

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-610

Filed 21 October 2026

Nash County, No. 24CVS000245-630

BENJAMIN EAGLES, as Receiver for Ikeem Cherry, Plaintiff,

v.

DISCOVERY INSURANCE COMPANY, Defendant.

Appeal by Defendant and Cross-Appeal by Plaintiff from Orders entered 22 July 2024 and 26 November 2024 by Judge Timothy W. Wilson in Nash County Superior Court. Heard in the Court of Appeals 26 March 2026.

White & Stradley, PLLC, by J. David Stradley, for Plaintiff-Appellee/Cross-Appellant.

Bennett Guthrie PLLC, by Joshua H. Bennett and Mitchell H. Blankenship, for Defendant-Appellant/Cross-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Defendant Discovery Insurance Company (Discovery) and Plaintiff Benjamin Eagles (Receiver), as the appointed Receiver for Ikeem Cherry, appeal from Orders granting summary judgment in favor of Receiver and awarding attorney fees and costs to Receiver. The Record before us tends to reflect the following:

Early on 10 May 2020, Ikeem Cherry and Samuel Tomlin were involved in a single-vehicle car accident. Cherry was driving a Honda owned by Melanie Sauls,

the mother of his child. Cherry had taken the vehicle after dropping off a Mother's Day present at Sauls' home earlier that evening. Tomlin was a passenger and sustained injuries in the crash.

At the time of the accident, the vehicle was insured under an insurance policy issued by Discovery (the Policy). The Policy provided coverage to Sauls as the named insured and to "[a]ny person using your [Saul's] covered auto." The Policy does not cover any insured who uses a covered vehicle "without a reasonable belief that [the] insured is entitled to do so."

Under Discovery's Claims Manual, an investigation of each claim is to be conducted to "obtain facts concerning coverage, liability and damages." The Claims Manual requires an investigation be "carried out until there are no unanswered questions." Discovery must also obtain a Vehicle Theft Affidavit from the insured on any vehicle theft claim.

The accident was first reported to Discovery on 11 May 2020. Sauls told Discovery that Cherry had stolen the vehicle. She also told Discovery Cherry wanted her insurance information but she "is not giving it to him." The claims adjuster noted she told Sauls that Discovery "would not pay anything" on behalf of Cherry "anyway" because Cherry had allegedly stolen the vehicle. The Record does not show that Discovery inquired any further into the stolen nature of the vehicle or obtained a Vehicle Theft Affidavit from Sauls.

On 23 December 2020, Tomlin filed a complaint in Wilson County against Cherry and Sauls (the Tomlin Action) alleging claims for the injuries he suffered in the accident. Sauls faxed Discovery a copy of the lawsuit and Discovery hired an attorney to represent her. Cherry did not file an answer or responsive motion, nor did he hire an attorney.

On 26 January 2021, Tomlin’s attorney emailed Discovery a courtesy copy of the complaint. Shortly thereafter, Tomlin dismissed Sauls from the suit.

On 23 March 2021, the trial court entered a Default Judgment against Cherry in the amount of \$3,000,000.00. After the Sheriff’s Office returned the writ of execution unsatisfied, Tomlin moved for appointment of a receiver. On 2 May 2022, Benjamin Eagles was appointed as Receiver to take jurisdiction and possession of certain “chose[s] in action belonging to” Cherry. In the order appointing the Receiver, the trial court set out specific powers:

- (a) The power to prosecute any claims which form any part of the receivership assets, including institution of lawsuits in the pursuit of any available remedies, whether legal or equitable in nature;
- (b) The power to retain counsel and experts to assist with the prosecution of such claims, including entering such contracts with counsel and others as he shall deem appropriate;
- (c) To incur expenses in connection with the prosecution of those claims;
- (d) The power to compromise such claims, subject to approval with the court.

Accordingly, Receiver initiated the instant suit against Discovery on 13 June 2022, alleging claims for Breach of Duty to Defend, Unfair and Deceptive Trade Practices, and Bad Faith Failure to Defend.

Discovery then filed suit against Tomlin and Cherry in Lenoir County seeking to vacate the Default Judgment (the Lenoir County Action). Receiver intervened in the Lenoir County Action with the consent of the parties. Cherry, represented by counsel secured and paid for by Receiver, filed a motion to dismiss and answer on 10 March 2023. The Lenoir County Action was consolidated with Receiver's suit on 14 June 2023.¹

On 25 August 2023, Receiver subpoenaed Discovery President David Stuart Lindley to appear for deposition on 5 September 2023. In response, Discovery filed a motion to quash the subpoena and for a protective order. Discovery argued, *inter alia*, the information Receiver sought from Lindley was irrelevant and privileged. After a hearing on 6 September 2023, the trial court ordered Receiver could not depose Lindley "at this time."

Discovery and Tomlin entered into a Settlement on 28 May 2024 (the Settlement Agreement). In exchange for a \$1,500,000.00 payment from Discovery to Tomlin, the parties dismissed with prejudice all claims asserted against each other. As an additional term of the Settlement Agreement, Tomlin marked his judgment

¹ On 9 February 2024, the trial court entered an order transferring the cases to Nash County and assigning new file numbers.

against Cherry as satisfied and agreed to release Cherry and Discovery from any future liability arising out of the accident. The Default Judgment was marked satisfied on 4 June 2024. Tomlin and Discovery jointly dismissed the Lenoir County Action pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure on 6 June 2024.

A hearing on the parties' Motions for Summary Judgment was conducted on 7 June 2024. On 22 July 2024, the trial court entered an Order granting Partial Summary Judgment in favor of Receiver on his claims for Breach of Duty to Defend, Unfair and Deceptive Trade Practices, and Bad Faith Failure to Defend. However, the trial court further determined Receiver failed to show Cherry suffered any actual or compensatory damages. Accordingly, the trial court concluded only nominal damages were warranted and granted summary judgment in favor of Discovery on the issues of Receiver's compensatory, treble, and punitive damages.

The trial court further concluded grounds existed to award Receiver attorney fees. Noting it had "insufficient evidence before it from which to make" findings on "the time and labor expended by the attorney, the skill required to perform the services rendered, the experience and ability of the attorney, and the customary fee for like work[.]" the trial court directed Receiver to submit evidence from which the trial court could base its award of attorney fees.

On 26 November 2024, the trial court entered an Attorney Fees Order awarding Receiver \$16,325.00 for his own fees and \$358.76 in costs, \$246,425.00 in

attorney fees and \$12,957.66 in costs, and \$29,487.32 for the fees and costs incurred in hiring Cherry's attorney. The trial court ordered Discovery to pay Receiver nominal damages in the amount of \$10.00.

Receiver filed Notice of Appeal on 23 December 2024. Discovery gave Notice of its Cross-Appeal on 2 January 2025. On 5 March 2026, after both parties completed their briefing in this case, Discovery filed a Motion to Dismiss the Appeal, arguing the receivership terminated when the Default Judgment was entered and, thus, Receiver does not have standing to appeal.

Issues

The issues on appeal are whether the trial court: (I) erred by allowing Receiver to continue to pursue claims for damages against Discovery after Discovery had entered into the Settlement Agreement with Tomlin; (II) erred by granting summary judgment in favor of Receiver on his claims for Breach of Duty to Defend, Unfair and Deceptive Trade Practices, and Bad Faith Failure to Defend; and (III) abused its discretion in awarding attorney fees.

Analysis

I. Subject Matter Jurisdiction

Discovery asserts the trial court erred in allowing Receiver to continue to pursue his claims against Discovery after Discovery and Tomlin entered into the Settlement Agreement. Discovery argues Receiver was appointed only to satisfy the Default Judgment. Thus, according to Discovery, the trial court lost subject matter

jurisdiction over Receiver's claims against Discovery once Discovery and Tomlin entered into the Settlement Agreement. We disagree.

“‘In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*.’ ” *In re Cornblum*, 220 N.C. App. 100, 102, 727 S.E.2d 338, 340 (2012) (quoting *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007)).

“[T]he purpose of receivership ‘is to afford the largest and most thorough means of scrutiny, legal and equitable in their character, in reaching such property as the debtor has, that ought *justly* to go to the discharge of the debt his creditor has against him.’ ” *Haarhuis v. Cheek*, 261 N.C. App. 358, 368, 820 S.E.2d 844, 852 (2018) (emphasis in original) (quoting *Massey v. Cates*, 2 N.C. App. 162, 166, 162 S.E.2d 589, 592 (1968)) (internal quotation marks omitted). “It is an important part of the duties of the receiver to take possession and get control of the property of the judgment debtor, whether in possession or action, as soon as practicable, and to bring all actions necessary to secure and recover such property as may be in the hands of third parties, however they may hold and claim the same” *Coates v. Wilkes*, 92 N.C. 376, 380, 1885 WL 1539, at *2.

“[E]quity authorizes the appointment of a receiver so long as the party seeking the same ‘establishes an apparent right to property[.]’ ” *Haarhuis*, 261 N.C. App. at 367, 820 S.E.2d at 852 (emphasis removed) (quoting *Neighbors v. Evans*, 210 N.C. 550, 554, 187 S.E. 796, 797 (1936)). “Once an apparent right to property is shown, it becomes the task of the *receiver*, rather than the trial court, to determine whether

any given ‘apparent right to property’ is indeed worth pursuing[.]” *Id.* (emphasis in original).

In the instant case, the trial court gave the Receiver the power to prosecute claims which form any part of the receivership assets:

- (a) The power to prosecute any claims which form any part of the receivership assets, *including institution of lawsuits in the pursuit of any available remedies*, whether legal or equitable in nature;
- (b) The power to retain counsel and experts to assist with the prosecution of such claims, including entering such contracts with counsel and others as he shall deem appropriate;
- (c) To incur expenses in connection with the prosecution of those claims;
- (d) The power to compromise such claims, subject to approval with the court.

(emphasis added). The trial court expressly defined the “receivership assets” as “any claim for damages against any insurer” and “any claim for the breach of any duty to defend the defendant against the claims brought by the plaintiff[.]”

Discovery asserts the receivership terminated when Discovery and Tomlin entered into the Settlement Agreement. Discovery argues there are two prerequisites to the “existence and continuance” of a receivership: (1) a judgment debtor and (2) an unsatisfied judgment. Discovery cites *Coates*, where the Court stated: “[A] receiver is appointed almost as of course, where it appears that the judgment debtor has, or probably has, property that ought to be so subjected to the satisfaction of the

judgment[.]” 92 N.C. at 380, 1885 WL 1539, at *2, and *Travelers Indemnity Co. v. Triple S Marketing Group*,² which provides: “[N.C. Gen. Stat. §] 1-352 sets the return of an unsatisfied judgment as a necessary condition for a judgment creditor to seek relief in supplemental proceedings[.]” 213 N.C. App. 425, 714 S.E.2d 274, 2011 WL 2848839, at *4 (unpublished). However, each of these authorities discuss circumstances which must exist for the *appointment* of a receiver. Neither provide express guidance as to what terminates a receivership.

Discovery also cites *Righton v. Pruden*, 73 N.C. 61, 1875 WL 2776. This case is inapposite. In *Righton*, the judgment was paid off after the plaintiff-receiver was appointed but before he had “filed his bond and was qualified as receiver[.]” The plaintiff-receiver did not institute any action against the defendant until after the judgment had already been satisfied. 73 N.C. at 63, 1885 WL 2776, at *2. The Court held “it would seem too clear for argument, that when the judgment had been *satisfied before the receiver began his suit*, that he was proceeding without having a cause of action.” *Id.* (emphasis added).

Here, unlike the plaintiff-receiver in *Righton*, Receiver instituted his suit against Discovery *prior* to Tomlin and Discovery entering into the Settlement Agreement. Receiver filed the present claims against Discovery on 13 June 2022—

² *Travelers* is an unpublished opinion. “An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored[.]” N.C. R. App. P. 30(e) (2026).

nearly two years before Tomlin and Discovery executed the Settlement Agreement on 4 June 2024. Thus, at the time Receiver instituted his suit, it appeared “the judgment debtor [had], or probably [had], property that ought to be so subjected to the satisfaction of the judgment[.]” *Coates*, 92 N.C. at 380, 1885 WL 1539, at *2. Nothing in *Righton* suggests the receivership terminates automatically upon satisfaction of the judgment. Indeed, Discovery has not been able to cite authority showing otherwise.

Likewise, nothing in the trial court’s order limited Receiver’s “power to prosecute claims” to satisfaction of the Default Judgment. Rather, the trial court’s order appointing Receiver gave Receiver “the power to prosecute any claims which form any part of the receivership assets.” To the extent Cherry had asserted valid claims against Discovery for unfair and deceptive trade practices, these certainly formed part of the receivership assets.

Thus, the trial court did not lose subject matter jurisdiction over Receiver’s claims against Discovery when Tomlin and Discovery entered into the Settlement Agreement. Therefore, the trial court did not err by allowing Receiver to continue pursuing claims against Discovery on behalf of Cherry after Tomlin and Discovery entered into the Settlement Agreement.³

II. Motion for Summary Judgment

³ Accordingly, we deny Discovery’s Motion to Dismiss the Appeal.

Discovery argues the trial court erred in granting Receiver's Motion for Summary Judgment. "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). "Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)).

Discovery argues the trial court erred by granting summary judgment in favor of Receiver because there was no evidence Cherry provided Discovery with "actual notice" of Tomlin's lawsuit. "[I]n North Carolina, the duty to defend arises when an insurer receives actual notice of the underlying action." *Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 293, 708 S.E.2d 138, 154 (2011). When faced with a claim that notice was not timely given,

the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, [e.g.], that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

Great Am. Ins. Co. v. C.G. Tate Constr. Co., 303 N.C. 387, 399, 279 S.E.2d 769, 776 (1981). Discovery contends "actual notice" is "not simply notice that an insured has

been named in a lawsuit.” Rather, Discovery argues “actual notice” requires that the insured forward a copy of the summons served on him to the insurer.

In support of its argument, Discovery cites *Davenport v. Travelers Indemnity Co.*, 283 N.C. 234, 195 S.E.2d 529 (1973), which it also relied on in the trial court proceedings. In that case, the plaintiff was injured on the premises of a business run by Thomas Mills and Ralph Mills. 283 N.C. at 235-36, 195 S.E.2d at 531. Thomas and Ralph Mills were covered under an insurance policy that conditioned coverage on “immediately forward[ing] to the [insurance] company every demand, notice, summons, or other process received by him or his representative.” *Id.* at 237, 195 S.E.2d at 531. The name on the insurance policy was “Thomas Mills and Ralph Mills, d/b/a Mills Motor Company.” *Id.* at 241, 195 S.E.2d at 534. The plaintiff filed her a complaint asserting claims for her injuries against “Thomas Mills, t/a Mills Grocery.” *Id.* at 235, 195 S.E.2d at 531. Thomas Mills “turned over all of the suit papers to his attorney who then transmitted them to the defendant insurance company”; however, the defendant insurance company determined it had not issued an insurance policy to “Thomas Mills, t/a Mills Grocery,” and denied coverage. *Id.* at 236, 195 S.E.2d at 531. After that, the plaintiff amended the caption of her complaint to assert claims against the parties as they were named in their insurance policy. *Id.* However, the defendant insurance company never received notice of the amended complaint, and default judgments were subsequently entered against both Ralph Mills and Thomas Mills. *Id.*

The plaintiff filed suit against the defendant insurance company seeking recovery of the default judgments. *Id.* at 236, 195 S.E.2d at 531. The trial court concluded the defendant insurance company was not liable for the default judgment against Ralph Mills because the defendant insurance company never received notice of the amended complaint in which Ralph Mills was named. *Id.* However, it further concluded the defendant insurance company had “waived the sending of further papers by Thomas Mills” under the policy because it had denied coverage to Thomas Mills in the proceedings before the plaintiff filed her amended complaint. *Id.* As such, the defendant insurance company had a duty to defend Thomas Mills and was liable for the default judgment against him. *Id.* at 237, 195 S.E.2d at 531-32.

This Court affirmed and our Supreme Court reversed, holding “the facts found by the trial judge do not support his conclusions of law that ‘when the insurance company denied coverage of the defendant Thomas Mills they waived the condition of the policy that all summonses and other papers be forwarded to them.’” *Id.* at 241, 195 S.E.2d at 534. The Court explained that because the defendant insurance company denied Thomas Mills coverage before the plaintiff amended her complaint, it could not have waived its right to notice in the amended lawsuit. *Id.* at 241, 195 S.E.2d at 534.

In the present case, the trial court concluded *Davenport* was inapposite to the facts at bar because the defendant insurance company in *Davenport* “never received any notice of the Amendment to the Complaint, or the summons, or any other notice,

after the initial Complaint was amended to name the defendant insurance company's insured." The trial court noted here, by contrast, Discovery had "receive[d] the Complaint naming [Cherry] and alleging facts that, if true, would bring [Cherry] within the coverage of the policy it had issued to [Sauls] as an insured."

We agree with the trial court's reasoning. While it is clear from the Record that Cherry did not personally forward Discovery summons or a copy of the complaint in the Tomlin Action, Discovery received copies of the complaint from Sauls and from Tomlin's attorney.⁴ Similarly, in *Kubit*, the notice of the lawsuit did not come directly from the individual anesthesiologist plaintiffs but from the "practice manager" of their hospital. 210 N.C. App. at 276, 708 S.E.2d at 143. Here, unlike the insurer in *Davenport*, Discovery had notice of the underlying proceedings against Cherry.⁵

⁴ Tomlin's attorney forwarded a copy of the lawsuit to Discovery on 26 January 2021—about one month after the complaint was filed. It is not clear from the Record when Sauls forwarded her copy of the lawsuit to Discovery. Accordingly, we presume Discovery had actual notice of the lawsuit by 26 January 2021.

⁵ The *Davenport* Court, in reaching its decision, quoted significant portions of the 8th Circuit's decision in *Campbell v. Continental Casualty Co. of Chicago*, 170 F.2d 669, 6 A.L.R.2d 655 (8th Cir. 1948). In *Campbell*, the "insured's principal contention" was that "he was not required to forward his summons and copy of petition to the insurer" because another party insured under the same policy "had previously delivered his summons and copy of petition to an employee in the insurer's office and this constituted a sufficient compliance as to both of them." 170 F.2d at 671. The 8th Circuit disagreed, noting "the insurer never knew, until after the default judgment was entered, that the insured had been brought into court by the service of process." *Id.* Notably, *Davenport's* discussion of this case is non-binding dicta. See *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to a decision is obiter dictum and later decisions are not bound thereby."). *Davenport's* holding was that the trial court's findings did not support its conclusions, as the defendant insurance company had no notice of the amended complaint and thus "could not have knowingly and intentionally waived the policy provision upon which it . . . relies." 283 N.C. App. at 241, 195 S.E.2d at 534. Indeed, the Court stated, "failure to give notice or immediately forward summons or other process received by the insured may be waived by denial of liability on other grounds", *id.* at 238, 195 S.E.2d at 532 (emphasis added)—suggesting notice may be given through means other than forwarding summons.

Moreover, Cassandra Stallings, Discovery's vice president of automotive claims, averred Discovery knew "both Sauls and Cherry had been sued":

[Counsel]: And [Sauls' attorney] sent [Discovery] a copy of [Tomlin's] lawsuit after it was filed; correct?

[Stallings]: Yes, sir.

[Counsel]: And [Discovery]—so [Discovery] knew that both Sauls and Cherry had been sued in connection with this accident; correct?

[Stallings]: Yes.

"The clear purpose of the notice provision is to protect the ability of the insurer to prepare a viable defense by preserving its ability fully to investigate the accident." *Great Am. Ins. Co.* 303 N.C. at 397, 279 S.E.2d at 775. "No condition of timely notice will be given a greater scope than required to fulfill its purpose. . . . If, under the circumstances of a particular case, the purpose behind the [notice] requirement has been met, the insurer will not be relieved of its obligations." *Id.* at 396, 279 S.E.2d at 775. Stallings' deposition testimony undermines any assertion by Discovery that an alleged lack of notice undermined its ability to fully investigate the accident. Thus, Discovery's argument it lacked notice is without merit.

Even presuming Discovery's knowledge Cherry had been named in the lawsuit was insufficient to trigger its duty to defend Cherry in the Tomlin Action, the trial court further concluded Discovery had waived the notice requirement by denying Cherry liability on other grounds. *See Davenport*, 283 N.C. at 238, 195 S.E.2d at 532

("[F]ailure to give notice or immediately forward summons or other process received by the insured may be waived by denial of liability on other grounds."). Indeed, the Record shows a Discovery claims adjuster told Sauls, when she reported that Cherry wanted her insurance information and she had refused to give it to him, Discovery "would not pay anything anyway because her [vehicle] was stolen." Discovery essentially argues it did not waive its rights to notice when it made this statement because it was not a formal denial of coverage made directly to Cherry. Nevertheless, Discovery made a clear statement it would "not pay anything" on Cherry's behalf, even if it did not make that statement directly to Cherry—which is all that *Davenport* appears to require. *See id.* at 238, 195 S.E.2d at 532 ("[D]enial of liability on other grounds is generally regarded as saying that payment would not have been made had the policy provisions been complied with[.]" (citations omitted)).

Finally, the trial court additionally concluded that if Cherry was required to make a showing of good faith under *Great American Insurance Co.*, Cherry had done so. The trial court concluded any alleged failure by Cherry to give notice was in good faith because "Cherry was not the named insured and did not know for certain that he was covered by Discovery[.]"

It is true, "[a]nyone who knows that he may be at fault or that others have claimed he is at fault and who purposefully and knowingly fails to notify [the insurer] ought not to recover even if no prejudice [to the insurer] results." *Great Am. Ins. Co.*, 303 N.C. at 399, 279 S.E.2d at 776. Here, however, there is no indication Cherry's

failure to personally contact Discovery was purposeful. *See id.* The Record shows Cherry attempted to get Sauls' insurance information, but she refused to give it to him. When asked if he provided Discovery with a copy of the lawsuit in which he had been named, Cherry responded he "had no way to do that."

The allegations in the complaint alleged facts which, if true, would bring Cherry within Discovery's coverage. *See Waste Mgmt. of the Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986) ("An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings[.]"). Specifically, the complaint alleged: (1) Cherry was driving Sauls' vehicle when the crash occurred, and (2) frequently drove the vehicle with Sauls' permission and consent, and (3) Cherry "had lawful possession" of the vehicle at the time of the accident. Discovery had notice Cherry had been operating Sauls' vehicle at the time of the accident and that claims had been asserted against him in the Tomlin Action. Further, presuming that notice was insufficient, the Record tends to show Cherry acted in good faith. Thus, the trial court did not err in granting Receiver's Motion for Summary Judgment as to his claims for Bad Faith Failure to Defend, Breach of the Contractual Duty to Defend, and Unfair and Deceptive Trade Practices.

III. Attorney Fee Award

Both parties present arguments relating to the trial court's award of attorney fees. "This Court employs a two-pronged standard of review in considering a trial court's award of fees pursuant to N.C. Gen. Stat. § 75-16.1(1)." *Faucette v. 6303*

Carmel Road, LLC, 242 N.C. App. 267, 278, 775 S.E.2d 316, 325 (2015) (citation omitted). “First, we determine whether any competent evidence supports the trial court’s findings of fact and whether these findings support the court’s conclusions of law. Second, we review the trial court’s fee award for abuse of discretion.” *Id.* (citations omitted). “A trial court abuses its discretion only when its award of fees is manifestly unsupported by reason or wholly arbitrary.” *Id.* (citation and quotation marks omitted).

A. Awarding attorney fees

Discovery argues the trial court erred by awarding Receiver attorney fees. Under N.C. Gen. Stat. § 75-16.1(1), in any suit instituted by a person who alleges the defendant committed unfair or deceptive trade practices, the trial court may, “in his discretion, allow a reasonable attorney fee” to the attorney representing the prevailing party upon a finding

[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit[.]

Here, the trial court found Discovery “willfully engaged in acts or practices prohibited by law, and that [Discovery] made an unwarranted refusal to even attempt a resolution of Tomlin’s claim against Cherry and [Discovery].” Discovery asserts the trial court’s Finding was erroneous because there was “no evidence” Discovery: (1) committed a “willful” act or (2) made an unwarranted refusal to settle.

1. *Willfulness*

“An act is ‘willful’ within the meaning of N.C. Gen. Stat. § 75-16.1(1) if it is ‘done voluntarily and intentionally with the view to doing injury to another.’ ” *Faucette*, 242 N.C. App. at 279, 775 S.E.2d at 326 (quoting *Standing v. Midgett*, 850 F. Supp. 396, 404 (E.D.N.C. 1993)).

In the instant case, the Record shows Discovery did not conduct an investigation consistent with the directive of its claims manual before informing Sauls that Cherry would not be covered under her policy. Further, as discussed above, the allegations in the complaint alleged facts which, if true, would bring Cherry within Discovery’s coverage, but Discovery did not take steps to determine whether Cherry was entitled to coverage under the Policy. Likewise, Stallings’ deposition testimony was that Discovery knew Cherry was named in the Tomlin Action, but Discovery did not make any efforts to defend him. She also testified Discovery knew the injury that could be done to an insured if the company failed to defend a lawsuit.

Thus, the Record tends to disclose Discovery failed to make an effort to defend Cherry or inquire into whether he came within Policy coverage despite knowing he had been named in Tomlin’s Lawsuit. Therefore, the Record supports the trial court’s Finding that Discovery’s conduct was willful.

2. *Unwarranted refusal to settle*

The trial court also found Discovery made an unwarranted refusal to settle:

6. [Discovery] made an unwarranted refusal even to attempt a resolution of the claim against it and its insured, Ikeem Cherry, in the [Tomlin Lawsuit], which refusal ultimately led to the appointment of Benjamin Eagles as Receiver for Ikeem Cherry . . . and then to the filing of this action and of the previously consolidated case. There was thus an unwarranted refusal by [Discovery] “to fully resolve the matter which constitutes the basis of [this] suit.” *See* N.C. Gen. Stat. § 75-16.1.

7. Further, [Discovery] persisted in pursuing litigation in both this case and in the previously consolidated case for nearly two years, with apparently no offer to settle Plaintiff’s claims herein until June 22, 2024, after it had shortly before settled the previously consolidated case, and after the hearing on [Discovery’s] motion for summary judgment shortly before did not result in an outright victory for [Discovery]. Although the Court was never called upon to rule on the issue in the previously consolidated case, it appears to the Court, as stated in the July 22 Order, that there was a lack of facts to support [Discovery’s] claim in that previously consolidated case. There was thus an unwarranted refusal by [Discovery] “to fully resolve the matter which constitutes the basis of [this] suit.” *See* N.C. Gen. Stat. § 75-16.1.

Discovery argues the trial court erred by basing Finding 6 on Discovery’s actions in the Tomlin Action, as opposed to the suit at bar. We disagree.

In order to award attorney fees, the trial court must find there was an unwarranted refusal to fully resolve the matter which constitutes the basis of the suit. N.C. Gen. Stat. § 75-16.1(1). The present case is inextricably intertwined with the Tomlin Action: the basis of the case at bar is Discovery’s bad faith and failure to defend Cherry in the Tomlin Action. Further, the Record shows Discovery did not defend Cherry in the Tomlin Action or make any attempts to settle that suit. Thus, the trial court’s Finding that Discovery made an unwarranted refusal to settle “the

matter which constitutes the basis of [this] suit” is supported by competent evidence. *See id.*

Moreover, even presuming the trial court’s consideration of the Tomlin Action was inappropriate, it made a separate Finding that Discovery made an unwarranted refusal to settle the case at bar. In Finding 7, the trial court found Discovery had been litigating the present case for “nearly two years, with apparently no offer to settle Plaintiff’s claims” until shortly after the summary judgment hearing.

Discovery contends Finding 7 is erroneous because it found that fees should be awarded to the Receiver because Discovery “persisted in pursuing litigation in . . . [the Lenoir County Action][.]” This mischaracterizes the trial court’s Finding. While the trial court did find Discovery persisted in pursuing litigation in the Lenoir County Action, it further found Discovery did so with “apparently no offer to settle Plaintiff’s claims[.]” That Discovery pursued litigation without making an offer to settle is the crux of the Finding. Discovery’s challenge to this Finding is, therefore, unavailing.

B. Awarding fees and costs for Cherry’s attorney

Discovery argues the trial court erred by awarding Receiver compensation for the fees and costs he incurred in hiring an attorney to represent Cherry in the Lenoir

County Action. Specifically, Discovery argues hiring an attorney for Cherry was outside the scope of the Receiver’s authority.⁶ We disagree.

As discussed above, the trial court gave Receiver the power to “prosecute any claims which form any part of the receivership assets” and to “retain counsel and experts to assist with the prosecution of such claims.” Thus, Receiver had authority to incur legal fees.

Discovery further argues the trial court did not consider the required statutory factors in awarding these fees. *See United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381-82 (1993) (explaining trial court should consider time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney, novelty and difficulty of the questions of law, adequacy of the representation, the difficulty of the problems faced by the attorney, and the kind of case for which the fees are sought and the result obtained). *See also* N.C. State Bar Rules, Ch. 1, Rule 1.5(a) (setting the *United Laboratory* factors as “[t]he factors to be considered in determining whether a fee is clearly excessive”). However, the Record contradicts this assertion—the trial court’s Findings reflect a clear consideration of the factors set forth in Rule 1.5:

24. Plaintiff also incurred costs and/or attorney’s fees of an additional \$29,487.32, consisting of \$29,287.50 in fees and \$199.82 in mileage, for the retention of counsel for Ikeem Cherry,

⁶ Discovery also argues hiring an attorney to represent Cherry was an attempt by Receiver to “thwart Cherry’s wishes[.]” However, Discovery has not provided any legal authority to explain why this does not justify the award of attorney fees.

which was reasonable and necessary in Plaintiff's litigation of this action and the previously consolidated case.

25. The legal work performed on Cherry's behalf concerning or arising from the same nucleus of operative facts and/or law in this case and the previously consolidated case consisted of, among other things:

- a. Oral and written correspondence with opposing counsel and the other attorneys of record;
- b. Preparing, filing, and serving multiple pleadings, motions, notices, discovery requests and responses;
- c. Conducting discovery, including attendance at multiple depositions;
- d. Attending hearings on and arguing various motions;
- e. Preparing for and attending a mediated settlement conference; and
- f. Conducting discussions regarding all of this.

26. Cherry's counsel expended a total of 113.9 hours in this case, and an additional 6.5 hours were expended by Cherry's counsel's paralegal, also properly considered by the Court.

27. The time invested by Cherry's counsel and paralegal, set forth above, is reasonable and is not excessive or redundant.

28. [Cherry's attorney] is, and was at the time the work was performed, a well-qualified and experienced professional with prior experience in complex tort and insurance litigation similar to this case. [Cherry's attorney] was licensed by the North Carolina State Bar in 1992. He and his firm have a good reputation with the requisite skill and experience to perform the work at issue.

29. The work described above and otherwise reflected in the record require an attorney familiar with multiple and relatively

novel areas of law, and required competent, quality representation. Cherry's attorney provided such representation.

30. On the grounds of both the evidence in the record and the information judicially noticed by the Court, and considering the skill required to perform the services at issue and the experience and ability of Cherry's counsel, the Court finds billing rates for Cherry's counsel at \$250 per hour, and paralegal at \$125 per hour, as requested, to be reasonable and appropriate, and consistent with the customary fees for like work.

. . . .

33. The Court has also considered the factors under Rule 1.5 of the North Carolina Rules of Professional Conduct and finds that the factors not otherwise specifically addressed herein either do not apply, or they weigh in favor of finding this award of Cherry's attorney's fees to be reasonable.

34. In the exercise of its considered discretion, the Court finds that an award of Cherry's fees as set forth herein to be a just, reasonable, adequate, and appropriate amount for an award of attorney's fees to Cherry's counsel.

Therefore, the trial court did not abuse its discretion by awarding Receiver fees and costs for the expenses he incurred in hiring Cherry's attorney.

C. Fees in Lenoir County Action

Discovery argues the trial court erred by awarding Receiver attorney fees for the work he performed in the Lenoir County Action.

Here, Receiver's suit and the Lenoir County Action were consolidated for all purposes up to trial on 12 June 2023. However, Discovery and Tomlin jointly filed a voluntary dismissal of the Lenoir County Action pursuant to Rule 41(a) on 6 June

2024. The trial court, in its Attorney Fees Order, referred to the work done in the Lenoir County Action in addition to the work performed in the present action:

10. The legal work performed on Plaintiff's behalf concerning or arising from the same nucleus of operative facts and/or law in this case *and the previously consolidated case* consisted of, among other things

. . . .

24. Plaintiff also incurred costs and/or attorney's fees of an additional \$29,487.32, consisting of \$29,287.50 in fees and \$199.82 in mileage, for the retention of counsel for Ikeem Cherry, which was reasonable and necessary in Plaintiff's litigation of this action *and the previously consolidated case*.

25. The legal work performed on Cherry's behalf concerning or arising from the same nucleus of operative facts and/or law in this case *and the previously consolidated case* consisted of, among other things

. . . .

31. Though Cherry was not a party in the instant action, he was named as a Defendant *in the previously consolidated case* by Defendant herein, Discovery Insurance Company. The retention of counsel for Cherry *in that case* by Plaintiff herein, the Receiver for Cherry, was reasonable and necessary, in light of the fact that Cherry had been defaulted in the [Tomlin Action], in light of the allegation against Cherry *in the previously consolidated case*, and in light of all the facts and issues involved.

32. The result achieved in this action *and in the previously consolidated case*—specifically, the entry of summary judgment in Plaintiff's favor herein as to liability on the first three claims of his Complaint, and [Discovery's] settlement with Samuel Tomlin resulting in the cancellation of the default judgment entered against Cherry in the [Tomlin Action]—both vindicate Cherry's rights, and benefit Cherry directly and substantially.

. . . .

35. Receiver . . . is also entitled to a reasonable fee for his services throughout this matter *and the previously consolidated case*. . . .

(emphasis added).

The facts of *McLennan v. C.K. Josey, Jr.*, 247 N.C. App. 95, 785 S.E.2d 144 (2016) are instructive. There, the plaintiffs filed two separate complaints—one in August 2010 and one in August 2011. 247 N.C. App. at 101, 785 S.E.2d at 149.

In its order taxing costs and reasonable attorneys fees, the trial court specifically allowed attorneys fees for both cases by finding:

22. The legal services in preparing pleadings in 2011 to add additional claims for relief by amendment to the pleadings in this case or by the filing of a companion law suit, being strategic in nature and designed to litigate all issues raised by Defendants' actions at the same time, were related to the prosecution of this civil action and the attorney's fees and litigation expenses incurred are properly recoverable in this action.

Id. at 102, 785 S.E.2d at 150.

The Court specifically noted: “the motion to consolidate the cases was denied.” *Id.* Because the record did not “contain the final result of the other case” nor was that case before the Court, the Court remanded the case to the trial court “to limit the fees applicable to this case.” *Id.*

Here, by contrast, the Lenoir County Action and the case at bar were consolidated for all purposes up to trial. Discovery and Tomlin voluntarily dismissed the Lenoir County Action only one day prior to the hearing on the parties' Motions

for Summary Judgment. Thus, the work done in the Lenoir County Action was the same work performed in the present case. Therefore, the trial court did not err in awarding attorney fees for the work performed in the Lenoir County Action.

D. Denying request for fees “equal to the value of the recovery that Receiver secured for” Tomlin

Receiver argues the trial court erred in determining the total attorney fees award. Receiver contends he is entitled to attorney fees “commensurate with the full value of the recovery.”

In its Memorandum in Support of Attorney Fees Award submitted to the trial court, Receiver argued Discovery would have had to pay Tomlin about \$2,805,630.87 for Tomlin to “net” a \$1,500,000.00 settlement. Receiver and his attorney had agreed to a 40-percent contingency fee. As such, Receiver contended the attorney fee award should be 40-percent of \$2,805,630. Accordingly, Receiver requested \$1,122,252.34 in attorney fees.

Receiver calculated his requested fee, in part, using the following rates and hours:

Attorney Stradley: 181 hours, at \$850.00 per hour;

Attorney Holmes: 164.5 hours, at \$600.00 per hour;

Attorney Ochsner: 127.99 hours, at \$600.00 per hour; and

Paralegals: 62.13 hours, at \$150.00 per hour.

The trial court ultimately awarded Receiver \$246,425.00 in attorney fees.⁷ The trial court calculated the attorney fees using the following rates and hours:

Attorney Stradley: 180.5 hours, at \$625.00 per hour;

Attorney Holmes: 164.5 hours, at \$425.00 per hour;

Attorney Ochsner: 128 hours, at \$425.00 per hour; and

Paralegals: 62 hours, at \$150.00 per hour.

Receiver, citing *Covington v. Rhodes*, 38 N.C. App. 61, 247 S.E.2d 305 (1978), argues “North Carolina enforces contingency fee contracts absent overreaching or unreasonableness.” The issue in *Covington* was “whether an attorney may recover on a contingent fee contract when his clients have discharged him prior to final disposition of the case.” *Id.* at 63, 247 S.E.2d at 307. Here, by contrast, the question of whether to award attorney fees and the amount of the award is squarely within the trial court’s discretion. *Faucette*, 242 N.C. App. at 278, 775 S.E.2d at 325; *Printing Servs. of Greensboro, Inc. v. Am. Cap. Grp., Inc.*, 180 N.C. App. 70, 81, 637 S.E.2d 230, 236 (2006) (“The decision whether or not to award attorney fees under section 75-16.1 rests within the sole discretion of the trial judge. And if fees are awarded, the amount also rests within the discretion of the trial court and we review such awards for abuse of discretion.” (citation and quotation marks omitted)), *aff’d*, 361 N.C. 347, 643 S.E.2d 586 (2007) (Mem.).

⁷ The trial court also awarded \$29,487.32 in fees and costs to Receiver for hiring Cherry’s attorney and a “receiver fee” of \$16,683.76. Receiver has not challenged these awards on appeal.

Moreover, we do not agree with Receiver’s assertion the trial court’s calculation was “driven by arbitrary rate assignment,” as opposed to “the statutory factors of risk, complexity, and results achieved[]” when the trial court’s order is replete with Findings of Fact showing a clear consideration of the relevant statutory factors:

4. This case and the previously consolidated case were vigorously contested over the course of more than two years, involving much discovery, including fifteen (15) depositions, and numerous hearings.

. . . .

10. The legal work performed on Plaintiff’s behalf concerning or arising from the same nucleus of operative factors and/or in law in this case and the previously consolidated case consisted of, among other things:

- a. Conducting extensive legal research;
- b. Oral and written correspondence with opposing counsel and the other attorneys of record;
- c. Preparing, filing, and serving multiple pleadings, motions, notices, subpoenas, discovery requests and responses, and memoranda of law’
- d. Conducting discovery, including fifteen (15) depositions;
- e. Coordinating and noticing hearings and proceedings before the Court;
- f. Attending hearings on and arguing the various motions;
- g. Preparing for and attending a mediated settlement conference; and
- h. Conducting internal conferences and discussion and client discussions regarding all of this.

11. Plaintiff's counsel expended a total of 473 hours in this case, broken down as follows:

Attorney J. David Stradley, 180.5 hours

Attorney Robert P. Holmes, 164.5 hours

Attorney Ann C. Ochsner, 128 hours

12. An additional 62 hours were expended by Plaintiff's counsel's paralegals, also properly considered by the Court.

13. The time invested by Plaintiff's counsel and legal professionals, set forth above, is reasonable and is not excessive or redundant in light of the complexity and uncommon nature of all the facts and issues involved in these matters.

14. Each of the three attorneys named above is, and was at the time the work was performed, a well-qualified and experienced professional with prior experience in complex tort and insurance litigation similar to this case. Attorney Stradley was licensed by the North Carolina State Bar in 1995, attorney Holmes in 1984, and attorney Ochsner in 2011. They and their firm have a good reputation with the requisite skill and experience to perform the work at issue.

15. The work described above and otherwise reflected in the record was complex, required substantial analysis and litigation of strongly disputed matters, required attorneys and legal professionals familiar with multiple and relatively novel areas of law, and required competent, quality representation. Plaintiff's attorneys and legal professionals provided such representation.

16. Based upon its experience, the Court is familiar with and aware of the common range of hourly rates charged by attorneys, paralegals, and law firms in North Carolina, and in the Wake County and Nash County markets particularly, for litigation of similar disputes and other complex civil cases. Based upon the Court's knowledge and experience, the Court may and does take judicial notice of such rates for the purposes of the Order.

Simpson v. Simpson, 209 N.C. App. 320, 328, 703 S.E.2d 890, 895 (2011) (judicial notice of attorneys' hourly rates is appropriate).

17. On the grounds of both the evidence in the record and the information judicially noticed by the Court, and considering the skill required to perform the services at issue and the experience and ability of Plaintiff's counsel, the Court finds billing rates for Plaintiff's counsel as set forth below to be reasonable and appropriate, not excessive, and commensurate with customary rates charged by firms, attorneys, and paralegals of similar experience and skill levels within and around this market for like work.

Attorney J. David Stradley	\$625
Attorney Robert P. Holmes	\$425
Attorney Ann C. Ochsner	\$425
Paralegals	\$150

18. Based upon the evidence of record and the Court's experience and information subject to judicial notice, the Court finds that the work performed and time expended, and the rates set forth above, are reasonable and consistent with the work performed, time expended, and rates charged by similarly situated attorneys and paralegals in the local market for the same or similar work.

19. Moreover, the work performed, time expended, and the rates set forth above are and were reasonable considering the difficulty and novelty of the matters involved, the skill required to perform the legal services properly, and amount and matters in controversy, and the results obtained.

20. The Court has also considered the factors under Rule 1.5 of the North Carolina Rules of Professional Conduct and finds that the factors not otherwise specifically addressed herein either do not apply, or they weigh in favor of finding this award of Plaintiff's attorney's fees to be reasonable.

21. In the exercise of its considered discretion, the Court finds that an award of attorney's fees as set forth herein to be a just, reasonable, adequate, and appropriate amount for an award of attorney's fees to Plaintiff.

Receiver has not identified any authority stating the trial court must "explain[] the departure" from Receiver's requested fees. Rather, the decision to award fees and the amount of the award is solely within the trial court's discretion. *Printing Servs. of Greensboro*, 180 N.C. App. at 81, 637 S.E.2d at 236. In any event, the trial court's Findings clearly explain how it calculated the fee award. Thus, the trial court did not abuse its discretion in determining the attorney fees award.

E. Nominal damages award

Receiver argues the trial court erred in determining Cherry was owed only nominal damages under the Unfair and Deceptive Trade Practices Act. Receiver argues Cherry is owed treble damages equal to the amount of the Default Judgment.

"When an insurer without justification refuses to defend its insured, the insurer is estopped from denying coverage and is obligated to pay the amount of any reasonable settlement made in good faith *by the insured* of the action brought against him by the injured party." *Ames v. Cont'l Cas. Co.*, 79 N.C. App. 530, 538, 340 S.E.2d 479, 485 (1986) (emphasis added). Here, however, Cherry—the insured—did not enter into a settlement with Tomlin. Thus, we find this principle inapplicable in the present case. *See also Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 219, 176 S.E.2d 751, 754 (1970) ("It is well settled that an insurer who wrongfully

refuses to defend a suit against its insured is liable to the insured for sums expended in payment or settlement of the claim, for reasonable attorneys' fees, for other expenses of defending the suit, for court costs, and for other expenses incurred because of the refusal of the insurer to defend." (citations omitted)).

With regard to claims against an insured in which a default judgment is obtained in favor of the claimant,

if an insurer had a right to defend the injury action against the insured, had timely notice of such action, and defends or elects not to defend, the judgment, in the absence of fraud or collusion, is binding upon the insurer as to issues which were or might have been litigated therein.

Naddeo v. Allstate Ins. Co., 139 N.C. App. 311, 318, 533 S.E.2d 501, 506 (2000) (quoting Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 106:50 (1997)), *overruled on other grounds as stated in Kubit*, 210 N.C. App. at 278, 708 S.E.2d at 145. In the instant case, however, the Default Judgment was marked satisfied prior to the summary judgment hearing. In the cases of *Garlock v. Henson*, 112 N.C. App. 243, 435 S.E.2d 114 (1993), *Vazquez v. Allstate Insurance Co.*, 137 N.C. App. 741, 529 S.E.2d 480 (2000), and *Nash Hospitals, Inc. v. State Farm Mutual Automobile Insurance Co.*, 254 N.C. App. 726, 803 S.E.2d 256 (2017)—each cited by Receiver in support of his argument—the defendants still owed contract damages when the trial court determined the damages under the Unfair and Deceptive Trade Practices Act. Here, by contrast, the Default Judgment was marked satisfied before Discovery's liability under the Unfair and Deceptive Trade Practices Act was decided. Thus,

there was no “judgment” in existence as contemplated in *Naddeo*. See 139 N.C. App. at 318, 533 S.E.2d at 506.

Moreover, contrary to Receiver’s assertion, the trial court did not apply the satisfaction of the judgment as a “credit” against Cherry’s damages. See *Richardson v. Bank of Am., N.A.*, 182 N.C. App. 531, 565-66, 643 S.E.2d 410, 432 (2007) (“[T]he trial court’s decision in the present case to deduct any refunds paid to Plaintiffs *after* trebling the entire amount of damages facilitates the remedial and punitive purposes of Chapter 75, and also encourages settlement.” (emphasis added)). While “trebling of any damages assessed is to be automatic once a violation is shown[.]” *Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981), Receiver did not show any damages to treble in this case.

Further, Receiver did not produce evidence of any other injury Cherry suffered. Receiver’s only evidence of damages was the Default Judgment—which had been marked satisfied by the time of the summary judgment hearing. The trial court expounded on this in its Order:

The Receiver has shown no evidence of any actual compensatory damages, such as would be the case if Cherry had paid to defend or settle the underlying Wilson County case, or if he has suffered some other loss because of the default judgment docketed against him. . . . The amount of the default judgment is not part of Cherry’s actual damages, because it does not compensate Cherry for any loss or damage that he suffered. “Actual damages are synonymous with compensatory damages” *Ringgold v. Land*, 212 N.C. 369, 193 S.E. 276 (1937).

(emphasis removed).

Thus, the trial court correctly determined the amount of the Default Judgment did not form part of Cherry’s actual injury.⁸ Therefore, because there was no evidence Cherry suffered any other injury, the trial court did not err in determining Cherry was entitled only to nominal damages. Consequently, the trial court properly entered its Orders.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court’s Orders.

AFFIRMED.

Judge ZACHARY concurs.

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

⁸ Accordingly, the trial court did not abuse its discretion in denying Receiver the opportunity to depose Discovery president Stuart Lindley. Receiver argues the deposition would “go[] to Discovery’s credibility and support[] the Receiver’s claim for punitive damages under N.C. Gen. Stat. § 1D-15.” However, a party must show compensatory damages in order to recover punitive damages. N.C. Gen. Stat. § 1D-15. Because the trial court properly determined Cherry did not show actual or compensatory damages and was entitled only to nominal damages—as opposed to punitive damages—any evidence in support of punitive damages elicited from Lindley would have been irrelevant.

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

The trial court did not lose subject matter jurisdiction over Receiver’s claims against Defendant Discovery once Discovery and Tomlin entered into the settlement agreement. The majority’s opinion properly affirms that portion of the trial court’s order.

Discovery was not placed on actual notice of Tomlin’s lawsuit and Cherry did not act in good faith when she failed to notify Discovery of the lawsuit. The trial court erred in granting summary judgment in favor of Receiver. The majority’s opinion improperly affirms the trial court’s order. I respectfully dissent.

I. Standard of Review

North Carolina Rule of Civil Procedure 56(c) entitles a movant to obtain summary judgment upon demonstrating “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits” show there is “no genuine issue as to any material fact” and the movant is “entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2025).

“The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact.” *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). A genuine issue of material fact is one supported by evidence that would “persuade a reasonable mind to accept a conclusion.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted).

“This burden may be met by proving that an essential element of the opposing party’s claim is nonexistent, or by showing through discovery . . . the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.” *Id.* (citation and internal quotation marks omitted).

“The evidence produced by the parties is viewed in the light most favorable to the non-moving party.” *Hardin v. KCS Int’l., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted). When the court reviews the evidence at summary judgment, “[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted).

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). The meanings of the terms and provisions used in an insurance policy are questions of law and reviewed on appeal *de novo*. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

II. Genuine Issue of Material Fact

Our General Statutes have long held summary judgment is proper only “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[.]” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2025). “An issue is genuine if it may be maintained by substantial evidence.” *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980) (citation and quotation marks omitted).

An issue is material if facts, as alleged “would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action.” *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

The majority’s opinion holds: “Tomlin’s attorney forwarded a copy of the lawsuit to Discovery on 26 January 2021— about one month after the complaint was filed. It is not clear from the Record when Sauls forwarded her copy of the lawsuit to Discovery. Accordingly, we presume Discovery had actual notice of the lawsuit by 26 January 2021.” This notion violates the standard of review during summary judgment. “[A]ll inferences of fact from the proofs proffered at the hearing must be drawn *against the movant and in favor of the party opposing the motion.*” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (citation omitted) (emphasis supplied).

The majority’s opinion purports to resolve a factual dispute. Our Supreme Court has long warned it is not the function of the trial court to weigh conflicting evidence, and issues “legitimately called into question” should be preserved for

resolution by a jury. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

III. Duty to Defend

A. Rules of Construction of Insurance Policies

Our Supreme Court stated *an insurance policy is a contract*, “[a]s with all contracts, the object of construing an insurance policy is to arrive at the insurance coverage *intended by the parties when the policy was issued.*” *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 9, 692 S.E.2d 605, 612 (2010) (citation and internal quotation marks omitted) (emphasis supplied); *see Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978) (“[T]he goal of [insurance policy] construction is to arrive at the intent of the parties when the policy was issued.”).

As in any other contract “the most fundamental rule [in interpreting insurance policies] is that the language of the policy controls.” *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994). Any ambiguities in the insurance policy are “strictly construed against the insurer and in favor of the insured.” *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 73 (1986).

Our Supreme Court stated our courts are to “construe[] liberally insurance policy provisions that extend coverage so as to provide coverage, whenever possible by reasonable construction,” and “strictly construe against an insurance company

those provisions excluding coverage under an insurance policy.” *Harleysville Mut. Ins. Co.*, 364 N.C. at 9-10, 692 S.E.2d at 612 (citation and internal quotation marks omitted); see *State Capital Ins. Co.*, 318 N.C. at 542-43, 350 S.E.2d at 71 (1986) (“Exclusionary clauses are interpreted narrowly while coverage clauses are interpreted broadly to provide the greatest possible protection to the insured.”).

If the insurance policy specifically defines a term, that definition governs its application. *York Indus. Ctr., Inc. v. Mich. Mut. Liab. Co.*, 271 N.C. 158, 162, 155 S.E.2d 501, 505 (1967) (“Since the word . . . is defined in the amended policy, it must be given that meaning, regardless of whether a broader or narrower meaning is customarily given to the term, the parties being free, apart from statutory limitations, to make their contract for themselves and to give words therein the meaning they see fit.”). As with all contracts, this Court has further stated, “all parts of an insurance policy are to be construed harmoniously so as to give effect to each of the policy’s provisions.” *Nationwide Mut. Ins. Co.*, 115 N.C. App. at 198, 444 S.E.2d at 667.

B. Duty of Defend

A *policyholder* claiming coverage under an enforceable insurance policy triggers two independent duties the *carrier owes to the insured*: the duty to defend *the insured* and the duty to indemnify. See *Harleysville Mut. Ins. Co.*, 364 N.C. at 6-7, 692 S.E.2d at 610-11. This Court has held: “the insured has the burden of bringing

itself within the insuring language of the policy.” *Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 283, 708 S.E.2d 138, 147 (2011) (citation and alteration omitted).

If the insured party meets this burden, the burden shifts to the insurer to “prove that a policy exclusion excepts the particular injury from coverage.” *Id.* (citation omitted). If the insurer meets this burden, the burden shifts back to the insured to “prov[e] that an exception to the exclusion exists and applies to restore coverage.” *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 189, 202, 494 S.E.2d 774, 783 (1998) (citation omitted).

Our Supreme Court examined the interplay between a contractual duty to defend and a duty to indemnify forty (40) years ago in *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986), holding:

Generally speaking, the insurer’s duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer’s duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial. *When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable.* Conversely, when the pleadings allege facts indicating that *the event in question is not covered*, and the insurer has no knowledge that the facts are otherwise, then it is *not bound to defend*.

Id. (emphasis supplied). The Supreme Court held an insurer is excused from its duty to defend when “the facts are not even arguably covered by the policy.” *Id.* at 692, 340 S.E.2d at 378.

Our Supreme Court further explained in *Waste Management* the duty of an insurer to defend: “Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage.” *Id.* at 691, 340 S.E.2d at 377 (citation omitted).

Later in *Harleysville Mut. Ins. Co.*, our Supreme Court articulated a “comparison test” by reading the policies at issue and the complaint “side by side” to determine whether an insurer has a duty to defend. *Harleysville Mut. Ins. Co.*, 364 N.C. at 6, 692 S.E.2d at 610. A court takes “the facts as alleged in the complaint . . . are true and compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend.” *Id.* at 7, 692 S.E.2d at 611.

This Court stated in *Waste Management* and *Harleysville Mut. Ins. Co.*, the “comparison test” considers allegations in the pleadings alongside of the text of the policy, and the inquiry may also include “facts learned from the insured and facts discoverable by reasonable investigation.” *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 638, 386 S.E.2d 762, 764 (1990).

C. Prejudice

Our Supreme Court examined how an insured’s failure to comply with the policy provisions could result in denial or no coverage in *Great American Ins. Co. v. C.G. Tate Constr. Co.*, and held:

where the insured does not think [s]he is involved but knows claims might be filed against h[er], and [s]he fails to notify the insurer because of that uncertainty, then there is both actual knowledge of possible liability *and* there is a knowing and purposeful decision not to inform the insurer. That decision is one made without good faith and the insurer is relieved of the responsibilities otherwise imposed by its policy with the insured, even if it was not prejudiced by the delay.

315 N.C. 714, 721, 340 S.E.2d 743, 748 (1986).

Here, Cherry clearly failed to provide actual notice to Defendant insurer as expressly required by the policy and never communicated with her carrier following her receipt of the Tomlin Action. The majority's opinion states: "Tomlin's attorney forwarded a copy of the lawsuit to Discovery on 26 January 2021." However, this disputed and purported "courtesy copy" did not include the summons or show when and if service was accomplished. This delay clearly prejudiced the insurer, because it could have defended under a reservation of rights, while it subsequently litigated a declaratory judgment action concerning the insured Sauls' prior and pressed charges for theft of her vehicle by the driver prior to the accident. She contacted the police first, reported her vehicle as stolen, and then Defendant insurer.

The insurer's contractual rights have been clearly prejudiced. The rule of waiver by denial of liability does not apply if the insurer has no actual prior notice of a claim of loss being asserted against its insured. *Id.* See *Davenport v. Travelers Indem. Co.*, 283 N.C. 234, 239, 195 S.E.2d 529, 533 (1973) (citations omitted). The presence of a disputed fact precludes summary judgment. *Howerton*, 358 N.C. at 471,

597 S.E.2d at 694.

IV. Conclusion

Defendant insurer was not placed on actual or timely notice of Tomlin's lawsuit as is required by the express terms of the policy, and Cherry was not acting in good faith when she failed to lawfully notify Defendant of the lawsuit. This gamesmanship prejudiced the Defendant and precludes summary judgment. *Id.*

The trial court erred in granting summary judgment in favor of Receiver. The majority's opinion improperly affirms the trial court's order. The award of summary judgment on disputed facts is prejudicial and reversible error. *Id.* I concur in part on jurisdiction and respectfully dissent in part on any purported breach of the insurer's duty to defend or indemnify.