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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 24-480

Filed 21 May 2025

Mecklenburg County, No. 23CVD006702-590

IRA CLUB FBO MELISSA DAHLQUIST IRA 2000487, Plaintiff,

v.

MONA LISA DANZY, Defendant.

Appeal by Plaintiff and cross-appeal by Defendant from order entered 2 November 2023 by Judge Alyssa M. Levine in Mecklenburg County District Court. Heard in the Court of Appeals 24 October 2024.

Hutchins Law Firm LLP, by J. Haydon Ellis and J. Scott Flowers, for Plaintiff-Appellant.

Robinson, Bradshaw & Hinson, P.A., by Ethan R. White, and Legal Aid of North Carolina, Inc., by Thomas Holderness, Alecia Amoo, and Celia Pistolis, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Plaintiff IRA Club FBO Melissa Dahlquist IRA 2000487 (Plaintiff) appeals from the Order and Judgment of the trial court denying its claim for Summary Ejectment against Defendant Mona Lisa Danzy (Defendant) and awarding Defendant

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monetary damages for both Unfair and Deceptive Trade Practices and violations of our debt collection statutes. Defendant cross-appeals from the same Order and Judgment. The Record before us tends to reflect the following:

On 22 March 2023, Plaintiff filed its Complaint in Summary Ejectment in Mecklenburg County District Court as a Small Claims action assigned to a Magistrate. A Magistrate granted Plaintiff's claim for Summary Ejectment of Defendant from the apartment and entered judgment against Defendant for unpaid rent in the amount of \$2,197.80. Defendant appealed to Mecklenburg County District Court. Additionally, Defendant posted a Bond to Stay Execution of the Summary Ejectment Judgment pending appeal agreeing to deposit with the court the amount of rent allegedly due each month during the pendency of the appeal. With the matter now before the District Court, Defendant filed an Answer and Counterclaims. The Answer denied the material allegations of the Complaint and asserted two affirmative defenses to the claim of unpaid rent owed to Plaintiff. The first affirmative defense averred Defendant owed no money due as a result of Plaintiff's debt collection violations. The second affirmative defense averred Plaintiff owed no money to Defendant because of Plaintiff's unfair and deceptive trade practices. Defendant additionally counterclaimed for (1) violations of debt collection statutes and (2) Unfair and Deceptive Trade Practices, specifically arising from Plaintiff's "collection of improper charges."

During the pendency of the case, Defendant made rental bond payments,

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beginning in April 2023 and continuing through July 2023. Plaintiff sent at least 89 automated emails during the pendency of the case requesting payment and listing the balance due, including charges and late fees for months in which the rental bond was paid.

The trial court heard the case on 28 July 2023. At this hearing, the trial court heard testimony from Defendant and employees of Plaintiff. The evidence from this hearing showed:

Defendant originally entered into a residential lease agreement to rent an apartment from Plaintiff in February 2016. During cross-examination by her own attorney, Defendant testified that upon moving in she observed that some of the apartment windows were not equipped with functional locks, and notified Plaintiff of this defect, verbally and in writing. Plaintiff objected to introduction of this evidence as outside the scope of the pleadings, and the trial court overruled the objection.

In November 2018, Plaintiff and Defendant entered into a new lease agreement, the terms of which form the basis of this dispute. This lease was for a period of one year, with a monthly rent of \$899. Upon the expiration of the one-year term, the lease automatically became a month-to-month lease that could be terminated by either party giving 60 days written notice. The parties continued under this month-to-month arrangement until November 2022.

On 2 November 2022, Plaintiff sent Defendant a lease renewal letter providing two options: Defendant could agree to a one-year lease at a rate of \$999 per month,

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or continue the month-to-month tenancy at \$1099 per month. Either way, the new lease agreement would take effect on 1 December 2022.¹ The letter also noted that the month-to-month tenancy at the new rate would go into effect by default unless Defendant signed a one-year lease or gave notice of vacating.

On 6 November 2022, Plaintiff charged Defendant a late payment fee of \$15. Defendant had paid her November rent on time, but her account retained a \$98 balance from a partially returned payment of her October rent and an associated administrative fee.

On 15 November, Defendant contacted Plaintiff and requested the one-year lease renewal option at \$999 per month. The parties never entered into a written lease agreement reflecting this, but Plaintiff charged \$999 for rent in December, which Defendant paid.

Defendant's mother, who lived with Defendant and was a party to the lease agreement, passed away in December 2022.

Plaintiff charged Defendant \$1,099 for rent in January. An employee of Plaintiff testified that Defendant was charged the month-to-month rate because there was no signed lease renewal. Defendant paid \$999, and Plaintiff assessed her a \$15 late fee. Later that month, Defendant again spoke with an employee of Plaintiff and indicated she would sign the one-year renewal at the \$999 rate. Although no signed

¹ Defendant does not argue Plaintiff failed to give the 60-day written notice required under the lease agreement.

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lease renewal was entered into, Plaintiff's records reflect that Defendant was charged \$999 for February and subsequent months.

Defendant did not make rental payments for February or March 2023. She informed Plaintiff she was attempting to secure rental assistance for those months while waiting on funds from her mother's life insurance.

On 9 February 2023, Plaintiff sent Defendant a demand letter instructing Defendant to pay the past due balance of \$1,276.95 within 10 days or to vacate the property. Plaintiff sent a second letter on 15 March instructing Defendant to pay her past due balance of \$2,325.90 within 10 days or her right to possession of the property would be terminated.

The trial court found Plaintiff had failed to terminate Defendant's tenancy under the lease and had not demanded possession, and it denied Plaintiff's claim for ejectment. It also found the late fees charged by Plaintiff and language used in its communications were improper and in violation of debt collection provisions of Chapter 75 of our General Statutes, finding a total of nine violations and awarding Defendant \$4,500 as a civil penalty.

The trial court also found the lack of window locks rendered the property imminently dangerous under the Charlotte Housing Code. Because of the defect in the premises, the trial court concluded the fair rental value of the premises was 15% less than the rate Defendant had paid. Accordingly, it granted Defendant's claim for Unfair and Deceptive Trade Practices, finding Defendant had been damaged in the

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amount of \$11,366.05 from February 2016 through March 2023. It offset the unpaid rent for February and March 2023 against these damages, ordering damages be paid to Defendant in the amount of \$9,837.75, trebled to \$29,513.25. It also released rent bonds in the amount of \$3,056.60 to Plaintiff.

Plaintiff filed timely notice of appeal. Defendant likewise gave notice of appeal.

Issues

The issues in this case as derived from both Plaintiff's appeal and Defendant's cross-appeal are whether the trial court erred in: (I) admitting and considering evidence of the defective window locks as a defense to Plaintiff's claim for money owed for unpaid rent; (II) granting Defendant damages of \$29,513.25 for Unfair and Deceptive Trade Practices on the basis of the defective window locks; (III) calculating monies owed by Defendant for unpaid rent; and (IV) granting Defendant's claim for statutory debt collection violations.²

Analysis

I. **Admissibility of Evidence of Defective Window Locks**

At trial, Defendant was called as a witness by Plaintiff and, on cross-examination, testified that the bathroom, kitchen, and bedroom windows could not

² Plaintiff also originally argued the trial court erred in denying Summary Ejectment. However, during the pendency of this appeal and following oral arguments in this matter, the parties jointly filed a Motion to Dismiss that specific argument on the basis it was now moot as Defendant had surrendered the premises. We allow that Motion. As a result, we do not address Plaintiff's argument on this point and leave undisturbed the trial court's ruling on Summary Ejectment.

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be locked. Plaintiff objected to the introduction of this evidence as outside the scope of the pleadings and therefore irrelevant. In response, Defendant argued the evidence was relevant to the issue of money owed because it showed Plaintiff was barred from collecting rent under Charlotte's Housing Code:

Mr. Ellis: Your Honor, I object. There are no claims in this matter. Nothing has been pled in the complaint. It certainly exceeds any scope of my examination. I would object to this line of questioning, Your Honor.

Mr. Holderness: Your Honor, the – the claim for rent owed can be defeated if they violated the warranty of habitability and no rent was owed, and because windows not locking is something for which landlord can't charge any rent under the housing code, then this does go to their claim that rent was owed because it's our defense that rent wasn't owed because these windows don't lock.

The trial court overruled Plaintiff's objection.

Plaintiff argues the trial court erred by admitting and ruling in reliance on this evidence because it was outside the scope of the pleadings. Defendant's Answer did not specifically allege the window locks were defective or that Plaintiff violated the warranty of habitability. She did, however, assert as a defense that she "does not owe Landlord any money due to Landlord's unfair and deceptive trade practices."

Despite this, Plaintiff argues Defendant failed to plead claims or defenses to which this evidence was relevant. Generally, affirmative defenses must be set forth

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in the pleadings or they are waived because of the failure to give notice. *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998); N.C. Gen. Stat. § 1A-1, Rule 8(c) (2023). Counterclaims likewise must be pled. N.C. Gen. Stat. § 1A-1, Rule 8(a). “Under the ‘notice theory of pleading’ a complainant must state a claim sufficient to enable the adverse party to understand the nature of the claim, to answer, and to prepare for trial.” *Ipock v. Gilmore*, 73 N.C. App. 182, 188, 326 S.E.2d 271, 276 (1985).

However, objections to evidence as outside the scope of the pleadings require the objecting party to show “the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.” N.C. Gen. Stat. § 1A-1, Rule 15(b). The objecting party may also request a continuance to meet the new evidence. *Id.* In *Smith v. Buckhram*, for example, the plaintiff sought damages for personal injury resulting from a car accident. 91 N.C. App. 355, 372 S.E.2d 90 (1988) At trial, she introduced evidence that her injuries were permanent, though her complaint did not allege permanent injury. *Id.* at 359, 372 S.E.2d at 92-93. Despite the defendant’s objection to this evidence, we held the trial court both properly admitted the evidence and treated the issue of permanency of injuries as if it had been raised in the pleadings: “The objections made at trial to this line of testimony were all general in nature, therefore defendants did not avail themselves of the opportunity to demonstrate prejudice, or to obtain a continuance, as provided for in the statute.” *Id.*

Under Rule 15(b) when the plaintiff offers evidence at trial which varies from his complaint and introduces a new issue, the defendant may object. If the defendant does not

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object, he is (except in certain unusual situations) viewed as having consented to admission of the evidence, and the pleadings are deemed amended to include the new issue. If the defendant does object, he has the burden of proving that he would be prejudiced by admission of the varying evidence. Unless he can satisfy the court that he would be prejudiced, the objection must be overruled, the evidence admitted, and the pleadings amended to incorporate the new issue.

Hardison v. Williams, 21 N.C. App. 670, 673, 205 S.E.2d 551, 553 (1974) (citations omitted). Here, Plaintiff made no argument as to how evidence of the window locks would prejudice it, nor did it request a continuance to address this new evidence.

Thus, as in *Buckhram*, the evidence was properly admitted. Therefore, this evidence could properly be considered—for the reasons stated by Defendant’s counsel—in bar of Plaintiff’s claims for rent owed.

II. Unfair and Deceptive Trade Practices

Plaintiff also argues the trial court erred by awarding damages for UDTP because Defendant failed to plead this claim or the underlying facts relating to the defective window locks. Although Plaintiff’s objection was insufficient to prevent the admission of evidence relating to the window locks generally, the scope of the amendment to the pleadings implied by the trial court’s award goes beyond that allowed under Rule 15(b) of our Rules of Civil Procedure because Plaintiff could not have been reasonably expected to understand the evidence as raising a new and separate UDTP claim for damages.

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While Defendant's Answer raised UDTP as a counterclaim, this claim was based on Plaintiff's collection of late fees from November 2022 through May 2023 and rent exceeding the agreed-upon rate in January 2023. The trial court, however, ordered Plaintiff to pay \$29,513.25 for Unfair and Deceptive Trade Practices stemming from violations of Charlotte's Housing Code. It found the fact the three exterior windows lacked operable locks, which under Section 11-45(e)(11) of the Charlotte Code of Ordinances rendered the premises "imminently dangerous to health or safety." Under the Code, it is "unlawful for the owner of a place of habitation that is imminently dangerous to health or safety to collect rent from another person who occupied the place of habitation at the time it became imminently dangerous to health or safety." Charlotte Ord. § 11-45(e) (2024). The trial court concluded the fair rental value of the property was 15% less than Defendant had been paying in rent, resulting in \$11,366.05 in damages to Defendant for the period of February 2016 through March 2023. It offset this amount by \$1,528.30, the calculated fair rental value of the property for February and March 2023 which Defendant did not pay, resulting in actual damages of \$9,837.75, which it trebled under N.C. Gen. Stat. § 75-16.

It is unlawful to participate in "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a). Section 75-16 allows those harmed by violations of Chapter 75 to assert UDTP claims as a civil cause of action. An action for UDTP "is a distinct

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action apart from fraud, breach of contract, or breach of warranty.” *Bernard v. Cent. Carolina Truck Sales*, 68 N.C. App. 228, 232, 314 S.E.2d 582, 585 (1984). In order to prevail on a UDTP claim, a party must show (1) the defendant committed an unfair or deceptive act or practice, (2) that the action in question was in or affecting commerce, and (3) that the action proximately caused actual injury to the party. *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991).

Residential rental agreements fall under this statute because the rental of residential property is considered commerce. *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 583 (1977). Collecting rent for a residence while knowing that the residence is uninhabitable can constitute an unfair or deceptive practice and give rise to a UDTP claim. *Pierce v. Reichard*, 163 N.C. App. 294, 301-02, 593 S.E.2d 787, 792 (2004).

On appeal, Plaintiff argues the issue of the window locks rendering the premises uninhabitable should have been raised in the pleadings. Defendant argues that, by failing to properly object to the evidence of the window locks, Plaintiff implicitly consented to the trial court hearing the issue and therefore the Answer should be presumed to be amended to conform to the evidence under Rule 15(b) of our Rules of Civil Procedure.

In general, the trial court has the authority “to permit an amendment to the pleadings at any time when there is no material prejudice to the opposing party and such amendment will serve to present the action on its merits.” *Williams v. Sapp*, 83

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N.C. App. 116, 118, 349 S.E.2d 304, 305 (1986). “[A]mendments should always be freely allowed unless some material prejudice is demonstrated[.]” *Mangum v. Surles*, 281 N.C. 91, 98-99, 187 S.E.2d 697, 702 (1972). Even in the absence of a motion to amend, an issue may be heard as though raised in the pleadings:

When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues.

N.C. Gen. Stat. § 1A-1, Rule 15(b).

A party’s failure to object to the introduction of evidence can indicate implicit consent to try an unpleaded issue raised by that evidence. “Under 15(b) the rule of ‘litigation by consent’ is applied when no objection is made on the specific ground that the evidence offered is not within the issues raised by the pleadings.” *Roberts v. William N. & Kate B. Reynolds Mem’l Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 726 (1972). As in *Buckhram* and *Roberts*, Plaintiff failed to properly object to evidence that raised issues outside the scope of the pleadings. Defendant argues the counterclaim should therefore be presumed to be amended to include a UDTP claim based on the habitability violations shown by evidence of the defective window locks.

However, the scope of amendment by implied consent under Rule 15(b) is not unlimited. “[A]mendment to conform to the evidence is appropriate only where . . .

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the parties understood, or reasonably should have understood, that the introduction of such evidence was directed to an issue not embraced by the pleadings.” *W & H Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 86, 268 S.E.2d 567, 570 (1980) (citing *Eudy v. Eudy*, 288 N.C. 71, 215 S.E.2d 782 (1975)). In *W & H Graphics*, for example, the case began as a shareholder suit to obtain an accounting and recover damages. 48 N.C. App. at 86, 268 S.E.2d at 570. Evidence was introduced at trial sufficient to raise the issue as to the reasonable necessity of involuntary dissolution under the corporation under N.C. Gen. Stat. § 55-125(a). *Id.* at 88, 268 S.E.2d at 571. However, we held the requirement that the parties understood, or reasonably should have understood, that the evidence was directed to that issue had not been met. *Id.* Dissolution was significantly removed from the shareholder action raised by the pleadings and would require a realignment of the parties, and it was unreasonable to expect that the defendant would have understood the evidence presented had raised that issue. *Id.*

In this case, Plaintiff could not reasonably have understood its case in summary ejectment had become an action for rent abatement over a seven-year period via Defendant’s testimony, on cross-examination, that the windows in her home did not properly lock—in turn giving rise to a separate UDTP claim. Unlike in *Buckhram*, where the evidence amended the pleadings to include damages for an additional type of injury resulting from the negligence claim already asserted, the UDTP claim in this case is an entirely new counterclaim unrelated to any cause of

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action asserted in the pleadings.

It is possible to introduce evidence such that a party is entitled to amend the pleadings to incorporate a new claim. *See, e.g., Mangum*, 281 N.C. at 99, 187 S.E.2d at 702 (holding the plaintiff was entitled as a matter of law to amend her complaint to incorporate a claim for fraud in factum). In this case, however, the amendment to add a new counterclaim could not have been reasonably foreseen. Not only did Plaintiff not anticipate such amendment of the pleadings, but Defendant also does not appear from the transcript to foresee the evidence of the window locks giving rise to the UDTP claim granted by the Judgment. At no point during the presentation of evidence or during closing arguments does counsel for either party seem to recognize the possibility of this claim. Counsel for Defendant does not make any argument for rent abatement or any other affirmative remedy for Plaintiff's violations of the warranty of habitability or the Charlotte Housing Code. From our review of the transcript of hearing and Record on appeal, the first notice to either party that this claim was at issue appears to be the Judgment entered by the trial court.

In responding to Plaintiff's objection to the evidence, counsel for Defendant explained:

Your Honor, the claim for rent owed can be defeated if they violated the warranty of habitability and no rent was owed, and because windows not locking is something for which landlord can't charge any rent under the housing code, then this does go to their claim that rent was owed because it's our defense that rent wasn't owed because these windows don't lock.

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Given the statements made by counsel for both parties at trial, the evidence of the window locks appears to be actually and reasonably understood as relevant *only* to Defendant's defense against Plaintiff's claim for money owed.

In cases where "evidence claimed to support trial by consent is relevant to an issue explicitly embraced by the pleadings, and there is no indication at the trial that the party introducing the evidence sought to raise a new issue, the pleadings will not be deemed amended by consent under Rule 15(b)." *Eudy v. Eudy*, 288 N.C. 71, 77-78, 215 S.E.2d 782, 787 (1975). While alleged violations of the warranty of habitability and Charlotte's Housing Code were not explicitly raised in the answer as a defense to the claim for money owed, the answer does deny validity of the money-owed claim based on Plaintiff's unfair and deceptive trade practices—which, as discussed above, can include collecting rent for a residence known to be uninhabitable. The evidence of the window locks was presented to the trial court and understood by the parties as supporting this argument. Plaintiff could not be reasonably be expected to understand the evidence as raising the issue of a claim for rent abatement extending back over seven years. *W & H Graphics*, 48 N.C. App. at 88, 268 S.E.2d at 571.

Thus, there was no claim before the trial court for UDTP arising from the evidence of defective window locks rendering the premises uninhabitable. Therefore, the trial court erred in granting Judgment in favor of Defendant for Unfair and Deceptive Trade Practices. Consequently, we vacate the award of damages to Defendant for UDTP.

III. Calculation of Money Owed

Plaintiff argues the trial court erred in denying its claim for money owed, and that the trial court's Findings of Fact establish Defendant made no payments for February and March 2023, and made only partial payments for November 2022 and January 2023. A claim for money owed is a simple breach of contract claim which requires "(1) existence of a valid contract and (2) breach of the terms of that contract." *D.G. II, LLC v. Nix*, 211 N.C. App. 332, 337, 712 S.E.2d 335, 339 (2011).

It is untrue that the trial court fully denied Plaintiff's claim for money owed, as its Order and Judgment offset \$1,528.30 against the award for Unfair and Deceptive Trade Practices. This amount is described by the trial court as the fair rental value of the premises for February and March 2023, which it determined was 15% lower than the \$899 per month fair rental value of the premises had it been in the condition required by law.

The trial court found Defendant had paid her November 2022 and January 2023 rent in full, and that the late fees charged for these months were unauthorized. The November fee appears to have been assessed because Defendant had a \$98 balance on her account from the previous month, and her November payment was applied to that balance first, thereby leaving her payment short of the full rent amount for that month. However, this practice is expressly disallowed under our General Statutes:

A late fee under subsection (a) of this section may be

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imposed only one time for each late rental payment. A late fee for a specific late rental payment may not be deducted from a subsequent rental payment so as to cause the subsequent rental payment to be in default.

N.C. Gen. Stat. § 42-46(b). Competent evidence therefore supported the trial court's finding that Defendant paid her November 2022 rent in full.

Defendant paid \$999 in rent for January 2023. Plaintiff sent Defendant a communication in November 2022 offering to renew the lease beginning in December 2022 either at \$999 per month for a one-year term, or \$1,099 per month on a month-to-month basis. Defendant testified she contacted Plaintiff and requested the \$999 option. Plaintiff charged Defendant the \$999 rate for December, but \$1,099 for January. Plaintiff then corrected this, charging \$999 for subsequent months. Competent evidence therefore supported the trial court's finding that the parties had contracted to a rate of \$999 per month, and an additional \$100 in rent for January 2023 was not owed.

It is undisputed that Defendant did not pay rent for February or March 2023. Defendant argues Plaintiff was prohibited from collecting rent entirely because the window locks rendered the premises imminently dangerous under Charlotte's Housing Code.

The evidence supporting this determination consisted entirely of Defendant's testimony regarding the broken window locks. As discussed above, this evidence was properly admitted under *Buckhram* as Plaintiff failed to show prejudice or request a

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continuance. 91 N.C. App. at 359, 372 S.E.2d at 93. Although Defendant did not specifically plead violation of the warranty of habitability or the Housing Code as an affirmative defense, this issue “was properly treated by the court as if it had been raised in the pleadings,” even if we assume the Answer was insufficient to raise it. *Id.* Unlike creating a UDTP claim for a rent adjustment extending the entire history of the lease, the use of this evidence as a defense against ejectment and money owed—the primary claims at issue in the case—was reasonably foreseeable by the parties.

Plaintiff argues it was denied due process because no determination was made by a code enforcement official, following notice and hearing, that the property was unsafe. Charlotte Ord. § 11-38. However, these procedures relate to the administration of code violations at large that render a habitation “unfit for human habitation,” and set out the processes for ordering owners to remedy defects and enforcing those orders. Charlotte Ord. § 11-31–43; 11-45(a)–(d). Separate from this process, the Housing Code also contains a discrete list of “minimum standards of fitness” which render a place of habitation “imminently dangerous to health or safety.” Charlotte Ord. § 11-45(e). This same provision renders it unlawful to collect rent from a person who occupied the place of habitation at the time it became imminently dangerous to health or safety. *Id.* This prohibition is not reliant on the code enforcement process to have effect.

However, no evidence in the record supports the 15% reduction in fair rental value applied by the trial court. As Defendant argues on cross-appeal, if the dwelling

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was imminently dangerous under Charlotte's Housing Code, that same code forbids Plaintiff from collecting any rent at all. Charlotte Ord. § 11-45(e). The trial court did find as fact the premises were "imminently dangerous to health or safety" as defined by the Housing Code. Plaintiff likewise argues no evidence supports a conclusion that the broken window locks reduce the fair rental value by 15%. We agree that this determination by the trial court was arbitrary and unsupported by evidence.

Accordingly, we vacate the trial court's Order as to Plaintiff's claims for money owed and remand that issue to the trial court for resolution in accordance with the evidence and governing law, including the Housing Code. We note as well that Plaintiff has filed with this Court a Motion for Relief from Judgment under Rule 60 of the North Carolina Rules of Civil Procedure, asserting it is entitled to relief from the Judgment due to newly discovered evidence regarding the window locks. We dismiss Plaintiff's Rule 60 Motion and instruct the trial court on remand to consider the issues raised therein. *See Bell v. Martin*, 43 N.C. App. 134, 141, 258 S.E.2d 403, 408 (1979) ("It is virtually universally accepted that the trial court 'is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b).'"), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980).

IV. Debt Collection Violations

The trial court also found for Defendant on her counterclaim for debt collection violations under Article 2 of Chapter 75, finding Plaintiff had committed one violation of N.C. Gen. Stat. § 75-54(4), two violations of § 75-54(6), and six violations of § 75-

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55(2). It awarded Defendant \$500 in statutory damages for each violation, for a total award of \$4,500. Plaintiff argues the trial court erred in finding these violations.

“Chapter 75 applies to residential rentals because the rental of residential housing is commerce pursuant to § 75-1.1.” *Creekside Apartments v. Poteat*, 116 N.C. App. 26, 36, 446 S.E.2d 826, 833 (1994). Debt collectors who violate the provisions contained in Article 2 of Chapter 75 are liable for actual damages caused as well as civil penalties not less than \$500 and not greater than \$4,000 for each violation. N.C. Gen. Stat. § 75-56(b). A plaintiff need not show actual injury in order to be awarded damages as a civil penalty, but must only show the debt collector violated the statute. *McMillan v. Blue Ridge Companies, Inc.*, 379 N.C. 488, 497, 866 S.E.2d 700, 707 (2021).³ We address violations of each statutory provision in turn.

A. *N.C. Gen. Stat. § 75-55(2)*

The trial court found Plaintiff had violated N.C. Gen. Stat. § 75-55(2) “by attempting many times to collect from Defendant six (6) fees incidental to the principal debt to which Plaintiff was not owed.” These fees consisted of two late fees

³ Section 75-56 was amended in 2009 and our Supreme Court has interpreted the amended statute as one that “provides for specified statutory damages without requiring the plaintiff to prove actual injury.” *McMillan* at 497, 866 S.E.2d at 707 (citing *Comm. To Elect Dan Forest v. Emps Pol. Action Comm.*, 376 N.C. 558, 613, 853 S.E.2d 698, 736 (2021) (Newby, C.J., concurring)). We note this appears to conflict with our subsequent decision in *Onnipauper LLC v. Dunston*, in which we reversed the trial court’s order finding a debt collector had violated Section 75-54 because the debtor had failed to show proximate injury. 290 N.C. App. 486, 496, 892 S.E.2d 487, 495 (2023). “Where there is a conflict between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court’s opinion.” *Employment Staffing Grp., Inc. v. Little*, 243 N.C. App. 266, 271 n.3, 777 S.E.2d 309, 313 n.3 (2015).

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of \$15 assessed in November 2022 and January 2023, charging \$1,099 rather than \$999 for Defendant's rent in January 2023, and three late fees of \$49.95 each in May, June, and July 2023, months in which Defendant paid a rental bond to the Clerk of Mecklenburg County Superior Court. Plaintiff argues each of these charges was lawfully assessed.

Under Section 75-55(2), debt collectors are prohibited from attempting to collect "all or any part of the debt collector's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge." Late fees for past due rent are debts under Chapter 75 and are subject to this provision. *Friday v. United Dominion Realty Trust, Inc.*, 155 N.C. App. 671, 678, 575 S.E.2d 532, 537 (2003).

Three of the six violations of Section 75-55(2) found by the trial court were Plaintiff's attempts to collect late fees of \$49.95 during the pendency of this action, during which Defendant paid a monthly rent bond to the Mecklenburg County Clerk of Court. Although Plaintiff argues these fees were lawfully assessed, lease terms regarding late fees are no longer applicable where a tenant signs an undertaking to make rent bond payments. *N.C. Indus. Cap., LLC v. Clayton*, 185 N.C. App. 356, 365, 649 S.E.2d 14 21 (2007). Late fees could not be charged to Defendant during these months, and the trial court did not err in finding that these fees were improperly assessed.

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The trial court also found as a violation that Plaintiff charged Defendant \$1,099 in rent for January 2023. As discussed above, competent evidence supported the trial court's finding that Defendant owed \$999 in rent for that month. However, in its numerous communications to Defendant attempting to collect on debt, from March through July 2023, Plaintiff continued to assert that Defendant owed an additional \$100. Competent evidence therefore supported the trial court's finding that Defendant violated Section 75-55(2) by attempting to collect a debt it was not owed.

Last, the trial court found Plaintiff had improperly assessed two \$15 late fees in November 2022 and January 2023, despite Defendant paying her November and January rent on time. As discussed above, the evidence supported the trial court's finding that Defendant had timely paid rent for November 2022 and January 2023. The trial court did not err in finding the late fees for those months were improperly assessed. It therefore did not err in assessing civil penalties for violations of Section 75-55(2)

B. N.C. Gen. Stat. § 75-54(4)

The trial court found Plaintiff had violated Section 75-54(4) "by falsely representing the amount of debt against Defendant in a legal proceeding as stated in the Complaint in Summary Judgment." Under Section 75-54(4), debt collectors may not falsely represent "the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding." "To prevail on a claim for violation of this

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section, one need not show deliberate acts of deceit or bad faith, but must nevertheless demonstrate that the act complained of ‘possessed the tendency or capacity to mislead, or created the likelihood of deception.’ ” *Forsyth Memorial Hosp., Inc. v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 169-70 (1992) (citation omitted).

The Complaint demanded \$2,196.00 in past due rent, representing the sum of \$999 for Defendant’s rent in both February and March, \$98 as the returned portion her rent payment in November, and the \$100 difference between the rent billed (\$1,099) and the rent Defendant paid (\$999) in January. As discussed above, the trial court found, based on competent evidence, the \$100 difference in January was impermissible and not contractually owed by Defendant. Demanding this amount in the Complaint was therefore a violation of Section 75-54(4).

Plaintiff argues the *Noerr-Pennington* Doctrine immunizes it from Defendant’s 75-54(4) claim. This doctrine protects private entities from liability under antitrust laws when lobbying the government:

In *Noerr* and *Pennington*, the Supreme Court held that attempts to influence the legislative process, even if prompted by an anticompetitive intent, are immune from antitrust liability. This doctrine rests on two grounds: the First Amendment’s protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government.

Potters Med. Ctr. v. City Hospital Ass’n, 800 F.2d 568, 578 (6th Cir. 1986). We have recognized *Noerr* as applicable to actions in North Carolina courts. *Good Hope Hosp.*,

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Inc. v. N.C. Dep't of Health and Human Servs., 174 N.C. App. 266, 275, 620 S.E.2d 873, 881 (2005). However, this doctrine is based “both on the First Amendment right to petition and on a statutory interpretation of federal antitrust law.” *Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 148, 555 S.E.2d 281, 288 (2001). We have therefore held the doctrine applicable to protect from claims stemming from portions of the General Statutes modeled after federal antitrust law, *id.* at 156, 555 S.E.2d at 293, but declined to conform the reasoning of *Noerr* to apply to unrelated claims. *Id.* at 148, 555 S.E.2d at 288 (“Because we see no relation between the tort of tortious interference and the legislative intent behind federal antitrust law, we decline to attempt to conform the reasoning of *Noerr* to the present case.”). Likewise, as we see no relation between antitrust law and our statutes promoting fair debt collection practices, we do not recognize the doctrine as a defense to Defendant’s claim under Section 75-54(4). The trial court did not err in assessing a civil penalty for Plaintiff’s violation of this statute.

C. N.C. Gen. Stat. § 75-54(6)

Finally, the trial court held Plaintiff had twice violated N.C. Gen. Stat. § 75-54(6) by asserting in the February and March letters to Defendant that Defendant’s existing obligation could be increased by the addition of attorney fees or other fees or charges. Under Section 75-54(6), a debt collector may not “falsely represent that an existing obligation of the consumer may be increased by the addition of attorney’s fees, investigation fees, service fees, or any other fees or charges.”

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Plaintiff's letters to Defendant represented: "If legal action should be required, you may be liable for court costs and fees, including reasonable attorneys' fees, associated therewith." However, a landlord may only recover attorney's fees pursuant to a written lease. N.C. Gen. Stat. § 42-46(i)(3). The lease in this case does not provide for the recovery of attorney's fees; it only allows for the recovery of "an administrative fee plus court costs and expenses." Representing that attorney's fees may increase Defendant's debt when there is no such provision in the contract violates of Section 74-54(6).

Plaintiff argues the *Noerr-Pennington* doctrine applies not only to court filings but to pre-litigation conduct, including demand letters. Just as the *Noerr-Pennington* doctrine does not insulate Plaintiff from liability for falsely representing the amount of a debt in its Complaint, it likewise does not shield Plaintiff from liability based on its pre-litigation communications, as the doctrine is inapplicable in this context of claims unrelated to antitrust law. The trial court did not err in assessing civil penalties for Plaintiff's violations of Section 75-54(6).

Conclusion

Accordingly, for the foregoing reasons, we: (1) reverse the award of damages for Unfair and Deceptive Trade Practices; (2) affirm the award of civil penalties for Plaintiff's debt collection violations under Chapter 75 Article 2; and (3) vacate the award of money owed to Plaintiff and remand to the trial court for resolution of that issue and ruling on Plaintiff's Rule 60 Motion.

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REVERSED IN PART; AFFIRMED IN PART; VACATED IN PART AND
REMANDED.

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).