimony and promoting a better understanding of it." *State v. Whittington*, 318 N.C. 114, 125, 347 S.E.2d 403, 409 (1986).

“‘[N]ot every improper remark made by the trial judge requires a new trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error.’” *Brinkley*, 159 N.C. App. at 447-48, 583 S.E.2d at 337 (quoting *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (1990) (citation omitted)). We use a totality of the circumstances test in evaluating whether a judge’s comments were improper and will consider any erroneous statement to be harmless “[u]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial.” *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (quoting *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950)). Among the factors that have been considered in determining the prejudicial effect of a trial judge’s comments are “whether the comment occurred in isolation, any ambiguity in the comment, and the degree to which the comment suggested lack of impartiality.” *Marley v. Graper*, 135 N.C. App. 423, 426, 521 S.E.2d 129, 132 (1999), *cert. denied*, 351 N.C. 358, 542 S.E.2d 214 (2000). “Where a construction can properly and reasonably be given to a remark which will render it unobjectionable, it will not be regarded as prejudicial[,]” *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 104, 310 S.E.2d

338, 345 (1984), with the burden of establishing that the trial judge's remarks were prejudicial resting on Defendant. *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985).

2. Trial Court's Statements to Defendant

a. "Tell the Truth"

In her brief, Defendant challenges the comment that the trial court made to Defendant during the following exchange, which addressed the ownership of a particular asset held by the estate:

[Plaintiffs' Counsel]: So when you got this letter, did you understand that Ms. Lacey was just asking for information about the estate?

[Defendant]: Not when there were things on here that Ms. Lacey knew were not true.

[Plaintiffs' Counsel]: Objection, move to stike.

[The Court]: Overruled, go ahead.

[Defendant]: Does that mean I'm supposed to go ahead?

[The Court]: You can answer the question.

[Defendant]: Okay. For instance, the coin collection that was supposed to be Mother's, that was not Mother's. They should have known it had belonged to Daddy.

[The Court]: Your father is dead.

[Defendant]: Do you want me to finish or not?

[The Court]: I want you to tell the truth.  
Your father was dead -

[Defendant]: That's what I'm -

[The Court]: -- and your mother had  
inherited the coin collection, correct?

[Defendant]: Right.

[The Court]: So it was your mother's,  
correct?

[Defendant]: At that point in time, yes.  
But it said it was always owned by her. To  
me that means she's the one who started the  
coin collection. I'm sorry I made that  
distinction.

Although Defendant vigorously asserts that the trial court's instruction to Defendant to "tell the truth" constituted an expression of opinion to the effect that Defendant had testified in a perjurious manner, we do not find this argument persuasive. As we read the record, Defendant's statement that the coin collection belonged to her father could have potentially confused the jury given the fact that the death of Defendant's father meant that he could not have owned the property in question. In light of this risk of confusion, the trial court acted within lawful bounds by seeking clarification concerning the fact that Ms. Longest, instead of Defendant's father, owned the coin collection at the time of her death. When taken in context, we believe that the trial court's decision to urge Defendant to "tell the truth" was nothing more than an effort to

persuade Defendant to refrain from giving what she should have known to be legally confusing answers and did not constitute a comment concerning Defendant's credibility.

b. "Then You've Got a Problem"

Secondly, Defendant challenges certain remarks made by the trial court during the following colloquy between Defendant and her trial counsel:

[Defendant's Counsel]: And so you were in a quandary, weren't you? I mean, you wanted to administer your mother's estate, didn't you?

[Defendant]: Yes, I did. And I kept asking after the bank had told me that it belonged to me -

[Defendant's Counsel]: Don't say what the -

[Plaintiffs' Counsel]: Objection, move to strike, Your Honor.

[The Court]: Sustained. And, ma'am, you cannot say what the bank said. I don't know whether the bank said that or not. Quit talking about what the bank said.

[Defendant]: I don't know how to tell you what happened if I -

[The Court]: Then you've got a problem.

According to Defendant, the trial court's statement that Defendant had a "problem" implied that Defendant was being deceptive and would have difficulty in proving her case. However, the record clearly reflects that, just prior to the

making of this statement, the trial court had sustained an objection directed to Defendant's attempt to testify concerning a statement that had been made to her by a bank employee on hearsay-related grounds. After Defendant's trial counsel and the trial court instructed Defendant to refrain from testifying about what other people had told her, Defendant indicated that the limitations to which she was being subjected would make it difficult to explain what had happened, an interjection that resulted in the making of the challenged comment. When read in that context, the challenged comment seems to represent nothing more than a reiteration of the trial court's prior statement that Defendant should refrain from testifying about statements made by other people rather than an assertion that Defendant's position had no merit or that Defendant was being deceptive. As a result, given the fact that "a construction can properly and reasonably be given to [the trial court's] remark which will render it unobjectionable," *Colonial Pipeline*, 310 N.C. at 104, 310 S.E.2d at 345, Defendant was not, at a minimum, prejudiced by the trial court's comment.

c. "Answer the Question First"

Thirdly, Defendant challenges the trial court's repeated instruction that Defendant should "answer the question first" before attempting to explain her answer and certain comments in

which, according to Defendant, the trial court answered certain questions that had been posed to Defendant. In support of this argument, Defendant directs our attention to the following portions of the record:

[Plaintiffs' Counsel]: Isn't it true, ma'am, that until you were removed, you never filed a claim against the estate for the cash in the safe deposit box?

[Defendant]: I didn't know I had to.

[The Court]: So the answer is no.

[Defendant]: No, yes, sir.

[The Court]: It's yes. I never filed -

[Defendant]: Yes, I never filed a claim.

. . . . .

[Plaintiffs' Counsel] And these are all assumptions that you made about Mary, correct?

[Defendant]: After a good while.

[Plaintiffs' Counsel]: Pardon?

[Defendant]: After a good while. After -

[The Court]: So the answer is yes, they're assumptions.

[Defendant]: Yes.

Although Defendant contends that these exchanges prejudiced Defendant in the eyes of the jury, we note that "[t]he trial court has a duty to control the examination of witnesses, both

for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861, *cert. denied*, 516 U.S. 994, 116 S. Ct. 530, 133 L. Ed. 2d 436 (1995). A careful review of the record clearly shows that the comments at issue here represented nothing more than an attempt on the part of the trial court to address the problem created by Defendant's failure to directly answer the questions that had been posed to her. As evidence of the existence of this problem, we note that Defendant's trial counsel made similar comments to Defendant on multiple occasions during the trial. In addition, the trial court instructed other witnesses in addition to Defendant to "[j]ust answer the question." As a result, given that the trial court's comments were made for a legitimate purpose and were consistent with the comments that the trial court made to other witnesses, we cannot conclude that the trial court erred by instructing Defendant to "answer the question" or by restating what Defendant's answers to the questions that had been posed to her actually were.

d. Comments Outside the Jury's Presence

Fourth, Defendant objects to certain comments that the trial court made to Defendant outside the presence of the jury. Among other things, the trial court stated that Defendant was



being "coy" and was wasting the jury's time. However, given that the particular comments at issue here were not made in the jury's presence and since Defendant has not otherwise shown that the trial court made impermissibly prejudicial comments to Defendant or her trial counsel, we conclude that Defendant has failed to establish that these comments prejudiced her chances for a more favorable outcome at trial. *State v. Hester*, 343 N.C. 266, 273, 470 S.E.2d 25, 29 (1996) (holding that the defendant suffered no prejudice from comments made outside of the jury's presence). As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of the making of these comments.

### 3. Trial Court's Statements to Defendant's Counsel

In addition to contending that the trial court made inappropriate comments to or about Defendant, Defendant contends that the trial court made inappropriate comments to or about her trial counsel as well. In assessing this argument, we are required, once again, to determine whether "the cumulative nature of the trial judge's inappropriate comments to the defense counsel . . . tainted the atmosphere of the trial to the detriment of Defendant." *State v. Wright*, 172 N.C. App. 464, 470, 616 S.E.2d 366, 370, *aff'd in part*, 360 N.C. 80, 621 S.E.2d

874, *disc. review denied in part*, \_\_ N.C. \_\_, 624 S.E.2d 633 (2005).

In her brief, Defendant excepts to certain comments that the trial court made in the course of discussing certain letters that had been admitted into evidence, specifically:

[The Court]: The letters speak for themselves. It's all established, it's all asked and answered. You've got your basis for your argument, can't you move on? The letters are in evidence, they speak for themselves. The dates speak for themselves.

[Defendant's Counsel]: Well, she says she doesn't remember this stuff, she doesn't know. It's established through other testimony, but it's not established through her.

[The Court]: It's established.

[Defendant's Counsel]: So you don't want me to ask her these questions.

[The Court]: No, because it's just repetitive. Under Rule 403, I'm going to limit that evidence because it's already in evidence, it's already before the jury. Go to your next topic.

In addition, Defendant challenges the appropriateness of the trial court's statement, in ruling on an objection, that "[i]t's sustained, Ladies and Gentlemen, and we're going to move on with the trial. I will remind you that the issue we're here to determine is whether or not the Defendant breached her fiduciary duty[.]" Although Defendant contends that these comments, which

were made in the presence of the jury, cast her trial counsel in an unfair light, the record reflects that the trial court directed similar statements to Plaintiffs' counsel as well. For example, the trial court interrupted Plaintiffs' counsel during a particular line of questioning by saying, "Let's move on"; by telling Plaintiffs' counsel to refrain from "chas[ing] rabbits"; and by inquiring about whether a certain line of questioning being pursued by Plaintiffs' counsel was repetitive. All of these comments were made in the course of an appropriate exercise of the trial court's authority to ensure that the court's time was not wasted by properly controlling the manner in which various witnesses were examined. *White*, 340 N.C. at 299, 457 S.E.2d at 861. Although the record clearly indicates that the trial court exhibited a certain degree of impatience during the trial, it meted out equal treatment to counsel for both parties in light of this desire for expedition.<sup>4</sup> As a result, this aspect of Defendant's challenge to the trial court's order lacks merit.

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<sup>4</sup>In addition to the comments discussed in the text of this opinion, Defendant argues that the trial court made improper remarks to her trial counsel outside of the presence of the jury for the purpose of urging her trial counsel to proceed with the trial in a more expeditious manner. The comments upon which this aspect of Defendant's argument is based were directed to "all counsel" and could not, for that reason, have prejudiced Defendant.

In an attempt to persuade us to reach a different conclusion, Defendant argues that the facts of this case are analogous to those at issue in *McNeill*, in which the Supreme Court held that the cumulative effect of a series of remarks that the trial court directed toward the defendants' counsel created an appearance of antagonism and had the effect of depriving the defendant of a fair trial. *McNeill*, 322 N.C. at 427, 368 S.E.2d at 621. In seeking to persuade us of the validity of this analogy, Defendant notes that the trial judge whose conduct was at issue in *McNeill* interrupted the examination of a witness being conducted by the defendants' counsel and asked, "[w]hat in the world has that got to do with this case?" When the defendants' counsel stated, "I'm gonna' move on—I'm gonna' move on," the trial court responded, "I hope so." *Id.* at 428, 368 S.E.2d at 622. In addition, the trial court in *McNeill* interrupted the examination of another witness being conducted by the defendants' counsel and stated, "I'm bored with the repetition, frankly, and I think everybody else is. Let's get on to something that's got something to do with this case without repeating other things." *Id.* at 428-29, 368 S.E.2d at 622. When the defendant's counsel requested permission to approach the bench, the *McNeill* trial court replied, "[n]o, sir, not if you just want to tell me something I

already know; that's what you're doing now. . . . But for the love of Mike, let's get down to something new." *Id.* at 429, 368 S.E.2d at 622.

Although there are limited similarities between the statements held impermissible in *McNeill* and the statements at issue here, we do not believe that *McNeill* is controlling in this case given that the Supreme Court's decision to reverse the trial court's judgment in *McNeill* rested on a number of factors that are not present in this case. For example, as the Supreme Court noted, *McNeill* involved a civil action between a governmental agency and a private citizen, a set of facts that created a risk that "[a]ny intimation by the trial court aligning itself with either side was certain to have effect in this environment." *Id.* at 428, 368 S.E.2d at 621. In addition, the trial court made several alcohol-related jokes during the course of the proceedings, causing the Supreme Court to note that, "[t]hroughout the trial, the court maintained an atmosphere of levity" which "diminished the seriousness of the mission assigned to the jury and gave the appearance of antagonism towards the defense attorney." *Id.* at 429, 368 S.E.2d at 622. Finally, the Supreme Court emphasized the fact that "[t]he same disaffection seemed not to be visited upon [the] plaintiff's witnesses." *Id.* Thus, given that the trial

court in this case did not create "an atmosphere of levity" by making inappropriate jokes and made similar comments to counsel for all parties, we do not believe that *McNeill* requires an award of appellate relief in this case. As a result, Defendant's challenge to the comments that the trial court directed to her counsel does not justify a decision to overturn the trial court's order.

#### B. Damages for Breach of Fiduciary Duty

Secondly, Defendant contends that the trial court erroneously denied Defendant's motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, on the grounds that the amount of compensatory damages awarded to Plaintiffs for breach of fiduciary duty lacked adequate record support and on the grounds that the amount of punitive damages awarded to Plaintiffs for breach of fiduciary duty was grossly excessive. More specifically, Defendant argues that the compensatory damage award was contrary to certain stipulations that had been entered into between the parties, that Plaintiffs failed to prove the damages that they sustained for breach of fiduciary duty with sufficient certainty, and that the amount of punitive damages that Plaintiffs were awarded was so grossly excessive as to be unconstitutional. Defendant's arguments lack merit.

#### 1. Standard of Review

A trial court is entitled to grant a new trial in favor of any party in the event that "excessive or inadequate damages appear[] to have been given under the influence of passion or prejudice" or in the event that the evidence is insufficient "to justify the verdict or that the verdict is contrary to law." N.C. Gen. Stat. § 1A-1, Rule 59(a)(6)-(7). "Whether to grant a [motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1,] Rule 59 [] on the grounds of excessive or inadequate damages is within the sound discretion of the trial judge," *McFarland v. Cromer*, 117 N.C. App. 678, 682, 453 S.E.2d 527, 529, *disc. review denied*, 340 N.C. 114, 456 S.E.2d 317 (1995), with the same being true with respect to the decision to grant or deny a motion for a new trial on the grounds that the evidence is insufficient to justify the verdict. *Haas v. Kelso*, 76 N.C. App. 77, 82, 331 S.E.2d 759, 762 (1985). However, the extent to which the amount of damages "has been proven with reasonable certainty is a question of law we review *de novo*." *Plasma Centers of America, LLC v. Talecris Plasma Resources, Inc.*, \_\_ N.C. App. \_\_, \_\_, 731 S.E.2d 837, 843 (2012) (citations omitted). We will now evaluate the validity of Defendant's challenge to the trial court's decision to deny Defendant's request for a new trial utilizing the applicable standard of review.

2. Relevant Facts

As we have already noted, Plaintiffs were entitled to fifty percent of Ms. Longest's estate, while Defendant was entitled to the other fifty percent. As executrix of Ms. Longest's estate, Defendant had a duty to expeditiously distribute the assets bequeathed in Ms. Longest's will to the appropriate beneficiaries. For a period that exceeded two years, however, Defendant refused to distribute the property to which Plaintiffs were entitled, with this conduct resting on the fact that Defendant entertained certain beliefs about Plaintiffs' activities and other subjects that were completely devoid of factual support. For example, Defendant asserted that Ms. Longest had been poisoned; that Plaintiff Lacey had given food contaminated with cesium to Ms. Longest; that Plaintiff Lacey gave Ms. Longest an overdose of morphine during a 2004 hospital stay; that Plaintiff Lacey had caused the death of other family members; and that Ms. Longest had executed another will after the date upon which the will that had been admitted to probate had been executed. In addition, Defendant claimed that Plaintiffs had stolen certain items of Ms. Longest's property. The parties stipulated prior to the beginning of the trial that several of Defendant's assertions were not true.



Upon developing these suspicions, Defendant contacted the police. After thoroughly investigating Defendant's assertions, the police concluded that they had no merit. Once she had learned that the official investigation into the alleged murder and thefts had been closed, Defendant hired an independent testing company to check the food that had been contained in her mother's freezer for the presence of poisons. After viewing the test results and consulting with numerous medical professionals, the police concluded that, "[a]s a result of our investigation, [Defendant's] mother's death has been deemed [to have had] natural causes." Even so, Defendant persisted in her refusal to make any distribution to Plaintiffs from Ms. Longest's estate.

At the conclusion of a mediated settlement conference, the parties reached an agreement pursuant to which Plaintiffs were to drop their claims against Defendant in exchange for the distribution of their shares of Ms. Longest's estate. Defendant, however, refused to carry out her obligations under this agreement based upon her belief that Plaintiffs had stolen property from Ms. Longest even though Defendant never took any steps to recover the allegedly stolen property from Plaintiffs and even though there was no evidence whatsoever tending to show that Defendant's contention had any basis in fact.

During the estate administration process, Defendant learned that Plaintiff Lucas was having financial troubles and that he was involved in a foreclosure proceeding that threatened to result in the loss of his home. Even so, Defendant still refused to distribute his share of the estate. Instead, Defendant told Plaintiff Lucas' wife that, while Plaintiffs "were going to get a little bit from the estate," "they weren't going to get as much as they thought they were, because they should have come around more often."

During the time that she served as executrix of Ms. Longest's estate, Defendant kept over \$160,000 in cash that belonged to the estate in a safety deposit box rather than placing that amount in an interest-bearing account.<sup>5</sup> In spite of the fact that Plaintiffs had inherited ownership interests in two houses under Ms. Longest's will, Defendant refused to allow Plaintiffs to have access to these houses and failed to distribute the rent that she collected from the occupants of these houses to Plaintiffs. After her removal as executrix on 29 August 2013, Defendant failed to promptly comply with instructions to turn over the estate's records and property to

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<sup>5</sup>At various times, Defendant attempted to claim that the cash contained in the safety deposit box belonged to her and, at other times, Defendant admitted that the cash belonged to the estate. A successor administrator rejected Defendant's claim to these funds.

the successor administrator, an action that impaired the successor administrator's ability to administer the estate and make proper distributions to Plaintiffs. Finally, in spite of Defendant's assertions to the contrary, there was simply no evidence that Ms. Longest had ever executed another will that treated Defendant more favorably than the one that had been admitted to probate.

### 3. Analysis of Trial Court's Rulings

#### a. Compensatory Damages

In her brief, Defendant argues that the jury's decision to award \$6,569.02 in compensatory damages to each Plaintiff based upon Defendant's breach of fiduciary duty was contrary to the stipulations into which the parties had entered and did not rest upon evidence that tended to show the amount of damages that Plaintiffs were entitled to recover with reasonable certainty.<sup>6</sup> Defendant's argument lacks merit.

According to well-established North Carolina law, a party seeking to recover damages bears the burden of proving the amount that he or she is entitled to recover in such a manner as to allow the finder of fact to calculate the amount of damages that should be awarded to a reasonable degree of certainty.

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<sup>6</sup>Defendant does not contest the jury's decision to find her liable to Plaintiffs for breach of fiduciary duty or contend that Plaintiffs are not entitled to recover some amount of compensatory damages from her.

*Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 95, 618 S.E.2d 739, 744 (2005) (citing *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586 (1987)), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006). "While the claiming party must present relevant data providing a basis for a reasonable estimate, proof to an absolute mathematical certainty is not required." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002).

At trial, the parties stipulated that, if the jury found that Plaintiffs had suffered damages as a result of Defendant's failure to distribute the estate in accordance with her duties, their share of the estate would have earned interest at the rate of one percent per year from the date of "reasonable distribution." However, the date upon which distribution could reasonably have been made was left for the jury's determination. In addition, the parties stipulated that the \$160,000 in cash that Defendant failed to deposit in an interest-bearing account would have earned between \$3,369.54 to \$6,093.85 in interest, depending on the manner in which that money was invested. Stan Atwell, who testified on Plaintiffs' behalf as an expert in estate administration, stated that all but about \$50,000 of the value of the property contained in Ms. Longest's estate could

have been safely distributed by October 2011<sup>7</sup>, which was after the date by which Ms. Longest's creditors were required to assert any claims that they might have against the estate, and that the entire estate administration process could reasonably have been concluded by June 2012.

Although we are not, of course, privy to the exact manner in which the jury calculated the amount of damages that should be awarded to each Plaintiff, we are confident that the record contains sufficient evidence to support the award of \$6,569.02 in compensatory damages that the jury made in favor of each Plaintiff. Had distribution been made at the earliest possible date for distribution set out in Mr. Atwell's testimony and had an appropriate amount of interest been earned on the \$160,000 in cash that Defendant kept in the safety deposit box, Plaintiffs would have been able to earn a total of approximately \$14,000 in interest, an amount slightly larger than the total amount of \$13,138.04 in compensatory damages that the jury awarded to Plaintiffs.<sup>8</sup> As a result, the record provides ample support for the total amount of compensatory damages awarded to Plaintiffs.

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<sup>7</sup>As of September 2011, the estate had a value of \$769,139.97.

<sup>8</sup>The value of the estate as of September 2011 was \$769,139.97. In our view, the jury could have reasonably used this amount as the value of the estate as of October 2011, which represented the earliest date upon which distribution could have

Defendant, however, argues that, since Plaintiffs stipulated that they were entitled to differing shares in Ms. Longest's estate, the jury's decision to award an identical amount of compensatory damages to each Plaintiff was contrary to the evidentiary record developed at trial. However, given that the total amount of damages awarded to Plaintiffs had adequate record support, Defendant has no right to complain about the manner in which the jury elected to apportion the overall damage amount between Plaintiffs given that "the defendant has no voice in the apportionment of damages between" multiple plaintiffs. *Daniels v. Roanoke Railroad & Lumber Co.*, 158 N.C. 418, 428, 74 S.E. 331, 334 (1912) (citing *Hocutt v. Wilmington & Weldon Railroad Co.*, 124 N.C. 214, 217, 32 S.E. 681, 682 (1899)). In view of the fact that "[i]t is not for this Court to second-guess the means by which the jury calculated the award of damages," *Keels v. Turner*, 45 N.C. App. 213, 220, 262 S.E.2d

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reasonably been made. After subtracting the \$50,000 that needed to be withheld from any distribution made at that time, Plaintiffs' share of this value of the estate comes to \$359,569.98. An application of the stipulated interest rate of 1% per year from the reasonable date of distribution until the date of the jury verdict, a period of 27 months, results in a rough total of \$8,000 in interest. In addition, the cash that Defendant kept in the safe deposit box would have earned up to \$6,093.85 in interest had it been invested in a 24 month certificate of deposit. As a result, the evidence would have supported a jury determination that Defendant's failure to administer the estate in a proper fashion could have cost Plaintiffs roughly \$14,000 in interest.

845, 848 (1980), and the fact that the evidentiary record supports the jury's overall damage award, the trial court did not err by denying Defendant's motion for a new trial with respect to this issue.

b. Punitive Damages

Secondly, Defendant argues that the jury awarded a grossly excessive amount of punitive damages in connection with Plaintiffs' breach of fiduciary duty claim. According to Defendant, the punitive damage award was so large as to violate the due process clause of the Fourteenth Amendment to the United States Constitution. We are not persuaded by Defendant's argument.

N.C. Gen. Stat. § 1D-25(b) provides that "[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater," and that, "[i]f a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount." *Id.* In view of the fact that the jury awarded each Plaintiff \$6,569.02 in compensatory damages, the trial court reduced the jury's punitive damage award of \$300,000 for each Plaintiff to \$250,000 for each

Plaintiff in compliance with N.C. Gen. Stat. § 1D-25(b). As a result, the ultimate issue raised by Defendant's challenge to the punitive damage award is whether an award of \$250,000 in punitive damages for each Plaintiff contained in the final judgment is grossly excessive.

"When a punitive damages award is 'grossly excessive,' it violates the due process clause of the Fourteenth Amendment." *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 157, 683 S.E.2d 728, 740 (2009) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 1596, 134 L. Ed. 2d 809, 822 (1996)). In determining whether an award of punitive damages is grossly excessive, we consider "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the compensatory and punitive damages awards; and (3) available sanctions for comparable conduct." *Id.* at 157-58, 683 S.E.2d at 740 (citing *BMW*, 517 U.S. at 574-75, 116 S. Ct. at 1598-99, 134 L. Ed. 2d at 826. The degree of reprehensibility of the defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 688, 562 S.E.2d 82, 94 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004) (citation omitted). The actual amount of punitive damages to be awarded in any particular case is committed to the jury's sound discretion.



*Rogers v. T.J.X. Companies, Inc.*, 329 N.C. 226, 231, 404 S.E.2d 664, 667 (1991).

In her brief, Defendant argues that, to the extent that she engaged in "reprehensible conduct," her actions were not particularly egregious given that she did not do anything more than "merely delaying distribution." In our view, this argument severely understates the nature and extent of Defendant's conduct. As the record clearly reflects, Defendant deliberately denied Plaintiffs access to property that had been bequeathed to them for an extended period time and engaged in this conduct at a time when at least one of them was suffering from significant financial difficulties without having any legitimate reason for acting in that manner. Defendant made baseless accusations that Plaintiffs had committed murder, attempted murder, and larceny in an attempt to avoid making any distribution of the assets of the estate to Plaintiffs even though these allegations were completely baseless. In the course of depriving Plaintiffs of their rightful inheritance, Defendant ignored official determinations that Ms. Longest had died of natural causes and that there was no evidence that any theft had taken place. Finally, Defendant refused to cooperate with the estate administration process even after her removal as executrix. The willfulness of Defendant's conduct was evidenced by her

admission that Plaintiffs "weren't going to get as much as they thought they were [from the estate], because they should have come around more often." In our view, Defendant's conduct is at least as reprehensible as the conduct at issue in the cases upon which Defendant relies, such as *Greene v. Royster*, 187 N.C. App. 71, 652 S.E.2d 277 (2007), in which we found sufficient reprehensible conduct to support a sizeable punitive damage award against individuals who knowingly sold cars that were unfit for operation on state roads and concealed information concerning the vehicles' net worth from prospective buyers. *Id.* at 80, 652 S.E.2d at 283. As a result, we hold that Defendant's conduct was, when considered in its entirety, exceedingly reprehensible.

In addition, Defendant argues that the 38 to 1 ratio of punitive to compensatory damages present in this case establishes the excessiveness of the punitive damages award at issue here. This Court has, however, upheld punitive damage awards reflecting similar compensatory damages to punitive damages ratios. *Rhyne*, 149 N.C. App. at 689, 562 S.E.2d at 94 (upholding awards involving ratios of punitive damages to compensatory damages of 30 to 1 and 23 to 1 and describing these ratios as "relatively low"); *Maintenance Equip. Co. v. Godley Builders*, 107 N.C. App. 343, 353-54, 420 S.E.2d 199, 204-05

(1992) (upholding the trial court's decision to deny a new trial motion based on the assertion that a \$175,000 punitive damages award was excessive when compared to a \$4,550 compensatory damages award). As a result, given that the ratio of compensatory damages to punitive damages present in this case is fully consistent with ratios that have been held not to be excessive in other cases, we find no basis for overturning the punitive damages award in this case based on the relative levels of compensatory and punitive damages awarded by the trial court.<sup>9</sup>

Finally, Defendant argues that, since she was not subjected to criminal liability for her conduct, the jury's punitive damages award was grossly excessive. Aside from the fact that nothing in our decisional law makes the availability of a criminal sanction necessary to justify a decision to uphold a punitive damage award, the fact that Defendant was merely subject to a civil, rather than a criminal, sanction for her conduct does not in any way serve to mitigate the reprehensibility of what she did. As a result, since the jury's punitive damages award stemming from Defendant's breach of fiduciary duty involved conduct that was exceedingly reprehensible and involved a ratio of punitive damages to

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<sup>9</sup>As Plaintiffs note, Defendant's assertion that a ratio of 38 to 1 is "eight times" greater than a ratio of 30 to 1 is mathematically incorrect.

compensatory damages that was quite similar to ratios that have previously been held not to be grossly excessive, we conclude that the trial court did not err by denying Defendant's motion for a new trial with respect to the amount of punitive damages awarded in connection with Plaintiffs' breach of fiduciary duty claim.

### C. Damages for Defamation

Finally, Defendant contends that the trial court erred by denying her motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, on the grounds that the \$50,000 in compensatory damages awarded in connection with Plaintiff Lacey's defamation claim lacked sufficient evidentiary support and was otherwise unlawful.<sup>10</sup> More specifically, Defendant argues that the amount of damages that the jury awarded for defamation was not established with the required reasonable certainty. Once again, we conclude that Defendant's argument lacks merit.

#### 1. Relevant Facts

As the record reflects, Defendant told numerous third parties, including several of the parties' relatives, that Plaintiff Lacey had either murdered or poisoned Ms. Longest or that Defendant had reason to believe that Plaintiff Lacey had

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<sup>10</sup>Defendant does not challenge the \$100,000 in punitive damages that was awarded in connection with Plaintiff Lacey's defamation claim.

caused Ms. Longest's death. In addition to admitting that she had made these statements, Defendant stipulated that these statements were not true. Plaintiff Lacey testified that Defendant's accusations caused her to be upset, hurt, and embarrassed; that certain family members would not speak to her after learning of Defendant's assertions; and that she was concerned about the impact that having been accused of murdering Ms. Longest would have on her business, her relationship with other members of the family, and her reputation in the community. The evidence clearly showed that Defendant was aware of the impact that the making of such statements would have upon Plaintiff Lacey's friends and family members.<sup>11</sup>

## 2. Compensatory Damages

According to well-established North Carolina law, oral defamation claims can be classified as either slander *per se* or slander *per quod*. *Donovan v. Fiumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 574 (1994). Slander *per se* consists of "'an oral communication to a third party which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease.'" *Losing v. Food Lion*,

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<sup>11</sup>In her brief, Defendant concedes that she made statements that damaged Plaintiff Lacey's reputation.

*L.L.C.*, 185 N.C. App. 278, 281, 648 S.E.2d 261, 263 (2007) (quoting *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29-30, 568 S.E.2d 893, 898 (2002), *disc. review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003)), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). A plaintiff may obtain a damage recovery on the basis of a slander *per se* theory without specifically pleading or proving special damages. *Donovan*, 114 N.C. App. at 528, 442 S.E.2d at 575; *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (stating that, in a slander *per se* action, damages are presumed upon proof of publication, with no further evidence of injury being required to support a damage award).

As we have already noted, Defendant made oral communications to several people in which she accused Plaintiff Lacey of having murdered Ms. Longest. It would be difficult to conceive of a criminal offense that involves greater moral turpitude than murdering someone through the use of poison. *Losing*, 185 N.C. App. at 281, 648 S.E.2d at 263. For that reason, any failure on Plaintiff Lacey's part to establish that she sustained pecuniary loss as a result of Defendant's statements is simply irrelevant. *Donovan*, 114 N.C. App. at 528, 442 S.E.2d at 575. However, the testimony that Plaintiff Lacey

provided at trial was more than sufficient to establish that she experienced significant emotional trauma stemming from Defendant's false accusations. As a result, the trial court did not err by denying Defendant's motion for a new trial relating to this issue.

#### D. Attorneys' Fee Award

In their sole challenge to the trial court's order, Plaintiffs contend that the trial court erred in the course of ruling on their request for an award of attorneys' fees and the costs. More specifically, Plaintiffs assert that the trial court lacked the authority to reduce the amount of attorneys' fees that it awarded to Plaintiffs based on the fact that Plaintiffs were the beneficiaries of a large punitive damages award. Plaintiffs' argument has merit.

##### 1. Standard of Review

"The award of attorney's fees is within the sound discretion of the trial judge and is not reviewable except for abuse of discretion." *Town of N. Topsail Beach v. Forster-Pereira*, 194 N.C. App. 763, 766, 670 S.E.2d 590, 592 (2009). However, "the trial court's discretion [in awarding attorney's fees] is not unrestrained." *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001), *disc. review denied*, 355 N.C. 500, 563 S.E.2d 191 (2002). For example, attorneys' fees

may not be awarded in the absence of express statutory authority. *Smith v. Smith*, 121 N.C. App. 334, 338, 465 S.E.2d 52, 55 (1996). If the trial court decides to award a reasonable attorneys' fee, it must make findings of fact that support the award, including the "time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.'" *Stilwell*, 148 N.C. App. at 131, 557 S.E.2d at 629 (quoting *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989)). In addition, a trial court is entitled to examine a number of other factors in the course of determining the reasonableness of an attorneys' fee award, including "the nature of litigation[,], nature of the award, difficulty, amount involved, skill required in its handling, skill employed, attention given, [and] the success or failure of the attorney's efforts." *Topsail Beach*, 194 N.C. App. at 766, 670 S.E.2d at 592 (citation and quotation omitted). As a result, "our review [of an order awarding attorneys' fees] is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *Id.* (quoting *Robinson v. Shue*,



145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (citation omitted)).

## 2. Analysis of Attorneys' Fee Award

In its motion seeking an award of attorneys' fees and the costs, Plaintiffs sought to collect a total of \$262,744.64, plus any additional amounts incurred from the date of the filing of the motion until the date upon which the motion in question was heard. In its order, the trial court found that, even though the evidence clearly established her liability for breach of fiduciary duty and defamation, Defendant had persisted in defending against Plaintiffs' claims, thereby necessitating the incurrence of the expenses associated with a four day jury trial. In addition, the trial court found that Defendant's conduct during the course of the litigation of this case had caused Plaintiffs to unnecessarily incur substantial additional attorneys' fees, including, but not limited to, fees stemming from Defendant's failure to comply with the applicable discovery rules; the fact that Defendant repeatedly changed her legal position; the fact that Defendant employed four different attorneys, effectively delaying final resolution of this matter; the fact that Defendant gave nonresponsive and evasive answers to questions posed to her during her deposition; and the fact that Defendant repudiated the mediated settlement agreement.

Finally, the trial court found that Plaintiffs had incurred attorneys' fees and expenses that could properly be taxed pursuant to N.C. Gen. Stat. § 7A-305(d) in an amount that exceeded \$255,000, that the fees charged by Plaintiffs' attorneys were comparable to those customarily charged for similar work, and that the fees charged by Plaintiffs' counsel were reasonable in light of all of the surrounding circumstances. After making these findings, however, the trial court awarded Plaintiffs \$93,709 in attorneys' fees, noting that it would have awarded a much greater amount in attorneys' fees except for the fact that Defendant had been ordered to pay a substantial amount of punitive damages.

As a preliminary matter, we note that Plaintiffs have not challenged any of the trial court's findings of fact as lacking in sufficient evidentiary support. For that reason, the trial court's findings are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Furthermore, Plaintiffs have refrained from challenging the majority of the trial court's conclusions of law. For that reason, Plaintiffs have accepted these unchallenged conclusions as well. *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999) (stating that "[f]ailure to [challenge a conclusion]

constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts).

As Defendant acknowledges, the trial court had the authority to make an award of attorneys' fees in favor of Plaintiffs pursuant to a number of statutory provisions, including N.C. Gen. Stat. §§ 1D-45, 6-20, 6-21, 6-21.5, and 7A-305(d).<sup>12</sup> In addition, the trial court found, based on the evidence that Plaintiffs presented, that the amount of attorneys' fees that Plaintiffs sought to collect was consistent with the level of fees that was customarily charged in the relevant area for similar work and was reasonable given the totality of the surrounding circumstances. Finally, the trial court found, based on sufficient record evidence, that Plaintiffs had incurred in excess of \$255,000 in attorneys' fees. However, instead of awarding the requested amount of attorneys' fees, the trial court awarded a substantially lower amount.

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<sup>12</sup>As Defendant suggests, the provisions of N.C. Gen. Stat. § 6-18 support an award of costs to Plaintiff Lacey in connection with her defamation claim. However, N.C. Gen. Stat. § 6-18 does not authorize an award of attorneys' fees in such cases. See *McKissick v. McKissick*, 129 N.C. App. 252, 254, 497 S.E.2d 711, 712 (1998) (stating that, since "there is not specific authorization that costs in the context of [N.C. Gen. Stat. § 6-18] are to include attorneys' fees, costs awarded [pursuant to that statutory provision] cannot include an award of attorneys' fees"). Thus, to the extent that any attorneys' fees were awarded to Plaintiff Lacey based solely on N.C. Gen. Stat. § 6-18, that award must be vacated on remand.

The trial court approved a lower-than-requested attorneys' fee award based on the following logic, which is set forth in the relevant findings of fact:

19. Pursuant to N.C. [Gen. Stat.] §§6-18, 6-21.5, 7A-305(d) and 1D-45, the Court finds that Mary Lacey should be awarded attorney's fees in the amount of \$18,741.80 and costs in the amount of \$2,490.50 (for a total of \$21,232.30) for the defamation claim. The Court finds that this amount is fair and reasonable in light of the circumstances of the case, the time expended, the labor required, the experience and skill applied, the number and complexity of factual and legal questions involved, the fees normally and customarily charged by WNHP and by other law firms in the locality for similar legal services, and the results obtained and the jury verdict.

20. Pursuant to N.C. [Gen. Stat.] §§6-20, 6-21, 6-21.5, 7A-305(d) and 1D-45 The Court finds that the Plaintiffs should be awarded attorney's fees in the amount of \$74,967.20 and costs in the amount of \$9,961.98 (for a total of \$84,929.18) for the breach of fiduciary duty claim, to be allocated equally between the two Plaintiffs. The Court finds that this amount is fair and reasonable in light of the circumstances of the case, the time expended, the labor required, the experience and skill applied, the number and complexity of factual and legal questions involved, the fees normally and customarily charged by WNHP and by other law firms in the locality for similar legal services, and the results obtained and the jury verdict.

21. The Court further notes that the undersigned would have awarded a much greater amount in attorneys' fees to the Plaintiffs under these facts were it not for

the amount of punitive damages assessed against the Defendant by the Jury.

As a result, the trial court appears to have refused to make the attorneys' fee award that it would have otherwise made based on the fact that Plaintiffs received a large punitive damages award.

The issue of whether, as Plaintiffs contend, the trial court abused its discretion by reducing the amount of attorneys' fees awarded to Plaintiffs based on the fact that they were the recipients of a large punitive damages award appears to be a question of first impression in this jurisdiction. Although our attorneys' fee jurisprudence gives trial judges substantial discretion in determining what amount of attorneys' fees to award in any particular case, we believe that the use of a substantial punitive damages award as the sole reason for reducing an otherwise reasonable attorneys' fee award involved reliance upon a factor that has no reasonable bearing on the making of a proper attorneys' fee award and, for that reason, constitutes an abuse of the trial court's discretion.

In making its attorneys' fee award in this case, the trial court properly considered and made findings of fact concerning the "'time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.'" *Stilwell*, 148 N.C. App. at 131, 557 S.E.2d at 629.

In addition, the trial court properly considered a number of other relevant factors, including the nature of the litigation, the complexity and amount of discovery involved in the case, and the success of the attorneys' efforts. *Topsail Beach*, 194 N.C. App. at 766, 670 S.E.2d at 592. Each of these factors has direct relevance to the reasonableness of the level of attorneys' fees that should be awarded in any particular instance. The fact that Plaintiffs received a large punitive damages award is not, however, similarly relevant to a proper attorneys' fee calculation. We reach this conclusion for several related reasons.

As an initial matter, we note that the underlying purposes sought to be effectuated by an award of attorneys' fees and an award of punitive damages are different. In essence, an award of attorneys' fees is intended to address costs that arise in the course of the litigation of a particular case while punitive damages are intended to punish a litigant for conduct that had already occurred by the time that the litigation had commenced. In other words, punitive damages "are awarded as punishment due to the outrageous nature of the wrongdoer's conduct," *Juarez-Martinez v. Deans*, 108 N.C. App. 486, 495, 424 S.E.2d 154, 159-60, *disc. review denied*, 333 N.C. 539, 429 S.E.2d 558 (1993); *see also Nance v. Robertson*, 91 N.C. App. 121, 123, 370 S.E.2d

283, 284 (stating that "[t]he purpose of punitive damages is to punish wrongdoers for misconduct of an aggravated, extreme, outrageous, or malicious character"), *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988); *Rhyne*, 358 N.C. at 166, 594 S.E.2d at 6 (stating that "North Carolina courts have consistently awarded punitive damages 'solely on the basis of [their] policy to punish intentional wrongdoing and to deter others from similar behavior'" (citation omitted)), while an award of attorneys' fees serves an entirely different set of purposes, including "restor[ing] Plaintiffs to the same position they would have been in had no breach of fiduciary duty occurred" in the instances to which N.C. Gen. Stat. § 6-20 and 6-21 apply or "discourag[ing] frivolous legal action" in instances governed by N.C. Gen. Stat. § 6-21.5. *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990). The Supreme Court recognized the difference between punitive damages awards and attorneys' fees awards in *United Labs. v. Kuykendall*, 335 N.C. 183, 193, 437 S.E.2d 374, 380 (1993), in which it stated that, "[s]ince [attorney fees and punitive damages] serve different interests and are not based on the same conduct," a "plaintiff is not required to elect between them to prevent duplicitous recovery." As a result of the different purposes sought to be achieved by punitive damages and attorneys' fee

awards, a decision to reduce an attorneys' fee award based on the fact that a party received a large punitive damages award would necessarily serve to thwart the purposes sought to be achieved by allowing the recovery of punitive damages without serving any purpose sought to be achieved by an award of attorneys' fees. Thus, the trial court abused its discretion to the extent that it reduced the amount of attorneys' fees that it would have otherwise awarded to Plaintiffs based solely on the fact that Plaintiffs received a large punitive damages award. *State v. Tuck*, 191 N.C. App. 768, 771, 664 S.E.2d 27, 29 (2008) (stating that, "[w]hen discretionary rulings are made under a misapprehension of law, this may constitute an abuse of discretion") (citations omitted).

In seeking to persuade us to reach a different result, Defendant argues that the trial court's decision represented a proper exercise of the discretion available to trial judges in making attorneys' fee awards and amounted to consideration of the nature and amount of the award that Plaintiffs received. However, for the reasons that we have previously discussed, the trial court's discretion in setting attorneys' fee awards must be based on a consideration of factors that are relevant to the reasonableness of the fee award rather than upon factors that have no bearing on the establishment of a proper attorneys' fee



award. In addition, allowing the trial court to reduce the amount of attorneys' fees awarded to a prevailing plaintiff based on the fact that the plaintiff persuaded the trier of fact to approve a large punitive damages award would turn the logic of allowing consideration of the nature and amount of the substantive award in awarding attorneys' fees on its head, punishing, rather than rewarding, a successful litigant for prevailing with respect to his or her substantive claims. As a result, since the trial court erred to the extent that it reduced the amount of attorneys' fees awarded to Plaintiffs solely on the basis of the amount of punitive damages that had been awarded to them, the trial court's attorneys' fee order must be reversed and this case must be remanded to the Alamance County Superior Court for the entry of a new attorneys' fee order that is based on a consideration of relevant factors and that contains proper findings of fact and conclusions of law.

### III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment and orders have merit and that the trial court erred by considering an impermissible factor in determining the size of Plaintiffs' attorneys' fee award. As a result, the trial court's judgment and the order denying Defendant's motion for a new trial

pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, should be, and hereby are, affirmed; the trial court's attorneys' fee order should be, and hereby is, vacated; and this case should be, and hereby is, remanded to the Alamance County Superior Court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge ELMORE and Judge DAVIS concur.