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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-86

Filed 15 January 2025

Catawba County, No. 18 CVS 1052

UNITED SEWING MACHINE SALES, LLC, Plaintiff,

v.

DIGITAL CUTTING SERVICES, INC., F/K/A PATHFINDER USA, INC., and  
DAVID COOK, Individually, Defendants.

Appeal by Defendants from Judgment entered 17 April 2023 by Judge Gregory  
Hayes in Catawba County Superior Court. Heard in the Court of Appeals 10  
September 2024.

*Wayne O. Clontz for plaintiff-appellee.*

*Wesley E. Starnes for defendants-appellants.*

HAMPSON, Judge.

**Factual and Procedural Background**

On 17 March 2023 a jury returned verdicts in favor of United Sewing Machine (Plaintiff) against Digital Cutting Services, Inc. (Digital Cutting Services) and David Cook (Cook) (collectively Defendants) for Tortious Interference with Contract and Damage to Personal Property. The trial court entered a Judgment consistent with

the jury verdicts on 17 April 2023. It is from this Judgment which Defendants appeal.

The Record before us tends to reflect the following:

Plaintiff is a corporation in the business of selling and servicing “cutting machines.” Donald Coulter<sup>1</sup> (Coulter) began employment with Plaintiff on 9 August 2007. As a condition precedent to his employment, Coulter entered into a “Noncompetition and Nondisclosure Agreement” (Noncompete). The Noncompetition Clause provides:

Employee will from time to time be assigned certain Accounts of Employer, for which Employee will be given primary sales and service responsibility. The Employee’s “territory” will be the area encompassing the physical location of such accounts and within a 100-mile radius around such accounts. Employee will not, for one year following the termination of Employee’s employment with Employer, whether voluntary or involuntary, sell or solicit the sale or service of any product competitive with those of the Employer to any customer located in the Employee’s Territory.

Similarly, the Nondisclosure Clause provides:

Employee will have access to certain “Confidential Business Information” of the company, which may include lists of customers’ names and needs, lists of potential customers, prices and pricing strategies, promotional materials, marketing strategies, product development strategies, and product specifications (unless such information is available by proper means from other sources other than the Employer). Employee will not disclose any Confidential Business Information for any purpose other than for the furtherance of Employer’s Business, whether before or after termination of employment by Employer. Employee will return all Confidential Business Information to Employer promptly upon termination of employee’s employment.

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<sup>1</sup> Coulter is not party to this action.

*Opinion of the Court*

While employed by Plaintiff, Coulter worked in “assembly and service.” His job functions included putting products together and going out into factories and servicing them.

Defendant Cook also previously worked for Plaintiff; specifically, Cook was employed from 2005 to 2009 to work on “Pathfinder machines.” Like Coulter, Cook signed a Noncompetition and Nondisclosure Agreement as a condition of his employment for Plaintiff. In 2009, Cook left his employment with Plaintiff to start his own business, Digital Cutting Services, formerly known as Pathfinder USA, Inc. Digital Cutting Services is primarily in the business of selling Pathfinder cutting machines; Cook is its founder and owner. After Cook left Plaintiff’s employment, Plaintiff sued him for violation of the Noncompetition Agreement. That dispute was settled out of court. In February 2014, Cook ran into Coulter, and Coulter inquired about coming to work for Digital Cutting Services. Shortly thereafter, Coulter left his employment with Plaintiff to work for Digital Cutting Services.

On 13 August 2014, Plaintiff brought claims for Conversion, Fraud/Misrepresentation, Tortious Interference with Contract, Civil Conspiracy, Constructive/Resulting Trust, Quantum Meruit, Unfair and Deceptive Trade Practices, Breach of Contract, and Injunctive Relief against Digital Cutting Services, Cook, and Coulter. That same day, a Temporary Restraining Order was entered against Defendants and Coulter. A preliminary injunction was subsequently entered against Defendants and Coulter on 20 January 2015. Plaintiff filed an Amended

Complaint and Request for Injunctive Relief on 12 February 2016.

After filing and serving the complaint, Plaintiff filed and served requests for production of documents, requests for admissions, and interrogatories. Coulter did not file an answer or respond to any of these requests. When Coulter failed to respond, Plaintiff filed a Motion to Compel Discovery. On 27 September 2017, the trial court entered a Show Cause Order and granted Plaintiff's Motion to Compel Discovery, ordering Coulter to respond. Again, Coulter did not respond. Plaintiff filed additional motions, including a Motion for Sanctions, Declaratory Judgment, and Entry of Default, and a second Show Cause Order. On 12 February 2018, the trial court granted Plaintiff's Motion for Entry of Default and entered an Order for a Default "in favor of the Plaintiff as to all causes of action contained in the Amended Complaint[.]" The trial court ordered a separate hearing for damages. On 9 March 2018, Plaintiff voluntarily dismissed Defendants from the action without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. The hearing for damages was held on 19 March 2018. A Default Judgment was entered against Coulter on 11 April 2018.

One month later, on 18 April 2018, Plaintiff re-filed its claims against Defendants in the present action. In its newly filed Complaint, Plaintiff alleged claims for Tortious Interference with Contract, Damage to Personal Property, Corporate Slander, and Unfair and Deceptive Trade Practices.

On 21 December 2018, Plaintiff filed a Motion for Declaratory Judgment and

*Opinion of the Court*

Motion in Limine, in which it requested the trial court bind Defendants to the Findings of Fact and Conclusions of Law made in the Default Judgment against Coulter. On 15 January 2019, Plaintiff filed a Motion for Summary Judgment. On 1 February 2019, Defendants filed a Motion to Dismiss for Failure to State a Claim and Motion for Summary Judgment. Plaintiff filed a second Motion for Summary Judgment on 7 February 2019. These Motions were heard on 18 February 2019. On 14 March 2019, the trial court entered an Order denying the Motions for Summary Judgment and Defendants' Motion to Dismiss; granting Plaintiff's Motion for Declaratory Judgment in part and denying it in part; and granting Plaintiff's Motion in Limine in part. An Amended Order was entered 21 May 2019. The 14 March 2019 Order and 21 May 2019 Amended Order bound Defendants to certain Findings of Fact contained in the Default Judgment, including a Finding the Noncompete Agreement was valid. On 16 December 2021, Defendants filed a Motion to Set Aside the Order and Amended Order. Defendants' Motion was granted the same day.

Prior to trial, Defendants and Plaintiff again brought Motions for Summary Judgment. The trial court denied both Motions. During argument on these Motions, Defendants requested the trial court rule on the validity of the Noncompete. The trial court indicated it would not decide the validity of the Noncompete as a matter of law but would instead leave the entire question to the jury.

The case was tried before a jury on 14 March 2023. At trial, Joseph Jacomine, Plaintiff's vice president, testified that, shortly before leaving his employment for

*Opinion of the Court*

Plaintiff, Coulter damaged multiple machines belonging to their clients, including a pattern cutting machine belonging to McCreary Modern. After Coulter left to work for Defendants, another machine Plaintiff had on loan to a client—Hickory Springs—was damaged. Jacomine testified Plaintiff's machine at McCreary Modern was damaged in “exactly the same way” Coulter had damaged machines in prior incidents. Jacomine testified Coulter “tore up” the machine at Hickory Springs. Defendants objected to the entire line of questioning, but the trial court allowed the testimony in. On cross-examination, Jacomine testified he did not personally witness Coulter damage the machine at Hickory Springs.

At the close of Plaintiff's evidence, Defendants requested the trial court dismiss all of Plaintiff's claims; the trial court treated Defendants' request as a Motion for Directed Verdicts and denied the Motion. At the close of all the evidence, Defendants renewed their Motions and again requested the trial court rule on the validity of the Noncompete. The trial court did not rule on the validity of the Noncompete and ordered a directed verdict in favor of Defendants on Plaintiff's claims for Slander and Unfair and Deceptive Trade Practices; the trial court also dismissed the Damage to Personal Property claim as to David Cook individually. The issues of Tortious Interference with Contract and Damage to Personal Property were submitted to the jury.

On 17 March 2023, the jury returned verdicts for Plaintiff awarding \$100,000 for Tortious Interference with Contract and \$15,000 for Damage to Personal

Property. The trial court entered Judgment consistent with the jury verdicts on 17 April 2023. On 15 May 2023, Defendants timely filed Notice of Appeal.

### **Issues**

The dispositive issues on appeal are whether the trial court erred by: (I) failing to rule on whether the Noncompete was enforceable; (II) denying Defendants' Motion for Directed Verdict as to the Tortious Interference with Contract claim; (III) admitting Joseph Jacomine's testimony regarding damage to the machine at Hickory Springs; and (IV) not joining Donald Coulter as a party to the present action.

### **Analysis**

#### **I. Tortious Interference with Contract**

The tort of Interference with Contract has five elements:

(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

*United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citation omitted). The dispute before us centers on the first element on the claim—whether the noncompetition agreement between Coulter and Plaintiff is a valid contract.

Defendants argue the Noncompete is invalid and unenforceable. Consequently, Defendants argue, without a valid contract, the Tortious Interference

*Opinion of the Court*

with Contract claim should have been dismissed. Both prior to trial and at trial, Defendants requested the trial court rule on the validity of the Noncompete. The trial court chose not to do so, instead submitting the claim to the jury. Defendants argue this was error because the validity of the Noncompete is a question of law which the trial court must decide, not the jury. Defendants contend, and urge us to agree, had the trial court decided the issue, it would have determined the Noncompete is unenforceable because its territorial restrictions are overbroad.<sup>2</sup> Thus, Defendants argue, the trial court should have dismissed the claim. Ultimately, while we agree with Defendants that the trial court erred in failing to rule on the validity of the Noncompete as a matter of law, the Noncompete is nevertheless not unenforceable. As such, any error by the trial court was harmless.<sup>3</sup>

A Tortious Interference with Contract claim centered around a noncompetition agreement may be dismissed upon a determination that the noncompetition agreement is invalid. *See, e.g., Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 670 S.E.2d 321 (2009) (affirming dismissal of tortious interference with contract claim where trial court found noncompetition agreement overbroad and thus

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<sup>2</sup> Defendants also argue the Noncompete is unenforceable under 16 C.F.R. § 910, the FTC Rule banning most noncompetition agreements. Defendants ignore the fact the effective date of this rule was 4 September 2024 and does not apply to actions accruing before the effective date. *See* FTC Non-Compete Clauses Rule, 16 C.F.R §§ 910.3, 910.6 (2024). Moreover, the FTC Rule has been struck down and its enforcement date stayed pending appeal. *See Ryan, LLC v. FTC*, --- F.Supp.3d ---, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024). As such, the FTC Rule does not impact our analysis.

<sup>3</sup> In response, Plaintiff raises a variety of haphazard counterarguments presented in slap-dash fashion. These arguments are generally unsupported by either legal authority or the record and are otherwise unavailing. As such we decline to address them in further detail here.



*Opinion of the Court*

unenforceable). Prior to trial, both Plaintiff and Defendants brought Motions for Summary Judgment before the trial court. In its argument, Defendants requested the trial court rule on the enforceability of the Noncompete, but the trial court chose to submit the claim to the jury without ruling on the issue.

[Defendants' Counsel]: Your Honor, as the judge -- those are not issues for a jury. Those are issues for Your Honor to decide whether that is a provision that's overbroad as to his geographic area.

. . . .

[Trial Court]: I bet you anything I'm going to hear that [Noncompete] argument to these 12 people over here, and you're going to ask them to find that this contract is invalid and unenforceable.

[Defendants' Counsel]: But see, Your Honor, I think you have to decide that.

[Trial Court]: I could do that. But once again, we've got 12 people coming in that I'm sure you want them to hear your [Noncompete] argument. So that motion for summary judgment is denied . . . As you all can see, pretty much every issue is I'm ready for 12 people to decide it.

Plaintiff also requested the trial court rule on the enforceability of the Noncompete.

[Plaintiff's Counsel]: . . . I argue and contend that whether or not this noncompete is legal or binding is a question of law, not a question of fact for the jury, and Your Honor needs to rule on it .

. . .

Nonetheless, the trial court denied all the Motions before it without ruling on the validity of the Noncompete. The trial court's submission of the issue to the jury without ruling on whether the Noncompete was reasonable as a matter of law was

error. *See Wescott v. State Highway Comm’n*, 262 N.C. 522, 527, 138 S.E.2d 133, 137 (1964) (“Only issues of fact must be submitted to a jury. The court determines questions of law.”) and *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000) (citation omitted) (“The reasonableness of a non-compete agreement is a matter of law for the court to decide.”). *See also Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 220, 333 S.E.2d 299, 300 (1985) (“[W]hether the covenant not to compete was breached is a question of law.”). We review questions of law de novo. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999).

In North Carolina, noncompetition agreements are enforceable if they are “(1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy.” *Id.* at 649-50, 370 S.E.2d at 380 (citing *A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983)). “In evaluating reasonableness as to time and territory restrictions, we must consider each element in tandem—the two requirements are not independent and unrelated.” *Farr Assocs.*, 138 N.C. App. at 280, 530 S.E.2d at 881. “Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable. A longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa.*” *Id.* (citing *Jewel Box Stores v. Morrow*, 272 N.C. 659, 158 S.E.2d 840 (1968)).

Here, the time restriction in the Noncompete is only one year, well within our

established parameters for valid covenants not to compete. *See, e.g., Enters., Inc. v. Heim*, 276 N.C. 475, 173 S.E.2d 316 (1970) (upholding a nationwide two-year restriction); *Farr Assocs.*, 138 N.C. App. at 280, 530 S.E.2d at 881 (citations omitted) (“A five-year time restriction is the outer boundary which our courts have considered reasonable, and even so, five-year restrictions are not favored.”). Thus, we evaluate the territorial restriction “in light of the relatively short duration of the time restriction.” *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 638, 568 S.E.2d 267, 273 (2002). Indeed, Defendants challenge only the territorial restriction of the Noncompete.

This Court has focused on the following factors in evaluating the reasonableness of the territorial restriction in a covenant not to compete:

(1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee’s duty and his knowledge of the employer’s business operation.

*Hartman v. Odell and Assoc., Inc.*, 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994) (citation omitted). “The scope of the territorial restriction must not be any wider than is necessary to protect the employer’s reasonable business interests.” *Precision Walls*, 152 N.C. App. at 638, 568 S.E.2d at 273 (citing *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 229, 393 S.E.2d 854, 857 (1990)).

In *Precision Walls*, this Court upheld a covenant not to compete that restricted

*Opinion of the Court*

an employee from soliciting business from his employer or being engaged in the same kind of business as his employer in North and South Carolina for a period of one year. 152 N.C. App. at 632, 568 S.E.2d at 269. This Court held the territory restrictions were reasonable because although the employee had only worked in North Carolina, he was “aware of information affecting business” in both states, “such as pricing arrangements with suppliers, labor costs, and profit margins.” *Id.* at 638, 568 S.E.2d at 273. In addition, the employee’s role for his new and former employer were “almost identical.” *Id.* This Court thus concluded that “it is within [the] plaintiff’s legitimate business interest to prohibit [the employee] from working in an identical position with a competing business” across two states. *Id.*

In *Wilmar, Inc. v. Corsillo*, this Court upheld a noncompetition agreement in which the employee was barred from competing with his employer “in the territory in which [the employee] worked while employed by [the employer]” for one year after termination of his employment. 24 N.C. App. 271, 271, 210 S.E.2d 427, 429 (1974). Despite the broad definition of “territory,” this Court upheld the restriction. *See id.* at 274, 210 S.E.2d at 430.

In *Okuma America Corp. v. Bowers*, this Court upheld a noncompetition agreement in which the employee was barred from competing with his former employer in the “areas in which [the employer] does business” for six months after terminating his employment. 181 N.C. App. 85, 90, 638 S.E.2d 617, 620 (2007). The employer did business in both North and South America, making the geographic

*Opinion of the Court*

restriction “quite broad.” *Id.* In holding the terms of the covenant valid and enforceable, this Court considered the employee’s “actual contacts with customers, the nature of his duties, the level of his responsibilities, the scope of his knowledge, and other issues relating to how closely the geographic limits fit with [his] work for [his former employer].” *Id.* at 92, 638 S.E.2d at 622. This Court concluded that “when taken in conjunction with the six-month duration, [the territory restriction was] not *per se* unreasonable.” *Id.* at 90, 638 S.E.2d at 620 (citations omitted).

Finally, in *Lloyd v. Southern Elevator Co.*, this Court upheld a covenant not to compete which provided that for two years following the termination of his employment, the employee would not compete in “[a]ny county in which he either is working at the time or has performed substantial work within two (2) years prior thereto” and “[a]ny location or locations within one hundred (100) miles of the boundaries of the county in which any office in or out of which he is working or has worked during his employment[.]” 184 N.C. App. 378, 646 S.E.2d 443, \*1 (2007) (unpublished). The employee “had extensive knowledge of his employer’s business operation, close contact with numerous customers and potential customers, and a thorough knowledge of the North Carolina . . . market, all acquired through his employment with” the employer. *Id.* at \*6. As such, this Court concluded the time and territory restrictions of the covenant not to compete were valid and enforceable. *Id.*

Here, as in *Wilmar*, the Noncompete bars Coulter from competing with

Plaintiff in Coulter's "territory" for one year after termination of his employment. *See Wilmar*, 24 N.C. App. at 271, 210 S.E.2d at 429. "Territory" is further defined as "the area encompassing the physical location of [assigned] accounts and within a 100-mile radius around such accounts." There is evidence in the Record that Coulter worked on a broad range of products and services, including not only pattern cutters but also "cushion stuffers," and "tables for sewing machines." Additionally, there was evidence Coulter had access to proprietary information including "wiring schematics, specifications on how to build up the products[.]" "how to operate the systems," "pricing," "customers," "customer lists," and the manufacturing costs of "[c]ushion stuffers and special sewing machines." As in *Precision Walls*, the evidence indicates Coulter was "aware of information affecting business" across Plaintiff's operations. *See Precision Walls*, 152 N.C. App. at 638, 568 S.E.2d at 273. Additionally, Coulter worked in similar job functions for both employers: "assembly and service" for Plaintiff and "assembling sewing machines" for Defendants. *See id.*

Thus, it is within Plaintiff's legitimate business interest to prohibit Coulter from working in such a position with a competing business. *See id.* In light of these similarities to the above cases and the short time restriction, therefore, the Noncompete is not unreasonable as to territory. Consequently, the trial court's failure to rule on the Noncompete and submission of the claim to the jury was harmless. *See Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 682, 340 S.E.2d 755, 758, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986) (quotation

marks omitted) (quoting 5 AM. JUR. 2D *Appeal & Error* § 795 (1962)) (“It is an almost universal rule that a verdict will cure defects in the pleadings unless the substantial rights of the adverse party have been prejudiced.”) and *Ipock v. Gaskins*, 161 N.C. 674, 77 S.E. 843, 847 (1913) (submission of question of law to jury is harmless when jury decides correctly).

## II. Denial of Directed Verdict

Defendants further argue the trial court erred by denying their Motion for Directed Verdict as to the Tortious Interference with Contract claim because Defendants and Plaintiff are business competitors.<sup>4</sup> This Court reviews a grant of a motion for directed verdict de novo. *Smith v. Herbin*, 247 N.C. App. 309, 312, 785 S.E.2d 743, 745 (2016) (citing *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003)). A directed verdict is proper where “it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish.” *Scarborough v. Dillard’s, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (citation and quotation marks omitted). “A trial court must deny a motion for directed verdict if, viewing the evidence in the light

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<sup>4</sup> To the extent Defendants’ argument appeals the denial of their Motion for Summary Judgment, we may not review these arguments on appeal. “Denial of a motion for summary judgment is not reviewable on appeal from a final judgment after a trial on the merits of the case. Any improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the evidence and merits by the trier of fact.” *Clarke ex rel Est. of Bohn v. Mikhail*, 243 N.C. App. 677, 684, 779 S.E.2d 150, 157 (2015) (citing *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985)). See also *In re Will of McFayden*, 179 N.C. App. 595, 599, 635 S.E.2d 65, 68 (2006) (citations omitted) (“[T]he denial of a motion for summary judgment also is not reviewable on an appeal from a final judgment on the merits.”).

most favorable to the non-movant, there is ‘more than a scintilla of evidence supporting each element of the non-movant’s claim.’ ” *Smith*, 247 N.C. App. at 312, 785 S.E.2d at 745 (quoting *Denson*, 159 N.C. App at 412, 583 S.E.2d at 320).

Defendants contend Plaintiff is barred from recovering for Tortious Interference with Contract. They assert, because they are parties in competition, “a claim for tortious interference with contract will not lie.” Defendants cite *Whittaker General Medical Corp. v. Daniel* in support of this proposition. 87 N.C. App. 659, 667, 362 S.E.2d 302, 307 (1987) (citing *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 367 S.E.2d 647 (1987)) (“[W]hen an employment contract, as in this case, is terminable at will and defendant, in competition with plaintiff, recruits one of plaintiff’s employees, an action for tortious interference with contract will not lie.”). In *Hooks*, our Supreme Court recognized: “If, however, the defendant is acting for a legitimate business purpose, his actions are privileged. Numerous authorities have recognized that competition in business constitutes justifiable interference in another’s business relations and is not actionable so long as it is carried on in furtherance of one’s own interests and by means that are lawful.” 322 N.C. at 221, 367 S.E.2d at 650 (citations omitted).

Defendants’ argument fails because there is evidence to support a finding they were not acting for a “legitimate business purpose.” *Id.* In *Kuykendall*, our Supreme Court reversed the decision of this Court in which we held that an action for tortious interference with contract could not lie because the parties were engaged in direct



competition. 322 N.C. at 643, 370 S.E.2d at 375. The Supreme Court, citing *Hooks*, explained that while in some situations a competitor may hire an employer's former employees without being liable for tortious interference with contract, that privilege may be lost when the competitor acts purposefully and maliciously. *See id.* at 662, 370 S.E.2d at 387. *See also Hooks*, 322 N.C. at 220, 367 S.E.2d at 650 (quotation marks and citation omitted) (“[T]he privilege [to interfere] is conditional or qualified; that is, it is lost if exercised for a wrong purpose. In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved.”).

In *Kuykendall*, our Supreme Court found the competitor to have acted maliciously where the competitor knew the recruited employee was subject to a covenant not to compete, knew the employee was in violation of said covenant not to compete, and obtained and used information from the employee to continue to solicit customers after the employee was enjoined from doing so himself. *Kuykendall*, 322 N.C. at 662-63, 370 S.E.2d at 387-88.

Here, there is evidence Defendants knew Coulter signed the Noncompete, knew he was engaged in acts in violation of the Noncompete, and—at best—failed to stop him from engaging in work and soliciting customers in violation of the Noncompete, or—at worst—facilitated his violation of the Noncompete. Indeed, Cook himself had been subject to the same noncompetition agreement language while employed by Plaintiff and, himself, litigated and ultimately settled claims by Plaintiff

against him. “Thus, we do not have a case, such as in *Hooks*, in which a competitor is merely hiring a competitor’s employees.” *Id.* at 663, 370 S.E.2d at 388.

Furthermore, the competitor in *Kuykendall* argued “it was justified in interfering with the contract because it had a good faith belief that the covenants in question were unenforceable.” *Id.* Our Supreme Court rejected this argument, stating “if a defendant has knowledge of the facts concerning plaintiff’s contractual rights, he is subject to liability even though he is mistaken as to their legal significance and believes that there is no contract or that the contract means something other than what it is judicially held to mean.” *Id.* (citation and quotation marks omitted). Here, then, Defendants’ belief the Noncompete had expired or applied “only to sewing machines” will not justify their interference. *See id.*

Thus, there was sufficient evidence Defendants acted with a wrongful purpose in interfering with the Noncompete. Therefore, the issue was properly submitted to the jury. Consequently, the trial court did not err in denying a Directed Verdict for Defendants.

### III. Admission of Joseph Jacomine’s Testimony

Defendants further contend the trial court erred in admitting testimony from Joseph Jacomine over their objections. Defendant claims Jacomine’s testimony was “pure speculation” and inadmissible hearsay. Defendant argues admitting the challenged testimony was prejudicial because, without it, there was “no admissible direct evidence that Donald Coulter damaged the machine at Hickory Springs

Manufacturing.”

Hearsay is a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). Under our Rules of Evidence, “[h]earsay is not admissible except as provided[.]” *Id.*, Rule 802 (2023). “[O]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay.” *State v. Elkins*, 210 N.C. App. 110, 121, 707 S.E.2d 744, 752 (2011) (alteration in original) (quoting *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998)). Furthermore, testimony that is mere speculation is inadmissible. *State v. Garcell*, 363 N.C. 10, 36, 678 S.E.2d 618, 635 (2009) (citing N.C. Gen. Stat. § 8C-1, Rule 602 (2007) (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.”)).

Specifically, Defendants challenge Jacomine’s testimony that Coulter damaged the pattern cutting machine at Hickory Springs:

[Plaintiff’s Counsel]: Now, remind us what machine at McCreary Modern was affected by Donald Coulter.

[Jacomine]: The Jingwei pattern cutter. The same kind that he tore up at Hickory Springs that was ours.

Defendants objected to this testimony but were overruled. Defendants contend this testimony is hearsay because Jacomine did not observe Coulter damage the machines at Hickory Springs or McCreary Modern. On cross-examination, counsel for

*Opinion of the Court*

Defendants questioned Jacomine as to whether he personally observed Coulter damage the machine at either factory:

[Defendants' Counsel]: Sir, isn't it true all your testimony today about the damage to the motherboard is based on what somebody else told you had happened to the motherboard after they had done diagnostics; isn't that correct?

[Jacomine]: No, he showed me what he was doing.

. . . .

[Jacomine]: When the guy come to check out the motherboards, he showed me that they were burned up.

[Defendants' Counsel]: Yes, sir. And you're aware that motherboards can burn up for any number of reasons, can't they?

[Jacomine]: Yes, but I observed Donnie doing it myself.

[Defendants' Counsel]: Yes, sir. Well, you weren't at McCreary Modern to observe what may or may not have happened there, were you?

[Jacomine]: I was not.

[Defendants' Counsel]: Yes, sir. And you weren't present at Hickory Springs Manufacturing to see what might or might not have happened there either, were you?

[Jacomine]: I was not.

[Defendants' Counsel]: Yes, sir. What you're talking about is what you witnessed at your own plant six weeks before Donnie Coulter left your employment?

[Jacomine]: That is correct.

It appears from this testimony that Jacomine did not personally observe

*Opinion of the Court*

Coulter damaged the machine at Hickory Springs, despite testifying to the incident. His testimony to this incident, therefore, was hearsay because its probative value is dependent upon the truth of the matter asserted, i.e., that Coulter was responsible for the damage to the machine at Hickory Springs. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). However, the erroneous admission of hearsay is not so prejudicial as to require a new trial unless Defendants’ case was adversely affected thereby. *See id.* § 1A-1, Rule 61 (2023).

Here, there was sufficient evidence for the jury to reach the conclusion Coulter intentionally damaged the machine at Hickory Springs, even without the admission of Jacomine’s testimony. Specifically, two other witnesses, Nancy Hope and Gary Farris—both employed at Hickory Springs at the time of the alleged incident—testified Coulter damaged the machine at Hickory Springs. Hope testified she saw Coulter “working on” the pattern machine even though “there was nothing wrong with that machine.” She testified that the next time the machine was used “it wouldn’t work” and hasn’t worked since the incident. Gary Farris also testified Coulter damaged the machine:

[Plaintiff’s Counsel]: Are you aware of who damaged [the machine]?

[Farris]: Yes, Mr. Coulter.

This testimony was sufficient for the jury to conclude Coulter damaged the pattern cutting machine. Thus, the admission of Jacomine’s testimony was not prejudicial.

Defendants further contend the claim for Damage to Personal Property should have been dismissed because Plaintiff did not present evidence that Coulter's alleged actions were "in the course and scope of his employment." As such, Defendants argue, "Plaintiff failed to present sufficient admissible evidence to allow the claim" to proceed to the jury and "it was error for the trial court to deny the motion to dismiss[.]" Defendants renewed these arguments at the close of all the evidence, which the trial court treated as a Motion for a Directed Verdict.

Evidence was introduced at trial that Coulter went to Hickory Springs at Defendants' direction. Other evidence in the Record showed that Defendants believed only Plaintiff's personnel should repair Hickory Springs' machine but sent Coulter to work on it anyways. This is "more than a scintilla of evidence" supporting that Coulter's actions were done at Defendants' direction. *See Smith*, 247 N.C. App. at 312, 785 S.E.2d at 745. Accordingly, we cannot conclude it was error for the trial court to have denied Defendants' Motion for Directed Verdict and submitted the Damage to Personal Property claim to the jury.

#### IV. Necessary Parties

Lastly, Defendants argue the trial court erred by failing to grant their Motion for Summary Judgment as to all claims, because Defendants were a necessary party to the Default Judgment, or alternatively, because Coulter was a necessary party to

the proceedings at bar.<sup>5</sup>

“A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party.” *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365-66 (1978) (citations omitted). “When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action.” *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202-03 (1983) (footnote omitted) (citing *Booker*, 294 N.C. at 158, 240 S.E.2d at 367).

The trial court entered the Default Order on 29 January 2018. Defendants were dismissed from the action on 9 March 2018. The hearing on 19 March 2018 was solely to decide the issue of damages to be assessed against Coulter. There is no evidence Defendants were so vitally interested in the damages to be assessed that a valid judgment could not be rendered in their absence. *See Booker*, 294 N.C. at 156, 240 S.E.2d at 365-66. Thus, they were not a necessary party to the Default Judgment.

Additionally, even if Defendants were a necessary party to the Default proceedings, nothing in the Record indicates Defendants raised the issue before the trial court. The trial court is not required to take action on its own initiative unless the absence of a necessary party is disclosed and no party makes a motion to bring

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<sup>5</sup> As we have explained, the denial of Defendants’ Motion for Summary Judgment is unreviewable on appeal. *See Clarke*, 243 N.C. App. at 684, 779 S.E.2d at 157.

*Opinion of the Court*

the absent party in. *See Pate*, 308 N.C. at 764, 304 S.E.2d at 202-03. *See also Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 668, 101 S.E.2d 679, 682 (1958) (citations omitted) (“Whenever . . . a fatal defect of parties is disclosed, the Court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the Court.”). Indeed, Defendants did not oppose their dismissal from the action.<sup>6</sup>

Nor was Coulter’s absence from the present action erroneous. Defendants neither raised Coulter’s absence before the trial court nor made a motion to join him under Rule 12(b)(7) of our Rules of Civil Procedure. *See* N.C. R. Civ. P. 12(b)(7) (2023) (failure to join a necessary party). As explained, the trial court is not required to join an absent necessary party unless their absence is disclosed. *See Pate*, 308 N.C. at 764, 304 S.E.2d at 202-03; *Morganton*, 247 N.C. at 668, 101 S.E.2d at 682. At no point did Defendants argue Coulter should be joined to the present action. Furthermore, our independent review of the Record does not reveal anything that

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<sup>6</sup> Defendants also argue their dismissal from the Default Judgment violates the *Frow* Doctrine. *Frow* is inapplicable to the facts before us. The *Frow* doctrine protects jointly liable defendants in default from inconsistent results with non-defaulting defendants. *See Frow v. De La Vega*, 82 U.S. 552, 554, 21 L.Ed. 60 (1872). Here, however, Defendants did not default, nor were they adjudged inconsistently with Coulter. Nor is there, as discussed, any evidence Defendants opposed their dismissal from the proceedings. Thus, the Default Judgment is final, such that even if the proceedings ran afoul of the *Frow* doctrine, we may not alter the Default Judgment. *See Henderson v. Matthews*, 290 N.C. 87, 90, 224 S.E.2d 612, 614-15 (1976) (“[P]laintiffs, by failing to appeal, are bound by the judgments against them . . . although there might have been error in the trial leading to these judgments.”).



*Opinion of the Court*

indicates Coulter was so vitally interested in the action that a valid judgment could not be rendered without his presence. *See Booker*, 294 N.C. at 156, 240 S.E.2d at 365-66. Thus, the trial court did not err by proceeding with the action without joining Coulter as a party.

**Conclusion**

Accordingly, for the foregoing reasons, we conclude there was no prejudicial error at trial and the Judgment is affirmed.

NO PREJUDICIAL ERROR.

Judges STROUD and GORE concur.

Report per Rule 30(e).