

NO. COA14-513

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

DEVIN NEIL, KOLLIN KALK, SUSAN
ZHAO, and JOHN STOEHR,
Plaintiffs,

v.

Watauga County
No. 12 CVS 677

KUESTER REAL ESTATE SERVICES,
INC., CHS/ASU, LLC, and KUESTER-
GREENWAY COMPANY, LLC,
Defendants.

Appeal by Plaintiffs from order dated 30 January 2014 by
Judge Mark E. Powell in Watauga County Superior Court. Heard in
the Court of Appeals 19 September 2014.

*Hedrick Kepley, PLLC, by Michael P. Kepley, and Eggers,
Eggers, Eggers, Eggers and Eggers, by Austin F. Eggers, for
Plaintiffs.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by Hatcher B.
Kincheloe and Lindsey L. Smith, for Defendant Kuester Real
Estate Services, Inc.*

*Turner Law Office, PA, by Victoria H. Tobin, for Defendants
CHS/ASU, LLC, and Kuester-Greenway Company, LLC.*

STEPHENS, Judge.

This case is an appeal from the trial court's denial of
Plaintiffs' motion for class certification in their action
against various real estate entities which provide rental

housing, largely to a college student population, in Boone, North Carolina. The crux of Plaintiffs' complaint concerns alleged violations of the North Carolina Tenant Security Deposit Act ("the Act"), and the dispositive question in resolving their motion for class certification concerns the remedy to which they would be entitled under the Act. Plaintiffs assert that the proper remedy would be an automatic full refund of their security deposits, obviating the need for separate trials on damages for every prospective class member. After careful consideration, we hold that, for the violations of the Act alleged, Plaintiffs would *not* be entitled to an automatic full refund, but rather, would only be entitled to a refund of any amounts withheld from their security deposits for a use not permitted by the Act. Determination of the appropriate amount of each Plaintiff's refund would require individual trials, thus rendering class action an inferior method for the adjudication of Plaintiffs' claims. Accordingly, we affirm the order of the trial court denying Plaintiffs' motion for class certification.

Factual and Procedural Background

At the time their complaint was filed in November 2012, Plaintiffs Devin Neil, Kollin Kalk, Susan Zhao, and John Stoehr were students at Appalachian State University in Boone. On 1

August 2011, Neil and Kalk, along with another individual, entered into a lease agreement with Defendant Kuester Real Estate Services, Inc. ("Kuester"), for unit 407 at Turtle Creek West, an apartment complex owned by Defendant CHS/ASU, LLC ("CHS"), and located near the University. CHS had contracted with Kuester to manage and maintain Turtle Creek West. The lease agreement ended on 31 July 2012, and Neil and Kalk allege that, before they vacated the premises, they thoroughly cleaned the apartment and returned it to the same condition as when they moved in, minus any normal wear and tear.

However, Neil and Kalk later received invoices from Kuester which reflected charges for, *inter alia*, carpet cleaning, painting, cleaning bathrooms, replacing drip pans, and cleaning the washer and dryer, as well as for an "administrative fee" of \$40. This fee is explicitly authorized by the lease addendum to which Neil and Kalk agreed in writing. In pertinent part, the lease addendum provides:

In order to promote and maintain the community, and as a condition of residency, "Turtle Creek West" has established the following additional rules and regulations for all tenants. Adherence to these rules and regulations is essential for the comfort and convenience of all tenants.

Tenant shall be subject to a \$40 Administrative Fee (in addition to the cost

of any repairs or remedies) for: [any of some forty listed safety, health, and maintenance regulations]

Among the rules and regulations listed are several which require tenants to keep their units clean and in good condition, specifically including the bathroom, kitchen, walls, and carpets. On appeal and in their complaint, Plaintiffs assert that the charges listed on each invoice exceeded the security deposit of \$250 per person which Neil and Kalk had made at the time they entered into the lease, leaving an outstanding balance owed by each of them.¹

On 6 August 2011, Zhao and Stoehr, along with another individual, entered into a lease agreement with Kuester for unit 104 at Greenway Commons, another apartment complex located in Boone and managed by Kuester. Greenway Commons is owned by Defendant Kuester-Greenway Company, LLC ("Greenway"). Zhao's and Stoehr's lease also ended on 31 July 2012, and like Neil and Kalk, they allege that they thoroughly cleaned their unit and

¹ The record on appeal does not support this assertion. The record contains four partially legible documents entitled "Transaction Listing," which appear to list charges by and payments to CHS and Greenway for each Plaintiff from roughly March 2011 through August 2012. The Transaction Listing for each Plaintiff appears to reflect a refund or reimbursement. In addition, in the excerpts of their depositions which are in the record, Stoehr and Kalk each mention receiving partial refunds of their security deposits.

returned it to its original condition, less any normal wear and tear, before moving out. They each received an invoice from Kuester which reflected charges for services such as carpet cleaning, painting, cleaning bathrooms, replacing drip pans, and cleaning the washer and dryer, as well as for an administrative fee of \$40. Greenway Commons requires all tenants to agree in writing to an addendum explaining the administrative fee to be charged for violation of listed rules and regulations. This addendum is identical to that used at Turtle Creek West, with the exception of the apartment complex name. Zhao and Stoehr each initialed an addendum. The complaint alleges that the total charges on each invoice exceeded the \$550² per person security deposit Zhao and Stoehr had been required to pay when signing their lease.³

On 13 November 2012, Plaintiffs initiated this action by the filing of a complaint in Watauga County Superior Court. The complaint alleges that Defendants formed a plan "to increase profits through the overcharging of their respective tenants and taking their security deposits at the end terms of their

² The record suggests that Neil and Kalk were required to pay a lower security deposit than Zhao and Stoehr because the former two Plaintiffs assumed an existing lease from other tenants.

³ See footnote 1, *supra*.

respective leases" and includes claims for violations of the Act, unfair and deceptive trade practices ("UDTP"), fraud, and punitive damages. Plaintiffs defined their proposed class as "[a]ll natural and/or legal persons who have entered into lease agreements to lease residential dwelling units at either and/or Turtle Creek West and Greenway Commons, which leases were managed by Defendant Kuester during the years 2009 and ongoing." In support of class certification, the complaint alleges, *inter alia*:

37. Common questions of law and fact exist as to all members of the Applicator Class, and they predominate over any questions that affect only individual Applicator Class Members. The questions of law and fact that are common to the Applicator Class, and which would dominate [sic] over any individualized issues, include but are not limited to the following:

- a. Whether Defendants violated the . . . Act through their administration and use of the Plaintiffs' and Applicator Class Members' respective security deposits;
- b. Whether Defendants withheld as damages part of Plaintiffs' and the Applicator Class Members' respective security deposits for conditions that were due to normal wear and tear;
- c. Whether Defendants retained amounts from Plaintiffs' and the Applicator Class[members'] respective

security deposits which exceeded their actual damages;

d. Whether Defendants knew, reasonably should have known, or were reckless in not knowing the lease agreements the Defendants were using to rent their respective properties contained clauses and requirements that were void, in contravention of the North Carolina General Statutes, in violation of public policy, and otherwise illegal;

e. Whether Defendants negligently, recklessly, and/or unfairly and deceptively concealed from [their] tenants the fact that their contracts contained clauses and requirements that were void, in contravention of the North Carolina General Statutes, in violation of public policy, and otherwise illegal;

f. Whether Defendants misrepresented to their respective tenants the actual damage sustained by Defendants, if any;

g. Whether Defendants failed to disclose material facts about the alleged need for repairs and/or cleaning to each of their respective tenants prior to sending the respective tenants invoices for alleged charges;

h. Whether Defendants' conduct constitutes unfair and/or deceptive acts or practices, in or affecting commerce, in violation of Chapter 75 of the North Carolina General Statutes;

i. Whether Plaintiffs and Applicator Class Members are entitled to compensatory damages;

j. Whether Plaintiffs and Applicator Class Members are entitled to an award of treble damages;

k. Whether Plaintiffs and Applicator Class Members are entitled to all or some of their security deposits to be returned to them along with all or some of the charges which were charged over and above their respective security deposits;

l. Whether Plaintiffs and Applicator Class Members are entitled to an award of punitive damages; and

m. Whether Plaintiffs and Applicator Class Members are entitled to an award of their reasonable attorneys' fees, expert witness fees, pre-judgment interest, post-judgment interest, and costs of suit.

38. The only non-common issue is the amount of specific damages for each particular member of the Applicator Class; therefore, common questions of law and fact clearly predominate within the meaning of Rule 23 of the North Carolina Rules of Civil Procedure.

39. Plaintiffs' claims are typical of the claims of all Applicator Class Members, in that Plaintiffs leased property from Defendant Kuester, and they were sent statements for itemized charges for alleged necessary cleaning, painting, and other alleged damage to the Premises once they vacated the Premises, and they seek to recover for the damages caused by Defendants' conduct and material misrepresentations to them regarding the alleged charges. Consequently, Plaintiffs' legal claims are the same as those of

another Applicator Class Member, and the relief they seek is the same as that of any other Applicator Class Member. Plaintiffs will fairly and adequately represent the interests of the absent Applicator Class Members, in that Plaintiffs have no conflicts with any other Applicator Class Members that would interfere with their zealous pursuit of these claims on behalf of the other Applicator Class Members. Furthermore, Plaintiffs have retained competent counsel who are experienced plaintiffs' attorneys and are in good standing with the North Carolina State Bar.

40. Class action treatment is superior to the alternatives, if any, for the fair and efficient adjudication of the controversy described herein, because it permits a large number of injured persons to prosecute their common claims in a single forum simultaneously, efficiently, and without unnecessary duplication of evidence and effort. Class treatment will also permit the adjudication of claims by Applicator Class Members who could not afford to individually litigate these claims against large corporate defendants.

On 14 January 2013, Kuester filed its answer, moving to dismiss Plaintiffs' lawsuit pursuant to Rule of Civil Procedure 12(b)(6) and asserting various affirmative defenses. On 15 January 2013, CHS and Greenway filed a joint answer which also included a motion to dismiss and affirmative defenses.

On 13 November 2013, Plaintiffs moved for class certification, alleging:

1. The class of people the named plaintiffs are seeking to represent are too numerous as to make it practicable to bring them all before the [c]ourt;

2. The named and unnamed members of the class have an interest in the same issues of law or fact that predominate over issues affecting only individual class members to wit:

a. Did [D]efendants violate the . . . Act by doing one or more of the following:

i. Charging tenants an unlawful \$40.00 "administrative fee", and taking the "administrative fee" from each tenant's security deposit;

ii. Withholding funds as damages from their tenants' security deposits for conditions which were due to normal wear and tear;

iii. Retaining amounts from their tenants' security deposits which exceeded their actual damages.

b. If so, did [D]efendants commit fraud and/or unfair and/or deceptive trade practices?

c. If so, what are the damages to each tenant?

3. The class members within the [c]ourt's jurisdiction can fairly and adequately represent the interests of those within and without the [c]ourt's jurisdiction; and

4. No reasons exist to deny the present motion.

Following a hearing on 18 November 2013, the trial court entered an order denying Plaintiffs' motion for class certification dated 5 February 2014. That order states:

This action was filed on November 13, 2012, by Plaintiffs[] Devin Neil, Kollin Kalk, Susan Zhao and John Stoehr on behalf of themselves and others similarly situated, alleging issues of law and fact common to all members of the Applicator Class, including, *inter alia*, the following:

- a. Whether Defendants violated the North Carolina Tenant Security Act;
- b. Whether Defendants improperly withheld funds from tenant deposits for conditions that were due to normal wear and tear;
- c. Whether the amounts withheld by Defendants exceeded their actual damages;
- d. Whether Defendants misrepresented their actual damages; and
- e. Whether Defendants' conduct entitles members of the proposed class to a refund of all or some of their security deposits.

The order also contained the following findings of fact:

1. There is nothing in the record to indicate that []Plaintiffs, Devin Neil, Kollin Kalk, Susan Zhao and John Stoehr, would unfairly or inadequately represent the interest of all of the potential members of a class in this matter;
2. There is no evidence of record that there exists a conflict of interest between []Plaintiffs and members of the proposed class;

3. []Plaintiffs have a genuine personal interest in the outcome of the case;

4. The [c]ourt assumes for purposes of this motion only that alleged issues of fact and law (a) and (e) above are common to all members of the proposed class;

5. With regard to issues (b), (c), and (d), the [c]ourt finds the resolution of the claims of individual tenants would necessarily require a series of separate trials to determine the relevant facts and the damages, if any, to which each tenant was entitled, resulting in differing outcomes which would negate the benefits of a class action lawsuit.

6. Even assuming as Plaintiffs' counsel has argued, that Defendants have no compulsory counterclaims, it still must be assumed that if Defendants' right to compensation for their damages from Plaintiffs' security deposits is forfeited, as Plaintiffs allege, then Defendants will file counterclaims for their damages for Plaintiffs' breaches of their lease obligations. These, too, would require separate trials of the breach of contract claims and result in potentially differing outcomes, thereby negating the benefits of a class action lawsuit.

7. The common issues of fact that may be shared by the class members do not predominate over issues affecting only individual class members.

Based upon those findings of fact, the trial court made the following conclusions of law:

1. The named representatives established that they will fairly and adequately represent the interests of all members of the class;
2. There is no conflict between the named representatives and class members;
3. The named representatives have a genuine personal interest in the outcome of the case;
4. The class members are so numerous that it is impractical to bring them all before the court;
5. The common issues of fact in this matter do not predominate over issues affecting only individual class members.
6. Plaintiffs' Motion for Class Certification is denied.

From the order denying their motion for class certification, Plaintiffs appeal.

Grounds for Appellate Review

As Plaintiffs note, the order denying their motion for class certification is interlocutory, as it does not constitute a final judgment on the merits of their claims. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "[a]n interlocutory order is appealable if it affects a substantial right and will work injury to the appellants if not corrected before final

judgment." *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 355-56 (1984) (citation omitted). This Court has held that, in cases purporting to warrant class certification, where a plaintiff "recovers after the trial court has refused to certify the action, the other members of the class will suffer an injury which could not be corrected if there were no appeal before the final judgment." *Id.* at 762, 318 S.E.2d at 356. Accordingly, an order denying a motion for class certification is immediately appealable. *Id.*

Standard of Review

Rule 23 of the North Carolina Rules of Civil Procedure governs class actions. It states in pertinent part: If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued. First, parties seeking to employ the class action procedure pursuant to our Rule 23 must establish the existence of a class. A class exists when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. The party seeking to bring a class action also bears the burden of demonstrating the existence of other prerequisites: (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and

members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class. When all the prerequisites are met, it is left to the trial court's discretion whether a class action is superior to other available methods for the adjudication of the controversy.

Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. The trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in [our case law].

The touchstone for appellate review of a Rule 23 order is to honor the broad discretion allowed the trial court in all matters pertaining to class certification. Accordingly, we review the trial court's order denying class certification for abuse of discretion. The test for abuse of discretion is whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Beroth Oil Co. v. N.C. Dep't of Transp., __ N.C. __, __, 757 S.E.2d 466, 470-71 (2014) (citations, internal quotation marks, ellipses, and certain brackets omitted). When reviewing a class

certification order, the trial court's "findings of fact are binding if supported by competent evidence, and [its] conclusions of law are reviewed *de novo*." *Id.* at ___, 757 S.E.2d at 471.

In sum, when ruling on a motion for class certification, the trial court must initially determine whether a class exists by considering whether "each of the [prospective class] members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at ___, 757 S.E.2d at 470. If the court determines that no class exists, no further analysis is required. *Id.*

Discussion

Plaintiffs argue that the trial court erred in holding that Plaintiffs failed to establish the existence of a class and, therefore, that the court abused its discretion in refusing to grant their motion for class certification. We disagree.

Specifically, Plaintiffs contend that the trial court erred in making finding of fact 5, that "the claims of individual tenants would necessarily require a series of separate trials to determine the relevant facts and the damages, if any, to which each tenant was entitled, resulting in differing outcomes which

would negate the benefits of a class action lawsuit[;]" and finding of fact 6, that, "if Defendants' right to compensation for their damages from Plaintiffs' security deposits is forfeited, . . . then Defendants will file counterclaims for their damages for Plaintiffs' breaches of their lease obligations. . . . [which] would require separate trials. . . ." Plaintiffs also challenge the court's ultimate determination, finding of fact 7 and conclusion of law 5, that "common issues of fact in this matter do not predominate over issues affecting only individual class members."

While denominated as factual findings, findings of fact 5 and 6 are better characterized as mixed findings of fact and conclusions of law. Finding of fact 7 is a legal conclusion. See *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.") (citations and internal quotation marks omitted).

Certainly, the trial court considered evidentiary facts, such as the alleged damage done to Plaintiffs' units and the

specifics of the billing to repair that damage, in order to reach the challenged determinations. However, our review of the record reveals the existence of competent evidence that Defendants claimed different amounts and types of alleged damages by each Plaintiff and charged each Plaintiff differing amounts for the alleged damages. For example, the Transaction Listings reflect that Plaintiffs were each charged different amounts for varied types of cleaning and repairs on their individual bedrooms and in the common areas of their units. A former property manager for Kuester testified that tenants were charged differing amounts based on the specific need for repairs and/or cleaning to the tenant's individual unit. Each Plaintiff was charged a different total amount against their security deposits, and each received some portion of his or her security deposit back. In sum, the factual portions of the trial court's determinations are supported by competent evidence and, thus, are binding on appeal. See *Beroth Oil Co.*, ___ N.C. at ___, 757 S.E.2d at 471. Even so, the core of Plaintiffs' appeal is their contention that the trial court reached erroneous legal conclusions about the remedies available to them under the Act which in turn led to erroneous conclusions about the need for

separate trials on damages. We must consider the court's conclusions *de novo*. *Id.*

Plaintiffs assert that any willful violation of the Act would require a *total* refund of each class member's security deposit, regardless of what damage may have been done to individual apartments, and that Defendants would not be entitled to file any counterclaims. They argue that the sole issue to be decided is whether Defendants violated the Act and that individual trials are neither necessary nor the most efficient option to determine that issue. If Plaintiffs' understanding of the Act is correct, we agree that no separate trials for individual class members would be required. We conclude, however, that Plaintiffs misinterpret the remedies available to them for Defendants' alleged violations of the Act.

The Act contains seven sections. The first section mandates how security deposits must be maintained by landlords:

Security deposits from the tenant in residential dwelling units shall be deposited in a trust account with a licensed and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, furnish a bond from an insurance company licensed to do business in North Carolina. The security deposits from the tenant may be held in a trust account outside of the State of North Carolina only if the landlord provides the tenant with an adequate bond in the amount

of said deposits. The landlord or his agent shall notify the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond.

N.C. Gen. Stat. § 42-50 (2013). The second section discusses the permitted uses of security deposits:

Security deposits for residential dwelling units shall be permitted only for the tenant's possible nonpayment of rent and costs for water or sewer services provided pursuant to [section] 62-110(g) and electric service pursuant to [section] 62-110(h), damage to the premises, nonfulfillment of rental period, any unpaid bills that become a lien against the demised property due to the tenant's occupancy, costs of re-renting the premises after breach by the tenant, costs of removal and storage of the tenant's property after a summary ejectment proceeding or court costs in connection with terminating a tenancy. The security deposit shall not exceed an amount equal to two weeks' rent if a tenancy is week to week, one and one-half months' rent if a tenancy is month to month, and two months' rent for terms greater than month to month. These deposits must be fully accounted for by the landlord as set forth in [section] 42-52.

N.C. Gen. Stat. § 42-51 (2011).⁴

⁴ Section 42-51 was amended effective 1 October 2012. 2012 N.C. Sess. Laws 17, s.4. The former version of this statute quoted herein applies to Plaintiffs' case. The substance of the statute remained largely the same, though the format was altered to list by subsection the specific permitted uses of the security deposit. One noteworthy change was the addition of

Section 42-52 discusses the obligations of landlords in providing tenants an accounting of any money withheld from the security deposit and a timely refund of any remaining balance:

Upon termination of the tenancy, money held by the landlord as security may be applied as permitted in [section] 42-51 or, if not so applied, shall be refunded to the tenant. In either case the landlord in writing shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord. If the extent of the landlord's claim against the security deposit cannot be determined within 30 days, the landlord shall provide the tenant with an interim accounting no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord and shall provide a final accounting within 60 days after termination of the tenancy and delivery of possession of the premises to the landlord. If the tenant's address is unknown the landlord shall apply the deposit as permitted in [section] 42-51 after a period of 30 days and the landlord shall hold the balance of the deposit for collection by the tenant for

subsection (a)(8): "Any fee permitted by G.S. 42-46." Section 42-46 is part of Article 5, entitled "Residential Rental Agreements" and includes provisions for various court-related fees, and fees for late payment of rent. N.C. Gen. Stat. § 42-46(a)(1) (2013). In their argument on appeal, Plaintiffs include a brief reference to Defendants' alleged violation of subsection (a)(8). Because subsection (a)(8) is contained in the amended version of the statute not applicable to Plaintiffs' security deposits, we do not address assertions regarding section 42-46 in this opinion.

at least six months. The landlord may not withhold as damages part of the security deposit for conditions that are due to normal wear and tear nor may the landlord retain an amount from the security deposit which exceeds his actual damages.

N.C. Gen. Stat. § 42-52 (2013). Section 42-53 concerns pet deposits, section 42-54 discusses transfer of units between landlords, and section 42-56 describes the persons and entities considered landlords under the Act and to whom the Act applies. See N.C. Gen. Stat. §§ 42-53, -54, -56 (2013).

Most pertinent to resolution of this appeal, the section entitled "Remedies" provides that,

[i]f the landlord or the landlord's successor in interest fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit. *The willful failure of a landlord to comply with the deposit, bond, or notice requirements of this Article shall void the landlord's right to retain any portion of the tenant's security deposit as otherwise permitted under [section] 42-51.* In addition to other remedies at law and equity, the tenant may recover damages resulting from noncompliance by the landlord; and upon a finding by the court that the party against whom judgment is rendered was in willful noncompliance with this Article, such willful noncompliance is against the public policy of this State and the court may award attorney's fees to be taxed as part of the costs of court.

N.C. Gen. Stat. § 42-55 (2013) (emphasis added). Plaintiffs focus on the italicized language as the remedy for Defendants' alleged violation of section 42-51 - by taking the \$40 administrative fee from their security deposits - and section 42-52 - by withholding from the security deposits damages attributable to normal wear and tear and retaining amounts greater than the actual damages done to the units. We are not persuaded by Plaintiffs' assertions.

Under our long-standing principles of statutory construction, "we presume that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein. [In addition], words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent while avoiding absurd or illogical interpretations." *Fort v. Cnty of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (citations and internal quotation marks omitted), *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012). Applying these principles to the plain language of the Act, section 42-55 sets forth four distinct remedies: (1) where a landlord "fails to account for and refund the balance of the tenant's security

deposit as required[,]” tenants can bring a civil action to receive the required accounting and appropriate refunds due them (“the appropriate refund remedy”); (2) where a landlord “willfully fails to comply with the deposit, bond, or notice requirements of this Article[,]” a tenant can seek refund of the entire security deposit, even if the landlord would otherwise be entitled to retain some portion thereof (“the full refund remedy”); (3) where a tenant has incurred damages from the landlord’s failure to comply with the Act, the tenant may sue to recover those damages (“the damages remedy”); and (4) where a landlord’s noncompliance is willful, the tenant can seek attorney’s fees (“the attorney’s fees remedy”). See N.C. Gen. Stat. § 42-55.

While the damages remedy and the attorney’s fees remedy could be sought in conjunction with each other or with the other remedies, the appropriate refund remedy and the full refund remedy are mutually exclusive. The first allows only for the required accounting and proper refund of the security deposit, while the second entitles a tenant to a total refund, even if the tenant’s actions would otherwise subject his deposit to partial or complete forfeit. Put another way, the appropriate refund remedy merely requires a landlord to comply with the

accounting and refund requirements of the Act, while the full refund remedy imposes a penalty for noncompliance. It follows, then, that these two remedies must apply to different types of noncompliance with the Act, since otherwise, every tenant with a noncomplying landlord would certainly elect to receive a full refund.

Plaintiffs appear to interpret the trigger for the full refund remedy, to wit, the phrase "willful failure of a landlord to comply with the deposit, bond, or notice requirements of this Article[,]" as a reference to non-permitted uses of security deposits in violation of section 42-51 and overcharging for damages in violation of section 42-52. We do not believe that the word "deposit" in the above-quoted portion of the remedy section is intended to reference *any and all* wrongful use or withholding of a security deposit. Such an interpretation would lead to a nonsensical result since the entire Act concerns security deposits, and thus every violation of the Act by a landlord would afford the landlord's tenants full refunds and the appropriate refund remedy would become, in effect, surplusage. Such statutory interpretations must be avoided. See *Fort*, 218 N.C. App. at 407, 721 S.E.2d at 355 (citations and internal quotation marks omitted).

We conclude that the full refund remedy is available only for willful violations of section 42-50, the only section of the Act containing provisions regarding deposit, bond, and notice *vis a vis* security deposits:

Security deposits from the tenant in residential dwelling units *shall be deposited in a trust account* with a licensed and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, *furnish a bond* from an insurance company licensed to do business in North Carolina. . . . The landlord or his agent *shall notify* the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond.

N.C. Gen. Stat. § 42-50 (emphasis added).

It seems equally clear that the appropriate refund remedy, to wit, a proper accounting and refund of any remaining portion of the security deposit to which a tenant is entitled, applies to violations of section 42-52, such as overcharging for damages and charging for normal wear and tear. The appropriate refund remedy is available when a landlord "fails to account for and refund the balance of the tenant's security deposit as required[,]" N.C. Gen. Stat. § 42-50, an echo of the requirement that landlords "shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security

deposit, no later than 30 days after termination of the tenancy and delivery of possession of the premises to the landlord." N.C. Gen. Stat. § 42-52.⁵ Nothing in the statute would require an automatic refund of every tenant's full security deposit for Defendants' alleged overcharging for repairs and charging for normal wear and tear. Thus, we agree with the trial court's conclusion that each prospective class member would require a separate trial to determine, *inter alia*, what portion of the class member's individual charges, if any, was attributable to overcharging or charging for normal wear and tear.

As for Plaintiffs' allegation that Defendants have violated section 42-51 by deducting the administrative fee – essentially a fine for breaking the rules and regulations listed in the lease addendum – from their security deposits, we likewise conclude that any such violations would entitle them only to the appropriate refund remedy, damages remedy, and/or attorney's fees remedy. Withholding money for an issue not on the list of permitted uses for security deposits directly implicates the

⁵ The damages and attorney's fees remedies could also be available if Plaintiffs were able to establish that they incurred damages from Defendants' noncompliance and/or that the noncompliance was willful. See N.C. Gen. Stat. § 42-55. Of course, any determination of damages would also require individual trials for each Plaintiff.

proper amount of a tenant's security deposit refund, thereby triggering the appropriate refund remedy.⁶

Further, we can find nothing in the Act that would prevent a landlord from fining tenants for violating health, safety, or other rules and regulations such as those Plaintiffs agreed to in their lease addenda. The Act simply bars landlords from taking those amounts out of security deposits. See N.C. Gen. Stat. § 42-51. Thus, even if Plaintiffs prevail in proving that Kuester violated the Act by deducting the administrative fee from their security deposits and the fees were therefore refunded to them, CHS and Greenway could simply bill them separately for the \$40 fee. We also note that, if any of the applicator class members had damage and cleaning costs which exceeded the amount of their security deposit, such that CHS or Greenway had to bill them for additional amounts, a fact-finder would need to determine whether the administrative fee was taken out of the security deposits or was part of the additional amount billed.⁷

⁶ See Footnote 5, *supra*.

⁷ The Transaction Listing for each of the four named plaintiffs appears to include a line item for \$40 noted as "Administrative Fee" with "Administrative fee" noted under the "Comment" column. In contrast, the amounts billed for various cleaning and repairs

In sum, the factual underpinnings of the findings of fact Plaintiffs challenge on appeal are supported by competent evidence. The trial court did not err in its ultimate finding and legal conclusion that "common issues of fact in this matter do not predominate over issues affecting only individual class members." Plaintiffs having failed to establish the existence of a class, the trial court did not abuse its discretion in denying Plaintiffs' motion. See *Beroth Oil Co.*, __ N.C. at __, 757 S.E.2d at 470-71. The order denying Plaintiffs' motion for class certification is

AFFIRMED.

Chief Judge MCGEE and Judge HUNTER concur.

required after Plaintiffs vacated their units are described as "Security Deposit Forfeit" with specific explanations of charges listed in the Comment column. For example, Kalk's Transaction Listing includes a charge of \$4 as "Security Deposit Forfeit" with the comment "Clean washer/dryer[.]" Accordingly, the evidence is disputed as to whether the administrative fees were actually taken out of the security deposits.