STATE OF NORTH CAROLINA IREDELL COUNTY ASHTON K. LOYD, Plaintiff, v. JAMES MICHAEL GRIFFIN and GRIFFIN INSURANCE AGENCY, INC., Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 2394 **ORDER ON MOTIONS IN LIMINE**

1. **THIS MATTER** is before the Court following the 30 October 2023 filing of (1) Plaintiff's Motions in Limine ("Plaintiff's Motions"), (ECF No. 164 ["Pl.'s Mots."]), and (2) Defendants' Motions in Limine ("Defendants' Motions," and together with Plaintiff's Motions, the "Motions in Limine"), (ECF No. 165 ["Defs.' Mots. Limine"]). Also before the Court is Defendants' separately filed Motion in Limine to Exclude or, Alternatively, Limit the Testimony of Gregory T. Reagan ("Motion to Exclude," and together with the Motions in Limine, the "Motions"). (ECF No. 162 ["Defs.' Mot. Exclude"].)

2. The factual and procedural background of this action is discussed in detail in this Court's Order and Opinion on Cross-Motions for Summary Judgment. *Loyd v. Griffin*, 2023 NCBC LEXIS 47 (N.C. Super. Ct. Mar. 27, 2023). Facts that are pertinent to the Motions are referenced herein in the Court's analysis of them.

3. This matter is set for a jury trial beginning on 27 November 2023.

4. The Motions came before the Court for a hearing at the final pretrial conference on 13 November 2023 (the "Hearing") at which all parties were represented through counsel. Accordingly, the Motions are now ripe for decision.

5. "A motion in limine seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial[.]" *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 792 (2007) (cleaned up). The Court's ruling on motions in limine is interlocutory and "subject to modification during the course of the trial." *Id.* (cleaned up). "The decision to either grant or deny a motion in limine is within the sound discretion of the trial court." *State v. Fritsch*, 351 N.C. 373, 383 (2000).

6. The purpose of motions in limine is " 'to avoid injection into trial of matters which are irrelevant, inadmissible[,] and prejudicial[.]' " *State v. Fearing*, 315 N.C. 167, 168 (1985) (quoting Black's Law Dictionary 914 (5th ed. 1979)).

A. <u>Plaintiff's Motions in Limine</u>

7. Plaintiff's Motions seek an order from the Court prohibiting Defendants' from (1) admitting any material or testimony into evidence that refers to Plaintiff Ashton Loyd as having committed or being convicted of a crime, having committed fraud, or having been found by any court or adjudicative body of committing fraud or a crime, (Pl.'s Mots. 1); and (2) calling any witness to testify that was not disclosed during discovery, (Pl.'s Mots. 6). The Court addresses each of these in turn.

8. First, Plaintiff seeks to prevent Defendants from asserting that Plaintiff's issuance of false or inaccurate certificates of insurance ("COIs") was a violation of

North Carolina criminal statutes, or that Plaintiff defrauded anyone or committed a crime in doing so. (Pl.'s Mots. 2–3.)

9. At issue in this matter, and as the Court discussed in detail at the summary judgment stage, is Plaintiff's admission to directing Griffin Insurance Agency ("GIA") staff to create false or misleading COIs. *See Loyd*, 2023 NCBC LEXIS 47, at *19. The evidence at summary judgment was that,

> [f]ollowing an investigation by the North Carolina Department of Insurance (the "NCDOI"), Mr. Loyd signed a Voluntary Surrender of License or Licenses (N.C.G.S. § 58-2-65), thereby surrendering all licenses issued to him by the NCDOI, which authorized him to sell insurance policies, for 20 years. The form provides an acknowledgement that the voluntary surrender is "equivalent to the taking of a regulatory action by the NCDOI."

Loyd, 2023 NCBC LEXIS 47, at *19 n.12 (internal citations omitted).

10. Plaintiff contends that Defendants' accusations of criminality are irrelevant and have no probative value, given that they are false. (Pl.'s Mots. 4.) Plaintiff further argues that "[c]alling Loyd a criminal, or saying he engaged in criminal conduct, or making similar accusations, are unduly prejudicial because they are false." (Pl.'s Mots. 4.)

11. The Court agrees that a regulatory action by the NCDOI is distinct from being prosecuted for or convicted of a crime. Further, the Court concludes in its discretion that Rule 403 bars the admission of this evidence. Rule 403 provides for the exclusion of evidence whose probative value is substantially outweighed by the danger of unfair prejudice, or that may "confus[e] the issues," "mislead[] the jury," or "waste . . . time." N.C. R. Evid. 403.

12. Any probative value of arguing that Plaintiff committed a crime, defrauded anyone, was guilty of a crime, or any similar statement, is substantially outweighed by the danger of unfair prejudice because accusing Plaintiff of a crime in the jury's presence would be highly prejudicial and would mislead the jury. *See Vitaform, Inc. v. Aeroflow, Inc.*, 2023 NCBC LEXIS 57, at *15 (N.C. Super. Ct. Apr. 6, 2023). Further, to label an action as legal or illegal is a legal conclusion, and "no witness, lay or expert, may testify to a legal conclusion." *State v. Smith*, 310 N.C. 108, 114 (1984); *see also, e.g., State v. Ledford*, 315 N.C. 599, 617 (1986).

13. Therefore, in the exercise of its discretion and after applying the Rule 403 balancing test, the Court **GRANTS** Plaintiff's Motions as to this first request and rules that Defendants may not state or argue that Plaintiff "committed a crime" or "engaged in criminal conduct" or such similar statement. However, Defendants may make arguments and introduce evidence regarding Plaintiff's wrongful conduct leading to his execution of the Voluntary Surrender of License or Licenses form and that doing so constituted the equivalent of a regulatory action by the NCDOI.

14. Second, Plaintiff's Motions seek to prohibit Defendants from calling any witness to testify that was not disclosed during discovery. At the Hearing, Plaintiff's counsel represented to the Court that this portion of the motion was a remnant of a prior error in reviewing the discovery materials.

15. Plaintiff served interrogatories on Defendant Michael Griffin ("Mr. Griffin") on 15 February 2021, and interrogatory five asked him to "identify any person who you believe is or may be a witness, other than potential expert witnesses, who possess

any information or knowledge, first-hand or otherwise, regarding or concerning any of the claims and allegations in your Counterclaim." (ECF Nos. 81.2, 172.1.)

16. Under Rule 26(e)(1) of the North Carolina Rules of Civil Procedure, "[a] party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to . . . (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony." N.C.G.S. § 1A-1, Rule 26(e)(1). It appears to the Court that Defendants did so, but that neither Keith Callister nor Kevin Callister were named or listed on that supplemental discovery response.

17. Therefore, Plaintiff's Motions are **GRANTED** in part as to this second request, and to the extent that Defendants seek to call Keith Callister or Kevin Callister to testify about any hesitancy to enter into an agreement to purchase GIA or merge with it due to the existence of an issue with Plaintiff's issuance of COIs. Except to that limited extent, Plaintiff's second request is **DENIED**.

B. <u>Defendants' Motions in Limine</u>

18. Defendants' Motions in Limine request that the Court limit or exclude the following evidence : (1) testimony that Mr. Griffin "must have known" of the issuance of false or inaccurate COIs at GIA; (2) testimony and argument regarding COIs issued to Concrete Forming Associates, Inc. ("Concrete Forming") and Mr. Griffin's knowledge of them; (3) testimony and argument that Plaintiff was "coerced" or entered into the GIA Shareholder Agreement by "duress" or force; (4) testimony and argument that Plaintiff and Mr. Griffin established a partnership; and (5) testimony

that Nationwide allegedly "blessed" Plaintiff's practice of issuing false or misleading certificates of insurance. (*See* Defs.' Mots. Limine.)

1. Testimony by Plaintiff regarding Mr. Griffin's knowledge of the COI issue

19. At his deposition, Plaintiff testified that "there is no way that Mr. Griffin could not know that there were some inaccuracies that were on certificates for various clients for accommodation reasons[.]" (Dep. Ashton Loyd 154:20–23, ECF No. 118 ["Loyd Dep."].) However, Plaintiff also testified that he did not know for certain, or have direct knowledge, that Mr. Griffin knew that Plaintiff was issuing or causing to be issued false or misleading COIs. At Plaintiff's 15 October 2021 deposition, he testified as follows:

> A: I do not believe that [Mr. Griffin] could not have known. That's a double negative. That he would have had to have known, through that many years, and the thousands -- probably hundreds of thousands of certificates at that point.
>
> Q: But, you can't point me toward any specific certificate of insurance that you believe was inaccurate that he knew about?
>
> A: Sitting here right here, I cannot hand you one.
>
> Q: Do you believe that he knew about, specific to you, your creation or your direction of the creation of inaccurate COIs?
>
> A: I do not know.

(Loyd Dep. 157:10–22.)

20. Rule 701 provides that that a lay witness testifying "in the form of opinions or inferences is limited to those opinions and inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his

testimony or the determination of a fact in issue." N.C. R. Evid. 701. "As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible." *State v. Bunch*, 104 N.C. App. 106, 110 (1991).

21. The Court agrees that Plaintiff improperly seeks to provide opinion testimony based purely on speculation. Plaintiff has come forth with no evidence at this time to support his contention that Mr. Griffin "must have known" about Plaintiff's issuance of false or misleading COIs. Therefore, Defendants' Motions in Limine are **GRANTED** in part as to this first request. However, the Court may reconsider this determination at trial if Plaintiff can lay a proper basis for testimony demonstrating that Mr. Loyd's opinion was "based on first hand observations[.]" *State v. Latham*, 157 N.C. App. 480, 486 (2003) ("If Brown's opinion had been based on first hand observations, it may have been admissible as a shorthand statement of fact under Rule 701.").

2. Testimony & argument regarding Mr. Griffin's knowledge of COIs issued to Concrete Forming

22. Defendants contend that Plaintiff has no firsthand knowledge that Mr. Griffin actually knew about GIA's issuance of false or misleading COIs to Concrete Forming. (ECF No. 167.) Plaintiff's testimony at his deposition was that he knew of another GIA employee consulting with Mr. Griffin prior to issuing COIs, and that "[i]t was an accepted practice from the time that I was there that if Concrete Forming needed something, Concrete Forming got it." (Loyd Dep. 292:5–293:2.) Defendants contend that, under Rule 701, Plaintiff's anticipated testimony about Mr.

Griffin's alleged knowledge of accommodations to Concrete Forming, his ex-wife's family business, would be based entirely on speculation. (ECF No. 167.)

23. Plaintiff does not direct the Court to any admissible evidence of how Plaintiff knew of or could make an appropriate inference regarding Mr. Griffin's knowledge. (*See* Resp. Defs.' Mots. Limine 4–5, ECF No. 173 ["Resp. Defs.' Mots. Limine"].)

24. Therefore, for the same reasons set forth above, the Court **GRANTS** Defendants' Motions in Limine as to this second request. However, the Court may reconsider this determination at trial if Plaintiff lays a proper foundation for this testimony demonstrating that Mr. Loyd's opinion was based on first-hand observations. *See Latham*, 157 N.C. App. at 486.

3. Testimony regarding coercion or duress

25. Defendants next seek to prohibit Plaintiff from testifying that the Shareholder Agreement that Plaintiff signed in June of 2018 was the product of coercion and duress from Mr. Griffin. (Defs. Mots. Limine 4.)

26. In response to Defendants' Motions in Limine, Plaintiff argues that he does "not assert that Defendant 'coerced' Loyd to make him sign the Shareholder Agreement. Neither has Plaintiff asserted a claim of duress." (Pl.'s Resp. Defs.' Mots. Limine 5.) Plaintiff's argument at this stage is that he "felt he had no other option than to sign the Shareholder Agreement[,]" and that this evidence may be used, in Plaintiff's view, to submit that Mr. Griffin's "coercive tactics and heavy handedness

evinces his disregard for corporate formalities and his duties as a fiduciary to [Plaintiff]." (Resp. Defs.' Mots. Limine 5.)

27. At the Rule 12 stage, the Court determined that Plaintiff failed to adequately allege "an external source of power that, combined with Plaintiff's threatened breach, gave Griffin means to exert duress over Loyd[,]" and dismissed the claim for recission of the Shareholder Agreement. *Loyd v. Griffin*, 2021 NCBC LEXIS 110, at **19–20 (N.C. Super. Ct. Dec. 10, 2021). The Court agrees with Defendants that any testimony regarding duress or coercion is no longer relevant to this matter because Plaintiff's claim for recission of the GIA Shareholder Agreement was dismissed. *See id.*

28. Any probative value of arguing that Plaintiff felt he had "no other choice" or was "coerced" or felt "duress" which resulted in his execution of the June 2018 Shareholder Agreement is substantially outweighed by the danger of unfair prejudice and confusion because such an accusation in the jury's presence would be highly prejudicial and would mislead or confuse the jury. Therefore, in the exercise of its discretion and after applying the Rule 403 balancing test, the Court **GRANTS** Defendants' Motions in Limine as to this third request.

4. Testimony about being "partners"

29. Defendants seek to prevent Plaintiff from testifying or arguing that, "up until he became a shareholder in GIA in 2018, he and Defendant Griffin/GIA had formed a Partnership under North Carolina Partnership law." (Defs.' Mots. Limine 4.)

30. In response to Defendants' Motions, Plaintiff contends that he "seeks to elicit testimony that Griffin treated Loyd as a 'partner' (albeit a junior and subordinate partner) during his initial solicitation to have Loyd join his business and then during the years of their relationship." (Resp. Defs.' Mots. Limine 7.) Plaintiff argues that he seeks to do so in order to show that their course of conduct revealed a fiduciary relationship. (Resp. Defs.' Mots. Limine 7.)

31. The Court determined at the summary judgment stage that there was "insufficient evidence that Mr. Loyd and Mr. Griffin formed a partnership to create an issue for the jury." *Loyd*, 2023 NCBC LEXIS 47, at **51. The Court was explicit in its holding that Plaintiff's breach of fiduciary duty and constructive fraud claims were dismissed "to the extent it is based on an alleged partnership between Mr. Loyd and Mr. Griffin prior to Mr. Loyd becoming a shareholder of GIA[.]" *Id.* at **52.

32. Therefore, Defendants' Motions in Limine are **GRANTED** as to this fourth request.

5. Testimony regarding Nationwide's "blessing" of Plaintiff's practice of issuing false or misleading COIs

33. Plaintiff agrees with Defendants that his testimony "as to what a particular individual from Nationwide told him may be impermissible hearsay, [but that] it is not hearsay if offered for other purposes other than to prove the matter asserted." (Resp. Defs.' Mots. Limine 7.) Plaintiff contends that he can testify regarding the effect on this listener for the non-hearsay purpose of explaining subsequent conduct. (Resp. Defs.' Mots. Limine 7 (citing *State v. Canady*, 355 N.C. 242 (2002).)

34. "[A] statement is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted." *State v. Canady*, 355 N.C. 242, 248 (2002) (citing N.C. R. Evid. 801(c)). "A statement which explains a person's subsequent conduct is an example of such admissible nonhearsay." *Id.* However, under Rule 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. R. Evid. 602.

35. At this time, it is not clear to the Court whether Plaintiff can identify who at Nationwide "blessed" his issuance of false or misleading COIs, or if anyone in fact did so. Therefore, Defendants' Motions in Limine are **GRANTED** as to this last request to the extent Plaintiff seeks to testify regarding permission from Nationwide about its policies on issuing false or misleading COIs. However, this determination is subject to reconsideration at trial if Plaintiff can establish a proper foundation, including demonstrating his own personal knowledge of who at Nationwide communicated such a "blessing" to him and the specific statements made. *See State v. Locklear*, 121 N.C. App. 355, 358–59 (1996) ("In this case, the witness could not identify the speaker, nor did she have personal knowledge of his voice. We affirm the trial court's decision to exclude the testimony.").

C. <u>Defendants' Motion to Exclude</u>

36. Defendants seek to exclude, or in the alternative, to limit the testimony of Plaintiff's expert Gregory T. Reagan ("Mr. Reagan"). (Defs.' Mot. Exclude.) Specifically, Defendants contend that Mr. Reagan's testimony does not meet the

standard for admission imposed by Rule 702(a) of the North Carolina Rules of Evidence. (Defs.' Mot. Exclude 2.)

37. The Court evaluates a motion to exclude an expert's testimony under Rule 702 of North Carolina Rules of Evidence, which is now "virtually identical to its federal counterpart and follows the *Daubert* standard for admitting expert testimony." *Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2016 NCBC LEXIS 100, at **5 (N.C. Super. Ct. Dec. 16, 2016) (citing *State v. McGrady*, 368 N.C. 880, 884 (2016)). Rule 702 has three essential elements: (1) expert testimony must be based on specialized knowledge that will assist the trier of fact, (2) the expert must be qualified by "knowledge, skill, experience, training, or education," and (3) the testimony must be reliable. N.C. R. Evid. 702(a); *McGrady*, 368 N.C. at 889–90. An expert's testimony is reliable if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. N.C. R. Evid. 702(a)(1)–(3).

38. The focus of the trial court's inquiry "must be solely on [the] principles and methodology" used by the expert, "not the conclusions that they generate." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993). As our Court of Appeals has explained,

> questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility. In other words, this Court does not examine whether the facts obtained by the [expert] witness are themselves reliable -- whether the facts used are qualitatively reliable is a question of the weight to be given the opinion by the factfinder, not the admissibility of the opinion.

Pope v. Bridge Broom, Inc., 240 N.C. App. 365, 374 (2015) (internal marks and citations omitted).

39. "The trial court is tasked with making the preliminary decision of the testimony's admissibility and has discretion in determining how to address the three prongs of the reliability test." *Insight Health Corp v. Marquis Diagnostic Imaging of N.C., LLC*, 2017 NCBC LEXIS 14, at *40 (N.C. Super. Ct. Feb. 24, 2017) (citing *McGrady*, 368 N.C. at 892–93). "In applying the *Daubert* standard, North Carolina courts may seek guidance from federal case law." *Id.* (citing *McGrady*, 368 N.C. at 888).

40. As noted by the Fourth Circuit, courts "should be mindful that Rule 702 was intended to liberalize the introduction of relevant expert evidence." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (citing *Cavallo v. Star Enter.*, 100 F.3d 1150, 1158–59 (4th Cir. 1996)). Importantly, expert testimony, like all other admissible evidence, "is subject to being 'tested by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.' " *Id.* (quoting *Daubert*, 509 U.S. at 596). It is with this standard in mind that the Court analyzes the reliability of Mr. Reagan's opinions and testimony.

41. Defendants appear to contest only the reliability of Mr. Reagan's opinions. Thus, the Court focuses its inquiry only on that three-factor inquiry.

42. First, Mr. Reagan relied on sufficient facts and information which was before the Court at the Cross-Motions for Summary Judgment. (*See* Dep. Gregory Thomas Reagan 23:11–25:12, ECF No. 162.1 ["Reagan Dep."]; ECF No. 174.3.)

43. Defendants appear to take issue primarily, if not exclusively, with Mr. Reagan's methods and the application of that methodology to the facts at issue. For example, Defendants argue that Mr. Reagan "measures the value of GIA at the wrong points in time" and that he "omits certain calculations from his damages analysis." (Defs.' Br. Supp Mot. Exclude 7, 10, ECF No. 163 ["Br. Supp. Mot. Exclude"].)

44. However, our courts "have recognized that a lack of testing or a failure to use specific types of testing only goes to the weight of the testimony and is not grounds for exclusion when an expert reaches an opinion through other reliable methods" because no single factor is dispositive. *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2022 NCBC LEXIS 9, at **30–31 (N.C. Super Ct. Feb 8, 2022).

45. Notwithstanding Defendants' arguments, Mr. Reagan's methodology was sufficiently reliable. As Plaintiff explained, Mr. Reagan calculated the fair market value of Mr. Loyd's shares in GIA, for purposes of determining his possible damages, by "dividing the number of GIA shares held by a shareholder . . . by the overall number of GIA shares outstanding, and then multiplying that fraction by the value of GIA[.]" (Pl.'s Br. Opp. Defs.' Mot. Exclude 4–5, ECF No. 174 ["Br. Opp. Mot. Exclude"]; *see* ECF No. 174.4.)

46. The Court agrees with Plaintiff that this is the typical damages calculation for claims of conversion. For example, our Court of Appeals has held that, "[t]he measure of damages for conversion is the fair market value of the converted property

at the time of the conversion, plus interest." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 81 (2008).

47. Further, courts following the *Daubert* standard typically conclude that challenges as to the application of methodology to the facts at issue go to the weight of an expert's opinion, not to the admissibility of that testimony. *Insight Health Corp.*, 2017 NCBC LEXIS 14, at *48–49. Defendants' contentions go to the testimony's weight, and they can be explored during cross-examination at trial without foreclosing Plaintiff's ability to present their expert witness. Indeed, Defendants seem to take great issue with the conclusions that Mr. Reagan generated. To the extent Defendants dispute Mr. Reagan's damages conclusions, the dispute is better left to the trier of fact and vigorous cross-examination by Defendants' counsel at trial.

48. However, the Court agrees with Defendants that Mr. Reagan's opinions, if any, regarding the validity and enforceability of the Shareholder Agreement should not be admitted at trial. (*See* Br. Supp. Defs.' Mot. Exclude 15.) Mr. Reagan was not designated as an expert with respect to the validity or enforceability of the Shareholder Agreement, (ECF No. 174.2), and is not an attorney qualified to opine on such an issue. Therefore, the Court **GRANTS** Defendants' Motion to Exclude to this limited extent and determines that Mr. Reagan shall not opine on issues concerning the validity of the June 2018 Shareholder Agreement. Except to that limited extent, Defendants' Motion to Exclude is **DENIED**.

49. **THEREFORE**, the Court **GRANTS** in part and **DENIES** in part the Motions as set forth herein.

SO ORDERED, this the 16th day of November, 2023.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases