IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-99

No. COA21-65

Filed 15 February 2022

Wake County, No. 13 CVS 16189

CECIL HOLCOMB RENOVATIONS, INC., and CECIL C. HOLCOMB and EUGENIA W. HOLCOMB, Individually, Plaintiffs,

v.

LAW FIRM OF WILSON & RATLEDGE PLLC; THOMAS J. WILSON, Individually; MICHAEL A. OSTRANDER, Individually; Defendants.

Appeal by Plaintiffs from a judgment and an order entered 20 May 2020 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 November 2020.

Law Office of Matthew I. Van Horn, PLLC, by Matthew I. Van Horn, for Plaintiff-Appellants.

Bailey & Dixon, LLP, by David S. Coats, for Defendant-Appellees.

JACKSON, Judge.

¶ 1 Plaintiffs Cecil Holcomb Renovations, Inc. ("Holcomb Renovations"), Cecil C. Holcomb ("Mr. Holcomb"), and Eugenia W. Holcomb ("Ms. Holcomb") (collectively "Plaintiffs") appeal from a judgment entered on a jury verdict against Plaintiffs and from a separate order taxing costs against Plaintiffs. After careful review, we affirm.

I. Factual and Procedural Background

¶ 2 This appeal arises from Defendants' Counterclaim against Plaintiffs for outstanding legal fees. Plaintiffs' underlying legal malpractice lawsuit against Defendants was dismissed before trial.

¶ 3 Prior to 2011, the Law Firm of Wilson & Ratledge PLLC ("Defendant Law Firm"), and its predecessor firm Wilson & Waller, regularly provided legal services to Plaintiffs. Defendant Thomas J. Wilson worked as the founding partner and manager for Defendant Law Firm. Beginning in 2007, Defendant Law Firm represented Plaintiffs Holcomb Renovations and Mr. Holcomb in litigation against Holly Springs Shopping Center, LLC ("Holly Springs") on breach of contract and fraud claims. Defendant Michael A. Ostrander joined Defendant Law Firm in May 2008 and began working on Mr. Holcomb's cases immediately. Beginning in September 2008, Defendant Law Firm represented Plaintiffs Mr. and Ms. Holcomb in litigation against David Weekley Homes, LP ("Weekley Homes"). The Holly Springs case settled in December 2010 after which Defendants and Mr. Holcomb corresponded about the outstanding fees for the Holly Springs and Weekley Homes cases, among other items. Thereafter, Mr. Holcomb terminated Defendant Law Firm's services in March 2011.

¶ 4 In 2012, Mr. Holcomb filed a grievance with the North Carolina State Bar against Defendants Ostrander and Wilson regarding the Holly Springs and Weekley Homes cases. The grievance was dismissed without merit in November 2013.

¶ 5 On 4 December 2013, Plaintiff Holcomb Renovations filed three *pro se* lawsuits, 13 CVS 16187, 13 CVS 16188, and 13 CVS 16189, against Defendants alleging legal malpractice. After securing legal counsel, on 25 March 2014, Plaintiff Holcomb Renovations filed Amended Complaints and joined Mr. and Ms. Holcomb as parties in 13 CVS 16189. On 22 May 2014, Defendants filed a Counterclaim in 13 CVS 16189 for outstanding fees in eight litigation matters including the Holly Springs case for the principal amount of $40,599.96 and the Weekley Homes case for the principal amount of $12,037.17. On Defendants' motion, Judge Kendra D. Hill struck proposed second Amended Complaints in all three actions on 19 March 2015. Plaintiffs did not file a third Amended Complaint in 13 CVS 16189 and the case proceeded on the allegations in the 25 March 2014 Amended Complaint.

¶ 6 On 4 June 2015, Plaintiffs filed a voluntary dismissal of their claims in 13 CVS 16189, leaving only Defendants' Counterclaim for resolution. On 3 February 2016, Plaintiffs filed a Notice of Substitution of Counsel, replacing James A. Davis with Brian Upchurch. After a series of motions filed by Plaintiffs and Defendants, *see infra*, Mr. Upchurch, who worked for Defendant Law Firm's predecessor Wilson & Waller from 1995 to 2001, was disqualified from serving as Plaintiffs' counsel.

¶ 7 On 7 June 2019, Plaintiffs' current counsel of record entered a Notice of Appearance. Defendants' Counterclaim for outstanding legal fees in 13 CVS 16189 came on for trial beginning 4 September 2019. At the conclusion of the five-day trial,

the jury entered a verdict in favor of Defendants on all claims. On 13 May 2020, the Honorable Bryan G. Collins entered Judgment against Plaintiffs based on the jury verdict, as well as an Order taxing costs against Plaintiffs.

¶ 8 Plaintiffs filed timely notice of appeal on 11 June 2020.

II. Analysis

¶ 9 Plaintiffs raise six arguments on appeal: (1) the trial court erred in disqualifying Mr. Upchurch as counsel for Plaintiffs; (2) the trial court erred in denying Plaintiffs' Motion to Reconsider its order disqualifying Mr. Upchurch as their counsel; (3) the trial court erred in denying Plaintiffs' motion for a directed verdict based on lack of subject matter jurisdiction; (4) the trial court erred in excluding evidence of Defendant Law Firm's billing practices related to Plaintiffs; (5) the trial court erred in entering final judgment on the jury's verdict and ordering Plaintiffs to pay costs; and (6) the trial court erred in entering an order taxing Plaintiffs with Defendants' costs.

A. Disqualification of Upchurch

¶ 10 Plaintiffs' first and second claims involve the disqualification of Mr. Upchurch from serving as counsel for Plaintiffs.

¶ 11 From 1995 to 2001, Mr. Upchurch worked as an associate attorney for Wilson & Waller. Mr. Upchurch was then employed as a general counsel for Tompkins International until 31 December 2013. During his time at Wilson & Waller, Mr.

Upchurch provided legal services to Plaintiffs. In October 2013, Mr. Holcomb contacted Mr. Upchurch regarding his legal malpractice action as Mr. Holcomb had been unable to retain counsel. Mr. Upchurch told Mr. Holcomb

> [he] would look at the documents he was presenting to prospective counsel and listen to his presentation of the facts just to understand what and how he was presenting himself and his complaints with [Defendant Law Firm]'s representation to prospective counsel. The sole purpose was to help him organize his documents and his thoughts to the extent that appeared to be part of the problem.

After conversing with Mr. Holcomb and reviewing the documents, Mr. Upchurch produced a document labeled "Brian Upchurch's Analysis" that Mr. Upchurch described as "a rudimentary narrative of salient facts interspersed with the barest of observations of possible deficits in [Defendant Law Firm]'s legal services." This document was first produced to Defendants during the deposition of an expert for Plaintiffs in October 2015, as it previously had been considered a privileged document by Plaintiffs.

¶ 12 In February 2014, Mr. Upchurch returned to private practice and opened his own firm, Upchurch Law Firm, PLLC. Mr. Holcomb subsequently contacted Mr. Upchurch about an unrelated matter which led to reestablishing an attorney-client relationship. Mr. Upchurch asserts that he did not agree to represent Mr. Holcomb in the legal malpractice action against Defendants despite Mr. Holcomb asking him to do so. On 19 January 2015, Mr. Upchurch and Defendant Wilson met about the

possibility of Mr. Upchurch associating with or joining Defendant Law Firm. At this meeting, Defendant Wilson asserts in his Affidavit that "Mr. Upchurch asked about Mr. Holcomb's suit against [Defendant Law Firm] and whether the case had merit. This resulted in a discussion wherein I briefly assessed the case including the underlying [Holly Springs] settlement which led up to Plaintiff's grievance and, subsequently, this lawsuit." Defendant Wilson adds that Mr. Upchurch did inform him he was representing Mr. Holcomb but that he would not represent Mr. Holcomb in the legal malpractice cases. Mr. Upchurch asserts in his Affidavit that he never asked about the pending legal malpractice suit and that the parties only discussed the case in the context of determining its practical impact on him joining Defendant Law Firm.

¶ 13 On 3 February 2016, Plaintiffs filed a Notice of Substitution of Counsel replacing Mr. Davis with Mr. Upchurch. On 19 February 2016, Defendants filed a Motion to Disqualify Mr. Upchurch from serving as Plaintiffs' counsel. After a stay initiated by Plaintiffs, Judge Paul C. Ridgeway entered an order on 1 November 2017 granting the motion and disqualifying Mr. Upchurch. Plaintiffs filed a Motion to Reconsider the disqualification on 16 November 2017. On 22 December 2017, Plaintiffs filed a Notice of Supplemental Authority citing a recent decision by our Supreme Court, *Worley v. Moore*, 370 N.C. 358, 807 S.E.2d 133 (2017), in which the Court advised that the appearance of impropriety test is the outmoded and incorrect

standard for disqualifying counsel. On 1 March 2018, Judge Ridgeway entered an order amending the 1 November 2017 Order to align with the guidance in *Worley*, but otherwise denying Plaintiffs' Motion to Reconsider and ordering Mr. Upchurch to withdraw from the litigation.

¶ 14 On 19 July 2018, Plaintiffs filed an untimely notice of appeal from the 1 November 2017 Order disqualifying Mr. Upchurch and the 1 March 2018 Order denying Plaintiff's Motion to Reconsider the disqualification. Defendants filed a Motion to Dismiss Appeal on 23 August 2018. The appeal was dismissed on 2 October 2018 by Judge Rebecca W. Holt on the basis that Plaintiffs violated North Carolina Rules of Appellate Procedure Rules 3, 7, and 11.

¶ 15 Plaintiffs' first claim, that the trial court erred in disqualifying Mr. Upchurch in the initial 1 November 2017 Order, is rendered moot as the trial court entered an amended order on 1 March 2018 utilizing the correct test for disqualification. While the initial order relied on the outmoded appearance of impropriety test to disqualify Mr. Upchurch, the amended order applied the North Carolina Rules of Professional Conduct standard for disqualification as instructed by the Court in *Worley*. Accordingly, we will only consider Plaintiffs' second claim that the trial court erred in denying Plaintiffs' Motion to Reconsider the disqualification.

¶ 16 We review the denial of a motion to reconsider to determine whether the trial court abused its discretion. *Lorbacher v. Housing Auth.*, 127 N.C. App. 663, 671, 493

S.E.2d 74, 79 (1997). Additionally, "[t]his court has stated absent a showing of an abuse of discretion, a decision regarding whether to disqualify counsel is discretionary with the trial judge and is not generally reviewable on appeal." *Ferguson v. DDP Pharm., Inc.*, 174 N.C. App. 532, 535, 621 S.E.2d 323, 326 (2005) (internal quotation and citation omitted).

¶ 17 In the 1 March 2018 amended order, the trial court replaced paragraphs 17 and 18 of the initial order with the following:

> 17. Even accepting that Upchurch did not consider himself to be Plaintiffs' lawyer because he prepared the written analysis of claims gratuitously or to help a friend, and had no expectation of further involvement in the bar grievance or litigation, the fact that Upchurch had taken on the role of a legal advisor to Plaintiffs, had counseled Plaintiffs specifically about the legal and factual basis of their claim against the Defendants, had drafted a detailed analysis of potential claims Plaintiffs could assert against Defendants, and that the Plaintiffs viewed Upchurch's document to be a privileged attorney-client communication, all lead to the inescapable conclusion that Upchurch acted, in fact, as the lawyer for the Plaintiffs. Therefore, his January 19, 2015 conversation about the pending litigation with Defendant Wilson, who Upchurch knew or could infer from the circumstances to be represented by counsel, was in violation of Rule 4.2 of the Rules of Professional Conduct.
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> 18. For this reason, because the Court has concluded that Rule 4.2 of the Rules of Professional Conduct has been violated, and taking into account that the purpose of Rule 4.2 is to aid in the "proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other

> lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation," the Court concludes that the appropriate remedy, and the only remedy available that will ensure that any information learned by Upchurch at the January 19, 2015 meeting will not be used to the disadvantage of the Defendants, is to disqualify Upchurch from further representation of Plaintiffs in this case.

Because the trial court premised its disqualification in the amended order on Rule 4.2 of the North Carolina Rules of Professional Conduct, we first review the trial court's determination that an attorney-client relationship existed between Plaintiffs and Mr. Upchurch in January 2015.

¶ 18 The existence of an attorney-client relationship "is a question of fact for the trial court and 'our appellate courts are bound by the trial court's findings of fact where there is some evidence to support these findings, even though the evidence might sustain findings to the contrary.'" *Cornelius v. Helms*, 120 N.C. App. 172, 175, 461 S.E.2d 338, 339-40 (1995) (quoting *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984)). "[A]n attorney-client relationship is formed when a client communicates with an attorney in confidence seeking legal advice regarding a specific claim and with an intent to form an attorney-client relationship." *Raymond v. N.C. Police Benevolent Ass'n*, 365 N.C. 94, 98, 721 S.E.2d 923, 926 (2011). "[T]he relation of attorney and client may be implied from the conduct of the parties, and is not dependent on payment of a fee, nor upon the execution of a formal contract." *N.C.*

State Bar v. Sheffield, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482 (1985). Formation of an attorney-client relationship does not require "an express verbal agreement" but can be reasonably inferred from the conduct of parties. *Id.*

¶ 19 Mr. Upchurch states in his Affidavit that "[n]o attorney-client relationship was intended or formed with Plaintiffs and no compensation was paid or even considered[]" when he prepared the Upchurch Analysis. However, the Upchurch Analysis contains more than seventeen paragraphs of factual narrative and concludes with a list of thirteen "Attorney's shortcomings." After drafting the Analysis, Mr. Upchurch later formally reestablished an attorney-client relationship with Plaintiffs in 2014. Noting his advisement on Plaintiffs' specific legal malpractice claims against Defendants and the existence of a formal attorney-client relationship between Mr. Upchurch and Plaintiffs, albeit on other matters, there was at least some evidence to support the trial court's finding that "Upchurch acted, in fact, as the lawyer for the Plaintiffs" in January 2015.

¶ 20 Next, we examine the trial court's conclusion that Rule 4.2 was violated. Rule 4.2 mandates that

> [d]uring the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court

order.

N.C. R. Prof. Conduct, R. 4.2(a). Given that Mr. Holcomb asked Mr. Upchurch to represent him in the legal malpractice action against Defendants in 2014, Mr. Upchurch knew or reasonably should have known that Defendant Wilson was represented by counsel in this case as of January 2015. Therefore, Mr. Upchurch should not have engaged in discussion of Plaintiffs' legal malpractice action with Defendant Wilson at their meeting regardless of whether he asked Defendant Wilson directly about the litigation or they discussed the case generally in relation to his joining Defendant Law Firm. Such communication in these circumstances violates Rule 4.2. Accordingly, we hold that the trial court did not abuse its discretion in disqualifying Mr. Upchurch from serving as Plaintiffs' counsel based on a Rule 4.2 violation.

B. Subject Matter Jurisdiction

¶ 21 Plaintiffs' third argument is that the trial court erred in denying Plaintiffs' motion for a directed verdict based on the court's lack of subject matter jurisdiction. Specifically, Plaintiffs contend Defendant Law Firm failed to notify Plaintiffs of the North Carolina State Bar's fee dispute resolution program and that compliance with the program is a prerequisite to the trial court assuming jurisdiction over the litigation. We disagree.

¶ 22 "The standard of review of directed verdict is whether the evidence, taken in

the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). "The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent. A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including for the first time upon appeal. We review questions of law de novo." *In re N.P.*, 376 N.C. 729, 731, 2021-NCSC-11, ¶5 (cleaned up).

¶ 23 At trial, after Defendants rested their case-in-chief and prior to Plaintiffs' presentation of evidence, Plaintiffs moved for a directed verdict in part on the basis "[Defendant Law Firm] did not provide [Plaintiffs] the letter required by the – under the fee dispute resolution regulation" and that "the court lacks jurisdiction until it's resolved by the fee dispute committee." The trial court denied the motion, ruling "as a matter of law that you don't have to send this fee dispute notification if you're counterclaiming in a malpractice suit."

¶ 24 North Carolina Rule of Professional Conduct 1.5(f)(1) states:

> Any lawyer having a dispute with a client regarding a fee for legal services must at least 30 days prior to initiating legal proceedings to collect a disputed fee, notify his or her client in writing of the existence of the North Carolina State Bar's program of fee dispute resolution; the notice shall state that if the client does not file a petition for resolution of the disputed fee with the State Bar within 30 days of the lawyer's notification, the lawyer may initiate legal proceedings to collect the disputed fee[.]

N.C. R. Pro. Conduct 1.5(f)(1). The official commentary to Rule 1.5 directs that "[b]efore filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program." *Id.* cmt. 10. The North Carolina Administrative Code section governing fee dispute resolution further illuminates the notice requirement outlined in Rule 1.5(f)(1):

> A lawyer is required by Rule of Professional Conduct 1.5 to notify in writing a client with whom the lawyer has a dispute over a fee (i) of the existence of the Fee Dispute Resolution Program and (ii) that if the client does not file a petition for fee dispute resolution within 30 days after the client receives such notification, the lawyer will be permitted by Rule of Professional Conduct 1.5 to file a lawsuit to collect the disputed fee. A lawyer may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client only if such filing is necessary to preserve a claim. If a lawyer does file a lawsuit pursuant to the preceding sentence, the lawyer must not take steps to pursue the litigation until the fee dispute resolution process is completed.

27 N.C. Admin. Code 1D.0707(a) (2021).

¶ 25 "When construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction." *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (internal citations omitted). The language of 27 N.C. Admin. Code 1D.0707(a) is clear and unambiguous and thus we apply the plain meaning of the words. Per the terms of

section 1D.0707(a), a lawyer can file a lawsuit to collect a disputed fee only after notifying the client of the fee dispute resolution program and the client does not file a petition for fee dispute resolution within 30 days. This interpretation tracks the language of Rule 1.5(f)(1) that a lawyer must notify the client of the fee dispute resolution program "prior to initiating legal proceedings to collect a disputed fee." These words plainly indicate that in a dispute over fees, before a lawyer can initiate a lawsuit to collect the disputed fees, the lawyer must give the client notice of the fee dispute resolution program. Neither Rule 1.5(f)(1) nor section 1D.0707(a) includes any reference to or requirement that a lawyer must give notice when the client initiates a lawsuit against the lawyer and the lawyer files a counterclaim to collect disputed fees.

¶ 26 Additionally, in a legal malpractice suit brought by a client, a counterclaim by the lawyer for outstanding fees in the underlying case will likely be compulsory. A compulsory counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presences of third parties of whom the court cannot acquire jurisdiction." N.C. Gen. Stat. § 1A-1, Rule 13(a) (2021). North Carolina courts examine three factors to determine if claims arose out of the same transaction or occurrence: "(1) whether the issues of fact and law raised by the claim and counterclaim are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any

logical relationship exists between the two claims." *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 599-600, 614 S.E.2d 268, 272 (2005) (internal marks and citation omitted). "[A]bsent a specific statutory or judicially determined exception, a party's failure to interpose a compulsory counterclaim in an action that has been fully litigated bars assertion of that claim in any subsequent action." *Id.* at 597, 614 S.E.2d at 271 (internal citation omitted).

¶ 27 A logical relationship exists between a claim of legal malpractice and a claim for outstanding legal fees arising from the same underlying case. The same evidence regarding legal services rendered and the cost of those services will likely bear, at least in part, on both claims. There also may be similar issues of fact and law raised by the claims. Accordingly, we agree with the trial court's interpretation of Rule 1.5(f)(1) and section 1D.0707(a) and hold specifically that lawyers do not have to notice the fee dispute resolution program when filing a compulsory counterclaim to collect disputed fees from the client in a legal malpractice suit initiated by a client.

¶ 28 Here, Plaintiffs, the clients, initiated the litigation and Defendants, the lawyers, filed compulsory counterclaims to collect fees from Plaintiffs. Defendants did not initiate legal proceedings to collect the disputed fees. Rather, Defendants filed counterclaims for outstanding legal fees in the Holly Springs and Weekley Homes cases as well as other matters, all of which were the subject of Plaintiffs' legal malpractice suit. Accordingly, the requirements set forth in Rule 1.5(f)(1) and section

1D.0707(a) that a lawyer must notify the client of the fee dispute resolution program before filing a lawsuit do not apply to the case at bar. Defendants did not need to notify Plaintiffs of the fee dispute resolution program before or after filing their compulsory counterclaim. Therefore, the trial court had subject matter jurisdiction and correctly denied Plaintiffs' motion for a directed verdict.

C. Evidence of Law Firm's Billing Practices

¶ 29 Plaintiffs' fourth argument is that the trial court erred in excluding evidence of Defendant Law Firm's billing practices as they related to Plaintiffs. We disagree.

¶ 30 On recross-examination of Defendant Wilson, Plaintiffs attempted to introduce thirteen exhibits, six of which supposedly referenced billing between Defendant Law Firm and Plaintiffs. After excluding a few documents, the trial court directed Plaintiffs' counsel to conduct a *voir dire* with Defendant Wilson on an internal memo addressed to Defendant Wilson offered as Plaintiffs' Exhibit 1. Exhibit 1 had a Bates number ("WR-01444") presumably from Defendant Law Firm. Defendant Wilson testified that he did not know who wrote the memo but it may have been Defendant Ostrander, the handwritten date was not his handwriting, and he did not recall seeing the memo prior to this litigation commencing. The trial court excluded Exhibit 1 stating, "it's not authenticated." The trial court ultimately excluded all of Plaintiffs' offered exhibits "for various reasons, mostly because they're not in the pretrial order, and they weren't provided to the clerk before the trial, and they're mostly outside the

scope of redirect examination."

¶ 31 "On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006) (cleaned up). "The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred." *Forsyth Cnty. v. Shelton*, 74 N.C. App. 674, 678, 329 S.E.2d 730, 734 (1985).

¶ 32 Plaintiffs argue that Plaintiffs' Exhibits 1 – 6 were self-authenticating under Rule of Evidence 902(8). Regarding a trial court's determination of authenticity, there appears to be a conflict in our caselaw as to whether the appropriate standard of review is abuse of discretion or *de novo*. *See In re Lucks*, 369 N.C. 222, 231, 794 S.E.2d 501, 508 (2016) (Hudson, J., concurring). In this case, we do not decide which standard of review should apply as the result under either standard would be the same.

¶ 33 Rule 902(8) states that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . [d]ocuments accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments."

N.C. Gen. Stat. § 8C-1, R. 902(8) (2021). Even assuming Exhibits 1 – 6 were produced by Defendant Law Firm during discovery and acknowledging that they are marked with a Bates number containing Defendant Law Firm's initials "WR," these circumstances do not satisfy the requirements of self-authentication within the meaning of Rule 902(8). Accordingly, Exhibits 1 – 6 would have to satisfy the general requirements of authenticity under Rule 901 of the North Carolina Rules of Evidence to be admissible.

¶ 34 Under Rule 901, a document may be authenticated by various methods including "[t]estimony that a matter is what it is claimed to be[]" or "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." N.C. Gen. Stat. § 8C-1, R. 901(b)(1), (4) (2021). Specifically examining Exhibit 1, Defendant Wilson's testimony during *voir dire* did not provide proper authentication that Exhibit 1 was what it claimed to be. In response to who authored the memo, Defendant Wilson testified that it could have been Defendant Ostrander "[b]ut then, when I first looked at it, I looked and see it included in the first bullet, included M.A.O.'s time. So since it was a third party, it didn't say my time. I just don't know." Defendant Wilson also testified that the handwriting on the memo was not his and that before that day he had only seen the document "going through an exhibit notebook." The characteristics of Exhibit 1 also do not provide proper authentication. Beyond the Bates number, the memo is not on

Defendant Law Firm letterhead and there is no author's name or signature. While the memo mentions "Cecil" and the "Holly Springs Shopping Center case," in conjunction with the circumstances, the appearance, internal patterns, and lack of distinctive characteristics are not sufficient for proper authentication. Accordingly, the trial court did not err in excluding Exhibit 1 on the grounds it was not authenticated.

¶ 35 Additionally, if Exhibit 1 was not authenticated under Rule 901(4), then an exhibit like Exhibit 6 could not be authenticated by its appearance, contents, substance, internal patterns, or other distinctive characteristics. Exhibit 6 is an unlabeled photocopy of a handwritten note which may or may not display the word 'contingency.' Other than the Bates number, there is no reference on Exhibit 6 to Plaintiffs, Holly Springs, or Weekley Homes, and there is no date or author's name. There is nothing about its appearance, contents, or distinctive characteristics that in conjunction with the circumstances support proper authentication. Accordingly, the trial court did not err in excluding Exhibit 6.

¶ 36 Assuming, arguendo, that Plaintiffs could have authenticated Exhibits 2 – 5, these exhibits were properly ruled outside the scope of recross-examination. Plaintiffs contend that these exhibits were permissibly within the scope of recross-examination as they relate to the issue of whether Defendant Law Firm agreed to bill Plaintiffs on a contingency basis for some of the litigation matters at issue. As

Defendants' counsel highlighted at trial, however, Exhibits 2 – 5 do not appear to reference contingency fees at all. Exhibits 2 – 5 are three invoices and a prebill that include some handwritten notes, none of which contain the word 'contingency.' Accordingly, the trial court properly excluded these exhibits as outside the scope of recross-examination.

¶ 37 Lastly, we note that in their brief, Defendants assert Exhibit 1 was excluded in part on Rule 403 grounds and argue that basis on appeal. Plaintiffs are correct in their response that the trial court did not rely on Rule 403 in ruling to exclude the exhibits. While Defendants did not object to the exhibits on Rule 403 grounds at trial and thus waived that argument for appeal, Defendants did object on the basis of the exhibits being beyond the scope of recross-examination, authentication, and the lack of mention in the pretrial order. The trial court properly excluded the exhibits on those grounds and thus Rule 403 is not dispositive in this case.

D. Final Judgment and Order

¶ 38 Plaintiffs' fifth argument is that the trial court erred in entering final judgment on the jury's verdict and ordering Plaintiffs to pay costs, and sixth argument is that the trial court erred in entering an order taxing Plaintiffs with Defendants' costs. Although Plaintiffs did not provide full briefing on these claims, we nevertheless briefly review each argument and affirm the trial court's proper entry of the Judgment and the Order taxing costs.

¶ 39 Plaintiffs argue that for the cumulative reasons stated in their first through fourth arguments, "the trial court's errors were of such importance and magnitude" that the jury's verdict cannot stand and must be set aside. "On appeal, the standard of review for a [judgment nonwithstanding the verdict] is the same as that for a directed verdict, that is whether the evidence was sufficient [as a matter of law] to go to the jury." *King v. Brooks*, 224 N.C. App. 315, 317-18, 736 S.E.2d 788, 791 (2012).

¶ 40 Here, for the reasons outlined above and after reviewing the transcript and record, the evidence presented at trial was sufficient to go to the jury. The trial court properly excluded Plaintiffs' Exhibits 1 – 6 and Defendants presented sufficient evidence of the outstanding fees owed by Plaintiffs in the Holly Springs and Weekley Homes cases, as well as the other litigation matters, to submit the case to the jury. The trial court therefore properly entered judgment on the jury's subsequent verdict.

¶ 41 Plaintiffs argue that for the cumulative reasons stated in their first through fourth arguments, "the trial court did not properly interpret the underlying statutes and law applicable to costs in the context of the issues involved in this case." "Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion." *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011) (internal citation omitted).

¶ 42 The trial court taxed costs against Plaintiffs pursuant to N.C. Gen. Stat. § 7A-

305(d). Section 7A-305(d) lists the expenses that are recoverable for the party to whom judgment is given and limits the trial court's discretion to the enumerated costs. N.C. Gen. Stat. § 7A-305(d) (2021). *See also id.* § 6-1, -20. Defendants requested the trial court to tax costs against Plaintiffs for mediation, deposition, and expert witness expenses. All of those expenses are listed in § 7A-305(d). Accordingly, the trial court properly interpreted the statutory framework applicable to costs and ordered Plaintiffs to pay the reasonable and necessary costs incurred by Defendants.

III. Conclusion

¶ 43 For the foregoing reasons, we conclude that the trial court did not err in disqualifying Mr. Upchurch from serving as Plaintiffs' counsel, that the trial court had subject matter jurisdiction over the case and thus properly denied Plaintiffs' motion for a directed verdict, that the trial court did not err in excluding the exhibits offered by Plaintiffs, and that the trial court properly entered final judgment against Plaintiffs and properly ordered Plaintiffs to pay costs.

AFFIRMED.

Judge MURPHY concurs in part and concurs in result only as to Part II-B.

Judge GRIFFIN concurs.

Report per Rule 30(e).