IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1008

Filed: 20 November 2018

Wake County, No. 14-CVS-014273

SADIE J. CARTER and HELEN C. LYTCH, Plaintiffs,

v.

ST. AUGUSTINE'S UNIVERSITY, Defendant.

Appeal by defendant and cross-appeal by plaintiffs from judgment entered 3 March 2017 and post-trial order entered 4 April 2017 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 21 February 2018.

The Noble Law Firm, PLLC, by Laura L. Noble and Nicholas J. Sanservino, Jr., for plaintiffs.

The Francis Law Firm, PLLC, by Charles T. Francis and Ruth Sheehan, for defendant.

BERGER, Judge.

St. Augustine's University (the "University") appeals and Dr. Sadie J. Carter ("Dr. Carter") and Helen C. Lytch ("Ms. Lytch") (collectively, "Plaintiffs") cross-appeal from a judgment entered March 3, 2017 and a post-trial order entered April 4, 2017. The University asserts that the trial court erred by (1) denying its motion for

judgment notwithstanding the verdict; (2) awarding treble damages; and (3) charging the jury with an unwarranted peremptory instruction. On cross-appeal, Plaintiffs contend that the trial court erred by denying Plaintiffs' attorney-fee request and awarding minimal costs. We find no error in part, and reverse and remand in part.

Factual and Procedural Background

The University hired Dr. Carter in 2012 to serve as the Associate Vice-President of Human Resources, and she reported directly to Colonel Angela Haynes ("Col. Haynes"), one of the University's vice presidents and its chief financial officer. In 2013, Dr. Carter hired Ms. Lytch to serve as the University's Director of Human Resources, and she reported directly to Dr. Carter. Plaintiffs were hired as at-will employees. The University hired Dr. Everett Ward as the interim president of the University ("Interim-President Ward") in April 2014. In this position, Interim-President Ward was responsible for approving all hiring and firing decisions for the University. However, as the University's vice president and Plaintiffs' supervisor, Col. Haynes had the exclusive authority to recommend Plaintiffs' terminations to Interim-President Ward.

In 2014, the University experienced financial distress due to decreased enrollment a decline in alumni donations. To address this issue, the University implemented a "reduction in force" program (the "RIF Program"). Under the RIF Program, the University terminated twelve employees and reassigned thirty-one

other employees in May 2014. Although Dr. Carter and Ms. Lytch's names were on the RIF Program's list as of May 8, 2014, Plaintiffs were not terminated along with the other twelve employees who were terminated in May 2014 under the RIF Program.

The University also reduced the compensation for all adjunct professors beginning in January 2014. Dr. Orlando Hankins ("Dr. Hankins"), Associate Provost of the University, was responsible for overseeing the University's reduced adjunct professor pay scale. Under this reduced pay scale, the deans of the University were required to notify the various adjunct professors about the modification and receive confirmation that the adjunct professors were still willing to teach. Dr. Hankins received complaints directly from supervising faculty members, deans, and some adjunct professors regarding the pay reduction. The University's policy required employees to raise compensation concerns through: (1) human resources—Ms. Lytch, Director of Human Resources, and then, if necessary, Dr. Carter, President of Human Resources; (2) the payroll department; (3) the chief financial officer—Col. Haynes; and, if necessary, (4) the president—Interim President Ward.

Beginning in early 2014, Dr. Carter and Ms. Lytch repeatedly communicated their concerns regarding Ms. Lytch's adjunct instructor compensation to Col. Haynes, Dr. Hankins, and other administrators. Dr. Hankins replied to Dr. Carter's inquiries regarding Ms. Lytch's lack of any adjunct professor compensation via email on March

13, 2015, in which Dr. Hankins promised that he would investigate further to "try to get [Ms. Lytch] paid." When she still did not receive any compensation, Ms. Lytch sent a follow-up email to Dr. Hankins on April 2, 2014.

As this compensation issue remained unresolved through June 2014, Ms. Lytch raised her concerns in an email to Interim-President Ward on June 13, 2014. After receiving no response to this email, Ms. Lytch sent a follow-up email to Interim-President Ward on June 24, 2014. On June 25, 2014, Col. Haynes called Dr. Carter and Ms. Lytch into her office, where she allegedly slammed a copy of Ms. Lytch's email to Interim-President Ward on her desk and demanded to know why Ms. Lytch sent that correspondence. The following day, Dr. Carter and Ms. Lytch received termination letters from Col. Haynes and they were escorted off campus. Dr. Carter took six file boxes from her office when she was being escorted off campus, which contained hundreds of pages of confidential personnel documents.

On October 28, 2014, Plaintiffs filed a complaint against the University, seeking unpaid wages under North Carolina's Wage and Hour Act (the "Wage Act") and damages for wrongful termination in violation of North Carolina's public policy. The University answered the complaint on January 5, 2015. Plaintiffs amended the complaint on May 4, 2016 to add a claim under North Carolina's Retaliatory Employment Discrimination Act ("REDA") after Plaintiffs received the pre-requisite "right-to-sue" letters from the North Carolina Department of Labor. On July 5, 2016,

the University answered the first amended complaint and filed counterclaims against Dr. Carter for conversion, embezzlement, and breach of fiduciary duty.

Plaintiffs' claims and the University's counterclaims were tried before a jury starting on January 23, 2017. At trial, Interim-President Ward testified that he had approved Plaintiffs' terminations based solely upon Col. Haynes' recommendation. Interim-President Ward also admitted that Plaintiffs' termination letters were drafted in violation of University policy as they did not contain the same language as the other termination letters provided to the twelve individuals terminated under the RIF Program.

At the close of all evidence and before submitting any issues to the jury, the trial court directed verdict for Dr. Carter on the University's breach of fiduciary duty counterclaim. All remaining issues were submitted to the jury. The jury returned a verdict in favor of all of Plaintiffs' claims, in favor of Dr. Carter on the University's embezzlement claim, and in favor of the University on its conversion counterclaim.

On February 13, 2017, Plaintiffs filed their "Motion for Entry of Judgment Including Supplemental Relief," in which Plaintiffs requested attorneys' fees and costs.

On March 3, 2017, the trial court entered the judgment (the "Final Judgment"), which, in relevant part, made the following findings:

> 6. The jury found for the plaintiffs on their claim for punitive damages in the amount of $150,000.

> 7. The plaintiffs moved to elect to receive treble damages for the claims pursuant to the Retaliatory Employment Discrimination Act, and not punitive damages.
>
> 8. The plaintiffs also moved for attorney fees and costs.
>
> 9. There has been presented no evidence that Defendant's counter claims were malicious, or frivolous.
>
> 10. There has been no evidence that any of Defendant's defenses were malicious, frivolous [or] in bad faith.

The trial court also stated the following, relevant conclusions of law:

> 1. In awarding punitive damages, the jury found by clear and convincing evidence the existence of willful or wanton conduct and by the greater weight of the evidence that the defendant's officer[s,] directors or managers participated in or condoned that conduct.
>
> 2. Defendant[']s conduct was willful.
>
> 3. The Plaintiffs are entitled to treble damages for Defendant's violation of the Retaliatory Employment Discrimination Act.
>
> 4. The plaintiffs' motion for treble damages and not punitive damages should be allowed.
>
> 5. Defendant's defenses and counter claims were not frivolous or malicious and were in good faith.

Based upon these, and other findings and conclusions, the trial court, ordered the following:

> 1. Plaintiff Lytch shall have and recover from Defendant compensatory damages of $635.00 on the claim for violation of the Wage and Hour Act relating to vacation pay; compensatory damages of $25,900 on the claim for wrongful discharge in violation of public policy; and compensatory damages of $90,000 (jury's $30,000 award trebled) on the claim for violation of the Retaliatory Employment Discrimination Act.

> 2. Plaintiff Sadie Carter shall have and recover from Defendant compensatory damages of [ ]$3,787.00 on the claim for violation of the Wage and Hour Act; compensatory damages of $15,000 on the claim for wrongful discharge in violation of public policy; and compensatory damages of $90,000 (jury's award of $30,000 trebled) on the claim for violation of the Retaliatory Employment Discrimination Act.
>
> 3. Defendant shall have and recover nothing of Plaintiff Carter by reason of its counterclaims for embezzlement and breach of fiduciary duty, and such counterclaims are dismissed with prejudice.
>
> 4. Defendant shall have and recover from Plaintiff Carter $1.00 as nominal damages on Defendant's conversion claim.
>
> 5. The plaintiffs shall have and recover from the defendant costs of the action in the amount of $1048.41.
>
> [6.] The Court in its discretion denies [Plaintiffs'] motion for attorney fees.

On March 10, 2017, the University moved for judgment notwithstanding the verdict ("JNOV"), or alternatively, for a new trial. On April 4, 2017, the trial court denied the University's JNOV motion in a post-trial order on appeal (the "Post-Trial Order").

The University timely appealed and Plaintiffs timely cross-appealed from both the Final Judgment and the Post-Trial Order. The University assigns error to the trial court's denial of its JNOV motion, award of treble damages, and a jury instruction on Plaintiffs' REDA claims. Plaintiffs challenge the denial of their motion for attorneys' fees and award of minimal costs. Each issue will be addressed in turn.

Analysis

I. JNOV Motion

The University first contends that the trial court erred by denying its JNOV motion on Plaintiffs' REDA claim, wrongful discharge claim, and punitive damages award as these claims and award were legally and factually unsupported. We disagree.

> The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict. A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict. A motion for directed verdict tests the legal sufficiency of the evidence to take the case to jury and support a verdict for the nonmovant.
>
> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. A directed verdict and judgment notwithstanding the verdict are therefore not properly allowed unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish.

Scarborough v. Dillard's, Inc., 363 N.C. 715, 719-20, 693 S.E.2d 640, 643 (2009) (*purgandum*[1]).

> To survive a motion for directed verdict or JNOV, the non-movant must present more than a scintilla of

[1] Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

> evidence to support its claim. While a scintilla is very slight evidence, the non-movant's evidence must still do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury. The trial court must construe the evidence in the light most favorable to the non-movant and resolve all evidentiary conflicts in the non-movant's favor. We review this question of law de novo.

Morris v. Scenera Research, LLC, 368 N.C. 857, 861, 788 S.E.2d 154, 157-58 (2016) (citations and quotation marks omitted).

A. JNOV Motion on REDA Claims

The University challenges the trial court's denial of its JNOV motion on Plaintiffs' REDA claims. The University argues that Plaintiffs failed to satisfy their burden of proving that that the University knowingly terminated Plaintiffs for engaging in a protected activity. We disagree.

In relevant part, REDA states:

> (a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:
>
> (1) File a claim or complaint, initiate an inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
>
> . . .
>
> b. Article 2A or Article 16 of this Chapter [which includes the Wage Act].
>
> . . .
>
> (2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee's behalf.
>
> . . .

> (b) It shall not be a violation of this Article for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under this Article if the person proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee.

N.C. Gen. Stat. § 95-241 (2017).

> In order to state a claim under REDA, a plaintiff must show (1) that he exercised his rights as listed under N.C. Gen. Stat. § 95-241(a), (2) that he suffered an adverse employment action, and (3) that the alleged retaliatory action was taken because the employee exercised his rights under N.C. Gen. Stat. § 95-241(a). An adverse action includes the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment. If plaintiff presents a prima facie case of retaliatory discrimination, then the burden shifts to the defendant to show that he would have taken the same unfavorable action in the absence of the protected activity of the employee. Although evidence of retaliation in a case such as this one may often be completely circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation.

Pierce v. Atl. Grp., Inc., 219 N.C. App. 19, 25, 724 S.E.2d 568, 573 (2012) (citations and quotations omitted).

For example, in *Fatta v. M & M Properties Mgmt., Inc.*, this Court held that the plaintiff established a *prima facie* REDA claim because "plaintiff demonstrated that he was terminated from employment five days after informing defendant of his work-related injury and of his intention to file a worker's compensation claim." *Fatta*

v. M & M Properties Mgmt., Inc., 221 N.C. App. 369, 373, 727 S.E.2d 595, 599 (2012). In so holding, the *Fatta* Court reasoned that "merely a closeness in time between the filing of a discrimination charge and an employer's firing an employee is sufficient to make a *prima facie* case of causality." *Id.* (citations, brackets, and quotation marks omitted).

Here, Plaintiffs asserted in their REDA claims that they were wrongfully terminated after Plaintiffs initiated an inquiry in good faith with respect to the University's violation of the Wage Act. The Wage Act requires every employer to "pay every employee all wages and tips accruing to the employee on the regular payday." N.C. Gen. Stat. § 95-25.6 (2017).

At trial, Plaintiffs presented evidence that Col. Haynes called them into her office the day after Ms. Lytch sent a follow-up email to Interim-President Ward inquiring about her lack of compensation for serving as an adjunct professor. Ms. Lytch testified that during that meeting, Col. Haynes slammed a copy of Ms. Lytch's email to Interim-President Ward on her desk and demanded to know why Ms. Lytch sent that correspondence to Interim-President Ward. The following day, Dr. Carter and Ms. Lytch received termination letters from Col. Haynes and were escorted off campus. Interim-President Ward approved Plaintiffs' terminations based solely upon Col. Haynes' recommendation. Several exhibits of time-stamped email exchanges

and Plaintiffs' dated termination letters were also admitted at trial to corroborate Plaintiffs' testimony.

Due to Col. Haynes' reaction to Ms. Lytch's email inquiring about her lack of compensation and the close temporal proximity between Plaintiffs' inquiry and terminations, Plaintiffs presented "more than a scintilla of evidence" to support their claims that they were terminated because they inquired about a violation of the Wage Act. *Morris*, 368 N.C. at 861, 788 S.E.2d at 157 (citation omitted). Although the University presented compelling evidence to the contrary, "[o]ur appellate courts have consistently held that it is the *jury's* function to weigh the evidence and to determine the credibility of the witnesses." *Henry v. Knudsen*, 203 N.C. App. 510, 520, 692 S.E.2d 878, 884 (2010) (citations and quotation marks omitted) (emphasis added). Plaintiffs carried their "minimal burden of presenting more than a scintilla of evidence" to support their REDA claims. *Morris*, 368 N.C. at 862, 788 S.E.2d at 158. Accordingly, we cannot conclude that the trial court erred by denying the University's JNOV motion on Plaintiffs' REDA claims.

B. JNOV Motion on Wrongful Discharge in Violation of Public Policy

The University also asserts that the trial court erred in denying its JNOV motion on Plaintiffs' claims of wrongful discharge in violation of public policy. The University contends that "the alleged violation of public policy—retaliatory firing of

an employee engaged in 'protected activity'—was demonstrated by neither fact nor law, and the jury's verdict on the same should be overturned." We disagree.

> North Carolina is an employment-at-will state. . . . The doctrine of employment-at-will, however, is not without limits, and a valid claim for relief exists for wrongful discharge of an employee at will if the contract is terminated for an unlawful reason or a purpose that contravenes public policy. Public policy is defined as the principle of law that holds no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. There is no specific list of what actions constitute a violation of public policy. However, wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employers request, (2) for *engaging in a legally protected activity*, or (3) based on some activity by the employer contrary to law or public policy.

Pierce, 219 N.C. App. at 29, 724 S.E.2d at 575-76 (*purgandum*) (emphasis added); *see also White v. Cochran*, 216 N.C. App. 125, 133, 716 S.E.2d 420, 426 (2011) (recognizing a claim for wrongful discharge in violation of public policy based on the defendant's REDA violation).

As previously discussed, Plaintiffs presented more than a scintilla of evidence to demonstrate that they were terminated because they inquired about a violation of the Wage Act, which is a legally protected activity under REDA. N.C. Gen. Stat. § 95-241(a)(1)(b). Therefore, although the University presented compelling evidence to the contrary, Plaintiffs presented more than a scintilla of evidence to support their wrongful discharge in violation of public policy claims. Accordingly, under this

minimal standard, the trial court did not err by denying the University's motion on Plaintiffs' wrongful discharge claims in violation of public policy as they did not violate public policy.

C. JNOV Motion on Punitive Damages

The University also argues that the trial court erred in denying its JNOV motion on Plaintiffs' punitive damages awards. We agree.

"As a general rule, punitive damages may be recovered where tortious conduct is accompanied by an element of aggravation." *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 50, 524 S.E.2d 53, 59 (1999) (citation omitted). "Our General Assembly has set parameters for the recovery of punitive damages through the enactment of Chapter 1D of the North Carolina General Statutes." *Scarborough*, 363 N.C. at 720, 693 S.E.2d at 643.

Section 1D-15 states:

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
> (2) Malice.
> (3) Willful or wanton conduct.
>
> (b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

N.C. Gen. Stat. § 1D-15(a)-(b) (2017). "Willful or wanton conduct means the conscious and intentional disregard of and indifference to the rights and safety of others, which

the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. Willful or wanton conduct means more than gross negligence." N.C. Gen. Stat. § 1D-5(7) (2017) (quotation marks omitted).

> A wanton act is an act done with a wicked purpose or done needlessly, manifesting a reckless indifference to the rights of others. An act is willful when there is a deliberate purpose not to discharge a duty, assumed by contract or imposed by law, necessary for the safety of the person or property of another.

Benton, 136 N.C. App. at 51, 524 S.E.2d at 60 (*purgandum*).

Pursuant to Section 1D-50,

> [w]hen reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter.

N.C. Gen. Stat. § 1D-50 (2017).

In *Scarborough v. Dillard's Inc.*, "our Supreme Court discussed the duties of a trial court [under Sections 1D-15(a) and 1D-50] when reviewing a jury's award of punitive damages on a defendant's JNOV motion." *Hayes v. Waltz*, 246 N.C. App. 438, 452, 784 S.E.2d 607, 619 (2016). The *Scarborough* Court held that the

> language [of Section 1D-50], coupled with that in 1D-15(b) requiring proof by clear and convincing evidence, manifests that the General Assembly intended that the quantum of

> evidence be more than would be sufficient to uphold liability for the underlying tort and that *the trial court have a role in ascertaining whether the evidence presented was sufficient* to support a jury's finding of the factor under the standard established by the legislature.

Scarborough, 363 N.C. at 721, 693 S.E.2d at 643-44 (quotation marks omitted) (emphasis added). The trial court's statutory responsibility, as dictated by Section 1D-50, requires the trial court to "simply recite[ ] the evidence, or lack thereof, forming the basis of the judge's opinion." *Id.* at 723, 693 S.E.2d at 644.

"The trial judge does not determine the truth or falsity of the evidence or weigh the evidence." *Id.* In fulfilling this statutory role, the trial court is not *required* to make findings of fact. However, findings of fact "provide a convenient format with which all trial judges are familiar to set out the evidence forming the basis of the judge's opinion." *Id.* at 722-23, 693 S.E.2d at 644. Moreover, although these findings "provide valuable assistance to the appellate court," these findings of fact are "not binding on the appellate court." *Id.*

For example, the plaintiff in *Scarborough* initially argued to this Court that the trial court erred in granting defendant's JNOV motion as to plaintiff's punitive damages claim. *Scarborough v. Dillard's Inc.*, 179 N.C. App. 127, 130, 632 S.E.2d 800, 802 (2006). This Court remanded the case for the trial court's failure to comply with Section 1D-50 because the trial court's order granting defendant's JNOV motion

did not explain why it disturbed the jury's verdict as to punitive damages. *Id.* at 130-32, 632 S.E.2d at 802-04.

Similarly, in *Hayes v. Waltz*, the plaintiff argued that the trial court erred in granting the defendant's JNOV motion and setting aside the plaintiff's jury award of punitive damages. *Hayes*, 246 N.C. App. at 452, 784 S.E.2d at 619. Relying on *Scarborough*, the *Hayes* Court remanded for the trial court to "issue a written opinion setting forth its specific reasons for granting Defendant's JNOV motion regarding the punitive damages award and citing the evidence, or lack thereof, upon which it based its decision," pursuant to Section 1D-50. *Id.* at 454, 784 S.E.2d 620. In so holding, the *Hayes* Court also relied on this Court's prior decisions in *Hudgins v. Wagoner* and *Springs v. City of Charlotte*. *See id.* at 454, 784 S.E.2d 619-620.

> In *Hudgins v. Wagoner,* 204 N.C. App. 480, 694 S.E.2d 436 (2010), *disc. review denied,* 365 N.C. 88, 706 S.E.2d 250 (2011), the defendants argued that the trial court erred in denying their JNOV motion concerning an award of punitive damages because insufficient evidence existed for the award of such damages. Citing *Scarborough,* we reversed the trial court's denial of the defendants' JNOV motion as to the punitive damages award because the trial court had failed to enter a written opinion stating its reasons for upholding the award. We concluded that it was necessary to remand the matter to the trial court for entry of a written opinion with respect to the award of punitive damages as required by North Carolina General Statutes, section 1D-50 and explained by *Scarborough*. In light of our holding that remand to the trial court was necessary, we did not address the parties' substantive arguments concerning the sufficiency of the evidence at trial to support a punitive damages award.

> Likewise, in *Springs* [*v. City of Charlotte*, 209 N.C. App. 271, 281, 704 S.E.2d 319, 326-27 (2011)], the trial court failed to comply with N.C. Gen. Stat. § 1D-50 in its order denying the defendant's motion for JNOV and upholding the jury's punitive damages award. On appeal, this Court noted that it was bound by both *Scarborough* and *Hudgins* and held that
>
> > since the trial court's order addressing defendants' motion for JNOV simply stated that the motion was denied without complying with N.C. Gen. Stat. § 1D-50, we must remand to allow the trial court to enter a written opinion setting out its reasons for upholding the punitive damages award. We cannot address the merits of [defendant's] arguments regarding the sufficiency of the evidence in the absence of the required written opinion.

Hayes, 246 N.C. App. at 454, 784 S.E.2d at 619-20 (*purgandum*).

Here, the trial court upheld the jury's punitive damages award by noting in the Final Judgment that "the jury found by clear and convincing evidence the existence of willful or wanton conduct and by the greater weight of the evidence that the defendant's officer[s,] directors or managers participated in or condoned that conduct." However, the trial court did not "state in a written opinion its reasons for upholding" the award or "address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages." N.C. Gen. Stat. § 1D-50. Accordingly, we vacate and remand the trial court's denial of the University's JNOV motion on punitive damages.

II. Treble Damages

The University next contests the trial court's award of treble damages by arguing that Plaintiffs did not present "sufficient evidence that the University's alleged violation of the REDA statute was willful." We vacate and remand the trial court's award without considering the sufficiency of the evidence because that task is for the trial court in the first instance.

"If . . . the court finds that the employee was injured by a willful violation of [REDA], the court shall treble the amount awarded" as "compensation for lost wages, lost benefits, and other economic losses that were proximately caused by the retaliatory action or discrimination." N.C. Gen. Stat. § 95-243(c)(4) (2017). Section 95-243(c)

> clearly establishes that damages shall be trebled under REDA if the *court* finds that the employee was injured by a willful violation. Thus, the trial court must make the finding of willfulness, and a reviewing court must uphold the trial court's finding of willfulness if there is competent evidence to support that finding.

Morris, 368 N.C. at 866, 788 S.E.2d at 161 (citation and quotation marks omitted). A "willful" violation of the REDA "requires a showing of the accused party's knowledge or reckless disregard of whether an action violated the statute." *Id.* at 867, 788 S.E.2d 161.

Here, the trial court made the following findings in the Final Judgment:

> 6. The jury found for the plaintiffs on their claim for punitive damages in the amount of $150,000.

> 7. The plaintiffs moved to elect to receive treble damages for the claims pursuant to the Retaliatory Employment Discrimination Act, and not punitive damages.

Based on these findings, the trial court concluded in relevant part:

> 1. In awarding punitive damages, the jury found by clear and convincing evidence the existence of willful or wanton conduct and by the greater weight of the evidence that the defendant's officer[s,] directors or managers participated in or condoned that conduct.
> 2. Defendant[']s conduct was *willful.*
> 3. The Plaintiffs are entitled to treble damages for Defendant's violation of the Retaliatory Employment Discrimination Act.
> 4. The plaintiffs' motion for treble damages and not punitive damages should be allowed.

(Emphasis added).

While the trial court concluded that the University's "conduct was willful," the trial court did not find that the University terminated Plaintiffs in willful *violation of REDA* as required by statute. Section 95-243(c)(4) permits the trial court to treble damages if "the court finds that the employee was injured by a *willful violation of [REDA].*" N.C. Gen. Stat. § 95-243(c)(4) (emphasis added). Moreover, it appears that the trial court based its conclusion that the University acted willfully solely on the jury's awards of punitive damages. Accordingly, we vacate the trial court's awards of treble damages and remand for the trial court to make new findings of fact and conclusions of law as to whether the University terminated Plaintiffs in willful violation of REDA to warrant treble damages under Section 95-243(c)(4).

III. Motion for New Trial

As an alternative argument to its JNOV appeal, the University argues that the trial court's denial of its motion for a new trial made pursuant to Rule 59(a)(7) of the North Carolina Rules of Civil Procedure as to Plaintiffs' REDA and wrongful termination claims was error. We disagree.

> A motion for new trial pursuant to Rule 59(a)(7) does not involve a question of law, therefore it is reviewed for abuse of discretion. The trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. In ruling on a Rule 59(a)(7) motion, the trial court should set aside a jury verdict only in those exceptional situations where the verdict will result in a miscarriage of justice, because it is the jury's function to weigh the evidence and determine the credibility of witnesses.

Kor Xiong v. Marks, 193 N.C. App. 644, 654-55, 668 S.E.2d 594, 601 (2008) (*purgandum*).

Rule 59(a) states that "[a] new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes of grounds," including "(7) [i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) (2017). "[I]n this context, the term 'insufficiency of the evidence' means that the verdict was against the greater weight of the evidence. The trial court has discretionary authority to appraise the evidence and to order a new trial whenever in his opinion the verdict is contrary to the greater

weight of the credible testimony." *In re Will of Buck*, 350 N.C. 621, 624-25, 516 S.E.2d 858, 860 (1999) (citations and quotation marks omitted).

"In ruling on a motion for a new trial under Rule 59(a), absent a specific request made pursuant to Rule 52(a)(2) [of the North Carolina Rules of Civil Procedure], a trial court is not required to either state the reasons for its decision or make findings of fact showing those reasons." *Strickland v. Jacobs*, 88 N.C. App. 397, 399, 363 S.E.2d 229, 230 (1988) (citations omitted). Absent such a request, "an appellate court should not disturb a *discretionary* Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *In re Will of Buck*, 350 N.C. at 625, 516 S.E.2d at 861 (citation and quotation marks omitted).

Here, the cold record presents the following evidence: Ms. Lytch sent a follow-up email to Interim-President Ward inquiring about her lack of compensation; the following day, Col. Haynes reprimanded Ms. Lytch and her supervisor, Dr. Carter, for Ms. Lytch's inquiry; and Plaintiffs were fired the day after they were reprimanded and two days after their inquiry.

This evidence tends to show that the jury's verdict, finding the University liable for wrongful discharge and for violating REDA, was not contrary to the greater weight of the credible testimony. "[B]ecause it is the jury's function to weigh the evidence and determine the credibility of witnesses," we do not find that these facts

present the "exceptional situation[ ] where the verdict will result in a miscarriage of justice." *Kor Xiong*, 193 N.C. App. at 654-55, 668 S.E.2d at 601 (*purgandum*). Accordingly, we find no error in the trial court's denial of the University's motion for a new trial.

IV. Jury Instructions

The University next contends "[t]he trial court's instructions in this case on Plaintiffs' REDA claims constituted an impermissible peremptory instruction on a key element of Plaintiffs' claims, namely whether Plaintiffs engaged in protected conduct." We disagree.

> On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. . . . Under such standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (*purgandum*).

> When all the evidence suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury finds the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. A peremptory instruction is proper only when all evidence points in the same direction with but a single inference to be drawn.

Hinnant v. Holland, 92 N.C. App. 142, 146, 374 S.E.2d 152, 155 (1988) (*purgandum*).

Here, the contested instruction stated:

> The fifth issue reads: "Was the plaintiff Helen Lytch's participation in conduct protected by law a substantial factor in the defendant's decision to terminate the plaintiff's employment?"
>
> On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:
>
> First, that the plaintiff participated in conduct protected by law. I instruct you that inquiring about wages one is owed is conduct protected by law.
>
> And Second, that the plaintiff's participation in conduct protected by law was a substantial factor in the defendant's decision to terminate the plaintiff. Absent an agreement to the contrary, an employer may terminate an employee with or without cause, and even for an arbitrary or irrational reason. Even so, no employee may be terminated because of her participation in conduct protected by law.
>
> Finally, as to the fifth issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the participation in conduct protected by law was a substantial factor in the defendant's decision to terminate the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.
>
> If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

The University specifically challenges the language of the first element, which states that "the plaintiff must prove, by the greater weight of the evidence, . . . that the plaintiff participated in conduct protected by law. I instruct you that inquiring about wages one is owed is conduct protected by law." The University argues that

this was a peremptory instruction that erroneously established this first element by indicating that the jury should assume "Plaintiffs' actions, which they claimed as the basis for their termination, rose to the level of a 'protected activity' [under the REDA]."

However, the University's interpretation of the trial court's instruction is misguided. The trial court's instruction is not peremptory as it does not "answer the inquiry" for the jury. *Hinnant*, 92 N.C. App. at 146, 374 S.E.2d at 155 (citation and quotation marks omitted). Rather, this instruction merely identified "inquiring about wages one is owed [as] a conduct protected by law," but it still required the jury to determine whether the plaintiff actually participated in this protected conduct: inquiring about wages one is owed. Moreover, this instruction properly "presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 177 (citation and quotation marks omitted). The trial court's instruction accurately stated the law, as REDA identifies an inquiry about a violation of the Wage Act as a legally protected activity. *See* N.C. Gen. Stat. § 95-241(a)(1)(b). Accordingly, the trial court did not err in instructing the jury on Plaintiffs' REDA claims.

V. Attorneys' Fees and Costs

In their cross-appeal, Plaintiffs claim that the trial court abused its discretion by only awarding $1,048.41 in costs and denying Plaintiffs' request for attorneys' fees under the Wage Act and REDA. We disagree.

"A trial court's decision whether or not to award attorneys' fees . . . is reviewed for abuse of discretion." *Kornegay v. Aspen Asset Grp., LLC*, 204 N.C. App. 213, 247, 693 S.E.2d 723, 746 (2010). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Sowell v. Clark*, 151 N.C. App. 723, 727, 567 S.E.2d 200, 202 (2002) (citation and quotation marks omitted).

"In North Carolina, parties to litigation are generally responsible for their own attorneys fees unless a statute provides otherwise." *McLennan v. Josey*, 247 N.C. App. 95, 98, 785 S.E.2d 144, 147 (2016) (citation omitted). The Wage Act states that "[t]he court . . . *may*, in addition to any judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to be paid by the defendant." N.C. Gen. Stat. § 95-25.22(d) (emphasis added). Similarly, REDA states that "[t]he court *may* award to the plaintiff and assess against the defendant the reasonable costs and expenses, including attorneys' fees, of the plaintiff in bringing an action pursuant to this section." N.C. Gen. Stat. § 95-243(c) (emphasis added). By stating that the trial court "may" award attorneys' fees to the prevailing party, attorney-fee awards under the Wage Act and REDA "rests with the sound discretion of the trial judge." *Varnell*

v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 457, 337 S.E.2d 616, 620 (1985) (citation omitted).

"If the trial court *elects to award* attorney's fees, it must make findings of fact to support its award." *Bryson v. Cort*, 193 N.C. App. 532, 536, 668 S.E.2d 84, 87 (2008) (citation omitted and emphasis added). "Before *awarding* attorney's fees, the trial court must make specific findings of fact concerning: (1) the lawyer's skill; (2) the lawyer's hourly rate; and (3) the nature and scope of the legal services rendered." *Williams v. New Hope Found., Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 588 (2008) (citation omitted and emphasis added).

However, this Court held that

> when the trial court in its discretion *denies* a motion for attorneys' fees, it need not make statutory findings required to support a fee award. . . . The distinction between orders awarding and denying fees makes sense, because if the trial court in its discretion is disinclined to award fees, the analysis of factors necessary to support a fee award is obviated. Requiring a trial court to engage in such an exercise to support an order denying attorneys' fees would be like requiring a civil jury which found no negligence to include in its verdict the amount of damage proximately caused by negligence.

E. Brooks Wilkins Family Med., P.A. v. WakeMed, 244 N.C. App. 567, 580-81, 784 S.E.2d 178, 186-87 (2016), *disc. review denied*, 369 N.C. 524, 797 S.E.2d 18 (2017). Although trial courts are generally not required to make findings of fact justifying the denial of attorneys' fees, it is always a better practice to make such findings as

"[t]he findings may shed light on how the trial court made its decision" and assist in our appellate review. *Id.* at 581, 784 S.E.2d at 188.

Here, the trial court made the following findings in support of its denial of Plaintiffs' request for attorneys' fees:

> 8. The plaintiffs also moved for attorney fees and costs.
>
> 9. There has been presented no evidence that Defendant's counter claims were malicious, or frivolous.
>
> 10. There has been no evidence that any of Defendant's defenses were malicious, frivolous [or] in bad faith.

The evidence before the trial court supports these findings. "We do not believe that the trial court's denial of attorneys' fees because of the substantial dispute in the evidence was manifestly unreasonable." *Kornegay v. Aspen Asset Grp., LLC*, 204 N.C. App. 213, 247, 693 S.E.2d 723, 746 (2010). Accordingly, we find no error in the trial court's denial of Plaintiffs' request for attorneys' fees.

Additionally, Plaintiffs abandoned their challenge of the trial court's award of costs. North Carolina's Rules of Appellate Procedure dictate that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6) (2017). Here, Plaintiffs only mentioned costs in their issues presented and argument headings. However, this is insufficient to raise an issue on appeal because "the issues presented, statement of the case, and statement of the facts sections in an appellant's brief cannot substitute

for substantive *arguments* on an issue." *See Wilson v. Pershing, LLC*, ___ N.C. App. ___, ___, 801 S.E.2d 150, 156 (2017) (citation omitted). As Plaintiffs' brief does not contain any substantive argument on costs, this issue "will be taken as abandoned." N.C.R. App. P. 28(b)(6).

Conclusion

The trial court did not err by denying the University's JNOV motion on Plaintiffs' wrongful termination and REDA claims. However, we vacate and remand the trial court's denial of the University's JNOV motion on Plaintiffs' punitive damages claims. Similarly, we vacate the trial court's awards of treble damages, and remand for the trial court to make appropriate findings of fact and conclusions of law as to whether the University terminated Plaintiffs in willful violation of REDA pursuant to N.C. Gen. Stat. § 95-243(c)(4). We find no error in the trial court's jury instructions on Plaintiffs' REDA claims. Finally, the trial court also did not err by denying Plaintiffs' request for attorneys' fees. Plaintiffs abandoned their appeal of the trial court's award of costs.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).