STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23CVS001594-100
VISTA HORTICULTURAL, INC. d/b/a EDEN BROTHERS, Plaintiff, v. JOHNSON PRICE SPRINKLE PA; and SOK HEANG CHENG. Defendants.	**ORDER ON MOTIONS IN LIMINE**

1. **THIS MATTER** is scheduled for a jury trial to begin on 21 July 2025. In advance of the trial, on 21 January 2025, the parties submitted three motions *in limine* which are presently before the Court: (1) Plaintiff's Motion to Exclude Expert Opinions[1]; (2) Defendants' Motion in Limine to Exclude Any Evidence or Opinions at Trial Other than as Disclosed in Discovery[2]; and (3) Defendants' Motion in Limine to Prohibit Evidence of Effect on [*sic*] Judgment on the Parties[3] (each a "Motion" and together, the "Motions").

2. Having considered the Motions, the related briefing, the arguments of counsel at a hearing on the Motions held on 12 February 2025, and other relevant

[1] (Pl.'s Mot. Exclude Expert Ops. [hereinafter, "Pl.'s Mot."], ECF No. 89.)

[2] (Defs. Johnson Price Sprinkle PA & Sok Heang Cheng's Mot. Lim. to Exclude Any Evid. or Ops. at Trial Other Than as Disclosed in Disc. [hereinafter, "Defs.' First Mot."], ECF No. 85.)

[3] (Defs. Johnson Price Sprinkle PA & Sok Heang Cheng's Mot. Lim. to Prohibit Evid. of Effect on J. on the Parties [hereinafter, "Defs.' Second Mot."], ECF No. 87.)

matters of record, the Court hereby **GRANTS in part** and **DENIES in part** the Motions as set forth below.

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. This is an accounting malpractice case concerning Defendants Johnson Price Sprinkle, PA ("JPS") and Sok Heang Cheng's ("Cheng"; together with JPS, the "Defendants") alleged failure to notify Vista Horticultural Inc. d/b/a Eden Brothers ("Vista" or "Plaintiff") of its obligation to pay various state sales taxes based on sales made to residents of those states. *See generally Vista Horticultural, Inc. v. Johnson Prince Sprinkle, PA*, 2024 NCBC LEXIS 124 (N.C. Super. Ct. Sept. 17, 2024).[4]

4. Vista is an online retailer specializing in seed and flower bulbs. *Id.* at *4. From 2017 through 2021, Vista engaged JPS to provide various accounting- and bookkeeping-related services, the scope of which the parties dispute. *Id.* Cheng was the JPS shareholder responsible for overseeing the Vista account throughout the engagement and served as Vista's primary point of contact for routine communications. *Id.*

5. Consistent with JPS's advice to Vista in 2017, and in accordance with the applicable law in 2017, Vista paid sales taxes from 2017 until 2021 only to the state of its physical operations – North Carolina. *Id.* at *6. During the time of Vista's engagement with JPS, on 21 June 2018, the United States Supreme Court ruled in *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018) that states could assess taxes to

[4] This Order and Opinion resolved Defendants' Motion for Summary Judgment.

out-of-state online retailers for sales to in-state residents, overruling prior law. *Id.* Since Vista conducted substantial online sales to residents in states other than North Carolina during and after 2018, the *Wayfair* decision greatly expanded Vista's sales tax liability for those out-of-state sales. *Id.* Vista contends that Defendants failed to advise it of the *Wayfair* decision until 2021, preventing Vista from passing its sales tax liability on to its online customers for three years and thereby causing the company to incur an unexpected tax liability of approximately $2.1 million. *Id.* Defendants maintain that they had no legal duty to advise Vista of the *Wayfair* decision, and that Vista is responsible for its losses as it "did not tend to its ordinary business affairs in a diligent manner." *Id.*

6. On 25 April 2023, Vista initiated this action in Buncombe County, asserting claims against JPS for breach of contract and against both JPS and Cheng for professional malpractice/professional negligence, common law negligence, gross negligence/punitive damages, and breach of fiduciary duty.[5] At the summary judgment stage, the Court dismissed Vista's claims for gross negligence/punitive damages and breach of fiduciary duty. *Vista Horticultural, Inc.*, 2024 NCBC LEXIS 124 at *43. Vista's claims against JPS for breach of contract and against JPS and Cheng for professional negligence/malpractice and common law negligence remain to be decided at trial. *Id.*

7. On 21 January 2025, Plaintiff filed a Motion to Exclude Expert Opinions. The same day, Defendants filed a Motion in Limine to Exclude Any

[5] (Second Am. Compl., ECF No. 40.)

Evidence or Opinions at Trial Other than as Disclosed in Discovery and a Motion in Limine to Prohibit Evidence of Effect on [*sic*] Judgment on the Parties. The Motions were fully briefed, and the Court held a hearing on the Motions on 12 February 2025 (the "Hearing"), at which all parties were represented by counsel. The Motions are now ripe for resolution.

II.

LEGAL STANDARD

8. "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) (quoting *Heatherly v. Indus. Health Council*, 130 N.C. App. 616, 619 (1998)). The purpose of a motion *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) (emphasis omitted)). Importantly, "[r]ulings on these motions are merely preliminary and thus, subject to change during the course of trial, depending on the actual evidence offered at trial." *Evans v. Family Inns of Am., Inc.*, 141 N.C. App. 520, 523 (2000). "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).

III.

ANALYSIS

A. Plaintiff's Motion to Exclude Expert Opinions

9. During the Hearing on the parties' Motions, counsel for the parties advised the Court that no party took the deposition of the opposing party's expert witness. Thus, no deposition transcripts exist setting forth the sworn testimony of any expert's opinions. Rather, the opinions of the parties' experts are those contained in their written expert reports, which both sides exchanged in discovery. Plaintiff designated Gregory T. Reagan ("Reagan") as its sole expert witness and Defendants designated Mark T. Hobbs ("Hobbs") as their lone expert witness.

10. Vista objects to the admissibility of Hobbs's anticipated testimony and expert opinions as set forth below and seeks an order excluding them from trial:

1. Speculation about the impact of possible tax deductions on Plaintiff's damages;
2. Conjecture about any party's state of mind;
3. Opinions about the credibility of Cheng's testimony; and
4. Opinions about Defendants' passing peer review reports.

Vista additionally seeks to exclude testimony offered by Cheng or other JPS personnel as expert witnesses.[6] The Court will consider each of Vista's objections in turn.

[6] (Pl.'s Mot. 1.)

Tax Deductions

11. In the "Background" section of Hobbs's report, after explaining how the total balance due of Plaintiff's tax liability is $2,159,711, Hobbs states:

> As a result of not being in compliance with the sales tax change, *Vista incurred the cost as an operating expense rather than billing, collecting and remitting the tax on the sales with no cost to Vista.* Presumably, Vista thereafter took the required deduction on its income taxes for these sales tax payments to various states, resulting in an approximate 40% savings as a result of reduced taxes. The net (of tax savings) out of pocket cost to Vista incurred would have been approximately $1.3 million. [7]

12. Preliminarily, the Court notes that Hobbs expressly sets forth eight opinions in the "Opinions" section of his report, and that neither an opinion on Plaintiff's taking a "required deduction on its income taxes for these sales tax payments to various states, resulting in an approximate 40% savings as a result of reduced taxes" nor an opinion on Plaintiff's damages is among the eight listed.[8]

13. Vista argues that Hobbs's commentary on the impact of potential tax deductions on Plaintiff's damages is inadmissible because "[i]t is contrary to the law of damages, as articulated by North Carolina courts and by leading federal courts," Hobbs's statements "are based on pure speculation," and Defendants did not identify Hobbs as an expert witness on damages.[9] Vista notes that the well-established

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[7] (Aff. Caroline Harris Crowne Supp. Pl.'s Mot. Exclude Expert Ops., Ex. A-4, Rep. of Expert [hereinafter, "Expert Rep."] 3, ECF No. 91.5.) (emphasis in original)

[8] (Expert Rep. 3, 6.)

[9] (Mem. L. Supp. Pl.'s Mot. Exclude Expert Ops. 6–9, ECF No. 90.)

purpose of compensatory damages is to "restore the victim to his original condition."[10] Vista contends that, because any damages awarded to Vista will be taxable income, it would be "improper to reduce [Vista's] damages by any income tax deductions taken that were attributable to its losses (the sales taxes paid)."[11] Vista asserts that to hold otherwise would "contravene North Carolina's principle that damages awarded should serve to 'restore the victim to his original condition'."[12]

14. Defendants contend Hobbs's "opinions" on tax deductions should be admitted because his "opinions on damages are not based on speculation" and "[d]amages are intended to make Plaintiff whole, not [to] provide [a] windfall."[13] Defendants argue that prohibiting the presentation of evidence on the impact of available tax deductions on Plaintiff's damages would "prevent the jury from hearing the actual, lesser, costs that Plaintiff actually incurred" and would permit Plaintiff to receive a windfall.[14] To support their argument, Defendants rely on the duty to mitigate damages applicable in breach of contract and negligence cases.[15] Specifically, they contend that the mitigation of damages doctrine, or the doctrine of avoidable consequences, prevents an injured party from recovering damages that

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[10] (Mem. L. Supp. Pl.'s Mot. Exclude Expert Ops. 7 (*citing Watson v. Dixon,* 352 N.C. 343, 347 (2000)).)

[11] (Mem. L. Supp. Pl.'s Mot. Exclude Expert Ops. 8.)

[12] (Mem. L. Supp. Pl.'s Mot. Exclude Expert Ops. 8.)

[13] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 5, 10, ECF No. 93.)

[14] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 9–10.)

[15] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 5–10.)

could have been avoided through reasonable efforts.[16] Defendants state that generally "the reasonableness of mitigation efforts is [] a jury question . . . [and] [e]ach party should be able to present to the jury its assertions for how damages should be calculated."[17]

15. There is no North Carolina case law that squarely addresses the issue presented to the Court here, that is, whether to exclude or admit an expert witness's testimony and opinions that compensatory damages a jury awards the plaintiff must be reduced by the percentage amount of tax savings the plaintiff would have realized in the form of reduced taxes had the plaintiff taken income tax deductions that were/are available to the plaintiff. Neither the Court nor the parties have located any North Carolina case law addressing this specific issue. However, in analogous instances, North Carolina courts have found pertinent for guidance and enlightenment federal decisions on an issue before the court. *See, e.g., Sutton v. Duke*, 277 N.C. 94 (1970); *Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC*, 2020 NCBC LEXIS 136, at **27 n.7 (N.C. Super. Ct. Nov. 9, 2020) (quoting *Turner v. Duke Univ.*, 325 N.C. 152, 164 (1989)).

16. The Court finds instructive *Osborn v. Griffin*, 865 F.3d 417, 453 (6th Cir. 2017). There, the Sixth Circuit, following the Seventh Circuit, held "[t]he 'general rule' is that the plaintiff's recovery 'should not be reduced by the amount of money'

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[16] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 7 (*citing Miller v. Miller*, 273 N.C. 228, 239 (1968)).)

[17] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 8.)

saved in tax consequences avoided or incurred as a result of the defendant's wrongful conduct." Explaining the reasoning for its finding and the rationale behind the "general rule," the Sixth Circuit quoted Judge Posner of the Seventh Circuit:

> Suppose, to take a simpler case, that [the defendant] had tortiously destroyed [the plaintiff's] Ming vase worth $10,000 and [the plaintiff] had deducted this amount as a casualty loss on her federal income tax return, garnering a tax saving of $3,000. [The defendant] could not in the ensuing tort suit deduct the $3,000 from the damages due [the plaintiff]. *The tort caused a harm of $10,000, and the fact that the plaintiff was able to lay off a part of the harm on someone else – the taxpayer – is not a good reason to cut down the tortfeasor's damages.* It is true that the result is a windfall to the plaintiff, *but this is better than an equivalent windfall to the tortfeasor* . . .. [T]he only important point here is that the tax treatment of the damages award *is irrelevant to the defendant's liability*; it is a matter between the plaintiff and the government.

Osborn, 865 F.3d at 453 (quoting *Burdett v. Miller*, 957 F.2d 1375, 1383 (7th Cir. 1992)) (emphasis added).

17. Considering persuasive but nonbinding decisions from other state courts is also permissible when analyzing an issue for which no North Carolina case law exists. In *Firmani v. Dar-Court Builders, LLC*, 339 Ga. App. 413, 424 (Ga. Ct. App. 2016), the Georgia Court of Appeals reached a similar conclusion to *Osborn*, holding that "the Appellants' argument that the tax deduction the [Appellees] received as a result of their dispute with the IRS could be used to offset their damages in this case finds no support in law." The *Firmani* court stressed that Georgia law is clear that in tort actions, "a benefit bestowed on the injured party should not be shifted so as to create a windfall for the tortfeasor." *Firmani*, 339 Ga. App. at 424 (*quoting Broda v. Dzeiwura*, 286 Ga. 507, 508 (2010)). After all, the court stated, "[i]t is the tortfeasor's

responsibility to compensate for all harm that he causes, [and that responsibility is] not confined to the net loss that the injured party receives." *Firmani*, 339 Ga. App. at 424 (*quoting Amalgamated Transit Union Local 1324 v. Roberts*, 263 Ga. 405, 406 (1993)). Although Georgia courts had not previously addressed the question of whether evidence of tax deductions or benefits that a plaintiff received due to a defendant's conduct could be introduced to offset the defendant's damages, the Georgia Court of Appeals chose to follow the "general rule" recognized in *Burdett*. Following the guidance of the Seventh Circuit, Tenth Circuit, and appellate courts of other states, the court held "damages should not be reduced by the amount of money that [the plaintiff] was able to save by deducting the loss . . . on her tax returns." *Firmani*, 339 Ga. App. at 424 (*quoting Burdett*, 957 F.2d at 1383; *referencing Fullmer v. Wohlfeiler & Beck*, 905 F.2d 1394, 1402 (10th Cir. 1990); *Western-Realco Ltd. P'ship 1983-A v. Harrison*, 791 P.2d 1139, 1147 (Colo. App. 1989); *Coty v. Ramsey Assoc.*, 149 Vt. 451, 462–63 (1988); *Danzig v. Grynberg & Assoc.*, 161 Cal. App. 3d 1128, 1139–40 (1984)).

18. The Court finds instructive and persuasive the guidance and reasoning of the above-cited federal and state appellate court cases addressing this issue. In light of the foregoing, the Court will follow the "general rule" and exclude any evidence, testimony, and opinions by Hobbs regarding the percentage amount by which any compensatory damages award that the jury may award to Vista must be reduced because of potential income tax savings Vista may realize due to potential

tax deductions be available to it. Therefore, Plaintiff's Motion to exclude this evidence and argument is **GRANTED**.

State of Mind

19. Plaintiff seeks an order excluding from trial any testimony from Hobbs about any party's state of mind. Specifically, Plaintiff references the following comments made by Hobbs in the "Observations" section of his report:

> Vista's failure to ask JPS for a sales tax analysis, and the resulting liabilities occurred during the Covid epidemic time-period, and also during the time period when management (buyout) changes were occurring at Vista. Thus, I have determined the owner of Vista could have been pre-occupied with other personal matters at that time, perhaps explaining why Vista never provided the sales tax information specifically requested by JPS by phone and in the February 2020 quarterly meeting.[18]

Plaintiff contends Hobbs's testimony and opinion on any party's state of mind should be excluded for three reasons: (1) the expert "has no expertise relevant to whether the owner of Vista was 'preoccupied with other personal matters' or to any other issue of mental state, motivation, or personal reason for action or inaction"; (2) "questions of state of mind are squarely in the province of the jury and do not benefit from expert opinion"; and (3) state of mind issues are not within the scope of the subjects for expert testimony disclosed by Defendants.[19] Defendants respond that their expert should be permitted to testify "regarding the facts of the case which facts include that Vista failed to ask JPS for a sales tax analysis and failed to provide the sales tax

[18] (Expert Rep. 6.)

[19] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 10.)

information specifically requested by JPS, and that these failures occurred while Vista was undergoing a management/buyout changes due to Ms. Randon's divorce from her husband and partner Terry Randon, and which occurred during the Covid epidemic time period."[20]

20. It is well established that expert witness testimony regarding a party's intent, motive, or state of mind is generally improper. *See, e.g., Yates v. J.W. Campbell Elec. Corp.*, 95 N.C. App. 354, 360 (1989); *Smith v. Wyeth-Ayerst Labs. Co.*, 278 F. Supp. 2d 684, 700 (W.D.N.C. Apr. 16, 2003) ("[T]he jury, not the witnesses, should consider the facts and make its own determination regarding Defendant's intent."); *BorgWarner, Inc. v. Honeywell Int'l, Inc.*, 750 F. Supp. 2d 596, 611 (W.D.N.C. Sept. 27, 2010) ("The Court further concludes that Goolkasian's [expert] opinion regarding intent . . . also should be excluded. Honeywell's intent . . . is a question for the trier of fact to decide and does not require the admission of expert testimony."); *Brakebush Bros., Inc. v. Certain Underwriters at Lloyd's of London – Novae 2007 Syndicate Subscribing to Pol'y with No. 93PRX17F157*, 2024 NCBC LEXIS 137, at *29–31 (N.C. Super. Ct. Oct. 16, 2024). The well-established rule prohibiting such testimony should apply here. As a result, Hobbs shall not be permitted to testify as to his own "determination" or opinions regarding the owner of Vista's state of mind. Accordingly, this portion of Plaintiff's Motion is **GRANTED.**

[20] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 13.)

Credibility of Testimony by Cheng

21. Plaintiff requests that the Court exclude Hobbs's testimony and opinions on the credibility Cheng's testimony. Plaintiff contends that Hobbs "seems to have fully credited Defendant Sok Heang Cheng's testimony on key disputed issues of fact which will be decided by the jury."[21] While defense counsel may ask Hobbs to assume certain facts as true for purposes of rendering his opinion, Plaintiff states that "it would not be proper for [the expert] himself to express an opinion on which party's version of events is true or more credible."[22]

22. It is well established that the credibility of witnesses and the weight of the evidence are solely for the jury to determine. *See, e.g., Sessoms v. McDonald*, 237 N.C. 720, 724 (1953). Furthermore, a foundational requirement for expert testimony is that it draw on "specialized knowledge" and thereby "assist the trier of fact." *See* N.C. R. Evid. 702(a). While an expert's specialized knowledge and testimony may sometimes assist a jury in assessing the credibility of a party or witness in a particular context, this is not the case in this instance. Here, the credibility of Cheng's testimony is not a matter within Hobbs's specialized knowledge. Nor is Hobbs better positioned to opine on Cheng's credibility than is the jury in its fact-finding role. Therefore, Hobbs may be asked properly phrased questions that are expressly premised on the jury finding certain facts or assertions being true. But he

[21] (Mem. L. Supp. Pl.'s Mot. Exclude Expert Ops. 11.)

[22] (Mem. L. Supp. Pl.'s Mot. Exclude Expert Ops. 11.)

may not opine on whether Cheng is telling the truth. Accordingly, this portion of Plaintiff's Motion is **GRANTED**.

Defendants' Peer Review Reports

23. In the "Observations" section of his report, Hobbs states that JPS received a passing score on its 2016 and 2019 peer review reports, stating:

> JPS and Ms. Cheng have never been subject to any regulatory non-compliance. . .. JPS received a pass report on [their two most recent 2016 and 2019 peer review reports] I examined. Pass reports mean that the firm's system of quality control is in compliance with the professional standards related to Quality Control.[23]

Plaintiff contends that Hobbs's testimony and opinions about Defendants obtaining passing peer review report scores should be excluded because it is inadmissible character evidence. *See* N.C. R. Evid. 404.

24. As above, the Court notes that Hobbs expressly sets forth eight opinions in the "Opinions" section of his report, and that an opinion on the fact or effect of JPS's passing peer review report scores is not one of the eight.

25. In response to Plaintiff's contention, Defendants state that N.C. R. Evid. 404 is clear that, while "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion," such evidence is admissible for other purposes. Defendants contend that Hobbs "is utilizing the information from the peer review reports for background information, to show JPS's capability as accountants, JPS's quality control standards, and JPS's

[23] (Mem. L. Supp. Pl.'s Mot. Exclude Expert Ops. 12; *see also* Expert Rep. 4.)

experience" rather than to suggest that, because JPS's past peer review reports were satisfactory, JPS must have acted properly in relation to the JPS engagement.[24] Upon consideration of the arguments of counsel, the Court finds that Hobbs's observations about Defendants' passing peer review scores do not constitute inadmissible character evidence. Thus, this portion of Plaintiff's Motion is **DENIED**.

Testimony Offered by Cheng or other JPS Personnel as Expert Witnesses

26. Lastly, Plaintiff requests that the Court should (1) not permit Cheng or other JPS personnel to be presented to the jury as expert witnesses and (2) not permit any defense witness, other than Hobbs, to offer an opinion as to whether Cheng's conduct, or that of her subordinates, met the applicable standard of care.[25]

27. Defendants agree with Plaintiff that, based on North Carolina case law, "it would be error to identify Ms. Cheng [or other JPS personnel] as an expert in front of the jury."[26] However, Defendants contend, "the case law does not hold that Ms. Cheng[, an accountant,] cannot opine on the standard of care for accountants and whether she believes she and the JPS staff met the applicable standard of care."[27]

28. As Defendants state, North Carolina case law does not hold that a defendant professional cannot opine on the standard of care for professionals in the

[24] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 15.)

[25] (Mem. L. Supp. Pl.'s Mot. Exclude Expert Ops. 13–14.)

[26] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 16.)

[27] (Defs.' Resp. Br. Opp. Pl.'s Mot. Lim. Exclude Expert Ops. 16.)

same field and whether she believes that standard of care was met. *See, e.g., Galloway v. Lawrence*, 266 N.C. 245, 250 (1966) ("There was no error in permitting the defendant to testify as an expert witness, for there was ample evidence to support the finding of his qualifications as such and his being a party does not disqualify him."); *Sherrod v. Nash Gen. Hosp.*, 348 N.C. 526 (1998). This conclusion is consistent with N.C. R. Evid. 702, which does not prohibit parties to a case from testifying on their own behalf as to whether a professional standard of care was met so long as they otherwise qualify as experts. However, as Plaintiff indicates, ample case law holds that it is prejudicial error for a trial court to rule in the presence of a jury that it, in fact and law, found a professional defendant to be an expert as such an announcement might influence the jury. *See, e.g., Galloway*, 266 N.C. at 250; *Sherrod*, 348 N.C. at 534.

29. Accordingly, Plaintiff's Motion is **GRANTED** to the extent that Cheng and other JPS personnel should not be identified as experts in front of the jury. Plaintiff's Motion is **DENIED** with respect to Cheng and others at JPS, who would otherwise qualify as experts, being permitted to testify as to whether Cheng's conduct, or that of her subordinates, met the applicable standard of care.

B. <u>Defendants' Motion in Limine to Exclude Any Evidence or Opinions at Trial Other than as Disclosed in Discovery</u>

30. In their first Motion, Defendants seek to exclude "[a]ny evidence or opinion at trial other than as disclosed in discovery including an exclusion of any expert opinions other than as disclosed in Gregory T. Reagan's report including an exclusion of any testimony, documents, or other evidence regarding any violation of

the standard of care by Defendant Sok Heang Cheng."[28] Defendants contend that, in his report, Reagan only draws conclusions that JPS failed to meet the standard of care.[29] While Reagan criticizes Cheng in his report, Defendants state, "he nowhere opines that Ms. Cheng failed to meet the standard of care or how Ms. Cheng failed to meet the standard of care [and] [i]t would be a stretch to allow Mr. Reagan's opinions as to JPS's alleged negligence to be imputed to Ms. Cheng."[30] Thus, Defendants maintain that "[i]t would be unfairly prejudicial to Ms. Cheng to allow Mr. Reagan to put forward any opinion that Ms. Cheng violated any standard of care."[31]

31. The Court disagrees. Generally, "[t]he purpose of discovery is to remove surprise from trial preparation and enable the parties to obtain evidence necessary to evaluate and resolve their dispute." *Dove v. Harvey*, 168 N.C. App. 687, 693 (2005). Here, in the Second Amended Complaint, Plaintiff specifies that its claim for professional malpractice/professional negligence is against both JPS and Cheng. Prior to the issuance of Reagan's expert report, Defendants were put on notice twice that Reagan intended to opine on the failures of both JPS and Cheng to meet the professional standard of care. In the Notice of Plaintiff's Designation of Expert Witness, filed on 8 February 2024, Plaintiff stated that "Mr. Reagan will testify to

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[28] (Defs.' First Mot. 1–2.)

[29] (Defs. Johnson Price Sprinkle PA & Sok Heang Cheng's Br. Supp. Mot. Lim. to Exclude Any Evid. or Ops. at Trial Other Than as Disclosed in Disc. [hereinafter, Defs.' Br. Supp. First Mot.] 8, ECF No. 86.)

[30] (Defs.' Br. Supp. First Mot. 8.)

[31] (Defs.' Br. Supp. First Mot. 9.)

federal and state professional standards governing CPAs' provision of accounting and tax services, JPS's and Ms. Cheng's violations of professional standards in rendering accounting and tax services to Plaintiff, . . . JPS's and Ms. Cheng's malpractice/negligence with respect to Plaintiff, and the damages suffered by Plaintiff as a result of JPS's and Ms. Cheng's violations, breaches, and malpractice/negligence."[32] In the affidavit Reagan submitted on 10 June 2024 in connection with summary judgment filings, he stated that "[b]ased on the relevant laws and standards, as well as [his] review of the evidence in this case so far, [he] expect[s] to conclude that JPS and Ms. Cheng violated the standard of care for North Carolina CPAs."[33] Furthermore, Reagan makes multiple specific mentions of Cheng's personal failures with respect to the Vista account in his report.[34] Based on the above, Defendants received ample notice and cannot credibly claim surprise that Reagan plans to testify and opine on whether Cheng violated applicable standards of care. In fact, as Plaintiff properly observes, "Defendants' expert [] prepared to address the issue of whether Ms. Cheng met the professional standard of care and did in fact include that topic in his report."[35] Defendants' claim of alleged prejudice

[32] (Not. Pl.'s Designation Expert Witness 2, ECF No. 41.)

[33] (Aff. Gregory T. Reagan 3, ECF No. 55.)

[34] (Pl.'s Resp. Opp. Defs.' Johnson Price Sprinkle PA & Sok Heang Cheng's Mot. Lim. Exclude Any Evid. or Ops. at Trial Other Than as Disclosed in Disc. [Pl.'s Resp. Defs.' First Mot.] 5–7, ECF No. 94.)

[35] (Pl.'s Resp. Defs.' First Mot. 10.)

at Reagan's plans to testify and opine about Cheng's standard of care violations is unavailing and is rejected. Thus, Defendants' first Motion is **DENIED**.

C. Defendants' Motion in Limine to Prohibit Evidence of Effect on Judgment on the Parties

32. In their second Motion, Defendants request that the Court "prohibit [the introduction of] any evidence by Plaintiff of any positive or negative effects of any judgment."[36] Specifically, Defendants state, "[t]his motion includes, but is not limited to, a preclusion of any evidence regarding any tax consequences to Plaintiff or any insurance coverage available to any Defendant."[37] Defendants further argue that any evidence regarding the consequences of the verdict would not only be irrelevant to the issues in this case but also would be prejudicial.[38]

33. Regarding the availability of insurance coverage, the general rule in North Carolina is that the existence of liability insurance is not admissible to show a party acted negligently or wrongfully. N.C. R. Evid. 411. However, the rule does not require the exclusion of evidence of insurance for other reasons, such as proof of agency. As our appellate courts have found,

> In deciding whether evidence of insurance should be received under Rule 411, a trial court should engage in the following analysis: (1) Is the insurance coverage offered for a purpose other than to show that a person acted negligently or otherwise wrongfully (Rule 411); (2) If so, is the evidence relevant to show that other purpose (Rule 401); and (3) If so, is the probative value of the relevant evidence substantially

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[36] (Defs.' Second Mot. 2.)

[37] (Defs.' Second Mot. 2.)

[38] (Defs.' Br. Supp. Mot. Lim. to Prohibit Any Test., Docs. or Other Evid. Regarding the Effect of a Verdict on the Parties 3–4, ECF No. 88.)

> outweighed by the factors set forth in Rule 403. *Williams v. Bell*, 167 N.C. App. 674, 678 (2005).

The Court finds this portion of Defendants' second Motion consistent with N.C. R. Evid. 411 and, thus, will **GRANT** Defendants' Motion to this extent.

34. Regarding Defendants' motion on the inadmissibility of tax consequences to Plaintiff, Vista agrees: "Plaintiff's position is that the tax consequences on *both sides of the equation* [are legally irrelevant and] should not be considered in calculating damages . . .."[39] To be admissible, evidence must be "relevant" under N.C. R. Evid. 401, which defines "relevant evidence" as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, any evidence regarding tax consequences to either Plaintiff or Defendants would not meet the relevance threshold established by N.C. R. Evid. 401, as it would not make the existence of any fact that is of consequence to the determination of this action more or less probable. The introduction of such evidence may additionally run afoul of N.C. R. Evid. 403, which provides that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .." The Court finds this portion of Defendants' second Motion consistent with the provisions of N.C. R. Evid. 401 and 403, and, thus, will similarly **GRANT** this aspect of Defendants' Motion.

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[39] (Pl.'s Resp. Opp. Defs.' Mot. Lim. Prohibit Any Test., Docs., or Other Evid. Regarding Effect of Verdict on Parties 4–5, ECF No. 95.)

35. **WHEREFORE**, the Court **GRANTS in part** and **DENIES in part** the Motions, as set forth herein.

SO ORDERED, this the 1st day of April, 2025.

/s/ A. Todd Brown
A. Todd Brown
Special Superior Court Judge
for Complex Business Cases