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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-856

Filed 15 October 2024

Cleveland County, No. 20 CVS 001499

WILLIAM HUFFSTICKLER and wife, GLENDA HUFFSTICKLER; and TIFFIANY HANNON, Plaintiffs,

v.

DUKE ENERGY CAROLINAS, LLC d/b/a and “DUKE ENERGY CORPORATION”; ITRON, INC.; and, ACLARA SMART GRID SOLUTIONS, LLC, Defendants.

Appeal by Plaintiffs from order entered 9 February 2023 by Judge Eric L. Levinson in Cleveland County Superior Court. Heard in the Court of Appeals 19 March 2024.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by William E. Moore, Jr., for Plaintiffs-Appellants.

McAngus, Goudelock & Courie, PLLC, by Jeffrey B. Kuykendal, for Defendant-Appellee Aclara Smart Grid Solutions, LLC.

GRIFFIN, Judge.

Plaintiffs William and Glenda Huffstickler appeal from the trial court’s order granting summary judgment in favor of Defendant Aclara Smart Grid Solutions, Inc. (“SGS”). Plaintiffs contend they presented claims sufficient to survive summary

judgment, the trial court improperly overruled another superior court judge, and the trial court erred in denying their post-judgment motions under Rules 37, 59, and 60 of the North Carolina Rules of Civil Procedure. We affirm in part and vacate in part.

I. Factual and Procedural Background

Plaintiffs owned a house at 531 Lee Drive in Shelby, North Carolina. Plaintiffs were customers of Duke Energy Carolinas, LLC (“Duke Energy”). Duke Energy contracted with SGS to install “smart meters” for approximately 300,000 customers in North Carolina. On 13 November 2017, an SGS employee arrived at Plaintiffs’ property to install a smart meter. Mr. Huffstickler directed the SGS employee to the location of the meter, outside of the home. The SGS employee stated the power would be off for forty-five seconds, but did not instruct Mr. Huffstickler to disconnect any electronics in the home or notify Mr. Huffstickler of the potential risk of surging electricity. Mr. Huffstickler continued watching television inside the home while the SGS employee replaced the meter.

The power in Plaintiffs’ home went out for thirty-eight seconds during the installation of the smart meter. Almost immediately thereafter, Mr. Huffstickler heard a popping sound in the back bedroom of the home followed by the smoke detector alarm being set off. Mr. Huffstickler ran to the bedroom and saw that a bed next to an electrical outlet was on fire. Mr. Huffstickler unsuccessfully attempted to put out the fire. Mr. Huffstickler ran outside to find the SGS employee and instructed him to call 911. The SGS employee drove away without calling 911 or otherwise

intervening. Rather, the SGS employee reported to SGS that he “didn’t talk to anyone at the home and didn’t see anyone and drove down the road.”

Firefighters from the Cleveland County Volunteer Fire Department arrived and reported the fire was caused by an “electrical malfunction.” The fire caused approximately \$130,000 worth of damage. Due to the fire, Plaintiffs lost their home, personal items, and their pet cat. Mr. Huffstickler also suffered burns on his arm from attempting to put the fire out.

On 8 June 2020, Plaintiffs filed a complaint in Gaston County Superior Court against Defendant. On 18 June 2020, Defendant filed a motion for a more definite statement. On 1 February 2021, Plaintiffs timely filed their amended complaint. On 9 June 2021, Defendant filed an answer.

On 27 July 2021, Plaintiffs filed a motion to compel discovery against SGS, but withdrew their motion one week later. On 9 August 2022, the parties entered a Consent Discovery Scheduling Order determining that “all discovery in this case shall be completed no later than sixty (60) days before trial” and “[t]his case shall be peremptorily set for trial on January 30, 2023, or as soon as thereafter can be scheduled.” (Emphasis removed). This case was then calendared for trial to begin on 31 January 2023.

On 20 October 2022, SGS filed a motion for summary judgment. On 21 December 2022, Plaintiffs filed a motion to compel discovery from Defendant. Both motions were calendared to be heard on 18 January 2023.

At the 18 January 2023 hearing, superior court Judge Pomeroy declined to hear Defendant’s motion for summary judgment, and instead issued an oral ruling granting in part and denying in part Plaintiffs’ motion to compel. On 23 January 2023, Judge Pomeroy entered a written order (the “Compel Order”) instructing Defendant, in part, to provide its company employee handbook, as requested by Plaintiff, no later than 27 January 2023. Defendant served responses to discovery on Plaintiff on January 27, but did not wholly comply as directed by the Compel Order.

On 30 January 2023, this case came on for trial as previously calendared. Judge Levinson heard Defendant’s motion for summary judgment prior to trial. On 2 February 2023, the trial court entered a written order granting summary judgment for Defendant and dismissing each of Plaintiffs’ claims. The parties received notice of the summary judgment order on 24 February 2023.

On 8 March 2023, Plaintiffs filed post-judgment motions to amend findings and to revise or set aside judgment, and/or for a new trial. On 24 March 2023, Plaintiffs filed a notice of appeal to this Court from the trial court’s summary judgment order. On 22 May 2023, the trial court denied Plaintiffs’ post-judgment motions. On 20 June 2023, Plaintiffs filed a notice of appeal from the denial of their post-judgment motions.

II. Analysis

Plaintiffs contend the trial court erred by granting summary judgment for Defendant, overruling another superior court judge’s order, and abusing its discretion

in denying their Rule 37, 59, and 60 post-judgment motions. We address each argument in turn.

A. Summary Judgment on Plaintiffs' Claims

Plaintiffs argue the trial court erred as a matter of law in granting summary judgment for Defendant. Plaintiffs presented twenty claims in their initial complaint but challenge the dismissal of only ten of those claims on appeal. Defendant contends the trial court correctly entered summary judgment on all of Plaintiffs' claims because Plaintiffs' forecasted evidence undisputably failed to satisfy the material elements of each cause of action.

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. R. Civ. P. 56(c) (2023). “A ‘genuine issue’ is one that can be maintained by substantial evidence.” *Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc.*, 385 N.C. 250, 267, 891 S.E.2d 100, 114 (2023) (citation omitted). The “movant bears the burden of establishing the lack of any triable issue[.]” *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999). Review of orders granting summary judgment is *de novo*, viewing the evidence in the light most favorable to the non-moving party. *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007).

1. Negligence

Plaintiffs' primary claim alleges the SGS employee's negligence caused the fire to start in Plaintiffs' home. Summary judgment is usually inappropriate as a remedy in cases of negligence because "the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court[.]" *Thompson v. Bradley*, 142 N.C. App. 636, 641, 544 S.E.2d 258, 261 (2001). "However, summary judgment is appropriate in a cause of action for negligence where 'the forecast of evidence fails to show negligence on [the] defendant's part or establishes [the] plaintiff's contributory negligence as a matter of law.'" *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (citation omitted).

"The test of liability for negligence . . . is the departure from the normal conduct of the reasonably prudent man, or the care and prevision which a reasonably prudent person would employ in the circumstances." *Tyson v. Ford*, 228 N.C. 778, 781, 47 S.E.2d 251, 253 (1948). To show negligence, the plaintiff must present evidence of "three elements: (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach." *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022). A proximate cause of an injury is found when an injury could have been foreseen as probable under all the facts as they existed. *See Mattingly v. R. R.*, 253 N.C. 746, 752, 117 S.E.2d 844, 848 (1961).

The standard of reasonable care that should be applied in most circumstances is ordinarily a question of fact for the jury to decide. *Frankenmuth Ins.*, 235 N.C.

App. at 34, 760 S.E.2d at 100–01. Nonetheless, in instances of professional negligence, the burden of establishing the standard of care requires an expert determination when common knowledge does not suffice. *See Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008).

Professional negligence arises where the allegedly negligent performance is conducted in the defendant’s professional capacity. *See Cranes Creek, LLC v. Neal Smith Eng’g, Inc.*, 291 N.C. App. 532, 534, 896 S.E.2d 273, 275 (2023). To establish professional negligence, “the plaintiff bears the burden of showing: (1) the nature of the defendant’s profession; (2) the defendant’s duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.” *Frankenmuth Ins.*, 254 N.C. at 34, 760 S.E.2d at 101 (quoting *Huffman Oil Co.*, 190 N.C. App at 271, 661 S.E.2d at 11 (internal quotation omitted)). “If the plaintiff fails to establish the proper standard of care through expert testimony in a professional negligence claim, summary judgment for the defendant is proper.” *Frankenmuth Ins.*, 235 N.C. App. at 35, 760 S.E.2d at 101.

Our Courts have held that defendants whose jobs involve the installation of equipment concerning electricity are professionals in their service because “[e]lectricity is not only dangerous, even deadly, but it is invisible, noiseless, and odorless, rendering it impossible to detect the presence of the peril until the fatal work is finished.” *Jenkins v. Leftwich Electric Co.*, 254 N.C. 553, 560, 119 S.E.2d 767, 772 (1961). “A high degree of foresight is required of the defendant because of the

character and behavior of electricity which it generates and sells.” *Kiser v. Carolina Power & Light Co.*, 216 N.C. 698, 700, 6 S.E.2d 713, 714 (1940). In *Jenkins*, the case concerned “the alleged negligence of [the] defendant in the installation of electric wiring, swit[c]h boxes, junction boxes, and receptacles in [the plaintiff’s] home.” *Id.* at 560–61, 119 S.E.2d at 772. This Court held that the appropriate standard of care was that of a reasonably prudent professional in the defendant’s field, stating:

One engaged in the business of generating and distributing electricity and who sells and engages to install electric equipment and supply current therefor must exercise the care of a reasonably prudent man skilled in the practice and art of installing such equipment, according to the state of the art or method generally used by persons engaged in a like business at the time the work is done

Id. at 560, 119 S.E.2d at 772. Our precedent has never spoken directly to the installation of electric meters, only the creation of electric current and the installation of electric wires; nonetheless, the same risks inherent in the management of electricity are present in the installation of electric meters and the duty of care should be the same for practitioners in each. *Jenkins*, 254 N.C. at 560, 119 S.E.2d at 772 (stating that “[o]ne who engages in the business of installing electric wires must be held to the same degree of care as those who make and distribute the current, because the danger to be guarded against is the same”).

Here, the SGS employee installed meters which measured and regulated the flow of electricity, and its business involved the same electrical risks present in *Jenkins*. Therefore, this case presents a question of professional negligence, whether

the SGS employee used the care of a reasonably prudent professional in the electrical field. While it is ordinarily the job of a jury to establish the standard of care, in this case, Plaintiffs had the burden to establish the relevant standard of care through expert testimony. Expert testimony qualifications are laid out by Rule 702 of the North Carolina Rules of Evidence:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(b).

Plaintiffs designated two witnesses as experts in this matter: Robert Krchnavec, an electrical engineer who investigates surges, and Bernard Kromenacker, a residential fire investigator. Plaintiffs' brief includes lengthy passages summarizing information presented by their experts across multiple depositions and causality reports. Though they are formatted as block quotes, these passages largely generalize from witness testimony and attempt to present record evidence showing that Plaintiffs established the professional standard of care

necessary in this case. Nonetheless, the record evidence from each of Plaintiffs' experts failed to establish the relevant professional standard of care beyond what they would personally do in the circumstances. Neither Kromenacker nor Krchnavec, nor any of Plaintiffs' other potential witnesses, forecast that they had prior training or experience regarding the installation and removal of electrical meters, that they were particularly familiar with the generally accepted practices or procedures used by those in the trade, or that the methods the SGS employee used in this case were faulty.

For instance, Krchnavec produced a causality report following his investigation of the electrical surge in Plaintiffs' home. The causality report repeatedly found that an "over-voltage condition" occurred when the meter was installed, resulting in the fire in Plaintiffs' home. His deposition testimony reiterates the same conclusion. However, when asked whether he was familiar with "generally accepted procedures used by those in the trade for installing smart meters" or whether "the people that installed the smart meter on the Huffstickler house failed to follow generally accepted procedures for doing so," Krchnavec conceded that his report did not opine on that and that he had not reviewed those relevant procedures. Likewise, Kromenacker produced a report following his investigation of the fire. But, when asked directly whether the smart meter had been improperly installed, Kromenacker conceded that he had not developed an opinion on the means, method, or training of the SGS employee's installation and he could not say whether the

installation contributed to the fire. Plaintiffs' expert witnesses admitted that they were unfamiliar with the generally accepted principles and methods in the relevant field and were unable to offer an opinion that, assuming a duty existed, the SGS employee's actions breached a professional duty and proximately caused Plaintiffs' injury.

It is the duty of this Court to consider the evidence in the light most favorable to Plaintiffs, but we are not required to infer the existence of evidence which was not presented. Taking the forecasted evidence in the light most favorable to Plaintiffs, Plaintiffs proffered expert witness testimony focused on the actual cause of the fire but failed to sufficiently forecast the professional standard of care, whether the SGS employee's conduct was a breach of that standard, and whether the act was a proximate cause of Plaintiffs' injury. Therefore, Plaintiffs failed to adequately present a claim for negligence and the trial court did not err by granting Defendant summary judgment against this claim.

2. Other Challenged Claims

Plaintiffs' remaining nine challenged claims include the following substantive causes of action: (1) products liability; (2) conversion; (3) breach of contract; (4) misrepresentation, fraud and/or aggravated breach of contract; (5) unfair and deceptive trade practices; and (6) negligent, reckless, and/or intentional infliction of emotional distress. Each of these claims requires a complainant to show a particular circumstance, position of the defendant, or resulting damages. We hold that those

elements are not present in this case. For each of these claims, our review of the evidence before the court during the summary judgment hearing shows Plaintiffs failed to present evidence of at least one essential element of each claim. The trial court therefore did not err in granting Defendant summary judgment for each of Plaintiffs' remaining claims.

B. Overruling Another Judge

Plaintiffs also contend the trial court erred because, by ruling on summary judgment before Defendant fully complied with the Compel Order, it “effectively overruled and refused to enforce” the Compel Order.

Rule 28 of the North Carolina Rules of Appellate Procedure requires a party's brief “shall contain citations of the authorities upon which the appellant relies,” and each issue “in support of which no reason or argument is stated, will be taken as abandoned.” N.C. R. App. P. 28(b)(6). “Under our appellate rules, it is the duty of appellate counsel to provide sufficient legal authority to this Court, and failure to do so will result in dismissal.” *Moss Creek Homeowners Ass'n, Inc. v. Bissette*, 202 N.C. App. 222, 233, 689 S.E.2d 180, 187 (2010) (citing N.C. R. App. P. 28(b)(6)).

In their brief on appeal, Plaintiffs correctly identify that “[t]he well-established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgments of another Superior Court judge previously made in the same action.” *Calloway v. Ford Motor*

Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). Apart from this broad citation, Plaintiffs do not provide any additional explanations, citations, or rules of law to show how Judge Levinson’s summary judgment ruling overruled Judge Pomeroy’s Compel Order. “Although this Court can, after reviewing the record and caselaw, discern some potential lines of argument that could have been made in this portion of the brief, those arguments have not been set forth by Plaintiff[s], ‘and it is not the role of this Court to create an appeal for an appellant or to supplement an appellant’s brief with legal authority or arguments not contained therein.’” *K2HN Constr. NC, LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 215, 832 S.E.2d 559, 565 (2019). We must deem this argument abandoned.

C. Post-Trial Motions

Finally, Plaintiffs contend the trial court erred in denying their post-judgment motions to amend findings, revise or set aside the judgment, and/or for a new trial, arising from North Carolina Rules of Civil Procedure 37, 59, and 60. We hold that the court’s judgments denying these motions are void due to lack of jurisdiction.

As “a general rule, an appeal takes a case out of the jurisdiction of the trial court.” *Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E.2d 879, 880 (1971) (citing *Am. Floor Mach. Co. v. Dixon*, 260 N.C. 732, 735–36, 133 S.E.2d 659, 662 (1963)); see *Bledsoe v. Nixon*, 69 N.C. 81, 84 (1873) (holding trial court lost jurisdiction to decide motion for new trial where a perfected appeal was pending); N.C. Gen. Stat. § 1-294 (2023) (“When an appeal is perfected . . . it stays all further proceedings in the court

below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure[.]”). “An appeal is not ‘perfected’ until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction.” *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011) (citation omitted). Our Supreme Court has held that the trial court does not retain jurisdiction to decide post-judgment motions after a notice of appeal to this Court:

The general rule . . . is not changed by Rules 59 and 60 of the [] Rules of Civil Procedure. Here, when the appeal was taken the trial court was divested of jurisdiction except to aid in certifying a correct record.

Bunch, 280 N.C. at 111, 184 S.E.2d at 882.

Here, Plaintiffs filed their notice of appeal on 24 March 2023. The superior court judge ruled on Plaintiffs’ post-judgment motions on 22 May 2023. The appeal was perfected with this Court, thereby divesting the trial court of jurisdiction as of March 24. The trial court did not have jurisdiction over this case when it ruled on the motions; therefore the rulings on these motions must be vacated.

III. Conclusion

We hold the trial court did not err in granting Defendant’s motion for summary judgment against each of Plaintiffs’ claims. Plaintiffs failed to appreciably argue their claim that granting summary judgment overruled the Compel Order. Finally,

HUFFSTICKLER V. DUKE ENERGY CAROLINAS, LLC

Opinion of the Court

we vacate the trial court's order ruling on each of Plaintiffs' post-judgment motions for lack of jurisdiction, and remand to the trial court for additional proceedings as necessary to resolve those motions.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge HAMPSON concurs.

Judge THOMPSON dissents in part by separate opinion.

Report per Rule 30(e).

THOMPSON, Judge, dissenting.

The majority asserts that, “this case presents a question of professional negligence[,]” and then concludes that the trial court was correct in granting defendant’s motions for summary judgment because “[p]laintiff’s proffered expert witness testimony focused on the actual cause of the fire but failed to sufficiently forecast the professional standard of care” I disagree with the majority’s assertion that this case presents a question of professional negligence,¹ and their conclusion that plaintiffs failed to sufficiently forecast the professional standard of care necessary to overcome defendant’s motion for summary judgment. For these reasons, I respectfully dissent.

At the outset, I note that there has not been a case by which our Supreme Court, or this Court, has extended the doctrine of “professional negligence” to the installation of electrical equipment—the factual circumstances presented by the case at bar.² The majority’s contention that “[o]ur Courts have held that defendants whose

¹ I would posit that this case does not present a question of “professional negligence”; rather, it presents a question of negligence. The employee who allegedly installed the smart meter in this case had no prior experience “dealing with the supply of electricity[,]” underwent just “three days [of] computer training[,]” and “had a trainer for about two weeks where [he] shadowed somebody.”

² As the United States District Court for the District of Massachusetts observed in *Strategic Energy, LLC v. W. Mass. Elec. Co.*, the defendant’s “claim for professional negligence lacks support from any Massachusetts cases involving a professional malpractice claim against electricity distributors *or recognizing any special professional duty owed by such actors*. The court, exercising diversity in jurisdiction, declines to recognize such a *dramatic expansion* of this cause of action when

jobs involve the installation of equipment concerning electricity are professionals” is incorrect.

Our Courts have *never* held that those “whose jobs involve the installation of equipment concerning electricity” are professionals;³ this breathtaking expansion of professional negligence—a doctrine established in the *medical malpractice* context—to *anyone whose job* involves the installation of *any* electrical equipment should concern any individual who uses electricity—in other words, all of us. For purposes of this dissent, I will assume, *arguendo*, that the majority is correct that, “this case presents a question of professional negligence” and analyze accordingly, but first note my vehement objection to this profound expansion of the doctrine of professional negligence, absent any basis in our caselaw.

In order to bring a claim for professional negligence, “a plaintiff must show: (1) the nature of the defendant’s profession; (2) the defendant’s duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.” *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008) (internal quotation marks, emphasis, and citation omitted). “The standard

it lacks a basis in extant state law.” 529 F.Supp.2d 226, 237 (D. Mass. 2008) (emphases added). This Court should *also* decline to engage in such a dramatic (and consequential) expansion of professional negligence, absent any basis in extant North Carolina law.

³ The word “professional” is *entirely absent* from *Jenkins*, the case the majority incorrectly cites for the proposition that “defendants whose jobs involve the installation of equipment concerning electricity are professionals.” Again, professional negligence *has not* been extended to those “whose jobs involve the installation of equipment concerning electricity[.]” as will be discussed at length below.

of care provides a template against which the finder of fact may measure the actual conduct of the professional.” *Id.* (citation omitted).

“The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit is to see if this defendant’s actions lived up to that standard.” *Id.* (internal quotation marks and citation omitted). “Ordinarily, expert testimony is required to establish the standard of care.” *Id.* (citation omitted).⁴ “If the plaintiff fails to establish the proper standard of care through expert testimony in a professional negligence claim, summary judgment for the defendant is proper.” *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 35, 760 S.E.2d 98, 101 (2014). However, an “exception to the requirement of establishing the professional standard of care by way of expert testimony [ex]is[ts] where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care.” *Michael*, 190 N.C. App. at 271, 661 S.E.2d at 11.

A survey of our caselaw on professional negligence demonstrates a trend by which negligence claims, construed as “professional negligence” claims, fail at the

⁴ I note that the case cited by *Huffman* for the proposition that, “[o]rdinarily, expert testimony is required to establish the standard of care[.]” *Bailey v. Jones*, concerns a *medical malpractice* lawsuit. I also note that this Court, in that case, held that there was “not a new standard of care for medical malpractice” and “did not abrogate the common law duties set forth in” numerous cases from our Supreme Court. *Bailey v. Jones*, 112 N.C. App. 380, 386, 435 S.E.2d 787, 791 (1993). Indeed, this Court reasserted that a “physician is required to (1) possess the degree of professional learning, skill, and ability possessed by others with similar training, and experience[.] . . . (2) exercise reasonable care and diligence[.] . . . and (3) use his best judgment in the treatment and care of his patient.” *Id.* “Failure to comply with any one of these duties is *negligence*.” *Id.* at 386, 435 S.E.2d at 791–92.

summary judgment stage due to the plaintiff's failure to establish the appropriate standard of care applicable to the "professional activities" in those cases.⁵ While the plaintiffs *in those cases* may have failed to establish the appropriate standard of care applicable to the professional activities at issue *in those cases*—none of the aforementioned cases dealt with the standard of care due in the installation of electrical equipment, the factual scenario presented by the case at bar, where the appropriate standard of care *has* long been established as a matter of law.

Nearly sixty years ago, in *Jenkins v. Leftwich Elec. Co.*, our Supreme Court established the standard of care to be applied in this case. 254 N.C. 553, 119 S.E.2d 767 (1961). There, the Court observed that it had previously "set forth some of the various expressions found in [its] decisions in respect to *the degree of care required by electric companies in such* [negligence] *cases,*" *id.* at 559, 119 S.E.2d at 771–72 (emphasis added), ultimately concluding that

as to *the degree of care required in such cases*, it is not to be supposed that there is a varying standard of duty by which responsibility for negligence is to be determined . . . [t]he standard is *always the rule of the prudent man, or the care which a prudent man ought to use under like*

⁵ See *Michael*, 190 N.C. App. at 261, 661 S.E.2d at 6 (dismissing the plaintiff's negligence action for failure to establish the standard of care applicable to "the design of a water main construction project by North Carolina professional engineers"); see also *Frankenmuth*, 235 N.C. App. at 36, 760 S.E.2d at 102 (dismissing the plaintiff's negligence action for failure to establish "what a reasonable municipal corporation providing water to the Club would do [differently] given the facts of the case"); see also *Cranes Creek v. Neal Smith Eng'g.*, 291 N.C. App. 532, 537, 896 S.E.2d 273, 277 (2023) (dismissing plaintiff's claim "because none of [the] [p]laintiff's experts were able to testify to the professional standard of care for engineers"). In my review of the caselaw pertaining to the doctrine of professional negligence, it appears that our Court has often conflated "professional malpractice" with "professional negligence."

circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions The standard is due care, and due care means commensurate care under the circumstances.

Id. at 559–60, 119 S.E.2d at 772 (emphases added).

The Court then observed that the “problem presented by th[at] appeal was to determine *the degree of care owed by a contractor who installs electric wires in a dwelling house*” as opposed to an electric company’s duty of care. *Id.* at 560, 119 S.E.2d at 772 (emphasis added). After surveying our caselaw’s principles regarding *an electric company’s standard of care* and applying them to the facts in *Jenkins*, our Supreme Court determined that, “[o]ne who engages in the business of installing electric wires *must be held to the same degree of care* as those who make and distribute the current, because the danger to be guarded against is the same.” *Id.* (emphasis added).

Synthesizing these principles, our Supreme Court concluded that a contractor who is hired to install electrical wires in a dwelling house “*must exercise the care of a reasonably prudent man skilled in the practice and art of installing such equipment, according to the state of the art or method generally used by persons engaged in a like business* at the time the work is done.” *Id.* (emphases added). Finally, our Supreme Court concluded that the defendant’s “use of an incompetent employee under the

circumstances” there, for the “installation of wiring, *etc.*,⁶ for the use of electricity is *negligence*, because the law imposes upon every person who enters upon an active course of conduct the positive duty to *exercise due care*, which means *commensurate care under the circumstances*, and calls a violation of that duty[,] negligence.” *Id.* at 565, 119 S.E.2d at 776 (emphases added). *This* is the appropriate standard of care applicable to the present case.

In the present case, in their amended complaint, plaintiffs asserted that defendant “had a duty to exercise reasonable care in . . . training and response of [smart meter] installers or users” and that defendant also

had a *duty to exercise reasonable care* in their handling, selling, use, deployment, attachment and/or distribution – of the [s]mart-[m]eters . . . including a duty of care to ensure that the [s]mart-[m]ete[r]s attached to [p]laintiffs’ home[] did not . . . unacceptably accelerate electrical energy in the existing wiring, electrical systems, or home[] of [p]laintiffs.

⁶ Our Supreme court’s use of “etc.” in *Jenkins* should not go unnoticed. The majority contends that “[o]ur precedent has never spoken directly to the installation of electric meters, *only* the creation of electric current and the *installation of electric wires.*” (emphases added). Again, this is not the case, as our Supreme Court’s use of “etc.” in *Jenkins* contemplates *more* than wiring, as the majority contends. Moreover, I would argue that the majority simply notes a distinction without a difference; whether the installation involves wires, electrical equipment, or smart meters—all of these involve *electricity*—where “a high degree of foresight is required of the defendant because of the character and behavior of electricity which it generates and sells.” *Kiser v. Carolina Power & Light Co.*, 216 N.C. 698, 698, 6 S.E.2d 713, 714 (1940). New technology does not abrogate the standard of care to be applied to the installation of electrical equipment that was established in *Jenkins*.

Similarly, plaintiffs asserted that “[d]efendants each owed a duty of care towards [p]laintiffs that was commensurate with the inherently dangerous, harmful, or injurious nature of conducting and metering electric current” and that

[d]efendants failed to *exercise ordinary care* by the foregoing specified acts and/or omissions that . . . result[ed] in the infiltration, surge, persistent energy, explosion, escape, and/or otherwise unacceptably accelerated electrical energy . . . resulting in [p]laintiffs’ personal injury, loss and damage as alleged herein.

(Emphasis added).

Finally, plaintiffs asserted the elements of a negligence claim,⁷ that (1) “[d]efendants, and each of them, through their respective acts and/or omissions . . . breached their respective duties of care to [p]laintiffs[,]” (2) “[i]t was reasonably foreseeable to [d]efendants that [p]laintiffs would likely suffer . . . by virtue of [d]efendants’ breach of their duty and failure to exercise ordinary care[,]” (3) “[b]ut for [d]efendants’ negligent and/or grossly negligent acts and/or omissions . . . [p]laintiffs would not have been injured or harmed[,]” and (4) “[e]ach of the [d]efendants’ negligent conduct was a direct and proximate cause (whether solely or jointly) of the loss, damage, and injury to [p]laintiffs and their respective personal and real property”

⁷ The elements of a claim for negligence are “(1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach.” *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022).

The majority acknowledges that a portion of plaintiffs' proffered expert testimony, witness Krchnavec's "causality report[,] repeatedly found that an 'over-voltage condition' occurred when the meter was installed, resulting in the fire in [p]laintiff's home." Indeed, Krchnavec testified in his deposition about the smart meter, noting that, "right in there is where we had an over-voltage condition causing an arc and an arc then, in turn, started the bed on fire." Krchnavec also testified that, "[w]hen you push this meter in, immediately you get all this current flowing that's trying to power up the air conditioner and the oven and the TV and this and that and it's that surge that gives you an over-voltage condition."

According to Krchnavec, if, "instead, you had everything turned off in the house and you plug this [smart meter] in, you don't get a surge because everything's off[.]" but "[p]ushing in, pulling out, pushing in, pulling out . . . each one of these is causing a little surge, maybe a big surge if the air conditioning is on" which "will likely cause a fire in that house if I do this a few times when this house has a large load [of electricity] on it, air conditioning, big TV, oven, all that stuff."

Krchnavec further testified that, "people will install meters without powering down stuff. *It goes against what I, as an electrical engineer, would recommend[.]*" (emphasis added) because "removing a meter and plugging a meter in when everything has been turned on opens you to additional surges because of the load that's waiting to be put on when that meter gets plugged in." According to Krchnavec, a proper installation of electrical equipment "would most likely have you turn off the

high load things, like air conditioner, don't be running the oven." Finally, and most convincingly for purposes of summary judgment in this negligence action involving the installation of electrical equipment, Krchnavec testified that, "[t]he way to do it properly is to turn off all the loads. If you turn off all the loads, you don't have anywhere near as large of a surge of current"

The majority contends that "[t]his record evidence from each of [p]laintiffs' experts failed to establish the relevant professional care *beyond what they would personally do in the circumstances.*"⁸ However, "[t]he standard of care provides a template against which the finder of fact may measure the actual conduct of the professional[.]" *Michael*, 190 N.C. App. at 271, 661 S.E.2d at 11 (citation omitted), and "[w]hen 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. 569, 573, 669 S.E.2d 572, 576 (2008) (emphasis added)—here, plaintiffs—to determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as

⁸ Two expert witnesses, an electrical engineer with twenty-three years of experience, and a residential fire investigator who had "been doing this for over forty years" testified as to the appropriate standard of care in this case and how it was breached. It strains credulity to assert that these two expert witnesses did not establish the requisite standard of care "beyond what they would personally do in the circumstances" in the installation of the smart meters, installations which, again, required no prior experience "dealing with the supply of electricity[.]" just "three days [of] computer training[.]" and "a trainer for about two weeks where [the smart meter installer] shadowed somebody."

a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). “Our standard of review of an appeal from summary judgment is de novo[,]” *Jones*, 362 N.C. at 573, 669 S.E.2d at 576, and “on appeal, we [also] view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party’s favor.” *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011).

Viewing the allegations of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits in the light most favorable to the non-moving party—here, plaintiffs—and resolving every reasonable inference in their favor, I would conclude that the aforementioned testimony from plaintiffs’ expert witness established the standard of care, “provide[d] a template against which the finder of fact may measure the actual conduct of the professional[,]” *Michael*, 190 N.C. App. at 271, 661 S.E.2d at 11 (citation omitted), and is sufficient to survive a motion for summary judgment in a professional negligence case involving the installation of electrical equipment.

Indeed, the evidence in the record raises a genuine issue of material fact: whether defendants exercised the care of a reasonably prudent man skilled in the practice and art of such equipment, according to the state of the art, or method

generally used by persons engaged in a like business at the time the work is done⁹ when they attempted to install the smart meter device in plaintiffs’ home without first instructing plaintiffs to “turn off the high load things, like [the] air conditioner”

Whether defendants breached their duty to exercise the care of a reasonably prudent man skilled in the practice and art of installing such equipment, according to the state of the art or method generally used by persons engaged in a like business at the time the work is done,¹⁰ the standard of care to be applied in this negligence action involving the installation of electrical equipment, per our Supreme Court’s holding in *Jenkins*, remains disputed—but what is not at issue, and has long been settled as a matter of law—is the appropriate standard of care in a case wherein there are allegations of negligence in the installation of electrical equipment.

⁹ Alternatively, again assuming, *arguendo*, that the majority is correct, that this case presents a case of professional negligence, and further assuming, *arguendo*, that *Jenkins* does not establish the appropriate standard of care applicable to the installation of electrical equipment, I would further posit that this case falls within the “common knowledge” exception of the requirement that a plaintiff pursuing a professional negligence action establish the requisite standard of care. “[T]he common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care[.]” *Michael*, 190 N.C. App. at 271, 661 S.E.2d at 11, and it does not take an expert, or voluminous deposition testimony from an expert, for a jury to evaluate the compliance with the standard of care in this case, because the installation of electrical equipment *should not*, and generally *does not*, result in a fire.

¹⁰ Again, the employee who allegedly installed the smart meter in this case had no prior experience “dealing with the supply of electricity[.]” underwent just “three days [of] computer training[.]” and “had a trainer for about two weeks where [he] shadowed somebody[.]” in a profession where “a high-degree of foresight is required of the defendant because of the character and behavior of electricity [that] it generates and sells[.]” *Kiser*, 216 N.C. at 698, 6 S.E.2d at 714, that is “not only dangerous, even deadly, but it is invisible, noiseless, and odorless, rendering it impossible to detect the presence of the peril *until the fatal work is finished*.” *Jenkins*, 254 N.C. at 560, 119 S.E.2d at 772 (emphasis added).

As our Supreme Court held long ago in *Jenkins*, “the rule was adopted primarily for the protection of human life, but the fact that property alone is injured or destroyed does not abrogate the rule.” *Jenkins*, 254 N.C. at 560, 119 S.E.2d at 772. Our Constitution guarantees the sacred and inviolable right to a jury trial; selectively parsing the deposition testimony of plaintiffs’ expert witnesses in the light *least favorable* to plaintiffs—to assert that plaintiffs did not establish the requisite standard of care—is not appropriate at the *summary judgment* stage. Plaintiffs have established the requisite standard of care; it is now for a jury to determine whether defendants breached that standard. For these reasons, I would conclude that the trial court erred in granting defendants’ motion for summary judgment, and I respectfully dissent from Section I of the majority’s opinion.

Finally, the majority contends that [p]laintiffs “do not provide any additional explanations, citations, or rules of law to show how Judge Levinson’s summary judgment ruling overruled Judge Pomeroy’s Compel Order.” However, plaintiffs’ brief asserts that, “the trial judge [in granting summary judgment] effectively overruled and refused to enforce the court order[.]” the Compel Order, which required defendants to “provide all contact information for [the witness] that will be dealt with in the next 24 hours.”

Moreover, as plaintiffs acknowledged in their appellate brief, “ordinarily one judge may not modify, overrule, or change the judgment of another [s]uperior [c]ourt judge previously made in the same action.” *Calloway v. Ford Motor Co.*, 281 N.C. 496,

501, 189 S.E.2d 484, 488 (1972).¹¹ It is unclear how total disregard for noncompliance with an existing Compel Order that deals with discovery issues, and the subsequent entry of summary judgment—without resolution of the discovery issues addressed by the Compel Order—does not constitute overruling the order of another superior court judge. For this reason, I also dissent from the majority’s opinion in Section II.B.

¹¹ While this is the only citation provided by appellants on this issue, and it is not the role of this Court to create an appeal by supplementing plaintiffs’ appellate brief with legal authority, this citation *alone* is sufficient to determine that the trial court erred in “modify[ing], overrul[ing], or chang[ing] the judgment of another[.]” because the superior court judge simply ignored that the Compel Order had not been complied with. In order to modify, overrule, or change the initial Compel Order, the burden was on *defendants* to establish that there was, *inter alia*, a “substantial change of circumstances since the entry of the prior order.” *First Fin. Ins. Co. v. Com. Coverage, Inc.*, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002). There was no showing of a substantial change in circumstances by defendants, and therefore, the second trial court judge *did* err in modifying, overruling, or changing the judgment of the first superior court judge—by simply ignoring the court’s Compel Order—and subsequently granting summary judgment to defendants absent defendants’ compliance with that Compel Order.