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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-917

No. COA21-380

Filed 29 December 2022

Mecklenburg County, No. 14 CVS 14445

James W. BRADSHAW, Carla O. Bradshaw, Resort Retail Associates, Inc., E.C. Broadfoot, Christina Dunn Chandra, Thomas Egan, Chuck Eggert, Mark P. Garside, Dr. James J. Green, Robert K. Grunewald, Ronald Holmes, David Lauck, Curt. W. Lemkau, Jr., Evan Middleton, Joshua M. Nelson, Christian C. Nugent, Regina H. Pakradooni, as Executrix of the Estate of Peter B. Pakradooni, Ford Perry, Marcello G. Porcelli, Adan Rendon, Richard H. Stevenson, Mitchell Wickham, William H. Williamson, William K. Wright, Alex M. Wolf, Chaffin Family Limited Partnership, and Solaris Capital LLC, Plaintiffs,

v.

Stephen E. MAIDEN, Maiden Capital, LLC, and SS&C Technologies, Inc., successor by merger to SS&C Fund Administration Services, LLC (a/k/ SS&C Fund Services), Defendants.

Appeal by Plaintiffs from orders entered 10 August 2015, 1 September 2020, and 15 September 2020 by Chief Business Court Judge Louis A. Bledsoe, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 February 2022.

Lewis & Roberts, PLLC, by Matthew D. Quinn and James A. Roberts, and Mauney PLLC, by Gary V. Mauney, for plaintiffs-appellants.

Alston & Byrd LLP, by Michael A. Kaeding and Ryan P. Etheridge, and Paul Weiss Rifkind Wharton & Garrison LLP, by Robert A. Atkins & Jeffrey J. Recher, for defendant-appellee SS&C Technologies, Inc.

JACKSON, Judge.

BRADSHAW V. MAIDEN

2022-NCCOA-917

Opinion of the Court

¶ 1

For the reasons stated by the trial court in the detailed orders entered 10 August 2015, 1 September 2020, and 15 September 2020 by Chief Business Court Judge Louis A. Bledsoe, III, said orders are affirmed.

AFFIRMED.

Judge DIETZ concurs.

Judge MURPHY concurs in part and dissents in part by separate opinion.

Report per Rule 30(e).

MURPHY, Judge, concurring in part and dissenting in part.

¶ 2 For the reasons explained in this opinion, I respectfully concur in part and dissent in part.

¶ 3 When a trial court dismisses a claim under North Carolina Rule of Civil Procedure 12(b)(6) based on matters outside the pleadings, the dismissal must be reviewed under the summary judgment standard in Rule 56(c). However, a document that is the subject of a plaintiff's action and that he or she specifically refers to in the complaint may be attached as an exhibit by a defendant and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment. A contractual agreement to which the plaintiff is a party thus may be properly considered where the contract is the subject of the plaintiff's action and is specifically referenced in the complaint. Here, however, the trial court improperly considered a contract between Defendant-Appellee SS&C Technologies, Inc. ("SS&C") and a hedge fund in which Plaintiffs-Appellants invested because the contract was not the subject of Plaintiffs' claims nor specifically referenced in the *Amended Complaint*. I therefore review the trial court's dismissal of Plaintiffs' claims under Rule 56(c), as the parties have had a reasonable opportunity to present evidence pertinent to considering whether SS&C was entitled to summary judgment.

¶ 4 Summary judgment is a drastic measure proper under Rule 56(c) only if the record shows that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. The movant must clearly demonstrate the

lack of any triable issue of fact and entitlement to judgment as a matter of law. Here, as explained in great detail below, SS&C has not established a lack of triable issues of fact or its entitlement to judgment as a matter of law on several of Plaintiffs’ claims: negligence, gross negligence, negligent misrepresentation, North Carolina Securities Act secondary liability under N.C.G.S. § 78A-56(c)(2), and punitive damages. SS&C has however met its burden in showing summary judgment to SS&C was appropriate on Plaintiffs’ claims for grossly negligent misrepresentation, civil conspiracy, and aiding and abetting constructive fraud. Accordingly, I would reverse in part and affirm in part.

BACKGROUND

¶ 5 Plaintiffs—several investors in a hedge fund, the Maiden Capital Opportunity Fund (“Fund”), that was run by Defendant Stephen E. Maiden and described as a “‘friends and family’ hedge fund”—brought suit against Defendants Maiden, Maiden Capital, LLC, and SS&C for claims arising out of Plaintiffs’ injuries from investing in the Fund. This appeal concerns Plaintiffs’ claims against SS&C, some of which were dismissed under Rule 12(b)(6) in 2015 and the rest under Rule 56(c) five years later.

¶ 6 Plaintiffs filed their *Complaint* on 7 August 2014. On 8 September 2014, then-Chief Justice Mark Martin of the North Carolina Supreme Court designated the action as a mandatory complex business case under the then-controlling N.C.G.S. §

7A-45.4(b).¹ This action was assigned to the Honorable Louis A. Bledsoe, III, Chief Business Court Judge.

¶ 7

Plaintiffs' *Complaint* allegedly asserted against SS&C claims for negligence, gross negligence, negligent misrepresentation, grossly negligent misrepresentation, North Carolina Securities Act ("Securities Act") secondary liability under N.C.G.S. § 78A-56(c)(2), civil conspiracy, punitive damages, and aiding and abetting constructive fraud based on SS&C's work in administering the Fund and regularly sending Plaintiffs statements ("Capital Statements" or "Statements") about the Fund. SS&C moved to dismiss the claims under Rule 12(b)(6) on 17 November 2014, and Plaintiffs filed an *Amended Complaint* asserting identical claims on 25 November 2014. On 20 August 2015, the trial court granted SS&C's motion in part, dismissing the gross negligence claim insofar as it was based on what SS&C should have known and limiting SS&C's duty to Plaintiffs to the functions expressly provided for in SS&C's written contract with the Fund to serve as its administrator. *See Bradshaw v. Maiden*, 2015 WL 4720387, 2015 NCBC 76 (N.C. Super. Ct. 20 Aug. 2015)

¹ In 2014, our General Assembly amended N.C.G.S. § 7A-27 to provide a direct right of appeal to the Supreme Court from a judgment of the Business Court for actions designated after the amendments became effective. *See* 2014 S.L. 102 §§ 1, 9 ("Section 1 of this act becomes effective [1 October 2014], and applies to actions designated as mandatory complex business cases on or after that date."). "This case is properly before [us]" because it "was designated as a mandatory complex business case on [8 September 2014], prior to the effective date of the 2014 amendments to [N.C.G.S.] § 7A-27(a)(2)." *USA Trouser, S.A. de C.V. v. Williams*, 258 N.C. App. 192, 195, *disc. rev. denied*, 371 N.C. 448 (2018).

[hereinafter “2015 Order”].

¶ 8

SS&C moved for summary judgment on Plaintiffs’ remaining claims on 28 October 2019. By amended order entered 15 September 2020, the trial court granted summary judgment to SS&C and dismissed Plaintiffs’ remaining claims. *See Bradshaw v. Maiden*, 2020 WL 5540151, 2020 NCBC 60A [hereinafter “2020 Order”]. On 7 January 2021, the trial court entered a default judgment against Defendants Maiden and Maiden Capital. On 5 March 2021, SS&C voluntarily dismissed its crossclaims against Defendants Maiden and Maiden Capital as well as its third-party complaint against the Fund. Plaintiffs timely appeal the trial court’s orders dismissing Plaintiffs’ claims against SS&C.²

ANALYSIS

A. Dismissal of Plaintiffs’ Claims Under Rule 12(b)(6)

² The 2020 Order did not address Plaintiffs’ claims against Maiden and Maiden Capital nor SS&C’s crossclaims against those Defendants and its third-party complaint against the Fund. *See* 2020 Order. However, once the trial court entered a default judgment against those Defendants on Plaintiffs’ claims concerning them and SS&C followed by voluntarily dismissing its crossclaims and third-party complaint, the 2020 Order dismissing Plaintiffs’ claims against SS&C became a final judgment over which we have jurisdiction to review on appeal. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392 (2007) (quoting *Veazey v. Durham*, 231 N.C. 357, 361-62, *reh’g denied*, 232 N.C. 744 (1950)) (“A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.”); *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 652-53 (2007) (quoting *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367 (2001)) (“Ordinarily, an appeal from an order granting summary judgment to fewer than all of a plaintiff’s claim[s] is premature and subject to dismissal. . . . [However, a] [p]laintiff’s voluntary dismissal of th[e] remaining claim does not make the appeal premature but rather has the effect of making the trial court’s grant of partial summary judgment a final order.”).

1. The Trial Court’s 2015 Order

¶ 9

Plaintiffs urge³ us to reverse the trial court’s 2015 Order that dismissed Plaintiffs’ gross negligence claim insofar as it was “based on allegations that SS&C should have known of Maiden’s fraud through inspection and verification of the Fund’s books and records and other purported ‘red flags[.]’” *See* 2015 Order at ¶ 38. By looking to the terms of the Administrative Services Agreement (“ASA”), the agreement executed by SS&C and the Fund, the trial court reasoned that SS&C “contracted away any obligation to provide investment, accounting, and auditing functions for the Fund other than as specifically provided in the ASA[.]” that any duty SS&C “owed to Plaintiffs did not include a duty to inspect the records or verify the accuracy of the information provided by Management or to provide independent accounting services to the Fund that were not specifically required . . . in the ASA[.]” and that “any harm to Plaintiffs from [the] failure to perform these functions was not

³ Plaintiffs initially filed a sealed brief on appeal after we entered a 17 September 2021 order allowing *Plaintiff-Appellants’ Motion to Seal Brief*. On 8 February 2022, we entered an order stating, “after the conclusion of the regularly scheduled oral argument scheduled in this matter at 10:45 a.m. on 9 February 2022, the Court will go into closed session to address whether the briefs and/or Record should remain under seal. *See generally, Doe v. Doe*, 263 N.C. App. 68 . . . (2018).” We subsequently ordered the parties to confer and allowed them to, “by agreement[,] file an unsealed Appellants Brief with redactions as necessary to protect the information” prior to 5:00 p.m. on 21 March 2022. On 18 March 2022, Plaintiffs and SS&C jointly submitted notice regarding their agreement that Plaintiffs may file an unsealed version of the brief without any redactions by 21 March 2022. Plaintiffs timely filed an unsealed version of their opening brief without any redactions on 21 March 2022.

reasonably foreseeable under the circumstances.” *Id.* at ¶ 34.

¶ 10 In its 2015 Order, the trial court also concluded that, although SS&C’s “duty to Plaintiffs is constrained and limited by the ASA[,] . . . SS&C, as the Fund administrator, cannot escape a duty to refrain from forwarding information to investors like Plaintiffs that it knew was false or inaccurate.” *Id.* at ¶ 35. Because the gross negligence claim was premised in part on this duty, the trial court permitted the claim against SS&C to proceed only “based on allegations that [SS&C] knowingly and willfully disseminated false and inaccurate information to Plaintiffs, knowingly and willfully failed to utilize GAAP and/or other applicable accounting standards required of [SS&C] under the ASA in preparing the financial information, [and] knowingly and willfully manipulated the Fund’s accounting” as well as “all other willful and knowing acts Plaintiffs plead that were in violation of [SS&C’s] duties under the ASA and applicable law.” *Id.* at ¶ 38.

¶ 11 The trial court also dismissed Plaintiffs’ claims for breach of fiduciary duty and for aiding and abetting fraud. *Id.* at ¶¶ 44-61. On appeal, Plaintiffs only challenge the 2015 Order to the extent that the trial court dismissed their gross negligence claim depending on what SS&C should have known and limited the duty SS&C owed Plaintiffs to obligations expressly provided for in the ASA. Although the trial court’s 2015 Order indicated the dismissal of Plaintiffs’ claims was under Rule 12(b)(6), as explained below, by looking to a contract that was not referenced in Plaintiffs’

Amended Complaint or the subject of the claims against SS&C, the trial court converted its dismissal into a grant of summary judgment under Rule 56.

2. Conversion of Rule 12(b)(6) Dismissal Into Rule 56 Summary Judgment

¶ 12 Generally, on appeal of a Rule 12(b)(6) motion, we conduct “a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, *aff’d per curiam*, 357 N.C. 567 (2003). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337 (2009) (marks omitted).

¶ 13 “The essential question on a motion under Rule 12(b)(6) ‘is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory.’” *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56 (2001) (quoting *Barnaby v. Boardman*, 70 N.C. App. 299, 302 (1984), *rev’d on other grounds*, 313 N.C. 565 (1985)). The trial court must treat allegations in the complaint as true, *see Hyde v. Abbott Labs.*, 123 N.C. App. 572, 575, *disc. rev. denied*, 344 N.C. 734 (1996), but it is not required to accept as true any conclusions of law or unwarranted deductions of fact. *See Sutton v. Duke*, 277 N.C. 94, 98 (1970). The trial court “‘should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.’” *White v. Consol.*

Plan., Inc., 166 N.C. App. 283, 292 (2004) (quoting *Block v. Cnty. of Person*, 141 N.C. App. 273, 277-78 (2000)), *disc. rev. denied*, 359 N.C. 286 (2003). Thus, we should not affirm a Rule 12(b)(6) dismissal “unless it appears to a *certainty* that [the plaintiffs are] entitled to *no relief* under any state of facts which could be proved in support of the claim.” *Cage v. Colonial Bldg. Co.*, 337 N.C. 682, 683 (1994) (emphasis added) (marks omitted). “But dismissal is proper ‘if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim.’” *Holton v. Holton*, 258 N.C. App. 408, 416 (2018) (quoting *State Emps. Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer*, 364 N.C. 205, 210 (2010)).

¶ 14 To the extent that a trial court considers a contract not specifically referenced in the complaint to dismiss Plaintiffs’ claim under Rule 12(b)(6), “the trial court’s order establishes that it considered matters outside the pleading, and thus its dismissal ruling is properly viewed as one of summary judgment on appeal.” *See Holton*, 258 N.C. App. at 418. “A document attached to and incorporated within a complaint is not considered a matter outside the pleading[s,]” and “a document that is the subject of a plaintiff’s action that he or she specifically refers to in the complaint may be attached as an exhibit by the defendant and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment.” *Id.* at 418-19. In *Holton*, we recently observed,

MURPHY, J., concurring in part and dissenting in part

the trial court's order establishes that it considered matters outside the pleadings, which were not the subject of [the] plaintiff's action, in dismissing the complaint. Specifically, it found that the separation agreement was executed on 18 April 2013 and waived [the] plaintiff's right to seek ED and postseparation support. These findings establish that the trial court either considered and relied on the terms of the separation agreement, which the record indicates was neither attached as an exhibit to the complaint nor [the] defendant's first or second dismissal motion, or [the] defendant's affidavit supporting his first dismissal motion, in which he asserted that [the] plaintiff's claims were waived by the 18 April 2013 separation agreement. Both of these documents were matters outside the pleading that would have converted [the] defendant's Rule 12(b)(6) motion into one of summary judgment.

While the trial court could have looked to matters outside the pleading to dismiss [the] plaintiff's ED and spousal support claims under Rule 12(b)(1) without mandating summary judgment review, such a dismissal would necessarily be predicated on the Rule 12(b)(6) grounds that either [the] plaintiff failed to plead a valid rescission claim, or that she was not entitled to relief because her ED and spousal support claims were waived by the separation agreement. Because the latter determination was necessarily based on the terms of the separation agreement itself or [the] defendant's affidavit, the trial court's dismissals of [the] plaintiff's ED and spousal support claims must be reviewed under the summary judgment standard.

Id. at 419-20. Here, Plaintiffs' gross negligence claim as to SS&C's constructive knowledge was dismissed because "[b]ased on the terms of the ASA, . . . [SS&C] contracted away any obligation to provide . . . functions for the Fund other than as specifically provided in the ASA." *See* 2015 Order at ¶ 34. The trial court deemed

this appropriate on the basis that, “[a]lthough Plaintiffs d[id] not attach the ASA to the [*Amended Complaint*], the ASA may be considered . . . on SS&C’s Motion to Dismiss because the ASA is specifically referred to in the [*Amended Complaint*] . . . and attached to SS&C’s Brief in Support of its Motion to Dismiss as Exhibit 5.” *See* 2015 Order at ¶ 14 n.3 (marks omitted). But the ASA was not explicitly referenced in or attached to Plaintiffs’ *Amended Complaint*. Plaintiffs only allege work that SS&C “agreed” to do for Maiden but do not refer to the ASA in the *Amended Complaint*. Further, as explained below, SS&C’s duty to Plaintiffs is not limited only to the functions expressly provided for in the ASA, and the ASA is not the subject of Plaintiffs’ gross negligence action. *Infra* ¶¶ 15-16, 27-39, 40-45. The trial court’s dismissal of Plaintiffs’ gross negligence claim based on SS&C’s constructive knowledge was “necessarily based on the terms of the [ASA]”—matters outside the pleadings—and therefore “the trial court’s dismissal[] . . . must be reviewed under the summary judgment standard.” *See Holton*, 258 N.C. App. at 420.⁴

¶ 15 This application of the summary judgment standard of review is consistent

⁴ Neither Plaintiffs nor SS&C argue on appeal that the trial court considered matters outside the pleadings when dismissing Plaintiffs’ gross negligence claim based on what SS&C should have known and thus that we should review the 2015 Order under the summary judgment standard. However, Plaintiffs argue there is sufficient evidence to support their gross negligence claim based on what SS&C should have known, and Plaintiffs’ counsel at oral argument expressly stated that “there became a point, where there is no doubt, in the Record, on the evidence, abundant evidence, that SS&C knew *or should have known* that what they were sending . . . to [investors] was false.”

with the aggregate of our prior decisions allowing a trial court to consider a contract and its terms when deciding a Rule 12(b)(6) motion on the basis that the contract was the subject of the action, expressly referenced in the complaint, and an agreement to which the plaintiff was a party. *See, e.g., Oberlin Capital, L.P.*, 147 N.C. App. at 54-56, 58-61 (holding a loan agreement properly considered where the creditor-plaintiff sued the defendants and alleged “they were personally liable for [the plaintiff’s] losses incurred in connection with the loan agreement” based on the defendants’ failure to disclose a breach by its supplier prior to finalizing the loan agreement that “had a material negative impact” on the debtor-corporation for which the defendants’ were directors because the “agreement [was] the subject of [the] complaint and [was] specifically referred to in the complaint”); *Robertson v. Boyd*, 88 N.C. App. 437, 440-41, 444-45 (1988) (holding a contract of sale between the buyer-plaintiffs and seller-defendants that required the defendants to furnish a termite report prepared by a separate defendant was properly considered where the plaintiffs discovered termite damage after closing and then brought claims, including breach of contract, mentioning the contract by name and noting what was required “[p]ursuant to the terms of said [c]ontract”); *Coley v. N.C. Nat’l Bank*, 41 N.C. App. 121, 123, 126 (1979) (holding a contract at the heart of the plaintiffs’ fraudulent inducement claim to which the plaintiffs were parties and that supposedly required the seller-defendants to relieve the plaintiffs of their obligations to the mortgage holders on their home was

properly considered where the plaintiffs alleged the defendants “materially misrepresented to the plaintiffs that the [seller-defendants] had in fact performed a material condition of the contract”); *see also Bank of Am., N.A. v. Rice*, 244 N.C. App. 358, 369-73 (2015) (holding compensation incentive plans—contracts between the bank-plaintiff and the defendant—pursuant to which the defendant “sought payment in his counterclaims” were properly considered where the counterclaims mentioned the plans). We are not presented with such a case here.

¶ 16 Plaintiffs are not parties to the ASA, their *Amended Complaint* does not mention the contract by name or refer to the contract generally except for noting what SS&C agreed to do for Maiden, and the ASA is not *the* subject of Plaintiffs’ claims nor a limit on SS&C’s duty to Plaintiffs. Therefore, as the trial court considered matters outside the pleadings by relying on the ASA in ruling on SS&C’s Rule 12(b)(6) motion, the dismissal must be reviewed under the summary judgment standard. *See Holton*, 258 N.C. App. at 420. “The mandatory language of [Rule 12(b)(6)] is unambiguous and leaves no room for variance in practice.” *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204 (2007) (citing *Minor v. Minor*, 70 N.C. App. 76, 78, *disc. rev. denied*, 312 N.C. 495 (1984)). However, we must still decide whether it is appropriate to apply the summary judgment standard at this time or remand to the trial court for the presentation of any additional evidence that may be considered under Rule 56.

¶ 17 “Although a party confronted with the conversion of a dismissal motion into a

summary judgment motion is entitled to be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56,” we have acknowledged that “it is significant that the rule provides for a reasonable opportunity rather than requiring that the presentation of materials be in accordance with Rule 56.” *Blackburn v. Carbone*, 208 N.C. App. 519, 523 (2010) (marks omitted), *appeal dismissed, disc. rev. denied*, 365 N.C. 194 (2011); *see also* N.C.G.S. § 1A-1, Rule 12(b) (2021). “[W]hat is ‘reasonable’ must be determined by the circumstances of a particular case.” *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 527 (1991).

¶ 18

In numerous cases, we have applied the summary judgment standard on appeal where a Rule 12(b)(6) motion is converted to a Rule 56 motion for summary judgment. *See, e.g., Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 32-42 (proceeding to apply summary judgment standard to converted motion where “neither party claim[ed] that it did not have a reasonable opportunity to present evidence or was surprised by the introduction of this material”), *disc. rev. denied*, 367 N.C. 236 (2013); *Mileski v. McConville*, 199 N.C. App. 267, 270 (2009) (“It is evident from the order that the trial court considered matters outside the pleadings. Thus, [the] defendants’ Rule 12(b)(6) motion was converted to a motion for summary judgment. In reviewing [the] plaintiff’s arguments, we will apply the standard of review from an order granting summary judgment.”); *Weaver*, 187 N.C. App. at 204-06; *Morris v. Moore*, 186 N.C. App. 431, 434-35 (2007) (holding a party was not denied

MURPHY, J., concurring in part and dissenting in part

a “reasonable opportunity” where they “did not request a continuance or additional time to produce evidence” and they were the party that “first offered material outside of the pleadings to the trial court for its consideration”); *Moore v. N.C. Coop. Extension Serv.*, 146 N.C. App. 89, 90 n.1 (citation omitted) (“For the purposes of this appeal, [the] defendants’ motion to dismiss is converted into [the] defendants’ motion for summary judgment Therefore, we review the trial court’s order as simply a denial of summary judgment.”), *appeal dismissed, disc. rev. denied*, 354 N.C. 574 (2001); *N.C. Steel, Inc. v. Nat’l Council on Comp. Ins.*, 123 N.C. App. 163, 169 (1996) (citations omitted) (“When a trial court considers matters outside the pleadings, a motion under Rule 12 is automatically converted into a motion for summary judgment. As a result, the case *sub judice* is before this Court pursuant to a grant of summary judgment to [the] defendants on . . . [the] plaintiffs’ claims.”), *rev’d in part on other grounds*, 347 N.C. 627 (1998); *Fowler v. Williamson*, 39 N.C. App. 715, 717 (1979) (“Having converted [the] defendants’ Rule 12(b)(6) motion into a Rule 56 motion for summary judgment, the question on appeal is whether there is a genuine issue as to any material fact.”); *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 273-75 (1979) (“Since in the present case the order of the trial court clearly stated it had considered affidavits and discovery in addition to the pleadings, we treat the defendants’ Rule 12(b)(6) defense which that court sustained as having been converted and merged into [the] defendants’ motion for summary judgment.”).

¶ 19 Meanwhile, in other cases, we have remanded a converted motion where discovery had not been completed and the parties have not been able to present all evidence pertinent to the Rule 56(c) summary judgment motion. *See Kemp v. Spivey*, 166 N.C. App. 456, 462 (2004) (citation and marks omitted) (“Upon conversion of the motion[,] . . . the parties were not afforded a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Accordingly, this case is remanded so as to allow the parties full opportunity for discovery and presentation of all pertinent evidence.”); *Locus*, 102 N.C. App. at 528 (finding no “reasonable opportunity” where the plaintiff “objected to the Rule 56 hearing, sought to present additional evidence and, further, requested a continuance to obtain additional evidence”). Even where discovery has not been completed, we have applied the summary judgment standard to a converted motion on appeal where potential or deferred discovery sought by a party would not be material to issues implicated by the motion. *See Weaver*, 187 N.C. App. at 206 (“We note that based upon our review of the record, we do not believe that the discovery sought by [the] plaintiff—and deferred—was material to the issues resulting in judgment for [the defendant].”).

¶ 20 Here, SS&C was the party that first offered material outside the pleadings to the trial court. Further, discovery occurred in the case, and both Plaintiffs and SS&C were able to submit their evidence, including depositions and documentary evidence, obtained during a years-long discovery period. Plaintiffs argue on appeal that the

evidence in the Record warrants denying summary judgment to SS&C, and the parties do not claim there may be additional evidence they could seek that would rebut the forecast such that no genuine disputes of material fact remain. I therefore conclude that the parties had a reasonable opportunity to present all material pertinent to whether summary judgment should be granted to SS&C on Plaintiffs' claims. *See Raintree Homeowners Ass'n v. Raintree Corp.*, 62 N.C. App. 668, 673 (1983) ("It is significant that the rule provides a 'reasonable opportunity' rather than requiring that the presentation of materials be in accordance with Rule 56."), *disc. rev. denied*, 309 N.C. 462 (1993). As such, I proceed to consider whether partial summary judgment was properly granted to SS&C in the 2015 Order.

B. Rule 56(c) Summary Judgment

¶ 21 In addition to the 2015 Order, Plaintiffs urge us to reverse the 2020 Order granting SS&C's motion for summary judgment and dismissing all claims against SS&C with prejudice. The trial court reasoned in its 2020 Order that Plaintiffs (i) did not "assert a *separate* claim against SS&C for negligence that provided the required notice to SS&C that Plaintiffs sought to hold it liable for mere negligence"; (ii) "have not met their burden to show that there is a genuine issue of material fact with regard to their claim that SS&C engaged in grossly negligent misconduct" because they "offered no evidence that SS&C committed any knowing or willful act in violation of its duty to Plaintiffs" and "failed to offer substantial evidence that

SS&C knew about or participated in Maiden’s fraud”; (iii) “fail[ed] to offer evidence showing that SS&C engaged in ‘wanton and willful’ misconduct” and “to respond to SS&C’s arguments for dismissal of the claim,” even “if [a grossly negligent misrepresentation] claim is later found to exist”; (iv) “failed to offer substantial evidence . . . of SS&C’s actual, not implied, knowledge of Maiden’s fraud or of SS&C’s substantial assistance or encouragement in facilitating Maiden’s fraud,” and our Supreme Court nevertheless “would not recognize a claim for aiding and abetting constructive fraud”; (v) “have presented no evidence that SS&C had actual knowledge of Maiden’s misconduct” sufficient for secondary liability under the Securities Act; (vi) “offer[ed] no evidence of how, when, where, or why a conspiracy between SS&C and Maiden arose” but instead “rel[ied] solely on what they describe as ‘manipulated accounting and . . . incriminating email trails’”; and (vii) “failed to show that punitive damages against SS&C are warranted” because they “offer[ed] no evidence in support of their allegation that SS&C knew of Maiden’s fraud and knowingly submitted false information to Plaintiffs” 2020 Order at ¶¶ 33-81 (marks omitted).

¶ 22 “Our standard of review of an appeal from summary judgment is de novo” *In re Will of Jones*, 362 N.C. 569, 573 (2008) (citing *Forbis v. Neal*, 361 N.C. 519, 524 (2007)). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a

MURPHY, J., concurring in part and dissenting in part

judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c) (2021). “The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law.” *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220 (1999). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.” *In re Will of Jones*, 362 N.C. at 573 (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)).

¶ 23 “[S]ummary judgment is a drastic measure, and it should be used with caution. This is especially true of a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case.” *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402 (1979) (citation omitted). Specifically, summary judgment “must be used with due regard to [Rule 56’s] purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue.” *Marcus Bros. Textiles*, 350 N.C. at 220 (quoting *Kessing v. Nat’l Mortg. Corp.*, 278 N.C. 523, 534 (1971)).

¶ 24 A genuine issue of material fact exists where “the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail.” *Mace v. Utley*, 275 N.C. App. 93, 98 (2020) (quoting *Smith v. Smith*, 65 N.C. App. 139, 142 (1983)). Further, “[a] genuine issue is one which can be

MURPHY, J., concurring in part and dissenting in part

maintained by substantial evidence.” *Smith*, 65 N.C. App. at 142. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference.” *United Cmty. Bank (Ga.) v. Wolfe*, 369 N.C. 555, 558 (2017) (marks omitted).

¶ 25 “If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.” *In re Will of Jones*, 362 N.C. at 573 (citing *Lowe v. Bradford*, 305 N.C. 366, 369-70 (1982)). “Nevertheless, ‘[i]f there is any question as to the weight of evidence, summary judgment should be denied.’” *Id.* at 573-74 (quoting *Marcus Bros. Textiles*, 350 N.C. at 220).

¶ 26 In applying the summary judgment standard to Plaintiffs’ claims, my analysis proceeds in four subsections, with the first two concerning arguments that SS&C contends bar recovery on several of Plaintiffs’ claims and the other two regarding Plaintiffs’ forecast of evidence in support of their tort and non-tort claims. First, I consider whether SS&C’s duty to Plaintiffs is limited to the obligations expressly provided for in the ASA. Second, I inquire whether Plaintiffs may prove their gross negligence claim through evidence of SS&C’s constructive knowledge—what SS&C should have known in preparing and sending the Statements to Plaintiffs. Third, with my conclusions on these issues in mind, I analyze whether Plaintiffs have forecasted evidence sufficient to survive summary judgment to SS&C on their tort

claims for negligence, gross negligence, negligent misrepresentation, and grossly negligent misrepresentation. Finally, I analyze the same question as it relates to Plaintiffs’ non-tort claims for Securities Act secondary liability, civil conspiracy, punitive damages, and aiding and abetting constructive fraud.

1. SS&C’s Duty to Plaintiffs That Forms the Basis of Negligence

¶ 27 Plaintiffs contend it was reversible error for the trial court to conclude “that SS&C’s duty to Plaintiffs is constrained and limited by the ASA.” *See* 2015 Order at ¶ 35. Plaintiffs argue SS&C, in “prepar[ing] and deliver[ing] investor [C]apital [S]tatements” to them, had a duty to use reasonable care in its accounting work as “measured by the standards applicable to accountants”

¶ 28 On the extent of these duties, the trial court cited unpersuasive authority to support the “contracted away” reasoning it employed to conclude SS&C “did not have a duty to protect Plaintiffs from Maiden’s alleged misconduct beyond complying with its specific duties under the ASA.” *Id.* at ¶¶ 32-34. The trial court accordingly characterized “any harm to Plaintiffs from [SS&C’s] failure to perform these functions” as being “not reasonably foreseeable under the circumstances.” *Id.* at ¶ 34. Plaintiffs are correct that the trial court erred in limiting SS&C’s obligations under the duty of ordinary care to only those that SS&C did not contract away and thus those that SS&C actually knew would cause injury to Plaintiffs.

¶ 29 Most importantly, the ability to “contract away” tort duties to non-parties in

this way is contrary to longstanding precedent. In *Pinnix v. Toomey*, 242 N.C. 358, 362 (1955), as the trial court correctly recited, *see* 2015 Order at ¶ 32, our Supreme Court stated that “accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and [] a negligent performance constitutes a tort as a well as a breach of contract.” But the trial court left out a critical statement later in the same paragraph in *Pinnix*: “[W]here the injured party elects to sue in tort rather than in contract, he must accept the standard of care prescribed by the common law as the test of determining actionable negligence”—“that degree of care which an ordinarily prudent person would have exercised under the same or similar circumstances.” *Pinnix*, 242 N.C. at 363. Our Supreme Court further stated, “[t]herefore, any contract provision prescribing a different standard of care from that imposed by rule of the common law is not relevant to the issue of actionable negligence and should be stricken on motion.” *Id.* *Pinnix* does not support allowing the ASA’s terms—contract provisions—to prescribe a different standard of care than the ordinary duty of care provided by the common law and thus does not support the trial court’s “contracted away” reasoning. *See id.*

¶ 30 SS&C’s characterization of *Pinnix* does not alter this conclusion. SS&C misreads *Pinnix* by claiming that our Supreme Court “recognized the distinction between the scope of a duty and the standard of care[] [in] holding that the terms of a contract show the relationship of the parties and the nature and *extent of the*

MURPHY, J., concurring in part and dissenting in part

common law duty on which the tort is based.” (Marks omitted). In *Pinnix*, the plaintiff argued that certain contract provisions stricken from the complaint “tend[ed] to show the relationship of the parties and the nature and extent of the legal duties which he allege[d] the defendants breached[,]” while the defendants contended the provisions “were properly eliminated on the ground of irrelevancy” because “the theory of the plaintiff’s cause of action as declared on [was] in tort” *Pinnix*, 242 N.C. at 362. Our Supreme Court wrote,

[t]he duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another. Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. But it must be kept in mind that the contract creates only the relation out of which arises the common-law duty to exercise ordinary care. Thus in legal contemplation the contract merely creates the state of things which furnishes the occasion of the tort. This being so, the existence of a contract is ordinarily a relevant factor,

MURPHY, J., concurring in part and dissenting in part

competent to be alleged and proved in a negligence action to the extent of showing the relationship of the parties and the nature and extent of the common-law duty on which the tort is based. Necessarily, then, it is proper for the complaining party to allege facts from which it can be said as a matter of law that the defending party owed to him a legal duty arising out of a contractual relationship. However, it suffices to state in a plain and concise manner the ultimate facts from which the law will imply such duty. And the complaint should not contain collateral, irrelevant, redundant, or evidentiary matters in respect to the relationship of the parties and the legal duty or duties upon which the plaintiff grounds his cause of action. Furthermore, where the injured party elects to sue in tort rather than in contract, he must accept the standard of care prescribed by the common law as the test of determining actionable negligence, [i.e.], that degree of care which an ordinarily prudent person would have exercised under the same or similar circumstances. Therefore, any contract provision prescribing a different standard of care from that imposed by rule of the common law is not relevant to the issue of actionable negligence and should be stricken on motion.

Id. at 362-63 (citations omitted). Applying these rules, the Court in *Pinnix* agreed with the defendant and held that the plaintiff failed to show the stricken contract provisions were relevant because the plaintiff had sued in tort. *Id.* at 363-67. For example, the Court explained that Article 35 of the contract was “calculated to substitute a contractual standard of care for the established rule of the ordinarily prudent man as the test in determining the question of negligence.” *Id.* at 364-65. According to the Court, “[n]o such substitution is permissible in a negligence action.” *Id.* at 365.

¶ 31 *Pinnix* did not hold, as SS&C suggests, that a contract’s terms exhaustively determine the extent of the duty even when the plaintiff bases their action in tort. SS&C cites no binding authority sharing its view of *Pinnix*. Indeed, our Supreme Court only mentioned that “the existence of a contract is ordinarily a relevant factor, competent to be alleged and provided in a negligence action to the extent of showing the relationship of the parties and the nature and extent of the common law duty on which the tort is based” to make clear that “[n]ecessarily, then, it is proper for the complaining party to allege facts from which it can be said as a matter of law that the defending party owed to him a legal duty arising out of a contractual relationship.” *Id.* at 362-63. This conclusion was premised on the rule “that the contract creates only the relation out of which arises the common-law duty to exercise ordinary care” and was qualified by the rules that “it suffices to state in a plain and concise manner the ultimate facts from which the law will imply such duty” and that “the complaint should not contain collateral, irrelevant, redundant, or evidentiary matters in respect to the relationship of the parties and the *legal duty or duties upon which the plaintiff grounds his cause of action.*” *Id.* (emphasis added). The Court further concluded, “[t]herefore, any contract provision describing a different standard of care from that imposed by rule of the common law is not relevant to the issue of actionable negligence” *Id.* at 363.

¶ 32 Dealing with two categories—(1) the extent of the relationship of the parties,

and (2) the nature and extent of the common law duty on which the tort is based—the Court in *Pinnix* allowed allegations regarding the first category: “facts from which it can be said as a matter of law that the defending party owed to [the complaining party] a legal duty arising out of a contractual relationship.” *See id.* at 362-63. But the Court referred to the common law duty as the “duty to exercise ordinary care” and noted that the facts from which the law *implies* “such duty” due to the contractual relationship are permitted, while allegations concerning collateral or evidentiary matters in respect to the legal duties in which the parties ground their action are not. *See id.* Therefore, as *Pinnix* does not distinguish between the standard of care and the duty owed in a negligence action but does consider the contract relevant for determining whether any duty exists in the first place, it cannot be read to allow the ASA to contract away SS&C’s duty to exercise ordinary care.

¶ 33 This interpretation of *Pinnix* is consistent with subsequent North Carolina appellate court decisions. In *Toone v. Adams*, 262 N.C. 403, 407 (1964), our Supreme Court cited *Pinnix* and stated that “any contract provision prescribing a greater, lesser, or the same standard of care is not relevant to the issue of actionable negligence and should be stricken on motion.” This contradicts SS&C’s reading of *Toone* as “merely recogniz[ing] that a common-law standard of care applies to a tort claim, not a contractual one[,]” and as “not suggest[ing] . . . that when a tort duty arises from contract, the scope of the duty extends to obligations not found in the

contract.” Decisions after *Toone* are consistent with this interpretation of *Pinnix*. See, e.g., *Asheville Contracting Co., Inc. v. City of Wilson*, 62 N.C. App. 329, 342 (1983) (“Ordinarily, an action in tort must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provided without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties.”); *Croker v. Yadkin, Inc.*, 130 N.C. App. 64, 68-69 (concluding a license did not create “an affirmative duty to safely operate recreational facilities” because “the license does not create a duty of care upon which [the] plaintiff might rely in a negligence action” as “[t]he latter must be based upon an alleged breach of a duty of care prescribed by the common law”), *disc. rev. denied*, 349 N.C. 355 (1998)⁵; see also *Oates v. Jag, Inc.*, 314 N.C. 276, 279 (1985) (citation omitted) (“The duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise.”).

¶ 34 Furthermore, none of the cases relied on by the trial court allowed a party to

⁵ In *Croker*, we mentioned the “nature and extent of the duty owed” but did so in the context of the duty “owed by an owner or occupier of land” *Croker*, 130 N.C. App. at 70. We did not look to any contractual terms and instead considered the specific context of the case—there it was the defendant as an owner or occupier of land, while here it is SS&C as an accounting services provider and hedge fund administrator that sent Plaintiffs monthly Statements regarding the Fund’s investments.

MURPHY, J., concurring in part and dissenting in part

contract away its general duty of care to third parties, nor did they involve harms that were reasonably foreseeable under the circumstances as the harms were here.

¶ 35 In *Caldwell v. Morrison*, 240 N.C. 324, 327 (1954) (citations omitted), our Supreme Court *recited* a rule from past cases—rather than “holding,” as the trial court summarized the case—that

[o]rdinarily, where gas lines and appliances are installed on private property, in the absence of notice of a leaky or defective condition therein, the supplier of gas is under no duty to inspect such lines and appliances and to keep them in repair, in the absence of a contract to do so.

Id. at 327; 2015 Order at ¶ 34. Our Supreme Court did not allow a party’s duties to be “contracted away.” *See Caldwell*, 240 N.C. at 327. *Caldwell* thus does not support limiting SS&C’s duties to those expressly provided in the ASA.

¶ 36 In *Fazzari v. Infinity Partners, LLC*, 235 N.C. App. 233, 239 (2014) (marks omitted), we stated that “[i]n general, a lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party.” The trial court summarized *Fazzari* as “stating [this] general proposition.” *See* 2015 Order at ¶ 34. But the trial court left out the fact that this “general proposition” in *Fazzari* was specific to duties owed by *lenders*, as we exclusively relied on cases specific to duties owed by lenders, and did not cite a case where accountants’ duties were similarly limited. *See Fazzari*, 235 N.C. App. at 239; 2015 Order at ¶ 34. Indeed, one of the cases we cited in *Fazzari*, *Lassiter v. Bank of N.C.*, 146 N.C. App. 264, 268

(2001), which involved a lender’s duty to a borrower, was the third case the trial court relied on to support its “contracted away” reasoning in the case *sub judice*. *Fazzari* and *Lassiter* therefore also do not support limiting SS&C’s duties to Plaintiffs to those expressly provided for in the ASA.

¶ 37 In *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485 (1999) *disc. rev. & cert. improvidently allowed*, 351 N.C. 342 (2000), which the trial court summarized here as “holding [the] defendant security company had no duty to protect against tortious acts of third parties where company contractually agreed to a duty to act as a deterrence against theft, vandalism and criminal activities by maintaining high visibility,” *see* 2015 Order at ¶ 34 (marks omitted), we affirmed the dismissal of the negligence claim in the case “[b]ecause we [were] bound by the documents filed with the trial court below, and because these documents reveal[] as a matter of law that there was *no duty owed* [] *by virtue of the contract . . .*” *Hoisington*, 133 N.C. App. at 488-90 (emphasis added). We looked to the contract to determine the duty owed in *Hoisington* “[i]n accordance with [the] decision” on “almost precisely the [same] issue” in *Cassell v. Collins*, 344 N.C. 160 (1996), *abrogated by Nelson v. Freeland*, 349 N.C. 615 (1998), *reh’g denied*, 350 N.C. 108 (1999). *See Hoisington*, 133 N.C. App. at 489. But *Cassell* is expressly limited to the duty that security guards hired by apartment complexes owe guests of that complex’s tenants and is based in part on an approach to premises liability that our Supreme Court would abolish two years later. *See*

Nelson, 349 N.C. at 631 (eliminating “the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors”); *Cassell*, 344 N.C. at 163-64.

¶ 38 In *Cassell*, our Supreme Court determined a security company, through its security guard, had no duty “to protect social guests of tenants at [an apartment] complex” based on the company’s contract with the complex. *Cassell*, 344 N.C. at 163-64. Rather than hold the company to the same duties as the landowner like the Court of Appeals majority and dissent both did based on the Restatement (Second) of Torts § 383 (Am. Law Inst. 1965), our Supreme Court expressly noted that its rejection of the Restatement (Second) approach was specific to “the context of th[e] case with respect to the duties owed the guest of an apartment complex tenant by a security services company.” *Id.* at 163. The Court also noted that its conclusion “parallels [the] general rule of law that declines to impose civil liability upon landowners for criminal acts committed by third persons” and distinguished *Cassell* from cases finding an exception to this rule where the criminal act was foreseeable. *Id.* at 165 (citations and marks omitted). Further supporting its decision in *Cassell*, the Court found there was “no authority in North Carolina for imposing [the alleged] duty upon security guards or those who provide them” *Id.* at 164. *Cassell* and, due to its complete reliance on that case as the basis for determining tort duties by looking to contract terms, *Hoisington* ultimately do not support narrowing SS&C’s duties to

Plaintiffs to only the duties expressly provided for in the ASA because *Cassell* was limited to determining the duties owed by security services companies to apartment tenant guests, which is not at issue here.

¶ 39 I see no reason that we are not bound by the longstanding rule from *Pinnix*:

[W]here the injured party elects to sue in tort rather than in contract, he must accept the standard of care prescribed by the common law as the test of determining actionable negligence, [i.e.], that degree of care which an ordinarily prudent person would have exercised under the same or similar circumstances.

Pinnix, 242 N.C. at 363. The trial court erred in limiting SS&C’s duties to the functions expressly provided for in the ASA.

2. North Carolina’s Gross Negligence Standard

¶ 40 I next address the trial court’s basis for granting in part SS&C’s motion to dismiss Plaintiffs’ gross negligence claim. The trial court concluded that SS&C’s motion “should be granted insofar as Plaintiffs’ claim is based on allegations that [SS&C] should have known of Maiden’s fraud through inspection and verification of the Fund’s books and records and other purported ‘red flags[]’” See 2015 Order at ¶ 38. Plaintiffs argue the trial court applied an incorrect gross negligence standard that requires knowing and willful misconduct rather than wanton misconduct.

¶ 41 “Gross negligence has been defined as wanton conduct done with conscious or reckless disregard for the rights and safety of others.” *Toomer v. Garrett*, 155 N.C.

App. 462, 482 (2002) (marks omitted), *appeal dismissed, disc. rev. denied*, 357 N.C. 66 (2003). “Aside from allegations of wanton conduct, a claim for gross negligence requires that [the] plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages.” *Id.*

¶ 42 “Our Supreme Court [has] stated that . . . ‘the difference between ordinary negligence and gross negligence is substantial.’” *McDevitt v. Stacy*, 148 N.C. App. 448, 460 (2002) (quoting *Yancey v. Lea*, 354 N.C. 48, 53 (2001), *superseded on other grounds by Piazza v. Kirkbride*, 372 N.C. 137 (2019)). Over numerous decades, our Supreme Court has ventured to make clear the distinction between willful misconduct and wanton misconduct. *See, e.g., Pleasant v. Johnson*, 312 N.C. 710, 714 (1985) (“Though the terms ‘willful,’ ‘reckless’ and ‘wanton’ are often used in conjunction, we have endeavored in prior cases to differentiate between them.”).

¶ 43 In *Pleasant*, our Supreme Court discussed the respective meaning of the terms, though in the context of holding that an “injury to another resulting from willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers’ Compensation Act.” *Id.* at 714-15. The Court stated that it had “described ‘wanton’ conduct as an act manifesting a reckless disregard for the rights and safety of others” and that the “term ‘reckless,’ as used in this context, appears to be merely a synonym for ‘wanton’ and has been used in conjunction with it for many years.” *Id.* at 714. Meanwhile, the Court noted that “[d]efining ‘willful

MURPHY, J., concurring in part and dissenting in part

negligence’ has been more difficult” but that the term “has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed.” *Id.* Almost directly contrary to the trial court’s conclusion here that actual knowledge of misconduct is required for gross negligence, *see* 2020 Order at ¶ 35, our Supreme Court in *Pleasant* unambiguously recognized that “[w]anton and reckless negligence gives rise to constructive intent” and that “[c]onstructive intent to injure may also provide the mental state necessary for an intentional tort.” *Id.* at 715.

¶ 44 Although our Supreme Court has identified factors sufficient for conduct to constitute gross negligence, it has never stated they were required factors. In *Yancey*, 354 N.C. at 53, the Court described the difference between ordinary and gross negligence as being based “not in degree or magnitude of inadvertence or carelessness” but in “intentional wrongdoing or deliberate misconduct affecting the safety of others.” It explained, “[a]n act or conduct rises to the level of gross negligence when the *act* is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard for the safety of others.” *Id.* Further, “[a]n act or conduct moves beyond the realm of negligence when the *injury or damage* itself is intentional.” *Id.*

¶ 45 Much more recently, in *Needham v. Price*, 368 N.C. 563, 565-66 (2015), our Supreme Court confirmed that “willful” acts include those “done knowingly’ and for

a particular purpose” but that “gross negligence,” which we had described as falling between ordinary negligence and intentional conduct, is less stringent than a “willful and malicious” standard because it includes “wanton” conduct that need not be intentional nor done with actual knowledge. I therefore do not agree with the trial court’s conclusion that a gross negligence claim should be dismissed to the extent that it is based on allegations of constructive, rather than actual, knowledge. The trial court erred in requiring allegations of actual knowledge for Plaintiffs’ gross negligence claim.

3. Applying the Summary Judgment Standard to Plaintiffs’ Tort Claims

¶ 46 Under the summary judgment standard, SS&C “must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law.” *Marcus Bros. Textiles*, 350 N.C. at 220. We view the evidence in the light most favorable to Plaintiffs, *see In re Will of Jones*, 362 N.C. at 573, and I am guided by the principle that “summary judgment is a drastic measure[] and [] should be used with caution.” *See Carolina Power & Light Co.*, 296 N.C. at 402. Plaintiffs claim their evidence “clearly supports claims for negligence, gross negligence, negligent misrepresentation, and grossly negligent misrepresentation.” I now consider whether Plaintiffs have offered sufficient evidence for these tort claims to overcome summary judgment.

a. Negligence

¶ 47

In granting summary judgment to SS&C, the trial court noted that “[e]ven under North Carolina’s generous standards of notice pleading, the Amended Complaint cannot be read to assert a *separate* claim against SS&C for negligence that provided the required notice to SS&C that Plaintiffs sought to hold it liable for mere negligence.” See 2020 Order at ¶ 38 (citing *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 262 N.C. App. 526, 541 (2018), *modified in part & aff’d in part, rev’d in part*, 375 N.C. 288 (2020)). But the part of *Savino* dismissing a negligence claim supposedly not asserted in the complaint because our courts “have refused to allow plaintiffs to assert negligence claims not pleaded in the complaint” that the trial court cited, see 262 N.C. App. at 541, was modified two years later by our Supreme Court in a way that contradicts the conclusion reached below. See *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 300 (2020). Our Supreme Court explained that, although it “agree[d] with the Court of Appeals that [the] plaintiff did not plead a separate claim for administrative negligence[,]” the plaintiff “was not required to do so. Rather, [the] plaintiff used multiple theories, including some administrative failures, to argue a single cause of action: medical negligence.” *Id.* Here, Plaintiffs *did* plead sufficient facts in the *Amended Complaint* to assert an ordinary negligence claim, and “labels as to legal theories which [a] plaintiff gave his claims in the [] complaint are not controlling[]” See *Haynie v. Cobb*, 207 N.C. App. 143, 149 (2010). *Savino* only reinforces this conclusion.

¶ 48 The trial court also cited a nonbinding decision by the Superior Court of the Virgin Islands, the trial court of general jurisdiction for the U.S. Virgin Islands, to support its conclusion that Plaintiffs did not assert a separate claim of negligence. See 2020 Order at ¶ 38 (citing *Bruni v. Alger*, No. ST-16-CV-639, 2019 WL 3047276, *3 (V.I. Super. Ct. 21 June 2019)). According to the court in *Bruni*, “[the] definition of gross negligence as wanton, reckless behavior—different in quality rather than degree from ordinary negligence—renders gross negligence an independent claim. Thus, negligence and gross negligence must be pled under separate counts.” *Bruni*, 2019 WL 3047276 at *3. *Bruni*, while based on a notice pleading standard, is contrary to our prior decisions because it effectively holds that all claims must be explicitly and separately labeled in the complaint. We have unambiguously stated in prior cases, and should confirm here, that labels are not controlling. See *Haynie*, 207 N.C. App. at 149; *Holton*, 258 N.C. App. at 417-18 (“Under [] notice-pleading [], the allegations of [the] plaintiff’s complaint were adequate for her rescission claim to survive a Rule 12(b)(6) dismissal Despite not enumerating a separate rescission claim, . . . we conclude that [the] complaint provided [the] defendant sufficient notice of the transaction . . . to produce a claim for rescission of th[eir] agreement.”).

¶ 49 I thus find no support for the contention that Plaintiffs needed to assert a claim of negligence as a separately labeled claim and thus that Plaintiffs did not assert a negligence claim at all. As explained below in discussing the evidence

supporting Plaintiffs' gross negligence claim, Plaintiffs have presented sufficient evidence to create triable issues of fact as to whether SS&C was negligent in administering the Fund, performing its accounting work, and preparing and sending the monthly Capital Statements to Plaintiffs. Accordingly, Plaintiffs have asserted a negligence claim on which summary judgment should not be granted to SS&C.⁶

b. Gross Negligence

¶ 50 Plaintiffs have provided sufficient evidence to conclude genuine factual disputes exist as to whether SS&C was grossly negligent in preparing the Capital Statements and sending them to Plaintiffs based on allegations of what SS&C knew and should have known.

¶ 51 Plaintiffs offer the following evidence in support of their gross negligence claim “establishing [] SS&C both knew and should have known that the Statements contained false information”: (1) “SS&C was aware that Maiden transferred hundreds of thousands of dollars from the Fund’s brokerage account to a [Bank of

⁶ SS&C contends negligence is barred as a matter of law because the ASA includes a limited-liability provision expressly stating that “SS&C shall not be liable to the Fund or Management except for damages finally determined by a court of competent jurisdiction to have resulted directly from the gross negligence, willful misconduct, or bad faith of SS&C.” I am unpersuaded. Plaintiffs were not parties to the ASA and thus are not bound by its limited-liability provision. Further, the longstanding rule of *Pinnix* still controls: “[W]here the injured party elects to sue in tort rather than in contract, he must accept the standard of care prescribed by the common law as the test of determining actionable negligence” See *Pinnix*, 242 N.C. at 363.

America] account controlled by Maiden”; (2) “SS&C booked millions of dollars of Fund assets at zero cost, as if Maiden acquired the assets for \$0[.00]”; (3) “SS&C changed the Fund’s general ledger to create a false investment basis of \$500,000[.00] in certain private shares, thereby making it appear that the shares had been paid for”; (4) “SS&C reduced the purported cost of the Fund’s holdings of a private company, thereby creating false investment gains”; and (5) “SS&C inflated investment multiples which increased the purported values of the Fund’s holdings.” According to Plaintiffs, “the trial court erroneously concluded that this evidence was insufficient because SS&C’s employees self-interestedly testified that they ‘never suspected that Maiden’s proffered information was false.’”

¶ 52 In response, SS&C contends that none of this evidence “suggests that SS&C knew the Capital Statements contained false information” and that this evidence “fails to establish gross negligence[.]” SS&C—with no citations—first points to what it considers “undisputed” facts: (a) “there are no communications between Maiden and SS&C in which they acknowledge, plan, or discuss reporting false financial information”; (b) “there are no internal documents in which SS&C employees indicate any awareness that the financial information reported by Maiden may be false”; (c) “SS&C was paid on a fixed-fee basis and had no motive—financial or otherwise—to further Maiden’s fraudulent scheme”; and (d) “every SS&C witness denied any knowledge of Maiden’s fraud.”

¶ 53

Even if I believed such facts are undisputed, they are ultimately irrelevant in determining whether Plaintiffs have met their burden of production regarding what SS&C knew or should have known. Viewing the facts in the light most favorable to Plaintiffs, it could be true that SS&C had no email or other memorialized communications internally or with Maiden about reporting false information *and* that SS&C nevertheless knew or should have known they were reporting false information. SS&C being paid a fixed-fee also does not mean there is *no* financial basis for furthering Maiden’s fraud—it simply means that the financial motive could be to not be fired or to not upset other clients whose funds SS&C administered at the time. Moreover, although every SS&C witness may have denied knowledge of Maiden’s fraud, wanton conduct rising to the level of gross negligence need not be based on admissions or other evidence of actual knowledge, *see supra* ¶¶ 40-45, and Plaintiffs point to a plethora other evidence disputing this testimony and suggesting a conscious and reckless disregard for the rights and safety of others. I now consider SS&C’s responses to the five categories of evidence that Plaintiffs contend show SS&C knew or should have known the Capital Statements contained false information such that SS&C was grossly negligent in preparing them and sending them to Plaintiffs.

¶ 54

First, on the transfers that Plaintiffs claim SS&C was aware Maiden made from the Fund to a Bank of America account he controlled, SS&C claims (a) “Maiden

MURPHY, J., concurring in part and dissenting in part

routinely told SS&C that the outflows were for Fund-related tax payments on fees[.]” and (b) “[t]he ASA expressly permits SS&C to rely on information received by Maiden.” Neither claim adequately disputes Plaintiffs’ evidence about the transfers to the account that tends to show SS&C knew or should have known that Maiden was operating a fraud and thus that, along with the other circumstantial evidence, SS&C was reporting false information that caused SS&C’s conduct to rise to the level of gross negligence. Viewing the evidence in the light most favorable to Plaintiffs, it is plausible Maiden could have routinely told SS&C the transfers were for Fund-related tax payments or fees *and* SS&C still should have known—or even did know—it was reporting false information about the Fund. Further, although the ASA may permit SS&C to rely on information provided by Maiden, the ASA’s provisions cannot replace the common law duty of ordinary care that is measured here by the standards ordinarily applicable to accountants,⁷ and the standards applicable to accountants,

⁷ The trial court found that SS&C’s accounting work did not, in fact, constitute “accounting” under the definition provided in N.C.G.S. § 93-1(a)(5). 2020 Order at ¶ 60 (citing *Mastrom, Inc. v. Cont’l Cas. Co.*, 78 N.C. App. 483, 485 (1985)). This definition describes “accountancy” as “involv[ing] the auditing or verification of financial transactions, books, accounts, or records, *or the preparation, verification or certification of financial, accounting and related statements intended for publication . . .*” N.C.G.S. § 93-1(a)(5) (2021) (emphasis added). According to the trial court, “the only work done by SS&C that arguably falls under this definition is the preparation of the Capital Statements, but those documents—by their own terms—were ‘preliminary, unaudited, and subject to change’” such that they were not the products of an “audit” or “verification[.]” See 2020 Order at ¶ 60. However, SS&C’s preparation of the Statements that it sent to Plaintiffs, the primary conduct underlying Plaintiffs’ claims, squarely falls under this definition as it involves the preparation of

such as any documentation standard, may be explained by expert testimony. *Supra* ¶¶ 27-39, 54 n.7; see *Copeland v. Amward Homes of N.C., Inc.*, 269 N.C. App. 143, 150 (2020) (holding expert testimony was “sufficient to impose a duty of care” and created a genuine dispute of material fact on the issue of duty that “cannot be resolved at summary judgment”), *disc. rev. improvidently granted*, 379 N.C. 14, 2021-NCSC-118.

¶ 55 Second, on SS&C’s “zero cost” booking, SS&C claims (a) Plaintiffs only point to one instance, which was accurate because the brokerage statement showed the investments were acquired at no cost; (b) there is “nothing inherently inappropriate” with zero cost booking; and (c) “SS&C’s mere recording of transactions on Maiden’s instructions cannot establish [SS&C knew] Maiden was operating a fraud.” SS&C only cites the Record when supporting its first response, and SS&C limits its citation to one instance of zero cost booking even though Plaintiffs point to several instances in the Record. Viewing these instances of zero cost booking in the light most favorable

“financial, accounting and related statements intended for publication” See N.C.G.S. § 93-1(a)(5) (2021). SS&C prepared the Statements with the intent that they be sent to Plaintiffs. It is irrelevant that the Statements were not the products of an audit or verification because the statute includes two categories of conduct: one involving an audit or verification and another involving the preparation, verification, or certification of statements meant for publication. *Id.* Plaintiffs’ claims concern conduct that is within the latter category. Similarly, SS&C’s disclaimer about the Statements being “preliminary, unaudited, and subject to change” is irrelevant because the statute includes three separate kinds of conduct—“preparation, verification or certification”—falling under that latter category.

to Plaintiffs, mere recording of transactions on Maiden’s instructions alone without documentation or further inquiry *could* show, along with the other circumstantial evidence, that SS&C knew or should have known the Capital Statements contained false information. It can reasonably be inferred that SS&C knew or should have known the Statements contained false information where SS&C was instructed to book millions of dollars of the Fund’s assets at zero cost without being provided *any supporting documentation* at the time. SS&C’s attempts to address Plaintiffs’ zero cost booking evidence therefore are unpersuasive.

¶ 56 Third, on SS&C altering the Fund’s general ledger to create a false investment basis of \$500,000.00, SS&C claims “the undisputed evidence shows that SS&C corrected its error in assigning cost basis by appropriately allocating the cost between private and public shares when it learned of its mistake.” At most, such evidence would create factual disputes as to whether the investment basis change was improper given that SS&C supposedly corrected its error when it learned of its mistake and whether the error shows SS&C knew or should have known that the Capital Statements contained false information. The Record, however, does not support SS&C’s characterization.

¶ 57 The deposition testimony cited by SS&C boils down to Maryanne Niedfeld—the primary accountant who worked with Maiden—saying “that the correction here of the cost basis being represented on the holdings properly occurred when it

MURPHY, J., concurring in part and dissenting in part

occurred, so that it was in place properly for year end purposes.” When asked “[w]hy [she] book[ed] [the investment basis] at the end of the year instead of when it would have occurred in reality[,]” Niedfeld responded, “[b]ecause it does[] [not] have an impact on the economic allocations or the capita[l] allocations we[] [are] doing throughout the year.” Niedfeld further explained that “it does[] [not] have any economic impact on our process” because there “is a swing between cost basis and market value[,]” and they had “the total cost basis[] [and] the total market value.” Niedfeld’s testimony is contradicted by the testimony of Plaintiffs’ expert, who stated that, by cost shifting, “[you are] going to affect the . . . unrealized gains that are being reported related to the different stocks[;] . . . what they were doing was trying to make it look like this was a legitimate transaction, because it didn’t look like a legitimate transaction when there was zero basis to start with.”⁸ Viewing this evidence in the

⁸ Although SS&C correctly points out that Plaintiffs’ expert witness cannot offer testimony as to SS&C’s state of mind or other issues based on personal knowledge, experts may offer opinion testimony under North Carolina Rule of Evidence 702(a) if the testimony “provide[s] insight beyond the conclusions that jurors can readily draw from their ordinary experience” such that it “assist[s] the trier of fact.” *State v. McGrady*, 368 N.C. 880, 889 (2016) (citations omitted); see N.C.G.S. § 8C-1, Rule 702(a) (2021). “Opinion testimony may be received regarding the underlying factual premise, which the fact finder must consider in determining the legal conclusion to be drawn therefrom, but may not be offered as to whether the legal conclusion *should* be drawn.” *Norris v. Zambito*, 135 N.C. App. 288, 292 (1999) (citing *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578 (1991)). Thus, it is proper for Plaintiffs’ expert to testify to whether the basis correction had any negative economic impact and to testify to the ordinary standards applicable to accountants and to SS&C’s alleged departures from what those standards require based on his skill, experience, training, and education. See *id.* It, however, would not be proper for Plaintiffs’ expert to tell the jury

light most favorable to Plaintiffs, there are genuine factual disputes concerning the effect of the corrections and the extent that the error and corrections establish SS&C knew or should have known the Capital Statements included false information, though it is undisputed that SS&C sent Capital Statements to Plaintiffs for several months before the correction. SS&C's arguments relating to this evidence are unconvincing.

¶ 58 Fourth, on SS&C creating false investment gains by reducing the cost of the Fund's holdings of a private company, SS&C claims (a) the "evidence" shows, although SS&C cites no Record evidence for this claim, that the error "was an inadvertent mistake"; and (b) "[a]s the [c]ourt below found, and as Plaintiffs do not dispute, the costs recorded had no impact on the financial information reported to Plaintiffs in the Capital Statements." There, again, is a factual dispute about whether SS&C's supposed mistake had any impact. Plaintiffs' expert testified that SS&C's mistake "ha[d] some effects[] because . . . that changes the . . . unrealized gains[,] as "it created very significant realized loss and -- which it should have been realized loss anyway because there was no cash transaction in this" and "there was

the legal conclusion that should be drawn therefrom—e.g., that SS&C owed a particular duty to Plaintiff, was negligent or grossly negligent, or breached its duty to Plaintiffs—in the case *sub judice*. See, e.g., *Norris*, 135 N.C. App. at 292-93 (affirming exclusion of expert testimony that the defendant was "grossly negligent" or "showed reckless disregard for the safety of others" and that the defendant violated the standard set out in the city policy at issue in the case).

not a sale of that security, so it should have been unrealized.” Further, SS&C’s answers do not adequately address that SS&C improperly reduced the cost of the Fund’s holdings of a private company—what SS&C calls an “inadvertent mistake”—and that, when viewing the evidence in the light most favorable to Plaintiffs, such a mistake shows SS&C knew or should have known the Capital Statements contained false information. One can reasonably infer that SS&C’s numerous accounting “mistakes” it blames on following Maiden’s instructions, even when Maiden provided no supporting documentation, tend to show what SS&C knew or should have known about the accuracy of the information it was booking and subsequently reporting to Plaintiffs in the Statements. We should leave it to the jury as the factfinder to resolve factual disputes about SS&C’s alleged mistakes.

¶ 59 Fifth, on SS&C inflating investment multiples, SS&C claims (a) the evidence does not support SS&C inflating the multiples because “it is undisputed that SS&C accurately recorded the investment valuations assigned by Maiden,” and (b) the trial court concluded that Maiden “bore sole responsibility under the ASA and the Offering Documents for attesting to the Fund’s investments and calculating their value.” SS&C’s responses suffer from the same shortcomings as SS&C’s answers to Plaintiffs’ other categories of evidence: the evidence they say is undisputed is not actually dispositive, and the disputed evidence in the Record is sufficient to create a triable issue of fact as to whether SS&C knew or should have known it was sending false

information in the Statements. For instance, SS&C may have accurately recorded the investment valuations assigned by Maiden *and* also known or should have known that the valuations themselves were incorrect, especially considering SS&C was provided no supporting documentation to back up Maiden's valuations. While SS&C and Maiden may have agreed Maiden bore sole responsibility for attesting to the Fund's investments and calculating their value under the ASA, SS&C prepared and sent out the Capital Statements based on valuations and bookings made pursuant to instructions that lacked *any* supporting documentation. If SS&C knew or should have known the information in the Statements was false, as Plaintiffs' evidence tends to show, then SS&C may be liable to Plaintiffs in tort; *Pinnix* dictates that the ASA cannot contract away SS&C's duty to exercise ordinary care in preparing the Statements and sending them to Plaintiffs.

¶ 60 Ultimately, even if it were undisputed what SS&C knew—based on testimony of SS&C employees alleged to have furthered Maiden's fraud—there would still be a dispute about whether SS&C *should have known* the information was false such that its conduct was “wanton,” which presents a triable issue given that constructive knowledge is sufficient. Accordingly, SS&C is not entitled to summary judgment as to Plaintiffs' gross negligence claim that it knew or should have known the information it sent to Plaintiffs in the monthly Capital Statements was false. This conclusion is only bolstered through a thorough review of the other evidence cited by

Plaintiffs.

¶ 61

In addition to the aforementioned evidence, Plaintiffs offered evidence in support of their gross negligence claim that they contend establishes SS&C willfully disregarded accounting documentation standards. Plaintiffs primarily rely on the testimony of their expert, Frank Buckless, Ph.D., which they summarize as opining that “SS&C’s failures represented *extreme* departures from applicable accounting standards of care.” Plaintiffs also rely on “SS&C kn[owing] that the Fund’s offering memorandum (and limited partnership agreement) [*mandated*] the application of ‘GAAP,’ and that GAAP applied, importantly, to the Fund’s ‘net profit and net loss’ calculations.” (Emphasis added). Plaintiffs also point to Maiden’s emails with SS&C accountants, who mentioned their accounting had to be “recorded . . . as per GAAP” and who repeatedly asked Maiden to provide documentation of the Fund’s holdings, and documents produced by SS&C explicitly stating that “SS&C maintains [International Accounting Standards] or US GAAP accounting principles regarding its clients’ financial administration.” Plaintiffs contend “GAAP, of course, requires documentation.” Based on this evidence, Plaintiffs argue SS&C was grossly negligent in willfully disregarding accounting documentation standards because “SS&C’s accounting manipulations made it falsely appear that the Fund was solvent, liquid, and profitable” such that SS&C’s conduct manifested a conscious and reckless disregard for the rights and safety of others.

¶ 62

SS&C's answers to Plaintiffs' arguments concerning the evidence that SS&C willfully disregarded accounting documentation standards boil down to the claims that (a) the ASA did not require GAAP, (b) the evidence affirmatively establishes that GAAP did not apply to SS&C's work, (c) Plaintiffs failed to create any material dispute of fact that SS&C knowingly and willfully disregarded an obligation to apply GAAP because "[t]he actual evidence is unrebutted" and "shows that SS&C's employees (correctly) believed that the Offering Documents did not require SS&C to apply GAAP," and (d) the SS&C emails cited by Plaintiffs reference GAAP in the context of SS&C's obligation under the ASA to coordinate with the Fund's auditors in connection with the Fund's audit. But these answers, again, rest on the assumption that SS&C's duty to Plaintiffs to exercise ordinary care in preparing the Capital Statements and sending them to Plaintiffs can be contracted away by an agreement to which Plaintiffs were not even a party. Even if Plaintiffs were a party to the ASA, the ASA's supposed standard releasing SS&C from following GAAP and thus obtaining supporting documentation cannot substitute for SS&C's common law tort duty to Plaintiffs to exercise ordinary care, which Plaintiffs argue—and support with expert testimony—is measured by accounting standards, such as GAAP, that demand supporting documentation. *Copeland*, 269 N.C. App. at 150 (holding expert testimony was "sufficient to impose a duty of care" and created a genuine dispute of material fact on the issue of duty that "cannot be resolved at summary judgment"). Viewing

the evidence in the light most favorable to Plaintiffs, even if SS&C believed it was not required to follow GAAP or obtain supporting documentation based on the ASA, it can still be inferred that SS&C knew GAAP requires documentation and that SS&C willfully disregarded the requirement. SS&C's claim that it knew documentation was not required under the ASA and thus that it sought no supporting documentation for Maiden's booking instructions only confirms that SS&C willfully chose to ignore GAAP standards. I therefore would hold that Plaintiffs have forecasted evidence to create a triable issue of fact as to whether SS&C's conduct in preparing the Capital Statements and sending them to Plaintiffs was "wanton" such that it amounted to gross negligence.

¶ 63 In sum, SS&C is not entitled to summary judgment on Plaintiffs' gross negligence claim, and the trial court erred in dismissing the claim.

c. Negligent Misrepresentation

¶ 64 Plaintiffs argue that the trial court incorrectly concluded they did not assert a claim for negligent misrepresentation and that they have offered substantial evidence supporting such a claim. In granting summary judgment to SS&C on Plaintiffs' grossly negligent misrepresentation claim, the trial court noted in a parenthetical that negligent misrepresentation was "a claim [Plaintiffs] did not plead[.]" *see* 2020 Order at ¶ 70, but Plaintiffs contend they asserted such a claim and the trial court simply looked to labels in the *Amended Complaint*. I agree that Plaintiffs' *Amended*

MURPHY, J., concurring in part and dissenting in part

Complaint sufficiently pleaded negligent misrepresentation. Thus, I consider Plaintiffs' forecast of evidence for this claim.

¶ 65 “The tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care.” *Boone Ford, Inc. v. IME Scheduler, Inc.*, 262 N.C. App. 169, 175 (2018) (quoting *Walker v. Town of Stoneville*, 211 N.C. App. 24, 30 (2011)). “A party cannot establish justified reliance on an alleged misrepresentation if the party fails to make reasonable inquiry regarding the alleged statement.” *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 369 (2014). “[T]he question of justifiable reliance is analogous to that of reasonable reliance in fraud actions, where it is generally for the jury to decide whether [a] plaintiff reasonably relied upon the representations made by [a] defendant.” *Marcus Bros. Textiles*, 350 N.C. at 224.

¶ 66 Our Supreme Court has emphasized that, “[i]n negligent misrepresentation cases, whether liability accrues is highly fact-dependent, with the question of whether a duty is owed a particular plaintiff being of paramount importance.” *Id.* at 220 (marks omitted). Further, “whether an actor is reasonable in relying on the representations of another is a matter for the finder of fact.” *Id.* at 224-25 (quoting *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 544, *reh’g denied*, 320 N.C. 639 (1987)). Summary judgment is therefore “seldom appropriate in these type[s] of cases, unless the evidence is free of material conflict, and the only reasonable

inference that can be drawn therefrom is that there was no negligence on the part of [the] defendant, or that his negligence was not the proximate cause of the injury.” *Id.* at 220.

¶ 67 The Court stated, “under certain circumstances, the tort of negligent misrepresentation set forth in section 552 of the Restatement (Second) of Torts could provide an appropriate remedy to plaintiffs who had been injured as a result of an accountant’s negligence.” *Id.* at 218.

“Under this approach, . . . [the plaintiff] must demonstrate: (1) the accountant either (a) knew that the third party would rely on this information, or (b) knew that the client for whom the audit report was prepared intended to supply the information to a third party who would rely on this information; and (2) the third party justifiably relied upon this information in its decision concerning the transaction involved or one substantially similar to it.”

Id. at 219.

¶ 68 Applying this test, in *Marcus Bros. Textiles*, our Supreme Court upheld the reversal of a trial court’s grant of summary judgment to a defendant on the plaintiff’s negligent misrepresentation claim. *Id.* at 219-26. First, the Court reasoned that “it [could] be reasonably inferred that [the defendant] knew Piece Goods regularly provided copies of its financial statements to a limited group of major trade creditors, of which group [the plaintiff] was a member.” *Id.* at 220-24. Second, the Court explained that the plaintiff “alleged and made a forecast of evidence that it made

MURPHY, J., concurring in part and dissenting in part

several extensions of credit to Piece Goods in reliance upon the audited 1992 financial statement” and that whether the plaintiff “justifiably relied on the \$30,332,000.00 receivable from a Piece Goods general partner, the accompanying interest, and current inventory are questions of fact for a jury to determine.” *Id.* at 224-26.

¶ 69 Here, in addition to adequately pleading a claim for negligent misrepresentation, Plaintiffs have forecasted evidence to create a triable issue of fact regarding whether §&C knew Plaintiffs would rely on information contained in the monthly Capital Statements and whether they justifiably relied on this information. SS&C, in sending the Statements, owed Plaintiffs a duty to exercise ordinary care as measured by standards applicable to accountants, *see supra* ¶¶ 27-39, 54, and Plaintiffs provide substantial evidence showing the information was prepared without ordinary care based on the purported testimony of their accounting expert. *See supra* ¶¶ 47-49, 51-62. SS&C made no attempt below to offer expert witness testimony of their own. In sum, SS&C is not entitled to summary judgment on Plaintiffs’ negligent misrepresentation claim because Plaintiffs have offered sufficient evidence to create genuine disputes of material fact regarding the claim. I would heed our Supreme Court’s guidance that “summary judgment is seldom appropriate in these type[s] of cases[.]” *See Marcus Bros. Textiles*, 350 N.C. at 220.

d. Grossly Negligent Misrepresentation

¶ 70 Plaintiffs argue that they have provided substantial evidence to support a

grossly negligent misrepresentation claim and thus that the trial court erred in granting summary judgment to SS&C on the claim. However, Plaintiffs' forecasted evidence for this claim need not be addressed.

¶ 71 Plaintiffs ignore an independent basis on which summary judgment was granted to SS&C. Their brief opposing SS&C's summary judgment motion only addressed negligent misrepresentation, not grossly negligent misrepresentation, and the trial court thus reasoned that, "separately, Plaintiffs' failure to respond to SS&C's arguments for dismissal of the claim . . . require[s] dismissal of the claim against SS&C under Rule 56." *See* 2020 Order at ¶ 70. Plaintiffs' Brief on appeal does not address this basis, and Plaintiffs' Reply does not attempt to rebut SS&C's argument that Plaintiffs' failure to address a separate basis for the ruling is sufficient to affirm the claim's dismissal. I therefore would deem Plaintiffs' argument that the trial court erred in granting summary judgment for SS&C on Plaintiff's grossly negligent misrepresentation claim abandoned on appeal because Plaintiffs do not attempt to rebut one of the trial court's independent bases for dismissing this claim. *See* N.C. R. App. P. 28(b)(6) (2022) ("Issues . . . in support of which no reason or argument is stated[] will be taken as abandoned."). As such, I join the Majority in affirming the dismissal of Plaintiffs' grossly negligent misrepresentation claim.

4. Applying the Summary Judgment Standard to Plaintiffs' Other Claims

¶ 72 Plaintiffs also challenge the grant of summary judgment to SS&C on Plaintiffs'

other claims: (a) Securities Act secondary liability, (b) civil conspiracy, (c) punitive damages, and (d) aiding and abetting constructive fraud.

a. Securities Act Secondary Liability

¶ 73 Plaintiffs contend that the trial court erroneously granted summary judgment on their Securities Act secondary liability claim under N.C.G.S. § 78A-56(c)(2).

¶ 74 We have recognized the Securities Act “imposes two essential elements for secondary liability: (1) the ‘material aid’ requirement, and (2) the ‘actual knowledge’ requirement.” *NNN Durham Office Portfolio 1, LLC v. Highwoods Realty Ltd. P’ship*, 261 N.C. App. 185, 194 (2018) (citing N.C.G.S. § 78A-56(c)(2) (2017)), *disc. rev. denied*, 373 N.C. 59 (2019); *see* N.C.G.S. § 78A-56(c)(2) (2021). We endorsed the trial court’s view in *NNN Durham Office Portfolio 1*, 261 N.C. App. at 194-96, that “material aid” must “be accompanied by proof that the party charged with secondary liability *acted with knowledge of the facts on which the claim of primary liability is based.*” *See NNN Durham Office Portfolio 1, LLC v. Grubb & Ellis Co.*, 2016 WL 7489690, 2016 NCBC 93A, ¶ 206 (N.C. Super. Ct. 29 Dec. 2016), *aff’d*, 261 N.C. App. 175 (2018). The trial court also viewed “material aid” as “requir[ing] conduct that rises to the level of having contributed substantial assistance to the act or conduct leading to primary liability” *Id.* at ¶ 203 (marks omitted). “[S]ubstantial assistance” is to be construed narrowly, “considering the potential breadth of secondary liability under [N.C.G.S. §] 78A-56(c)(2)[.]” *Id.*

¶ 75 Here, Plaintiffs forecasted evidence on both elements to support the claim. The trial court dismissed the claim based on its conclusion that “Plaintiffs have presented no evidence that SS&C had actual knowledge of Maiden’s misconduct[,]” *see* 2020 Order at ¶¶ 73-74, and SS&C simply restates this holding as its only argument supporting the dismissal. On the knowledge element, Plaintiffs argue, “SS&C ‘actually knew’ the facts underlying Maiden’s fraud” because “SS&C booked millions of dollars of undocumented and bogus assets into the Fund’s records, and then sent [P]laintiffs false Statements.” Whether such evidence establishes SS&C’s actual knowledge is a disputed issue of fact that is reserved for the jury. On the material aid element, Plaintiffs contend, “SS&C materially aided Maiden’s fraud by knowingly producing bogus accounting entries to support the Statements, by manipulating the accounting to support that fraud, and by helping Maiden conceal that fraud.” Whether such forecasted evidence proves SS&C provided material aid is likewise reserved for the jury. I therefore would hold that summary judgment should not have been granted to SS&C on Plaintiffs’ Securities Act secondary liability claim.

b. Civil Conspiracy

¶ 76 Plaintiffs next contend that the trial court erroneously granted summary judgment to SS&C on Plaintiffs’ civil conspiracy claim.

¶ 77 Under North Carolina law, “to state a claim for civil conspiracy, a complaint must allege ‘(1) a conspiracy, (2) wrongful acts done by certain of the alleged

conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy.” *BDM Invs. v. Lenhil, Inc.*, 264 N.C. App. 282, 300 (2019) (quoting *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444 (2008)). “If a party makes this showing, all of the conspirators are jointly and severally liable for the act of any one of them done in furtherance of the agreement.” *Id.*

¶ 78 “[T]here is not a separate civil action for civil conspiracy in North Carolina.” *Fox v. City of Greensboro*, 279 N.C. App. 301, 2021-NCCOA-489, ¶ 68 (quoting *Dove v. Harvey*, 168 N.C. App. 687, 690 (2005), *disc. rev. denied*, 360 N.C. 289 (2006)). “Instead, ‘civil conspiracy is premised on the underlying act.’” *Piraino Bros., LLC v. Atl. Fin. Group, Inc.*, 211 N.C. App. 343, 350 (quoting *Harris v. Matthews*, 361 N.C. 265, 273 n.2 (2007)), *disc. rev. denied*, 365 N.C. 357 (2011). “Only where there is an underlying claim for unlawful conduct can a plaintiff state a claim for civil conspiracy by also alleging the agreement of two or more parties to carry out the conduct and injury resulting from that agreement.” *Toomer*, 155 N.C. App. at 483. “[T]he underlying unlawful conduct need not be separately stated; [we] review[] all sections of a complaint as to allegations to support such a claim.” *BDM Invs.*, 264 N.C. App. at 300 (citing *Fox v. Wilson*, 85 N.C. App. 292, 301 (1987)). “A party may prove an action for civil conspiracy by circumstantial evidence; however, sufficient evidence of the agreement must exist to create more than a suspicion or conjecture in order to justify submission of the issue to a jury.” *Id.* (marks omitted).

¶ 79 Here, Plaintiffs have failed to forecast evidence to support at least one element of a claim for civil conspiracy. Plaintiffs offered no evidence of an agreement between SS&C and Maiden to carry out wrongful acts that creates more than a suspicion or conjecture. As the trial court correctly concluded, Plaintiffs “rely solely on what they describe as ‘manipulated accounting and . . . incriminating email trails[,]’” and “[t]his evidence does not show that SS&C . . . agreed to participate . . . in Maiden’s fraud.” See 2020 Order at ¶ 77. I therefore would hold that summary judgment was properly granted to SS&C on Plaintiffs’ civil conspiracy claim because Plaintiffs fail to offer substantial evidence supporting the claim.

c. Punitive Damages

¶ 80 Plaintiffs also contend that the trial court erroneously granted summary judgment to SS&C on Plaintiffs’ punitive damages claim. Citing N.C.G.S. § 1D-15, Plaintiffs argue that “SS&C’s intentional, and willful and wanton conduct supports [P]laintiffs’ punitive damages claim.” Plaintiffs provide no reasoning, support, or other context for this argument.

¶ 81 “Punitive damages may be awarded . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts.” N.C.G.S. § 1D-1 (2021). To recover such damages, it must be shown that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory

MURPHY, J., concurring in part and dissenting in part

damages were awarded:

(1) Fraud.

(2) Malice.

(3) Willful or wanton conduct.

N.C.G.S. § 1D-15(a) (2021). A claimant must also “prove the existence of an aggravating factor by clear and convincing evidence.” N.C.G.S. § 1A-15(b) (2021). Under North Carolina Rule of Civil Procedure 9(k), “[a] demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity.” N.C.G.S. § 1A-1, Rule 9(k) (2021). When a trial court has “dismissed all of [the] plaintiff’s substantive claims, [the plaintiff] is precluded from recovering punitive damages since, ‘[a]s a rule[,] you cannot have a cause of action for punitive damages by itself.’” *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 150 (2013) (quoting *Oestreicher v. Am. Nat’l Stores, Inc.*, 290 N.C. 118, 134 (1976)).

¶ 82 “The clear and convincing standard requires evidence that ‘should fully convince.’” *Scarborough v. Dillard’s, Inc.*, 363 N.C. 715, 721 (2009) (quoting *In re Will of McCauley*, 356 N.C. 91, 101 (2002)), *cert. denied*, 563 U.S. 988, 179 L.Ed.2d 1211 (2011). “This burden is more exacting than the ‘preponderance of the evidence’ standard generally applied in civil cases, but less than the ‘beyond a reasonable doubt’ standard applied in criminal matters.” *Id.* (citing *Williams v. Blue Ridge Bldg. &*

Loan Ass’n, 207 N.C. 362, 364 (1934)).

¶ 83 In granting summary judgment to SS&C, the trial court rejected Plaintiffs’ punitive damages claim for two reasons. *See* 2020 Order at ¶¶ 78-80. First, the trial court explained, “Plaintiffs cannot assert a claim for punitive damages . . . where, as here, their substantive claims against SS&C have been dismissed.” *Id.* at ¶ 78. Second, the trial court reasoned that, “[b]ecause Plaintiffs offer no evidence in support of their allegation that SS&C knew of Maiden’s fraud and knowingly submitted false information to Plaintiffs, they have failed to show that punitive damages against SS&C are warranted.” *Id.* at ¶¶ 79-80.

¶ 84 Here, given that wanton conduct may be shown by what a defendant should have known, *see supra* ¶¶ 40-45, I would hold that SS&C was not entitled to summary judgment on Plaintiffs’ punitive damages claim because Plaintiffs’ gross negligence claim is based on substantial evidence of wanton conduct—about what SS&C knew *and* should have known—such that there is a genuine dispute of material fact as to whether SS&C’s conduct falls within the reach of our punitive damages statute. *See Seguro-Suarez v. Key Risk Ins. Co.*, 261 N.C. App. 200, 219 (2018) (“[T]he [plaintiff’s] allegations of fraudulent, malicious, and willful and wanton conduct on the part of [the] [d]efendants in perpetrating those acts are sufficient to allege punitive damages within the meaning of Section 1D-15 of our General Statutes.”).

d. Aiding and Abetting Constructive Fraud

¶ 85 Plaintiffs finally contend that the trial court erroneously granted summary judgment to SS&C on Plaintiffs’ aiding and abetting constructive fraud claim. The trial court granted summary judgment to SS&C on the claim on the basis that “the North Carolina Supreme Court would not recognize a claim for aiding and abetting constructive fraud if the issue were presented for decision.” *See* 2020 Order at ¶¶ 71-72. Plaintiffs do not address the trial court’s basis for dismissal, instead only providing the one-sentence argument in their brief that “Plaintiffs have [] forecast proof of their aiding and abetting constructive fraud claim.” I therefore deem Plaintiffs’ argument—that the trial court erred in granting summary judgment for SS&C on Plaintiff’s aiding and abetting constructive fraud claim—abandoned on appeal. *See* N.C. R. App. P. 28(b)(6) (2022).

CONCLUSION

¶ 86 For these reasons, I respectfully dissent in part and would reverse the dismissal of Plaintiffs’ claims against SS&C for negligence, gross negligence, negligent misrepresentation, Securities Act secondary liability, and punitive damages because SS&C was not entitled to summary judgment on such claims. However, I concur in the Majority’s decision to affirm the dismissal of Plaintiffs’ claims for grossly negligent misrepresentation, civil conspiracy, and aiding and abetting constructive fraud.