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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-277

No. COA21-223

Filed 19 April 2022

Forsyth County, No. 15 CVS 668

SOUTHEAST CAISSONS, LLC, Plaintiff,

v.

CHOATE CONSTRUCTION COMPANY, CHOATE CONSTRUCTION GROUP, LLC, and FALCON ENGINEERING, INC, Defendants.

Appeal by Plaintiff from Order entered 31 June 2019 and Judgment entered 15 November 2019 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 25 January 2022.

Randolph M. James, P.C., by Randolph M. James, for Plaintiff-Appellant.

Johnston, Allison & Hord, P.A., by Robert L. Burchette and David V. Brennan, and Pharr Law, PLLC, by Steve M. Pharr and Kyle Leopard, for Defendants-Appellees Choate Construction Co. and Choate Construction Group, LLC.

Hamilton, Stephens, Steele, & Martin, PLLC, by Adrianne Chillemi, Kenneth Dantinne, and Sarah J. Sawyer, for Defendant-Appellee Falcon Engineering, Inc.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Southeast Caissons, LLC, (Plaintiff) appeals from Order granting Falcon Engineering, Inc.'s (Falcon) Motion for Summary Judgment and Judgment dismissing Plaintiff's claims against Choate Construction Company and Choate Construction Group, LLC, (collectively Choate) following a jury trial and verdict in favor of Choate. The Record tends to reflect the following:

¶ 2 Choate is a general contractor who entered into a contract (Prime Contract) with the Trustees of Wake Technical Community College (Owner) for the construction of a 174,000 square foot concrete parking deck (Project) on 28 July 2011. The Owner also contracted with BBH Design P.A. (BBH) to act as the Project's architect and with Kimley-Horn and Associates, Inc. (KHA) to act as the Project's structural engineer.[1] Subsequently, BBH subcontracted with Falcon for design-stage geotechnical investigation, field quality control, and special inspections of the Caisson Work. BBH specified the Project's scope which included deep foundations with forty-two shafts drilled to competent bearing material and reinforced cast-in-place concrete caissons or piers installed in the shafts to support the weight of the deck (Caisson Work). Subsequently, the Owner contracted directly with Falcon to evaluate bearing

[1] Plaintiff named BBH and KHA as defendants in its Complaint filed 6 February 2015. Plaintiff dismissed the claims against BBH and KHA in June 2015, then refiled claims against them in a separate action on 29 July 2016. The trial court consolidated the re-filed claims with this action on 28 November 2016. Subsequently, Plaintiff dismissed its claims against these parties again on 16 February 2018.

capacity; observe drilling operations; and record drilled pier dimensions, reinforcement, and rock bearing materials. Falcon was required to prepare Drilled Shaft Inspection Reports (Inspection Reports) for each drilled pier.

¶ 3 Plaintiff, a subcontractor, submitted a bid to Choate for the Caisson Work on 30 June 2011 (Bid Proposal). Plaintiff's Bid Proposal included a payment schedule in which the payment for drilling in "rock" or "not in soil" is higher than drilling in soil. Plaintiff defined "rock" or "not in soil" as augur refusal or when a drill advances no more than two inches in five minutes with full torque and crowd force of the rig being applied.[2] However, the Prime Contract called for a bid with a payment schedule that did not distinguish between drilling in soil or rock (not in soil), and instead used one set price for drilling to design depths, regardless of the type of material being drilled. Plaintiff was not the lowest bidder for the Caisson Work, and Choate did not award them the subcontract.

¶ 4 In August 2011, Choate learned the lowest bidder for the Caisson Work could not perform the work in accordance with the project schedule, and on 26 August 2011 Plaintiff met with Choate to discuss the scope of the Caisson Work. At the meeting, Plaintiff requested that Choate send a formal subcontract to them for the Caisson

[2] The evidence reflected that the term "full crowd force" refers to the application of the drill rig's full capabilities of downward force and torque (twisting force), which it can only do for a short period of time before the equipment begins to break.

Work. Subsequently, on 6 October 2011, Choate sent Plaintiff the formal subcontract, (October Subcontract) which did not incorporate the terms, conditions, and exclusions included in Plaintiff's Bid Proposal. Specifically, the October Subcontract, in accordance with the Prime Contract, used one set price for drilling in soil and rock/not in soil instead of using a higher price for drilling in rock. Plaintiff did not sign the October Subcontract, and instead, attempted to negotiate the terms of the subcontract over the ensuing months.

¶ 5 On 24 October 2011, Plaintiff attended a pre-drilling meeting with representatives of Choate, Falcon, the Owner, BBH, and KHA. At the pre-drill meeting the parties discussed the Caisson Work, including the process for how it would be determined the shafts had reached competent bearing material. The parties agreed the shafts were to be drilled until hitting hard rock, at which point, Falcon would inspect the bottom of the drilled shaft to confirm the shaft was on hard rock that was suitable bearing material. During the meeting, Plaintiff inquired about when it would be a paid a higher rock unit rate, as opposed to a soil unit rate, but was informed that only under limited circumstances would further drilling be necessary or required once the drill reached rock.

¶ 6 After the meeting, on 26 October 2011, Plaintiff emailed Choate an addendum of nineteen modifications to the October Subcontract. In the email Plaintiff stated: "[Plaintiff] hereby accepts the terms of the attached Subcontract, subject to and

conditioned upon [Choate's] acceptance of the terms set forth in this Addendum[.]" These modifications affected terms, including *inter alia*, payment terms, when rock unit rates would apply, and the rock qualification procedure. Choate did not accept the modified terms of the October Subcontract and the parties continued to engage in conversations attempting to negotiate the terms. Choate represented to Plaintiff that it required a signed subcontract prior to beginning work; however, Plaintiff began the Caisson Work on 7 November 2011 without any written subcontract agreement in place.

¶ 7 In January 2012, contract negotiations broke down between the parties. Plaintiff claimed it had drilled through large quantities of rock and demanded additional compensation. On or about 22 March 2012 after Plaintiff had finished the drilling work, Choate paid Plaintiff $207,085.00 pursuant to the terms of the October Subcontract. Choate also submitted a request to the Owner for Plaintiff's alleged additional costs associated with purported drilled-in-rock quantities occurring below design depth elevations. The Owner rejected the request for additional payment.

¶ 8 Following the completion of the Caisson Work, Plaintiff filed a Complaint on 23 February 2015 in Forsyth County Superior Court. In the Complaint, Plaintiff asserted claims for relief against Choate for breach of contract, quantum meruit, fraud, and unfair and deceptive trade practices. Plaintiff also asserted a negligence claim against Falcon, alleging Falcon "discontinue[d] the measurement of auger

refusal on its field drilled shaft reports" thereby "arbitrarily and capriciously denying Plaintiff's rock pay." This corresponded with Plaintiff's allegation that auger refusal was the applicable measurement for when Plaintiff was entitled to additional payment for drilling in rock under its "agreement" with Choate.

¶ 9 Subsequently, on 7 May 2015, Choate filed a Motion to Dismiss or Alternatively for Change of Venue, Answer, Counterclaims, and Crossclaims (Venue Motion). In support of the Venue Motion, Choate alleged Article X.I.A. of the October Subcontract required Plaintiff to file and serve a demand for arbitration within thirty days following Plaintiff's receipt of the decision to deny additional compensation, and Article X of the October Subcontract required any subsequent litigation to be initiated in Wake County. In the Venue Motion, Choate also crossclaimed against Plaintiff for breach of contract alleging Plaintiff "failed to provide skilled workers and operators, failed to prosecute its work in accordance with the [October Subcontract] and custom and practice in the industry for drilling contractors of the experience level represented by [Plaintiff]."

¶ 10 On 10 August 2015 the trial court entered an Order denying the Venue Motion, and Choate appealed the denial to this Court. This Court affirmed the trial court's Order on 19 April 2016, concluding the parties did not reach mutual assent on the terms of the October Subcontract, including the venue selection provision. *Se. Caissons, LLC v. Choate Const. Co. et al*, 247 N.C. App. 104, 784 S.E.2d 650 (2016).

Subsequently, on 23 August 2017, Plaintiff voluntarily dismissed, without prejudice, its quantum meruit claim against Choate despite the trial court's warning that withdrawing the quantum meruit claim, leaves Plaintiff without an alternative claim in the event Plaintiff failed to prove the parties came to an agreement as to payment terms.

¶ 11 On 14 May 2019, Falcon and Choate filed Motions for Summary Judgment, and the Motions came on for hearing on 14 June 2019. In support of its Motion for Summary Judgment, Falcon contended pursuant to the Owner/Falcon Agreement, Falcon was not required to record augur refusal in its Inspection Reports. Falcon acknowledged it had noted augur refusal on a few Inspection Reports but discontinued the use because Falcon's inspectors determined Plaintiff was not actually demonstrating true auger refusal. Furthermore, the Owner/Falcon Agreement did not confer upon it a duty to record or observe an entitlement to rock pay based on auger refusal. The trial court entered an Order granting Falcon's Motion for Summary Judgment on 31 June 2019. However, the trial court entered an Order denying Choate's Motion for Summary Judgment ruling there were genuine issues of material fact to be determined at trial.

¶ 12 Prior to trial, on 15 July 2019, Choate filed four Motions *In Limine* including: First Motion *In Limine* to Exclude Testimony of Plaintiff's Designated Expert, Second Motion *In Limine* to Exclude Audio and Video Recordings (Second Motion *In Limine*),

Third Motion *In Limine* to Exclude Deposition Video and Transcript of Deponents M. Dwayne Durham and Nick Parker (Third Motion *In Limine*), and Fourth Motion *In Limine* Concerning Prior Court of Appeals' Opinion (Fourth Motion *In Limine*).

¶ 13 In support of the Third Motion *In Limine*, Choate alleged during the depositions of Choate employees, M. Dwayne Durham and Nick Parker, Plaintiff used smartphone recordings from telephone conversations, project meetings, and conversations that occurred on-site during the Project over Choate's objection. Plaintiff did not produce the recordings prior to the depositions despite Choate's previous discovery requests for their production. Furthermore, the court reporter did not record the portions of the audio recording played for the deponents, and instead, the transcript merely states "Playing Recording" during the times Plaintiff played the recordings. Thus, Choate alleged it was impossible to determine from the deposition transcripts the actual content of the recordings to which the deponents were responding. Additionally, after the depositions and prior to trial, M. Dwayne Durham, suffered a fatal cardiac event.

¶ 14 The trial court granted in part and denied in part Choate's Third Motion *In Limine*. The trial court ordered Plaintiff not to use any portion of Mr. Durham's deposition "in which recorded audio of him was played, nor . . . use at trial any portion of his deposition that seeks to have him answer questions directly related to the audio recordings." However, the trial court permitted Plaintiff to use the portions of the

deposition that are not directly related to the audio recordings. The trial court based this conclusion on its Findings that Choate was denied the opportunity to prepare Mr. Durham regarding the content of the audio files and Choate could not "redepose" Mr. Durham because the recordings were not produced to Choate before Mr. Durham's deposition or before his death less than two months after the deposition. Thus, the trial court concluded that after engaging in the balancing test, pursuant to Rule 403, "it would be unfairly prejudicial to Choate, and confusing to the jury," to use these portions of the transcript.

¶ 15 In the Fourth Motion *In Limine*, Choate sought to preclude Plaintiff "from making comments, references, and/or characterizations to the jury concerning the Court of Appeal's Opinion." Additionally, Choate sought to preclude Plaintiff from arguing at trial that "the law of the case doctrine prevented [Choate] from presenting evidence to the jury that the parties explicitly intended for many of the terms located within the unexecuted written subcontract agreement to govern their relationship and the performance of the project work."

¶ 16 In response to Choate's Fourth Motion *In Limine*, Plaintiff filed Motion *In Limine* twenty-seven to "exclude testimony, evidence, reference to, or argument from Choate's counsel and witnesses regarding the issue of whether the Choate [October Subcontract] was binding on the parties . . . ." In support of this Motion, Plaintiff argued Choate should not be permitted to re-litigate the issue of whether the October

Subcontract was binding on the parties because that issue had already been decided by the Court of Appeals, and therefore, Choate's argument was barred by the law of the case doctrine.

¶ 17 The trial court heard argument on Choate's Fourth Motion *In Limine* and Plaintiff's Motion *In Limine* twenty-seven before the start of the trial, on 29 July 2019. Choate argued the Court of Appeal's Opinion did not prevent them from testifying as to what they thought the contract was, and that ultimately, the jury would have to decide if there was a contract. Plaintiff responded they were not seeking to exclude Choate from presenting arguments or evidence of the subcontract documents sent back and forth to show what they thought was the binding contract, but rather, sought to bar Choate from arguing to the jury the October Subcontract was actually binding on the parties. The trial court concluded Choate could present arguments and evidence as "to the documents that were being exchanged and that could have formed or were being proposed as part of the contract issue."

¶ 18 Following the hearing on the pre-trial motions, the trial began and both parties presented evidence. At the conclusion of the trial, Plaintiff moved for a directed verdict on Choate's crossclaim for breach of contract. Plaintiff argued it was entitled to a directed verdict because "Choate failed to show any evidence of an implied contract" and "admitted that no terms contained in the written subcontract document issued to Plaintiff were intended by Choate to be severable or independently binding,

in the absence of contract formation as to the entirety of the written subcontract document." The trial court denied the Motion finding there was evidence to submit the case to the jury on the questions of whether there was a contract, and if there was, whether the terms were governed by the October Subcontract or a combination of the terms in the October Subcontract and Plaintiff's addendums.

¶ 19 After the trial court denied the Motion for Directed Verdict, the parties submitted proposed jury instructions. As to the issue of contract formation, Plaintiff submitted special written instructions regarding "Intended, But Unexpressed Terms" and "All Material Terms Agreed." These special written instructions mimicked the pattern jury instructions, but also included the following statements of law:

> (i) "Often a subcontractor submits a bid for the prime contractor's use in obtaining the principal contract; the latter's acceptance of the bid may consummate the subcontract even though it is not reduced to a formal instrument as was contemplated; the terms may be sufficiently definite and complete." 1 A. Corbin, Contracts § 30, at 100-03 (1963); (ii)"The parties failure to reach agreement on the written subcontract does not preclude the conclusion that an express contract existed." *Industrial & Textile Piping, Inc. v. Indus. Rigging Servs., Inc.*, 69 N.C. App. 511 (1984); and (iii) material contract term could be determined from multiple sources, including meetings and industry standards.

¶ 20 Nevertheless, the trial court did not include the statements of law proposed by Plaintiff in the jury instructions, and instead, instructed the jury consistent with the North Carolina Pattern Instruction on offer and acceptance. Additionally, the trial court explained to the jury Plaintiff contends, and Choate denies, that the parties:

> entered into an express or implied contract the terms of which were comprised of any agreement from the scope meeting held in late August 2011, [Plaintiff's] bid, Choate's emailed notice of intent . . . dated September 2, 2011, and any agreements reached at the predrill installation meeting held on October 24, 2011.

The trial court then gave the jury an instruction regarding express or implied contracts:

> If the parties have expressed an agreement as to payment terms and tasks to be performed, written or verbal, the contract may be an express contract. However, should you find that the parties failed to reach an express agreement, then the plaintiff's contract may be established through the parties conduct. . . . a contract implied in fact arises when the intentions of the parties is not expressed but an agreement of fact creating an obligation is implied or presumed from their acts or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and common understanding of men, show a mutual intent to contract.

¶ 21 On 28 August 2019 the jury returned a verdict finding Plaintiff did not enter into a contract with Choate; Plaintiff was not damaged by the fraud of Choate; Choate did not agree to or acquiesce to the changing of the term auger refusal in conjunction with others to try to avoid payment of drilled-in rock per agreed-upon terms; Choate did not agree or acquiesce to a false suggestion that full crowd had not been applied as a way to avoid payment to Plaintiff for drilled-in rock; Choate did make untruthful promises of payment to Plaintiff to convince Plaintiff to continue and complete their work on the project after learning that Plaintiff claimed drilled in rock quantities; and Choate's conduct was not in commerce nor did it affect commerce.

¶ 22 On 15 November 2019 the trial court entered final Judgment dismissing Plaintiff's claims against Choate and Choate's counterclaim against Plaintiff. Plaintiff filed Notice of Appeal on 12 December 2019.

Issues

¶ 23 The issues on appeal are whether: (I) the trial court erred in granting Falcon's Motion for Summary Judgment; (II) the trial court erred in excluding portions of the testimony and recordings of Dwayne Durham; (III) the trial court erred in granting Choate's Fourth Motion *In Limine*; (IV) the trial court erred in granting a Directed Verdict on Choate's Counterclaim; and (V) the trial court erred in instructing the jury consistent with the pattern jury instructions.

Analysis

I. Motion for Summary Judgment

¶ 24 Plaintiff contends the trial court erred by granting Falcon's Motion for Summary Judgment because Plaintiff demonstrated genuine issues of material fact on its claims against Falcon for negligence and bad faith. "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

A. Negligence

Plaintiff contends it "demonstrated genuine issues of material fact that Falcon breached its duties of care by, *inter alia*: (i) arbitrarily changing the term [augur refusal] to [partially weathered rock] on its drill logs more than halfway through the Project; and (iv) failing to record on its drill logs any issues with Plaintiff's qualification of augur refusal if Falcon truly believed such issues existed."

"Whether there is a duty owed by one person to another to use care, and, if so, the degree of care required, depends upon the relationship of the parties one to the other." *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 140, 146 S.E.2d 53, 60 (1966). Historically, the parties were required to be in privity of contract, or an intended beneficiary of the contract, in order for this duty to arise amongst contractors working on a construction project. *See e.g.*, *McKinney Drilling Co. v. Nello L. Teer Co.*, 38 N.C. App. 472, 476, 248 S.E.2d 444, 447 (1978); *Durham v. Reidsville Engineering*, 255 N.C. 98, 102, 120 S.E.2d 564, 567 (1966).

¶ 25 For example, in *McKinney Drilling Co. v. Nello Teer Co.*, the plaintiff, a caisson subcontractor responsible for drilling and excavating for foundation caissons, attempted to bring a claim of negligence against the engineering subcontractor responsible for on-the-site inspections and supervision to assure that the caisson foundations excavated met the weight bearing capacity requirements called for in the plans and specifications. 38 N.C. App. at 474, 248 S.E.2d at 446. The dispute arose when the engineering subcontractor advised the general contractor to require the

plaintiff to continue drilling beyond the requirements of plans and specifications. *Id.* The general contractor submitted a claim to the owner for additional compensation for the cost of the additional excavation, but the request was denied because the additional excavation was outside the boundaries of the plans and specifications drafted by the supervising architect. *Id.* The issue on appeal was whether the plaintiff could maintain a cause of action against the engineer grounded on negligent performance of its contract with the general contractor. *Id.* at 474, 248 S.E.2d at 446. This Court concluded the engineer could not be held liable for negligence in the absence of privity of contract especially when "this defendant did not have final authority to determine compliance with the contract. Such authority lay ultimately in the architect in this case." *Id.* at 475, 248 S.E.2d at 446 (citing *Durham*, 255 N.C. at 102-03, 120 S.E.2d at 567) (concluding engineer could not be liable in the absence of privity when their role resembled that of an arbitrator as they were employed to resolve disputes involving the character of the work, to interpret the meaning and intent of the plans, and to inspect work to ensure fulfillment of the plans).

¶ 26 Nevertheless, this Court subsequently acknowledged liability could be imposed on an architect or supervising engineer working on a construction project in the performance of his contract with the owner in two sequential cases in the absence of privity. *See Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co.*, 42 N.C. App. 259, 270, 257 S.E.2d 50, 58 (1979); *Davidson & Jones, Inc. v. Cty. of New Hanover*, 41 N.C. App.

661, 668, 255 S.E.2d 580, 585 (1979). This Court was careful, however, to distinguish the facts of these cases from the facts of *Drilling Co.* and *Durham*. For example, in *Shoffner*, this Court concluded *Durham* and *Drilling Co.* were not intended to encompass the factual situation disclosed by the case *sub judice*. *Shoffner*, 42 N.C. App. at 269, 257 S.E.2d at 57. Specifically, this Court concluded the following facts were distinguishable: the function of the architects encompassed considerably more supervisory control including the right to authorize or withhold payments, administer the contract, reject nonconforming work, and approve specifications and designs. *Id.* Thus, while this Court held privity is not necessarily required for a contractor or subcontractor to maintain a negligence action, the imposition of such negligence liability must still be limited to those cases where the architect or engineer exercised a significant degree of authority and control over the contractor and subcontractor. *See id.*

¶ 27 Here, just as in *Durham* and *Drilling Co.*, Falcon's role in the Project was to supervise the drilling and excavating for the caissons and determine whether adequate end bearing material had been met. Falcon did not design the plans and specifications for the Project and did not have the authority to release, revoke, alter or increase the requirements of the contract, control the contractor's means or methods, or stop work for the Project. Moreover, unlike in *Shoffner*, Falcon had no authority to authorize or withhold payments. Indeed, under the Project documents,

the Architect had the authority "to issue final interpretations, directions, and decisions as may be necessary to administer the Project"; to render written decisions on claims made by the Contractor for extra costs; to administer the contracts; interpret the contract documents; and even withhold payment from the contractor. Thus, while the Architect had broad supervisory control over the Project, Plaintiff failed to show Falcon exercised enough control or authority over Plaintiff's work as required to overcome the privity requirement. Therefore, the trial court did not err in granting Falcon's Motion for Summary Judgment on the negligence claim.

B. Bad Faith

Plaintiff also contends it demonstrated genuine issues of material fact that Falcon provided "professional and unbiased, objective record of the work that was done on the job." Even without privity of contract or broad supervisory control, a cause of action may exist against a supervising engineer or architect if they exercise bad faith in the performance of their contractual duties. *Drilling Co.*, 38 N.C. App. at 477-78, 248 S.E.2d at 448. Indeed, our Supreme Court has noted:

> it may be stated generally that the decision of the architect or engineer is conclusive as to any matter connected with the contract if the parties, by any stipulation, constitute the architect or engineer the final arbiter of such matter as between the parties. Accordingly, where the contract provides that the work shall be done to the satisfaction, approval, or acceptance of an architect or engineer, such architect or engineer is thereby constituted sole arbitrator between the parties, and the parties are bound by his

> decision, in the absence of fraud or gross mistake.

Welborn Plumbing & Heating Co. v. Randolph Cty. Bd. of Educ., 268 N.C. 85, 90, 150 S.E.2d 65, 68 (1966). However, our Courts have also indicated that central to a claim for bad faith in these circumstances, is the requirement the architect or supervising engineer actually be contractually obligated to act in the capacity as arbitrator in the case of a dispute between the parties to the contract. *See Durham*, 255 N.C. at 102-03, 120 S.E.2d at 567.

Here, Plaintiff's argument assumes Falcon had the contractual duty to be the final arbitrator of whether Plaintiff had reached auger refusal and make corresponding notations in its Inspection Reports. However, a review of the Record including the Owner/Falcon Agreement reveals Falcon did not have the contractual duty to record auger refusal nor did Falcon have a duty to record or observe an entitlement to rock pay. Moreover, Falcon explained although it had notated auger refusal during the beginning stages of the construction, Falcon ultimately determined Plaintiff was not demonstrating true auger refusal and discontinued the use of this notation. Thus, in the absence of any evidence Falcon was contractually obligated to determine and record whether Plaintiff had reached augur refusal, the trial court did not err in determining Plaintiff's claim for bad faith fails as a matter of law. Therefore, in turn, the trial court did not err in granting Summary Judgment in favor of Falcon.

II. <u>Partial Exclusion of the Testimony and Recordings of Dwayne Durham</u>

¶ 28 Plaintiff contends the trial court erred by excluding the portions of Dwayne Durham's testimony in which recorded audio of him was played or any of Durham's testimony "directly related" to the audio recordings because the recordings (i) were not unfairly prejudicial; (ii) were probative; and (iii) were admissible under the rules of evidence.

¶ 29 The trial court may exclude relevant evidence under Rule 403, which states in relevant part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, R. 403 (2021). "We apply an abuse-of-discretion standard when reviewing a trial court's Rule 403 decision." *Watts-Robinson v. Shelton*, 251 N.C. App. 507, 513, 796 S.E.2d 51, 56 (2016). The trial court's decision "will only be reversed on appeal upon a showing that the decision was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jordan*, 128 N.C. App. 469, 475, 495 S.E.2d 732, 736 (1998).

¶ 30 Here, the Record reflects the trial excluded parts of the testimony that contained parts of the audio recordings because Plaintiff did not produce the recordings before Mr. Durham's deposition or before his death less than two months after the deposition. The trial court reasoned it would be unfairly prejudicial to

Choate to permit Plaintiff to admit the testimony as Choate was denied the opportunity to prepare Mr. Durham regarding the content of the audio files and Choate could not "redepose" Mr. Durham. Furthermore, the trial court stated admitting these portions of the deposition could mislead the jury as the transcript did not reflect the content of the recordings and instead merely said "Playing Recording." Therefore, the trial court reasoned without the benefit of the context of Mr. Durham's responses, the jury could misinterpret his statements.

¶ 31 Finally, recognizing portions of Mr. Durham's testimony had probative value not outweighed by concerns of prejudice or jury confusion, the trial court permitted Plaintiff to use the portions of Mr. Durham's testimony that did involve the use of unproduced audio recordings. Thus, the Record reflects the trial court engaged in the Rule 403 balancing test and made a reasoned decision to exclude portions of the deposition due to the dangers of unfair prejudice and jury confusion. Consequently, since the decision was not manifestly unsupported by reason or arbitrary, the trial court properly exercised its discretion in granting in part Choate's Third Motion *In Limine*.

III. Denial of Plaintiff's Motion *In Limine* Twenty-Seven

¶ 32 Plaintiff contends the trial court abused its discretion and violated the law of the case doctrine when it denied Plaintiff's Motion *In Limine* Twenty-Seven.

"When a party purports to appeal the granting or denying of a motion *in limine* following the entry of a final judgment, the issue on appeal is not actually whether the granting or denying of the motion *in limine* was error, as that issue is not appealable, but instead whether the evidentiary rulings of the trial court, made during the trial, are error." *State v. Gaither*, 148 N.C. App. 534, 539, 559 S.E.2d 212, 215-16 (2002) (citation and quotation marks omitted). Therefore, "[w]hen a motion *in limine* has been denied and when the contested evidence is then offered at trial, the party opposing admission of the evidence must renew his objection at trial to preserve the issue for appellate review." *State v. Mays*, 158 N.C. App. 563, 578, 582 S.E.2d 360, 370 (2003).

¶ 33 In this case, during arguments on Plaintiff's Motion *In Limine* twenty-seven, Plaintiff admitted they did not seek to exclude the documents exchanged between the parties or exclude testimony as to what Choate thought were the binding contract terms. However, in direct contradiction to this admission made at trial, on appeal, Plaintiff contends it was error for the trial court to permit Choate to introduce into evidence four versions of Choate's form subcontract that were exchanged between the parties. Furthermore, Plaintiff did not make any contemporaneous objections when Choate tendered and admitted the Subcontract Exhibits. Indeed, upon Choate's introduction of the first Subcontract Exhibit, the trial court asked if Plaintiff had an objection, and Plaintiff answered, "No sir." Therefore, since Plaintiff did not make

any contemporaneous objection to the exhibits at trial, they have not preserved this issue for appellate review. Thus, the issue of whether the trial court violated the law of the case doctrine by admitting four versions of the subcontract is not properly before this Court. Consequently, we do not reach the merits of this issue.

IV. Denial of Plaintiff's Motion for Directed Verdict

¶ 34 Plaintiff contends the trial court erred in denying its Motion for a Directed Verdict as to Choate's counterclaim for Breach of Contract because "Choate failed to show any evidence of an implied contract" and expressly argued against the existence of a contract.

¶ 35 "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference, which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). "[T]he motion should be denied if there is any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977). The non-moving party "may even allege and prove inconsistent or alternative theories without subjecting the case to directed verdict." *Hall v. Mabe*, 77 N.C. App. 758, 760, 336

S.E.2d 427, 429 (1985). "In 'borderline' civil cases, the court should submit the case to the jury to avoid unnecessary appeals and retrials." *Id.*

¶ 36 Here, over the course of the five-week trial, both parties presented evidence and testimony concerning the parties' extended interactions, communications, exchange of documents, and conduct relating to the Project and the Caisson Work in an attempt to prove the existence, or non-existence, of a contract. Indeed, on appeal, Plaintiff continues to argue a contract did exist between the parties but argues this same evidence of interactions, conduct, and communications could not be used to support Choate's alternative theory of breach of contract because Choate's primary position was that no contract existed between the parties. However, our case law is clear that a party may "allege and prove inconsistent or alternative theories without subjecting the case to directed verdict." *Hall*, 77 N.C. App. at 760, 336 S.E.2d at 429. Thus, Plaintiff's argument that Choate cannot present alternative theories is without merit. Moreover, when considered in the light most favorable to Choate, the totality of the five weeks' worth of evidence established more than a scintilla of evidence that an express contract existed between the parties sufficient to allow the jury to decide whether the parties were governed by express rather than implied contractual terms. Consequently, the trial court did not err in denying Plaintiff's Motion for Directed Verdict.

V. Jury Instructions

¶ 37 Plaintiff contends the trial court committed reversible error by failing to give Plaintiff's requested special instruction regarding "Intended, But Unexpressed Terms" and "All Material Terms Agreed." Plaintiff also contends the trial court's jury instruction that Plaintiff bore the burden of proving a contract improperly relieved Choate of any burden to prove a contract to support its counterclaim.

¶ 38 "A specific jury instruction should be given when (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Id.*

¶ 39 "However, these two requirements of correctness and evidentiary support guarantee neither the entitlement to nor the delivery of all proposed or proffered special instructions." *Dung Thang Trang v. L J Wings, Inc.*, 268 N.C. App. 136, 140, 834 S.E.2d 679, 682 (2019). Indeed, "where a party fails to object to jury instructions, it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error." *Madden v. Carolina Door Controls, Inc.*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994); *see also* N.C. R. App. P. 10 (a)(2) (2021). Moreover, "[i]f a party consents to the issues submitted or does not object at the time or ask for

a different or an additional issue, he cannot make the objection later on appeal." *Geoscience Grp., Inc. v. Waters Constr. Co.*, 234 N.C. App. 680, 690, 759 S.E.2d 696, 703 (2004) (citations and quotations omitted).

¶ 40 Here, a review of the Record reveals Plaintiff did not object to the exclusion of Plaintiff's proposed special instructions nor did Plaintiff object to the instruction explaining Plaintiff bore the burden of proving a contract. Indeed, the trial court engaged in a lengthy discussion with both parties to ensure the proposed jury instructions were in conformity with the evidence and issues presented at trial. During this discussion, Plaintiff's counsel admitted:

> in the way I had originally submitted my instructions is I put -- admittedly it wasn't perfect by any means it had, if you don't do this then do that, if you don't do that do this.

Moreover, after the first day of discussion, the trial court presented the parties with a revised set of jury instructions for the parties to review and asked the parties if they had any substantive issues with the revised instructions. Plaintiff's counsel stated he had no objections other than the two issues raised the day before.[3] Thus, the

[3] Plaintiff did object to the inclusion of the instruction under contract formation explaining to the jury that Choate argues if the parties "entered into a contract, that the contract includes the terms contained in Choate's standard subcontract agreement." Plaintiff also objected to the inclusion of the instruction under the second issue explaining: "The second issue reads: Did Choate enter into a contract with Southeast as a result of fraud? You will answer this issue only if you've answered the issue yes in favor of Southeast." However, these objections are not the same as the objections raised on appeal.

Record reveals Plaintiff never objected to the exclusion of the proposed special instructions nor the instruction regarding the burden of proof. Therefore, Plaintiff failed to preserve these issues for appellate review. *See Geoscience Grp., Inc.*, 234 N.C. App. at 690, 759 S.E.2d at 703. Consequently, these arguments are dismissed.

Conclusion

¶ 41 Accordingly, for the reasons set forth above, we affirm the Order granting Falcon's Motion for Summary Judgment and the Judgment dismissing Plaintiff's claims against Choate following the jury verdict.

AFFIRMED.

Judges DIETZ and JACKSON concur.

Report per Rule 30(e).