NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 248

21 JUNE 2016

2 AUGUST 2016

RALEIGH
2019

CITE THIS VOLUME

248 N.C. APP.

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CASES REPORTED

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STELLA ANDERSON, PAM WILLIAMSON, MARIANNE CLAWSON, ALAINA DOYLE, LAUREN LARUE JOYNER, IAN O'KEEFE, AND DAVID SABBAGH, PETITIONERS
v.
THE NORTH CAROLINA STATE BOARD OF ELECTIONS, RESPONDENT

No. COA14-1369

Filed 21 June 2016

1. Appeal and Error—mootness—past election—exception for issue capable of repetition but escaping review—not applicable

A case involving an election that had come and gone was moot. A procedural issue that the Board contended survived was not capable of repetition yet evading review. The United States Supreme Court has specified that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. Here, the Court of Appeals could not discern a reasonable expectation, much less a demonstrated probability, that the same complaining party would again be subject to the same action.

2. Appeal and Error—mootness—past election—public interest exception—not applicable

The public interest exception to mootness did not apply in a case involving a past election where the Board's argument was focused on its own interests, in essence seeking an advisory opinion. The matter is not one of such general importance as to justify application of the public interest exception.

Judge DILLON dissenting.

Appeal by respondent from order entered 13 October 2014 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 August 2015.

Bailey & Dixon, LLP, by Sabra J. Faires and William R. Gilkeson, Jr., for petitioner-appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General Katherine A. Murphy, for respondent-appellant.

CALABRIA, Judge.

Respondent North Carolina State Board of Elections ("the Board") appeals from the superior court's order requiring it to adopt an early voting plan in Watauga County that included at least one site on Appalachian State University's campus during the 2014 general election. Because we hold that this appeal is moot, it must be dismissed.

I. Background

Pursuant to our General Statutes, registered voters in North Carolina may, as an alternative to voting in person at their assigned precincts on Election Day, vote by mail-in absentee ballot. N.C. Gen. Stat. §§ 163-226, -227.2 (2015). Registered voters may also cast ballots through a procedure called "one-stop absentee voting," which is also known as "early voting." *Id.* § 163-227.2 (2015).

From 2006 until its 2013 municipal election, Watauga County elections included an early voting and an Election-Day voting site in Boone on the Appalachian State University campus ("ASU"). Subsequently, the Watauga County Board of Elections ("WCBOE") made numerous changes and departed from the customary voting sites. Specifically, the early voting plan for the 2014 primary did not include any Boone site other than the required site at the WCBOE office and four sites located in rural parts of Watauga County.

On 23 July 2014, the WCBOE met to adopt an early voting plan. The three-member board submitted two early voting plans for the 2014 general election. One plan included an early voting site on ASU campus ("minority plan") and the other plan, ("the majority plan") had five sites but did not include an early voting site on ASU's campus. Although the WCBOE voted on the competing proposals, they did not reach a unanimous agreement on an early voting plan for Watauga County.

N.C. Gen. Stat. § 163-227.2(g) provides that

> [i]f a county board of elections . . . has been unable to reach unanimity in favor of a Plan, a member or members of that county board of elections may petition the State Board of Elections to adopt a plan for it. If petitioned, the State Board may also receive and consider alternative petitions from another member or members of that county board. The State Board of Elections may adopt a Plan for that county. The State Board, in that plan, shall take into consideration factors including geographic, demographic, and partisan interests of that county.

N.C. Gen. Stat. § 163-227.2(g) (2015). At the time of the 2014 general election, subsection 163-227.2(g) further provided that the Board could make available a plan that did not offer early voting at the county board of elections office, but "only if the Plan include[d] at least one site reasonably proximate to the county board of elections office and the . . . Board [found] that the sites in the Plan as a whole provide[d] adequate coverage of the county's electorate." *Id.* § 163-227.2(g) (2014).

Since the WCBOE members were unable to adopt a unanimous early voting plan, they petitioned the Board to adopt a plan for Watauga County pursuant to subsection 163-227.2(g). As a result, the competing proposals for the minority and majority plans were submitted for the Board's consideration. After the Board considered proposals at a 21 August 2014 hearing, it adopted the WCBOE's majority plan without significant changes. On 29 August 2014, the Board memorialized its decision in a form letter addressed to the WCBOE's Director.

On 19 September 2014, seven registered voters in Watauga County ("Petitioners") filed a Petition for Judicial Review in Wake County Superior Court. The petition requested that the superior court determine whether the Board abused its discretion by adopting the majority plan for Watauga County, and it was filed pursuant to N.C. Gen. Stat. 163-22(l), which provides:

> Notwithstanding any other provision of law, in order to obtain judicial review of any decision of the State Board of Elections rendered in the performance of its duties or in the exercise of its powers under this Chapter, the person seeking review must file his petition in the Superior Court of Wake County.

N.C. Gen. Stat. § 163-22(l) (2015). Petitioners alleged that the Board made no findings to explain how it took the geographic, demographic, and partisan interests of Watauga County into consideration. They also alleged that the Board violated Article I, Section 19 and Article VI, Section I of the North Carolina Constitution and the 14th and 26th Amendments to the United States Constitution by erecting barriers for voters aged 18 to 25. Based on these allegations, petitioners asked the court to remand the majority plan to the Board to enter findings and explain its bases for adopting it.

In response, the Board filed a motion to dismiss the petition on seven enumerated grounds, the majority of which challenged the trial court's subject matter jurisdiction to hear and rule on the petition. According to the Board, the petition was improperly brought because it did not seek judicial review of either a "contested case" brought under Chapter 150B of North Carolina's General Statutes or a decision of the Board "made in its quasi-judicial capacity under Chapter 163 of the General Statutes." Rather, the Board contended, the petition impermissibly sought review of the Board's decision, which was made pursuant to subsection 163-227.2(g) and "in its supervisory capacity over the [WCBOE]." After conducting a hearing on the Board's motion, the superior court entered an order on 13 October 2014. The order concluded that "[u]nder the unique circumstances of this case, [the Board's] early voting plan for [Watauga County was] subject to review by the Wake County Superior Court under [subsection] 163-22(l)." After reviewing the entire record before it, the superior court could find "no other intent from [the WCBOE's majority plan] other than to discourage student voting," and as a result, the court concluded that the plan "r[ose] to the level of a constitutional violation of [students'] right to vote." The superior court's order also denied the Board's motion to dismiss in its entirety and remanded the case for the Board to adopt an early voting plan for Watauga County for the 2014 November general election that included at least one voting site on the ASU campus. The Board appeals.

II. Analysis

A. Mootness and the Generally Applicable Law

Since the 2014 election is over and petitioners were granted the relief they sought, we must address whether the issues presented by this appeal are moot.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing

controversy." *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted). For well over a century, our state courts and the federal courts have largely refused to address questions deemed moot. *See, e.g.*, *Crawley v. Woodfin*, 78 N.C. 4, 6 (1878); *Mills v. Green*, 159 U.S. 651, 653, 40 L. Ed. 293, 293-94 (1895). While the mootness doctrine has been formulated in different ways, it must be understood as a core concept of justiciability, a general term which refers to whether a legal controversy is "appropriate or suitable" for judicial adjudication. *Black's Law Dictionary* 696 (9th ed. 2009); *see also Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991) ("A justiciable issue has been defined as an issue that is 'real and present as opposed to imagined or fanciful.' " (quoting *K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989))) (citations omitted). However, whether a moot case is appropriate for judicial disposition may depend largely upon the tribunal that confronts it.

In the federal context, mootness was generally applied as though it were a prudential or discretionary doctrine until the mid-twentieth century. *Honig v. Doe*, 484 U.S. 305, 330, 608, 98 L. Ed. 2d 686, 711 (1988) (Rehnquist, J. concurring) ("[I]t seems very doubtful that the earliest case I have found discussing mootness, *Mills v. Green*, . . . was premised on constitutional constraints[.]"). However, in 1964, The United States Supreme Court recognized mootness as a constitutional limitation on the jurisdiction of federal courts, which pursuant to Article III, Section 2 of the United States Constitution may decide only actual, ongoing cases and controversies. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3, 11 L. Ed. 2d 347, 351 n.3 (1964) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."). The mootness doctrine is also rooted in the prohibition against advisory opinions. *North Carolina v. Rice*, 404 U.S. 244, 246, 30 L. Ed. 2d 413, 415 (1971). For these reasons, "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' " while confining them "to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 108 L. Ed. 2d 400, 411 (1990) (quoting *Rice*, 404 U.S. at 246, 30 L. Ed. 2d at 415). All told, the constitutional jurisdictional underpinnings of mootness are now well

established,[1] *e.g.*, *Honig*, 484 U.S. at 317-18, 98 L. Ed. 2d at 703, and the doctrine presents issues of justiciability at all stages of judicial proceedings. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10, 39 L. Ed. 2d 505, 515 n.10 (1974) ("The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

By contrast, in state courts "[t]he exclusion of moot questions . . . represents a form of judicial restraint." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). This principle of restraint does not implicate jurisdiction but rather it is partially grounded in the notion that " '[j]udicial resources should be focused on problems which are real and present rather than dissipated . . ., hypothetical[,] or remote questions[.]' " *Crumpler v. Thornburg*, 92 N.C. App. 719, 722, 375 S.E.2d 708, 710 (1989) (citation omitted). In particular, "courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. Our state-court mootness doctrine is also justified by the notion that a judicial tribunal's "inherent function . . . is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations." *Angell v. City of Raleigh*, 267 N.C. 387, 389-90, 148 S.E.2d 233, 235 (1966) (citation and internal quotation marks omitted). Therefore, as a general rule, "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed[.]" *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912.

Despite the differences in its origins at the state and federal levels, the mootness doctrine's limits "are articulated almost identically in the federal courts and the courts of this State." *Thomas v. N.C. Dep't of*

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1. We note that courts and treatises have raised significant questions about the constitutional model of mootness in federal courts. Judges and scholars alike have argued that if the mootness bar was truly jurisdictional in nature, courts would have no authority to hear moot cases, even where prudential factors favored doing so. *See, e.g.*, *Honig*, 484 U.S. at 330, 98 L. Ed. 2d at 711 (1988) (Rehnquist, J. concurring) ("If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are 'moot' but which also raise questions which are capable of repetition but evading review than we would to decide cases which are 'moot' but raise no such questions."); 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3533.1 (3d ed. 1998) ("There is reason to wonder whether much reliance should be placed on constitutional concepts of mootness when . . . all ordinary needs can be met by the discretionary doctrines. The Article III approach is nonetheless firmly entrenched, and must be reckoned the major foundation of current doctrine.").

Human Res., 124 N.C. App. 698, 705, 478 S.E.2d 816, 820 (1996) (citation omitted). Thus, federal treatment of the mootness doctrine may be instructive to state courts when they are confronted with moot questions in a variety of contexts.

Here, the trial court's order required the Board to adopt a plan that included the location of an early voting site on ASU's campus during the 2014 election. Since the petitioners were granted the relief they sought, and the 2014 election has come and gone, all parties agree that this case is technically moot. In addition, neither party contends that the substantive legal issue in this case—whether the WCBOE's majority plan infringed the constitutional rights of students—is still alive. The Board, however, asserts that an important procedural question has survived on appeal. Specifically, the Board argues, and asks this Court to decide, that the superior court does not have jurisdiction under subsection 163-22(l) to conduct a judicial review of a "decision made by [the] Board in the exercise of its supervisory capacity over county boards of elections."

B. Capable of Repetition, Yet Evading Review Exception to Mootness

[1] Although "the general rule is that an appeal presenting a question which has become moot will be dismissed[,]" *id.* (citation and internal quotation marks omitted), courts may consider moot cases falling within one of several limited exceptions to the doctrine. *See In re Investigation Into the Injury of Brooks*, 143 N.C. App. 601, 604, 548 S.E.2d 748, 751 (2001) (recognizing "at least five exceptions to the general rule that moot cases should be dismissed"). The Board contends that the procedural issue it has raised under subsection 163-22(l) falls within two established exceptions to mootness. The Board first argues that we are permitted to address the merits of this otherwise moot appeal because the case is " 'capable of repetition, yet evading review.' "[2] *Shell*

2. We note that the United States Supreme Court has repeatedly described mootness as " 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22, 137 L. Ed. 2d 170, 193 n.22 (1997) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 63 L. Ed. 2d 479, 491 (1980) (citation omitted)). However, the Court has also noted that this description of mootness "is not comprehensive." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190, 145 L. Ed. 2d 610, 633 (2000). Thus, in applying well established exceptions to the mootness doctrine, courts should not confuse mootness with standing: The "[s]tanding doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often . . . for years. *Id.* at 191, 145 L. Ed. 2d at 634; *see also Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 2338, 115 L. Ed. 2d 288, 301

Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 286, 292, 517 S.E.2d 401, 405 (1999); *see also Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006) ("A case is not moot . . . if a party can demonstrate that the apparent absence of a live dispute is merely a temporary abeyance of a harm that is 'capable of repetition, yet evading review.' " (quoting *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003)). We disagree.

The " 'capable of repetition, yet evading review' " exception applies when: " '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.' " *130 of Chatham, LLC v. Rutherford Electric Membership Corp.*, __ N.C. App. __, __, 771 S.E.2d 920, 926 (2015) (citation omitted). Since the parties agree that this case satisfies the first prong, we see no reason to address it: the majority of election cases are unique in that the controversy's endpoint, the election itself, is firmly established and beyond the control of litigants. As to the second prong, the United States Supreme Court has specified "that a mere physical or theoretical possibility [is not] sufficient to satisfy the test . . . . Rather, . . . there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party."[3] *Murphy v. Hunt*, 455 U.S. 478, 482, 71 L. Ed. 2d 353, 357 (1982) (citation omitted). The Court has further stated that the capable-of-repetition exception "applies only in exceptional situations." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 75 L. Ed. 2d 675, 689 (1983). For the

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(1991) ("[T]he mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced.") (internal citation omitted).

3. The United States Supreme Court has determined that a "reasonable expectation may be satisfied by something less than a "demonstrated probability." *Honig*, 484 U.S. at 319 n.6, 98 L. Ed. 2d at 704 n.6 (citing "numerous cases" where the Court "found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable"). However, in *Honig*, Justice Scalia argued that the majority's reasoning on this point was circular, and he insisted that for there to be a "reasonable expectation" that a party will be subjected to the same action again, the relevant event must be a "demonstrated probability." *Id.* at 334, 108 S. Ct. 592, 610, 98 L. Ed. 2d at 714 (Scalia, J, dissenting) ("It is obvious that in saying 'a reasonable expectation or a demonstrated probability' we have used the conjunction in one of the latter, or nondisjunctive, senses. Otherwise (and according to the Court's exegesis), we would have been saying that a controversy is sufficiently likely to recur if either a certain degree of probability exists or a higher degree of probability exists."). It appears that North Carolina courts have not addressed this issue (or even included the "demonstrated probability" language in the capable-of-repetition analysis). In any event, here, the Board has failed to meet either threshold.

reasons that follow, we cannot discern a reasonable expectation, much less a demonstrated probability, that the same complaining party will again be subject to the same action.

While the term "same action" may not hold an inflexible meaning,[4] it is clear that the capable-of-repetition exception requires specificity between a case deemed moot and one that may arise in the future. *See, e.g.*, *Sullivan v. Wake Cnty. Bd. of Educ.*, 165 N.C. App. 482, 488, 598 S.E.2d 634, 638 (2004) ("There is no reasonable expectation that the same complaining party[—parents who challenged their son's elementary school assignment—]would be subject to the *same factors* used by the school board in making its assignment/transfer determinations for *any school year beyond* 2002-2003.") (emphasis added); *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 704 (2002) (newspaper publisher's action against city council for alleged violations of public records laws was technically moot, but there was "a reasonable likelihood that [the council], in considering the acquisition of other property for municipal purposes, could *repeat the conduc*t which is *at issue here*, subjecting [the publisher] to the same action") (emphasis added); *Crumpler*, 92 N.C. App. at 724, 375 S.E.2d at 712 (case not capable of repetition where it had "been more than two years since plaintiff filed [his] suit and he ha[d] yet to be arrested or refused a permit for a similar demonstration"). It is equally clear that the term ordinarily refers to a decision, practice, or other harm that was challenged and litigated by a plaintiff, or a "complaining party." Although North Carolina courts have not squarely addressed this issue, the United States Supreme Court has specified that the capable-of-repetition doctrine "applies . . . generally only where the *named plaintiff* can make a reasonable showing that he will again be subjected to the alleged illegality." *Lyons*, 461 U.S. at 109, 75 L. Ed. 2d 689 (emphasis added). Thus, as a general rule, the "same action" must be understood as referring to the conduct that gave rise to the plaintiff's (or complainant's) claims in the relevant proceeding or lawsuit. *See Lux v. Judd*, 651 F.3d 396, 401 (4th Cir. 2011) (concluding that challenge of Virginia State Board of Elections decision brought by former congressional candidate and

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4. We note that this Court recently held the capable-of-repetition exception "does not require [an examination] of the exact same action occurring in the future[;]" rather, it allows consideration of "similarly situated parties[.]" *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs.*, __ N.C. App. __, __, 776 S.E.2d 329, 335 (2015). However, the holding in *Cumberland Cnty.* has no bearing on our analysis in this case. As explained below, the Board completely reinvents the "same action" requirement of the exception, and it cannot be considered the "same complaining party."

his supporters was " 'capable of repetition' " when " 'there [was] a reasonable expectation that the challenged provisions [would] be applied against the plaintiffs again during future election cycles' ") (citation omitted); *Shell Island Homeowners Ass'n*, 134 N.C. App. at 292, 517 S.E.2d at 405 ("Assuming *arguendo* that the claims are capable of repetition, there is no evidence to suggest that [the] plaintiff's grievances have evaded review.").

Despite these well-established principles, the Board attempts a clever "bait and switch" on appeal: it contends that the central issue is whether the superior court "has jurisdiction to hear what amounts to a collateral attack on a decision of the . . . Board to adopt an early voting plan for a county in which the county board of elections was not unanimous." Based on this characterization of the case, the Board argues that "absent a ruling from this Court clarifying the superior court's jurisdiction, it is reasonably likely that the . . . Board will again find itself in this same position, namely, forced to defend against a collateral challenge to an early voting plan that [it] has approved or adopted[.]" The Board's approach is inherently flawed, however, because it impermissibly recasts the nature of the parties' dispute. In making its arguments, the Board turns the capable-of-repetition exception on its head. Our review of the pertinent case law reveals that the exception is intended to allow plaintiffs to obtain a judgment or appellate review in cases where the two prongs are met; it is not designed to protect defendants or respondents from future lawsuits. Accordingly, based on the facts of this case, the "same action" is not whether the Board might be forced to defend against its adoption of a future early voting plan, but whether future registered voters will challenge an early voting plan adopted by the Board as violative of the constitutional rights of voters aged 18 to 25.

We agree with petitioners that a series of speculative events must occur for a similar controversy, i.e., the "same action," to arise again: (1) a local board of elections must be unable to adopt a unanimous early voting plan; (2) the majority members of the local board must adopt a plan which allegedly discriminates against young voters and violates their state and federal constitutional rights; (3) the Board must review competing plans from the local board and adopt the majority plan without significant change; (4) and one or more voters must file a petition for judicial review of the Board's decision pursuant to subsection 163-22(l). Another factor weighing against the repetition of the same action is the ever-changing composition of the Board and local boards of election. *See* N.C. Gen. Stat. §§ 163-19 (2015) (providing four-year terms (and a maximum of two consecutive terms) for members of the Board); 163-30 (2015) (providing two-year terms for members of local boards).

In a rather tepid response to this line of reasoning, the Board asserts that the issue it "asks this Court to review is the purely procedural question of whether the superior court has jurisdiction to hear a petition for judicial review of the adoption of an early voting plan, irrespective of the reasons underlying the challenge." The Board's position, as we understand it, is simply that it would like to know if its future adoptions of early voting plans for counties will be subject to judicial review under subsection 163-22(l). Indeed, at oral argument, the Board stated that it would like the "comfort" of knowing whether subsection 163-227.2(g) requires it to adjudicate the constitutional rights of voters when it adopts an early voting plan for a county. Yet as our Supreme Court has previously pointed out, it is not a proper function of courts " 'to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter.' " *Adams v. N.C. Dept. of Natural and Economic Res.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978) (citation omitted). By seeking "clarification" and "comfort," the Board is surely asking us for advice we are not obliged to give. More to the point, just because the Board says the procedural issue it has identified may arise again does not make that issue the "same action" for purposes of analysis under the capable-of-repetition exception to mootness.

The second prong of the exception is also unsatisfied here because the Board—the respondent in this case—wrongly characterizes itself as the same "complaining party." *See Black's Law Dictionary* 323 (9th ed. 2009) (defining "complainant" as "[t]he party who brings a legal complaint against another; esp[ecially], the plaintiff in a court of equity or, more modernly, a civil suit"). Although situations may arise where a defendant or respondent can be considered the complaining party for purposes of this exception to mootness, we are aware of no North Carolina appellate decisions that have adopted such an approach. As we have intimated above, the implicit rule in North Carolina is that the term "complaining party" invariably refers to plaintiffs who could be subjected to the complained of activity again in the future. *See*, *e.g.*, *Sullivan*, 165 N.C. App. at 488, 598 S.E.2d at 638 (analyzing whether the respondent school board would subject the petitioners' son to the same action again); *Boney Publishers, Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 704 (analyzing whether the defendant might subject the plaintiff to the same action again); *Crumpler*, 92 N.C. App. at 724, 375 S.E.2d at 712 (same). Several federal circuit courts have explicitly recognized this rule. *See Sierra Club v. Glickman*, 156 F.3d 606, 620 (5th Cir. 1998) ("By its very terms, the exception is designed to protect plaintiffs; it is not designed to protect defendants from the possibility of future lawsuits[.]"); *Fischbach*

v. N.M. Activities Ass'n, 38 F.3d 1159, 1161 (10th Cir. 1994) ("The mere fact that the [defendant] claims the action is not moot does not make [it] the complaining party for purposes of analysis under the exception to the mootness doctrine. The complaining parties in this action are the [plaintiffs], and it has been established that they will not be subjected to the actions of the [defendant] again."); *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985) ("The . . . [capable of repetition exception] usually is applied to situations involving governmental action where it is feared that the challenged action will be repeated. The defending party being constant, the emphasis is on continuity of identity of the complaining party. When the litigation is between private parties, we must consider whether the anticipated future litigation will involve the same defending party as well as the same complaining party.").

Here, petitioners' allegations that the Board adopted an unconstitutional early voting plan gave rise to the original action; however, the superior court's order resolved the case to their satisfaction, and there is no reason to believe that they will be subjected to the same action in future elections. By contrast, on appeal, the Board complains that under petitioners' "view of the law, any disgruntled voter who is dissatisfied with the early voting plan adopted for his or her county may file a petition in the Superior Court of Wake County challenging the . . . Board's approval or adoption of an early voting plan for the county, as a means of changing a plan that is not to his or her liking." This contention assumes that the superior court would find that it had jurisdiction under subsection 163-22(l) in any conceivable scenario. Furthermore, at oral argument, the Board insisted that it was "extraordinary" for the superior court to rule on petitioners' constitutional claims based on such a "thin" record (i.e., no evidentiary hearing was held and the Board made no findings). The Board then declared that petitioners should have filed an "independent" action invoking the superior court's original jurisdiction. But when asked how the record would have differed in any material way had petitioners brought a declaratory judgment action or a suit for injunctive relief, the Board had no viable answer. As such, the Board is simply positing a distinction without a difference, and it cannot be considered the complaining party for purposes of the capable-of-repetition exception to the mootness doctrine. In other words, the Board's argument is little more than a complaint about the *form* of future legal actions which may be filed against it. Even if we accepted the Board's view on the issues its appeal purportedly presents, the fact that petitioners could have obtained review of the Board's decision through other legal and procedural avenues suggests that *all* aspects of this case are moot.

In sum, since there is no reasonable expectation that petitioners (the complaining party in this case) will be subject to the same action again, the Board cannot demonstrate that this particular controversy will repeat itself. Accordingly, based on the record before us, we conclude that this case is not one that is capable of repetition, yet evading review.

C. Public Interest Exception to Mootness

[2] The Board also argues that the public interest exception to mootness applies in this case. Once again, we disagree.

A court may consider a case that is technically moot if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). However, this is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest. *See, e.g.*, *Granville Cnty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n*, 329 N.C. 615, 623, 407 S.E.2d 785, 790 (1991) ("Because the process of siting hazardous waste facilities involves the public interest and deserves prompt resolution in view of its general importance, we elect to address it."); *State v. Corkum*, 224 N.C. App. 129, 132, 735 S.E.2d 420, 423 (2012) (holding that an issue of structured sentencing under the Justice Reinvestment Act of 2011 required review because "all felons seeking confinement credit following revocation of post-release supervision will face similar time constraints when appealing a denial of confinement credit effectively preventing the issue regarding the trial judge's discretion from being resolved"); *In re Brooks*, 143 N.C. App. at 605-06, 548 S.E.2d at 751-52 (applying the public interest exception to police officers' challenge of a State Bureau of Investigation procedure for handling personnel files containing "highly personal information" and acknowledging that "the issues presented . . . could have implications reaching far beyond the law enforcement community").

Our review of the Board's arguments is animated by the following principles. First, North Carolina courts "do not issue anticipatory judgments resolving controversies that have not arisen." *Bland v. City of Wilmington*, 10 N.C. App. 163, 164, 178 S.E.2d 25, 26 (1970), *rev'd on other grounds*, 278 N.C. 657, 180 S.E.2d 813 (1971). Second, litigants are not permitted "to fish in judicial ponds for legal advice." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986) (citation omitted).

We begin by noting that the arguments the parties make, and the words they use, before this Court matter. In the instant case, the Board

requests that we provide "proper *guidance* . . . so that [the Board] can provide the appropriate procedure at its hearings on matters brought before it pursuant to [section] 163-227.2." (Emphasis added). The Board also insists that "[t]his appeal [should] *determine* whether the . . . Board is *required* to conduct . . . hearings [on non-unanimous early voting plans for counties] as quasi-judicial hearings." (First emphasis added). Such language suggests that the Board intends to "put [the requested opinion] on ice to be used if and when [the] occasion might arise." *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942). In essence, we have been asked to render a declaratory judgment, complete with practical advice, on how the Board must perform its duties pursuant to section 163-227.2. This we cannot do. Furthermore, deciding the issues raised by the Board on appeal would require us to issue an advisory opinion, something we are unwilling and unauthorized to give. *E.g.*, *In re Wright*, 137 N.C. App. 104, 111-12, 527 S.E.2d 70, 75 (2000) (" '[T]he courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . . provide for contingencies which may hereafter arise, or give abstract opinions.' " (omission in original) (quoting *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960))). Although "guidance" is always useful in the election-law context, the Board's arguments fail to demonstrate why the procedural issues it raises deserve prompt resolution.

The Board also fails to explain how the particular judicial review that petitioners obtained implicates any greater public interest, nor do we believe that it does. Instead, the Board's "public interest" argument is focused on its own interests, to wit: it seeks advice on how to conduct hearings on early voting plans and what resources must be employed in that process. But self-serving contentions based upon a theoretical state of affairs cannot defeat the principle of judicial restraint that sustains our State's mootness doctrine. Simply put, the matter is not one of such "general importance" as to justify application of the public interest exception. *Beason v. N.C. Dep't of Sec'y of State*, 226 N.C. App. 233, 239, 741 S.E.2d 663, 667 (2013) (citation omitted).

III. Conclusion

The 2014 election is over and the superior court's order granted petitioners the relief they sought. As a result, this appeal presents questions that are moot. Despite the Board's arguments to the contrary, there is no reasonable expectation that petitioners will be subjected to the same action again. The issues raised before the superior court, therefore, do

not fall within the capable of repetition, yet evading review exception to the mootness doctrine. In addition, since the Board asserts little more than self-serving interests on appeal, the issues it has presented to this Court are not of such public interest as to except this matter from its otherwise moot nature. Accordingly, we dismiss the Board's appeal.

DISMISSED.

Judge ELMORE concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I agree with the majority that this case is technically moot. The 2014 election is over. However, because I conclude that the issues raised are "capable of repetition, yet evading review," my vote is *not* to dismiss this appeal based on mootness. Accordingly, I respectfully dissent.

I. Background

In August 2014, the State Board of Elections (the "Board") exercised its authority to implement a plan (the "2014 Plan") designating early voting sites in Watauga County for the 2014 general election. N.C. Gen. Stat. § 163-227.2 (2013). The 2014 Plan adopted by the Board included a number of voting sites throughout Watauga County, including one location within one mile of the Appalachian State University ("ASU") campus.

In September 2014, seven county residents filed a "Petition for Judicial Review" in Wake County Superior Court seeking an order to compel the Board to include a voting site *on* ASU's campus.

On 13 October 2014, ten days before early voting began, the superior court held a hearing on the petition and issued an order (the same day), concluding that the Plan – requiring would-be ASU students who wanted to vote early to travel one mile to cast the vote – constituted a "significant infringement of [ASU] student rights to vote and rises to the level of a constitutional violation of the right to vote[.]" Accordingly, the court compelled the Board to provide a site on ASU's campus.

On 16 October 2014, the Board filed its notice of appeal to our Court. However, by the time the record on appeal was settled and the appellate briefs had been filed, the 2014 general election was well over.

II. Discussion

The issues pertaining to the 2014 Plan are technically moot; however, the issues involved are exactly the type which are "capable of repetition, yet evading review[.]" *See Reep v. Beck*, 360 N.C. 34, 40, 619 S.E.2d 497, 501 (2005) (recognizing the "capable of repetition, yet evading review" exception as one of the "longstanding exceptions to the mootness rule"). Accordingly, I conclude that the mootness doctrine does not apply.

The Watauga County Board of Election and the Board, which are statutorily empowered to choose the location of "one stop" early voting sites in Watauga County, are each controlled by the sitting Governor's political party.[1] N.C. Gen. Stat. § 163-227.2(g) (2015). In choosing the sites, these boards are afforded some discretion, so long as the decision is not violative of applicable state or federal laws or of the state and federal constitutions. Whatever decision is made on the site locations, certain voters will be required to travel farther than other voters in order to take advantage of early voting.

In 2012, the Democratic-controlled boards decided to locate an early voting site *on* ASU's campus, requiring voters who lived near ASU to travel to the campus to vote (or to a more remote location). The 2014 Plan adopted by the Republican-controlled boards, however, would have provided a site which was more convenient than the 2012 on-campus site for certain voters but less convenient for ASU students living on campus. To be sure, politics may have played some part in the decisions of both boards, but their decisions are nonetheless permissible *unless* violative of state or federal law or our state or federal constitutions. In the same way, our General Assembly has *some* discretion to consider politics in drawing our congressional and legislative districts, *see Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S. Ct. 1545, 1551, 143 L. Ed.2d 731, 741 (1999), *see also Dickson v. Rucho*, ___ N.C. ___, ___, 781 S.E.2d 404, 437 (2015) (recognizing "partisan advantage" as a "legitimate governmental interest[]"), provided the maps do not violate controlling state or federal laws or our state or federal constitutions.

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1. Control by the Governor's party is not mandated, but occurs in practice. The State Board of Elections is set up to be controlled by the Governor's political party as its five members are appointed by the Governor and the Governor is allowed to have a majority come from his/her own party. N.C. Gen. Stat. § 163-19 (2015). The State Board, in turn, appoints each county board's three members, and is allowed to have a majority (two) of each county board to come from the Governor's political party. N.C. Gen. Stat. § 163-30 (2015).

It is now 2016, and the Republicans are still in control of the Watauga County and State boards of elections. The United States Supreme Court has recognized that cases challenging election practices which may otherwise become moot due to an election being held should be nonetheless decided as the issues involved are likely to recur in subsequent elections. *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 n. 48, 116 S. Ct. 1186, 1214 fb. 48, 134 L. Ed.2d 347, 382 n. 48 (1996). Here, the election practice at issue is likely to recur in the 2016 general election. However, like in the present case, any appeal regarding the 2016 general election would most likely *not* be in a position to be resolved by our state appellate courts until well after the election has been held.

In conclusion, I believe the "election practice" issues are ripe for our consideration despite the fact that the 2014 election is over. There is another election just around the corner, and the Watauga County Board will again be faced with whether their plan must provide a voting site on ASU's campus. Accordingly, I believe we should resolve this issue and not dismiss the appeal merely because the 2014 election is over.[2]

2. Also, even if the issues do not fit the criteria for being capable of repetition, yet evading review, I believe that the matter raised here involves substantial issues of public interest – issues involving the integrity of our election process – and, therefore, we should resolve the issues, notwithstanding the fact that the 2014 election is over. These issues include, for example, the scope of the authority of boards of elections to choose early voting sites, the standing of voters to seek judicial review of a decision by a board of elections regarding the location of early voting sites, and the proper procedure to challenge such decisions made by a board of elections.

IN THE MATTER OF THE ESTATE OF RICHARD DIXON PEACOCK
DATE OF DEATH: 12/19/2013

No. COA15-1238

Filed 21 June 2016

1. Husband and Wife—marriage—without license—valid

In an appeal arising from a motion to determine decedent's heirs, decedent and petitioner were held to have been married, with all of the attendant rights and obligations, where petitioner and decedent married, divorced, reconciled, and were remarried at their request by their ordained Episcopal minister at decedent's deathbed (he died the day after) without a marriage license.

2. Appeal and Error—preservation of issues—issue not addressed at trial—not argued as an alternative basis for supporting order

The issue of whether a spouse who had married without a license had renounced her rights to inherit was not before the Court of Appeals where it was not addressed by the trial court based on its resolution of the preceding issue of whether the marriage was valid. Moreover, the issue was not argued as an alternate basis in law for supporting the order.

Appeal by Bernadine Peacock from order entered by Judge Ebern T. Watson, III in Superior Court, New Hanover County. Heard in the Court of Appeals 11 April 2016.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for Appellee.

Johnson Lambeth & Brown, by Regan H. Rozier, for Appellant.

McGEE, Chief Judge.

I.

Richard Dixon Peacock ("Decedent") and Bernadine Peacock ("Petitioner") were married 1 August 1993. Decedent had two children by a prior marriage, Rachel Peacock Ceci ("Rachel") and Richard Eric Peacock ("Eric"). Decedent and Petitioner had three children: two living at the time of this action, Richard Peacock II ("Richard") and Kristen

Alicia Peacock ("Kristen"); and Jonathan Peacock, deceased and without heirs. Decedent and Petitioner divorced in 2007. The uncontested testimony is that Decedent and Petitioner reconciled, and Petitioner moved back into Decedent's house in July 2012. They attended church "every Sunday with Richard, and established a relationship with their pastor, Reverend Dena Bearl ("Reverend Bearl"). Reverend Bearl first assumed Decedent and Petitioner were married, but they informed her they had divorced and reconciled, and that they intended to re-marry, but "never made a solid date." According to Reverend Bearl, Decedent and Petitioner "just said they wanted to do it, and I said, you know, give me a call and we'll get together and discuss it. And, you know, just he got ill and we – they just – we never had that meeting that they wanted to have."

Decedent had chronic medical issues, and Petitioner cared for him. Decedent became ill on 16 November 2013, and required hospitalization. Decedent was twice transferred from the hospital to a rehabilitation facility before returning to the hospital on 14 December 2013. Decedent and Petitioner discussed marriage while Decedent was hospitalized, and decided to marry while Decedent was still in the hospital. Petitioner asked their friend, Mary Bridges "to be . . . her 'maid of honor' as a witness and [Petitioner's] son, Richard, as a best man [and the second witness]." Reverend Bearl visited Decedent in the hospital about every other day, and she agreed to officiate the wedding ceremony at Decedent's and Petitioner's request. Reverend Bearl testified she had been ordained for twenty-two years, had performed many wedding ceremonies in her capacity as a pastor, and was fully authorized by her church to do so. Reverend Bearl testified she performed the regular ceremony that she performs for weddings, though certain parts were shortened. Reverend Bearl testified both Decedent and Petitioner affirmed: "In the name of God, I take you to be my wife[/husband], to have and to hold from this day forward, for better, for worse, richer or poorer, in sickness, in health, to love and to cherish until death[.]" Reverend Bearl then "pronounce[d] [Decedent and Petitioner] husband and wife[,]" and performed "the blessing of the marriage" which, Reverend Bearl testified, "for us [her church] is very important."

However, because Decedent and Petitioner had not procured a marriage license, Reverend Bearl testified:

> It was my intent to provide what I thought was for Richard in the last days of his life some closure to something that he felt and regretted had not been done. So, it was

> a pastoral act on my part. I knew there wasn't a wedding license. I wasn't in there as a representative of the state, which clergy are, you know, when they're doing marriages and have the license present. So, I mean, we all knew that there was not a wedding, a marriage license. So, this was a pastoral and a sacramental – I would say for me it was mainly a sacramental act, a sacrament that they wanted to know that they had.
>
> Q. When you left the room, did you feel that they were now husband and wife?
>
> A. I felt that they felt that they were, that they had taken the vows seriously.
>
> . . . .
>
> Q. Did you discuss with them whether they – you could legally marry them?
>
> A. I – well, I told them that it would not be a legal marriage if we didn't have a license, and they did not have a license. But I believe the sacrament took place, and that was what was important to them.

Petitioner testified that she did not attempt to obtain a marriage license because Decedent was too ill to travel to the register of deeds, and that "we didn't really think about a marriage license, we just were happy to finally get married."

Decedent died intestate on 19 December 2013, the day following the ceremony. Rachel filed an application for letters of administration on 17 April 2014, in which she listed four known heirs: herself, Eric, Richard and Kristen. Petitioner filed a motion for determination of heirs dated 16 October 2014, contending she was the spouse of Decedent when he died and, therefore, she should be included as an heir of Decedent's estate. This matter was initially heard by an Assistant Clerk of Court of New Hanover County on 11 December 2014. The Assistant Clerk of Court concluded that the 18 December 2013 ceremony did "not make [Petitioner] an 'heir' or entitle [Petitioner] to a spousal allowance or the share of the surviving spouse or any other interest in or from the Decedent's Estate." The Assistant Clerk of Court ruled that Decedent's heirs were Rachel, Eric, Richard, and Kristen.

Petitioner appealed the decision to superior court. Petitioner's appeal was heard on 7 May 2015, and additional testimony was permitted.

The trial court, in an order entered 26 May 2015, made its own findings of fact and conclusions of law, and affirmed the Assistant Clerk of Court's decision. Petitioner appeals.

II.

Appellate review of orders of clerks of court is as follows:

> On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate court. When the order or judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the trial judge on appeal is to apply the whole record test. In doing so, the trial judge reviews the Clerk's findings and may either affirm, reverse, or modify them. If there is evidence to support the findings of the Clerk, the judge must affirm. . . . The standard of review in this Court is the same as in the Superior Court.

In re Estate of Pate, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2-3 (1995) (quotations and citations omitted). "Errors of law are reviewed *de novo*." *Overton v. Camden Cty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002) (citation omitted). Though Petitioner argues that certain findings of fact were not supported by the evidence, we have thoroughly reviewed the findings of fact and hold that the relevant findings of fact are supported by the evidence. We therefore review the relevant conclusions of law, and the trial court's ruling, *de novo* for errors of law. *Id.*

III.

[1] Petitioner argues that the "[trial] court's judgment is inconsistent with the applicable law." We agree.

The rulings of the Assistant Clerk of Court and the trial court are based upon conclusions that the ceremony conducted on 18 December 2013 did not result in a valid marriage. The "Requisites of marriage" are set forth, in relevant part, in N.C. Gen. Stat. § 51-1 as follows:

> A valid and sufficient marriage is created by the consent of a male and female person[1] who may lawfully marry,

1. This provision limiting the definition of a valid marriage to exclude same-sex couples has been held violative of the United States Constitution. *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695, 698 (M.D.N.C. 2014), *appeal dismissed*, (4th Cir. 2015).

> presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, either:
>
> (1) a. In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate; and
>
> b. With the consequent declaration by the minister or magistrate that the persons are husband and wife[.]

N.C. Gen. Stat. § 51-1 (2015). In the present case, it is undisputed that Decedent and Petitioner were able to lawfully marry at the time of the ceremony; that they seriously and freely expressed their desire to become husband and wife in the presence of each other; that Reverend Bearl was an ordained minister with authority to conduct marriage ceremonies; and that Reverend Bearl declared during the ceremony that Decedent and Petitioner were husband and wife.

However, it is also undisputed that the ceremony was conducted without a marriage license as required by N.C. Gen. Stat. § 51-6, which states:

> No minister, officer, or any other person authorized to solemnize a marriage under the laws of this State shall perform a ceremony of marriage between a man and woman, or shall declare them to be husband and wife, until there is delivered to that person a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage license was issued or by a lawful deputy or assistant.

N.C. Gen. Stat. § 51-6 (2015). Violation of N.C. Gen. Stat. § 51-6 by a minister or other authorized person is a misdemeanor, and is punishable by a fine:

> Every minister, officer, or any other person authorized to solemnize a marriage under the laws of this State, who marries any couple without a license being first delivered to that person, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within 10 days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two

> hundred dollars ($200.00) to any person who sues therefore, and shall also be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 51-7 (2015).

Our Supreme Court has discussed the consequences of violating the license requirement in N.C. Gen. Stat. § 51-6:

> C.S., 2498,[2] emphasizes the requirement that the license must be first delivered to the officer before the solemnization of the marriage:
>
> > "No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, *until* there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy."
>
> It is true that the marriage is not invalid because solemnized without a marriage license; *Maggett v. Roberts*, 112 N.C. 71, 16 S. E. 919; *State v. Parker*, 106 N.C. 711, 11 S.E. 517; *State v. Robbins*, 28 N.C. 23, [44 Am. Dec. 64], —or under an illegal license; *Maggett v. Roberts*, *supra* — but it is clear that both these sections of the statute require that the license shall be first delivered to the officer before the marriage is solemnized, else under the latter statute he is liable to the penalty sued for in this action.

Wooley v. Bruton, 184 N.C. 438, 440, 114 S.E. 628, 629 (1922). *Wooley* states the principal, well-established in North Carolina jurisprudence, that though violation of N.C. Gen. Stat. § 51-6 might subject a person who officiates a wedding ceremony without first receiving a marriage license to prosecution, the lack of a valid license will not invalidate that ceremony, or the resulting marriage. *Wooley*, 184 N.C. at 440, 114 S.E. at 629; *see also Sawyer v. Slack*, 196 N.C. 697, 700, 146 S.E. 864, 865 (1929) (citation omitted) ("It has, however, been uniformly held by this Court that a marriage, without a license as required by statute, is valid."); *Maggett v. Roberts*, 112 N.C. 71, 74, 16 S.E. 919, 920 (1893) (citations omitted) ("The marriage under an invalid license, or with no license, as has been repeatedly held, would be good, if valid in other respects. The

2. C.S. § 2498 was the precursor to N.C. Gen. Stat. § 51-6.

only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of $200, prescribed by The Code[.]"); *State v. Robbins*, 28 N.C. 23, 25 (1845) ("The law of this State . . . authorizes and empowers the clerks of the several county courts to grant marriage licenses, upon the applicant's giving bond and security agreeably to its provisions; but if a marriage is solemnized by a minister of the gospel or a magistrate, without a license, though he may subject himself to a penalty, the marriage is, notwithstanding, good to every intent and purpose.").

Therefore, in order to show a valid marriage,

> [N.C. Gen. Stat. § 51-1] require[s] the parties to "express their solemn intent to marry in the presence of (1) an ordained minister of any religious denomination, or (2) a minister authorized by his church or (3) a magistrate."
>
> Our Supreme Court has stated: "[u]pon proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage." The burden of proof rests upon plaintiff to prove by the greater weight of the evidence grounds to void or annul the marriage to overcome the presumption of a valid marriage.

Pickard v. Pickard, 176 N.C. App. 193, 196, 625 S.E.2d 869, 872 (2006) (citations omitted). A marriage performed in full accordance with N.C. Gen. Stat. § 51-1, but lacking the license required by N.C. Gen. Stat. § 51-6, is valid, and neither void nor voidable. *Sawyer*, 196 N.C. at 700, 146 S.E. at 865. This Court must follow the law as written, and follow the precedents set by prior decisions. It is the sole province of the General Assembly to amend the laws to make a marriage license a pre-requisite to a valid marriage.

In the present case, the trial court made the following relevant findings of fact:

> 13. On or about December 18, 2013, . . . Reverend Dena Bearl, Rector of St. Paul's Episcopal Church in Wilmington, North Carolina, conducted a ceremony at the hospital involving Decedent and [Petitioner]. Reverend Bearl performed the "Celebration and Blessing of a Marriage" . . . from the Episcopal Book of Common Prayer, which is used in the Episcopal Church to perform marriage ceremonies. However, Reverend Bearl considered this a "religious wedding," and did not intend for this ceremony to be a "legal wedding."

> 14. Reverend Bearl informed the Decedent and [Petitioner] at the time of the December 18, 2013 ceremony that a marriage license was required for a legal marriage and that the ceremony she was performing did not constitute a legal marriage.
>
> . . . .
>
> 21. "[Petitioner] intended to participate in the December 18, 2013 ceremony without a marriage license, despite knowing that she needed a marriage license to be married to the Decedent."

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

> 1. There is insufficient evidence to show that the Petitioner and Decedent attempted to comply, intended to comply, or were unable to comply with North Carolina law requiring a marriage license for a valid, legal marriage.
>
> 2. The ceremony performed by Reverend Bearl at the hospital on December 18, 2013, with the Decedent and [Petitioner] was a religious ceremony and not a legal marriage.
>
> 3. The heirs of Decedent . . . are Rachel Peacock Ceci, Richard Eric Peacock, Richard Dixon Peacock, II, and Kristen Alicia Peacock.

Petitioner argues that our Supreme Court's opinion in *Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012), supports the rulings of the Assistant Clerk of Court and the trial court in this matter. We disagree. In *Mussa*, the defendant ("the wife") was married in November 1997 to the plaintiff ("the husband"). *Id.* at 185, 731 S.E.2d at 405. The husband sought to have the marriage annulled, arguing that the wife had been married earlier to another man ("Braswell"), who was still living, and that the wife and Braswell had never divorced. *Id.* at 186-87, 731 S.E.2d at 406. The person who officiated the Islamic marriage ceremony was a friend of Braswell's named Kareem, about whom little was known. *Id.* at 187-88, 731 S.E.2d at 406. Kareem could not be located, and there was no evidence that he was a person authorized to conduct marriage ceremonies pursuant to N.C. Gen. Stat. § 51-1. *Id.* at 189, 731 S.E.2d at 407. The husband argued that his marriage to the wife was bigamous and therefore void. *Id.* at 186-87, 719 S.E.2d at 406. The trial court in *Mussa* found, and our Supreme Court noted, that no marriage license had been obtained for the ceremony performed by Kareem "because they only

intended to establish a religious union." *Id.* at 187, 719 S.E.2d at 406. Our Supreme Court held the following:

> As the attacking party, [the husband] then had the burden to demonstrate that his marriage to defendant was bigamous. But based upon the evidence presented at trial, the district court concluded that [the wife] and Braswell never were married because Kareem was not authorized to perform marriage ceremonies pursuant to the version of section 51–1 that was in effect in 1997. As we have stated previously, the prior version of section 51–1 required parties participating in a marriage ceremony to "express their solemn intent to marry in the presence of (1) 'an ordained minister of any religious denomination,' or (2) a 'minister authorized by his church' or (3) a 'magistrate.' "
>
> The district court made several uncontested findings of fact regarding Kareem's qualifications to conduct marriages. Most notably, the court found that "[t]here was insufficient evidence presented for [it] to find that Kareem had the status of either 'an ordained minister' or a 'minister authorized by his church' . . . . There was no evidence presented that Kareem was a magistrate." The court also found that "[t]here was no evidence presented about Kareem's authorization or qualification to perform the ceremony." These uncontested findings are binding, but we also observe that according to [the wife's] testimony, Kareem was an out-of-state friend of Braswell's whose primary occupation was construction – he was not an imam. Additionally, in finding of fact fifteen, the court noted that [the wife] and Braswell did not "obtain[ ] a marriage license prior to the ceremony." Based upon these findings, the court concluded that: "Because no marriage license was obtained by or issued to Defendant and Khalil Braswell, and there is insufficient evidence that the marriage ceremony met the requirements for a valid marriage, the Court cannot find that Defendant married Mr. Braswell as contemplated by the statute." The district court also concluded that plaintiff "failed to meet his burden in establishing that his marriage was bigamous" because he had not shown that [the wife] "was previously legally married."
>
> In sum, *we are bound by the district court's uncontested finding that Kareem was not authorized to perform*

> *marriage ceremonies in North Carolina. From this finding* it follows that [the husband] failed to show that his marriage to [the wife] was bigamous because he could not demonstrate that [the wife] married Braswell during a marriage ceremony that met the requirements of section 51–1.

Id. at 194, 731 S.E.2d at 410-11 (citations omitted) (emphasis added). Though our Supreme Court mentions the finding of fact by the trial court that no marriage license was procured for the ceremony conducted by Kareem, it bases its holding that the husband had failed to prove the earlier marriage was valid on the husband's failure to demonstrate that the ceremony had complied with the requirements of N.C. Gen. Stat. § 51-1 – specifically that the husband could not prove that Kareem was a person authorized to perform a marriage ceremony. *Id.* N.C. Gen. Stat. § 51-6 is not mentioned in this holding, and there is nothing in *Mussa* indicating that our Supreme Court has overruled *Wooley*, S*awyer*, *Robbins*, or other opinions which hold that the absence of a valid marriage license will not invalidate a marriage performed in accordance with the requirements of N.C. Gen. Stat. § 51-1. Further, there is nothing in *Mussa* indicating that our Supreme Court was concerned that the ceremony had "only [been] intended to establish a religious union." *Id.* at 187, 719 S.E.2d at 406. The holding in *Mussa* is based on the husband's failure to prove that Kareem was a person authorized to conduct a marriage ceremony pursuant to N.C. Gen. Stat. § 51-1.

As we have held above, the fact that the ceremony in the present case was conducted without a license could not serve to invalidate an otherwise properly performed ceremony and resulting marriage. There is no dispute that the ceremony was conducted in the presence of a minister authorized to perform marriages, and that that minister, Reverend Bearl, declared that Decedent and Petitioner were husband and wife. *See* N.C. Gen. Stat. § 51-1(1). There is no dispute that Decedent and Petitioner could lawfully marry at the time the ceremony was conducted, and that they stated at the ceremony that they would take each other as "husband and wife freely, seriously and plainly expressed by each in the presence of the other[.]" N.C. Gen. Stat. § 51-1. The only remaining question is whether Decedent and Petitioner "consented" to take each other as "husband and wife," as contemplated by N.C. Gen. Stat. § 51-1. Stated differently, if Decedent and Petitioner believed the ceremony to have been a religious ceremony only, and not a legal ceremony, could they be found to have "consented" as required by N.C. Gen. Stat. § 51-1.

We note, based upon a plain reading of N.C. Gen. Stat. § 51-1, that the intent of the person performing the ceremony is not a relevant factor in determining whether a valid marriage has resulted. Therefore, Reverend Bearl's intent to perform a "religious ceremony" but not a "legal ceremony" does not affect the outcome in the present case. Further, there is nothing in N.C. Gen. Stat. § 51-1 requiring that a valid marriage ceremony is contingent upon the persons being married understanding or agreeing with all the legal consequences of that marriage. They must only be free to "lawfully marry," and "consent . . . presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other[.]" *Id.* It is uncontested that Decedent and Petitioner reconciled after their divorce, that Petitioner moved back in with Decedent, that they functioned as a family with Richard, and that they both discussed their desire to remarry with Reverend Bearl. Simply put, there was no evidence presented that the ceremony conducted by Reverend Bearl on 18 December 2013 failed to comply with N.C. Gen. Stat. § 51-1. Because the 18 December 2013 ceremony complied with N.C. Gen. Stat. § 51-1, and because our Supreme Court has repeatedly held that a marriage license is not a prerequisite to a valid marriage, we hold that Decedent and Petitioner were married on 18 December 2013. This marriage included all the attendant rights and obligations.

IV.

[2] As Kristen notes in the fact section of her brief, Petitioner testified at trial that she would renounce her rights to inherit from Decedent's estate. Kristen's trial attorney requested that the trial court rule that Petitioner had renounced her rights to inherit in the event the trial court decided that the ceremony resulted in a valid marriage. Because the trial court ruled there was no valid marriage, it did not address the issue of renunciation. Although Kristen, in her brief, notes Petitioner's testimony, Kristen does not argue in her brief that Petitioner's alleged renunciation constituted "an alternate basis in law for supporting the order[.]" N.C.R. App. P. Rule 10(c). This issue is therefore not before us. *See City of Asheville v. State*, __ N.C. App. __, __, 777 S.E.2d 92, 102-03, (2015), *review allowed*, *writ allowed*, __ N.C. __, 781 S.E.2d 476 (2016); *Maldjian v. Bloomquist*, __ N.C. App. __, __, 782 S.E.2d 80, 85 (2016).

We reverse the trial court's order affirming the decision of the Assistant Clerk of Court, and remand to the trial court for remand to the New Hanover County Clerk of Superior Court with instruction to acknowledge the validity of the 18 December 2013 marriage of Decedent and Petitioner, and take further action regarding Decedent's

estate consistent with Petitioner's status as Decedent's spouse at the time of his death.

REVERSED AND REMANDED.

Judges STEPHENS and DAVIS concur.

IN THE MATTER OF THE ESTATE OF CATHLEEN BASS SKINNER

No. COA15-384

Filed 21 June 2016

Trusts—Special Needs Trust—purchase of home and furnishings by trustee

On appeal from an order removing respondent (Mr. Skinner) as Trustee of the Cathleen Bass Skinner Special Needs Trust and as Guardian of Estate of Cathleen Bass Skinner, the Court of Appeals reversed the order based on several errors of law. The order was erroneous where it concluded the following: that the Trust's purpose was to save money for Mrs. Skinner's future medical needs; that the Trust prohibited the use of assets for prepaid burial insurance; that the purchase of a house, furniture, and appliances violated the provisions of the Trust; that such purchases were wasteful and imprudent; that such purchases were not for Mrs. Skinner's "sole benefit"; and that Mr. Skinner engaged in a serious breach of trust by using Trust assets to pay for attorney's fees incurred for guardianship proceedings occurring prior to establishment of the Trust.

Judge BRYANT dissenting.

Appeal by respondent from order entered 22 October 2014 by Judge Donald Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 January 2016.

Ward and Smith, P.A., by Jenna Fruechtenicht Butler and Michael J. Parrish, for petitioner-appellees.

Braswell Law, PLLC, by Ira Braswell, IV, for respondents-appellant.

ZACHARY, Judge.

Respondent Mark Skinner ("Mr. Skinner") appeals from the trial court's order affirming an order entered by Wake County Assistant Clerk of Court Bill Burlington ("assistant clerk of court") removing Mr. Skinner as Trustee of the Cathleen Bass Skinner Special Needs Trust and as Guardian of the Estate (GOE) of Cathleen Bass Skinner. On appeal, Mr. Skinner argues that the order of the assistant clerk of court contains findings that are not supported by the evidence and certain conclusions that are legally erroneous. For the reasons discussed below, we agree.

I. Background

Cathleen Bass Skinner (Mrs. Skinner) suffers from cognitive and physical difficulties. On 13 April 2010, the assistant clerk of court adjudicated Mrs. Skinner to be "incompetent to a limited extent" and appointed "Wake County Human Services" as Mrs. Skinner's guardian. The order provided that Mr. Skinner could apply to become Mrs. Skinner's guardian in six months. Mrs. Skinner submitted a handwritten appeal from the clerk's order, asking that Mr. Skinner be appointed as her guardian. On 3 August 2010, Mrs. Skinner and Mr. Skinner were married, and on 4 August 2010, Mr. Skinner filed a motion to modify the guardianship order and appoint him as Mrs. Skinner's guardian. The parties to the motion included Mrs. Skinner, Mr. Skinner, Mrs. Skinner's Guardian ad Litem, Mary Easterling, Kathy Shelton,[1] and Wake County Human Services. On 20 January 2011, the assistant clerk of court entered a consent order appointing Mr. Skinner as the guardian of the person of Mrs. Skinner. On 27 August 2012, Mrs. Skinner's mother died, and on 23 August 2013, two of Mrs. Skinner's siblings filed a petition asking the assistant clerk of court to appoint Mrs. Skinner's sister Nancy Bass Clark (Mrs. Clark) as GOE for Mrs. Skinner.

The court appointed Kimberly Richards as temporary GAL for Mrs. Skinner, and Ms. Richards reviewed the files in this case and interviewed Mr. Skinner, Mrs. Skinner, and Mrs. Skinner's family members. Mrs. Skinner informed Ms. Richards that she wanted Mr. Skinner appointed as her GOE, while Mrs. Skinner's siblings preferred that Mrs. Clark be appointed. In her report to the assistant clerk of court, Ms. Richards stated that:

> By all accounts, Mark Skinner has taken care of Cathy Bass Skinner for the past two years and her family has not been

1. The record indicates that Mary Easterling and Kathy Shelton had each petitioned to be appointed as Mrs. Skinner's guardian, and that Mary Easterling was a "family friend." Both Easterling and Shelton consented to Mr. Skinner serving as Mrs. Skinner's guardian and agreed to withdraw their petitions for guardianship.

> actively involved in her life. It appeared to me that Mark and Cathy care for each other and are actively involved in each other's lives. A family friend, Mary Easterling, reports that the couple is loving and happy.

On 9 October 2013, Mr. Skinner was appointed as the GOE of Mrs. Skinner, and on 5 December 2013, Mr. Skinner was bonded for $250,000. The GOE order, which found that Mrs. Skinner's inheritance was expected to be between $200,000 and $250,000, required that Mr. Skinner set up a Special Needs Trust for Mrs. Skinner. Accordingly, the Cathleen Bass Skinner Special Needs Trust was established and executed on 18 March 2014, and provided that Mr. Skinner would act as Trustee. On 25 March 2014, the assistant clerk of court entered an order approving the Trust and finding that the parties were "in agreement with the provisions of the Cathleen Bass Skinner Special Needs Trust," which included having Mr. Skinner serve as the Trustee of the Trust. The Trust was funded on 10 June 2014 with an initial distribution from the estate of $170,086.67. Shortly thereafter, Mr. Skinner used Trust assets to purchase a house where he and Mrs. Skinner live together, as well as some furniture and appliances.

On 28 July 2014, two of Mrs. Skinner's siblings filed a petition to remove Mr. Skinner as Trustee, on the grounds that Mr. Skinner had not complied with the Trust's requirement that Mr. Skinner provide Mrs. Clark with monthly bank statements. A hearing was conducted on 18 August 2014, at which the parties agreed that additional issues could be raised. On 27 August 2014, the assistant clerk of court entered an order removing Mr. Skinner both as GOE and as Trustee of the Cathleen Bass Skinner Special Needs Trust and replacing him with Mrs. Clark. Mr. Skinner appealed to the superior court of Wake County, and on 22 October 2014, the trial court entered a summary order affirming the assistant clerk of court's order. Mr. Skinner has appealed to this Court from the trial court's order.

II. Standard of Review

The assistant clerk of court removed Mr. Skinner as both GOE and as Trustee. N.C. Gen. Stat. § 35A-1290(a) (2015) gives the clerk of court the authority "to remove any guardian . . . to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents." Under N.C. Gen. Stat. § 35A-1290(b) (2015), it "is the clerk's duty to remove a guardian" if the guardian "wastes the ward's money or estate

or converts it to his own use," "mismanages the ward's estate," or "has violated a fiduciary duty through default or misconduct."

Regarding the clerk's authority to remove a trustee, N.C. Gen. Stat. § 36C-7-706(b) (2015) provides in relevant part that the clerk "may remove a trustee" if "(1) The trustee has committed a serious breach of trust" or "(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries[.]"

N.C. Gen. Stat. § 1-301.3 (2015) provides that a party aggrieved by an order of the clerk arising from the administration of trusts and estates may appeal to superior court, and that upon appeal:

> [T]he judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following: (1) Whether the findings of fact are supported by the evidence, (2) Whether the conclusions of law are supported by the findings of facts, [and] (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

Upon Mr. Skinner's appeal from the trial court's order affirming the order entered by the assistant clerk of court, this Court is called upon to review a non-jury proceeding. As a general rule:

> The standard of review of a judgment rendered following a bench trial is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." "Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*."

Gilbert v. Guilford County, __ N.C. App. __, __, 767 S.E.2d 93, 95 (2014) (quoting *Hanson v. Legasus of N.C., LLC*, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010)). "If the court's findings of fact are supported by competent evidence, they are conclusive on appeal, even if there is contrary evidence." *Collins v. Collins*, __ N.C. App. __, __, 778 S.E.2d 854, 856 (2015) (citation omitted).

If the assistant clerk of court's findings are supported by the evidence and its conclusions of law are supported by the findings, then the clerk's decision on the appropriate action to take is reviewed for abuse of discretion.

> As the removal of a trustee is left to the discretion of the clerks of superior court . . . our review is limited to determining whether the trial court abused its discretion. Under this standard, we accord "great deference" to the trial court, and its ruling may be reversed only upon a showing that its action was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision."

In re Estate of Newton, 173 N.C. App. 530, 539, 619 S.E.2d 571, 576 (2005) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). In determining whether there was an abuse of discretion, "[w]e may not substitute our own judgment for that of the trial court." *Kinlaw v. Harris*, 364 N.C. 528, 533, 702 S.E.2d 294, 297 (2010) (citing *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982)). Further, "[i]t is axiomatic that it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Don't Do It Empire, LLC v. Tenntex*, __ N.C. App. __, __, 782 S.E.2d 903, __ (2016) (internal quotation omitted). Therefore, in our review of the order entered by the assistant clerk of court, we are neither "reweighing the evidence" nor "disregarding the deferential standard of review." Nor do we express any opinion on the merits of the clerk's determination that Mr. Skinner was no longer the best person to serve as GOE and as trustee, or on the clerk's assessment of the credibility and weight of evidence or his resolution of evidentiary inconsistencies.

However, "an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Koon v. United States*, 518 U.S. 81, 100, 2047, 135 L. Ed. 2d 392 (1996). "[F]indings made under a misapprehension of law are not binding," and "[w]hen faced with such findings, the appellate court should remand the action for consideration of the evidence in its true legal light." *Allen v. Rouse Toyota Jeep, Inc.*, 100 N.C. App. 737, 740, 398 S.E.2d 64, 65 (1990) (citing *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E.2d 819 (1978) (other citation omitted). " 'While this Court is bound by the findings of fact made by the [trial court] if supported by evidence, it is not bound by that court's conclusions of law based on the facts found.' Accordingly, we review the trial court's conclusions of law *de novo*." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) (quoting *State v. Wheeler*, 249 N.C. 187, 192, 105 S.E.2d 615, 620 (1958)). In sum, we review for abuse of discretion only those of the clerk's decisions that are based upon properly supported findings and legally correct conclusions:

> In the event that the result reached with respect to a particular issue is committed to the sound discretion of the trial court, appellate review is limited to determining whether the trial court abused that discretion. "A [trial] court by definition abuses its discretion when it makes an error of law." As a result . . . the extent to which the trial court exercised its discretion on the basis of an incorrect understanding of the applicable law raises an issue of law subject to *de novo* review on appeal.

In re A.F., 231 N.C. App. 348, 352, 752 S.E.2d 245, 248 (2013) (quoting *Koon*, 518 U.S. at 100, 135 L. Ed. 2d at 414, and citing *Rhodes*, 366 N.C. at 536, 743 S.E.2d at 39, and *Falk Integrated Technologies, Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999)).

In this case, although Mrs. Skinner's siblings filed the petition to remove Mr. Skinner as GOE and as Trustee, they did not present any witnesses at the hearing. Instead, Mr. Skinner was the only witness who testified at the hearing, and accordingly Mr. Skinner's testimony was uncontradicted by any other witness. The assistant clerk of court was free to evaluate the credibility and weight of this evidence. In addition, the assistant clerk of court properly considered the extent, if any, to which Mr. Skinner's testimony was contradicted by the documentary evidence, such as the GOE order and the Trust instrument. However, the clerk's findings of fact necessarily had to be based on his assessment of the competent evidence. "[I]t is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996).

III. U.S.C. § 1396p(d)(4)(A) Trust—Introduction

The term "special needs trust" (SNT) refers generally to a trust created for the benefit of a disabled person in accordance with governmental and statutory regulations so that the disabled person maintains his or her eligibility for government benefits. There are several types of SNTs, each with different specific statutory and regulatory requirements in order to be effective.

The Cathleen Bass Skinner Special Needs Trust is a self-settled, sole benefit trust, established pursuant to 42 U.S.C. § 1396p(d)(4)(A) for the purpose of allowing Mrs. Skinner to enhance the quality of her life without jeopardizing her eligibility for Medicaid and Social Security (SSI) benefits. To be eligible for Medicaid and Social Security disability benefits, an individual's financial resources must be below a specified amount. U.S.C. § 1396p(d)(4)(A) states that the assets in a trust will not

count toward an applicant's available resources, provided that the trust has the following characteristics:

> (A) A trust containing the assets of an individual under age 65 who is disabled . . . and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under [42 U.S.C. § 1396 *et. seq.*].

Thus, a U.S.C. § 1396p(d)(4)(A) trust has three requirements:

> 1. It is established for the benefit of a beneficiary who is under 65 years old and is disabled.
>
> 2. The trust, despite the label "self-settled," must be established for the benefit of the beneficiary with the assets of the beneficiary by a third party such as the beneficiary's parent, a court, etc.
>
> 3. The trust must include a "payback" provision stating that upon the death of the beneficiary or the early termination of the trust the state will be reimbursed for the beneficiary's Medicaid expenditures before any other distribution may be made. Because a U.S.C. § 1396p(d)(4)(A) trust has a payback provision, it is not required to be administered in an "actuarially sound" manner whereby the entire trust is distributed during the beneficiary's lifetime.

In this case, there is no dispute that the Cathleen Bass Skinner Special Needs Trust meets the requirements set out in U.S.C. § 1396p(d)(4)(A).

IV. Purpose of U.S.C. § 1396p(d)(4)(A) trust

In Finding No. 10 of his order, the assistant clerk of court stated that the GOE order had directed establishment of a special needs trust "in order to preserve those assets for [Mrs. Skinner's] long term health needs." This is an error of fact and law.

First, the GOE order does not state that the purpose of the Trust is to provide for Mrs. Skinner's future medical needs. Thus, this finding is not supported by the evidence. In addition, because a special needs trust established under U.S.C. § 1396p(d)(4)(A) is, by definition, for the benefit of a person who is disabled and is receiving Medicaid benefits,

its purpose is not to save money for the person's future medical needs; rather, this type of trust is "intended to provide disabled individuals with necessities and comforts not covered by Medicaid" while maintaining Medicaid eligibility. *Lewis v. Alexander*, 685 F.3d 325, 331 (3rd Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 933, 184 L. Ed. 2d 724 (2013). Accordingly, § 2.03 of the Cathleen Bass Skinner Special Needs Trust bars the Trustee from using trust funds for "any property, services, benefits, or medical care otherwise available from any local, state, or federal governmental source[.]"

The Cathleen Bass Skinner Special Needs Trust, as a U.S.C. § 1396p(d)(4)(A) trust, states the following regarding its purpose:

> This Irrevocable Trust is to enable [the] Beneficiary to qualify for (i) the Supplemental Security Income ("SSI") Program; (ii) medical assistance under the Medicaid program as provided for by Section 1396p(d)(4)(A) of Title 42 of the United States Code . . . or (iii) any other governmental program.

In addition, § 1.04, Statement of Grantor's Intent, states that:

> Grantor is creating this trust as a Means by which trust assets may be held for the sole benefit of . . . [Mrs. Skinner] on the terms and conditions set forth in this instrument.
>
> It is Grantor's intent to create a Special Needs Trust that conforms to North Carolina law.
>
> This trust is created expressly for [the] Beneficiary's supplemental care, maintenance, support, and education, in addition to the benefits Beneficiary otherwise receives or may receive from . . . any local, state or federal government, or from any private agency . . . or from any private insurance Carriers covering Beneficiary.
>
> It is Grantor's intent that the funding and administration of this trust will not subject Beneficiary to a period of ineligibility under Medicaid law pursuant to U.S.C. § 1396p(d)(4)(A) and North Carolina law. . . .

Clearly the subject assets were not intended to be used for Mrs. Skinner's future medical needs, and in ruling otherwise, the assistant clerk of court made an error of law.

V. Mr. Skinner's Duty to Provide Bank Statements

Two of Mrs. Skinner's siblings alleged that Mr. Skinner had failed to comply with the Trust's accounting requirement. § 5.04 of the Cathleen Bass Skinner Special Needs Trust provides that:

> The Trustee shall cause monthly statements reflecting the current balance of the Trust's assets and all receipts, disbursements, and distributions made within the reporting period to be mailed to Beneficiary, Nancy Bass Clark (or to any successor appointed by Nancy Bass Clark), and to the Beneficiary's legal representative. . . .
>
> . . .
>
> Failure to provide reports, statements or returns within seven (7) days after the date such report, statement or return was due or became available shall result in the disqualification of the Trustee. . . .

The petition for Mr. Skinner's removal as Trustee alleged, not that Mr. Skinner had failed to provide bank statements, but that a recent bank statement indicated that Mr. Skinner had "us[ed] a debit transaction in order to obtain cash - thus hiding the purpose and entity to which Trust funds are being transferred." At the hearing, Mr. Skinner testified that when the Trust was first established he had no printed checks and therefore used cashier's checks to pay for several expenditures. The bank statement did not show the payee of the cashier's checks, so Mr. Skinner later provided Mrs. Clark with this information. Thus, it was undisputed that Mr. Skinner did send bank statements, but that he had used several cashier's checks that did not reveal the purpose for which the money was spent.

This evidence does not appear to establish that, as a matter of law, Mr. Skinner breached the trust's accounting requirement. However, we need not resolve this issue, given that the assistant clerk of court's order does not mention Mr. Skinner's compliance or lack of compliance with the accounting requirement. Had the assistant clerk of court found that Mr. Skinner breached the Trust's provision requiring accounting, we could review the clerk's findings and conclusions on this issue. However, the clerk made no such findings or conclusions and it is axiomatic that "[a]n appellate court does not weigh the evidence in order to make new findings[.]" *Timmons v. North Carolina DOT*, 351 N.C. 177, 182, 522 S.E.2d 62, 65 (1999).

VI. Prepaid Burial Insurance

In Finding No. 24 of his order, the assistant clerk of court states that the "trust specifically states that funeral expenses are not permitted to be paid from the Trust prior to reimbursement to North Carolina (or any other state) for medical expenses." This finding is factually inaccurate. On the basis of this finding, the assistant clerk of court concludes in Conclusion of Law No. 4 that "Mr. Skinner's payment of $3,644.00 to Columbus Life for prepaid funeral expenses also is in contradiction to the terms of the Trust and in violation of his fiduciary duties as Trustee." This conclusion of law is in error.

A trust established under U.S.C. § 1396p(d)(4)(A), such as the Cathleen Bass Skinner Special Needs Trust, must provide for reimbursement of Medicaid payments upon the death of the beneficiary or early termination of the trust. Accordingly, Article Four of the Trust, "Administration of the Cathleen Bass Skinner Special Needs Trust upon Beneficiary's Death," provides in relevant part that:

> Upon Beneficiary's death, the Trustee shall notify the appropriate state agency of Beneficiary's death and must promptly obtain an accounting from the states (or local Medicaid agencies of the states) that have made Medicaid payments on Beneficiary's behalf during her lifetime.
>
> Upon receipt of such accounting, the Trustee will distribute all of the trust property as follows:
>
> (i) first, the Trustee must reimburse the state as provided in Section 4.01, entitled "Reimbursement to State," below;
>
> (ii) second, the Trustee may pay the expenses specified in Section 4.02, entitled "Payment of Expenses and Taxes," below[.] (emphasis added).

Section 4.01 requires the Trustee to repay to state or local Medicaid agencies "the lesser of" either the total amount of Medicaid benefits paid on Beneficiary's behalf during her lifetime, or "the entire balance of the Trust Estate." Section 4.02 states that upon "full reimbursement" to state and local Medicaid agencies, any funds remaining in the trust may be used for specified purposes, including "Beneficiary's funeral expenses." These "payback" provisions, which are required for a trust to comply with U.S.C. § 1396p(d)(4)(A), establish that upon termination of the trust, Medicaid is to be repaid first, even if this requires depletion of the entire trust.

The requirement that, upon termination of the trust, the State must be reimbursed before any other distribution may be made is restated in Article Three, which addresses termination of the trust prior to the beneficiary's death. Section 3.04 of this article requires that, in the event of early termination of the Trust, "[t]he following expenses and payments are examples of some of the types [of payments] not permitted prior to reimbursement to North Carolina (or any other state) for medical assistance . . . (iv) funeral expenses[.]" This section simply means that the order of payments upon termination is the same for both termination upon death of the beneficiary and for early termination.

These provisions serve the express purpose of ensuring that, upon termination of the Trust, Medicaid agencies are reimbursed before any other expenses, including funeral expenses, may be met with Trust funds. However, the provisions dealing with the order of repayment upon termination of the Trust do not govern the allowable expenditures during the Beneficiary's lifetime. The Trust does not bar the use of Trust funds to purchase a prepaid burial insurance policy. The assistant clerk of court's order cites no legal authority for the proposition that SNT funds cannot be used to purchase prepaid burial insurance. In fact, the expenditure was approved by the Medicaid provider prior to being purchased. The clerk made an error of law by failing to distinguish between the use of Trust funds for funeral expenses after termination of the Trust and use of Trust funds for purchase of prepaid funeral or burial insurance during the Beneficiary's lifetime.

VII. Purchase of House, Appliances, and Furniture

A. Introduction

In the order removing Mr. Skinner as trustee, the assistant clerk of court made several findings relevant to the use of Trust assets to purchase a home in which Mrs. Skinner and Mr. Skinner were living at the time of the hearing:

> 21. Mr. Skinner also used the Trust assets to purchase a house (Wake Co. Deed Book 014713, Page 01402-06), new furniture, [and] new appliances[.]
>
> 22. Mr. Skinner resides with [Mrs. Skinner] in the house purchased by the Trust and he benefits from the Trust purchases and expenditures relating to the house.
>
> 23. The terms of the Trust require that the Trust assets be used for [Mrs. Skinner's] sole benefit.

The assistant clerk of court reached the following conclusions of law that appear to be related to Mr. Skinner's use of Trust funds to purchase a house, furniture, and appliances for Mrs. Skinner:

> 5. A Trustee is required, among other things, to administer a trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust in the exercise of reasonable care, skill, and caution.
>
> 6. Mr. Skinner has demonstrated that he lacks appropriate judgment and prudence.
>
> 7. Mr. Skinner is in breach of his fiduciary duties pursuant to the terms of the Trust, the terms of the GOE Order, and applicable law.
>
> 8. Mr. Skinner has wasted the Trust assets, mismanaged the Trust assets, and converted the Trust's assets to his own use. [(the conclusion regarding conversion arises from Mr. Skinner's use of trust funds to pay certain attorneys' fees, as discussed below)].

The assistant clerk of court's rulings reflect the clerk's conclusions that (1) the terms of the Trust did not permit the Trustee to use Trust assets for the purpose of a house, furniture, or appliances; (2) the purchase of a house and furniture with Trust assets constituted waste and mismanagement of Trust assets; and (3) the fact that Mr. Skinner lived with Mrs. Skinner and presumably used the appliances and furniture was, as a matter of law, a violation of the requirement that the Trust be administered for the "sole benefit" of Mrs. Skinner. The first and third conclusions are errors of law, and the second is unsupported by any record evidence.

B. The Trust Permits the Purchase of a House, Furniture, and Appliances with Trust Assets

On appeal, Mr. Skinner argues that he did not violate the terms of the Trust or violate his fiduciary duty as a Trustee by using assets of the Trust to purchase a house, furniture, and appliances for the beneficiary. We agree.

The distribution of Trust funds is addressed in Article Two of the Trust, which states that:

> The Trustee will hold, manage, invest and reinvest the Trust Estate, and will pay or apply the income and principal of the Trust Estate in the following manner:
>
> During Beneficiary's lifetime, the Trustee will pay from time to time such amounts from the Trust Funds for the satisfaction and benefit of [the] Beneficiary's Special Needs (as hereinafter defined), as the Trustee determines in the Trustee's discretion, as hereinafter provided. . . .

Section 7.02(a) defines the term 'special needs' as the "Beneficiary's needs that are not covered or available from any local, state, or federal government, or any private agency, or any private insurance carrier covering Beneficiary."

In this case, the evidence indicates that Mr. Skinner authorized the following expenditures from Trust assets: (1) approximately $135,000 for the purchase of a house, which is titled to the Trust; and (2) between $3200 and $4500 for furniture, appliances, and repairs to the house. The uncontradicted evidence shows that the house, furnishings, and appliances are owned by the Trust; the house is handicapped accessible; the location of the house, which is close to where Mrs. Skinner previously lived, is helpful to Mrs. Skinner, given her cognitive limitations; and the purchase of a house was something that Mrs. Skinner had wanted and that had improved the quality of her life. Therefore, as a general proposition, these expenditures were clearly within the Trust's definition of "special needs." The purchase of a house, furniture, and appliances fits squarely within the permissible uses of Trust assets under the terms of the Cathleen Bass Skinner Special Needs Trust. The assistant clerk of court erred as a matter of law by ruling otherwise.

C. No Evidence Suggests Trust Assets were Wasted

Mr. Skinner also argues that the assistant clerk of court erred by concluding that Mr. Skinner had failed to manage the trust in a prudent manner and that the Trust assets had been "wasted" and "mismanaged." We agree, and conclude that the clerk's findings and conclusions on this issue are unsupported by any record evidence.

Although some funds were spent on furniture and appliances for the house, the bulk of the Trust expenditure was the purchase of a handicapped accessible house, which is titled in the name of the Trust and in which Mrs. Skinner has an equitable ownership interest. Upon Mrs. Skinner's death, the house will be an asset of the Trust that could be sold and used to repay her Medicaid benefits. If the funds are needed prior

to Mrs. Skinner's death, the house may be sold at that time. Therefore, the money is not "gone" but has been invested in real estate, which is permitted under the Trust provisions. The wisdom of this investment is a separate question, but it is factually and legally inaccurate to state that the Trust assets were "wasted" or "depleted" in the absence of any findings regarding the wisdom of this particular investment.

The fact that the purchase of a house is authorized by the terms of the Trust does not necessarily mean that it was a wise investment. Under specific factual circumstances the purchase of a house might constitute an imprudent investment or a wasteful use of the assets of a trust. This might be the case if, for example, evidence were introduced showing that the house was in serious disrepair, was in a neighborhood with declining real estate values, was overpriced, or was inappropriately large or luxurious for the beneficiary's needs and circumstances.

However, in this case, the only evidence introduced on this subject indicates that the house was purchased for the relatively modest sum of $135,000, an amount which was less than its appraised value. There was no other evidence regarding whether the house was a prudent investment of the Trust assets. Nor was evidence introduced regarding the costs or savings attributable to Mrs. Skinner's living in her own house, with Mr. Skinner providing care for her at no charge. Therefore, the assistant clerk of court's conclusion that the purchase of a house, furniture, and appliances demonstrated Mr. Skinner's lack of prudence is unsupported by any record evidence and is therefore erroneous as a matter of law.

D. The Trust was Administered for the "Sole Benefit of Mrs. Skinner"

Mr. Skinner argues next that the assistant clerk of court erred by finding that because Mr. Skinner lived in the house with Mrs. Skinner, his wife, and presumably used the furniture and appliances, that Mr. Skinner "benefitted" from the purchase of a house and furniture. On this basis the assistant clerk of court concluded that these purchases violated the requirement that the Trust be administered for the "sole benefit" of Mrs. Skinner. In reaching this conclusion, the assistant clerk of court apparently employed a personal, colloquial definition of "benefits." Mr. Skinner contends that under the relevant Medicaid and Social Security regulations, and pursuant to the interpretation of these regulations by the Wake County agencies charged with administration of these programs, the clerk erred in its interpretation of the term "sole benefit." We agree and conclude that an examination of the relevant regulations in the context of trust common law and the common sense realities of

the life of any person, and especially of the challenges faced by a disabled person, makes it clear that the term "sole benefit" does not mean that a disabled person with a U.S.C. § 1396p(d)(4)(A) trust must live in a state of bizarre isolation in which no other person may "benefit" from her house or furnishings.

In concluding that the Trust was not administered for Mrs. Skinner's sole benefit, the assistant clerk of court applied an informal or conversational definition of "benefits" as arising, not from the legal or financial effect of transactions involving Trust assets, but as depending instead on whether Mr. Skinner used or enjoyed - and thus "benefitted" from - the house, furniture, and appliances. The assistant clerk of court's ruling was not supported by citation to legal authority or by reference to any negative actions taken regarding Mrs. Skinner's receipt of Medicaid or SSI, such as suspending or decreasing Mrs. Skinner's benefits, and Mr. Skinner testified that he consulted with and had the approval of local aid agencies before making the purchase with trust funds.

The assistant clerk of court's interpretation of the legal term "sole benefits" would lead to an absurd result. Members of the general population are free to determine with whom to live and socialize, and how to entertain or otherwise interact with other people. Under the assistant clerk of court's interpretation of the requirement that a U.S.C. § 1396p(d)(4)(A) trust be administered for the "sole benefit" of the beneficiary, if a trustee uses the assets of a special needs trust to purchase items such as a handicapped accessible home, specially equipped car, or furniture, then the disabled beneficiary must either live alone or charge "rent" to her husband, who presumably must have his own separate furniture, washer and dryer, etc. The beneficiary of a U.S.C. § 1396p(d)(4)(A) trust could not allow another to drive or ride in her specially equipped car, to watch her TV, or have a visitor for supper, lest the other person's use of the dishes, enjoyment of a television program, or shared ride to a restaurant constitute a violation of the "sole benefit" rule. The clerk's interpretation is particularly absurd given the likelihood that a disabled person may need assistance from someone living in the home.

We wish to emphasize that in our analysis of this issue we do not consider the clerk's evaluation of the weight or credibility of any evidence, but only the clerk's ruling on the meaning of the legal term "sole benefit." It is long established that an appellate court should, when possible, avoid a statutory interpretation that yields an unjust or absurd result:

> "The Court will not adopt an interpretation which resulted in injustice when the statute may reasonably be otherwise

> consistently construed with the intent of the act. Obviously, the Court will, whenever possible, interpret a statute so as to avoid absurd consequences."

Nationwide Mut. Ins. Co. v. Mabe, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) (quoting *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989)). Moreover, our review of the relevant statutes and regulations leads us to conclude that there is no indication that the legal conclusion reached by the assistant clerk of court correctly interpreted U.S.C. § 1396p(d)(4)(A), or that it comports with North Carolina trust law.

At the outset, we note that there appear to be no appellate cases in which a Court has held that the use of assets in a U.S.C. § 1396p(d)(4)(A) trust to purchase a house in which the beneficiary lives with his or her spouse or family members constitutes a *per se* violation of the sole benefit rule, without regard to the specific circumstances of the purchase. Given that Congress passed the legislation authorizing § 1396p(d)(4)(A) trusts in 1993, we believe that the absence of any cases that have applied the definition utilized by the assistant clerk of court indicates that the agencies charged with administration of Medicaid and Social Security have not taken the position espoused by the assistant clerk of court. Moreover, Mr. Skinner's uncontradicted testimony was that he had obtained the approval of the local administrators of Medicaid and Social Security prior to purchasing the house and other items.

Nor is the assistant clerk of court's position supported by the relevant regulations. The Social Security Administration (SSA) issues a Program Operations Manual System, known as POMS, that instructs SSA employees on the SSA's interpretation of U.S.C. § 1396p(d)(4)(A). "The POMS represent 'the publicly available operating instructions for processing Social Security claims.' The Supreme Court has stated that '[w]hile these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect.' " *Kelley v. Comm'r of Soc. Sec.*, 566 F.3d 347, 351 n.7 (3rd Cir. 2009) (quoting *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385, 154 L. Ed. 2d 972, 986 (2003)).

> The Medicaid statute is complex, and the day-to-day application of the statute has been largely left to administrative agencies. Where that is the case, a court construing a statute will often look to the manner in which the administrative agencies have interpreted that statute, giving

> deference to the construction placed on the statute by presumed experts in the field.

Hobbs v. Zenderman, 542 F. Supp. 2d 1220, 1228 (D.N.M. 2008) (citation omitted), *aff'd*, 579 F.3d 1171 (10th Cir. N.M. 2009).

POMS Transmittal 48, SI 01120 TN 48, effective 15 May 2013, "modified [SSA's] policy on how to interpret the 'sole benefit' requirement for special needs and pooled trusts[,]" which includes a trust established under U.S.C. § 1396p(d)(4)(A). Transmittal 48 states in relevant part that:

> 2. Trust established for the sole benefit of an individual.
>
> a. General rule regarding sole benefit of an individual.
>
> Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life. Except as provided in SI 01120.201F.2.b. in this section and SI 01120.201F.2.c. in this section, do not consider a trust that provides for the trust corpus or income to be paid to or for a beneficiary other than the SSI applicant/recipient to be established for the sole benefit of the individual.
>
> b. Exceptions to the sole benefit rule for third party payments. Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:
>
> Payments to a third party that result in the receipt of goods or services by the trust beneficiary[.] . . .

The SSA's general definition of "sole benefit" is somewhat circular, as it defines a "sole benefit" trust as one that "benefits no one but that individual." The listed exception makes clear, however, that payment to a third party for a house, furniture, or appliances does not violate the sole benefit requirement. Similarly, the North Carolina Adult Medicaid Manual, in discussing the sole benefit requirement of a U.S.C. § 1396p(d)(4)(A) trust, states that "Sole benefit means that any real or personal property which is capable of being titled and is purchased by the trust must be titled solely in the name of the trust," exactly as was done in the present case.

Based upon a review of the regulatory definitions and the common law principles of trust law, the reasonable interpretation of the "sole benefit" rule for a U.S.C. § 1396p(d)(4)(A) trust is that:

> 1. The trust must have no primary beneficiaries other than the disabled person for whom it is established.
>
> 2. The trust may not be used to effect uncompensated transfers or other sham transactions. For example, the sole benefit provision would be violated if the beneficiary's parents funded the trust with the assets of the beneficiary and then had the beneficiary give the money to her parents in a sham transaction.
>
> 3. The trust is one in which the trustee does not have a duty to balance the fiduciary benefit to the beneficiary with a duty to ensure that funds remain for creditors such as Medicaid or for contingent beneficiaries.
>
> 4. When trust assets are used for investments, the financial and legal benefit of these transactions must remain with the trust.

In this case, Mrs. Skinner is the only primary Beneficiary named in the Trust. The house purchased with Trust assets is titled in the name of the Trust. (Mrs. Skinner would be considered to be living in her own house based on her equitable ownership of the residence.) The accrual of equity in the house or increase in the house's market value remains with the Trust, and thus is for Mrs. Skinner's legal benefit. The use of Trust assets to purchase a house, furniture, and appliances for Mrs. Skinner was an expenditure that resulted in her receiving goods. We conclude that the Cathleen Bass Skinner Special Needs Trust was established, and is being administered, for Mrs. Skinner's sole benefit. We have reached this conclusion without consideration of any aspect of this case that might implicate the weight or credibility of evidence, such as Mr. Skinner's testimony that Mrs. Skinner's parents wanted her to have a house. Instead, we have based our conclusion solely upon the undisputed terms of the Trust and the applicable jurisprudence.

VIII. Use of Trust Funds for Mr. Skinner's Attorneys' Fees

Section 5.03 of the Cathleen Bass Skinner Special Needs Trust states that:

> The Trustee may retain and pay for attorneys . . . and any other professional[s] required for Beneficiary's benefit in the discretion of the Trustee, subject to the limitations set forth in this trust.

> Specifically, the Trustee may pay for attorney fees and disbursements and court fees related to (i) any guardianship proceeding pertaining to Beneficiary . . . and (ii) attorney fees related to the preparation, funding, maintenance, and administration of this trust.

(emphasis added). The record indicates that Mr. Skinner used Trust assets to reimburse himself for attorneys' fees incurred in connection with guardianship proceedings that took place prior to establishment of the Cathleen Bass Skinner Special Needs Trust. The assistant clerk of court concluded that the Trust funds could not properly be used to reimburse these attorneys' fees because the fees arose from the Mr. Skinner's research into whether he could legally marry Mrs. Skinner and the proceedings for him to be appointed as her guardian, rather than pursuant to guardianship proceedings occurring after Mr. Skinner was appointed Mrs. Skinner's guardian.

The relevant Trust provisions are ambiguous, in that they allow reimbursement for attorneys' fees "related to (i) any guardianship proceeding pertaining to Beneficiary" without specifying that this means "any guardianship proceeding pertaining to Beneficiary and that occurs after the trust is established." N.C. Gen. Stat. § 36C-10-1006 provides that a "trustee who acts in reasonable reliance on the terms of the trust as expressed in a trust instrument is not liable for a breach of trust to the extent that the breach resulted from the reliance."

Moreover, assuming that it was a violation of the Trust's provisions for Mr. Skinner to use Trust assets for this purpose, the assistant clerk of court made no findings to support its implied conclusion that this error constitutes "a serious breach of trust" as opposed to an honest mistake. The Official Comment to N.C. Gen. Stat. § 36C-7-706 states that:

> Subsection (b)(1) . . . makes clear that not every breach of trust justifies removal of the trustee. The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. (emphasis added).

In this case, Mr. Skinner's uncontradicted testimony was that he believed that he could use Trust funds to reimburse himself for attorneys' fees incurred in connection with the guardianship proceedings for

Mrs. Skinner, although the fees were incurred before he was named as GOE. In addition, the record indicates that he agreed to repay the Trust when this error was pointed out. This single error would not, standing alone, support a conclusion that Mr. Skinner had committed "a serious breach of trust."

IX. Conclusion

We conclude that we are not required to address Mr. Skinner's compliance with the Trust's accounting requirement, because it was not included in the assistant clerk of court's order. We further conclude that the clerk's order removing Mr. Skinner as GOE and Trustee was based upon several significant errors of law. The assistant clerk of court erred by concluding that the purpose of the Trust was to save money for Mrs. Skinner's future medical needs, and by holding that the Trust prohibited the use of Trust assets for prepaid burial insurance. In addition, the assistant clerk of court erred as a matter of law by ruling that the Trustee's use of Trust assets to purchase a house, furniture, and appliances violated the provisions of the Trust. The clerk's conclusion that these purchases were wasteful or imprudent was not supported by any evidence. The assistant clerk of court made another error of law by adopting a interpretation of the requirement that the Trust be for "the sole benefit" of Mrs. Skinner that is not supported by the pertinent regulations or citation to appellate authority. Finally, the order does not contain findings that would support the clerk's implied conclusion that Mr. Skinner engaged in a serious breach of trust by using Trust assets to pay for attorney's fees incurred for guardianship proceedings occurring prior to establishment of the Trust.

We agree with the dissent that an appellate court should not reweigh the evidence, second-guess the fact finder's determinations of the weight or credibility of the evidence, or substitute its judgment on a matter committed to the discretion of the trial court. We have adhered to these well-known principles, and there are no factual findings or discretionary decisions by the clerk that we have failed to respect. Nor are we suggesting that the assistant clerk of court's subjective judgment on the merits of Mr. Skinner as a GOE or Trustee was unreasonable. However, for the reasons discussed above, we conclude that the Order removing Mr. Skinner as Trustee of the Cathleen Bass Skinner Special Needs Trust and as GOE was based on several significant errors of law and must be reversed for application of the proper legal standards.

REVERSED.

Judge DILLON concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

The majority opinion reverses the superior court's order, which affirmed the Assistant Clerk of Court's (the "Clerk's") order, by determining that the Clerk's order contains findings that are not supported by the evidence and conclusions that are legally erroneous. Because the majority opinion functions to essentially reweigh the evidence, despite its many disclaimers to the contrary, and disregards the deferential standard of review on appeal, I respectfully dissent.

The decision to remove a trustee is "left to the *discretion* of the clerks of superior court," or, in [some] case[s] the trial court, [and this Court's] review is limited to determining whether the trial court [or clerk] abused its discretion. *In re Estate of Newton*, 173 N.C. App. 530, 539, 619 S.E.2d 571, 576 (2005) (emphasis added) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). "Under this standard, *we accord 'great deference' to the trial court*, and its ruling may be reversed only upon a showing that its action was 'manifestly unsupported by reason' or 'so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (emphasis added) (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 833); *see also Smith v. Underwood*, 336 N.C. 306, 306, 442 S.E.2d 322, 322 (1994) (reversing this Court and determining the trial court *did not* abuse its discretion by failing to remove a trustee).

In determining whether a clerk of superior court or a trial court abused its discretion in removing a trustee, this Court reviews the record in order to determine whether "*sufficient evidence supports the trial court's findings of fact, and its findings of fact support its conclusions of law.*" *Newton*, 173 N.C. App. at 540, 619 S.E.2d at 577 (emphasis added).

In reviewing the Clerk's decision to remove Mr. Skinner as guardian, this Court reviews "(1) whether the Assistant Clerk's *findings of fact are supported by the evidence, and (2) whether those findings support the Assistant Clerk's conclusions and order.*" *In re Estate of Armfield*, 113 N.C. App. 467, 469–70, 439 S.E.2d 216, 217 (1994) (emphasis added).[1]

1. I note also that "[a] guardianship is a trust relation and in that trust relationship *the guardian is a trustee* who is governed by the same rules that govern other trustees." *Armfield*, 113 N.C. App. at 474, 439 S.E.2d at 220 (emphasis added) (citing *Owen v. Hines*,

Furthermore, regardless of whether this Court is reviewing a Clerk's order removing a guardian or a trustee, "an appellate court, or a trial court engaged in the appellate review of an order of the clerk of court, may neither reweigh the evidence, nor disregard findings of fact when supported by competent evidence, even if the evidence would also support a contrary result." *In re Estate of Van Lindley*, No. COA06-1281, 2007 WL 2247269, *10, 2007 N.C. App. LEXIS 1731, *28–29 (2007) (unpublished) (citing *Hearne v. Sherman*, 350 N.C. 612, 620, 516 S.E.2d 864, 868 (1999) and *Joyner v. Adams*, 87 N.C. App. 570, 574, 361 S.E.2d 902, 904 (1987)); *see also Garrett v. Burris*, 224 N.C. App. 32, 38, 735 S.E.2d 414, 418 (2012) ("It is not the function of this Court to reweigh the evidence on appeal.").

Mr. Skinner's removal as guardian of the estate and trustee is before this Court after a proceeding before the Clerk of Superior Court and an appeal heard before the superior court. The Clerk, after hearing evidence and arguments of counsel, made findings of fact and conclusions of law and removed Mr. Skinner as guardian of the estate and trustee. The superior court then affirmed the Clerk's order, and stated that

> [a]fter hearing the arguments of counsel and reviewing portions of the Record on Appeal, including in detail, the [Clerk's] August 27, 2014 Order, the [superior] [c]ourt finds and concludes that the findings of fact in the August 27, 2014 Order are supported by the evidence, the conclusions of law are supported by the findings of fact, and the August 27, 2014 Order is consistent with the conclusions of law and applicable law.

We should not, at this stage—far-removed from the original fact-finder—"second-guess [both] the court's [and the Clerk's] reasoning and attempt to impose any differing opinion we may have; [the Clerk] was in a better position than we to assess" Mr. Skinner's credibility over four years of incompetency, guardianship, and removal proceedings involving both Cathy and Mr. Skinner. *See Smith v. Underwood*, 113 N.C. App. 45, 56–57, 437 S.E.2d 512, 518 (1993) (John, J., dissenting), *rev'd by*

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227 N.C. 236, 41 S.E.2d 739 (1947)) (affirming the removal of guardians of the estate). "Because respondents [guardians of the estate] are governed by the same rules that govern other trustees they are 'held to something stricter than the morals of the marketplace.' " *Id.* at 475, 439 S.E.2d at 220–21 (quoting *Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967)).

336 N.C. 306, 442 S.E.2d 322 (1994) (per curiam) (reversing for the reasons stated in the dissenting opinion). Indeed,

> [a] trial court may be reversed for abuse of discretion *only* upon a showing that its actions are *manifestly unsupported by reason*. A ruling committed to a trial court's discretion is to be accorded *great deference* and will be upset *only* upon a showing that it was so arbitrary that it *could not have been the result of a reasoned decision*.

White, 312 N.C. at 777, 324 S.E.2d at 833 (emphasis added) (citation omitted).

In reversing the superior court's order, which affirmed the Clerk's order removing Mr. Skinner as trustee and guardian of the estate, the majority reaches the conclusion that the decisions of the fact-finder (the Clerk) and the superior court—to whom we accord *great deference*—were *both* "*manifestly unsupported by reason*." *See id.* (emphasis added). The Clerk made findings of fact which were supported by competent evidence (with the exception of the Clerk's finding that funeral expenses are not permitted to be paid from the Trust, on which point I agree with the majority that the Clerk erred in making this finding), and those findings in turn supported his conclusion that Mr. Skinner "is unsuitable to continue serving as Trustee of the Trust and [GOE]." The Clerk subsequently removed Mr. Skinner as Trustee and GOE, and the superior affirmed this decision after "reviewing . . . in detail, the [Clerk's] August 27, 2014 Order." With the exception of the finding as to funeral expenses, the record contains sufficient, competent evidence to support the Clerk's findings of fact and conclusions of law. Thus, I cannot agree with the majority's conclusion that the orders of the Clerk and the superior court are both "manifestly unsupported by reason."

Ultimately, it does not matter that the majority considers that the implications of the Clerk's ruling (that Mr. Skinner breached his fiduciary duties pursuant to the terms of the Trust, based on, *inter alia*, his use of Trust assets to purchase a home in which he also lived, in contradiction with the terms of the Trust which require that Trust assets be used for Cathy's "sole benefit") would lead to an absurd result. This is not the standard. The standard is whether the Clerk's findings of fact are supported by the evidence, which findings in turn support the conclusions of law. *See Armfield*, 113 N.C. App. at 469–70, 439 S.E.2d at 217.

According the proper deference to the Clerk's findings, which support the determination that Mr. Skinner "is unsuitable to continue serving

as Trustee of the Trust and [GOE]," as well as to the *discretionary* decision to remove Mr. Skinner, I respectfully submit that the majority opinion erroneously reverses the trial court's order affirming the Clerk's order for abuse of discretion, where it has not been established "that its actions are *manifestly unsupported by reason*." *See White*, 312 N.C. at 777, 324 S.E.2d at 833 (emphasis added) (internal citation omitted).

For the forgoing reasons, I respectfully dissent.

IN THE MATTER OF M.A.W.

No. COA15-1153

Filed 21 June 2016

Termination of Parental Rights—juvenile neglected by mother—incarcerated father

The trial court erred by terminating a father's parental rights upon the conclusion that the child was neglected where there was a prior adjudication of neglect by the mother, the father was incarcerated, the permanent plan was initially reunification with the father, dependent on his reunification efforts, and the court expressed disapproval of the father's reunification efforts after his release and changed the permanent plan to adoption. There was no evidence before the trial court, and no findings of fact, that father had previously neglected the child at the time of the hearing.

Appeal by respondent from order entered 12 August 2015 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 31 May 2016.

New Hanover County Department of Social Services, by Regina Floyd-Davis, for petitioner-appellee.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for guardian ad litem.

Rebekah W. Davis, for respondent-appellant.

CALABRIA, Judge.

IN RE M.A.W.

[248 N.C. App. 52 (2016)]

Respondent-appellant ('father") of the juvenile M.A.W. ("Mary")[1] appeals from an order terminating his parental rights. We reverse.

On 11 March 2013, New Hanover County Department of Social Services ("DSS") filed a petition alleging that Mary was a neglected juvenile. DSS alleged that Mary's mother ("L.W.") "has a history of substance abuse and mental health issues, which has previously interfered with her ability to provide appropriate care for her children." On 19 February 2013, L.W. tested positive for Percocet, a narcotic for which she did not have a prescription. Additionally, two social workers who were present for her drug screen detected the odor of alcohol emanating from L.W. At the time the petition was filed, father was incarcerated. Accordingly, DSS claimed that Mary, who was less than two months old, was living in an environment injurious to her welfare and did not have the ability to protect or provide for herself. DSS obtained non-secure custody of Mary. On 5 July 2013, the trial court adjudicated Mary neglected and dependent based upon the parties' stipulations to the allegations in the petition.

The trial court held a permanency planning review hearing on 10 April 2014. The trial court ceased further reunification efforts between Mary and L.W., and L.W. executed a consent for adoption. The trial court determined that the permanent plan for Mary should be reunification with father. The court noted, however, that father was still incarcerated, had a "drinking problem," and that "[h]is continued sobriety is paramount to any plan of reunification."

On 4 September 2014, the trial court held another permanency planning review hearing. The court found that father had been released from incarceration. The court noted that, during his incarceration, father had "completed a parenting education class, regularly attended Alcoholic Anonymous meetings and worked towards obtaining his GED." The court found that DSS should continue to make reasonable efforts towards a permanent plan of reunifying Mary with father. At a subsequent permanency planning review hearing, however, the trial court expressed disapproval regarding father's efforts at reunification. Accordingly, the trial court ceased reunification efforts and changed Mary's permanent plan for Mary to adoption.

On 10 February 2015, DSS filed a petition to terminate father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect) and

1. A pseudonym is used to protect the juvenile's identity and for ease of reading.

(5) (failure to legitimate). On 12 August 2015, the trial court terminated father's parental rights on the ground of neglect. Father appeals.

Father argues that the trial court erred by concluding that grounds existed to terminate his parental rights. We agree.

Section 7B-1111 sets out the statutory grounds for terminating parental rights. "A finding of any one of the grounds enumerated therein, if supported by competent evidence, is sufficient to support a termination." *In re J.L.K.*, 165 N.C. App. 311, 317, 598 S.E.2d 387, 391. "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000)).

In the instant case, the trial court concluded that grounds existed to terminate father's parental rights based on neglect. N.C. Gen. Stat. § 7B-1111(a)(1) (2015). A "Neglected juvenile" is defined as:

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2015). Generally, "[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). When, however, as here, "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.' " *Id.* (quoting *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003)). "In those circumstances, a trial court may find that grounds for termination exist upon a showing of a 'history of neglect by the parent and the probability of a repetition of neglect.' " *Id.*

In this case, while there was a prior adjudication of neglect, the party responsible for the neglect was the juvenile's mother, not father.

At the time the petition was filed, father was incarcerated, and the trial court noted that father "was the non-offending parent at the time of [the juvenile's] removal." Therefore, there was no evidence before the trial court, and no findings of fact, that father had previously neglected Mary. Without evidence of any prior neglect, petitioner failed to show neglect at the time of the hearing. *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 455 (2006). Furthermore, the evidence, as well as the trial court's findings, do not support a conclusion that there was ongoing neglect at the time of the termination hearing. Accordingly, we hold that the trial court erred in concluding grounds existed under N.C. Gen. Stat. § 7B–1111(a)(1) to terminate father's parental rights and reverse the order entered.

REVERSED.

Judges DILLON and INMAN concur.

MICHAEL P. LONG AND MARIE C. LONG, PETITIONER-PLAINTIFFS
v.
CURRITUCK COUNTY, NORTH CAROLINA AND ELIZABETH LETENDRE, RESPONDENTS

No. COA15-376

Filed 21 June 2016

Zoning—unified development ordinance—single family residential

The trial court erred by affirming the Board of Adjustment's decision that a structure proposed for construction on property owned by respondent Letendre was a single family detached dwelling under the unified development ordinance and a permitted use in the single family residential remote zoning district. The project included multiple "buildings," none of which were "accessory structures." Any determination that this project fit within the definition of single family dwelling required disregarding the structural elements of the definition.

Appeal by petitioner-plaintiffs Michael P. Long and Marie C. Long from decision and order entered 8 December 2014 by Judge Cy A. Grant in Superior Court, Currituck County. Heard in the Court of Appeals 23 September 2015.

George B. Currin, for petitioner-plaintiff-appellants Michael P. Long and Marie C. Long.

Donald I. McRee, Jr., for respondent-appellee Currituck County.

Gregory E. Wills, P.C., by Gregory E. Wills, for respondent-appellee Elizabeth Letendre.

STROUD, Judge.

Petitioner-plaintiffs Michael Long and Marie Long appeal a Superior Court (1) "DECISION AND ORDER" affirming the Currituck County Board of Adjustment's decision "that a structure proposed for construction on property owned by Respondent Elizabeth Letendre is a single family detached dwelling under the Currituck County Unified Development Ordinance and a permitted use in the Single Family Residential Outer Banks Remote Zoning District" and dismissing petitioners' petition for writ of certiorari and (2) "ORDER" denying petitioners' petition for review of the Currituck County Board of Adjustment's decision and again affirming the Currituck County Board of Adjustment's decision. For the following reasons, we reverse and remand.

I. Background

Respondent Ms. Letendre owns an ocean-front lot in Currituck County and planned to build a project of approximately 15,000 square feet on the lot. The project consisted of "a three-story main building that includes cooking, sleeping, and sanitary facilities" and two "two-story side buildings that include sleeping and sanitary facilities." The main building and side buildings are connected by "conditioned hallways" so that all three may be used together as one unit, and each of the three buildings is approximately 5,000 square feet. Petitioners, who are adjacent property owners, challenged the construction of respondent Letendre's project claiming that the project as proposed was not a permitted use in the Single Family Residential Outer Banks Remote District ("SF District") because it is not a "single family detached dwelling" ("Single Family Dwelling") as defined by the Currituck County Unified Development Ordinance ("UDO").

The Currituck County Planning Director determined that respondent Letendre's project was a "single family detached dwelling;" the Currituck County Board of Adjustment ("BOA") affirmed the Planning Director's decision. Petitioners then appealed the BOA's decision to the Superior Court, and the Superior Court agreed, concluding that the

"structure proposed for construction on property owned by Respondent Elizabeth Letendre is a single family detached dwelling under the Currituck County Unified Development Ordinance and a permitted use in the Single Family Residential Outer Banks Remote Zoning District" and therefore denied "Petitioner's Petition for Review of the Currituck County Board of Adjustments Order" and affirmed "[t]he Order of the Currituck County Board of Adjustments dated May 9, 2014[.]" Petitioners appealed the Superior Court's orders to this Court, and for the reasons discussed below, we reverse and remand.

On appeal, there is no real factual issue presented but only an issue of the interpretation of the UDO. The parties have made many different arguments, with petitioners focusing upon the applicable definitions and provisions of the UDO, and respondents focusing upon the intended use and function of the project. This case ultimately turns upon the definition of a "single family detached dwelling[.]" Currituck County, N.C., Unified Development Ordinance of Currituck County, North Carolina § 10.1.7 ("UDO").

II. Single-Family Residential Outer Banks Remote District

Petitioners first contend that "the Superior Court erred in affirming the Currituck County Board of Adjustment's decision to uphold the planning director's determination that the proposed structures met the definition of the term 'single family detached dwelling,' as that term is used and defined in the Currituck County Unified Development Ordinance." (Original in all caps.) The parties agree on the background underlying this appeal and one of the most salient facts is that the project is comprised of multiple buildings.[1] The project "plans indicate a three-story main building that includes cooking, sleeping, and sanitary facilities; as well as two-story side buildings that include sleeping and sanitary facilities." Each building is approximately 5,000 square feet.[2] The main

1. We have had difficulty determining what noun to use to describe the buildings which are the subject of this litigation. In this opinion, we will refer to the entire group of buildings, variously described in the record and briefs as three or four separate buildings, as the "project." Since the words "building" and "structure" have definitions in the ordinance which are somewhat different than the common use of these words, we will place these words in quotation marks if we are using them as terms defined in the ordinance; if these words are not in quotes, we are using them colloquially. *See* Currituck County, N.C., Unified Development Ordinance of Currituck County, North Carolina §§ 10.43, .83.

2. In addition to the county's approval, the project required a Coastal Area Management Act ("CAMA") permit. Generally speaking, CAMA regulations require a greater set-back from the ocean for larger buildings; in other words, a 15,000 square foot building would need to be "set back further" than a 5,000 square foot building.

building and side buildings are connected by "conditioned hallways[.]"[3] The hallways were originally proposed as uncovered decking but the Currituck County Planning Director determined that the uncovered decking did not comply with the ordinances, and thus the project plans were revised to connect the buildings via "conditioned hallways" which the Planning Director determined would make the entire project "a single principal structure" based upon the functioning of the three buildings as one dwelling.

In this appeal, the issue is the county's classification of the project as a "single principal structure" based upon the use or function of the project. The parties agree that (1) the classification of the project is governed by the UDO; (2) pursuant to the UDO the lot is zoned as SF District; and (3) this project must fit within the definition of Single Family Dwelling in order to comply with the UDO. Both the BOA and the Superior Court determined that the project did constitute a Single Family Dwelling, but on appeal, interpretation of a municipal ordinance requires this Court to engage in *de novo* review. *See Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjust.*, 365 N.C. 152, 155, 712 S.E.2d 868, 870-71 (2011) ("We review the trial court's order for errors of law. . . . Reviewing courts apply *de novo* review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a municipal ordinance.")

> In reviewing a decision of the Board of Adjustment for errors of law in the application and interpretation of a zoning ordinance, the superior court applies a *de novo* standard of review and can freely substitute its judgment for that of the board. Similarly, in reviewing the judgment of the superior court, this Court applies a *de novo* standard of review in determining whether an error of law exists and we may freely substitute our judgment for that of the superior court. Questions involving the interpretation of ordinances are questions of law. . . .
>
> In determining the meaning of a zoning ordinance, we attempt to ascertain and effectuate the intent of the legislative body. Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. In

3. The Planning Director defined "conditioned space" as "[a]n area or room within a building being heated or cooled, contained uninsulated ducts, or with a fixed opening directly into an adjacent conditioned space[.]"

> addition, we avoid interpretations that create absurd or illogical results.

Ayers v. Bd. of Adjust. for Town of Robersonville, 113 N.C. App. 528, 530-31, 439 S.E.2d 199, 201 (1994) (citations and quotation marks omitted). We therefore review "the application and interpretation of [the] zoning ordinance" *de novo*. *Id.*

Before turning to the specific applicable ordinances, we note that the UDO itself provides that "[w]ords and phrases shall be construed according to the common and approved usage of the language, but technical words and phrases that may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." UDO § 10.1.7. The UDO provides that the SF District

> [i]s established to accommodate very low density residential development on the portion of the outer banks north of Currituck Milepost 13. The district is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events. *The district accommodates single-family detached homes* . . . . Public safety and utility uses are allowed, while commercial, office, and industrial uses are prohibited.

UDO § 3.4.4 (emphasis added). The UDO defines "DWELLING, SINGLE-FAMILY DETACTED" as follows: "*A residential building* containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure." UDO § 10.51 (emphasis added).[4] Thus, the definition of a Single Family Dwelling has five elements: (1) A building, (2) for residential use, (3) containing not more

4. Many of the ordinance provisions in our record are identified by a clear subsection number. An example is "Subsection 3.4.4: Single-Family Residential Outer Banks Remote (SFR) District." UDO § 3.4.4. However, in Chapter 10 of the UDO, at least for the pages in our record, definitions of terms appear in alphabetical order without specific subsection numbering for each term. Our citations in this opinion are thus based upon the large bold number in the bottom right-hand corner of each page of the UDO. We also have to rely solely upon the ordinance provisions as provided in the record since this Court cannot take judicial notice of municipal ordinances. *See Surplus Co. v. Pleasants*, 263 N.C. 587, 592, 139 S.E.2d 892, 896 (1965) ("[W]e do not take judicial notice of a municipal ordinance or resolution.")

than one dwelling unit,[5] (4) to be occupied by one family, and (5) not physically attached to any other "principal structure."[6] The definition of a Single Family Dwelling includes portions that address the physical structure of the proposed dwelling: "a building[,]" "containing not more than one dwelling unit[,]" and "not physically attached to any other principal structure." *Id.* But portions of the definition of a Single Family Dwelling also address the use and function of the proposed dwelling, requiring the building be for "residential" use and "occupied by one family[.]" *Id.* To qualify as a Single Family Dwelling, a project must fulfill each element of the definition, including both structural and functional provisions. The parties' briefs have addressed each part of the definition at length, but the structural portion of the definition, and particularly the first element -- a building -- is controlling in this case.

Petitioners argue that the project is not "[*a*] residential building[,]" but rather multiple buildings. *Id.* (emphasis added). Respondent Currituck County barely addresses that the project must be "a residential building" but focuses mainly on the use of the project and meaning of "one dwelling unit[.]" *Id.* Respondent Elizabeth Letendre contends that "*the characterization of a 'building'* and the methods used to lay a foundation *does* [(sic)] *not matter under the UDO*. The connection of the rooms so as to ensure that it will 'function' as a 'dwelling unit' is what counts." (Emphasis added.) Respondent Letendre further argues that that petitioners' arguments based upon the word "building" being singular is "a complete red herring" which "only works if one ignores the UDO definitions, ignores what [the Planning Director] wrote when analyzing two different sets of plans, and ignores what he said under oath at the BOA hearing." Respondent Letendre would be correct if the

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5. The UDO defines "dwelling unit" as "one room or rooms connected together, constituting a separate, independent housekeeping establishment for owner or renter occupancy, and containing independent cooking and sleeping facilities, and sanitary facilities." UDO § 10.51.

6. Although the term "structure" is defined by the UDO, the term "principal structure" is not. *See* UDO § 10.83. The UDO does define "accessory structure" as "[a] structure that is subordinate in use and square footage to a principal structure or permitted use." UDO § 10.34. In his testimony before the BOA on 13 March 2014, the Planning Director described his understanding of the term: "I would consider the building that contains all the components of a single-family detached dwelling as the principal structure. I consider the other structures to be accessory structures that weren't consistent with the ordinance or did not meet the requirements of the ordinance." The Planning Director went on to clarify that he considered all the buildings of the project as one "principal structure": "I think collectively the buildings are connected with the conditioned space, and I think they function as a principal structure."

UDO defined a Single Family Dwelling based only upon the function of the project -- whether it has a "residential" use as "one dwelling unit" for "one family" -- but again, the use argument fails to address the structural portion of the definition: "[a] building." *Id.* We have considered the Planning Director's interpretations of the UDO and his testimony, which focused upon the use and function of the three buildings, but this Court is required to perform a *de novo* interpretation of the UDO, a municipal ordinance. *See Morris Commc'ns Corp.*, 365 N.C. at 155, 712 S.E.2d at 871.

We therefore turn to the applicable ordinance provisions and definitions. The UDO definition of "BUILDING" provides, "See 'Structure'." UDO § 10.43. The definition of "STRUCTURE" provides that anything that "requires a location on a parcel of land" is a "structure" and thereby, apparently, also a "building":

> [a]nything constructed, installed, or portable, the use of which requires a location on a parcel of land. This includes a fixed or movable building which can be used for residential, business, commercial, agricultural, or office purposes, either temporarily or permanently. "Structure" also includes, but is not limited to, swimming pools, tennis courts, signs, cisterns, sewage treatment plants, sheds, docks, mooring areas, and similar accessory construction.

UDO § 10.83. Thus, pursuant to the UDO, a "building" is a "structure[,]" since a "building" is "constructed [or] installed" and it "requires a location on a parcel of land." *Id.* As all of the "buildings" in the project are constructed on a "location on a parcel of land" each is both a "building" and a "structure[.]" *Id.* There is no dispute that this project includes multiple "buildings" or "structures." The ordinance allows only for a singular "building[,]" UDO § 10.51, although a project may include other structures such as "swimming pools, tennis courts, signs, cisterns, sewage treatment plants, sheds, docks, mooring areas, and similar accessory construction[,]" all of which are obviously not buildings in the colloquial sense. UDO § 10.83. These other "structures" instead serve the needs of residents of the "building" which is the dwelling. *See generally id.*

Thus far, at each level of review, the focus has been on the residential use of the project and the definition of "one dwelling unit" based upon the intended function of the project, while overlooking the essential element that such dwelling unit must be within "a residential building[.]" UDO § 10.51. Even if we assume that the use of the project is residential and that the multiple buildings will be used as "one dwelling

unit" for "one family," the project still includes three "buildings." *Id.* The 22 November 2013, LETTER OF DETERMINATION from the Planning Director describes the project as follows: "The plans indicate a three-story main building that includes cooking, sleeping, and sanitary facilities; as well as two-story side buildings that include sleeping and sanitary facilities. The building plans also show two conditioned hallways connecting rooms within the proposed single family detached dwelling." This is an accurate and undisputed description of the project. The BOA affirmed the Planning Director's description, and the Superior Court affirmed the BOA's decision. The description is not challenged on appeal. Thus, the Planning Director, BOA, and the Superior Court all have found that this project includes a main building and two side buildings, each of approximately 5000 square feet. No one has ever described this project as a single "building[,]" and they simply did not address the structural portion of the plain definition of a Single Family Dwelling. *See generally* UDO § 10.51.

Our interpretation of the definition of Single Family Dwelling is also consistent with the definitions of other types of dwellings in the ordinances. *See generally* UDO §§ 10.50-51. The UDO provides eleven distinct definitions regarding dwellings, including: duplex dwelling, live/work dwelling, mansion apartment dwelling, manufactured home dwelling – class A, manufactured home dwelling – class B, manufactured home dwelling – class C, multi-family dwelling, single-family detached dwelling, townhouse dwelling, upper story dwelling, and dwelling unit. UDO §§ 10.50-51. The other definitions are primarily functional, and the definition of the Single Family Dwelling is the *only* definition which includes "a residential building" or in fact, *any* reference to a "building" in the definition. *Contrast* UDO §§ 10.50-51. Thus, "a residential building" -- singular -- is a necessary and not merely superfluous part of the definition a Single Family Dwelling. *Contrast* UDO §§ 10.50-51.

Yet the definition of Single Family Dwelling clearly allows more than one "building" or "structure" to be constructed on the same lot, so the presence of three "buildings" alone does not disqualify the project. However, the remainder of the definition does disqualify the project. The last element in the definition of a Single Family Dwelling is "[n]ot physically attached to *any other* principal structure." UDO § 10.51. (emphasis added). In other words, the Single Family Dwelling is "detached[,]" which is part of the title. *Id.* The UDO provides that "[w]ords used in the singular number include the plural number and the plural number includes the singular number, unless the context of the particular usage clearly indicates otherwise." UDO § 10.1.11. In the definition of Single

Family Dwelling, the context does clearly indicate otherwise. We cannot substitute the word "buildings" for "a building" without rendering the last phrase of the definition, "not physically attached to any other principal structure" either useless or illogical. The Planning Director determined that the multiple buildings together function as a principal structure, but even if they are functionally used as one dwelling unit, each individual building is itself a "structure." *See* §§ 10.43, .83. Thus, each building is necessarily either an "accessory structure" or a principal structure. And respondents do not argue that the side buildings are "accessory structures;" they argue only that the entire project *functions* as one "principal structure." Although the ordinance does not define principal structure, it does define "accessory structures" as "subordinate in use *and square footage*" to a principal structure. UDO § 10.34 (emphasis added).[7] Even assuming that the two side "buildings" or "structures" are subordinate in use to the center "building," it is uncontested that all of the buildings are approximately 5,000 square feet. No building is subordinate in square footage to another so none can meet the definition of an "accessory structure." *See id.* This would mean that each building is a principal structure, however a Single Family Dwelling only allows for one. *See* UDO § 10.51. In addition, the ordinary meaning of "principal" is in accord. *See* Webster's Seventh New Collegiate Dictionary 676 (1969). "Principal" is defined as "most important[.]" *Id.* There can be only one "principal structure" on a lot in the SF District and that principal structure can be attached only to "accessory structures[.]" *See generally* UDO § 10.51.

Respondent Currituck County argues that to interpret the UDO to allow only one "building" would create "absurd consequence[s]" because this would mandate that "nowhere in Currituck County could a property owner construct a single-family residential dwelling with wings, supported by their own foundation, connected by conditioned space or connect a main house to a garage with bedroom or other habitable space located above by way of conditioned space." But these hypotheticals are not comparable to this project, since both include one building, the main house, which is a principal structure and is physically attached to "accessory structures," the wings or the garage with a bedroom above the garage. *See* UDO § 10.34. In the hypotheticals, the accessory structures are "subordinate in use and square footage"

7. Again, "principal structure" is not defined, but it is clear a principal structure cannot be a structure that is "subordinate in use and square footage" as that would make it an "accessory structure." UDO § 10.34

to *a* principal structure. *Id.* Perhaps a more "absurd" result would be if we were to read the ordinances to focus only upon the "use" portion of Single Family Dwelling definition, as respondents argue, while ignoring the structural portion, since it would not matter how many "buildings" are connected by "conditioned hallways" if they are *functioning* as one dwelling for one family. Were we to adopt respondent Currituck County's interpretation, a project including ten 5,000 square foot buildings, all attached by conditioned hallways, which will be used as a residential dwelling for one family with a kitchen facility in only one of the buildings would qualify as a Single Family Dwelling. Respondents' interpretation would also be contrary to the stated purpose of the zoning, which calls for "very low density residential development" and "is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events." UDO § 3.4.4.

In summary, this project includes multiple "buildings," none of which are "accessory structures;" *see* UDO § 10.34. Any determination that this project fits within the definition of Single Family Dwelling requires disregarding the structural elements of the definition, including the singular "a" at the beginning of the definition to describe "building" and allowing multiple attached "buildings," none of which are accessory structures, to be treated as a Single Family Dwelling in clear contravention of the UDO. UDO § 10.51. The project does not fit within the plain language of the definition of Single Family Dwelling, and thus is not appropriate in the SF District. *See* UDO §§ 3.4.4; 10.51. We therefore must reverse the Superior Court order and remand for further proceedings consistent with this opinion.

III. Conclusion

For the foregoing reasons, we reverse and remand.

REVERSED AND REMANDED.

Judges CALABRIA and INMAN concur.

STATE v. ARMSTRONG

[248 N.C. App. 65 (2016)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
ARTHUR ORLANDUS ARMSTRONG, DEFENDANT

No. COA 15-1324

Filed 21 June 2016

Jurisdiction—subject matter jurisdiction—superior court—dismissal of felony charge before trial

The superior court did not retain subject matter jurisdiction over a misdemeanor driving while license revoked offense and speeding infraction after the State dismissed the felony charge of habitual impaired driving before trial. Under section 7A-271(c), once the felony was dismissed prior to trial, the court should have transferred the two remaining charges to the district court.

Appeal by Defendant from judgment entered 20 May 2015 by Judge Alma L. Hinton in Nash County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General David L. Gore, III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

HUNTER, JR. Robert N., Judge.

Arthur Orlandus Armstrong ("Defendant") appeals from a jury's verdict convicting him of misdemeanor driving while license revoked and finding him responsible for speeding. Defendant contends the superior court did not retain subject matter jurisdiction over the misdemeanor offense and the infraction after the State dismissed the felony charge before trial. We agree. As a result, we vacate the convictions and judgment of the superior court.

I. Factual and Procedural History

On 12 January 2015, a grand jury indicted Defendant on three charges in three separate indictments: habitual impaired driving, driving while license revoked ("DWLR"), and speeding. On 20 April 2015, the State dismissed the felony habitual impaired driving charge following a report from the State Crime Laboratory showing Defendant's

blood-alcohol concentration ("BAC") was 0.00 when Trooper Michael Davidson stopped him. The trial for misdemeanor DWLR and the infraction of speeding began in superior court on 19 May 2015. The State presented one witness, Trooper Davidson of the North Carolina Highway Patrol.

On 2 November 2013, Trooper Davidson patrolled the area near North Carolina Highway 97 around 2:00 a.m. While stopped at an intersection, he observed a vehicle that "appeared [to be] speeding" traveling east on N.C. 97. He followed the vehicle, using radar and a pace check to obtain its speed. He noted the radar reading, 72 miles per hour in a 55 mile per hour zone. The vehicle "crossed the center line and touched the fog-line" of the highway. Trooper Davidson then activated his lights and siren, and stopped the vehicle at a nearby gas station.

Trooper Davidson asked Defendant to produce his license and registration. Defendant did not produce a license or registration for the vehicle. Defendant stated "he was in the process of getting his license back. That there was an error, but he thought his license was valid." Defendant exited his vehicle and sat in the passenger seat of Trooper Davidson's patrol car. Defendant provided Trooper Davidson with his name, address, and date of birth for Trooper Davidson to search Defendant's license information in Trooper Davidson's on-board computer.

Trooper Davidson charged Defendant with speeding and DWLR. Trooper Davidson "thought [he] smelled a little bit of alcohol coming from [Defendant]." Trooper Davidson charged Defendant with driving while impaired ("DWI").

The State rested its case. Defendant moved to dismiss the charge of DWLR, which the court denied. The defense did not present any evidence. Defendant renewed his motion to dismiss, which the court again denied. Neither the State nor the Defendant raised any jurisdictional issues at trial. The jury returned a verdict of guilty of DWLR and found Defendant responsible of speeding. The superior court sentenced Defendant to 120 days active confinement. Defendant timely gave oral and written notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b), which provides for an appeal of right to the Court of Appeals from any final judgment of a superior court.

III. Standard of Review

An argument regarding subject matter jurisdiction may be raised at any time, including on appeal. *See In Re T.R.P.*, 360 N.C. 588, 595, 636 S.E. 2d 787, 793 (2006). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E. 2d 590,592 (2010). Even if a party did not object to it at trial, they may contest jurisdiction. *See Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E. 2d 876, 880 (1961).

IV. Analysis

Generally, once jurisdiction of a court attaches, a subsequent event will not undo jurisdiction, even if the subsequent event would have prevented jurisdiction from attaching in the first place. *In Re Peoples*, 296 N.C. 109, 146, 250 S.E. 2d 890, 911 (1978). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. *Id.* (quoting *Silver Surprize, Inc. v. Sunshine Mining Co.*, 74 Wash. 2d 519, 523, 445 P.2d 334, 336-37 (1968)).

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E. 2d 673, 675 (1987). In criminal cases, the State bears the burden of "demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E. 2d 826, 829 (2013). A defendant may raise the question of subject matter jurisdiction at any time, including on appeal. *Id.*

In 1961, the General Assembly enacted House Bill 104, entitled "An Act to Amend the Constitution of North Carolina by Rewriting Article IV Thereof and Making Appropriate Amendments of Other Articles so as to Improve the Administration of Justice in North Carolina." 1961 N.C. Sess. Laws 436. This constitutional amendment, ratified by the People on 6 November 1962, provides, in pertinent part:

> (3) Superior Court. Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.
>
> (4) District Courts; Magistrates. The General Assembly shall, by general law uniformly applicable in every local

> court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates.

N.C. Const. art. IV §12(3-4).

In 1965, pursuant to the rewritten Article IV, the General Assembly enacted House Bill 202, entitled "An Act to Implement Article IV of the Constitution of North Carolina by Providing for a New Chapter of the General Statutes of North Carolina, to be Known as 'Chapter 7A-Judicial Department', and for Other Purposes." 1965 N.C. Sess. Laws 369. These statutes now provide, in pertinent part:

> §7A-271. Jurisdiction of Superior Court.
>
> (a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:
>
> (1) Which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or
>
> (2) When the charge is initiated by presentment; or
>
> (3) Which may be properly consolidated for trial with a felony under G.S. 15A-926;
>
> (4) To which a plea of guilty or nolo contendere is tendered in lieu of a felony charge; or
>
> (5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser included or related charge.
>
> . . .
>
> (c) When a district court is established in a district, any superior court judge presiding over a criminal session of court shall order transferred to the district court any pending misdemeanor which does not fall within the provisions of subsection (a), and which is not pending in the superior court on appeal from a lower court.
>
> §7A-272. Jurisdiction of district court; concurrent jurisdiction in guilty or no contest pleas for certain felony offenses; appellate and appropriate relief procedures available.

> (a) Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

N.C. Gen. Stat. §7A-271(a), (c), 272(a) (2015).

North Carolina superior courts have jurisdiction to try a misdemeanor "[w]hich may be properly consolidated for trial with a felony under G.S. 15A-926." N.C. Gen. Stat. §7A-271(a)(3) (2015). Two or more offenses, "whether felonies or misdemeanors or both," may "be joined in one pleading or for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. §15A-926(a) (2015).

For example, in *State v. Pergerson*, a grand jury indicted a defendant and he stood trial for larceny of an automobile (a felony) and unlawful operation of a vehicle (a misdemeanor) in superior court. 73 N.C. App. 286, 287, 326 S.E. 2d 336, 337 (1985). At the close of the State's evidence, the court dismissed the felony larceny charge. *Id.* This Court held the superior court retained jurisdiction over the misdemeanor charge after the felony charge had been dismissed, as "[c]learly, the two offenses . . . were based on the same act or transaction." *Id.* at 289, 326 S.E. 2d at 338. The superior court had jurisdiction at the time the case went to trial because the State properly joined the felony offense with the misdemeanor offense. The critical fact in *Pergerson* was the superior court properly had jurisdiction at the time of trial. This follows the general principle of invocation of jurisdiction, as the superior court had jurisdiction at the time the case proceeded to trial and jurisdiction existed throughout the duration of the trial.

In contrast, in *State v. Wall*, the superior court accepted a defendant's plea of guilty to two misdemeanor charges. 271 N.C. 675, 677, 157 S.E. 2d 363, 365 (1967). The grand jury did not indict the defendant on any felony charge. The Supreme Court held the "superior court was without jurisdiction to *proceed to trial* on [the] . . . indictments." *Id.* at 368, 157 S.E. 2d at 682. (emphasis added). The superior court was without jurisdiction to proceed to trial because "[p]resently, defendant is under indictment for misdemeanors." *Id.* As a result, jurisdictional status hinges upon the circumstances as they exist at the time a case is to "proceed to trial." *Id.* Once established, jurisdiction cannot be taken away.

With regard to infractions, including speeding, N.C. Gen. Stat. §7A-271(d) provides a superior court has jurisdiction over an infraction in two instances. First, a superior court has jurisdiction when the infraction is a lesser-included offense of a "criminal action properly before the court." N.C. Gen. Stat. §7A-271(d)(1) (2015). The second instance is when the infraction is a lesser-included offense of a "criminal action properly before the court, or . . . a related charge." A superior court has jurisdiction to accept an admission of responsibility for the infraction. N.C. Gen. Stat. §7A-271(d)(2) (2015).

N.C. Gen. Stat. §7A-271(c) establishes the procedure for trial court judges to follow when the superior court does not have subject matter jurisdiction over a pending case pursuant to N.C. Gen. Stat. §7A-271(a):

> When a district court is established in a district, any superior court judge presiding over a criminal session of court *shall* order transferred to the district court any pending misdemeanor which does not fall within the provisions of subsection (a), and which is not pending in the superior court on appeal from a lower court.

N.C. Gen. Stat §7A-271(c) (2015). (emphasis added). The transfer of a matter not properly before a superior court is not a decision that rests within the discretion of a superior court judge. On the contrary, the statute requires a superior court judge "shall order" pending cases without subject matter jurisdiction to be transferred to the district court. Before a case proceeds to trial, a superior court judge must transfer to the appropriate court a pending matter which is not properly before the superior court. *Id.*

"When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E. 2d 708, 711 (1981). Where a trial court lacks jurisdiction to allow a conviction, the appropriate remedy is to vacate the judgment of the trial court. *See State v. Partridge*, 157 N.C. App. 568, 571, 579 S.E. 2d 398, 400 (2003).

Here, Defendant contends the superior court lacked jurisdiction to try him on the misdemeanor DWLR charge and the infraction of speeding. Defendant argues his case presents none of the exceptions listed in N.C. Gen. Stat. §7A-271 in which a superior court has jurisdiction to try a misdemeanor or an infraction. He argues N.C. Gen. Stat. §7A-271(c) directs a superior court in this situation to transfer the matter to the

appropriate district court. Defendant asks us to vacate the judgment of the superior court. We are persuaded by Defendant's arguments.

The grand jury issued three indictments charging Defendant with three offenses: a felony, a misdemeanor, and an infraction. The State properly joined the three offenses for trial under N.C. Gen. Stat. 15A-926, as the offenses were part of the same act, specifically Defendant's operation of the motor vehicle on 2 November 2013. Had the case gone to trial at this point, the superior court would have had jurisdiction over the misdemeanor and the infraction. However, the State dismissed the felony charge of habitual impaired driving on 20 April 2015. At the time the case proceeded to trial in superior court, only a misdemeanor and an infraction remained. Without the felony offense, the misdemeanor fell under none of the exceptions in N.C. Gen. Stat. §7A-271(a), and the infraction fell under none of the exceptions in N.C. Gen. Stat. 7A-271(d). Thus, under N.C. Gen. Stat. §7A-271(c), once the felony was dismissed prior to trial, the court should have "transferred" the two remaining charges to the district court.

The record here shows after dismissal of the felony the superior court lacked jurisdiction over the misdemeanor and the infraction. We hold the superior court did not properly have subject matter jurisdiction in this case.

V. Conclusion

We vacate the judgment of the superior court.

VACATED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
DON NEWTON BROWN

No. COA15-1347

Filed 21 June 2016

Search and Seizure—probable cause for warrant—confidential informant's statement—time criminal activities seen—not included—evidence suppressed

In a prosecution which began with a statement made by a confidential informant and concluded with a guilty plea, the trial court erred by denying defendant's motion to suppress evidence that was the result an affidavit that did not specify when the informant witnessed the alleged criminal activities.

Appeal by Defendant from order entered 19 March 2013 by Judge James W. Morgan and judgment entered 20 July 2015 by Judge Jesse B. Caldwell III in Gaston County Superior Court. Heard in the Court of Appeals 25 April 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Phillip K. Woods, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for Defendant.

STEPHENS, Judge.

In this case, a search warrant was issued based on an affidavit that failed to specify when an informant witnessed Defendant's allegedly criminal activities. Such an affidavit contains insufficient information to establish probable cause and thus cannot support the issuance of a search warrant. Accordingly, we reverse the trial court's order denying Defendant's motion to suppress evidence discovered as a result of the execution of that search warrant and vacate the judgment entered upon Defendant's subsequent guilty pleas.

Factual and Procedural Background

This case arises from the execution of a search warrant applied for and granted to Detective Kevin Putnam of the Gastonia Police Department ("GPD") on 26 November 2012. On that date, Putnam

sought and received a warrant to search the residence of Defendant Don Newton Brown at 1232 North Ransom Street in Gaston County for counterfeit currency and related items, as well as firearms. The application included an affidavit by Putnam that averred, *inter alia*, Putnam had received a counterfeit $100 bill from an informant who claimed it had been obtained from Brown's home, where the informant also claimed to have seen firearms, including a handgun. As a result of items found during the search of Brown's residence, he was indicted on one count each of possession of a stolen motor vehicle, possession of five or more counterfeit instruments, and possession of a firearm by a felon.

On 7 January 2013, Brown moved to suppress the fruits of the search of his residence, asserting that "[t]hat the application and warrant fail to contain the information necessary to meet the 'lack of staleness' requirement . . . ." The motion to suppress was heard in the Gaston County Superior Court on 18 March 2013 before the Honorable James W. Morgan, Judge presiding. At the hearing, Putnam was the sole witness, testifying about what he intended for the affidavit to state in an effort to clarify vague language about when the informant obtained his information regarding Brown's allegedly criminal activities. The trial court denied Brown's motion in open court and entered a written order memorializing the ruling on 19 March 2013 ("the suppression order").

The case came on for trial at the 20 July 2015 criminal session of Gaston County Superior Court, the Honorable Jesse B. Caldwell III, Judge presiding. Brown pled guilty to all three charges against him, specifically reserving his right to appeal the suppression order. The trial court consolidated the convictions for judgment, imposing a term of 25-39 months in prison. Brown gave notice of appeal in open court.

Discussion

On appeal, Brown argues that the trial court erred in (1) denying his motion to suppress the evidence discovered as a result of the search, (2) calculating his prior record level, and (3) including a civil judgment for restitution in the written judgment which was not part of the court's oral ruling. We reverse the order denying the motion to suppress and vacate the judgment entered upon Brown's subsequent guilty pleas. As a result, we do not consider Brown's other arguments.

I. Motion to suppress

Brown argues that the trial court erred in denying his motion to suppress. Specifically, Brown contends that Putnam's affidavit in support of his search warrant application was conclusory and lacked sufficient

details about when the informant ("the CRI") acquired the information that formed the basis of Putnam's warrant request. We agree.

A. Standard of review on appeal

> The scope of appellate review of a ruling upon a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

State v. Johnston, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citation and internal quotation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *Johnston*, 115 N.C. App. at 713, 446 S.E.2d at 137 (citations omitted).

> This deference, however, is not without limitation. A reviewing court has the duty to ensure that a [judicial officer] does not abdicate his or her duty by "mere[ly] ratif[ying] . . . the bare conclusions of [affiants]." [*Illinois v.*] *Gates*, 462 U.S. [213,] 239, 103 S. Ct. [2317,] 2333, 76 L. Ed. 2d [527,] 549 [(1983)]; *see State v. Campbell*, 282 N.C. 125, 130-31, 191 S.E.2d 752, 756 (1972) ("Probable cause cannot be shown by affidavits which are purely conclusory . . . ." (citation and internal quotation marks omitted)); *see also United States v. Leon*, 468 U.S. 897, 914, 104 S. Ct. 3405, 3416, 82 L. Ed. 2d 677, 693 (1984) ("[C]ourts must . . . insist that the [judicial officer] purport to perform his neutral and detached function and not serve merely as a rubber stamp for the police.") (citations and internal quotation marks omitted), *superseded in part by* Fed. R. Crim. P. 41(e).

State v. Benters, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014).

B. Standard and scope of review at the suppression hearing

The question for a trial court

> reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the

> [judicial officer's] decision to issue the warrant. North Carolina [employs] the totality of the circumstances approach for determining the existence of probable cause . . . . Thus, the task of the issuing judicial officer is to make a common-sense decision based on all the circumstances that there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. McCoy, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citations and internal quotation marks omitted).

Because its duty in ruling on a motion to suppress based upon an alleged lack of probable cause for a search warrant involves an evaluation of the judicial officer's decision to issue the warrant, the trial court should consider only the information before the issuing officer. Thus, although our appellate courts have held that "the scope of the court's review of the [judicial officer's] determination of probable cause is not confined to the affidavit alone[,]" additional information can only be considered where

> [t]he evidence shows that the [judicial officer] *made his notes on the exhibit contemporaneously from information supplied by the affiant under oath*, that the paper was not attached to the warrant in order to protect the identity of the informant, that the notes were kept in the magistrate's own office drawer, and that the paper was in the same condition as it was at the time of the issuance of the search warrant.

State v. Hicks, 60 N.C. App. 116, 119, 120-21, 298 S.E.2d 180, 183 (1982) (internal quotation marks omitted; emphasis added), *disc. review denied*, 307 N.C. 579, 300 S.E.2d 553 (1983). In such circumstances, an appellate court may consider whether probable cause can be supported by the affidavit in conjunction with the aforementioned notes. *Id.* at 121, 298 S.E.2d at 183; *see also* N.C. Gen. Stat. § 15A-245(a) (2015) ("Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, *but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.*") (emphasis added). Outside of such contemporaneously recorded information in the record, however, it is error for a reviewing court to "rely[] upon facts elicited at

the [suppression] hearing that [go] beyond 'the four corners of [the] warrant.' " *See Benters*, 367 N.C. at 673, 766 S.E.2d at 603.

C. "Staleness" of information supporting issuance of a search warrant

The concern regarding the possible "staleness" of information in an affidavit accompanying a search warrant application arises from the requirement that

> proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. The general rule is that no more than a reasonable time may have elapsed. The test for staleness of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock.
>
> *As a general rule, an interval of two or more months between the alleged criminal activity and the affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant.*

State v. Lindsey, 58 N.C. App. 564, 565-66, 293 S.E.2d 833, 834 (1982) (citations, internal quotation marks, and ellipsis omitted; emphasis added). However, where the alleged criminal activity has been observed within a day or two of the affidavit and warrant application, the information is generally not held to be stale. *See*, *e.g.*, *State v. Walker*, 70 N.C. App. 403, 405, 320 S.E.2d 31, 33 (1984) (upholding a search warrant for a location where an informant had seen marijuana within the past 48 hours); *State v. Barnhardt*, 92 N.C. App. 94, 97, 373 S.E.2d 461, 463 (upholding a search warrant for a location where an informant had seen cocaine within the past 24 hours), *disc. review denied*, 323 N.C. 626, 374 S.E.2d 593 (1988).

D. Analysis

Here, in support of his warrant application, Putnam submitted an affidavit stating:

> *In the past 48 hours, Det. Putnam spoke with a person whose name cannot be revealed. This person has concern*

> *for their [sic] safety, and Det. Putnam feels this person would be of no further value to law enforcement if their [sic] true identity was revealed. For the remainder of this application Det. Putnam will refer to this person as "CRI #1095." CRI #1095 has been in contact with Don Brown and has provided Det. Putnam with a counterfeit $100 bill that came from 1232 N. Ransom St. Det. Putnam verified that this is the addess [sic] of Don Newton Brown. Don Brown resides at this residence with a black female by the name of Kisha Harris. The house is also frequented by Paquito Brown and Don . . . Brown. Don Brown is known to have firearms and the CRI stated that Don Brown has been seen with a handgun.*
>
> In the past 48 hours, Det. Putnam spoke to Special Agent Rumney, United States Secret Service (USSS), Charlotte Field Office. Agent Rumney conducted a couneterfeit [sic] (CFT) note search on the serial number provided by CRI #1095. The searial [sic] number is of record with the USSS with passes having been conducted in the Gaston County area in 2005 and 2006.
>
> Furthermore, SA Rumney (USSS) stated that Don Brown is of record with the USSS from a previous counterfeit case involving the manufacturing a [sic] passing of CFT Federal Reserve Notes (FRNS) in 2005 and 2006 in Gaston County and surrounding counties.
>
> Additionally, SA Rumney (USSS) stated that in Nov. 2010, he interviewed Paquito Rafeal Brown, nephew of Don Brown, at the Gaston County Jail, after P. Brown was found to be in possession of a CFT $100 FRN. A CFT FRN inquiry on the serial number in P. Brown's possession matched those involved in the 2005-2006 counterfeit case involving Don Brown.

(Emphasis added).

At the suppression hearing, Putnam testified that what he *meant* to say in the first paragraph of the affidavit was both (1) that the CRI told Putnam the information about Brown within 48 hours of applying for the warrant and also (2) that the CRI had obtained the counterfeit money within that time period. At the hearing, as on appeal, Brown did not dispute that Putnam *intended* to say that the CRI had gathered the information he gave Putnam within 48 hours of the warrant application.

Instead, he argued that: (1) Putnam's affidavit did not state when the CRI obtained the information about Brown, making it impossible to evaluate the information's staleness; and, (2) in ruling on the question of staleness, the trial court should not consider Putnam's hearing testimony about what he intended to say in the affidavit:

> . . . . Now, I understand [Putnam's] explanation is that he meant this to say that all of that occurred within 48 hours. Any independent person reading [the affidavit] has no way of understanding that. That's not what—that's not what's written here, that's not what's understood by any independent person reading this. There is no way that occurs.
>
> There is no information in this affidavit as to when that information the CRI supposedly gave this officer, there is no information about when that information was gathered by the CRI, anything. All we know is when that CRI told that officer that information.
>
> . . . .
>
> As the [c]ourt is aware, the magistrate is stuck with what—the magistrate and this [c]ourt are stuck with what's in the application in this writing unless they reduce or record any other information, or put it on the search warrant, anything like that. None of that occurred in this case. When any independent third[]party reads this application they [sic] have no idea when that information was gathered. If you read the warrant actually it looks like it could have been from 2005 through 2010, just as readily as it was supposedly from what the officer said that day. That's what he put in the application. Any independent third[]party doesn't have the information necessary to make a decision to issue a valid warrant.

The State, in contrast, "contend[ed] [Putnam] can explain what he put in the affidavit . . . . This would go to explain his writing with regard to the affidavit and what sources he relied on."

The trial court denied Brown's motion in open court and entered a written order memorializing the ruling on 19 March 2013. That order contains the following findings of fact:

> 1. On November 26, 2012, Detective Putnam obtained a search warrant from a Gaston County Magistrate related to

> this matter, a copy of said search warrant was attached to [the] defendant's motion to suppress.
>
> 2. Detective Putnam stated in said application for search warrant that in the past 48 hours Detective Putnam had spoken with a confidential informant. That the confidential informant had given him a counterfeit $100 bill that had come from 1232 North Ransom Street, an address verified to be that of the defendant.
>
> 3. *Detective Putnam testified that* the 48 hours referred to conversations with the confidential informant occurring on November 23rd, November 24th, and November 26th.
>
> 4. Further, Detective Putnam spoke with Special Agent Rumney, of the United States Secret Service, regarding connections between the counterfeit note and prior investigations between 2005 and 2010, which referred to the defendant.

(Emphasis added). As a result of these factual findings, the court concluded that the motion should be denied because, "under the totality of the circumstances[,] there is a substantial basis for the magistrate's finding of probable cause . . . ."

The suppression order clearly indicates that the trial court *did* consider Putnam's hearing testimony about what he intended the affidavit to mean—evidence outside the four corners of the affidavit and not recorded contemporaneously with the magistrate's consideration of the application—in determining whether a substantial basis existed for the magistrate's finding of probable cause. As noted *supra*, this was error. *See* N.C. Gen. Stat. § 15A-245(a); *see also Benters*, 367 N.C. at 673, 766 S.E.2d at 604. More importantly, however, a plain reading of the order indicates a more significant error: the trial court *did not* resolve the critical issue of whether Putnam's affidavit could be fairly read as stating that *the CRI obtained the information allegedly incriminating Brown within 48 hours of the warrant application*. Our case law makes clear that it cannot.

Regarding staleness, we find the wording of the affidavit here strikingly similar to that in *State v. Newcomb*:

> . . . . Within the past five days from [the date of the warrant application], the person who I will refer to as "He," regardless of the person's sex, contacted me. This person offered

> his assistance to the City-county vice unit in the investigation of drug sales in the Burlington-Alamance County area. This person told myself [sic] that he had been inside the residence described herein being Rt. 8, Box 122, Lot #82 County Club Mobile Home Park, Burlington, where he observed a room filled with marijuana plants. He stated that the suspect Charles Wayne Newcomb was maintaining the plants. . . .

84 N.C. App. 92, 93, 351 S.E.2d 565, 566 (1987). As did Putnam here, the officer in *Newcomb* "failed to state . . . the time the informant's observations were made." *Id.* at 93-94, 351 S.E.2d at 565. Rather, as in Putnam's affidavit, the affidavit in *Newcomb* only provided information regarding the time when the informant spoke to the officer. *Id.* In determining that this "bare-bones affidavit" contained insufficient information to establish probable cause and support the issuance of a search warrant, this Court observed that

> [t]he information [the informant] supplied is sparse. His statement gives no details from which one could conclude that *he had current knowledge of details or that he had even been inside the defendant's premises recently*. The affidavit contains a mere naked assertion that the informant *at some time* saw a 'room full of marijuana' growing in [the] defendant's house.

Id. at 95, 351 S.E.2d at 567 (emphasis added). *Compare id. with Walker*, 70 N.C. App. at 405, 320 S.E.2d at 33 (upholding search warrant based upon an affidavit stating, *inter alia*, "the informant stated he had been in [the] defendant's house within the past 48 hours and had seen marijuana") *and Barnhardt*, 92 N.C. App. at 97, 373 S.E.2d at 463 (upholding search warrant based upon an affidavit stating, *inter alia*, "cocaine was seen in the residence located at 914 South Carolina Ave. by the confidential informant within the past 24 hours"). We cannot distinguish the staleness of the CRI's information contained in Putnam's affidavit from that in *Newcomb*. Accordingly, we reverse the trial court's suppression order and vacate the judgment entered upon Brown's subsequent guilty pleas. In view thereof, it is unnecessary to address Brown's remaining arguments.

ORDER REVERSED; JUDGMENT VACATED.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
DITTRELL LESHEA DOVE, DEFENDANT

No. COA15-1273

Filed 21 June 2016

Criminal Law—altering, stealing, or destroying criminal evidence—motion to dismiss—theft of money—controlled sale of illegal drugs

The trial court erred by denying defendant's motion to dismiss the charge of altering, stealing, or destroying criminal evidence based upon his alleged theft of money obtained from the controlled sale of illegal drugs. The money was not evidence as defined by statute.

Appeal by defendant from judgment entered 10 June 2015 by Judge John E. Nobles, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 28 April 2016.

Roy Cooper, Attorney General, by Kenneth A. Sack, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

ZACHARY, Judge.

Defendant was charged with altering, stealing, or destroying criminal evidence, based upon his alleged theft of money obtained from the controlled sale of illegal drugs. Because the money in question was not evidence as defined by statute, the trial court erred in denying defendant's motion to dismiss the charge of altering, stealing, or destroying criminal evidence.

I. Factual and Procedural Background

On 12 September 2012, Detective Joshua Porter (Det. Porter), an employee of the narcotics division of the Jacksonville Police Department and the United States Drug Enforcement Administration task force (DEA), learned of Dittrell Dove (defendant) from the Kansas field office of the DEA. Defendant had been stopped by the Kansas Highway Patrol with a large amount of marijuana in his vehicle, bound for Jacksonville, North Carolina. Defendant was willing to cooperate with

law enforcement by delivering the drugs to their intended recipient, a Mr. Thompson of Jacksonville.

Det. Porter and the narcotics division formulated a plan to facilitate defendant's delivery of the drugs. Defendant would be flown to Jacksonville with 14 pounds of marijuana and taken into custody by Det. Porter, and would then drive in a rented vehicle with the drugs to a designated location for the sale of the drugs, at which point law enforcement would arrest Thompson. After the arrest, defendant would surrender the money received for the drugs to the Jacksonville Police Department.

Shortly before midnight on 24 September 2012, and during the early morning hours of 25 September 2012, defendant and Thompson agreed on a meeting place. Pursuant to plan, defendant wore a recording device. Defendant drove the rented vehicle to the meeting place, with law enforcement following directly behind. After meeting with Thompson, defendant drove to Thompson's residence to complete the transaction. Defendant then contacted Det. Porter to confirm that the deal was concluded, and that defendant had the money. Defendant met Det. Porter in person and informed him that Thompson had paid defendant $20,000, and owed him $10,000 more. Defendant gave Det. Porter a shopping bag filled with currency. Det. Porter then searched defendant, and found currency "stuffed up his coat sleeves, in his pockets, like, down his pants . . . ." There was money "all over his vehicle" and "money stuffed in some of his luggage . . . There was just money everywhere, including on his person." The shopping bag contained $19,120, and $4,608 was found on defendant's person and in his vehicle. Defendant told Det. Porter that he had children, and admitted to stealing the money. Defendant was arrested and charged with stealing evidence pursuant to N.C. Gen. Stat. § 14-221.1; upon his being booked into jail, another $1,000 was found on his person by jail staff. Defendant was tried at the 8 June 2015 session of Onslow County Superior Court. At the close of State's evidence, defendant moved to dismiss the charges. Defendant presented no evidence.

The jury found defendant guilty of altering, stealing, or destroying criminal evidence. The trial court found defendant to have a prior felony record level III, and sentenced defendant in the presumptive range to 6-17 months' imprisonment. The trial court then suspended this sentence, and ordered defendant to be placed on supervised probation for 60 months.

This Court granted defendant's petition for writ of certiorari to review this case.

II. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

III. Motion to Dismiss

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss. We agree.

Defendant was charged with stealing criminal evidence, pursuant to N.C. Gen. Stat. § 14-221.1. This statute provides, in relevant part:

> Any person who breaks or enters any building, structure, compartment, vehicle, file, cabinet, drawer, or any other enclosure wherein evidence relevant to any criminal offense or court proceeding is kept or stored with the purpose of altering, destroying or stealing such evidence; or any person who alters, destroys, or steals any evidence relevant to any criminal offense or court proceeding shall be punished as a Class I felon.
>
> As used in this section, the word evidence shall mean any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice being retained for the purpose of being introduced in evidence or having been introduced in evidence or being preserved as evidence.

N.C. Gen. Stat. § 14-221.1 (2015).

The language of the statute is explicit. "[T]he word evidence shall mean any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice…." Defendant was neither of these things; at most, the argument could be made that he was an agent of law-enforcement officers, but he was not one himself.

Nor are we prepared to assume that this statute was intended to apply to agents of law enforcement other than those explicitly named

in the statute. Inasmuch as the statutory language could be considered ambiguous, the rule of lenity demands that we construe such ambiguity in favor of defendant.

This is not to say that defendant's actions were not criminal. It is entirely possible that defendant could have been tried for some other offense. However, at issue in this case is the offense of altering, stealing, or destroying criminal evidence, and that offense requires that the evidence at issue be "in the possession of a law-enforcement officer or officer of the General Court of Justice…." We hold that the money in question did not meet this statutory definition, that the State failed to present substantial evidence of this element of the offense, and that the trial court erred in denying defendant's motion to dismiss.

REVERSED.

Chief Judge McGEE and Judge DILLON concur.

STATE OF NORTH CAROLINA
v.
JOSHUA WAYNE MARTIN, DEFENDANT

No. COA15-1104

Filed 21 June 2016

Criminal Law—prosecutor's arguments—misstatement of law

Where the prosecutor made a misstatement of law during closing arguments in defendant's trial for robbery with a dangerous weapon, defendant nonetheless received a trial free from prejudicial error because the trial court took appropriate steps to correct the prosecutor's misstatements of law and otherwise properly instructed the jury on the law and the offenses at issue.

Appeal by defendant from judgment entered 14 January 2015 by Judge Michael D. Duncan in Forsyth County Superior Court. Heard in the Court of Appeals 30 March 2016.

Kimberly P. Hoppin for defendant.

Attorney General Roy Cooper, by Assistant Attorney General Andrew O. Furuseth, for the State.

ELMORE, Judge.

A jury found Joshua Wayne Martin (defendant) guilty of robbery with a dangerous weapon. On appeal by writ of *certiorari*, defendant argues that the trial court committed reversible error and abused its discretion by overruling his objections during the State's closing arguments. We hold that defendant received a trial free from prejudicial error.

I. Background

The State's evidence at trial tended to show the following: On 22 April 2014, defendant entered the Adams Market convenience store with a shotgun and demanded money from the manager, Wanda Robinson. Ms. Robinson complied, turning over approximately $250.00 from the cash register. Defendant then fled from the convenience store, leaving Ms. Robinson unharmed. Police identified defendant as the robbery suspect and arrested him three days later.

During interrogation, defendant told police that the shotgun used in the robbery was under a truck bed cover behind his father's house. Police found the shotgun in that same location. It was unloaded. Defendant's father testified that the shotgun was his, though he did not have ammunition for it and had not fired it since he was thirteen or fourteen years old. He also testified that he did not know when defendant took the shotgun.

At trial, defendant admitted that he "robbed the store." When asked how he used the shotgun, defendant testified, "I pointed it towards Ms. Wanda and asked for the money and then I pointed it away from her and grabbed the money." According to defendant, however, the shotgun was unloaded during the robbery. During closing arguments, both attorneys argued whether the shotgun defendant used during the robbery could be considered a dangerous weapon. Defendant's counsel stated on several occasions that "the law recognizes that an unloaded gun is not a dangerous weapon." She also acknowledged that an unloaded gun could be a dangerous weapon if it was used to strike someone, "but there is no evidence of that" in this case. Over defendant's objections, the prosecution argued to the jury that the shotgun could be a dangerous weapon even if it was unloaded:

> It is easy to say there is no ammunition in the shotgun. It is easy to remove ammunition from the shotgun in the three-day period from the robbery until the gun was found, but again at the end of the day, as we'll go through in a few moments with the elements of a crime[,] *it doesn't matter whether there is ammunition in the shotgun or not.*

MS. TOOMES: Objection.

THE COURT: Overruled.

. . . .

The sixth and seventh elements, ladies and gentlemen of the jury[,] are the key to the case. This is what makes this case an Armed Robbery case as opposed to a Common Law Robbery case. The sixth element is that at the time the defendant obtained the property, at the time they [sic] took the money, this defendant was in possession of a dangerous weapon. You are going to be told that a dangerous weapon is one, once again[,] that is likely to cause death or serious bodily injury. You are also going to be told and that parenthetical is important is very important as well " . . . or, that it reasonably appeared to the victim that a dangerous weapon was being used in which case you may infer the[ ] said instrument was what the defendant's conduct represented it to be."

Once again we know that this shotgun is a dangerous weapon for two reasons: No. 1) because someone can fire the shotgun and shoot someone else with a projectile or projectiles that would come from the shotgun, and No. 2) even if a shotgun is not loaded with any ammunition, it is a dangerous weapon in and of itself. You have heard testimony, the barrel of a shotgun is made of steel. It is a hard surface. This is not foam. This is not [s]alt. This is not plastic. This is not a toy. This [is] real. What the defendant used is real. One can imagine, if a person takes this shotgun and strikes or assaults someone, especially doing so repeatedly, that will likely cause or will cause serious bodily injury or death. Our common sense and reason tell us that. *That is why if the defendant had brought in a plastic or toy gun and pointed that at the victim, this would not be an armed robbery case, or when you bring a real gun and point a shotgun at someone it is armed robbery.*

MS. TOOMES: I'm going to object, Your Honor.

THE COURT: Overruled.

(Emphasis added.)

Immediately after closing arguments, the trial court instructed the jury that "[b]oth attorneys in their closing arguments have stated what they believe the law is in this case. I will instruct you that if their statements in closing arguments differ from what I am getting ready to tell you the law is then you are to follow the instructions of the law as I given it [sic] to you." The court then instructed the jury on the elements of robbery with a dangerous weapon and common law robbery. As to the dangerous weapon element, the court explained that

> an object incapable of endangering or threatening lives cannot be considered a dangerous weapon. In determining whether evidence of a particular instrument constitutes evidence of a dangerous weapon, the determinative question is whether there is evidence that a person's life was in fact endangered or threatened. Now members of the jury, a robbery victim, that is one who is a victim of a robbery, more particularly, an armed robbery, should not have to force the issue of whether the instrument being used actually is also loaded and can shoot a bullet.
>
> In an Armed Robbery case the jury may conclude that the weapon is what it appeared to the victim to be, a loaded gun; if, however, there is any evidence that the weapon was in fact not what it appeared to be, that is a loaded gun, to the victim, the jury must determine what, in fact, the instrument was. It is for the jury to determine the nature of the weapon, and [ ] how it was used[,] and [ ] you could, but you're not required to infer from the appearance of the instrument[ ] to the victim or alleged victim that it was a dangerous weapon.

On 14 January 2015, the jury found defendant guilty of robbery with a dangerous weapon, and the trial court sentenced defendant to an active term of sixty-seven to ninety-three months of imprisonment. Defendant filed a written notice of appeal on 20 January 2015, though the notice failed to "designate the judgment or order from which appeal is taken," as required by Rule 4. N.C. R. App. P. 4(b) (2016). Despite the timely filing and service on the State, appellate entries were not made until 6 April 2015. Nevertheless, we allow defendant's petition for writ of *certiorari* pursuant to Rule 21(a)(1) to review the merits of the appeal. N.C. R. App. P. 21(a)(1) (2016) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ");

see State v. Gordon, 228 N.C. App. 335, 337, 745 S.E.2d 361, 363 (2013) (" 'Appropriate circumstances' may include when a defendant's right to appeal has been lost because of a failure of his or her trial counsel to give proper notice of appeal." (citing *State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012))).

II. Discussion

Defendant argues that the trial court erred in overruling his objections to the statements made by the prosecutor during its closing argument regarding whether the shotgun was a dangerous weapon.

"It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted). Pursuant to N.C. Gen. Stat. § 15A-1230, counsel

> may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2015). "Counsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom, but may not place before the jury incompetent and prejudicial matters and may not travel outside the record by interjecting facts of their own knowledge or other facts not included in the evidence." *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144 (1993) (citing *State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d 909, 918 (1989), *sentence vacated*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991)). "Incorrect statements of law in closing arguments are improper . . . ." *State v. Ratliff*, 341 N.C. 610, 616–17, 461 S.E.2d 325, 328–29 (1995) (holding that the trial court erred in failing "to sustain defendant's objection and instruct the jury to disregard" the prosecutor's improper statement of the law).

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*,

355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "[S]tatements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41 (1994).

In North Carolina, armed robbery is defined in N.C. Gen. Stat. § 14-87 as follows:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2015). "The essential difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened." *State v. Lee*, 282 N.C. 566, 569, 193 S.E.2d 705, 707 (1973).

In *State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986), our Supreme Court summarized the evidentiary rules in armed robbery cases where the "dangerous weapon" element is at issue:

> (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be. (2) If there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but

> does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened. (3) If all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.

Id. at 124–25, 343 S.E.2d at 897.

Here, defendant argues that the prosecutor made an incorrect statement of the law when he told the jury that "it doesn't matter whether there is ammunition in the shotgun or not." According to defendant, the prosecutor's statements turned the "permissive inference," whereby the jury was permitted but not required to infer that the shotgun was a dangerous weapon, into a "mandatory presumption that the weapon was as it appeared to the victim to be." Defendant also contends that it was improper for the prosecutor to tell the jury that "when you bring a real gun and point a shotgun at someone it is armed robbery," as that statement, in context, suggests the shotgun was a dangerous weapon "in and of itself" because it could be used to "strike or assault" someone. We agree.

Whether the shotgun was loaded at the time of the robbery was relevant because "[a]n object incapable of endangering or threatening life cannot be considered a dangerous weapon." *State v. Frazier*, 150 N.C. App. 416, 419, 562 S.E.2d 910, 913 (2002) (citing *Allen*, 317 N.C. at 122, 343 S.E.2d at 895). In *Frazier*, we explained that "where a defendant presents evidence that the weapon used during a robbery was unloaded or otherwise incapable of firing, such evidence 'tend[s] to prove the absence of an element of the offense [of armed robbery].' " *Id.* (quoting *State v. Joyner*, 67 N.C. App. 134, 136, 312 S.E.2d 681, 682 (1984), *aff'd*, 312 N.C. 779, 324 S.E.2d 841 (1985)). If the jury believed defendant's evidence tending to show that the shotgun was unloaded, it should have found defendant not guilty of armed robbery.

In addition, while prior decisions have held that a firearm incapable of firing may be a dangerous weapon where it was used to strike or bludgeon the victim, *e.g.*, *State v. Funderburk*, 60 N.C. App. 777, 778–79, 299 S.E.2d 822, 823 (1983), there was no evidence in this case that defendant used the shotgun to strike Ms. Robinson. By suggesting that the shotgun could have been used to strike her, the prosecutor ignored "the circumstances of use" from which we "determine whether an instrument is capable of threatening or endangering life." *State v. Westall*,

116 N.C. App. 534, 539, 449 S.E.2d 24, 27 (1994) (citing *State v. Pettiford*, 60 N.C. App. 92, 298 S.E.2d 389 (1982)); *see State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982) ("[T]he determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." (citing *State v. Moore*, 279 N.C. 455, 183 S.E.2d 546 (1971))).

Although we agree that the prosecutor's statements were improper, defendant has failed to show prejudice. N.C. Gen. Stat. § 15A-1442(6), -1443(a) (2015). "[A]s a general rule, a trial court cures any prejudice resulting from a prosecutor's misstatements of law by giving a proper instruction to the jury." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citing *State v. Trull*, 349 N.C. 428, 452, 509 S.E.2d 178, 194 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999)). After closing arguments, the trial court admonished the jury to follow its own instructions and not the attorneys' statements of the law. The court then properly instructed the jury on the elements of armed robbery, including the permissive inference regarding the "dangerous weapon" element, and the lesser-included offense of common law robbery. Based on the steps taken by the trial court, defendant has failed to show prejudice which would warrant a new trial.

III. Conclusion

We conclude that defendant received a trial free from prejudicial error. The trial court took appropriate steps to correct the prosecutor's misstatements of the law and otherwise properly instructed the jury on the law and the offenses at issue.

NO PREJUDICIAL ERROR.

Judges HUNTER, JR. and DAVIS concur.

STATE OF NORTH CAROLINA
v.
BARSHIRI SANDY, DEFENDANT

STATE OF NORTH CAROLINA
v.
HENRY SURPRIS, DEFENDANT

No. COA15-996

Filed 21 June 2016

Appeal and Error—writ of certiorari—motion for appropriate relief—consideration of email communications outside of record

The Court of Appeals invoked Rule 2 of the North Carolina Rules of Appellate Procedure to consider certain e-mail communications outside the record in order to prevent manifest injustice. Defendants were entitled to the relief they sought in their motion for appropriate relief. Their constitutional rights were violated by the assistant district attorney's failure to provide information which Defendants could have used in a robbery case to make their own case and impeach the alleged victim's testimony that he was not a drug dealer. Accordingly, the judgments were vacated and remanded to the trial court.

Appeal by Defendants from judgments entered 14 December 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 24 February 2016.

Attorney General Roy A. Cooper, III, by Assistant Attorney General LaShawn Piquant and Assistant Attorney General Robert D. Croom, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant-Appellant Barshiri Sandy.

Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant Henry Surpris.

DILLON, Judge.

Defendants Barshiri Sandy ("Sandy") and Henry Surpris ("Surpris") (collectively referred to as "Defendants") were indicted for various

charges for allegedly robbing Marcus Smith ("Mr. Smith") at gunpoint in Mr. Smith's garage. Defendants were tried together, and the jury returned guilty verdicts on three felony charges. Defendants gave notice of appeal. While their appeals were pending before this Court, Defendants filed motions for appropriate relief ("MARs"). In their MARs, Defendants ask this Court to vacate the judgments, contending that their constitutional rights were violated during the prosecution of their cases. We grant Defendants' MARs and order that the judgments entered against them be vacated, we dismiss Defendants' underlying appeal as moot, and we remand the matters to the trial court for further proceedings consistent with this opinion.

I. Background

A. The "Armed Robbery"

In April 2013, the two Defendants, along with Bryant Baldwin ("Mr. Baldwin"), approached Marcus Smith in his garage as he was exiting his car. During the encounter, the following occurred: (1) Defendants obtained $1,153.00 and a ring from Mr. Smith; (2) Mr. Smith grabbed a gun and shot both Defendants; (3) Mr. Smith was shot in the arm by one of the Defendants; and (4) Defendants fled in a car driven by Mr. Baldwin.

Defendants and Mr. Baldwin were subsequently arrested. Though Mr. Baldwin initially stated he was not present during the shooting, he changed his story and agreed to testify against Defendants after being confronted with certain evidence that placed him at the scene.

B. The Trial

In October 2014, Defendants were jointly tried for a number of felonies in connection with the alleged robbery/shooting in Mr. Smith's garage. All four men who were at the scene on the night in question testified at the trial: Mr. Baldwin and Mr. Smith testified for the State, and Defendants testified on their own behalf.

The State's evidence tended to show as follows: Defendants entered Mr. Smith's garage *with the intent to rob Mr. Smith*. Mr. Smith testified that he was a "club promoter," a position that required him to carry cash which accounted for the large amount of money he carried from time to time. He testified that Defendants approached him in his garage wearing masks and robbed him of $1,153.00 and some jewelry. He stated that he was able to shoot Defendants during the robbery, but was struck once in the arm by a bullet fired by one of the Defendants. Mr. Smith denied

being a drug dealer. Mr. Baldwin's testimony essentially corroborated Mr. Smith's account of the robbery.

Defendants' evidence tended to show as follows: Defendants testified that Mr. Smith was, in fact, an active drug dealer. Defendants went to see Mr. Smith, not to rob him, but rather *to confront him* about marijuana they claimed they had purchased from him but had not yet received. Mr. Smith admitted to owing Defendants marijuana. Mr. Smith stated that he did not want to conduct business inside his residence (as his family was inside), but that he would give them $1,153.00 in cash and a ring in lieu of the marijuana owed to Defendants. After handing over the money and ring, Mr. Smith grabbed a gun and shot both Defendants. Defendants fled in a vehicle driven by Mr. Baldwin. Defendants presented no evidence that Mr. Smith was, in fact, a major marijuana dealer besides their own self-serving testimony.

Defendants were convicted of all charges. The trial court entered judgments and sentenced them accordingly.

C. The Appeal/Motions for Appropriate Relief

Defendants timely appealed their convictions to this Court. In February 2015, before this appeal was heard, the State's key witness, Mr. Smith, was indicted by the federal government for trafficking large amounts of marijuana. Mr. Smith's indictment was based largely on evidence uncovered during an ongoing investigation by the Raleigh Police Department (the "RPD"). Through information obtained during the federal prosecution of Mr. Smith, Defendants' counsel has learned of information which suggests that *prior* to Defendants' trial: (1) The lead assistant district attorney (the "ADA") in Defendants' case was fully aware of the RPD investigation of Mr. Smith's drug trafficking activities; (2) the ADA corresponded with the lead RPD detective through a private e-mail account she maintained regarding the RPD's active investigation of Mr. Smith's involvement in drug trafficking; (3) when the RPD detective had cause to arrest Mr. Smith for drug trafficking, the ADA encouraged the RPD detective to hold off on the arrest until after she had completed her prosecution of Defendants; and (4) during Defendants' trial, the ADA called Mr. Smith as her key witness, who testified that he was not a drug trafficker, testimony which the ADA knew or should have known was false.

Defendants have filed MARs with this Court pursuant to N.C. Gen. Stat. § 15A-1418, requesting that their convictions be vacated. Their MARs are based, in large part, on information outside the Record on Appeal (the "Record"), including information contained in the court

filings in the federal prosecution of Mr. Smith. As indicated in Defendant Surpris's MAR:

> Defense and State witnesses gave drastically different accounts of the events of 17 April 2013. The key issue producing these radically dissimilar accounts was whether Marcus Smith [the victim and the State's key witness] trafficked large amounts of marijuana. The defense argued he did. The State argued he did not.
>
> The defense was correct, but did not have the direct evidence to prove it because the State suppressed substantial evidence documenting Marcus Smith's marijuana trafficking. The State, on the other hand, knew Smith trafficked marijuana, but allowed Smith to falsely tell the jury he made money legitimately as a club promoter.

Defendants argue that they were denied constitutional due process based, in part, on the ADA's failure to disclose evidence of Mr. Smith's drug trafficking activities during discovery, *see Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), and the ADA's failure to act when the State's key witness, Mr. Smith, gave testimony at Defendants' trial that he was not involved in drug dealing, testimony the ADA knew or should have known was misleading or false. *See Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed.2d 1217 (1959).

II. Summary of Holding

In disposing of the MARs, we invoke Rule 2 of the North Carolina Rules of Appellate Procedure to consider certain e-mail communications outside the Record in order to prevent manifest injustice as the "substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007). Specifically, in our consideration of the MARs, we look not only to the Record but also to certain e-mails between the ADA and the RPD detective and an e-mail communication from the ADA to Defendants' counsel. We note that the State has not disputed the authenticity of these e-mails or made any argument that an evidentiary hearing is necessary to determine the authenticity of these e-mails. Accordingly, we conclude that invocation of Rule 2 is appropriate in this case.[1]

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1. The State has argued that our Supreme Court's recent decision in *State v. Benitez* bars appellate review of an MAR filed pursuant to N.C. Gen. Stat. § 15A-1418 if the underlying evidence is not part of the record on appeal. *State v. Benitez*, 368 N.C. 350, 350, 777 S.E.2d 60, 60 (2015). However, *Benitez* is distinguishable because in that case there was a need for the trial court to make findings regarding an evidentiary dispute, whereas here,

We further hold that these e-mails and the Record are sufficient for our Court to conclude that Defendants are entitled to the relief they seek in the MARs. Specifically, it is clear that their constitutional rights were violated, at the very least by the ADA's failure to provide information which Defendants could use to make their own case and impeach Mr. Smith's testimony, namely, his assertions that he was not a drug dealer. Accordingly, we vacate the judgments against Defendants and remand the matters to the trial court for further proceedings consistent with this opinion.

III. Discussion

A. Legal Grounds for Defendants' MARs: *Brady* and *Napue* Violations

In the present case, Defendants argue the following: (1) the ADA had reason to know that Mr. Smith was active in dealing marijuana (as asserted by Defendants during the trial); (2) the ADA, whether intentionally or unintentionally, suppressed evidence concerning Mr. Smith's drug activities (information which Defendants could have used to impeach Mr. Smith and corroborate their version of what occurred during the shooting); and (3) the ADA failed to act when her witness, Mr. Smith, gave the false impression that he was not actively involved in dealing marijuana, in violation of *Brady* and *Napue*.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed.2d at 218. Further, that Court has instructed that "[i]mpeachment evidence [which the defense could use against a government witness] as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed.2d 481, 490 (1985); *see also State v. Williams*, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008) (recognizing that the Due Process Clause prohibits a prosecution from suppressing "impeachment evidence or exculpatory evidence"). Further, a prosecutor's duty to disclose extends beyond the prosecutor's case file to other materials in the possession of governmental investigative agencies. *Kyle v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed.2d 490, 508 (1995) (recognizing that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). And a Due Process Clause violation occurs when such evidence is suppressed "irrespective

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the State has not argued that the e-mails are not authentic. Further, in *Benitez*, there was no invocation of Rule 2 for the consideration of evidence outside the record.

of the good faith or bad faith of the prosecution." *Williams*, 362 N.C. at 636, 669 S.E.2d at 296.

In *Napue*, the United States Supreme Court held that a due process violation occurs when a State witness offers false testimony which the prosecution knew or should have known was false. *Napue*, 360 U.S. at 269, 272, 79 S. Ct. at 1177, 1178-79, 1179, 3 L. Ed.2d at 1221, 1222-23. *See also Giglio v. United States*, 405 U.S. 150, 153-55, 92 S. Ct. 763, 766, 31 L. Ed.2d 104, 108-09 (1972) (reaffirming *Napue* holding in matter involving prosecution's nondisclosure of a promise to witness, namely: that he would not be charged if he testified on behalf of the prosecution). A violation occurs even where "the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269, 79 S. Ct. at 1177, 3 L. Ed.2d at 1221. *See also State v. Wilkerson*, 363 N.C. 382, 402-03, 683 S.E.2d 174, 187 (2009) (citing the *Napue* decision for the general proposition that the use of false evidence is improper even if the prosecution does not solicit it).

B. Our Court's Authority to Rule on MARs

A defendant may seek a motion for appropriate relief where "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." N.C. Gen. Stat. § 15A-1415(b)(3) (2013). And a defendant may make such motion *in the appellate division* when the case is pending in the appellate division. N.C. Gen. Stat. § 15A-1418(a) (2013).

Our Court has the statutory authority *to dispose of* a MAR filed in our Court during an appeal if the taking of additional evidence is not necessary. *See* N.C. Gen. Stat. § 15A-1418(b) ("motion may be determined on the basis of the materials before" the appellate division). *See also State v. Jones*, 296 N.C. 75, 78, 248 S.E.2d 858, 860 (1978) (granting a motion for appropriate relief under N.C. Gen. Stat. § 15A-1418(a) as: "(1) the facts were sufficiently developed in the documents to enable us to rule on the legal question presented"; "(2) there was no controversy between the state and defendant as to any of the essential facts"; and "(3) it was not necessary to remand the case to the trial division [to take additional evidence and make findings]"). Otherwise, if the taking of additional evidence is necessary, it is the appellate court's duty to remand the MAR to the trial division for the taking of additional evidence. *See id.*

C. Our Consideration of Matters Outside the Record in Ruling on the MARs

Normally, any matter on appeal is decided solely on information contained in the record on appeal. However, Rule 2 of our Rules of Appellate Procedure recognizes the "residual power possessed by any

authoritative rule-making body to suspend or vary operation of its published rules in specific cases *where this is necessary to accomplish a fundamental purpose of the rules*." *Hart*, 361 N.C. at 316, 644 S.E.2d at 205. Our courts have not hesitated to invoke Rule 2 where the substantial rights of criminal defendants are implicated. *See*, *e.g.*, *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam).

Here, Defendants seek relief on the basis of newly discovered, documentary evidence obtained subsequent to the filing of the Record which establishes the ADA's failure to disclose information which she knew or had reason to know was favorable to Defendants, in violation of their substantial rights under *Brady* and *Napue*. The e-mails contain the ADA's own words, and the State makes no argument that the e-mails are not authentic. We conclude that it is not necessary to remand the matter to the trial court to conduct an evidentiary hearing on the matter. The e-mails speak for themselves. These e-mail communications establish that on 22 August 2014 – two months prior to Defendants' trial – the RPD raided a "stash" house operated by Mr. Smith and others while Mr. Smith was not present, and discovered a large quantity of marijuana.[2]

In December 2015, based on information uncovered during Mr. Smith's federal prosecution, Defendants' counsel contacted the ADA about certain correspondence she had with the RPD detective regarding a 22 August 2014 raid on a certain drug stash house. The ADA responded that she had no notes of any such conversations or any e-mails with the RPD except those which she had already provided.

Thereafter, Defendants' counsel was told by Mr. Smith's defense attorney in the federal prosecution that the federal prosecutor had disclosed specific e-mail communications between the ADA and the RPD detective regarding the stash house raid. Upon learning this information, Defendants' counsel again contacted the ADA about alleged communications she had with the RPD prior to Defendants' trial concerning her star witness' drug activities, to which she admitted that she communicated with the RPD detective through her private Yahoo e-mail account:

> *Back in December [2015], I told you that I had looked through my "nccourts" email account and had not found*

2. We note that during discovery, Defendants specifically made a discovery request seeking *Brady* evidence, including "[a]ny notes taken or reports made by investigating officers which would . . . contradict other evidence to be presented by the State" and also "any and all information of any of the types herein requested that comes to the attention of the District Attorney's Office after compliance with this request, or which, by the exercise of due diligence should have been known to the District Attorney."

> *any correspondence with [the RPD detective], which is accurate. However, right after the holidays, as I was driving to work one morning, it dawned on me that back at that time [summer/fall of 2014] that I tried your client,* ***I often used a "yahoo" email account to correspond with law enforcement officers, and I had not looked in that account. As soon as I got to work, I looked through that account, and located the five emails that I have attached.***

(Emphasis added.) The ADA then disclosed five e-mails containing correspondence between her and the RPD detective prior to Defendants' trial concerning Mr. Smith's drug trafficking activities, activities which Mr. Smith denied on the stand during Defendants' trial:

27 July 2014 e-mail from the ADA to the RPD detective investigating Marcus Smith for alleged drug trafficking (one month prior to the stash house raid):

> I am . . . reaching out to you because Marcus Smith is the victim in a fairly nasty home-invasion case of mine that is set to go to trial in the very near future, so I'd like to talk to you a bit about it, as well as educate myself on what your investigation entails, before anything too much further happens.

27 July 2014 e-mail response from RPD detective to ADA:

> I . . . would be happy to meet at your convenience. Please call or text my cell phone and we can schedule a time.

30 July 2014 e-mail from ADA to RPD detective:

> Please don't hate me, but we've set the trial date for 10/6. Good news is that I will do all three of my defendants [Defendants and Mr. Baldwin], so once we're done, we'll be really done! I'm sorry – but I really appreciate your understanding and willingness to work with me on this . . . .

19 August 2014 e-mail from RPD detective to ADA (3 days before the stash house raid):

> I have located the stash house for Mr. Smith and have obtained P.C. [probable cause] to apply for a search warrant for it. I would like to execute the search warrant on the home this week when Smith is not there. It is not

> Smith's house. He does not maintain any utilities there. I would not be charging Smith with any crimes. Please get back to me when you have time.

26 September 2014 e-mail from ADA to RPD detective (1 month after the raid):

> I assume nothing earth-shattering is happening on your end, otherwise I would've gotten a call from either you or [Mr. Smith's] lawyer :). I wanted to tell you that (let me preface this with: PLEASE DON'T HATE ME PLEASE DON'T HATE ME PLEASE DON'T HATE ME) [Defendant] Sandy's lawyer got scheduled by a federal court judge for next week [the scheduled 10/6 trial date], and we've had to bump the trial back a month. We are now set for 10/26 . . . .

The State has made no argument that these e-mails are inauthentic.

D. Evidence in the Record Relevant to the MAR

In the Record itself, there are numerous statements made by Mr. Smith and by the ADA during the October 2014 trial, two months after the stash house raid, which suggest that Mr. Smith was not a drug trafficker. For example, the ADA elicited testimony from Mr. Smith that he had no pending charges, testimony, which though true, can be viewed as misleading. During the course of the trial, the ADA admitted that Mr. Smith had denied any involvement in drug trafficking:

> Mr. Smith has been asked . . . is he still participating in drug sale activity. *His answer was no*. . . . I, again, no problem with him being asked if he is still participating in that type of activity. *He asked and he answered the question.*

(Emphasis added.) During closing arguments, the ADA discounted Defendants' version of the events, namely that Defendants were confronting a drug dealer about a recent transaction, by pointing out the lack of evidence that Mr. Smith was involved in drug trafficking:

> There has been absolutely no evidence from the witness stand outside the Defendants' testimony that this has anything to do with drugs . . . . The Defendants are the only people who've been talking about drugs . . . . *From that, the defense wants to make you believe that Marcus Smith is apparently a drug kingpin.*

(Emphasis added.)

E. Violation of Defendants' Constitutional Rights

On the basis of the materials in the Record and the undisputed, documentary evidence submitted in support of the MARs, we hold that Defendants' constitutional rights were violated. Their due process rights were violated by the ADA's failure to provide them information concerning the drug trafficking activities of the State's star witness, Mr. Smith. *See Brady*, 383 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed.2d at 218. Defendants' version of events on the night in question was built on the premise that the alleged victim, Mr. Smith, was in fact a drug dealer. The ADA's e-mails cited above conclusively establish that the ADA knew or had reason to know of information which would have been helpful to Defendants and failed to disclose it. We see no need to remand the matter to the trial court for the taking of additional evidence *on this point*. Again, the e-mails speak for themselves.

Further, Defendants' due process rights were violated by the ADA's failure to correct the false testimony given by the State's star witness, Mr. Smith. As the United States Supreme Court has stated:

> 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct when [s]he knows to be false and elicit the truth. [Even if] the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'

Napue, 360 U.S. at 269-70, 79 S. Ct. at 1177, 10 L. Ed.2d. at 1221. *See Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967) ("[D]ue process is violated not only where the prosecution uses perjured testimony to support its case, but also where it uses evidence which it knows creates a false impression of a material fact.")

We hold that these violations were prejudicial in nature. Defendants' version of the shooting was based on their contention that they were in Mr. Smith's garage to settle accounts with Mr. Smith, not to rob him. Their self-serving testimony, however, was the only evidence that Mr. Smith was, in fact, a drug trafficker. Further, the State's key evidence was Mr. Smith's testimony. Evidence which would tend to show that at least part of his testimony was false could have made a difference in the outcome. *See U.S. v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015)

(citing *Brady* decision to hold that prosecution violated defendants' constitutional rights by failing to provide counsel with SEC impeachment evidence). It bears repeating that the State has failed to make any argument disputing the authenticity of the ADA-RPD e-mails. There are no questions of fact that would require an evidentiary hearing. As such, the State's reliance on *Benitez* and similar cases is misplaced.[3]

IV. Conclusion

We grant Defendants' MARs, thereby vacating the judgments against them. We, therefore, dismiss Defendants' appeal as moot.

VACATED AND REMANDED.

Judges CALABRIA and DIETZ concur.

3. We note that Defendants have produced *other* information in support of their MARs. Further, we note that some of this *other* information may require the taking of additional evidence. However, we conclude that we can resolve Defendants' MARs based on the e-mails alone. Perhaps more evidence is required to discover the ADA's true motive; however, such evidence is not necessary for our purposes in this appeal. The constitutional violation occurred irrespective of the ADA's motive. *Williams*, 362 N.C. at 636, 669 S.E.2d at 296.

STATE OF NORTH CAROLINA
v.
ROBERT EARL SPENCE, JR., DEFENDANT

No. COA15-549

Filed 21 June 2016

1. Sentencing—remand—resentencing—de novo

Where defendant appealed from the trial court's judgments resentencing him in the presumptive range following a remand from the Court of Appeals for a new sentencing hearing, the Court of Appeals rejected defendant's argument that the trial court failed to conduct the resentencing hearing de novo. The trial court did not need to make specific findings of mitigating factors for a sentence in the presumptive range, and the record indicated that the court did review the evidence and factors presented anew.

2. Sentencing—remand—resentencing—clerical errors

Where defendant appealed from the trial court's judgments resentencing him in the presumptive range following a remand from the Court of Appeals for a new sentencing hearing, the Court of Appeals held that the trial court used incorrect language on the judgment forms when it wrote that it had arrested judgment on three sex offense convictions based on the judgment of the Court of Appeals vacating the convictions. The trial court also erred by including one of the sex offense convictions in the vacated judgments when the Court of Appeals had not ordered that conviction to be vacated. The Court of Appeals remanded the case for the trial court to correct the clerical errors.

Appeal by defendant from judgments entered 18 December 2014 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 19 November 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Kimberly N. Callahan, for the State.

Amanda S. Zimmer for defendant-appellant.

STROUD, Judge.

Defendant Robert Earl Spence, Jr. appeals from the trial court's judgments resentencing him in the presumptive range to three consecutive sentences of 230 to 285 months. On appeal, defendant argues that the trial court failed to conduct the resentencing hearing *de novo*. He also argues that the court failed to comply with an earlier mandate issued by this Court when it arrested judgment on three sex offense convictions that were vacated by this Court. Since the trial court need not make specific findings of mitigating factors for a sentence in the presumptive range, and the record indicates that the court did review the evidence and factors presented anew, we conclude that it properly conducted a resentencing hearing *de novo*. Moreover, we find that the trial court improperly stated that it "arrested judgment" on the first-degree sex offense convictions in all four judgments, rather than properly indicating that three of those convictions were in fact vacated by this Court previously. In addition, the court also included one sex offense conviction that was not vacated by this Court in the group of "arrested" judgments. Accordingly, we affirm the trial court's judgments in part but vacate the judgment for each case in which the court noted that it was "arresting judgment" on the first-degree sex offenses and remand for proper entry and to correct the record accordingly.

Facts

Defendant was indicted on 12 December 2011 for four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative stemming from numerous acts of sexual misconduct committed by defendant to his daughter, Donna[1], from the time she was five years old until she reached the age of 12. Defendant was tried by jury from 10 June 2013 until 18 June 2013. At the trial, Donna could recall the locations where the sexual attacks occurred but could not remember dates or time frames. The State tried to establish the time frames of the offenses by establishing when defendant lived at the various locations. On 18 June 2013, a jury found him guilty of four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative. Defendant was sentenced in the presumptive range to three consecutive sentences of 230 to 285 months. Defendant appealed to this Court.

On 18 November 2014, this Court issued an opinion finding no error in part but also vacating three of the four convictions for first-degree sexual offense, in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774,

1. We use a pseudonym to protect the privacy of the juvenile victim.

because there was insufficient evidence in the record to establish that those offenses occurred in 2001, 2004, or 2005 as alleged in the indictments. This Court noted: "With regard to 11 CRS 226769, the only evidence that a sex offense had occurred was when Donna read an entry from her journal that chronicled her prior abuse and other witnesses testified about statements Donna made to them prior to trial." After explaining its reasoning in more detail, this Court then concluded: "the State failed to provide substantial evidence of a first-degree sex offense in 2001, and the trial court erred by denying defendant's motion to dismiss this charge in 11 CRS 226769." This Court found further that "the State failed to provide substantial substantive evidence of a 'sexual act' for the first-degree sex offense charges in 11 CRS 226773 and 11 CRS 226774." The case was remanded for a new sentencing hearing in light of this opinion.

On remand, the trial court acknowledged that the sex offense convictions had been vacated in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774. At the resentencing hearing, the State explained that those three convictions originally "were all consolidated with other charges." Then, the State requested "that the same sentencing occur and just subtract those." Defendant's trial counsel asked the court to consider and find multiple mitigating factors. After hearing those factors, the trial court informed defendant that it would "enter three judgments consistent with the Court of Appeals ruling or mandate in this case, and the net effect will be the same as the sentences that are already imposed. These judgments are within the presumptive range."

The court entered a judgment in 11 CRS 226769 with the following note:

> In accordance to the North Carolina Court of Appeals judgment dated 8 December 2014, the court will vacate the judgments that were entered for first degree sexual offense in case numbers 11CRS 226769, 11CRS 226773, and 11CRS 226774. Therefore this court will have to conduct a new sentencing hearing.

The trial court entered judgments in 11 CRS 226769, 11 CRS 226773, 11 CRS 226774, and 11 CRS 226775 relating to the first-degree sexual offense convictions stating that "[t]he Court arrested judgment on this count based on the judgment from the Court of Appeals vacating this conviction." The court then resentenced defendant in the presumptive range to three consecutive sentences of 230 to 285 months. Defendant timely appealed to this Court.

Discussion

I. Referred motion to dismiss

The State filed a motion to dismiss defendant's appeal, arguing that defendant has no statutory right to appeal his presumptive range sentences imposed under N.C. Gen. Stat. § 15A-1444(a1) (2015). N.C. Gen. Stat. § 15A-1444(a1) provides:

> (a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

Specifically, the State argues that since defendant "was sentenced in the presumptive range, he does not have a right to appeal this issue under section 15A-1444(a1)."

Defendant points out, however, that he does not challenge on appeal whether his sentences were supported by the evidence. Rather, defendant raises issue with whether the trial court failed to conduct his resentencing hearing *de novo* and whether the trial court erred by arresting judgment on the sex offense convictions. Thus, since defendant makes no challenge regarding the sufficiency of the evidence, defendant argues N.C. Gen. Stat. § 15A-1444(a1) is inapplicable. We agree.

This Court addressed a similar situation in *State v. Hagans*, 188 N.C. App. 799, 656 S.E.2d 704 (2008). In *Hagans*, the defendant appealed after a jury found him guilty of possession of a firearm by a felon, assault with a deadly weapon, and discharge of a firearm into an occupied vehicle. *Id.* at 800, 656 S.E.2d at 705. This Court then vacated the possession of a firearm by a felon conviction and remanded to the trial court for resentencing. *Id.* The defendant appealed from his new sentence, arguing that "the trial judge who sentenced him was biased and that his due process rights, therefore, were violated." *Id.* at 801, 656 S.E.2d at 706. On appeal, this Court concluded that the defendant "does not contend that his sentence was not supported by the evidence, but rather than the sentencing judge was biased. Therefore, section 15A-1444(a1) does not bar defendant's appeal of this matter." *Id.* at 801 n. 2, 656 S.E.2d at 706 n.2.

Similarly, here, defendant raises issue not with whether his sentence was supported by the evidence but rather with whether the trial court applied the proper standard of review and whether it correctly followed this Court's earlier mandate to vacate three of the offenses. Since defendant, like the defendant in *Hagans*, does not challenge whether his sentence is supported by the evidence, N.C. Gen. Stat. § 15A-1444(a1) does not bar his appeal. Accordingly, we deny the State's referred motion to dismiss defendant's appeal and turn now to the issues raised on appeal.

II. Resentencing Hearing: *De novo* review

[1] On appeal, defendant first argues that the trial court erred and failed to conduct his resentencing hearing *de novo*. "Should this Court find a sentencing error and remand a case to the trial court for resentencing, that hearing shall generally be conducted *de novo*. Pursuant to a de novo review on resentencing, the trial court must take its own look at the evidence." *State v. Paul*, 231 N.C. App. 448, 449-50, 752 S.E.2d 252, 253 (2013) (internal citation, quotation marks, and brackets omitted).

Defendant argues that the trial court erred in this case because his defense counsel presented a list of mitigating factors to be considered by the trial court and "[w]ithout indicating it had newly considered these factors, the trial court stated, 'I'm going to enter three judgments consistent with the Court of Appeals ruling or mandate in this case, and the net effect will be the same as the sentences that are already imposed. These judgments are in the presumptive range.' " Thus, defendant contends that the trial court erred because it did not expressly indicate that it would consider those factors or look at the matter anew.

Defendant relies on this Court's decision in *State v. Jarman*, __ N.C. App. __, __, 767 S.E.2d 370, 372 (2014), where a defendant likewise claimed that the trial court had failed to conduct the resentencing hearing *de novo*. In *Jarman*, after being sentenced based on a prior record level designation as a level IV offender, the defendant "filed a motion for appropriate relief requesting a resentencing hearing to correct his prior record level designation from a designation as a level IV offender to a designation as a level III offender, and to reconsider his sentence . . . in light of the correction to his prior record level determination." *Id.* at __, 767 S.E.2d at 371. Following his resentencing hearing, the defendant appealed to this Court, arguing that "the trial court made statements 'indicating that it was not conducting a *de novo* resentencing and did not understand that it should.' " *Id.* at __, 767 S.E.2d at 372.

This Court disagreed and explained:

> It has been established that each sentencing hearing in a particular case is a *de novo* proceeding. The judge hears the evidence without a jury, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists. Although the judge must consider all statutory aggravating and mitigating factors that are supported by the evidence, the judge weighs the credibility of the evidence and determines by the preponderance of the evidence whether such factors exist. At each sentencing hearing, the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, and must find aggravating and mitigating factors without regard to the findings in the prior sentencing hearings.
>
> However, the trial court need make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences. When a trial court enters a sentence within the presumptive range, the court does not err by declining to formally find or act on a defendant's proposed mitigating factors, regardless of whether evidence of their existence was uncontradicted and manifestly credible.

Id. at __, 767 S.E.2d at 372-73 (internal citations, quotation marks, and brackets omitted).

Like the *Jarman* Court, "we are not persuaded that the trial court's . . . remarks demonstrate that it did not understand its obligation to conduct a *de novo* review of the evidence that was properly before it for consideration." *Id.* at __, 767 S.E.2d at 373 (internal quotation marks omitted). The State pointed out to the trial court that defendant's first-degree sex offense convictions in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774 had been vacated by this Court. The State requested that defendant be sentenced to the same sentence length as he was previously since the vacated convictions had previously just been consolidated with other charges that still remained. The court also heard from defendant and his defense counsel submitted several mitigating factors for consideration, including: that defendant had good character and reputation in his community prior to the time of his conviction; that prior to his arrest he supported his family; that he has an extensive family support system in Wake County; and that he had a positive employment

history and was gainfully employed prior to his arrest. The trial court heard all this evidence, then informed defendant: "I'm going to enter three judgments consistent with the Court of Appeals ruling or mandate in this case, and the net effect will be the same as the sentences that are already imposed. These judgments are within the presumptive range."

The transcript shows that the trial court did consider defendant's requests, and that is all that the trial court is required to do. The trial court is not required to change the sentences or make any particular findings about the defendant's evidence to demonstrate its consideration. *See, e.g.*, *State v. Dorton*, 182 N.C. App. 34, 43, 641 S.E.2d 357, 363 (2007) ("[T]he trial court need make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences[.] As the trial court in the present case entered a sentence within the presumptive range, the court did not err by declining to formally find or act on defendant's proposed mitigating factors, regardless whether evidence of their existence was uncontradicted and manifestly credible." (internal citation and quotation marks omitted)). Moreover, "[a] trial court's resentencing of a defendant to the same sentence as a prior sentencing court is not *ipso facto* evidence of any failure to exercise independent decision-making or conduct a *de novo* review." *State v. Morston*, 221 N.C. App. 464, 470, 728 S.E.2d 400, 406 (2012).

Here, defendant's offenses were consolidated for sentencing. Under N.C. Gen. Stat. § 15A-1340.15(b) (2015), when an offender's offenses are consolidated, "[t]he judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense[.]" *See also State v. Skipper*, 214 N.C. App. 556, 557-58, 715 S.E.2d 271, 273 (2011) ("[I]f the trial court consolidates offenses into a single judgment, it is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment."). Thus, since defendant's offenses were consolidated and the most serious offense remained, the trial court was well within its discretion to sentence defendant to the same presumptive range sentence as was previously entered after conducting a new sentencing hearing. Accordingly, we conclude that the trial court in this case did properly conduct the resentencing hearing *de novo*.

III. Arrested Judgment on Sex Offenses

[2] Defendant also argues that the trial court failed to comply with the mandate of this Court to vacate three of the sex offense convictions when it instead wrote on the judgment forms: "The Court arrested judgment

on this count based on the judgment from the Court of Appeals vacating this conviction."

In defendant's prior appeal, *State v. Spence*, __ N.C. App. __, __, 764 S.E.2d 670, 681 (2014), this Court vacated defendant's sex offense convictions in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774 and remanded to the trial court for a new sentencing hearing. At the resentencing hearing, the trial court informed defendant that it would "enter three judgments consistent with the Court of Appeals ruling or mandate in this case[.]" After the hearing, the trial court entered the following note with its judgment in 11 CRS 226769:

> In accordance to the North Carolina Court of Appeals judgment dated 8 December 2014, the court will vacate the judgments that were entered for first degree sexual offense in case numbers 11CRS 226769, 11CRS 226773, and 11CRS 226774. Therefore this court will have to conduct a new sentencing hearing.

In addition, the court included the following language in reference to the sex offense conviction in 11 CRS 226769, 11 CRS 226773, 11 CRS 226774, and 11 CRS 226775: "The Court arrested judgment on this count based on the judgment from the Court of Appeals vacating this conviction."

Defendant argues that the trial court should have vacated those judgments, rather than arresting judgment. "While . . . in certain cases an arrest of judgment does indeed have the effect of vacating the verdict, . . . in other situations an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact." *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990). Here, this Court mandated that the trial court vacate three of the sex offense convictions; it was not ordered to arrest judgment and doing so is not proper in this case.

It seems, however, that the trial court understood this Court's mandate and simply used incorrect language on its form, leading to this confusing result. Essentially, this is a clerical error. Although the judgments state that the court "arrested judgment" on these three offenses, it is evident from the resentencing hearing transcript and the language used by the court itself that it was aware that this Court had vacated those convictions. The court's language, that it "arrested judgment on this count based on the judgment from the Court of Appeals vacating this conviction[,]" shows that it was aware of what this Court did. Furthermore, the trial court did not include those convictions when it resentenced defendant based on the remaining consolidated offenses.

The court merely used improper wording on the form when entering the new sentences on the judgment forms to address the charges that were removed. Nevertheless, this was done in error and must be corrected on remand.

In addition, the trial court arrested judgment on the sex offense conviction from 11 CRS 226775 as well, even though this Court did not mandate that the court vacate this conviction. This was in error, as the prior mandate by this Court vacated only the sex offense convictions in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774. This Court left the sex offense conviction in 11 CRS 226775 intact. Thus, the trial court both used incorrect language and erred in that it should not have included that conviction in the vacated judgments. We, therefore, must vacate and remand simply for the trial court to correct the clerical errors in the order to reflect the accurate disposition of those offenses.

Conclusion

In conclusion, we hold that the trial court did conduct a proper *de novo* review at defendant's resentencing hearing. We also find that while the trial court understood that the sex offense convictions were vacated, the wrong language was used on the judgment forms, and judgment on one sex offense count that was not vacated by this Court previously was inadvertently "arrested." Thus, we vacate those judgments and remand so that the trial court can correct these errors consistent with this opinion.

VACATED AND REMANDED.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
SAMUEL EUGENE WILLIAMS, JR.

No. COA15-1004

Filed 21 June 2016

1. Sentencing—motion to strike—aggravating factors—prior notice

The trial court did not err in a driving while impaired case by denying defendant's motion to strike grossly aggravating and aggravating factors. Defendant's sentence was enhanced based only on his prior convictions. Also, defendant received prior notice of the State's intent to use aggravating factors seven days prior to trial.

2. Motor Vehicles—driving while impaired—motion to suppress—probable cause

The trial court did not commit plain error when it denied defendant's motion to suppress evidence of his driving while impaired arrest based on alleged lack of probable cause. The trial court's findings and conclusions were such that one could reasonably conclude that defendant operated a vehicle on a street or public vehicular area while under the influence of an impairing substance.

Appeal by defendant from judgment entered 19 February 2015 by Judge Wayland J. Sermons, Jr., in Hyde County Superior Court. Heard in the Court of Appeals 9 February 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant.

BRYANT, Judge.

Where the trial court enhanced a sentence based solely on a defendant's prior record of convictions, defendant's Sixth Amendment right to "reasonable notice" was not violated. Further, where the underlying facts support the trial court's conclusions of law, the trial court did not err in denying defendant's motion to suppress.

On 21 June 2011, Ms. Laura Weatherspoon and her boyfriend were on vacation on Ocracoke Island, when they observed a golf cart traveling

on the road nearby. She described the golf cart as going really fast and noted that the three passengers on the golf cart were being very loud and rocking the golf cart, causing it to sway back and forth. As the golf cart approached Weatherspoon's location, the driver suddenly made a hard U-turn, and the passenger riding on the rear of the golf cart, Clay Evans, fell off. Weatherspoon and others attempted to assist Evans, but he was rendered unconscious by the fall and died later that evening.

Deputy Sheriff Scott W. Wilkerson, employed by the Hyde County Sheriff's Department, was on duty on Ocracoke Island. Deputy Wilkerson received a call to report to the scene of an accident involving a golf cart. He arrived at approximately 8:41 PM and observed an individual lying in the roadway, with a golf cart right in front of him and being attended to by a number of people. Deputy Wilkerson questioned people at the scene to determine the identity of the driver of the golf cart. Samuel Eugene Williams, Jr., defendant, responded that he was the driver.

Deputy Wilkerson detected a strong odor of alcohol coming from defendant's breath. He also noted that defendant's clothes were bloody, that he was very talkative and repeated himself, stating at least nine times that he had been trying to make a U-turn. Deputy Wilkerson further observed that defendant's eyes were red and glassy and, as they spoke, defendant had to lean against the deputy's patrol car. Based on his observations of defendant, including the odor of alcohol on his breath, his repeating the same sentence over and over, his red and glassy eyes, and defendant's leaning on the patrol car, Deputy Wilkerson formed an opinion that defendant was impaired. Defendant was asked if he had been drinking, to which defendant replied that he had only had "six beers since noon." Defendant was requested to submit a breath sample into a portable breath testing device while at the scene. Defendant provided multiple breath samples, which resulted in a positive result for alcohol. Defendant was then placed under arrest and transported to the Hyde County Sheriff's Office substation on Ocracoke Island.

At the Sheriff's Office, defendant was taken to the intoxolizer room and advised of his implied consent rights around 9:28 PM. Defendant spontaneously stated to Deputy Wilkerson that he had consumed three "Jager bombs" after he left the bar and prior to the accident. However, defendant refused to submit to a chemical breath test. Subsequently, troopers with the North Carolina State Highway Patrol brought in a blood test kit and, at approximately 10:27 PM, defendant signed a consent form to having his blood drawn, which was done.

On 20 February 2012, a Hyde County Grand Jury indicted defendant for Driving While Impaired ("DWI"). Prior to trial, defendant filed multiple motions to suppress evidence. On 25 May 2012, defendant filed a motion to suppress that challenged the probable cause to arrest him for impaired driving.[1] Defendant's motion to suppress based on lack of probable cause to arrest was heard on 9 May 2013 during the Administrative Session of Hyde County Superior Court before the Honorable Wayland J. Sermons, Jr., Judge presiding. By order entered 23 July 2013, Judge Sermons denied defendant's motion.

On 9 February 2015, the State served Notice of Grossly Aggravating and Aggravating Factors on counsel for defendant. This case came on for trial during the 16 February 2015 session of Hyde County Criminal Superior Court before the Honorable Wayland J. Sermons, Jr., Judge presiding. Defendant filed a Motion to Strike Grossly Aggravating and Aggravating Factors, which motion was denied.

The jury returned verdicts of Guilty of DWI and Not Guilty of Aggravated Felony Death by Motor Vehicle. After the jury verdict but prior to sentencing, the trial court conducted a hearing on defendant's Motion to Strike. Although the trial court denied defendant's Motion to Strike, the court elected not to consider any factors in aggravation other than defendant's prior record history or submit to the jury any factors in aggravation.

At sentencing, the trial court found the existence of two grossly aggravating factors, *i.e.*, that defendant had two or more convictions involving impaired driving, also which occurred within seven years before the date of the offense. The trial court found two factors in mitigation. Defendant was sentenced to Level One punishment with an active sentence of eighteen months in the Misdemeanant Confinement Program. Defendant gave notice of appeal in open court.

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1. Defendant also filed a motion to suppress results of the Alco-Sensor test administered to him prior to his arrest and, on 16 July 2012, defendant filed another motion to suppress the results of an analysis of blood samples seized from him after his arrest. These motions were also heard on 9 May 2013. Judge Sermons granted defendant's motion to suppress the blood analysis, and denied defendant's motion to suppress the results of the Alco-Sensor test. On 29 July 2013, the State filed a notice of appeal to this Court from Judge Sermon's 23 July 2013 order suppressing the blood analysis. On 17 July 2014, this Court filed a published opinion that affirmed Judge Sermons's order. On 22 July 2014, the State filed petitions for writ of supersedeas and discretionary review in the North Carolina Supreme Court. The Court denied both petitions on 19 August 2014. *See State v. Williams*, ___ N.C. App. ___, 759 S.E.2d 350, *disc. review denied*, 367 N.C. 528, 762 S.E.2d 201 (2014).

On appeal, defendant argues that the trial court erred when it (I) denied defendant's Motion to Strike; (II) found two grossly aggravating factors; and (III) denied defendant's motion to suppress evidence obtained as a result of his DWI arrest. Because defendant's arguments (I) and (II) are primarily based on the State's alleged failure to comply with the ten-day statutory notice requirement set out in N.C. Gen. Stat. § 20-179(a1)(1), we address these arguments together.

I & II

[1] Defendant first argues that the trial court erred when it denied defendant's Motion to Strike Grossly Aggravating and Aggravating Factors. Specifically, defendant contends that the State served its notice of grossly aggravating and aggravating factors on defense counsel seven days before trial—and three years after defendant was indicted—in violation of N.C. Gen. Stat. § 20-179(a1)(1). Defendant asserts that the notice provisions contained in N.C.G.S. § 20-179 were enacted as part of the Motor Vehicle Driver Protection Act of 2006, in order to protect defendant's Sixth Amendment right to notice of aggravating factors. He further argues that the State's failure to comply with the ten-day requirement violates the United States Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296, 304, 159 L. Ed. 2d 403, 414 (2004) ("When a judge inflicts punishment that the jury's verdict does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." (internal citation omitted)).

Defendant contends that, as a result of the trial court's denial of his Motion to Strike, the trial court consequently erred when it found two grossly aggravating factors, sentenced defendant to Level One punishment, and imposed an active sentence. We disagree.

Statutory errors are questions of law reviewed *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (citations omitted). Under the *de novo* standard, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

The statute here at issue states as follows, in pertinent part:

> (1) **Notice.** – *If the defendant appeals to superior court*, and the State intends to use one or more aggravating

> factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days prior to trial and shall contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.

N.C. Gen. Stat. § 20-179(a1)(1) (2014), *amended by* 2015 N.C. Sess. Laws 2015-264, § 38(b), eff. Dec. 1, 2015 (emphasis added) (amending subsection (c) of N.C. Gen. Stat. § 20-179 to state that the grossly aggravating factor "Driving by the defendant at the time of the offense while his driver's license was revoked" is subject to the notice provision in N.C.G.S. § 20-179(a1)). This amendment was added subsequent to defendant's trial.

With regard to defendant's statutory argument, we acknowledge the plain language of the statute, which would seem to preclude this notice provision from applying in this case. The notice provision states that it only applies to sentencing in cases where "*the defendant appeals to superior court . . . .*" *See id.* (emphasis added). The record clearly indicates that defendant was indicted in superior court on the impaired driving offense, and therefore, the charge was not *on appeal* to the superior court. *Cf. State v. Reeves*, 218 N.C. App. 570, 576–77, 721 S.E.2d 317, 322 (2012) (remanding for resentencing where the defendant appealed to superior court after he was found guilty of DWI after jury trial in district court, and where "the State failed to provide [d]efendant with the statutorily required notice of its intention to use an aggravating factor"—that the defendant's driving was "especially reckless"—pursuant to N.C.G.S. § 20-179(a1)(1)). Where, as here, the charge in question was not on appeal to the superior court, defendant's argument that his seven-day notice was in violation of the statute providing for ten-day notice, is overruled.

We also address defendant's main argument, which is a constitutional one—that the State's failure to comply with statutory notice requirements amounts to a Sixth Amendment violation, as set forth in *Blakely*.

The Sixth Amendment guarantees defendant the right to be informed of the charges against him and, specifically, any fact that could increase the maximum penalty beyond that for the crime charged in the indictment. *See* U.S. Const. amend. VI; *Blakely*, 542 U.S. at 301–02, 159 L. Ed. 2d at 412 ("[A]n accusation which lacks any particular fact which the

law makes essential to the punishment is . . . no accusation within the common law . . . .” (citation and quotation marks omitted)). “ ‘Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.’ ” *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)).

Where, as here, the trial court enhances a sentence based solely on a defendant’s prior record of convictions, a defendant’s Sixth Amendment right to “reasonable notice” is not violated. *See State v. Pace*, ___ N.C. App. ___, ___, 770 S.E.2d 677, 683 (2015) (“We do not believe [d]efendant’s Sixth Amendment right to ‘reasonable notice’ is violated where the State provides no prior notice that it seeks an enhanced sentence based on the fact of prior conviction.”). *But see State v. Keel*, No.COA15-69, 2015 WL 4620513, at *1, *5 (N.C. Ct. App. Aug. 4, 2015) (unpublished) (remanding for new sentencing hearing following DWI conviction where the State “failed to file the notice of sentencing factors in the trial court, and it was not included in the trial court record”).

Here, defendant’s sentence was enhanced based only on his prior convictions. Also, defendant received prior notice of the State’s intent to use aggravating factors seven days prior to trial. Accordingly, defendant’s argument that he was improperly sentenced because his right to constitutionally adequate notice was violated is overruled.

III

[2] Lastly, defendant argues that the trial court committed plain error when it denied his motion to suppress evidence of his DWI arrest based on lack of probable cause. Defendant asserts there was no evidence to establish that the golf cart was operated in an “other than normal” fashion, that his balance, coordination, and speech were normal, and he was not requested to submit to any field sobriety test.[2] We disagree.

A “pretrial motion to suppress is not sufficient to preserve for appeal the question of admissibility of [evidence]” where the defendant does not object at the time the evidence is offered at trial. *See State v. Golphin*, 352 N.C. 364, 405, 533, S.E.2d 168, 198 (2000) (“[W]e have previously stated

2. Defendant also contends that the Alco-Sensor result cannot be used to establish probable cause where the State failed to produce evidence that the device used was an appropriate one and that it was used in the approved manner. Defendant’s contention regarding the Alco-Sensor will not be considered where the trial court denied defendant’s motion to suppress the results of the Alco-Sensor test, and defendant did not challenge that ruling on appeal.

that a motion *in limine* was not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial. . . . As a pretrial motion to suppress is a type of motion *in limine*, [defendant's] pretrial motion to suppress is not sufficient to preserve for appeal the question of the admissibility of his statement because he did not object at the time the statement was offered into evidence." (citations omitted)).

Here, defendant filed a pretrial motion to suppress evidence of his arrest alleging that there was not sufficient evidence to establish probable cause for his arrest. That motion was decided after an evidentiary hearing and denied. Thereafter, the record is silent as to any further objection from defendant to the introduction of the same evidence at the trial of this case. Therefore, defendant has waived any objection to the denial of his motion to suppress, and it is not properly preserved for this Court's review. *See State v. Oglesby*, 361 N.C. 550, 553–54, 648 S.E.2d 819, 821 (2007); *Golphin*, 352 N.C. at 405, 533 S.E.2d at 198. Defendant, however, attempts to cure this defect by arguing that the trial court committed plain error instead.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2015); *see also State v. Goss*, 361 N.C. 610, 622–23, 651 S.E.2d 867, 874–75 (2007). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of the evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). Under the plain error rule, defendant must establish " 'that a fundamental error occurred at trial' " and that absent the error, it is probable the jury would have returned a different verdict. *State v. Carter*, 366 N.C. 496, 500, 739 S.E.2d 548, 551 (2013) (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)).

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are exclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C.

132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

In determining whether probable cause is present, the North Carolina Supreme Court has stated that

> "[p]robable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." . . .
>
> Probable cause "deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

State v. Bone, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) (alteration in original) (internal citation omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890 (1949)).

Here, the uncontested facts[3] found by the trial court in its order include that the charging officer, Deputy Wilkerson, responded to a call involving the operation of a golf cart and serious injury to an individual still in the roadway when he arrived at the scene. Defendant admitted to Deputy Wilkerson that he was the driver of the golf cart. Defendant had "very red and glassy" eyes and "a strong odor of alcohol coming from his breath." Defendant's clothes were bloody, and he was very talkative, repeating himself several times. Defendant's mannerisms were "fairly slow," and defendant placed a hand on the deputy's patrol car to maintain his balance. Defendant further stated that he had "6 beers since noon." Defendant submitted to an Alco-Sensor test, the result of which was positive for alcohol. This evidence was sufficient to provide probable cause to arrest defendant for DWI.

Therefore, the trial court's findings and conclusions were such that one could reasonably conclude that defendant operated a vehicle

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3. Defendant does not contest that the trial court's findings of fact are supported by evidence, but only challenges its conclusions of law. Therefore, the facts found by the trial court are binding on this Court. *State v. White*, 232 N.C. App. 296, 302–03, 753 S.E.2d 698, 702 (2014) ("[U]nchallenged findings of fact . . . are binding on appeal . . . .").

on a street or public vehicular area while under the influence of an impairing substance in violation of N.C. Gen. Stat. § 20-138.1. *See State v. Townsend*, ___ N.C. App. ___, ___, 762 S.E.2d 898, 905 (2014) (holding there was sufficient probable cause for officer to arrest a defendant for driving while impaired where defendant had "bloodshot eyes and a moderate odor of alcohol about his breath," admitted to "drinking a couple of beers earlier," and two Alco-Sensor tests yielded positive results); *State v. Tappe*, 139 N.C. App. 33, 38, 533 S.E.2d 262, 265 (2000) ("[Officer's] observations of defendant, . . . including his observation of defendant's vehicle crossing the center line, defendant's glassy, watery eyes, and the strong odor of alcohol on defendant's breath, provided sufficient evidence of probable cause to justify the warrantless arrest of defendant." (citations omitted)). The trial court did not commit error, plain or otherwise, in denying defendant's motion to suppress. Defendant's argument is overruled.

NO ERROR.

Judges DILLON and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JUNE 2016)

DAMMONS v. N.C. DEP'T OF PUB. SAFETY No. 15-1252	N.C. Industrial Commission (TA-22267)	Affirmed
FRIESON v. TURPIN No. 15-1094	Wilson (13CVS197)	No Error
HENDERSON v. GARCIA MOTORRAD, LLC No. 15-1250	Wake (13CVS5714)	Affirmed in part; Reversed in part, and remanded
IN RE C.B. No. 16-93	Madison (14JA38) (14JA39)	Affirmed
IN RE CRANOR No. 15-1119	Durham (13SP721) (15M56)	Dismissed
IN RE D.T. No. 16-39	Cumberland (10JT556) (11JT477) (12JT623) (14JT16)	Affirmed
IN RE J.O.M. No. 15-1320	Nash (13JT137)	Affirmed
IN RE K.R. No. 15-1367	Rowan (14JA145)	Affirmed in part; Reversed and remanded in part.
IN RE S.M.M. No. 15-1295	Henderson (15JB60)	Vacated
IN RE T.D.C. No. 15-1269	Guilford (13JT329) (13JT330) (13JT331)	Affirmed
LCA DEV., LLC v. WMS MGMT. GRP., LLC No. 15-1110	Pitt (12CVS3376)	Affirmed
NAYLON v. NAYLON No. 15-1247	New Hanover (07CVD1112)	Vacated

POWERS v. POWERS No. 15-1378	Wake (10CVD16478)	Vacated and remanded in part, dismissed in part, affirmed in part
STATE v. AGATI No. 15-1053	Mecklenburg (14CRS203823)	No Error
STATE v. CHAVIS No. 16-222	Robeson (10CRS50116)	Reversed and Remanded
STATE v. CLINTON No. 15-1105	Forsyth (12CRS58153) (13CRS138)	No error in part; Dismissed without prejudice in part
STATE v. FRAZIER No. 15-568	Randolph (11CRS50526)	No Error
STATE v. GRAHAM No. 15-1155	Guilford (14CRS68910)	12 CRS 98010-1: Petitions for Writ of Certiorari allowed; judgments Affirmed 14 CRS 68910: Affirmed in part; Dismissed without prejudice in part
STATE v. HYDE No. 15-1260	Davie (13CRS50554) (13CRS50555)	Affirmed; remanded for correction of clerical error
STATE v. JOHNSON No. 15-1156	Gaston (13CRS10402) (13CRS61976-77)	No prejudicial error in part and remanded in part.
STATE v. JONES No. 15-569	Guilford (12CRS32808) (12CRS75793) (12CRS75803) 12CRS75807) (12CRS75909)	No Error
STATE v. LINDSEY No. 15-1251	Craven (09CRS51204)	Vacated and Remanded
STATE v. LINEBERGER No. 15-1233	Catawba (14CRS5074)	No Error
STATE v. MURPHY No. 15-1169	Nash (12CRS50961)	Affirmed

STATE v. SUGGS No. 15-1371	Iredell (12CRS57980-82) (13CRS3136)	No Error
STATE v. THOMPSON No. 15-633	Onslow (14CRS50763)	Dismissed
STATE v. WEST No. 15-860	Forsyth (13CRS57248)	No Error
STATE v. WILLIAMS No. 15-635	Mecklenburg (13CRS223872)	No prejudicial error.
STATE v. WRIGHT No. 15-1218	Sampson (14CRS50729-30)	No Plain Error
WHICHARD v. CH MORTG. CO., INC. No. 15-1200	Guilford (15CVS3811)	Affirmed

ALLEN INDUSTRIES, INC., PLAINTIFF
v.
JODY P. KLUTTZ, DEFENDANT

No. COA15-521

Filed 5 July 2016

Injunctions—preliminary—voluntary dismissal—damages

Defendant's motion for damages arising from a preliminary injunction entered against her in an employment matter was correctly denied where plaintiff voluntarily dismissed the action after the non-competition clause expired. Defendant relied solely on the argument that the voluntary dismissal by plaintiff per se entitled her to recover the bond; however, the trial court determined that the injunction was not wrongly issued since defendant's actions were in violation of the covenant not to compete. The facts of the specific case must be considered in determining whether the trial court properly concluded that defendant had not been wrongfully enjoined.

Appeal by defendant from order entered 15 October 2014 by Judge Lindsay R. Davis, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 21 October 2015.

Tuggle Duggins P.A., by Denis E. Jacobson and Brandy L. Mills, for plaintiff-appellee.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order denying her motion for damages on a preliminary injunction bond. Because the trial court correctly determined, in light of the facts and legal arguments presented by the parties, that the preliminary injunction was not wrongfully entered at the inception of the lawsuit, we affirm the trial court's order denying defendant's motion for damages.

I. Background

Plaintiff is in the business of making commercial signs and awnings, and defendant used to be plaintiff's employee who managed "daily relationship[s] with customers" for plaintiff. On 9 May 2013, plaintiff

filed a complaint against defendant alleging that defendant had begun working for a "direct competitor" and had breached her employment contract by using customer information she had gained from plaintiff. Plaintiff sought both an injunction and monetary relief. Plaintiff also filed a separate motion for a preliminary injunction.

On 28 June 2013, the trial court granted plaintiff's motion for a preliminary injunction based on "the non-competition clause" of the employment contract. The order enjoined defendant from working for Atlas Sign Industries of NC, LLC, plaintiff's competitor, through 14 March 2014. The order also required a $20,000 bond from plaintiff. On 3 June 2013, defendant appealed the preliminary injunction order. In May of 2014, in an unpublished opinion, this Court dismissed defendant's appeal as moot and declined to address the merits of the case because the time period of the covenant not to compete had already expired. *See Allen Industries, Inc. v. Kluttz*, ___ N.C. App. ___, 759 S.E.2d 711 (2014) (unpublished).

After the case was remanded to the trial court, in July of 2014, plaintiff voluntarily dismissed the case. The following month, defendant made a "MOTION IN THE CAUSE FOR DAMAGES ON PRELIMINARY INJUNCTION BOND" ("motion for damages") requesting payment to her of the $20,000 bond for the preliminary injunction she contended was wrongfully entered. On 15 October 2014, the trial court denied defendant's motion for damages based on its interpretation of the employment contract. Defendant appeals the denial of her motion for damages.

II. Preliminary Injunction Bond

Defendant argues that "[t]he trial court erred in finding that [defendant] is not entitled to recover damages on the preliminary injunction bond." (Original in all caps.) Defendant contends based upon *Industries Innovators, Inc.* that "[a] voluntary dismissal of a complaint is equivalent to a finding that the defendant was wrongfully enjoined." 99 N.C. App. 42, 51, 392 S.E.2d 425, 431, *disc. rev. denied*, 327 N.C. 483, 397 S.E.2d 219 (citations and quotation marks omitted) (1990). We consider whether the trial court's findings of fact and conclusions of law are sufficient to support the judgment. *See generally id.* at 42, 49, 392 S.E.2d at 430.

In order to recover the preliminary injunction bond, defendant needed to demonstrate that she was "wrongfully enjoined[.]" N.C. Gen. Stat. § 1A-1, Rule 65(c) (2013); *see generally Indus. Innovators, Inc.*, 99 N.C. App. at 49, 392 S.E.2d at 430. But *Industries Innovators, Inc.* explains "three possibilities" for concluding whether a party has

been wrongfully enjoined, not all of which require a final determination on the merits. 99 N.C. App. at 49-51, 392 S.E.2d at 430-31. However, *Industries Innovators, Inc.* acknowledges that there is no hard and fast rule for determining whether an individual has been wrongfully enjoined:

> North Carolina case law presents a somewhat confusing picture of the standard for determining liability under an injunction bond.
>
> Any standard for determining whether the defendant was wrongfully enjoined should be consistent with the very purpose of the bond which is to require that the plaintiff assume the risks of paying damages he causes as the price he must pay to have the extraordinary privilege of provisional relief. Consistent with that purpose, and we believe consistent with present North Carolina case law, Professor Dobbs observed:
>
> > The fact that the plaintiff's position seemed sound when it was presented on the *ex parte* or preliminary hearing is no basis for relieving him of liability, since the very risk that requires a bond is the risk of error because such hearings are attenuated and inadequate. To say that proof of the inadequate hearing, against which the bond is intended to protect, relieves of liability on the bond is merely to subvert the bond's purpose. Thus the few cases that seem to deal with this situation seem correct in assessing liability to the plaintiff who loses on the ultimate merits, even when his proof warranted preliminary relief at the time it was awarded.
>
> Accordingly, a defendant is entitled to damages on an injunction bond only when there has been a final adjudication substantially favorable to the defendant on the merits of the plaintiff's claim. Such an adjudication is equivalent to a determination that the defendant has been wrongfully enjoined. A final judgment for the defendant which does not address the merits of the claim, i.e., dismissal for lack of jurisdiction, gives rise to damages on the injunction bond only if the trial court determines that defendant was actually prohibited by the injunction from doing what he was legally entitled to do.

99 N.C. App. at 50, 392 S.E.2d at 431 (citations and quotation marks omitted).

Furthermore, specifically as to the consideration of wrongful enjoinment after a voluntary dismissal, our Supreme Court determined, in *Blatt Co. v. Southwell*, that despite a voluntary dismissal by the plaintiff, the trial court must consider the reasons for the dismissal in determining whether the defendant was entitled to recovery:

> In an action in which the plaintiff has obtained a temporary restraining order or injunction by giving bond such as that required by G.S. 1-496, (t)he voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought.
>
> When, however, the dismissal of the action is by an amicable and voluntary agreement of the parties, the same is not a confession by the plaintiff that he had no right to the injunction granted, and does not operate as a judgment to that effect. As stated in *American Gas Mach. Co. v. Voorhees*, *supra*: A judgment of voluntary dismissal by agreement of the parties of an action in which a restraining order has been issued is not an adjudication that the restraining order was improvidently or erroneously issued.

259 N.C. 468, 472, 130 S.E.2d 859, 862 (1963) (citations and quotation marks omitted).

This case presents a voluntary dismissal by plaintiff, but the dismissal was taken only after there was no longer any need to maintain the case because the covenant not to compete had expired by its own terms. As neither party has cited North Carolina case law on this precise issue of mootness, we also look to general principles of law on this issue which have been established in other jurisdictions:

> [T]here is no reason for the court to presume that an interlocutory injunction deprived the defendant of any right. Courts have consistently concluded that a final judgment that a claim has been mooted does not mandate recovery by the defendant; they have held that they must probe the merits of the original claim to determine whether the plaintiff is liable for damages resulting from the injunction. In examining the merits of the mooted claims, however, some courts have held that the defendant can be

> denied recovery if the plaintiff made a claim in good faith or a claim that presented serious questions. These courts may have deprived defendants of compensation for damages resulting from being unjustly deprived of a right. The defendant's entitlement standard would eliminate the possibility of that injustice, for it would require the court to address the merits before absolving the plaintiff of liability or allowing recovery.

Harvard Law Review Association, Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c), 99 Harv. L. Rev. 828, 839-40 (1986) (quotation marks and footnotes omitted). Thus, other courts have also determined that no precise factors, rules, or specific circumstances will be controlling; rather, we must consider the facts of this specific case in determining whether the trial court properly concluded that defendant had not been wrongfully enjoined. *See generally id.* This treatment of mootness is also consistent with *Industries Innovators, Inc.*, as the trial court must "determine[] that defendant was actually prohibited by the injunction from doing what he was legally entitled to do." 99 N.C. App. at 50, 392 S.E.2d at 431.

Turning to the specifics of this case, based primarily upon the employment contract, the trial court determined that the injunction was not wrongfully issued since defendant's actions were in violation of the covenant not to compete in spite of defendant's arguments that the language of the covenant was overbroad:

> The undisputed record in this case establishes that the defendant was employed in a sales-related position by the plaintiff, in the course of which she was privy to and used confidential and proprietary information, about the plaintiff's products and services relating to sales and service. The plaintiff established a legitimate business interest in the protection of that information from a direct competitor, and considered with the fact that defendant left her employment with the plaintiff and took essentially the same position with a direct competitor, the language of the covenant is no broader than necessary to protect that interest.

On appeal, defendant has not challenged any of the findings of fact or conclusions of law but has relied solely upon her argument that the voluntary dismissal by plaintiff *alone* per se entitles her to recover the bond. As defendant misapprehends the law, we reject this argument and conclude that the trial court properly determined that defendant

was not "wrongfully enjoined" based upon the employment contract as applied to the facts of this case. Defendant's argument is overruled.

III. Conclusion

The trial court properly denied defendant's motion for recovery of the bond. For the foregoing reasons, we affirm.

AFFIRMED.

Judges STEPHENS and DAVIS concur.

CARON ASSOCIATES, INC., PLAINTIFF
v.
SOUTHSIDE MANUFACTURING CORP. AND CROWN FINANCIAL, LLC, DEFENDANTS

No. COA15-1376

Filed: 5 July 2016

Assignments—accounts receivable—failure to deliver under terms of original contract

Where Caron Associates contracted with Southside Manufacturing to buy cabinetry for a construction project and Southside subsequently assigned all of its accounts receivable to Crown Financial, the trial court did not err by granting summary judgment in favor of Caron on Crown's claims against Caron. Payment on the contract was due within 30 days of delivery of the cabinetry, and Southside failed to deliver the cabinetry.

Appeal by Defendant from an order entered 3 September 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 11 May 2016.

StephensonLaw, LLP, by Philip T. Gray, for Plaintiff-Appellee.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Crown Financial, LLC ("Crown"), appeals following an order awarding Caron Associates, Inc. ("Purchaser") summary judgment. On appeal

Crown contends the trial court erred in awarding Purchaser summary judgment because Purchaser owes Crown money pursuant to an assignment. After careful review of the record, we affirm the trial court.

I. Factual and Procedural Background

On 4 October 2013, Purchaser entered into a contract with Southside Manufacturing Corp. ("Cabinet Maker") to buy cabinetry for a construction project at Bertie County High School. Purchaser agreed to pay Cabinet Maker $103,500.00 for the cabinetry provided that Cabinet Maker deliver the cabinetry in "late November 2013." The parties agreed payment was due "within 30 days after delivery." After the parties executed the contract, "[Cabinet Maker] notified [Purchaser] the November 2013[] delivery date needed to be extended to December 18, 2013," and Purchaser agreed to the 18 December 2013 delivery date.

On 9 December 2013, Cabinet Maker sent Purchaser a "progress billing" invoice for incomplete cabinetry that it did not deliver. The next day, Purchaser told Cabinet Maker it would not accept invoices. Purchaser stated, "invoices are not sent until product is actually delivered. [Cabinet Maker] was to deliver . . . on December 18, 2013 and the [c]ontract terms called for [Purchaser] to make payment within 30 days after the delivery."

On 9 December 2013, Cabinet Maker assigned all of its accounts receivable to Crown. Crown is in the business of factoring, the business of buying accounts receivable at a discounted rate. Crown ran a credit check on Purchaser and agreed to purchase all of Cabinet Maker's accounts receivable for $33,750.00. The record does not disclose whether Crown failed to review the Purchaser-Cabinet Maker contract, which states Purchaser's obligation to pay $103,500.00 is contingent upon Cabinet's Maker's timely delivery.

On 9 December 2013, Crown sent Purchaser an "Assignment of Receivables Letter." In the letter, Crown informed Purchaser that it is the assignee of Cabinet Maker's accounts receivable. The letter states the following in relevant part:

> This will inform you that [Cabinet Maker] has assigned all rights, title, and interest in its accounts receivable to Crown Financial, LLC ("Crown") effective today's date. All present and future payments due to [Cabinet Maker] need to be remitted to:

> [Cabinet Maker] Manufacturing Corp.
> c/o Crown Financial, LLC
> P.O. Box 219330
> Houston, Texas 77218
>
> Please confirm by signing below that these remittance instructions will not be changed without written instructions from both [Cabinet Maker] and "Crown." Also attached is Exhibit "A" which is a list of invoice(s) totaling $45,000.00 that we will be advancing on initially. Please confirm by signing below that these invoice(s) are in line for payment and the payment obligation of [Purchaser] is not subject to any offsets, back charges, or disputes of any kind or nature.
>
> In the future, we will be faxing additional Exhibit "A's" for your confirmation pursuant to these same terms and conditions.

On 11 December 2013, Purchaser signed the assignment letter underneath the language, "Accepted and acknowledged this 9th day of December 2013 by: Caron Associates" and returned the letter to Crown. The record shows Cabinet Maker signed a copy of the letter separately and returned it to Crown.

Cabinet Maker bounced several checks and failed to deliver the cabinetry to Purchaser. On 8 January 2014, Crown emailed Purchaser and asked, "[J]ust following up to make sure that Cabinet Maker has delivered the finished product to the Bertie County High School and that there are no problems?" Purchaser responded to Crown and stated the following:

> Are you kidding me? [Cabinet Maker] is the biggest joke I have ever seen in my life. Not only did they not deliver but we have been given the run around for 3 weeks and found out today that the owner . . . has some previous legal issues, [Cabinet Maker] has been bouncing employee and vendor pay checks and all employees have been laid off. Not a good day.

Crown replied, "Thank you for the info. I was afraid that would be your answer. . . ."

On 12 February 2014, Crown sent Purchaser a demand letter for $45,000.00. Crown claimed Purchaser owed it $45,000.00 under the terms of the assignment letter.

On 27 March 2014, Purchaser filed a complaint against Cabinet Maker and Crown. Purchaser raised claims for breach of contract, negligent misrepresentation, and sought a declaratory judgment that it did not owe Crown $45,000.00. Purchaser filed an amended complaint on 28 April 2014 and raised the same claims.

On 28 May 2014, Crown filed an answer generally denying the allegations and raised counterclaims against Purchaser for breach of contract and detrimental reliance. Crown also raised a crossclaim against Cabinet Maker for $45,000.00.

On 23 June 2014, Purchaser moved for entry of default against Cabinet Maker. The Clerk of Wake County Superior Court entered default against Cabinet Maker on 24 June 2014. On 30 July 2014, Purchaser filed a response to Crown's counterclaims.

Discovery began on 4 February 2015 and Crown sent requests for admission to Purchaser. Purchaser responded to the requests on 10 June 2015.

On 11 August 2015, Purchaser moved for summary judgment pursuant to Rule 56. Purchaser attached an affidavit from its vice president, Peter Huffey, to its motion, along with other email exhibits. On the same day, Purchaser filed a motion for default judgment against Cabinet Maker.

On 21 August 2015, Crown moved for summary judgment pursuant to Rule 56. Crown attached an affidavit from its officer, Philip R. Tribe, to its motion, along with its assignment letter and Cabinet Maker's progress billing invoice for $45,000.00. Crown did not provide any evidence disputing the terms of the Purchaser-Cabinet Maker contract, or Cabinet Maker's failure to deliver. On 1 September 2015, the trial court entered default judgment against Cabinet Maker.

The trial court heard the parties on their motions for summary judgment on 1 September 2015. At the hearing, Purchaser stated the following:

> [T]he original delivery date was pushed back at the request of [Cabinet Maker], and that was no problem. . . . [A]nd right before the delivery date I guess [Cabinet Maker] was in financial straits and so independently [Cabinet Maker] contracted with [Crown] to factor basically interest it looks like their entire book of business. . . . And on an aside, the principals of [Cabinet Maker] are now sitting in federal prison for raiding the corporation. [Cabinet Maker]

> is defunct and there's been a whole lot of mess and a lot of other companies been [sic] injured . . . .

Crown's counsel conceded there was no genuine issue of material fact and stated, "Well I don't think there are any issues of fact because the affidavit in the file . . . ."

On 4 September 2015, the trial court granted Purchaser's motion for summary judgment, declared Purchaser had no duty or obligation to Crown, and denied Crown's motion for summary judgment. On 30 September 2015, Crown gave its notice of appeal. Thereafter, the parties settled the record on appeal and filed their appellate briefs.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Analysis

Crown contends the trial court erred in granting Purchaser summary judgment because Purchaser waived its defenses by signing the assignment letter. Further, Crown contends Purchaser is an account debtor under N.C. Gen. Stat. § 25-9-403 (2015). We disagree.

North Carolina law allows for an "[a]greement not to assert defenses against [an] assignee" under N.C. Gen. Stat. § 25-9-403 (2015). Section 25-9-403 sets out the following:

> [A]n agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:
>
> (1) For value;
>
> (2) In good faith;
>
> (3) Without notice of a claim of a property or possessory right to the property assigned; and
>
> (4) Without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under [N.C. Gen. Stat. §] 25-3-305(a).

Id. An account debtor is a "person obligated on an account, chattel paper, or general intangible." N.C. Gen. Stat. § 25-9-102(a)(3) (2015).

After careful review of the record, it appears there is no genuine issue of material fact surrounding the Purchaser-Cabinet Maker contract. The contract does not appear in the record but Purchaser's affidavit in support of its motion for summary judgment shows that payment for the cabinets was due within thirty days of delivery. Therefore, Cabinet Maker's duty to deliver is a condition precedent to Purchaser's duty to pay the contract price. "A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance. The event may be largely within the control of the obligor or the obligee." *Powell v. City of Newton*, 364 N.C. 562, 566, 703 S.E.2d 723, 727 (2010) (citation omitted). The parties "are bound when the condition [precedent] is satisfied." *Id.* (citation omitted).

Crown does not dispute the terms of the Purchaser-Cabinet Maker contract. Crown does not dispute Cabinet Maker's failure to deliver the cabinets. Therefore, under these facts, Purchaser cannot be a "person *obligated*" because there is no evidence to suggest the condition precedent, Cabinet Maker's delivery, was satisfied. *See* N.C. Gen. Stat. § 25-9-102(a)(3) (2015) (emphasis added).

Further, the plain language of the assignment letter does not obligate Purchaser. It merely informs Purchaser that all present or future payments due to Cabinet Maker are due to Crown as Cabinet Maker's assignee. The letter references Cabinet Maker's premature invoice for $45,000.00, and states "[Crown] will be advancing on [the $45,000.00] initially." The letter states, "the payment obligation . . . is not subject to any offsets, back charges, or disputes of any kind or nature." This Court observes there is no record evidence that Crown gave Purchaser any consideration in exchange for Purchaser's signature on the assignment letter. Therefore, the assignment letter in itself cannot be a contract.

As our Supreme Court has held, "it is well-settled principle" that when an assignee buys a chose in action "for value, in good faith, and before maturity," the assignee takes the action "subject to all defenses which the debtor may have had against the assignor based on facts existing at the time of the assignment or on facts arising thereafter but prior to the debtor's knowledge of the assignment." *William Iselin & Co. v. Saunders*, 231 N.C. 642, 646–47, 58 S.E.2d 614, 617 (1950) (citations omitted). Therefore, under these facts, Purchaser never incurred a duty to pay Cabinet Maker because Cabinet Maker failed to deliver. Without delivery, Crown is unable to compel Purchaser's payment.

Lastly, we review Crown's claim that it detrimentally relied on Purchaser's representations in the assignment letter. A "party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party." *Whiteacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (citations omitted). The doctrine of equitable estoppel prevents such a party from "taking inconsistent positions in the same or different judicial proceedings . . . to protect the integrity of the courts and the judicial process." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007) (internal quotation marks and citations omitted). To proceed on an equitable estoppel claim, the claimant must provide a forecast of evidence showing "(1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Hawkins v. M & J Fin. Corp.*, 238 N.C. 174, 177–78, 77 S.E.2d 669, 672 (1953) (citations omitted). Here, Crown failed to provide a forecast of evidence showing that it lacked the knowledge and means to review the Purchaser-Cabinet Maker contract. In doing so, Crown failed to raise a genuine issue of material fact concerning its counterclaim for detrimental reliance.[1]

After careful *de novo* review of the record, we hold there is no genuine issue of material fact.

IV. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Judges CALABRIA and TYSON concurs.

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1. When "only one inference can reasonably be drawn from undisputed facts, the question of estoppel is one of law for the court to determine." *Hawkins*, 238 N.C. at 185, 77 S.E.2d at 677 (citations omitted). When the evidence "raises a permissible inference that the elements of equitable estoppel are present, but . . . other inferences may be drawn from contrary evidence, estoppel is a question of fact for the jury . . . ." *Creech v. Melnik*, 347 N.C. 520, 528, 495 S.E.2d 907, 913 (1998) (citation omitted).

EISENBERG v. HAMMOND

[248 N.C. App. 136 (2016)]

MARCIA T. EISENBERG, PLAINTIFF
v.
PATRICK J. HAMMOND, DEFENDANT

No. COA15-287

Filed 5 July 2016

Arbitration and Mediation—testimony outside presence of parties—failure to object in accordance with arbitration agreement

Where the trial court vacated two arbitration awards because the arbitrator had taken testimony from a witness outside the presence of the parties, the Court of Appeals reversed the order of the trial court because defendant waived his right to challenge the arbitrator's alleged error under the terms of the arbitration agreement, which required objections to be written and timely filed with the arbitrator.

Appeal by plaintiff from order entered 12 November 2014 by Judge Anna Worley in District Court, Wake County. Heard in the Court of Appeals 7 October 2015.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell and Vitale Family Law, by Lorion M. Vitale, for plaintiff-appellant.

Raleigh Family Law, PLLC, by Imogen Baxter and Sonya Dubree and Gammon, Howard & Zeszotarski, PLLC, by Joseph E. Zeszotarski, Jr., for defendant-appellee.

STROUD, Judge.

Plaintiff appeals the trial court's order vacating two arbitration awards. Because defendant waived his right to challenge the alleged error of the arbitrator under the terms of the arbitration agreement, the trial court erred by vacating the arbitration awards based upon that alleged error, so we reverse and remand.

I. Background

In 1986 the parties were married and in 1992 they had a daughter, Sue.[1] In 2009 the parties separated. In March of 2010, plaintiff filed a

1. A pseudonym will be used to protect the daughter's identity.

complaint against defendant requesting equitable distribution. On 20 April 2010, defendant answered plaintiff's complaint and counterclaimed for equitable distribution, post-separation support and alimony, and attorney's fees. On 16 November 2010, the trial court entered an order awarding post-separation support to defendant; this order is not at issue on appeal.

On 15 June 2011, the parties entered into a consent order to arbitrate their remaining claims. The consent order set out the "conditions and provisions" for the arbitration. Prior to arbitration, in August of 2011, Sue's psychologist requested that defendant not be present when Sue, then 19 years old, testified, due to mental health concerns for Sue. Defendant refused to consent to Sue's psychologist's request. Plaintiff's attorney then requested that Sue's testimony be taken outside of the presence of all of the parties. The arbitrator granted the request and took Sue's testimony outside of the presence of both parties, although counsel for both parties were present. Defendant's counsel did a direct examination and a re-direct examination of Sue. On or about 30 August 2011, the arbitrator entered two decisions regarding (1) alimony and attorney's fees and (2) equitable distribution; the substance of these decisions is not challenged on appeal.

On 23 September 2011, defendant filed a motion to vacate the arbitration awards because the arbitrator had taken testimony from Sue outside the presence of the parties in contravention of the terms set forth in the consent order which required (1) compliance with the Rules of Civil Procedure and Evidence which mandate witness testimony to be taken in open court and (2) that all parties shall be present during witness testimony. In November of 2011, plaintiff moved to confirm the arbitration awards. On 12 November 2014, the trial court vacated the arbitration decisions, thus effectively allowing defendant's motion to vacate the arbitration decisions and denying plaintiff's motion to confirm the arbitration awards.[2] The trial court reasoned that pursuant to North Carolina General Statute § 50-54 the arbitrator had "exceeded his powers under the Consent Order" and "committed an error of law" by excluding defendant from Sue's testimony. Plaintiff appeals the trial court order vacating the arbitration decisions.

II. Arbitration

Plaintiff argues that "the trial court erred by vacating the arbitration awards because . . . [defendant] waived his right to be present during

2. The record does not reveal why the defendant's motion was not heard until nearly three years after it was filed.

the testimony of . . . [Sue] and his right to seek vacation of the award." (Original in all caps.) "The standard of review of the trial court's vacatur of the arbitration award is the same as for any other order in that we accept findings of fact that are not clearly erroneous and review conclusions of law *de novo*." *Carpenter v. Brooks*, 139 N.C. App. 745, 750, 534 S.E.2d 641, 645 (citations and quotation marks omitted), *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000). North Carolina General Statute § 50-54 provides that

> [u]pon a party's application, the court shall vacate an award for any of the following reasons:
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> . . . .
>
> (3) The arbitrators exceeded their powers;
>
> . . . .
>
> (8) If the parties contract in an arbitration agreement for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights.

N.C. Gen. Stat. § 50-54(a)(3), (8) (2011). In the consent order, the parties specifically agreed that the trial court could conduct review of errors of law pursuant to North Carolina General Statute § 50-54(a)(8).

Defendant contended in his motion to vacate the award that the taking of testimony from Sue without his presence was beyond the power of the arbitrator under both the consent order and applicable law and that the taking of testimony without his presence was an error of law prejudicing his rights. "An arbitrator's ability to act is both created and limited by the authority conferred on him by the parties' private arbitration agreement." *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 573, 654 S.E.2d 47, 51 (2007). Both parties agree that the current dispute is controlled by the consent order which governs the parties' arbitration. Paragraph 15(c) of the consent order provides that the parties will abide by the Rules of Civil Procedure and Evidence; as a general rule, these rules require testimony be taken in open court in the presence of the parties. *See* N.C. Gen. Stat. § 1A-1, Rule 43(a); *see also* § 8C-1, Rules 615, 616 (2011). Defendant argues that the very next sentence of the consent order in paragraph 15(d) states, "Evidence shall be taken in the presence of the arbitrator and all parties[.]" Yet defendant ignores the last half of the sentence; paragraph 15(d) in its entirety reads: "Evidence shall be taken in the presence of the arbitrator and all parties, *except*

where a party is absent in default or *has waived the right to be present*." (Emphasis added.) Paragraph 20 of the consent order then explains how a party may waive a right:

> A party who proceeds with the arbitration after knowledge that a provision or requirement of this consent order has not been complied with and *who fails to object in writing shall be deemed to have waived the right to object. An objection must be timely filed with the arbitrator with a copy sent to the other party.*

(Emphasis added.)

The evidence establishes that by 10 August 2011 defendant had "knowledge" of Sue's psychologist's request that Sue be allowed to present testimony out of the presence of the parties because his attorney emailed plaintiff's attorney on this day that defendant "feels that [Sue] can testify in front of h[im] and [plaintiff,] and won't consent to lawyers only." Defendant's attorney's email was in writing, but it was not filed with the arbitrator, so it cannot qualify as a written objection under paragraph 20 of the consent order. Defendant was also aware that plaintiff intended to move *in limine* that Sue be allowed to testify outside the presence of the parties, as her attorney emailed defendant's attorney the day before the arbitration: "I plan to make a pretrial motion on this matter to exclude the parties for the mental health of their child. You are certainly entitled to put on your defense." In addition, on 11 August 2011, after defendant had knowledge of the request regarding Sue's testimony, the parties entered into a "FINAL PRETRIAL ORDER" by agreement. The final pretrial order identified Sue as one of the witnesses defendant intended to call to testify but does not note any issue regarding the circumstances of her testimony.

Defendant's first written "objection," other than the email to plaintiff's attorney, regarding the conditions of Sue's testimony occurs on 23 September 2011 in his motion to vacate the arbitration award, but defendant's 23 September 2011 "writing" was not "filed with the arbitrator" but rather with the trial court and came only after the arbitration was complete. Defendant never made any written request or objection which was filed with the arbitrator about Sue's testimony prior to or during the arbitration. In fact, the arbitration began on 11 August and did not resume until 17 August, but defendant still failed to file any written objection during that time or when the arbitration resumed. We also note that defendant had a right under the consent order to have the arbitration proceedings recorded, but he did not elect to do so and we have

no record of the discussion, if any, which occurred at arbitration regarding defendant's objection to the manner of Sue's testimony, the arbitrator's response, or Sue's testimony.[3]

The trial court found that defendant had raised an oral objection to Sue's testimony outside of his presence at the arbitration hearing, and that no written objection was required:

> The Defendant did not halt the proceeding or file a written objection as required by Paragraph 20 of the Consent Order to Arbitrate. It was not necessary for the Defendant to halt the proceeding or file a written objection. His oral objection was enough to satisfy this requirement because the Plaintiffs motion in limine was made orally just prior to the commencement of the hearing.

This appeal raises a question of law, since it depends upon interpretation of the consent order, which we review *de novo*. *See Carpenter v. Brooks*, 139 N.C. App. at 750, 534 S.E.2d at 645. We conclude that the trial court erred by disregarding the plain terms of paragraph 20 in its conclusion that an oral objection was sufficient. We conclude further that defendant waived his right to be present for Sue's testimony by his failure to timely file a written objection with the arbitrator pursuant to paragraph 20. Having concluded that defendant did waive his right to raise an objection as to how Sue's testimony was taken, we turn to defendant's brief which focuses on a series of related arguments as to why the trial court order should be affirmed. We address each in turn.

A. Paragraph 11 of the Consent Order

Defendant argues that the arbitrator did not have the power to exclude him as a party, from the testimony of a witness, based upon paragraph 11 of the consent order which provides, "The arbitrator shall have the power to require exclusion of any witness, other than a party, his or her lawyer or other essential person, during any other witness's testimony." We agree with defendant that both paragraphs 11 and 15 give

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3. Paragraph 13(a) of the consent order provides, "The hearing will be recorded by tape recording if elected by a party. The hearing will be opened by recording the date, time and place of the hearing; and the presence of the arbitrator, the parties, and their counsel." Both parties acknowledge in their briefs that plaintiff made an oral motion *in limine* that Sue testify outside the presence of the parties and that after hearing arguments from both sides, the arbitrator granted the motion. Although we have no transcript of either the arbitration or the hearing upon defendant's motion to vacate, the trial court found the facts as stated in the briefs, and these findings are not challenged on appeal, so we take them as true.

the parties a right to be present during all testimony and that the arbitrator should not have excluded him from Sue's testimony. But defendant's argument based upon paragraph 11 is still defeated by paragraph 20, since defendant was required to make a timely written objection if he believed the arbitrator was conducting the hearing improperly. Even if defendant made an oral objection, as the trial court found, the consent order required a timely written objection filed with the arbitrator.

B. Deviation from Standard Arbitration Terms

Defendant argues that because the Rules of Civil Procedure and Evidence were to govern the hearing, both of which generally require parties to be present during witness testimony, the Consent Order "deviat[ed] significantly from standard arbitration practice[.]" We agree that the Rules of Civil Procedure and Evidence do generally give parties the right to be present during all witness testimony, but the parties elected to draft an arbitration agreement and to conduct the arbitration under the terms they established. Defendant's argument emphasizes the importance of paragraph 20's requirement that a timely written objection be filed with the arbitrator.

C. Absurd Results

Defendant argues that "Plaintiff's argument distorts Paragraph 20 completely and would lead to absurd results" and then provides an example of a party having to halt proceedings in order to file a written motion during a witness's testimony regarding hearsay. Defendant then proposes that paragraph 20 applies only to certain types of objections that are "fundamental to the scope or propriety of arbitration[,]" arguing:

> Instead, Paragraph 20 is properly interpreted to contemplate objections that can be made in advance of arbitration that are fundamental to the scope or propriety of arbitration. Requiring these types of objections to be in writing and providing for a waiver if the objecting party proceeds with arbitration without asserting the objection in writing serves two purposes: (1) it allows the parties to obtain a ruling from the trial court on the issue before the commencement of arbitration, after which the trial court would abstain from exercising jurisdiction, and (2) it prevents unfairness to the non-objecting party who proceeds with arbitration -- and obtains a favorable award -- without notice of a fundamental objection from the other party that could undo the entire award.

Although Paragraph 20 does not limit its provisions to certain kinds of objections, even assuming defendant's argument was correct, he certainly had the opportunity to "obtain a ruling from the trial court on the issue before the commencement of arbitration[.]" We note that such a request would require that defendant file some sort of written motion or objection with the trial court. Under the consent order, defendant would not have had to file anything with the trial court, but only with the arbitrator, in order to preserve his objections. Defendant was aware of the plaintiff's intent to file a motion *in limine* prior to arbitration and still failed to make any sort of written objection. As to the second part of defendant's argument, requiring a written objection, under paragraph 20, "prevents unfairness to the non-objecting party" — here plaintiff — "who proceed[ed] with arbitration – and obtained a favorable award -- without notice" that defendant considered his position on Sue's testimony to be "a fundamental objection[.]"

We also note that paragraph 20 does not require that the proceedings be halted; it requires only filing a timely written objection. We do not find the requirement of a timely, written objection to be absurd at all. During an arbitration hearing, which may not be recorded, requiring a written objection to be provided to the arbitrator either before the hearing or during the hearing would ensure (1) that the arbitrator and other party are aware that the objecting party believes a serious violation of the agreement may occur or is occurring; (2) that the objection is made prior to or at the hearing, or at the very least before the final award is entered, when the opposing party and arbitrator still have the opportunity to address it; and (3) that a clear record of the objection is made so that it may be reviewed by the trial court upon motion by a party to vacate the award or by the appellate court on appeal from the trial court's order. Most attorneys today are quite capable of preparing a typed, written document during a hearing, but if not, writing the objection on a piece of paper and handing a copy to the other party and to the arbitrator is still a perfectly valid means of making a written objection.[4]

D. Defendant's Attorney's E-mail

Defendant next argues that if a written objection was required, his emails to plaintiff's attorney satisfy that requirement. Plaintiff argues

4. Defendant could also have filed a request to re-open the evidence even after completion of the hearing so that he could recall Sue to testify in his presence under paragraph 19: "Reopening Hearing. The hearing may be reopened on the arbitrator's initiative, or upon any party's application, at any time before the award is made. The arbitrator may reopen the hearing and shall have thirty (30) days from the closing of the reopened hearing within which to make an award." However, defendant chose not to invoke paragraph 19.

that defendant did not make this argument to the trial court, and although we have no transcript of the hearing, plaintiff is correct that defendant's motion does not allege that he made any sort of written objection, even by email. Furthermore, even defendant concedes his emails were addressed to plaintiff's attorney, and he does not assert that any written objections were filed "with the arbitrator" as is required by paragraph 20. In fact, plaintiff's attorney emailed defendant's attorney and stated she thought the arbitrator should be included in the emails regarding Sue's testimony, but defendant's attorney responded, "I would object to any email to [the arbitrator] on this matter."

E. North Carolina General Statute § 50-54

Defendant then broadly turns to North Carolina General Statute § 50-54(a), arguing the trial court properly vacated the decisions because the arbitrator "exceeded [his] power" and "committed an error of law prejudicing a party's, [his], rights." N.C. Gen. Stat. § 50-54(3), (8). We do not disagree with defendant's contentions that he had a right to be present for Sue's testimony, based upon paragraphs 11 and 15 of the consent order, the Rules of Civil Procedure and Evidence.[5] Furthermore, we do not disagree that his absence could be grounds for vacatur pursuant to North Carolina General Statute § 50-54(3) and (8) -- except that rights can be waived -- and under paragraph 20, defendant waived his right. Defendant's arguments still ignore the plain language of paragraph 20 of the consent order, and defendant waived his right to raise these arguments by failing to file a timely written objection with the arbitrator.

F. Summary

As defendant waived his right to object to the circumstances of Sue's testimony prior to, during, and even after the arbitration -- until after the award was announced -- we conclude that defendant has also waived his right to challenge the arbitration decisions on this basis. *See generally State v. Johnson*, 204 N.C. App. 259, 266, 693 S.E.2d 711, 716–17 (2010) ("As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal."). The trial court therefore erred in vacating the awards based upon the

5. We are not asserting that defendant has shown how his exclusion from Sue's testimony prejudiced him. Defendant's attorneys were present and questioned Sue, and he failed to record the arbitration proceedings so that we may consider how her testimony may have differed in his presence. Although defendant did raise other objections to the arbitration award, defendant has not identified any substantive grounds which could have been affected by Sue's testimony.

arbitrator's decision to receive testimony from Sue outside the presence of the parties.

III. Conclusion

We reverse the order of the trial court vacating the arbitration decisions and remand for further proceedings consistent with this opinion. We note that defendant raised other issues regarding the substance of the arbitration awards in his motion to vacate and we express no opinion on those issues. We also note that plaintiff's motion to confirm the awards still remains to be determined, as the order on appeal is reversed.

Reversed and Remanded.

Judges STEPHENS and DAVIS concur.

DURON LAMAR HAMPTON, PLAINTIFF
v.
ANDREW T. SCALES, DEFENDANT

No. COA15-1335

Filed 5 July 2016

1. Attorneys—legal malpractice—standard of care—plea arrangement

The trial court did not err in a legal malpractice case by granting summary judgment in favor of defendant attorney on the issue of whether defendant's representation of plaintiff met the standard of care for an attorney representing a criminal defendant who has directed his counsel that his preference was to resolve the charges against him with a plea arrangement. The evidence was sufficient to establish that defendant did not breach his duty to plaintiff and to shift the burden to plaintiff.

2. Attorneys—legal malpractice—duty to exercise reasonable care and diligence

The trial court did not err in a legal malpractice case by granting summary judgment in favor of defendant attorney on the issue of whether defendant breached his duty to exercise reasonable care and diligence. Plaintiff failed to offer any evidence that plaintiff would have been entitled to funds for the services of an expert or

an investigator, or that defendant was remiss in not attempting to obtain funds for this purpose.

3. Attorneys—legal malpractice—review of videotaped interview

The trial court did not err in a legal malpractice case by granting summary judgment in favor of defendant attorney on the issue of plaintiff's allegation that defendant failed to properly review the videotaped interview of the victim or to accurately convey its contents to plaintiff. Plaintiff failed to establish that he could offer a prima facie case of legal malpractice based on defendant's alleged failure to accurately inform plaintiff that the victim did not identify him during the videotaped interview.

4. Attorneys—legal malpractice—failure to show damage

Plaintiff failed to properly allege or to support with evidence any basis upon which to conclude that defendant attorney's alleged negligence while representing him, even if proven, caused plaintiff any damage.

Appeal by plaintiff from judgment entered 13 July 2015 by Judge Joseph N. Crosswhite in Stanly County Superior Court. Heard in the Court of Appeals 28 April 2016.

The Law Office of Charles M. Putterman, P.C., by Charles M. Putterman, for plaintiff-appellant.

Poyner Spruill LLP, by E. Fitzgerald Parnell, III, T. Richard Kane, and J. M. Durnovich, for defendant-appellee.

ZACHARY, Judge.

Duron Hampton (plaintiff) appeals from an order granting summary judgment in favor of Andrew Scales (defendant) on plaintiff's claim of legal malpractice against defendant. Defendant previously represented plaintiff on eight charges of second-degree rape and one charge of crime against nature. On appeal plaintiff argues that the trial court erred by entering summary judgment against him, on the grounds that the evidence before the trial court presented a genuine issue of material fact on the issue of whether defendant's representation of plaintiff on these charges met the applicable standard of care. We conclude that the trial court did not err by granting summary judgment for defendant and that its order should be affirmed.

I. Factual and Procedural Background

On 30 June 2011, Sharon Thomas reported to Albemarle Police Officer Star Gaines that her fifteen-year-old daughter "Tina"[1] had been having sex with a twenty-one year old man whom Tina identified as "Run Run." Plaintiff has admitted that he was previously known by the nickname Run Run. Detective Cindi Rinehart investigated Ms. Thomas's allegation. During this investigation, Tina was evaluated at the Butterfly House Children's Advocacy House ("Butterfly House"), where she was interviewed by Registered Nurse Amy Yow, a licensed forensic interviewer and a certified sexual assault nurse examiner. Nurse Yow first conducted a videotaped interview of Tina, during which Tina told Nurse Yow that she had previously had sexual relations with three men, whom she identified as "DeShawn," "Frankie," and "Cameron." At the end of the videotaped portion of the interview, Nurse Yow and Tina were joined by certified nurse midwife Rebecca Huneycutt, who performed a comprehensive physical examination of Tina. As Nurse Yow, Nurse Huneycutt, and Tina walked to the examination room, Tina told the two nurses that she had also had sex with plaintiff, whom she identified as Run Run. Officer Gaines, Detective Rinehart, Nurse Yow, and Nurse Huneycutt each executed an affidavit averring that Tina had stated that she had sex with plaintiff. In addition, Detective Rinehart obtained a statement from D.H., a friend of Tina's, in which D.H. stated that Tina had called D.H. on more than ten occasions to talk about having sexual intercourse with plaintiff.

Detective Rinehart also reviewed Tina's school records. In 2002, when Tina was six years old and in kindergarten, testing indicated that her I.Q. was around 64 and she was classified by the school system as being an "educable mentally disabled" student. When Tina was reevaluated in 2009, she was classified as having a "mild" intellectual disability. In her interview with Nurse Yow, Tina reported that she was in a "special class" at school.

On 14 February 2012, arrest warrants were issued charging plaintiff with eight charges of second-degree rape, in violation of N.C. Gen. Stat. § 14-27.3,[2] and one charge of crime against nature in violation of N.C. Gen. Stat. § 14-177. The charges of second-degree rape alleged that plaintiff had engaged in intercourse with a person who is mentally

1. To protect the privacy of the victim, we refer to her by the pseudonym "Tina."

2. N.C. Gen. Stat. § 14-27.3 was recodified as N.C. Gen. Stat. § 14-27.22, effective 1 December 2015. Plaintiff was charged with offenses occurring in 2011 and was charged under former N.C. Gen. Stat. § 14-27.3.

disabled. These warrants were served on plaintiff while he was in the Stanly County jail on other charges. After plaintiff was charged with these offenses, he sent a note to Detective Rinehart asking her to obtain "a good plea offer" that would enable plaintiff to be released from jail and return to his wife and child.

On 2 March 2012, defendant was appointed by the Court to represent plaintiff on these charges. Plaintiff sent several notes to defendant. None of the letters in the record that were written by plaintiff to defendant include any assertion by plaintiff that he was factually innocent of the charged offenses or that he wanted a jury trial. Instead, all of plaintiff's notes urgently requested defendant to negotiate a plea bargain that would enable plaintiff to be released from jail as soon as possible. For example, on one occasion plaintiff wrote the following to defendant:

> Sir, I am not trying to fight these charges in no way. I have a wife and daughter at home that desperately need me. You are the best attorney for this case. I just want to plea out. These charges are from last year before I went to prison, and I'm truly a changed person with responsibilities. I was attending college before these new charges. I am no longer breaking laws, getting in all kinds of mess. . . . I'm asking for you [to] please get my life back. This is it for me. My family is my everything. Please move speedily on a plea of any kind of probation. I'll take it.

Defendant was successful in negotiating a plea bargain with the prosecutor and on 27 April 2012, plaintiff pleaded guilty to one charge of taking indecent liberties in violation of N.C. Gen. Stat. § 14-202.1 (2014), a Class F felony. Plaintiff entered a guilty plea pursuant to *N.C. v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant enters into an *Alford* plea when he proclaims he is innocent, but intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *State v. Cherry*, 203 N.C. App. 310, 314, 691 S.E.2d 40, 44 (2010) (citation omitted). In exchange for plaintiff's guilty plea, the prosecutor dismissed the eight charges of second-degree rape and the charge of crime against nature. Plaintiff was released from jail, placed on probation, and required to register with the North Carolina Sex Offender Registry. Additional details about the charges against plaintiff will be discussed below, as relevant to the issues raised on appeal.

About a year after pleading guilty to taking indecent liberties, plaintiff obtained a signed statement from Tina stating that she and plaintiff had not had any sexual contact. Plaintiff retained defendant to prepare

a motion for appropriate relief, and Mr. Patrick Currie was appointed to represent plaintiff in court. A hearing on plaintiff's motion for appropriate relief was conducted by Judge Anna Wagoner on 13 May 2013, at which testimony was elicited from Ms. Thomas and Tina in support of plaintiff's contention that in 2011 Tina had falsely accused him of having sexual relations with her. On 24 May 2013, Judge Wagoner entered an order granting plaintiff's motion for appropriate relief, setting aside his guilty plea, dismissing all charges against plaintiff related to sexual contact with Tina, and removing plaintiff from the Sex Offender Registry.

On 24 July 2014, plaintiff filed the instant suit against defendant seeking damages for legal malpractice and asserting that defendant had been negligent in his representation of plaintiff on the criminal charges discussed above. Plaintiff alleged that defendant had failed to "properly investigate" the charges against him and had mistakenly told plaintiff that during the videotaped portion of Tina's interview she named plaintiff as one of the men with whom she had sex. Plaintiff did not identify any specific damages, but alleged generally that as a "direct and proximate result" of defendant's negligence plaintiff had "sustained pecuniary damages, mental anguish and emotional distress[.]" Defendant filed a motion for summary judgment on 1 July 2015. Following a hearing on defendant's motion, the trial court entered an order on 13 July 2015 granting summary judgment in favor of defendant and dismissing plaintiff's complaint. Plaintiff has appealed to this Court from the summary judgment order entered against him.

II. Standard of Review

Pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 56(c) (2014), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1 Rule 56(e) requires that evidence presented to the trial court on a motion for summary judgment must be admissible at trial. " 'When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' " *Ron Medlin Constr. v. Harris*, 364 N.C. 577, 580, 704 S.E.2d 486, 488 (2010) (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)).

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met "by proving that an essential

> element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim."

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (quoting *Collingwood v. G.E. Real Estate Equitie*s, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)) (other citation omitted). " '[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.' " *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)).

In the course of a trial court's ruling on a motion for summary judgment, " '[a] verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.' " *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 605, 676 S.E.2d 79, 83-84 (2009) (quoting *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972)). "On the other hand, 'the trial court may not consider an unverified pleading when ruling on a motion for summary judgment.' Plaintiff's complaint in this case was not verified, so it could not be considered in the course of the trial court's deliberations concerning Defendant's summary judgment motion." *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (2011) (quoting *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999), *disc. review improvidently allowed*, 352 N.C. 145, 531 S.E.2d 213 (2000)).

"We review a trial court's order granting or denying summary judgment *de novo*. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

In a negligence action, "summary judgment for defendant is correct where the evidence fails to establish negligence on the part of defendant . . . or determines that the alleged negligent conduct complained of was not the proximate cause of the injury." *Bogle v. Power Co.*, 27

N.C. App. 318, 321, 219 S.E. 2d 308, 310 (1975), *cert. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976) (citation omitted). " 'If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision.' " *Point South v. Cape Fear Public Utility*, __ N.C. App. __, __, 778 S.E.2d 284, 287 (2015) (quoting *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 (1996)).

III. Legal Malpractice: General Principles

It is axiomatic that:

> [W]hen an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Hodges v. Carter, 239 N.C. 517, 519, 80 S.E.2d 144, 145-46 (1954) (citations omitted). In the present case, plaintiff does not assert that defendant lacked "the requisite degree of learning, skill, and ability" or that he failed to exercise his best judgment. Instead, plaintiff's claim of legal malpractice is based on his assertion that defendant failed to "exercise reasonable and ordinary care and diligence" in his representation of plaintiff.

A plaintiff who seeks damages on a claim of professional malpractice based on negligence by an attorney "has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth by *Hodges*, 239 N.C. 517, 80 S.E. 2d 144, and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985). " 'To establish that negligence is a proximate cause of the loss suffered, the plaintiff must establish that the loss would not have occurred but for the attorney's conduct.' " *Belk v. Cheshire*, 159 N.C. App. 325, 330, 583 S.E.2d 700, 704 (2003) (quoting *Rorrer*, at 361, 329 S.E.2d at 369).

IV. Legal Analysis

As discussed above, the elements of a claim for legal malpractice are a breach of the attorney's duty to his or her client, and damages that proximately result from the attorney's negligence. In the present case,

we conclude that plaintiff has failed to produce evidence of a *prima facie* case that the acts and omissions upon which plaintiff bases his negligence claim, even if proven, constituted a breach of the standard of care or proximately caused damage to plaintiff.

A. Defendant's Evidence Shifted the Burden of Proof

[1] It is undisputed that defendant repeatedly directed defendant to negotiate a plea bargain with the prosecutor, under the terms of which plaintiff would be released from jail and allowed to rejoin his family. There is no evidence in the record to suggest that plaintiff ever indicated any desire to resolve the charges against him at a jury trial. Consequently, the question raised by plaintiff's complaint was whether defendant's representation of plaintiff met the standard of care for an attorney representing a criminal defendant who has directed his counsel that his preference is to resolve the charges against him with a plea arrangement. The standard of care for an attorney representing a criminal defendant requires more extensive investigation and preparation for a jury trial than for entry of a plea of guilty. Nonetheless, we agree with plaintiff's general proposition that a client's preference for a plea bargain as opposed to a trial does not relieve the attorney of the duty to exercise reasonable care and diligence in negotiating an appropriate plea arrangement and representing the client's interests in this regard.

In this case, plaintiff was charged with eight Class C felonies and one Class I felony, for which he was potentially subject to imprisonment for more than forty years. Had the charges gone to trial, the primary evidence against plaintiff would have been Tina's testimony.[3] In addition, the record includes extensive corroborating evidence, including the following:

> 1. The affidavit of Albemarle Police Officer Gaines stating that on 30 July 2011 Ms. Thomas reported that her daughter, Tina, had admitted having sex with plaintiff.
>
> 2. A statement from D.H. that Tina had called her a number of times to discuss having sex with plaintiff.
>
> 3. The affidavit of Nurse Yow stating that after the initial videotaped interview ended and as she, Tina, and Nurse Huneycutt were walking to the medical examination

3. In 2014, Tina signed a statement saying that she had falsely accused plaintiff of having sex with her. Our evaluation of plaintiff's legal malpractice claim depends, however, on the evidence available in 2012, when defendant represented plaintiff.

> room, Tina told the two nurses that she had had sex with plaintiff.
>
> 4. The affidavit of Nurse Huneycutt stating that during her physical examination of Tina she asked Tina if she had anything else to report and that Tina "promptly responded that she had had sexual relations with [plaintiff]."
>
> 5. The affidavit of Detective Rinehart summarizing her investigation of the charges, including her interview with Ms. Thomas, review of Tina's school records, interview of D.H., and her review of Tina's interview and examination at Butterfly House.
>
> 6. Tina's school records, which established that she was intellectually disabled.

On this record, we conclude that the charges against plaintiff were supported by adequate evidence to take the case to the jury. Defendant successfully negotiated a plea arrangement pursuant to the terms of which plaintiff pleaded guilty to one charge of taking indecent liberties, agreed to register with the North Carolina Sex Offender Registry, and would be released from jail, in exchange for which the State dismissed the numerous other serious charges against plaintiff. Given plaintiff's insistence on pleading guilty, the seriousness of the charges against plaintiff, and the strength of the evidence supporting these charges, the plea bargain arranged by defendant appears to reflect a reasonable exercise of professional skill on defendant's part.

Moreover, the record reflects that defendant was aware of both the strengths and weaknesses of the State's case. At the hearing during which plaintiff pleaded guilty to taking indecent liberties, plaintiff shared the following with the court:

> DEFENDANT: Your Honor, this is a case Mr. Hampton and I have spoken at length [about]. He's obviously, very conflicted. He's got a wife and a young daughter. And why he's entering the *Alford* plea, because of the liability, the criminal liability that he's facing, exposed to, with [the] amount of charges that is a Class C felony. And actually, I think the District Attorney's office was seeking to send superseding indictments to the grand jury for the B1 felonies. So therefore, even more exposure.
>
> I explained to him the risks. And with hesitation and with concern, he's wanting to take the plea. I've asked him

numerous times if he was sure, and he says that he is, but he's doing it because -- not because he's guilty, but because he wants to get out and be with his family.

I've made abundantly sure that he's wanting to do this. Again, he's hesitant, but is doing it for those reasons. That's why we're entering it as an *Alford* plea.

Your Honor, there's certainly holes in this case. Statements that the victim gave doesn't mention Mr. Hampton the first time. Then she goes to the Butterfly House, and then Mr. Hampton's name comes up, and then it happens eight or nine times. Then there's, apparently, a friend that she told that to.

But there's also people, when she's mentioning her sexual partners, doesn't mention Mr. Hampton. The dates of offense happened for the course of a month in May of last year. It was just reported in February of this year. So there's definitely issues in the case.

And I explained to Mr. Hampton that those are triable issues and we'd have to cross-examine the witness at a trial. And I advised him that [there] would be things that would affect her credibility, things that would look good for his case in his defense.

He has decided to not go that route because of what it could mean if the jury believed her. And I understand what he's doing, respect what he's doing in a way to get out and support his family. Young daughter is his first child.

But he's very upset about it, as you can tell. And I just wanted to be clear and want the court to make sure they're clear with him that this is what he's doing, he's doing it and he knows what he's doing and he has other options. And I've explained that to him, but I want to make sure we're good there. (emphasis added).

We conclude that defendant produced uncontradicted evidence that (1) plaintiff directed him to negotiate a plea bargain; (2) defendant's investigation of the charges against plaintiff was sufficient to apprise defendant of the general strengths and weaknesses of the State's evidence; (3) defendant negotiated a plea bargain that met plaintiff's expressed requirement that he be released from jail; and (4) the terms of

the plea arrangement were reasonable, given the strength of the State's case against plaintiff and plaintiff's potential exposure to a lengthy prison term.

This evidence was sufficient to establish that defendant did not breach his duty to plaintiff, and to shift the burden to plaintiff to produce admissible evidence demonstrating that he could make at least a *prima facie* case that defendant breached his duty of care to plaintiff and that defendant's negligence proximately caused damage to plaintiff. "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

B. Failure to Hire an Expert or a Private Investigator

[2] Plaintiff's argument that defendant breached his duty to exercise reasonable care and diligence in representing plaintiff is based upon the following allegations:

> 1. Plaintiff alleges generally that defendant was negligent in that he failed to "properly investigate" the charges against him, and specifically that defendant failed to consider hiring an expert or a private investigator.
>
> 2. Plaintiff alleges that defendant was negligent in that he may have failed to review the videotape of Tina's interview at Butterfly House and that defendant inaccurately told plaintiff that Tina had named him as one of her sexual contacts on the video.

We first consider plaintiff's allegation that defendant was negligent by failing to properly consider whether he should seek funds to hire an expert or private investigator. Defendant was appointed by the court to represent plaintiff, who qualified for appointment of counsel as an indigent criminal defendant. Therefore, before defendant could retain an expert or private investigator, he would have needed to seek funding from the Stanly County superior court.

> In order to receive state-funded expert assistance, an indigent defendant must make "a particularized showing that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." . . . Furthermore, "the State is not required by law to finance a fishing expedition for the defendant in the

> vain hope that 'something' will turn up." "Mere hope or suspicion that such evidence is available will not suffice."

State v. McNeill, 349 N.C. 634, 650, 509 S.E.2d 415, 424 (1998) (quoting *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992), *State v. Alford*, 298 N.C. 465, 469, 259 S.E.2d 242, 245 (1979), and *State v. Tatum*, 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976)).

Plaintiff has failed to indicate a proposed area of expertise for the "expert" or any specific role for the expert as part of negotiating a plea bargain for plaintiff. Similarly, plaintiff has not articulated a basis for a request to obtain funds from the Stanly County superior court with which to hire an investigator. Neither plaintiff's evidence at the trial level nor his appellate brief addresses the legal standard for securing funds for expert or investigative assistance for an indigent criminal defendant, and plaintiff has not advanced an argument that a hypothetical request by defendant for funds with which to hire an expert or an investigator would have met this standard. In the absence of any specific evidentiary or legal goal to be pursued by the expert or investigator posited by plaintiff, their roles as experts would appear to be speculative and, as stated in *Parks*, "the State is not required by law to finance a fishing expedition for the defendant in the vain hope that 'something' will turn up." We conclude that plaintiff has failed to offer any evidence, or even a colorable argument, that plaintiff would have been entitled to funds for the services of an expert or an investigator, or that defendant was remiss in not attempting to obtain funds for this purpose.

C. Video Recording of Nurse Yow's Interview of Tina

[3] The other basis of plaintiff's claim for legal malpractice is plaintiff's allegation that defendant failed to properly review the videotaped interview of Tina or to accurately convey its contents to plaintiff. For the reasons discussed below, we conclude that plaintiff is not entitled to relief on the basis of this argument.

Plaintiff's legal malpractice action is premised almost entirely upon his allegation that, although Tina did not name plaintiff as a person with whom she had previously had sex during her videotaped interview, defendant erroneously told plaintiff that he had been identified by Tina on the video. In his appellate brief, plaintiff supports this contention with a detailed recitation of questions that Nurse Yow asked Tina and of her answers, in order to establish that during the videotaped interview Tina named three men with whom she had sex in the past but did not name plaintiff, even when Nurse Yow asked her if she had anything to add. It was only after the videotape was turned off and Nurse Huneycutt joined

Tina and Nurse Yow, when Nurse Huneycutt asked Tina if she had anything else to share, that Tina stated that she had also had sex with plaintiff.

The record on appeal includes three CDs containing identical depictions of the videotaped interview between Tina and Nurse Yow. In each of these CDs the interview ends before Nurse Yow asks Tina to identify the individuals with whom she has had sexual relations, and the CDs do not include the part of the interview upon which plaintiff bases most of his arguments. N.C. R. App. P. 9(a) provides in relevant part:

> In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, . . . and any [other] items filed with the record on appeal pursuant to Rule 9(c) and 9(d). Parties may cite any of these items in their briefs and arguments before the appellate courts.

"Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to the record on appeal . . . and any other items filed with the record in accordance with Rule 9(c) and 9(d)." *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008). Our appellate courts " 'can judicially know only what appears of record.' . . . 'An appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it.' " *State v. Price*, 344 N.C. 583, 593-94, 476 S.E.2d 317, 323 (1996) (quoting *Jackson v. Housing Authority*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988), and *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254, *disc. rev. denied*, 315 N.C. 188, 337 S.E.2d 862 (1985)). Because the videotaped interview that was made a part of the record and was provided to this Court in the form of three identical CDs does not include the questions and answers discussed by plaintiff on appeal, we cannot consider these alleged statements in our analysis of the trial court's summary judgment order.

For the reasons discussed above, we conclude that plaintiff failed to establish that he could offer a *prima facie* case of legal malpractice based on either defendant's alleged failure to properly consider hiring an investigator or expert, or upon defendant's alleged failure to accurately inform plaintiff that Tina did not identify him during the videotaped interview.

D. Damages

[4] Plaintiff has also failed to identify any damages resulting from defendant's alleged negligence in representing him on the criminal charges discussed above. In his complaint, plaintiff makes a generalized

allegation that he "sustained pecuniary damages, mental anguish and emotional distress and is entitled to recover damages in a sum in excess of . . . $10,000." This is a conclusory assertion without reference to specific factual evidence; moreover, plaintiff's complaint is unverified and therefore was not proper for the trial court's consideration in ruling on defendant's motion for summary judgment. In his affidavit, plaintiff avers that if defendant had informed him that Tina did not identify him during the videotaped interview, he would have "continued to reject the plea to indecent liberties with a minor[.]" However, plaintiff does not identify any damages that he sustained as a result of pleading guilty. We have carefully reviewed the record and conclude that plaintiff has failed to properly allege or to support with evidence any basis upon which to conclude that defendant's alleged negligence, even if it were proven, caused plaintiff any damage.

"It is well established that in order to prevail in a negligence action, plaintiffs must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages." *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995) (citation omitted). Because plaintiff failed to offer evidence of the element of damages, we are unable to evaluate whether defendant's alleged malpractice proximately caused damage to plaintiff.

As discussed above, we have concluded that defendant offered evidence that his representation of plaintiff met the standard of care for an attorney representing a criminal defendant who wishes to enter a plea of guilty, and that plaintiff has failed to produce evidence either that defendant breached the duty he owed to plaintiff or that plaintiff suffered any damages. Having reached this conclusion, we do not reach the other arguments advanced by the parties.

For the reasons discussed above, we conclude that the trial court did not err by granting defendant's motion for summary judgment and that its order should be

AFFIRMED.

Chief Judge McGEE and Judge DILLON concur.

J. RANDY HERRON, PETITIONER
v.
NORTH CAROLINA BOARD OF EXAMINERS FOR
ENGINEERS AND SURVEYORS, RESPONDENT

No. COA15-1382

Filed 5 July 2016

Engineers and Surveyors—revocation of land surveyor license—due process of law

The trial court erred by reversing respondent North Carolina Board of Examiners for Engineers and Surveyors' order revoking the land surveyor's license held by petitioner based upon the trial court's conclusion that the procedure employed by respondent violated petitioner's due process rights. The trial court's ruling was based solely on an analysis of the administrative structure under which respondent decided petitioner's case. Further, there is a critical distinction between disqualifying bias against a particular party and permissible pre-hearing knowledge about the party's case.

Appeal by respondent from order entered 15 September 2015 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 26 May 2016.

Long Parker Warren Anderson & Payne, P.A., by Robert B. Long, Jr., and Andrew B. Parker, for petitioner-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields, for respondent-appellant.

ZACHARY, Judge.

The North Carolina Board of Examiners for Engineers and Surveyors (respondent) appeals from an order of the trial court that reversed respondent's order revoking the land surveyor's license held by J. Randy Herron (petitioner). In its order, the trial court concluded that the procedures followed by respondent in its revocation of petitioner's surveyor's license "violated the Petitioner's Due Process rights to a fair and impartial hearing by an unbiased fact-finder" and "constituted unlawful procedure." On this basis, the trial court reversed and vacated respondent's order revoking petitioner's surveyor's license, and remanded for a hearing *de novo* before an Administrative Law Judge. On appeal, respondent

argues that the trial court erred in reaching these conclusions and in reversing respondent's order. We agree.

I. Background

Respondent is an administrative agency that was established under Chapter 89C of the North Carolina General Statutes and that is charged with regulation of the practice of land surveying in North Carolina. "Chapter 89C of the General Statutes . . . provides that, '[i]n order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest.' " *In re Suttles Surveying, P.A.*, 227 N.C. App. 70, 75, 742 S.E.2d 574, 578 (2013), *disc. review improvidently allowed*, 367 N.C. 319, 754 S.E.2d 416 (2014).

Petitioner was first licensed as a land surveyor in 1989. In July 2004, respondent notified petitioner that, after a review of plats prepared by petitioner, respondent found "sufficient evidence which supports a charge of gross negligence, incompetence, or misconduct." Respondent issued a formal reprimand against petitioner, imposed a civil penalty of $2000.00, and required petitioner to complete a continuing education course in professional ethics within ninety days. Petitioner failed to complete the required course within ninety days and in April 2005, respondent suspended petitioner's surveyor's license, which was reinstated after he completed the professional ethics class. In November 2009, respondent again notified petitioner that, following its investigation into several plats prepared by petitioner, respondent had evidence of gross negligence, incompetence, or misconduct. Petitioner did not contest this ruling and in May 2010, respondent imposed a civil penalty of $2000.00 against petitioner and suspended petitioner's surveyor's license for a period of three months, after which petitioner's license was reinstated. The record thus establishes that at the time of the events giving rise to this appeal, respondent had previously imposed formal discipline against petitioner on two occasions.

In November 2011, less than two years after respondent had suspended petitioner's surveyor's license for three months, respondent sent petitioner an annual notification regarding renewal of his surveyor's license. Respondent informed petitioner that his surveyor's license would expire on 31 December 2011 unless renewed. Although petitioner had been subject to the annual renewal requirement for more than twenty years, he failed to renew his surveyor's license in a timely fashion. Petitioner's surveyor's license was suspended from 31 January

2012 until petitioner renewed his license on 28 February 2012. During February 2012, while petitioner's surveyor's license was suspended, petitioner conducted surveys, signed and certified five plats, and recorded one survey plat with the Haywood County Register of Deeds. Petitioner admitted that he practiced surveying while his license was inactive or expired, in violation of N.C. Gen. Stat. § 89C-16(c) (2015).

On 13 June 2012, respondent sent petitioner a letter informing him that it was investigating petitioner's practice of surveying while his license was expired. The letter stated that during this investigation respondent had reviewed the five plats that petitioner signed and sealed in February 2012, and had determined that these plats violated certain provisions of the North Carolina Administrative Code (NCAC) governing the practice of surveying. On 14 November 2012, respondent mailed petitioner a Notice of Contemplated Board Action, informing petitioner that respondent intended to revoke petitioner's surveyor's license, but that petitioner had the right to request "a settlement conference and a formal hearing of [this] matter in the event that it could not be resolved consensually." Petitioner requested a settlement conference and on 28 February 2013, petitioner and his counsel met with respondent's Settlement Conference Committee. The Committee's recommendation was that petitioner's surveyor's license be revoked without a hearing, unless a hearing was requested by petitioner.

On 13 March 2013, respondent conducted a meeting of its Board. During this meeting a Board member moved that the Board "approve [the] consent agenda as presented." The "consent agenda" included "Board-authorized case openings, comity applications, firm applications for nine professional corporations, 17 limited liability companies, [and] two business firms, one Chapter 87 corporation name change request, four d/b/a requests, minutes, settlement committee recommendations, and [a] request for retired status[.]" The written materials that accompanied the consent agenda included a written report by the Settlement Conference Committee concerning petitioner's case, with all identifying information redacted. The Settlement Conference Committee recommended that petitioner's surveyor's license should be revoked "without [a] hearing unless requested by [petitioner]." However, none of the Board members reviewed the written materials associated with petitioner's case. Instead, the Board summarily passed the motion to approve the consent agenda in its entirety, without discussion or review of the individual items on the agenda. As a result, although respondent unanimously approved the consent agenda that included petitioner's case, none of the Board members were "aware of the facts of the settlement

conference . . . [or] of the settlement recommendations" of the committee until the formal hearing on petitioner's case.

On 14 August 2013, respondent wrote to petitioner, acknowledging his request for a formal hearing and setting out the specific allegations against petitioner. On 11 and 12 September 2013, several months after the Board meeting at which the Board had approved the consent agenda that included the Settlement Conference Committee's recommendation concerning petitioner's case, respondent conducted a hearing on the allegations against petitioner. The two Board members who had served on the Settlement Conference Committee - the Board's public member and Gary Thompson, a surveyor member of the Board - were recused from participation in the hearing. Despite this precaution, at the outset of the hearing, petitioner moved that his case be heard by an Administrative Law Judge instead of by respondent. Petitioner's motion was based on the fact that at the March 2013 Board meeting, respondent had approved the consent agenda that included a recommendation by the Settlement Conference Committee that petitioner's surveyor's license be revoked without a hearing unless a hearing was requested by petitioner. The record indicates, as discussed above, that the Board had passed a motion for a blanket approval of the entire consent agenda, but had not read or heard any information concerning petitioner's case in particular, and had not even known that the Committee was recommending revocation of petitioner's license. Petitioner, however, argued that the fact that the Board previously approved a consent agenda including his case was sufficient to establish that respondent had prejudged his case and could not afford him a "disinterested" review of the evidence. After a brief recess, petitioner's motion was denied, and each of the Board members stated on the record that he could be impartial.

At the hearing, David Evans, respondent's assistant executive director, testified that in February 2012 he was informed that petitioner was practicing surveying without a license. Review of the records of the Haywood County Register of Deeds revealed that petitioner had signed five plats during February 2012, while his license was suspended. Respondent therefore established a Settlement Conference Committee to conduct further investigation into petitioner's practice of surveying while his license was suspended and also into whether the plats that petitioner signed in February 2012 complied with respondent's rules for the preparation of plats.

Kristopher Kline was respondent's primary witness on the issue of petitioner's compliance with the standards of practice for land surveyors. Mr. Kline had been a licensed land surveyor for over twenty years,

had extensive experience in teaching and writing on subjects related to surveying, and had served for three years as the chairman of the education committee of the North Carolina Society of Surveyors. Although Mr. Kline practices surveying in Haywood County, he also testified that the rules and standards for surveying and preparation of plats are uniform across North Carolina. Mr. Kline was familiar with petitioner's work as a surveyor, and had observed a "regular pattern of substandard work" by petitioner over a period of years. Mr. Kline had previously reported petitioner to respondent for failure to comply with the requirements for surveyors. Mr. Kline had examined the plats signed by petitioner while his license was suspended and found numerous violations of the rules for the preparation of plats or property survey maps. The defects that Mr. Kline observed in petitioner's plats may be generally summarized as follows:

> 1. Practice of surveying without a license.
>
> 2. Failure to indicate or mark any ties or tie lines on some of his plats.[1]
>
> 3. Failure to employ ties that are external to the parcel being surveyed, including ties to the corners of an adjoining parcel so long as neither corner is on a common boundary line.
>
> 4. Repeated failure to properly mark right of ways (ROWs), including failure to indicate the source of a ROW, its width, and where the ROW crosses the property's boundary line.
>
> 5. Failure to include a ROW that appeared in a prior map, based on petitioner's belief that it was not a valid ROW or easement.
>
> 6. Lack of monumentation.[2]
>
> 7. Petitioner's practice of signing his plats in red ink, which he admitted was done to make it harder for a plat to be copied, although N.C. Gen. Stat. § 37-40 requires the signature to be legible and the plat to be reproducible.

Mr. Kline testified that the ties employed by petitioner in his plats did not comply with the purpose of a surveying tie as stated in respondent's

1. In the practice of surveying, a tie consists of a link between a point on the property being surveyed with another point that has previously been surveyed.

2. The United States Bureau of Land Management defines a "monument" as a "physical structure, such as an iron post . . . which marks the location of a corner point."

Survey Ties Guidelines manual ("the Guidelines"), which is provided to North Carolina surveyors. The Guidelines provide that "[t]he purpose of a tie is to reproduce a boundary when all or most of the property corners have been destroyed, or to verify the position of any given corner without the necessity of resurveying the entire tract of land." The Guidelines further instruct surveyors that:

> The North Carolina Board of Examiners for Engineers and Surveyors is providing this document to serve as an interpretative guide for proper ties to comply with Board Rule 21-56.1602(g). The variation in surveys makes it difficult to prepare a finite list of procedures for proper ties. Use of the ties shown and described herein will assure the Professional Land Surveyor (PLS) that a tie will comply with the requirements for a tie in the Board Rules. Professional judgment must be used to prepare and document a tie on a plat or report of survey. Variations from the examples given here may be acceptable to the Board if the intent of the rule is met.

The ties depicted in the Guidelines are all ties to points outside the property being surveyed. Mr. Kline testified that without a tie to an external point, it would not be possible to reproduce the survey without conducting a new survey. No evidence was elicited to contradict that point.

Petitioner presented the testimony of three local attorneys whose practices included real estate transactions, each of whom testified that he considered petitioner to be a competent surveyor and had found petitioner's surveys to be adequate for his use. However, each of petitioner's witnesses also testified that he was unfamiliar with the rules and regulations governing the practice of surveying and did not know whether petitioner's plats met these requirements.

Petitioner testified at the hearing and admitted that he had practiced surveying during February 2012 while his license was suspended. Petitioner also admitted that the Guidelines stated that the purpose of marking and indicating ties in a plat was to enable another surveyor to reconstruct the survey in the event that the property's corners were destroyed, and that without external ties this situation would require a new survey. However, petitioner also tendered various explanations for why he believed that his plats were in compliance with the rules for the practice of surveying. Petitioner generally conceded that he was "in the wrong" and that it was appropriate for respondent to impose discipline against him, and admitted that he had been disciplined by respondent on two prior occasions.

On 19 September 2013, respondent issued its final decision revoking petitioner's land surveying license. Petitioner appealed to the Buncombe County superior court. Following a review of the record in August 2015, the trial court entered an order on 15 September 2015. In its order, the trial court concluded that the administrative procedure followed by respondent, in which the Settlement Conference Committee made a recommendation, followed by a full hearing if requested by petitioner, constituted a violation of petitioner's due process right to a "fair and impartial hearing by an unbiased fact finder and adjudicator[.]" The trial court reversed and vacated respondent's final decision and ordered that the case be "remanded to Respondent to cause an Administrative Law Judge to be appointed, which appointed Administrative Law Judge shall hear this matter *de novo* to render a final decision in this matter." Respondent noted an appeal to this Court from the trial court's order.

II. Standard of Review

N.C. Gen. Stat. § 150B-43 provides that "[a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision." N.C. Gen. Stat. § 150B-51(b) authorizes a trial court to reverse or modify an agency's decision if the petitioner's substantial rights have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

" 'The North Carolina Administrative Procedure Act governs both trial and appellate court review of administrative agency decisions.' 'On judicial review of an administrative agency's final decision, the substantive nature of each [issue on appeal] dictates the standard of review.' " *Nanny's Korner Care Ctr. v. N.C. Dep't of Health & Hum. Servs.*, 234 N.C. App. 51, 57, 758 S.E.2d 423, 427 (2014) (quoting *Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 596, 446 S.E.2d 383,

387, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994), and *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004)). " 'The first four grounds for reversing or modifying an agency's decision . . . may be characterized as 'law-based' inquiries,' while '[t]he final two grounds . . . may be characterized as 'fact-based' inquiries.' " *Nanny's Korner*, 234 N.C. App. at 58, 758 S.E.2d at 427 (quoting *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894).

" '[Q]uestions of law receive *de novo* review,' whereas fact-intensive issues 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.' " *Carroll*, at 358 N.C. 659, 599 S.E.2d at 894 (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319). " 'Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions.' " *Blackburn v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 784 S.E.2d 509, 517-18 (2016) (quoting *Henderson v. N.C. Dept. of Human Resource*s, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988)). "Substantial evidence" is defined as "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b) (2015). It is well-established that:

> In reviewing the whole record, the trial court "is not the trier of fact but rather sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law." "It is not the function of the reviewing court, in such a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board." . . . The trial court examines the whole record to determine whether the Board's decision is supported by competent, material, and substantial evidence. In doing so, "the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency."

Good Neighbors v. County of Rockingham, __ N.C. App. __, __, 774 S.E.2d 902, 907-08 (quoting *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust.*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993), *In re Campsites Unlimited*, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975), and

Cumulus Broadcasting, LLC v. Hoke Cnty. Bd. of Comm'rs, 180 N.C. App. 424, 426, 638 S.E.2d 12, 15 (2006)), *disc. rev. denied*, 368 N.C. 429, 778 S.E.2d 78 (2015).

III. Trial Court's Ruling on Due Process

The trial court vacated and reversed respondent's final decision and remanded the case for the appointment of an administrative law judge, based upon the trial court's conclusion that the procedure employed by respondent violated petitioner's right to due process of law. We conclude that the trial court erred in reaching this conclusion.

Without question, " '[p]rocedural due process requires that an individual receive adequate notice and a meaningful opportunity to be heard before he is deprived of life, liberty, or property.' Moreover, a professional license, such as a surveyor's license, is a property interest, and is thus protected by due process." *Suttles*, 227 N.C. App. at 77, 742 S.E.2d at 579 (quoting *In re Magee*, 87 N.C. App. 650, 654, 362 S.E.2d 564, 566 (1987)). In this case, the trial court found and concluded that petitioner's right to due process was violated in that he did not receive a hearing before a fair and unbiased tribunal.

> Whenever a government tribunal . . . considers a case in which it may deprive a person of life, liberty or property, it is fundamental to the concept of due process that the deliberative body give that person's case fair and open-minded consideration. "A fair trial in a fair tribunal is a basic requirement of due process."

Crump v. Bd. of Education, 326 N.C. 603, 613, 392 S.E.2d 579, 584 (1990) (quoting *In re Murchinson*, 349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955)). In *Crump*, our Supreme Court discussed the term "bias":

> While the word "bias" has many connotations in general usage, the word has few specific denotations in legal terminology. Bias has been defined as "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction," Black's Law Dictionary 147 (5th ed. 1979)[.] . . . Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination. [The plaintiff] . . . alleged that one or more Board members came into his hearing having already decided to vote against him, based on "factual" information obtained outside the hearing process. This type [of] bias can be labeled a "prejudgment of adjudicative facts."

Crump, 326 N.C. at 615, 392 S.E.2d at 585. In the instant case, as in *Crump*, petitioner has alleged that respondent prejudged the adjudicative facts of his case. "A party claiming bias or prejudice may move for recusal and in such event has the burden of demonstrating 'objectively that grounds for disqualification actually exist.' " *In re Ezzell*, 113 N.C. App. 388, 394, 438 S.E.2d 482, 485 (1994) (quoting *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993)). " 'However, in order to prove bias, it must be shown that the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way.' " *Smith v. Richmond Cty. Bd. of Education*, 150 N.C. App. 291, 299, 563 S.E.2d 258, 265-66 (2002) (quoting *Evers v. Pender County Bd. of Educ.*, 104 N.C. App. 1, 15, 407 S.E.2d 879, 887 (1991), *aff'd*, 331 N.C. 380, 416 S.E.2d 3 (1992)), *disc. review denied*, 356 N.C. 678, 577 S.E.2d 297 (2003). "This Court has held that there is a 'presumption of honesty and integrity in those serving as adjudicator' on a quasi-judicial tribunal." *In re N. Wilkesboro Speedway, Inc.*, 158 N.C. App. 669, 675-76, 582 S.E.2d 39, 43 (2003) (quoting *Taborn v. Hammonds*, 83 N.C. App. 461, 472, 350 S.E.2d 880, 887 (1986)).

The trial court made the following findings of fact directly pertinent to its conclusion that petitioner's due process rights were violated. Other findings by the trial court might be construed as part of the trial court's analysis of due process. For example, the court's finding that there was no substantial evidence to support respondent's findings that petitioner failed to comply with surveying regulations might be intended to support the trial court's conclusion that respondent was biased. However, the findings and conclusions listed below are the ones that are more directly pertinent to the issue of due process.

. . .

> 11. . . . [O]n November 14, 2012, the Board mailed Herron a Notice of Contemplated Board Action, stating that the Board intended to revoke the land surveying certificate of licensure of Petitioner, and offering him an opportunity for a settlement conference and a formal hearing of his matter in the event it could not be resolved consensually.
>
> 12. Herron requested and engaged in a settlement conference accompanied by his counsel on February 28, 2013 with the Settlement Conference Committee of the Board, composed of two Board members, along with the Executive Director of the Board and Board Counsel.

13. The Settlement Conference Committee and Herron were unable to resolve the issues, and Petitioner's counsel requested a Board hearing.

. . .

15. . . . [A]t the March 13, 2013 Board meeting of Respondent ("March Board Meeting"), before any notice of any hearing at which Herron or his counsel were permitted to attend and present evidence, cross-examine witnesses, or otherwise present a defense, the Board received factual information concerning this disputed matter from the Settlement Committee . . . without the use of Herron's name, and further received the recommendation of the Settlement Conference Committee to revoke Herron's license, and then affirmatively and unanimously voted to approve the recommendation for license revocation upon the alleged facts then made known to it.

16. The Board's vote to revoke Herron's surveying license at the March Board Meeting was confirmed by letter to Petitioner's counsel . . . [stating] in pertinent part, that: "The full Board at its March 13, 2013 meeting approved the recommendation of the Settlement Conference Committee which was to revoke Herron's surveying Certificate of License. The Board acknowledges the request of your client for a hearing. . . . "

17. Thereafter, the Board provided notice of a hearing . . . on or about August 14, 2013 to Petitioner.

18. The hearing was held before the Board on September 11 and 12, 2013, at which hearing Herron was represented by his counsel.

19. At the outset of such hearing, Petitioner, by and through his counsel, moved to disqualify the Board from hearing the contested case and that an Administrative Law Judge should be appointed because the Board had already made a decision before hearing evidence to approve the recommendation of the Settlement Conference Committee to revoke Petitioner's license from a range of penalty options that were available, and that constituted prejudgment of this matter and a biased fact-finder and adjudicator of the outcome of this matter.

> 20. The motion to disqualify [respondent] . . . was denied following a closed session during which members of the Board deliberated without further participation by Petitioner Herron or his counsel.
>
> 21. All of the participating Board members at the September 11, 2013 hearing, with the exception of Board Member Willoughby, were in attendance and voted to approve the recommendation of the Settlement Conference Committee at the March Board Meeting.
>
> 22. The Final Decision entered by the Board did in fact revoke Petitioner's Professional Land Surveying License[.]

Based on its findings of fact, the trial court made the following conclusions of law regarding petitioner's right to due process:

> 3. Petitioner was entitled to a fair and impartial hearing by an unbiased fact finder and adjudicator under the Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment to the Constitution, and under Article I, Section 19 of the Constitution of North Carolina.
>
> 4. That at the March Board Meeting, where Petitioner and his counsel were not present or provided an opportunity to be heard, and prior to any hearing, the entire Board, except for one absent member, received facts of the case as submitted by the Settlement Conference Committee, without the name of Petitioner, and voted affirmatively to approve the recommendation of the Settlement Conference Committee to revoke Petitioner's certificate of licensure without hearing unless requested by the respondent, and thereby was made upon unlawful procedure and violated the Petitioner's Due Process rights to a later fair and impartial hearing.
>
> 5. The denial of Petitioner's motion to disqualify the Board from hearing the matter and for reference to an Administrative Law Judge, as provided in NCGS § 150B-40(e), and thereafter conducting the hearing violated the Petitioner's Due Process rights to a fair and impartial hearing by an unbiased fact-finder and adjudicator contrary to both the aforesaid constitutional provisions and constituted unlawful procedure.

We note that petitioner did not claim, and the trial court did not find, that anyone involved in this matter had a personal bias against petitioner individually or on the basis of an aspect of petitioner's identity such as race or religion. Instead, the trial court's ruling is based solely on an analysis of the administrative structure under which respondent decided petitioner's case. The trial court's conclusion that petitioner's right to due process was violated was based on the following:

> 1. During respondent's March 2013 Board meeting, respondent passed a motion approving an extensive "consent agenda" that included the recommendation of the Settlement Conference Committee on petitioner's case. None of the Board members reviewed the Committee's written report, which had redacted all identifying information.
>
> 2. In September 2013, respondent conducted a hearing on the allegations against petitioner, at which the Board members heard sworn testimony, received documentary evidence, and rendered a decision. All but one of the Board members at the hearing were also present at the earlier meeting.

We conclude that these circumstances, which were not accompanied by evidence that any member of respondent's Board was personally biased against petitioner, do not support the trial court's holding on the issue of due process. We have reached this conclusion for several reasons.

We first clarify the nature of the action taken by respondent at its March 2013 meeting. The trial court found that at this meeting respondent "received factual information concerning this disputed matter" and then "unanimously voted to approve the recommendation for [petitioner's] license revocation." The trial court also found that respondent's "vote to revoke" petitioner's surveying license was confirmed in a letter to Petitioner's counsel. These findings suggest that at its March 2013 meeting respondent evaluated the evidence against petitioner and rendered a decision as to the appropriate level of discipline. This implication is not accurate.

As discussed above, the Board did not receive a presentation from the Settlement Conference Committee at the March 2013 Board meeting. Although the Board passed a motion for a blanket approval of the entire consent agenda that included written materials prepared by the Committee in petitioner's case, it did so without reading these documents or discussing petitioner's case. The wisdom of this procedure,

whereby significant decisions are made without discussion or review, may be subject to question. However, our focus is not on the merits of respondent's internal procedures, but on whether these procedures violated petitioner's due process rights. The record shows that respondent's approval of the consent agenda did not include any review or assessment by the Board of the evidence in petitioner's case, or any analysis of whether revocation of petitioner's license would be appropriate. As a result, the trial court's findings of fact to the contrary lack evidentiary support.

The trial court essentially held that the respondent's blending of investigative and adjudicative functions violated petitioner's constitutional right to due process as a matter of law, without requiring evidence that any individual on respondent's Board was biased against petitioner. We conclude that although respondent technically "approved" the Settlement Conference Committee's recommendation, it did so without learning that the Committee recommended revocation of petitioner's license and without any exposure to the evidence or investigation that had led to this recommendation. Moreover, this Court has previously held that "[t]there is a critical distinction between disqualifying bias against a particular party and permissible pre-hearing knowledge about the party's case." *Wilkesboro Speedway*, 158 N.C. App. at 676, 582 S.E.2d at 43 (citing *Farber v. N.C. Carolina Psychology Bd.*, 153 N.C. App. 1, 9, 569 S.E.2d 287, 294 (2002), *cert. denied*, 356 N.C. 612, 574 S.E.2d 679 (2003)). " '[M]ere familiarity with the facts of a case gained by an agency in the performance of its statutory duties does not disqualify it as a decision-maker.' " *Farber*, 153 N.C. App. at 9, 569 S.E.2d at 294 (quoting *Thompson v. Board of Educatio*n, 31 N.C. App. 401, 412, 230 S.E.2d 164, 170 (1976), *reversed on other grounds*, 292 N.C. 406, 233 S.E.2d 538 (1977)).

In *Farber*, the North Carolina Psychology Board (the respondent) assigned a staff psychologist to investigate a report that the petitioner, a licensed psychologist, had engaged in an improper romantic relationship with a patient. The investigator presented his findings to respondent, with the petitioner's name redacted, and the respondent found probable cause to issue a formal complaint against the petitioner. At the formal hearing on the matter, the petitioner moved to disqualify those board members who had heard the investigator's report and sought to have his case heard by an administrative law judge. The petitioner's motion was denied and following the hearing respondent suspended the petitioner's license for two years. The petitioner appealed to the superior court, which reversed on the grounds that the respondent had violated the petitioner's due process and statutory rights. This Court reversed the trial court, holding that:

> Regarding bias in the context of an administrative agency, the United States Supreme Court has cautioned that "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators[.]" . . . This Court has echoed the Supreme Court's warning, stating that "there is no per se violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter." Thus, "[a]bsent a showing of actual bias or unfair prejudice petitioner cannot prevail."

Farber, at 153 N.C. App. 9, 569 S.E.2d at 294 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L. Ed. 2d 712, 723-24 (1975), and *Hope v. Charlotte-Mecklenburg Bd. of Education*, 110 N.C. App. 599, 603-04, 430 S.E.2d 472, 474-75 (1993)). We conclude that *Farber* is controlling on the issue of whether respondent's administrative procedure constitutes a *per se* violation of petitioner's right to due process.

Petitioner attempts to distinguish *Farber* from this case on the grounds that in *Farber* the pre-hearing knowledge of the petitioner's case arose when the board made a preliminary finding of probable cause to pursue the allegations against the petitioner. However, because the board in *Farber* made a finding of probable cause based upon an assessment of the evidence against that petitioner, there was more, rather than less, opportunity for the board in *Farber* to develop a bias against the petitioner than in the case now before this Court, in which respondent approved the recommendation of the Settlement Conference Committee without review of the evidence or even of the nature of that recommendation.

We conclude that the trial court erred by holding that petitioner's due process rights were violated. We reverse the trial court's order and remand for further proceedings applying the standard of review discussed above, in Section II of this opinion.

REVERSED AND REMANDED.

Judges STEPHENS and McCULLOUGH concur.

HOOVER v. HOOVER

[248 N.C. App. 173 (2016)]

PATRICIA B. HOOVER, PLAINTIFF
v.
GEORGE BARRY HOOVER, DEFENDANT

No. COA15-1396

Filed 5 July 2016

Divorce—alimony—modification—substantial change of circumstances—retirement—bad faith

The trial court did not err in an alimony case by finding that defendant was retired or by concluding that there had been a substantial change of circumstances. Further, plaintiff failed to preserve for review the issue of whether defendant had acted in bad faith such that the trial court should have imputed income to defendant in calculating his earning capacity.

Appeal by plaintiff from order entered 7 August 2015 by Judge Edward L. Hedrick, IV, in Iredell County District Court. Heard in the Court of Appeals 12 May 2016.

Homesley, Gaines, Dudley, & Clodfelter, LLP, by Leah Gaines Messick and Edmund L. Gaines, for plaintiff-appellant.

No brief submitted for defendant-appellee.

ZACHARY, Judge.

Patricia Hoover (plaintiff) appeals from an order modifying the amount of alimony that George Hoover (defendant) is obligated to pay her on a monthly basis. On appeal, plaintiff argues that the trial court erred by finding that defendant had retired and by concluding that there had been a substantial change of circumstances, and that because defendant had voluntarily suppressed his earnings in bad faith the trial court should have imputed income to defendant. We conclude that the trial court did not err by finding that defendant was retired or by concluding that there had been a substantial change of circumstances, and that plaintiff failed to preserve for our review the issue of whether defendant had acted in bad faith such that the trial court should have imputed income to defendant in calculating his earning capacity.

I. Background

Plaintiff and defendant were married on 8 March 1978, separated on 29 December 1993 and divorced on 21 July 1999. There were no children born of the parties' marriage. A consent order entered in 2003 required defendant to pay plaintiff permanent alimony of $400.00 per week. Pursuant to an order entered on 25 July 2007, defendant's alimony obligation was reduced to $750.00 per month.

On 2 January 2015, defendant filed a motion to modify alimony. Defendant alleged that there had been a substantial change of circumstances since the 2007 alimony order was entered, in that he was seventy-two years old, he had several serious medical problems, and his sole income consisted of a monthly Social Security payment of "approximately $1508.00." The trial court conducted a hearing on defendant's motion on 2 July 2015. On 7 August 2015, the trial court entered an order finding that there had been a substantial change of circumstances and reducing defendant's alimony payment to $195.00 per month. On 8 September 2015, plaintiff appealed to this Court from the trial court's order modifying alimony.

II. Standard of Review

Pursuant to N.C. Gen. Stat. § 50-16.9(a) (2014), an order for alimony "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party[.]" " 'As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay.' " *Parsons v. Parsons*, 231 N.C. App. 397, 399, 752 S.E.2d 530, 532 (2013) (quoting *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982)). On appeal:

> "The well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding. Conclusions of law are, however, entirely reviewable on appeal." A trial court's unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal."

Mussa v. Palmer-Mussa, 366 N.C. 185, 191, 731 S.E.2d 404, 408-09 (2012) (quoting *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994), and *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

III. Trial Court's Order

In its order, the trial court's findings of fact included the following:

. . .

4. Pursuant to an Order entered . . . July 25, 2007, the Defendant's obligation to pay Alimony was modified to $750.00 per month beginning July 6, 2007.

5. [In July 2007] . . . Defendant was employed part-time at NAPA Auto Parts earning $241.52 per week and lived with his mother in her former residence which she had conveyed to him and his two siblings. . . .

6. On January 10, 2008, the Defendant moved to modify his Alimony obligation and . . . [alleged] that Plaintiff . . . was no longer dependent. . . . Defendant's motion was denied.

7. On September 2, 2011, the parties agreed to reduce Defendant's Alimony obligation by $290.00 per month pending Defendant's knee surgery. Defendant's obligation pursuant to that Order would revert to $750.00 per month upon the Defendant's return to work.

8. On August 1, 2014, when the Defendant was approximately 72 years old, he quit his job at NAPA Auto Parts because he desired to retire. At the time he left employment, he was making $9.90 per hour. His gross income from this employment in 2014 was $14,663.46.

9. The Defendant continues to live in the same home with his mother. The home is owned by Defendant and his two siblings; however, he divides the expenses associated with the home with his mother equally[.] . . . When he has insufficient money to pay ½ of the expenses, his mother pays them all. In fact, his mother pays most of the utilities. The home is worth approximately $150,000.

10. Defendant's current income is solely in the form of social security retirement in the gross amount of $1,528.90 per month. For the last several years, his mother has given the Defendant and his siblings $10,000 per year, but has not given him the gift in 2015.

> 11. Defendant is 73 years old. Defendant had a heart attack 8 years ago and a knee replacement 3 years ago. He also had a hip replacement just before his knee replacement. Very recently, he suffered severe vision loss in one eye. Although he had surgery, his vision remains only 30% of that enjoyed by the eye prior to the retinal tear.
>
> 12. Defendant's reasonable monthly expenses can be found in the following table . . . [table omitted, showing a total monthly expense amount of $ 1,467.38].
>
> 13. Upon the factors about which no evidence was presented, the Court will find the Defendant failed to prove a substantial change in circumstances related to those factors outline[d] in N.C.G.S. §50-16.3A and the dependency of the Plaintiff.
>
> 14. Defendant is earning at his capacity. There is insufficient evidence for the Court to find that retiring at the age of 72 was done by the Defendant in a bad faith attempt to disregard his marital obligations.
>
> 15. Defendant owes medical providers more than $42,000 for past medical treatment.
>
> 16. Defendant receives unearned benefits from his mother in the sum of $133.44 per month as outlined in the table above.
>
> 17. Therefore, the Defendant's monthly income and benefits exceed his reasonable needs by $194.96.

The trial court's conclusions of law included the following:

> . . .
>
> 2. A substantial change in circumstances has occurred since the entry of the last Order affecting Defendant's ability to pay Alimony and his Motion to Modify Alimony should be allowed.
>
> 3. Although Defendant's reduction in income was voluntary, it was not in bad faith.
>
> 4. Considering the resources of the Defendant and the other factors outlined above, it would be appropriate for the Court to modify Defendant's obligation to pay Alimony as of August 1, 2015.

5. Defendant has the ability to pay the amount ordered herein.

Based upon its findings and conclusions, the trial court granted defendant's motion to modify alimony and ordered him to pay plaintiff alimony "in the sum of $195.00 per month beginning August 1, 2015, which shall be garnished from the Defendant's social security check and be paid directly to the Plaintiff." We conclude that the trial court's findings of fact are supported by the evidence, and that its findings support its conclusions of law.

In reaching this conclusion, we have considered plaintiff's arguments for a contrary result. We first note that plaintiff has not argued that the modification order has resulted in plaintiff's lacking adequate funds with which to support herself. Moreover, plaintiff does not challenge the evidentiary facts found by the trial court, but only the trial court's ultimate finding that defendant had retired, and its conclusions that defendant was earning at his capacity because he had not left work in a bad faith attempt to evade his alimony obligation, and that there had been a substantial change of circumstances.

Regarding the trial court's finding that defendant had retired, the undisputed evidence established the following facts:

1. Defendant was 72 years old[1] when he quit work, and was 73 at the time of the hearing on defendant's motion.

2. During the time between entry of the 2007 alimony order and the hearing on defendant's motion to modify alimony, defendant had experienced the following medical problems: (a) a heart attack; (b) a knee replacement; (c) a hip replacement; (d) instances of skin cancer; (e) hearing loss; and (f) 70% loss of vision in one eye.

3. After defendant left his employment, his only ongoing source of income was a monthly Social Security check of approximately $1530.00 per month.

4. Defendant was 73 years old and living with his 99 year old mother who contributed to the payment of his expenses.

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1. We note that employment beyond the age of 72 is prohibited in some circumstances. *See* N.C. Gen. Stat. § 7A-4.20 (2015).

We hold that the evidence of these circumstances, which is not challenged on appeal, clearly supports the trial court's finding that defendant had retired. Plaintiff is not entitled to relief on the basis of this argument.

Plaintiff also argues that the trial court erred by concluding that there had been a substantial change of circumstances. Plaintiff asserts on appeal that in its determination of whether there had been a change of circumstances, the trial court should have made a finding that defendant acted in bad faith and should have imputed income to defendant in the amount of his previous earnings. We have carefully reviewed the transcript of the hearing in this matter, and conclude that plaintiff did not argue before the trial court that defendant had acted in bad faith, and did not argue that the trial court should impute income to defendant.

Because plaintiff did not argue at the trial level that the trial court should find that defendant acted in bad faith and, on that basis, should impute income to defendant, neither defendant nor the trial court had an opportunity to address this issue. N.C.R. App. P. Rule 10(a)(1) (2014) provides in relevant part that in order to preserve an issue for appellate review, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must have "obtain[ed] a ruling upon the party's request, objection, or motion." "As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal." *State v. Johnson*, 204 N.C. App. 259, 266, 693 S.E.2d 711, 716-17 (2010).

> "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. . . . The defendant may not change his position from that taken at trial to obtain a steadier mount on appeal."

Cushman v. Cushman, __ N.C. App. __, __, 781 S.E.2d 499, 504 (2016) (quoting *Balawejder v. Balawejder*, 216 N.C. App. 301, 307, 721 S.E.2d 679, 683 (2011)). We conclude that, by failing to raise this issue at the trial level, plaintiff waived review on appeal.

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

AFFIRMED.

Judges DILLON and DAVIS concur.

IN RE ADOPTION OF C.H.M.

[248 N.C. App. 179 (2016)]

IN THE MATTER OF THE ADOPTION OF C.H.M., A MINOR CHILD

No. COA15-1057

Filed 5 July 2016

Adoption—consent of father required—funds for child saved in lockbox

Where, upon learning that his former girlfriend was pregnant, respondent-father contacted her on numerous occasions expressing his enthusiasm for becoming a father and offering financial support, saved approximately $100 to $140 per month for the baby by depositing it in a lockbox kept in his residence, and sought in other ways to be involved in the life of the baby despite resistance by the mother, the Court of Appeals affirmed the trial court's order concluding that respondent-father's consent was required to proceed with the adoption of his minor daughter by petitioners.

Appeal by Petitioners from order entered 9 February 2015 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 8 March 2016.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for Petitioners.

Marshall & Taylor, PLLC, by Travis R. Taylor, for Respondent.

STEPHENS, Judge.

Petitioners Michael T. Morris and Carolyn L. Morris appeal from the district court's order concluding that Respondent-father Venson Allen Westgate's consent is required to proceed with the adoption of his minor daughter, C.H.M. We affirm the district court's order.

Factual Background and Procedural History

Westgate is a 31-year-old resident of Illinois. Beginning in 2009, he became involved in an on-and-off intimate relationship with C.H.M.'s biological mother, Brandi Wood, who also resided in Illinois at that time. In 2012, Westgate saved money for several months to purchase an engagement ring and asked Wood to marry him, but she rejected his proposal. However, she later became pregnant after the two rekindled their intimate relationship in late October or early November 2012.

In January 2013, Wood married a member of the military stationed in North Carolina, but she remained in Illinois. Around the same time, Wood told Westgate that she was pregnant and that he might be the father; however, Wood also demanded that Westgate keep her pregnancy secret. Westgate promised that he would not tell anyone about Wood's pregnancy until she told him he could, but continued to visit Wood at the Dollar General store where she worked and also communicated with her extensively on the social networking site Facebook. In February 2013, shortly after learning of Wood's pregnancy, Westgate offered via Facebook to start setting money aside for their child; although Wood rebuffed this offer, Westgate replied that he wanted to do so anyway in order to ensure that the child had everything he or she would ever need. In addition to offering financial support, Westgate also offered to pay for Wood's medical bills and to purchase specific items for the child. Wood refused these offers as well. However, in March 2013, she allowed Westgate to accompany her to a prenatal medical appointment, which was paid for by her husband's insurance. In Facebook messages he sent to Wood around this time, Westgate expressed his enthusiasm for becoming a father and his concerns for the health of Wood and her child, discussed research he had conducted into healthcare providers, suggested potential baby names, requested pregnancy pictures, and stated his intent to be present at the child's birth. In the months that followed, Wood told Westgate that it was impossible for him to be the father of her child because she had become pregnant as a result of a sexual assault by an unknown person in the autumn of 2012. Westgate reaffirmed that if the child was his, he wanted to be there as a father, and repeatedly requested to take a DNA test to confirm or exclude the possibility of his paternity, but Wood refused.

Before giving birth, Wood moved to North Carolina to join her husband in Onslow County. Westgate did not know Wood's North Carolina phone number or address and had no way of contacting her other than Facebook messages; eventually, Wood blocked Westgate on Facebook. On 28 June 2013, Wood gave birth to C.H.M. and subsequently placed her for adoption with A Child's Hope, LLC ("ACH"), an adoption agency. Wood did not inform Westgate that she had given birth, did not tell him she had placed C.H.M. for adoption, nor did she identify Westgate to the adoption agency as the child's biological father; instead, Wood told ACH that her pregnancy resulted from a sexual assault by an unknown person. On 9 July 2013, the Morrises filed a petition in Wake County District Court to adopt C.H.M.

On 27 July 2013, Wood returned to Illinois and asked Westgate to meet her at a bar, at which point he realized she was no longer pregnant.

However, Wood did not inform Westgate she had placed C.H.M. for adoption and instead told him that the child was hospitalized due to a heart problem. Westgate again requested a DNA test but Wood refused, offering an array of reasons why he could not be the father, including that her pregnancy had resulted from a sexual assault, that the timing of conception and birth did not align with their intimate encounter, and that Westgate's blood type and hair color did not match that of the child. At some point in September or October 2013, Westgate began to contact attorneys in Illinois and North Carolina to inquire about his legal rights. However, in November 2013, Wood admitted to Westgate that she had placed the child for adoption and that he was the father. On 27 November 2013, Westgate was served with a notice of pendency of adoption proceedings. A subsequent DNA test, paid for by ACH, confirmed Westgate's paternity.

On 23 December 2013, Westgate filed a response to notice and objection to the adoption. A hearing in this matter was held during the 23 April 2014 civil session of Wake County District Court, the Honorable Debra Sasser, Judge presiding. At the hearing, Westgate testified that he has been employed for several years as a repairman for J&J Ventures in Illinois and earned approximately $35,000 per year during the term of Wood's pregnancy. Westgate testified further that once he learned Wood was pregnant, on several occasions via Facebook messages and in person, he offered to provide financial support for Wood and C.H.M. and told Wood he had been saving money to do so, but that Wood rebuffed him because she did not want her husband to know about their relationship. According to Westgate, despite Wood's refusal to accept financial support, he immediately began saving money for his child by depositing cash withdrawn from ATMs, cashback purchases from Walmart, and monthly dividend checks into a "lockbox" he kept in his residence. Westgate testified that he typically deposited at least $100 to $140 per month and sometimes more into the lockbox. He also testified that although he had a bank account, he generally lived paycheck to paycheck and chose to utilize the lockbox because he wanted to assure the funds for his child were kept separate for her exclusive use. Westgate provided his bank statements dating back to before C.H.M.'s conception, and testified extensively about his monthly expenses and withdrawals. Westgate also introduced the lockbox into evidence, which, by the time of the hearing, held $3,260. Westgate acknowledged that he had contacted attorneys in Illinois and North Carolina several months after his daughter's birth in September and October 2013 to inquire about suing Wood for custody or demanding a DNA test, but stated that he planned to pay any legal or associated fees from his bank account, rather than

from the lockbox. In addition, Westgate testified that after the DNA test confirmed his paternity, he purchased items for C.H.M. and made arrangements to transfer his employment to the town in Illinois where his parents lived and to move in with them in order to better facilitate childcare for his daughter.

Wood did not appear at the hearing. Although Wood had been served in Illinois with a subpoena to compel her appearance approximately one week prior to the hearing, counsel for the Morrises explained that after Wood was served, she contacted him. He informed her that if she was present in North Carolina, she would have to comply with the subpoena, but in the event she had changed her state of residence to Illinois, he did not believe the subpoena was valid.

On 9 February 2015, the district court entered an order in favor of Westgate. In its findings of fact, the court found that Westgate had acknowledged paternity of C.H.M. and had regularly visited and communicated with Wood throughout her pregnancy. The court also found that "[w]hile there are legal issues in dispute the [c]ourt finds that the major fact in dispute is whether [Westgate's] testimony regarding putting money aside for the minor child and Mrs. Wood is credible." The court ultimately found Westgate's testimony credible. In light of the evidence that Wood refused to accept any financial support after Westgate told her he was saving money for their child, the court further found that Westgate

> made regular and consistent payments into his lock box/safe for the support of the minor child. These payments were made on a monthly (and sometimes more frequent) basis. While these funds were not deposited into a bank or other financial institution, they were deposited into a safe, and these funds were earmarked for the minor child. No other funds were deposited into this safe.

After entering findings regarding Westgate's income, the court found as fact and concluded as a matter of law that, in accordance with his financial means, Westgate's regular and consistent deposits into the lockbox were a reasonable method of providing support for C.H.M. The court also concluded that Westgate had "presented a legally sufficient payment record of his efforts to provide support." Consequently, the court determined that Westgate had satisfied all three of the statutory requirements imposed by section 48-3-601 of our General Statutes, and therefore his consent was required to proceed with the adoption. The Morrises gave notice of appeal to this Court on 11 March 2015.

Analysis

The Morrises argue that the district court erred in determining that Westgate's consent was necessary for the adoption. Specifically, the Morrises contend that Westgate failed to satisfy the statutory support requirement imposed by section 48-3-601 of our General Statutes. We disagree.

Adoption proceedings are "heard by the court without a jury." N.C. Gen. Stat. § 48-2-202 (2015).

> Our scope of review, when the [c]ourt plays such a dual role, is to determine whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts. This Court is bound to uphold the trial court's findings of fact if they are supported by competent evidence, even if there is evidence to the contrary. Finally, in reviewing the evidence, we defer to the [district] court's determination of witnesses' credibility and the weight to be given their testimony.

In re Adoption of Shuler, 162 N.C. App. 328, 330-31, 590 S.E.2d 458, 460 (2004) (citations and internal quotation marks omitted). The district court's conclusions of law are subject to *de novo* review. *See generally In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001).

Chapter 48 of our General Statutes governs adoption procedures in North Carolina. Section 48-3-601 makes the consent of certain individuals mandatory before a court may grant an adoption petition, and provides that a putative father's consent is only required if he

> [b]efore the earlier of the filing of the [adoption] petition or the date of a hearing under [section] 48-2-206, has acknowledged his paternity of the minor and
>
> . . .
>
> [h]as provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of the pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to communicate with

> the biological mother during or after the term of pregnancy, or with the minor, or with both[.]

N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2015). In construing the purpose of section 48-3-601 in *In re Adoption of Byrd*, our Supreme Court stated:

> We believe the General Assembly crafted these subsections of this statute primarily to protect the interests and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father for all intents and purposes has walked away from his responsibilities to mother and child, but later wishes to intervene and hold up the adoption process.

Byrd, 354 N.C. at 194, 552 S.E.2d at 146. In *Byrd*, the putative father, Gilmartin, was an unwed 17-year-old who impregnated his high school girlfriend, O'Donnell. Gilmartin held several part-time jobs in Pea Ridge, where he lived free of charge with his uncle and later his grandparents and, after learning of the pregnancy, he offered to help support and raise the child. *Id.* at 190, 552 S.E.2d at 144. In addition, his family offered O'Donnell a place to live during her pregnancy as well as assistance with her medical bills and living expenses. *See id.* O'Donnell declined these offers. *See id*. At one point, Gilmartin moved to Nags Head to work in construction in an effort to earn and save money for the care of O'Donnell and her expected child. *See id*. However, Gilmartin failed to save any money and ultimately provided no financial support to O'Donnell during the term of her pregnancy. *See id.* One day after giving birth, O'Donnell placed the child for adoption, and an adoption petition was filed the same day. *Id.* at 191, 552 S.E.2d at 145. Four days later, Gilmartin mailed a money order for $100 and some baby clothing to O'Donnell, and subsequently sought custody of the child. *See id*. In evaluating whether Gilmartin had satisfied the statutory support requirement imposed by section 48-3-601, our Supreme Court reasoned that "support is best understood within the context of the statute as actual, real and tangible support, and that attempts or offers of support do not suffice." *Id.* at 196, 552 S.E.2d at 148 (internal quotation marks omitted). Because the record established that Gilmartin had at least some income during the term of O'Donnell's pregnancy but "never provided tangible support within his financial means to [O'Donnell or her child] at any time during the relevant period before the filing of the adoption petition," the Court held that he failed to satisfy the statutory support requirement, and therefore his consent was not required for the adoption. *Id.* at 197, 552 S.E.2d at 148. In summarizing its holding, the Court emphasized that

"[t]he interests of the child and all other parties are best served by an objective test that requires unconditional acknowledgment [of paternity] and tangible support," and reiterated that "attempts or offers of support, made by the putative father or another on his behalf, are not sufficient for the purposes of the statute." *Id.* at 197-98, 552 S.E.2d at 148-49.

In *In re Adoption of Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006), the Court reaffirmed the distinction drawn in *Byrd* between actual, tangible support and mere offers or attempts. There, the putative father, Avery, impregnated his high school girlfriend, Anderson. *Id.* at 272, 624 S.E.2d at 627. After learning of the pregnancy, Avery, who lived with his parents and paid nothing for rent, utilities, food, or clothing, dropped out of school, obtained gainful employment at the International House of Pancakes, and used some of his earnings to purchase a car for $1,000 and pay for automobile insurance. *Id.* at 273-74, 624 S.E.2d at 627-28. At trial, Avery acknowledged that he never provided any financial support to Anderson before the filing of the adoption petition, but introduced testimony from several witnesses that prior to the filing of the adoption petition, he repeatedly offered Anderson money in person at school, which she refused; drove to her family's residence and attempted to deliver an envelope containing a check for $100, which her father refused; and also had his attorney send her a letter acknowledging paternity and offering financial assistance to her and the child. *Id.* at 274, 624 S.E.2d at 628. The trial court nevertheless concluded that Avery failed to satisfy the statutory support requirement and therefore his consent to the adoption was not required. *Id.* When the case reached our Supreme Court, Avery contended that strict adherence to the standard articulated in *Byrd* risked inviting mothers "to thwart the rights of putative fathers simply by declining to accept support." 360 N.C. at 275, 624 S.E.2d at 628. In rejecting this argument, our Supreme Court stated, "We see no reason to modify *Byrd*'s bright-line rule. The rule comports with the language of the subsection and reflects the importance of a clear judicial process for adoptions." *Id.* at 278, 624 S.E.2d at 630 (internal quotation marks omitted). After reaffirming that mere offers of support are insufficient to satisfy the statutory support requirement, the Court examined the record and determined that competent evidence supported the trial court's factual finding—that despite possessing adequate resources, Avery never provided actual financial support for Anderson. *See id.* In upholding the trial court's conclusion that Avery's consent to the adoption was not required, the Court also explained that "our resolution of the instant case does not grant biological mothers the power to thwart the rights of putative fathers" because the language of section 48-3-601 "obliges

putative fathers to demonstrate parental responsibility with reasonable and consistent payments *for* the support of the biological mother." *Id.* at 279, 624 S.E.2d at 630 (citation and internal quotation marks omitted; emphasis in original). As the Court reasoned,

> [t]he legislature's deliberate use of "for" rather than "to" suggests the payments contemplated by the subsection need not always go directly to the mother. So long as the father makes reasonable and consistent payments *for* the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest.

Id. (emphasis in original). The Court went on to note that Avery "could have supplied the requisite support any number of ways, such as opening a bank account or establishing a trust fund for the benefit of Anderson or their child." *Id.* at 279, 624 S.E.2d at 631. "Had he done so, Anderson's intransigence would not have prevented him from creating a payment record through regular deposits into the account or trust fund in accordance with his financial resources." *Id.*

This Court has since recognized that *Anderson* did not purport to provide an exhaustive list of ways that a putative father can satisfy the statutory support requirement when his child's biological mother refuses his offers of support. *See In re Adoption of K.A.R.*, 205 N.C. App. 611, 696 S.E.2d 757 (2010), *disc. review denied*, 365 N.C. 75, 706 S.E.2d 236 (2011). *In K.A.R.*, the putative father, Alvarez, was an unemployed high school dropout who lived with his parents. *Id.* at 612-13, 696 S.E.2d at 759. However, after learning that his girlfriend, Richardson, was pregnant, Alvarez obtained employment at a rate of $8.00 per hour, attended prenatal classes with Richardson, and accompanied her to doctor's visits until she requested that he stop. *Id.* at 613, 696 S.E.2d at 759. As soon as Alvarez had income from his job, and prior to the child's birth and the filing of the adoption petition, "he began purchasing equipment and supplies for the child, such as: a car seat, a baby crib mattress, and clothing worth over $200." *Id.* Based on this evidence, the district court concluded that Alvarez had satisfied the statutory support requirement, and that his consent was therefore required for the adoption. *Id.* On appeal, we affirmed the district court's determination, emphasizing that, in contrast to the putative fathers in *Byrd* and *Anderson*, Alvarez "independently provided items of support for the child, even after his efforts to provide support and assistance directly to [Richardson] were rebuffed." *Id.* at 617, 696 S.E.2d at 761. Because competent evidence supported the district court's findings that the support Alvarez provided was consistent and reasonable in accordance with his financial means,

we held that Alvarez had complied with "the bright-line requirement [established in *Byrd* and reaffirmed in *Anderson*]——that the support contemplated by the statute must be provided prior to the filing of the petition." *Id.* at 617, 696 S.E.2d at 762. In so holding, we explained:

> There are few options available to a young unmarried biological father who has shown in many ways his strong desire to keep his child, and whose efforts to provide direct support to the mother have been rebuffed. [The *Anderson* Court] suggested one way a father could provide support independently of the mother; the father in this case, as determined by the trial court, has shown another.

Id.

In the present case, the Morrises contend that the district court erred in concluding that Westgate satisfied the statutory support requirement imposed by section 48-3-601. Specifically, the Morrises argue that Westgate's efforts to save money for C.H.M. in the lockbox he kept in his home were legally insufficient to satisfy the statutory support requirement because, by failing to either keep a detailed ledger of his deposits in the lockbox or subpoena records of cashback purchases he testified he made at Walmart, Westgate failed to create the sort of "payment record" the Morrises claim is required under *Anderson* to prove that he provided tangible support through reasonable and consistent payments according to his financial means. This argument is unavailing. Our holding in *K.A.R.* demonstrates that although *Anderson* suggested that opening a trust fund or bank account would satisfy the statutory support requirement, *Anderson* did not purport to provide an exhaustive list of ways for a father to do so, nor did it explicitly impose any sort of specific accounting requirements. Indeed, contrary to the Morrises' characterization of the "payment record" as a bright line rule, *K.A.R.* also indicates that the objective, bright line test established in *Byrd* and reaffirmed in *Anderson* focused on the distinction between mere offers or attempts and actual, tangible support. While a formal record of payments by a father would certainly be illustrative of the latter, *K.A.R.* mandates that where there is competent evidence in the record to support a district court's determination that, prior to the filing of an adoption petition, a putative father provided reasonable and consistent payments for the support of his child in accordance with his financial means, this Court will not disturb such a determination on appeal.

In the present case, the Morrises challenge numerous findings related to the court's determination that Westgate satisfied the statutory support

requirement, complaining, for example, that Westgate's testimony that he made offers of financial support to Wood and saved money for C.H.M. was uncorroborated by any other witness, that his bank records do not definitively prove that the cash he withdrew was deposited in the lockbox, and that the director of ACH testified that Westgate told her via telephone he was saving money to hire an attorney and pay for DNA testing. However, our standard of review makes clear that this Court is "bound to uphold the trial court's findings of fact if they are supported by competent evidence, even if there is evidence to the contrary," and we must "defer to the [district] court's determination of witnesses' credibility and the weight to be given their testimony." *Shuler*, 162 N.C. App. at 330-31, 590 S.E.2d at 460. Based on the record before us—which includes extensive testimony from Westgate regarding his efforts to set aside money for C.H.M. in the lockbox, as well as over one year's worth of his bank records, and hundreds of pages of his Facebook messages with Wood—we conclude there is ample evidence to support the district court's determination that Westgate provided reasonable and consistent payments for the support of C.H.M. before the filing of the adoption petition.

The Morrises also argue that the district court improperly shifted Westgate's burden of proof when it found his testimony credible despite its additional findings that Wood was "the only witness who could either confirm or contradict [Westgate's] testimony as to his offers of financial support for her or the minor child that he made through sources other than social media accounts," that Wood did not appear at the hearing and failed to comply with the subpoena served on her in Illinois, and that there was no evidence the Morrises or ACH ever sought to depose Wood or compel her appearance at the hearing. While the Morrises may be correct that they were under no obligation to produce a witness who could corroborate Westgate's testimony, we do not read the court's findings on this point as any indication that it somehow penalized the Morrises or rewarded Westgate or otherwise shifted the burden of proof based on Wood's failure to appear. While these challenged findings shed light on the context in which the court determined Westgate's testimony was credible, they do nothing to undermine the competent evidence in the record on which that determination was based. We are similarly unpersuaded by the Morrises' related argument that Westgate failed to meet his burden of proof based on their contention that the subpoena served on Wood in Illinois was invalid. Despite the Morrises' protestations to the contrary, we do not believe that Wood's absence from the hearing, standing alone, rendered Westgate's testimony incompetent or precluded the court from finding it credible. In our view, the Morrises'

arguments on this point serve as little more than an indirect invitation to second-guess the district court's credibility determinations, which we decline to do.

In addition, the Morrises also challenge the sufficiency of the court's findings that the support Westgate provided was consistent with his financial means. Specifically, they highlight the court's finding that "the evidence presented at trial was insufficient to determine a presumptive amount of child support" under our State's child support guidelines. The Morrises contend that this finding demonstrates Westgate failed to meet his burden of proof. This argument misconstrues our case law as well as the court's findings on this issue. Our prior holdings recognize that the application of child support guidelines in calculating whether a putative father's payments were reasonable is a matter within the court's discretion. *See Miller v. Lillich*, 167 N.C. App. 643, 647, 606 S.E.2d 181, 183 (2004) ("Although such a measure is not required by [section 48-3-601], it was within the [district] court's discretion to make its determination of reasonableness based on the comparison."). Moreover, in the present case, the court's findings make clear that "[t]here are no child support guidelines for the determination of the reasonable amount of support that a putative father should provide to a birth mother who is married to someone else at the time the putative father learns of the pregnancy," and that even if the guidelines were applicable, any attempt to calculate them would be futile in light of the fact that because Wood failed to appear at the hearing, there was no credible evidence of her income or living expenses while she was staying with her relatives in Illinois and her husband was living in North Carolina. In any event, we conclude that the court's determination that Westgate's regular and consistent deposits into his lockbox were reasonable in accordance with his financial means was adequately supported by competent evidence. This argument is without merit.

For these reasons, the district court's order is

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

IN RE FORECLOSURE OF CAIN

[248 N.C. App. 190 (2016)]

IN THE MATTER OF THE FORECLOSURE BY GODDARD & PETERSON, PLLC, SUBSTITUTE TRUSTEE, OF A DEED OF TRUST EXECUTED BY LILLIAN A. CAIN DATED OCTOBER 19, 1999 AND RECORDED ON OCTOBER 27, 1999 IN BOOK NO. 5183 AT PAGE 131 OF THE CUMBERLAND COUNTY PUBLIC REGISTRY

No. COA15-591

Filed 5 July 2016

1. Appeal and Error—appealability—motion to dismiss—failure to obtain written ruling on motion

The trial court did not err by denying respondent's motion to dismiss a foreclosure proceeding based on petitioner's purported judicial admissions. Respondent failed to obtain a written ruling on her motion and thus could not appeal.

2. Mortgages and Deeds of Trust—foreclosure—former substitute trustee appearing as counsel—no fiduciary duty

The trial court did not err by allowing RTT, the former substitute trustee, to appear as counsel for petitioner and advocate against respondent in a de novo foreclosure hearing. RTT had no specific fiduciary duty to respondent when the de novo foreclosure hearing was conducted. Further, respondent failed to demonstrate any legal or ethical violation in connection with RTT's representation of petitioner at that proceeding.

3. Witnesses—qualified witness—affidavit—authorized signer—default loan records

The trial court did not abuse its discretion in a foreclosure proceeding by admitting an affidavit and attachments into evidence from an authorized signer for petitioner. The authorized signer was a qualified witness under Rule 803(6) and petitioner's records regarding respondent's default on her loan account were properly introduced through the affidavit.

Appeal by respondent from order entered 16 February 2015 by Judge Ebern T. Watson, III in Cumberland County Superior Court. Heard in the Court of Appeals 3 November 2015.

Rogers Townsend & Thomas, PC, by Matthew T. McKee, for petitioner-appellee.

Brent Adams & Associates, by Brenton D. Adams, for respondent-appellant.

CALABRIA, Judge.

Lillian Cain ("respondent") appeals from an order authorizing the Substitute Trustee, Goddard & Peterson, PLLC ("G&P"), to proceed with the foreclosure of the Deed of Trust for 1478 Thelbert Drive in Fayetteville, North Carolina ("the property"). We affirm.

I. Background

On 19 October 1999, respondent borrowed $74,500 by executing a promissory note ("the Note"). To secure the loan evidenced by the Note, respondent executed a Deed of Trust on the property. Initially, the Note was specially endorsed to Household Realty Corporation ("HRC") by Household Bank, FSB; HRC later specially endorsed the Note to Beal Bank, S.S.B. ("petitioner"). Subsequently, respondent defaulted on the deed of trust.

In April 2012, petitioner executed a Substitution of Trustee of the Deed of Trust substituting Rogers Townsend & Thomas ("RTT") for the original trustee, Andre F. Barrett. Roughly a month later, RTT sent respondent a preforeclosure notice for the property that included the date of her last scheduled payment, which was made on 1 December 2011. In June 2012, RTT sent respondent a letter informing her, *inter alia*, that it had been retained to initiate foreclosure proceedings for the property, and that she could pay the amount of the debt ($68,559.51), dispute the debt, or dispute that petitioner was the creditor. On 17 September 2012, RTT executed an affidavit certifying that a Notice of Hearing and a Notice of Substitute Trustee's Foreclosure Sale of the property were mailed to respondent.

On 24 September 2012, the Clerk of Superior Court of Cumberland County heard evidence and found, *inter alia*, that notice was given to the record owner of the property, that petitioner was the holder of the Note and Deed of Trust, that the Note was in default, and that the Deed of Trust gave petitioner the right to foreclose under a power of sale. Consequently, the clerk entered an order allowing RTT to proceed with the foreclosure sale. Respondent noted an appeal to Cumberland County Superior Court from the clerk's order.

On 23 September 2013, respondent served RTT with a Request for Admissions, which asked petitioner to admit it was not the holder of the Note and the Deed of Trust. Respondent also filed a Certificate of Service specifying that copies of the Request had been served on all parties and were properly addressed to the attorney or attorneys for all parties. The only names listed on the Certificate of Service, however,

were attorneys David W. Neill and Michael Morris from RTT, which was acting as Substitute Trustee at the time. It appears that petitioner never responded to the Request for Admissions.

On 13 October 2013, petitioner executed another Substitution of Trustee, substituting G&P for RTT. After being relieved from its duties as Substitute Trustee, RTT began representing petitioner in the foreclosure proceedings. In April 2014, G&P filed a Notice of Appeal Hearing and certified that respondent and her attorney were served.

On 16 February 2015, the Honorable Ebern T. Watson, III presided at the hearing on respondent's appeal from the clerk's Order. Before any evidence was presented, respondent served petitioner with a motion to dismiss the foreclosure proceedings and presented the unfiled motion to Judge Watson. The motion was based entirely upon petitioner's purported failure to answer respondent's Request for Admissions. Because the motion had not been scheduled to be heard separately or at the *de novo* hearing, neither petitioner nor G&P had notice that respondent planned to move the superior court to dismiss the proceeding. Judge Watson orally denied respondent's motion.

During the hearing, petitioner introduced an Affidavit of Indebtedness which was executed by Tracy Duck ("Duck"), an "authorized signer" for petitioner. A number of exhibits were attached to Duck's affidavit, including photocopies of the Note, the Deed of Trust, and accounting records pertaining to respondent's loan from petitioner. Duck's affidavit was admitted into evidence over respondent's objection, as were the exhibits. Respondent also objected to the appearance of RTT as petitioner's counsel, but Judge Watson overruled the objection and proceeded with the hearing.

After hearing all the evidence, the superior court entered an order on 16 February 2015 that authorized G&P to proceed with the foreclosure sale. Respondent appeals.

II. Standard of Review and Generally Applicable Law

" 'The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.' " *In re Foreclosure of Adam*s, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010) (citation omitted). " 'Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.' " *Id.* at 321, 693 S.E.2d at 708 (citations omitted).

" 'A power of sale is a contractual arrangement [which may be contained] in a mortgage or a deed of trust[.]' " *Id.* (citation omitted). When a deed of trust contains a power of sale provision, the trustee or mortgagee is vested with the " 'power to sell the real property mortgaged without any order of court in the event of a default.' " *In re Michael Weinman Assocs. Gen. P'ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (citation and internal quotation marks omitted). "A foreclosure by power of sale is a special proceeding commenced without formal summons and complaint and with no right to a jury trial." *United Carolina Bank v. Tucker*, 99 N.C. App. 95, 98, 392 S.E.2d 410, 411 (1990) (citation omitted). Once a mortgagee or trustee has filed a notice of hearing with the clerk of court and served that notice on the necessary parties, N.C. Gen. Stat. § 45-21.16(d) (2015) provides that the clerk shall conduct a hearing on the matter. At the hearing, the lender must prove and establish the following six criteria before the clerk of court may authorize the mortgagee or trustee to proceed with the foreclosure under a power of sale:

> (i) [a] valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) [a] right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45–101(1b) . . . and (vi) that the sale is not barred by G.S. 45–21.12A[.]

Id.

In the context of a section 45-21.16 foreclosure proceeding, "the clerk . . . is limited to making the six findings of fact specified under subsection (d) . . . ." *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013). The clerk's decision may be appealed to superior court for a hearing *de novo*, N.C. Gen. Stat. § 45-21.16(d1), but the superior court is similarly limited to determining whether subsection 45-21.16(d)'s six criteria have been satisfied. *In re Foreclosure of Carter*, 219 N.C. App. 370, 373, 725 S.E.2d 22, 24 (2012). However, in conducting its review, the superior court may consider evidence of legal defenses that would negate the findings required under section 45-21.16. *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993). "A foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply." *Lifestore Bank v. Mingo Tribal Pres. Trust*, 235 N.C. App. 573, 577, 763 S.E.2d 6, 9 (2014), *review denied*, __ N.C. __, 771 S.E.2d 306 (2015).

III. Motion to Dismiss

[1] Respondent first argues that the trial court erred by denying her motion to dismiss the foreclosure proceeding. According to respondent, since petitioner did not respond to her formal Request for Admissions, it was conclusively established that petitioner was not the holder of the Note or the Deed of Trust. Respondent asserts that by ignoring these judicial admissions, the superior court erroneously found that petitioner was "the holder of the Note and Deed of Trust sought to be foreclosed." We disagree.

Rule 36(a) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that when a written request for admissions is properly served upon a party to a lawsuit,

> [t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney[.]

N.C. Gen. Stat. § 1A-1, Rule 36(a) (2014). Rule 36(b), which governs the effect of admissions, provides that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." *Id.* § 1A-1, Rule 36(b). "In order to avoid having requests for admissions deemed admitted, a party must respond within the period of the rule if there is any objection whatsoever to the request." *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 162, 394 S.E.2d 698, 701 (1990). "Failure to do so means that the facts in question are judicially established." *J.M. Parker & Sons, Inc. v. William Barber, Inc.*, 208 N.C. App. 682, 688, 704 S.E.2d 64, 68 (2010).

> "A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence."

Eury v. N.C. Emp't Sec. Comm'n, 115 N.C. App. 590, 599, 446 S.E.2d 383, 389 (1994) (internal citation omitted) (quoting *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981)).

In the instant case, respondent's motion to dismiss was based entirely upon petitioner's purported judicial admissions. Unfortunately

for respondent, she failed to obtain a written ruling on her motion. Although the superior court announced its decision to deny respondent's motion at the *de novo* hearing, "an order rendered in open court is not enforceable until it is 'entered,' i.e., until it is reduced to writing, signed by the judge, and filed with the clerk of court." *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998); N.C. Gen. Stat. § 1A-1, Rule 58 ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."); *see also Onslow Cnty. v. Moor*e, 129 N.C. App. 376, 388, 499 S.E.2d 780, 788 (1998) (explaining that "Rule 58 applies to judgments **and** orders, and therefore, an order is entered when the requirements of . . . Rule 58 are satisfied"). The record reveals that respondent has appealed only from the superior court's order authorizing G&P to proceed with the foreclosure sale. This order neither mentions respondent's motion nor does it contain any findings or conclusions of law on the motion. Since a written order was never "entered" on respondent's motion to dismiss, no appeal could be taken from it. *Mastin v. Griffith*, 133 N.C. App. 345, 346, 515 S.E.2d 494, 494-95 (1999) ("Entry of judgment by the trial court is the event which vests jurisdiction in this Court. Thus, an order may not properly be appealed until it is entered." (internal citation and quotations marks omitted)). Accordingly, the issue respondent raises regarding her motion to dismiss is not properly before us.[1]

IV. Appearance of Counsel

[2] Respondent next argues that the court erred in allowing RTT, the former Substitute Trustee, to appear as counsel for petitioner and advocate against respondent in the *de novo* foreclosure hearing. Respondent's argument, as we understand it, is that (1) RTT owed a fiduciary duty to her when this matter went before the superior court, and that (2) RTT's representation of petitioner constituted a breach of that duty. We disagree.

Although fiduciary relationships often escape precise definition, they generally arise when "there has been a special confidence reposed

1. We further note that respondent's Request for Admissions was served one year after entry of the clerk's order authorizing the foreclosure sale and approximately a year and a half before the *de novo* hearing in the superior court. Thus, petitioner's purported failure to respond to the Request was old news when the *de novo* hearing was held. Although we impute no bad faith to respondent, the basis of her motion—judicial admissions under Rule 36(b)—and the manner in which it was presented to the superior court—with no prior notice to the court or respondent—suggest nothing more than an attempt to introduce confusion into the *de novo* hearing and perhaps complete a "Hail Mary" before the foreclosure clock ran out.

in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)) (internal quotation marks omitted). Fiduciary relationships are characterized by " 'confidence reposed on one side, and resulting domination and influence on the other.' " *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (citation and emphasis omitted). "To state a claim for breach of fiduciary duty, a plaintiff must allege that a fiduciary relationship existed and that the fiduciary failed to 'act in good faith and with due regard to [the plaintiff's] interests[.]' " *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 70, 614 S.E.2d 328, 337 (2005) (quoting *White v. Consol. Planning Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004)). Furthermore "[t]his Court has held that breach of fiduciary duty is a species of negligence or professional malpractice. Consequently, [such] claims require[ ] proof of an injury proximately caused by the breach of duty." *Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 68, 628 S.E.2d 15, 20 (2006) (citations and internal quotation marks omitted).

"In deed of trust relationships, the trustee is a disinterested third party acting as the agent of both [parties]." *In re Proposed Foreclosure of McDuffie*, 114 N.C. App. 86, 88, 440 S.E.2d 865, 866 (1994). As such, in a typical foreclosure proceeding, trustees have a long-recognized fiduciary duty to both the debtor and the creditor. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 397, 722 S.E.2d 459, 465 (2012). "Upon default [a trustee's] duties are rendered responsible, critical and active and he is required to act discreetly, as well as judiciously, in making the best use of the security for the protection of the beneficiaries." *Id.* (quoting *Mills v. Mut. Bldg. Loan Ass'n*, 216 N.C. 664, 669, 6 S.E.2d 549, 552 (1940)). More specifically, "the trustee . . . is required to discharge his duties with the strictest impartiality as well as fidelity, and according to his best ability." *Hinton v. Pritchard*, 120 N.C. 1, 3, 26 S.E. 627, 627 (1897).

Here, since RTT was removed as Substitute Trustee on 13 October 2013, its formal fiduciary duties to respondent ended well before the 2 February 2015 *de novo* hearing in superior court. Apart from citing the general fiduciary duties of an *acting* trustee, respondent fails to explain how RTT's representation of petitioner at the *de novo* hearing either violated a specific principle of law or was undertaken in bad faith. Also absent from respondent's brief is an argument that she sustained some specific injury that was proximately caused by RTT's conduct. We suspect this argument has not been made because it does not exist. At the time of the hearing, G&P, the acting Substitute Trustee, was charged

with acting in the best interests of both petitioner and respondent. When the parties appeared before the superior court, RTT had no obligation to act as a disinterested party. Consequently, we discern no prejudice to respondent's rights or interests as a result of RTT's representation of petitioner.

Furthermore, looking beyond the substantive law, we cannot see how RTT's representation of petitioner allowed petitioner to procure an unfair advantage in the foreclosure proceeding. While not precedential authority for this Court, North Carolina State Bar Ethics Opinions ("RPCs" and "CPRs") "provide ethical guidance for attorneys and . . . establish . . . principle[s] of ethical conduct." 27 N.C. Admin. Code 1D.0101(j) (2015). Our State Bar has addressed the specific issue that respondent has raised. N.C. CPR 220 (1979) provides that if a lawyer who is acting as a trustee for a deed of trust resigns his position as trustee, the lawyer may represent the petitioner bringing the foreclosure claim "as long as no prior conflict of interest existed because of some prior obligation to the opposing party." N.C. RPC 82 (1990) states that "former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to foreclosure under a deed of trust." N.C. RPC 90 (1990) ties it all together, and provides that

> [i]t has long been recognized that former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to foreclosure under a deed of trust. CPR 220, RPC 82. This is true whether the attorney resigns as trustee prior to the initiation of foreclosure proceedings or after the initiation of such proceedings when it becomes apparent that the foreclosure will be contested.

Furthermore, in 2013, the State Bar adopted Formal Opinion 5, which more specifically defined RPC 90, by stating:

> [A] lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

N.C. Formal Opinion 5 (2013).

In the instant case, respondent does not argue that she was an unrepresented, unsophisticated consumer of legal services or that she

disclosed material confidential information to RTT when it was acting as Substitute Trustee. Instead, the record suggests that respondent was represented by counsel throughout the contested foreclosure proceedings held before the clerk and the superior court, which spanned more than three years. Further, respondent has not demonstrated that RTT failed to notify her of its intent to represent petitioner in the foreclosure proceedings. Because the record is replete with correspondence from RTT notifying respondent of and updating her on the *de novo* hearing in superior court, she has failed to demonstrate any legal or ethical violation in connection with RTT's representation of petitioner at that proceeding. Accordingly, the superior court did not err in overruling respondent's objection to such representation.

V. Duck's Affidavit of Indebtedness

[3] Respondent's final argument is that the trial court erred in admitting Duck's affidavit and its attachments into evidence. Specifically, respondent contends that (1) Duck was not a qualified witness as required under Rule 803(6) of the North Carolina Rules of Evidence ("the business records exception" to the hearsay rule), (2) the Note and Deed of Trust were not business records and were not properly authenticated, and (3) certain statements contained in Duck's affidavit were inadmissible hearsay. We disagree.

"The admissibility of evidence in the trial court is based upon that court's sound discretion and may be disturbed on appeal only upon a finding that the decision was based on an abuse of discretion." *In re Foreclosure by David A. Simpson, P.C.*, 211 N.C. App. 483, 488, 711 S.E.2d 165, 170 (2011). As a result, the superior court's ruling may be reversed only upon a showing that it was so arbitrary that it could not be the result of a reasoned decision. *Reis v. Hoots*, 131 N.C. App. 721, 727, 509 S.E.2d 198, 203 (1998).

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2015). Unless allowed by statute or the North Carolina Rules of Evidence, hearsay evidence is not admissible in court. N.C. Gen. Stat. § 8C-1, Rule 802 (2015).

Pursuant to the business records exception, the following items of evidence are not excluded by the hearsay rule, even though the declarant is unavailable as a witness:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or

> diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2015). Qualifying business records are admissible under Rule 803(6) "when a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *In re S.D.J.*, 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008) (citations and internal quotation marks omitted). " '[An] '[o]ther qualified witness' has been construed to mean a witness who is familiar with the business entries and the system under which they are made.' " *Steelcase, Inc. v. Lilly Co.*, 93 N.C. App. 697, 702, 379 S.E.2d 40, 44 (1989) (citation omitted). "While the foundation must be laid by a person familiar with the records and the system under which they are made, there is 'no requirement that the records be authenticated by the person who made them.' " *In re S.D.J.*, 192 N.C. App. at 482-83, 665 S.E.2d at 821 (citation omitted).

Generally, 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. Gen. Stat. § 8C-1, Rule 602 (2015); *see also Gilreath v. N.C. Dep't of Health and Human Servs.*, 177 N.C. App. 499, 505, 629 S.E.2d 293, 296 (2006) (requiring affidavits to be made on personal knowledge "setting forth facts admissible in evidence"). Rule 56(e) of the North Carolina Rules of Civil Procedure requires that affidavits supporting or opposing a summary judgment motion "be made on personal knowledge . . . ." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2015). "Knowledge obtained from the review of records, qualified under Rule 803(6), constitutes 'personal knowledge' within the meaning of Rule 56(e)." *Hylton v. Koontz*, 138 N.C. App. 629, 635, 532 S.E.2d 252, 256 (2000). This principle applies with equal force here. *Cf. U.S. Leasing Corp. v. Everett, Creech, Hancock, and Herzig*, 88 N.C. App. 418, 423, 363 S.E.2d 665, 667 (1988) (even though a witness's knowledge was "limited to the contents of [the] plaintiff's file with which he had familiarized himself, he could

properly testify about the records and their significance so long as the records themselves were admissible under [Rule 803(6)]").

In the instant case, while the Note and Deed of Trust were identified as attachments, the only specific "business records" that petitioner sought to introduce through Duck's affidavit were documents related to respondent's loan account. Our review of the record reveals that the foundational requirements of Rule 803(6) were satisfied through the submission of Duck's affidavit, which provided that petitioner's financial records were made and kept in the regular course of business by persons having knowledge of the information set forth at or near the time of the acts, events, or conditions recorded. Furthermore, Duck—an "authorized signor" for petitioner who was permitted "to make the representations contained" in the affidavit—specifically stated that her averments were "based upon [her] review of [petitioner's] records relating to [respondent's] loan and from [her] own personal knowledge of how they are kept and maintained." As a result, Duck was a qualified witness under Rule 803(6) and petitioner's records regarding respondent's default on her loan account were properly introduced through Duck's affidavit.

Respondent also briefly argues that the Note and Deed of Trust are not "business records" and were not properly authenticated by Duck's affidavit. Even assuming respondent raised this objection below—*see Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (holding that where a theory argued on appeal was not raised before the trial court, "the law does not permit parties to swap horses between courts in order to get a better mount [in the appellate court]")—we will not address it. Except for a passing reference to Rule 803(6), respondent fails to cite any legal authority in support of her contentions. Since "[i]t is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein[,]" respondent has abandoned her arguments as to admission of the Note and the Deed of Trust. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005); N.C.R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Finally, respondent argues that certain statements contained in Duck's affidavit constituted inadmissible hearsay. For example, respondent takes issue with Duck's statement that petitioner "is the holder of the loan." We reject respondent's argument for two reasons.

We first note that in a foreclosure hearing before the clerk of court, "the clerk shall consider the evidence of the parties and may consider . . . affidavits and certified copies of documents. N.C. Gen. Stat. § 45-21.16(d). In addition, this Court has held that affidavits may be used as competent evidence to establish the required statutory elements in *de novo* foreclosure hearings. *In re Foreclosure of Brown*, 156 N.C. App. 477, 486-87, 577 S.E.2d 398, 404 (2003). The borrower in *Brown* contended that affidavits—which testified as to the existence of the statutory elements for a section 45-21.16 foreclosure—from the California-based lender's assistant secretary were inadmissible hearsay. *Id.* at 485, 577 S.E.2d at 404. After noting that "[a] power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action[,]" this Court held that "the 'necessity for expeditious procedure' substantially outweigh[ed] any concerns about the efficacy of allowing [the secretary] to testify by affidavit, and the trial court properly admitted her affidavit into evidence." *Id.* at 486, 577 S.E.2d at 404-05 (citation omitted).

The record in the instant case reveals that Duck (and presumably petitioner) is based in Illinois, and respondent cites no authority that would support requiring out-of-state lenders seeking to foreclose under a power of sale to present live witness testimony in North Carolina. We conclude, as the *Brown* Court did, that Duck's Affidavit of Indebtedness was the most certain and expeditious way to prove and establish certain criteria required by subsection 45-21.16(d).

Moreover, this Court has previously held that whether an entity is a "holder" is "a legal conclusion . . . to be determined by a court of law on the basis of factual allegations." *In re Simpson*, 211 N.C. App. at 495, 711 S.E.2d at 173. However, " '[s]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect [.]' " *Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 349 (2004) (citation omitted); *In re Simpson*, 211 N.C. App. at 495, 711 S.E.2d at 173 (disregarding the affiant's "conclusion as to the identity of the 'owner and holder' of the [promissory note and deed of trust]"). Thus, even though we disregard Duck's conclusion of law that petitioner is the holder of the Note, we reject respondent's argument that this, and any other, legal conclusion Duck may have made resulted in the affidavit being admitted in error. Accordingly, for the reasons stated above, the trial court did not abuse its discretion in allowing Duck's affidavit and its accompanying attachments into evidence.

VI. Conclusion

Since an order was never entered on respondent's motion to dismiss, she cannot appeal from the superior court's denial of that motion. Furthermore, the superior court did not err in allowing RTT to represent petitioner because the firm had no specific fiduciary duty to respondent when the *de novo* foreclosure hearing was conducted, and there is no evidence that the representation was injurious to respondent or was undertaken in bad faith. Finally, the superior court did not err in allowing Duck's affidavit and its attachments to be admitted into evidence. For these reasons, the superior court properly authorized G&P to proceed with the foreclosure sale. We therefore affirm the superior court's order.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

AARON JENKINS, JR, PLAINTIFF
v.
RICHARD E. BATTS, AND RICHARD E. BATTS PLLC, DEFENDANTS

No. COA15-655

Filed 5 July 2016

Prisons and Prisoners—personal injury arising out of incarceration—motion for summary judgment—motion to dismiss

The trial court erred by granting defendants' motion for summary judgment and motion to dismiss claims for personal injury actions arising out of plaintiff's incarceration in 2009. The complaint did not state a claim upon which relief could be granted, and considering the additional affidavits and information considered by the trial court, genuine issues of material fact remained to be resolved by a jury.

Appeal by plaintiff from order entered 9 February 2015 by Judge Cy A. Grant in Superior Court, Edgecombe County. Heard in the Court of Appeals 19 November 2015.

Benson, Brown & Faucher, PLLC, by Drew Brown, for plaintiff-appellant.

Richard E. Batts, PLLC, by Richard E. Batts, for defendants-appellees.

STROUD, Judge.

Plaintiff Aaron Jenkins, Jr. appeals from the superior court's order granting defendants' ("defendant Batts" and "defendant PLLC") motion for summary judgment and motion to dismiss. On appeal, plaintiff argues that the trial court erred in granting defendants' motion to dismiss and motion for summary judgment. As the trial court considered the motions as a summary judgment motion, we review its order on that basis and conclude that the complaint does state a claim upon which relief may be granted, and considering the additional affidavits and information considered by the trial court, genuine issues of material fact remain to be resolved by a jury. Accordingly, we reverse the trial court's order.

Facts

Plaintiff's complaint tended to show the following facts. According to plaintiff, defendant Batts agreed to represent plaintiff in personal injury actions arising out of plaintiff's incarceration in 2009. Plaintiff and defendant Batts met on 19 July 2011 and defendant agreed to represent plaintiff in the personal injury actions at that time. In 2012, the statute of limitations ran on plaintiff's claims, but no lawsuit was ever filed by defendant Batts with the North Carolina Industrial Commission. Plaintiff alleged that defendant Batts, as a lawyer practicing law in this state, owed a duty to of care towards plaintiff to act within the requisite standard of care. Plaintiff argued that defendant Batts breached that duty by failing to timely file and preserve his claims; failing to advise on statute of limitations; failing to notify plaintiff orally or in writing if he was not going to represent him; and failing to safeguard and provide plaintiff with his entire file.

In response, defendants filed a motion to dismiss, answer, and affirmative defenses on 3 September 2014. Defendants' first defense and motion to dismiss stated defendant Batts' version of the events. Defendant Batts acknowledged that he interviewed plaintiff on 19 July 2011 regarding two alleged incidents that occurred when plaintiff was incarcerated. The first involved injuries to plaintiff arising from another inmate tying a blanket around one of his legs while asleep, which caused him to fall and led to a herniated disk in his back. The other alleged incident occurred when plaintiff was shackled and handcuffed in the front, walking down a ramp to be loaded into the jail van and be taken back to jail from the courthouse. In that incident, plaintiff said he lost his footing on the ramp because it was icy and fell on his back and was injured.

In relation to the first incident, defendants alleged that plaintiff "was informed of the unlikelihood of recovery on the facts as he stated them and that any action against the Sheriff would be pursued only with advance retainer payments." As for the second incident, defendants again alleged that defendant Batts discussed the challenges of the case with plaintiff and pointed out potential issues with contributory negligence since other inmates used the same ramp without falling. Defendants alleged further that plaintiff was told that defendant Batts could not commit to filing any action on plaintiff's behalf "until additional research supported a conclusion that Plaintiff stood a good chance of being successful[.]" Furthermore, defendants claimed that plaintiff "was informed of the statute of limitations and the consequences of same and that an action would not be pursued unless he provided payment of an amount believed to be $280.00." Defendants alleged that plaintiff never paid that amount, so he had "no reasonable expectation" that an action would be filed on his behalf by defendants. Defendants also alleged that defendant Batts initially had contact with plaintiff on 25 June 2011 in relation to a traffic charge of driving while his license was revoked, and he was able to get a reduction of plaintiff's charge but then was never paid more than $50.00 by plaintiff.

Defendants' answer included additional defenses and motions to dismiss for breach of contract, lack of vicarious liability, contributory negligence, failure to state a claim, and good faith belief that best judgment was used by defendant Batts when initially advising on plaintiff's case. Defendants also attached, as Exhibit 1, defendant Batts' client interview notes from his meeting with plaintiff on 19 July 2011. In addition, defendants attached defendant Batts' notes from his interview with plaintiff on 25 June 2011.

Plaintiff filed an affidavit on 6 January 2015 disputing some of the facts alleged in defendants' answer. For example, plaintiff asserted that defendant Batts "did agree to take [his] civil cases on a contingency fee basis." Furthermore, plaintiff alleged that defendant Batts "mentioned nothing to [him] at all about the statute of limitations or that [he] needed to do anything else to preserve [his] rights" and never sent a letter advising him about such limits.

Plaintiff also filed an affidavit of Brian Walker, an attorney practicing in North Carolina, who asserted that in his opinion, defendant Batts "violated the standard of care [for practitioners in North Carolina] by failing to advise plaintiff of the applicable statute of limitations and failing to timely file the actions." Mr. Walker also asserted that "[e]ven if the jury believed [defendant] Batts['] version of events, [defendant] Batts

violated the standard of care by failing to advise [plaintiff] in writing of the applicable statutes of limitations and their impacts." Finally, Mr. Walker stated that "[t]he underlying matters had merits and in my opinion as a practitioner, the plaintiff would have recovered damages in each case had they been timely filed and handled."

On 20 January 2015, defendants filed a memorandum in support of their motions to dismiss and for summary judgment stating much of the same information as in the earlier answer. The trial court held a hearing on 20 January 2015 regarding defendant's motion for summary judgment and motion to dismiss. At the hearing, defendant Batts briefly described defendants' version of the facts. Defendant Batts then referenced plaintiff's affidavit, stating: "But he has produced a – there's an affidavit from him that indicates he disagrees with two things. One, that I charged him a fee up front and, two, that I told him about statute of limitations." Defendant Batts, while noting that the hearing was for a summary judgment motion, explained: "And so to get through summary judgment, obviously, [plaintiff is] contesting whether or not there was a requirement to pay up front money. So that's we might say for the jury." Defendant Batts also argued that two of his defenses in his motion, a motion to dismiss and motion to dismiss based on contributory negligence, were both based on plaintiff's failure to pay. Defendant Batts pointed out again, however, that plaintiff "disagrees with that" contention.

Plaintiff's counsel then addressed the court, noting that in contrast to defendants' recitation of the facts, plaintiff contended "that he was told by [defendant] Batts that he was representing him on the personal injury action on a contingency fee basis only." Plaintiff's counsel pointed out that defendant Batts' intake notes refer to plaintiff as "client" and claimed that those notes would support a ruling in plaintiff's favor, but noted "that would ultimately be up to a jury." Plaintiff's counsel brought an affidavit from a licensed attorney who would testify at trial that defendant Batts violated the standard of care. Once again, plaintiff's counsel argued that "[i]t's a question of fact for the jury as to the credibility of the two parties."

Defendant Batts responded,[1] in relation to a contingency fee agreement document, that "[o]ne was not produced for [plaintiff] because he

1. The transcript shows a "Mr. Battle" as the person who spoke these words. Considering the fact that no one of such name was present at the hearing, that defendant Batts' name is similar, and the context of the words, we can reasonably assume this name was written in error and defendant Batts was the person who made these statements at the hearing.

had not, we had [sic] agreed to take his case yet. But, again, that's a matter for the jury." Defendant Batts argued that evidence was missing from the record to show that any negligence on the part of defendants caused plaintiff to not recover. Defendant Batts pointed out that "in the summary judgment action, there should be a forecast of the type of evidence that would be produced to a jury from which the jury can do something other than speculate or guess or surmise about whether or not recovery would have actually taken place." Thus, defendant Batts argued that "the case is completely deficient of a showing that there is a proximate, that the negligence was a proximate cause of the person not being able to recover money."

Plaintiff's counsel, by contrast, argued that such evidence was not missing but rather could be found in plaintiff's affidavit. Plaintiff pointed out that while "a typical [slip and fall on] ice case is a tough case," that is not so "when you're in shackles and there's nothing you can do about it." After the court questioned precisely what the licensed attorney that plaintiff's counsel identified as his "expert" would testify to in regards to a violation of the standard of care, plaintiff argued that such specifics were not what was at issue at the hearing, but rather "[w]hat's before you today is a question of did [defendant Batts] agree to represent [plaintiff] on a contingency fee basis." Plaintiff reiterated that what was before the court "is a he said, she said summary judgment." The trial court cut off plaintiff before he could finish his statement, concluding "I'm going to allow the motion for summary judgment."

On 9 February 2015, the trial court issued an order granting defendants' motion to dismiss and for summary judgment, dismissing all of plaintiff's claims with prejudice. Plaintiff timely appealed to this Court. On 29 April 2015, defendants filed a motion for extension of time to settle and file the record on appeal, which was granted on 1 May 2015. Since the parties did not agree on the record, it was settled by operation of rule on 30 May 2015 and subsequently filed and docketed on 8 June 2015. Documents that the parties did not agree on that were requested by defendants were included in a Rule 11(c) supplement to the record on appeal. In addition, on 24 August 2015, this Court granted plaintiff's motion to supplement the record on appeal pursuant to Rule 9(b)(5)(b) of the Rules of Appellate Procedure.[2]

2. Defendant argues in his appellate brief that the record on appeal contains "material deficiencies" that should result in this Court dismissing plaintiff's appeal. Since this Court allowed plaintiff's motion to supplement the record on appeal, addressing the main issues defendant raises, we decline to address these arguments further.

Discussion

I. Motion to Dismiss

The first issue raised on appeal is whether the trial court erred in granting defendants' motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that the complaint failed to state a claim upon which relief can be granted. Plaintiff argues that his complaint states a claim upon which relief can be granted and, therefore, we should reverse the trial court's granting of defendants' motion to dismiss.

Because the trial court considered matters outside the pleadings and treated the matter as a motion for summary judgment, we need not specifically address defendants' motion to dismiss under Rule 12(b)(6). While the trial court's written order grants both defendants' motion to dismiss and the motion for summary judgment, the trial court clearly rendered its ruling as if it was based on a summary judgment motion. Defendants' memorandum in support of the motion to dismiss and motion for summary judgment requested, in the prayer for relief, that the trial court grant summary judgment in favor of defendants. Furthermore, it is evident from both the record itself and the hearing that the trial court considered more than just the pleadings, but also plaintiff's affidavit and other additional information.

Thus, even if defendants had only made a motion to dismiss, the trial court's consideration of affidavits and other information outside the pleadings would have converted such motion into a motion for summary judgment. *See*, *e.g.*, *Morris v. Moore*, 186 N.C. App. 431, 434, 651 S.E.2d 594, 596 (2007) ("When material outside of the pleadings is presented to the trial court during a hearing considering a motion to dismiss pursuant to Rule 12(b)(6), and the material is not excluded by the trial court, the motion is treated as one for summary judgment and disposed of pursuant to Rule 56 of the North Carolina Rules of Civil Procedure."). Accordingly, we focus our analysis on the court's granting of defendant's motion for summary judgment.

II. Summary Judgment

The second -- and primary -- issue on appeal, therefore, is whether the trial court erred when it granted defendants' motion under Rule 56 of the Rules of Civil Procedure on the grounds that there was no genuine issue of material fact. Plaintiff argues that the trial court erred in entering summary judgment for defendant because "[t]here was sufficient

evidence of each of the elements for the tort to necessitate denying the Motion for Summary Judgment."

Under Rule 56(c) of the Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "A trial court's decision to grant a summary judgment motion is reviewed on a *de novo* basis." *Austin Maint. & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 408, 742 S.E.2d 535, 541 (2012).

Thus, this Court's review is limited to "whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Campbell v. Duke University Health Sys., Inc.*, 203 N.C. App. 37, 42, 691 S.E.2d 31, 35 (2010). "When considering a motion for summary judgment, the trial court must consider the evidence in the light most favorable to the non-moving party." *Manecke v. Kurtz*, 222 N.C. App. 472, 474, 731 S.E.2d 217, 220 (2012) (internal quotations and brackets omitted). Furthermore, this Court has noted to prevail in a summary judgment action, "[t]he movant . . . bears the burden of showing that (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim." *Andresen v. Progress Energy, Inc.*, 204 N.C. App. 182, 184, 696 S.E.2d 159, 161 (2010) (internal quotations omitted).

In this case, in an effort to show that an element of plaintiff's claim is nonexistent, defendants claim that plaintiff failed to properly allege and could not prove "that any failure to timely file Plaintiff's action resulted in the loss of damages to Plaintiff." We disagree. Plaintiff's complaint identifies the underlying causes of action and alleges that defendant Batts failed to file or inform plaintiff that he was not going to file a claim on his behalf while also failing to notify him of the statute of limitations for his claims. Furthermore, plaintiff alleges that he would have prevailed in at least one of his underlying claims to recover "in excess of $10,000" and claims that "[a]s a result of [defendant] Batts['] negligent acts, [plaintiff] has been damaged in an amount in excess of $10,000." Construing the allegations in the light most favorable to plaintiff, we find defendants' argument to be without merit.

Defendants further claim on appeal that plaintiff's complaint is fatally deficient because it fails to allege any actual physical injury suffered by plaintiff as a result of negligence by the Edgecombe County Sheriff or

the State of North Carolina. Although we need not spend much time addressing this issue, we once again disagree. The trial court treated the matter as a summary judgment motion and considered not just the complaint but also additional documents including defendants' answer and interview notes, which both noted that plaintiff alleged that he had a herniated disk from the first incident and that his back was injured in the fall on the icy ramp. In the complaint itself, plaintiff alleged that he "would have prevailed in at least one of the underlying claims which [defendant] Batts failed to file which would have resulted in a recovery in excess of $10,000." This is sufficient to survive summary judgment.

In addition, defendants present arguments on appeal claiming that defendants made a "reasonable showing" of affirmative defenses presented in their answer to defeat plaintiff's complaint. Defendants may have affirmative defenses upon which they will ultimately prevail but that is not relevant to our review of the trial court's summary judgment motion. What matters is whether any genuine issue of material fact exists, taking all of the allegations in the light most favorable to plaintiff. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). In this case, there is no question that such material factual issues remain, and defendant himself identified them in his argument to the trial court when he stated, "that's a matter for the jury."

Here, plaintiff's complaint states a claim for professional negligence. Plaintiff alleged that defendants agreed to represent plaintiff in the underlying actions, owed him a duty of care in that representation, and then breached that duty by failing to timely file and preserve plaintiff's claims, failing to advise plaintiff on the statute of limitations for his claims, and failing to timely notify plaintiff that defendants would not be representing plaintiff. When the affidavits and other evidence -- including that produced by defendants -- are viewed in the light most favorable to plaintiff, they show that plaintiff was seriously injured in both alleged incidents and they support a claim for professional negligence. Defendant Batts' client notes contain additional support for plaintiff's claims, as defendant Batts refers to plaintiff as "client" and lists the facts of the alleged incidents.

The evidence presented to the court further shows genuine issues of material fact that remain and should have been left for a jury. At the hearing, defendants themselves actually identified several genuine issues of material fact regarding their agreement on representation and the failure to inform plaintiff on the statute of limitations as "for the jury." Furthermore, in defendants' memorandum in support of his motion to dismiss and for summary judgment, defendant identifies a material

issue when he notes his argument regarding plaintiff being contributorily negligent for failing to pay. Defendants' memorandum claims that "[n]o attorney client relationship existed, and attorney had no duty [to] file any action on Plaintiff's behalf, after properly informing Plaintiff of his obligation to pay legal service fees and the consequences of his failure to do so." Plaintiff, in contrast, argued that he and defendants did have an attorney-client relationship and that defendant Batts never informed him of the statute of limitations and consequences.

In addition, at the hearing on defendants' motion, defendant Batts himself identified a genuine issue of material fact when he was discussing the facts and plaintiff's affidavit, stating "But [plaintiff] has produced a – there's an affidavit from him that indicates he disagrees with two things. One, that I charged him a fee up front and, two, that I told him about statute of limitations." Moreover, defendant Batts later made the following statement: "And so to get through summary judgment, obviously, he's contesting whether or not there was a requirement to pay up front money. So that's we might say for the jury." This evidence, viewed as a whole and in plaintiff's favor, indicates that genuine issues of material fact remained in dispute.

Similarly, defendants also assert on appeal that the trial court "could reasonably have determined that Defendants met their burden of (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." "Reasonable determination" is not, however, the proper standard of review for a summary judgment motion or a motion to dismiss which is being considered as a summary judgment motion, as explained in Rule 56(c).

Defendants dispute plaintiff's allegations, but plaintiff has plead the elements of a professional negligence action and supported his allegations with affidavits, and the material facts surrounding the action remain in dispute. Plaintiff is not required to produce a forecast of evidence until defendants have met their burden; nevertheless, in this case, plaintiff has produced a sufficient forecast of evidence to demonstrate issues of material fact which prevent summary judgment. *See*, *e.g.*, *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000) ("Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial."). Since material factual

issues remain in this case, defendants have not -- and cannot -- meet that burden. Thus, we need not address this argument in more detail.

Defendants also argue that summary judgment in favor of defendant PLLC is proper even if not as to defendant Batts individually. This argument, however, is misplaced, as it addresses the wrong issue. Defendants' argument refers to the assignment of legal malpractice claims *to another* to prosecute, which has nothing to do with the liability of the PLLC for defendant Batts' actions in the course and scope of his employment. The issue in this case regarding defendant PLLC is not assignability, but rather, vicarious liability. As defendants' argument regarding the PLLC is irrelevant to the facts of this case, we decline to address it further.

As this Court has noted, "[s]ummary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676 (2006). Here, plaintiff alleged all the essential elements of a professional negligence claim in his complaint and supported them by affidavits. Even the defendant acknowledged before the trial court that genuine issues of material fact remain that should be resolved by a trier of fact. Consequently, we find that the court below erred when it granted defendants' motion for summary judgment in this case.

Conclusion

In sum, we conclude that plaintiff's complaint does state a claim upon which relief may be granted and there are genuine issues of material fact in dispute. We hold, therefore, that the trial court erred in granting defendants' motion to dismiss and motion for summary judgment. Accordingly, we reverse the decision of the court below.

REVERSED.

Judges DIETZ and TYSON concur.

THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA15-896

Filed 5 July 2016

Taxation—trust—out-of-state

The trial court's order granting summary judgement for a trust and directing the Department of Revenue to refund taxes and penalties was affirmed where the connection between North Carolina and the Trust was insufficient to satisfy the requirements of due process. The Trust was established by a non-resident settlor, governed by laws outside of North Carolina, operated by a non-resident trustee, and did not make any distributions to a beneficiary residing in North Carolina during the pertinent period.

Appeal by defendant from order entered 23 April 2015 by Judge Gregory P. McGuire in Wake County Superior Court. Heard in the Court of Appeals 23 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Peggy S. Vincent, for the State.

Moore & Van Allen, PLLC, by Thomas D. Myrick, Neil T. Bloomfield and Kara N. Bitar, for plaintiff-appellee.

BRYANT, Judge.

Where North Carolina did not demonstrate the minimum contacts necessary to satisfy the principles of due process required to tax an out-of-state trust, we affirm the lower court's grant of summary judgment in favor of the trust and uphold the order directing the Department of Revenue to refund taxes and penalties paid by the trust.

On 21 June 2012, representatives of plaintiff The Kimberley Rice Kaestner 1992 Family Trust (the Trust) filed a complaint against the North Carolina Department of Revenue (the Department) after the Department denied a request to refund taxes the Trust paid during tax years 2005 through 2008. The claims brought forth alleged that taxes imposed upon the Trust pursuant to N.C. Gen. Stat. § 105-160.2 were imposed in violation of due process, the Commerce Clause, and

the North Carolina Constitution. Pursuant to section 105-160.2, taxes are "computed on the amount of taxable income of the estate or trust that is for the benefit of a resident of this State[.]"

In 1992, an *inter vivos* trust (original trust) was established by settlor Joseph Lee Rice III, with William B. Matteson as trustee. The situs, or location, of the original trust was New York. The primary beneficiaries of the original trust were the settlor's descendants (none of whom lived in North Carolina at the time of the trust's creation). In 2002, the original trust was divided into three separate trusts: one for each of the settlor's children (Kimberley Rice Kaestner, Daniel Rice, and Lee Rice). At that time in 2002, Kimberley Rice Kaestner, the beneficiary of plaintiff Kimberley Rice Kaestner 1992 Family Trust, was a resident and domiciliary of North Carolina. On 21 December 2005, William B. Matteson resigned as trustee for the three separate trusts. The settlor then appointed a successor trustee, who resided in Connecticut. Tax returns were filed in North Carolina on behalf of the Kimberley Rice Kaestner 1992 Family Trust for tax years ending in 2005, 2006, 2007, and 2008 for income accumulated by the Trust but not distributed to a North Carolina beneficiary. In 2009, representatives of the Trust filed a claim for a refund of taxes paid to the Department amounting to $1,303,172.00, for tax years 2005, 2006, 2007, and 2008. The claim was denied. Trust representatives commenced a contested case action in the Office of Administrative Hearings (OAH). However, the OAH dismissed the contested case for lack of jurisdiction: the sole issue was the constitutionality of the enabling statute, G.S. § 105-160.2. The current action commenced in Wake County Superior Court and, thereafter, was designated as a mandatory complex business case.

On 11 February 2013, the Honorable John R. Jolly, Jr., Chief Special Superior Court Judge for Complex Business Cases, entered an order ruling on a motion to dismiss filed by the Department.[1] Based on the Court's order, the Department asserted Rules 12(b)(1), (2), and (6) as a basis for dismissal of the constitutional claims and the injunctive relief. Judge Jolly found that "[N.C. Gen. Stat. §] 105-241.19 set out exclusive remedies for disputing the denial of a requested refund and expressly prohibit[ed] actions for injunctive relief to prevent the collection of a tax." Judge Jolly granted the Department's motion to dismiss the Trust's claim for injunctive relief which sought a refund of all taxes paid. However, Judge Jolly denied the Department's motion to dismiss the

1. The Department's motion to dismiss was not made a part of the record on appeal.

Trust's constitutional claims, concluding "there is at least a colorable argument that North Carolina's imposition of a tax on a foreign trust based solely on the presence of a beneficiary in the state does not conform with the Due Process Clause, the Commerce Clause or Section 19 [of Article I of the North Carolina Constitution]."

On 8 July 2014, the Trust moved for summary judgment, alleging there were no genuine issues of material fact: the Trust had paid the State of North Carolina over $1.3 million in taxes for tax years 2005 through 2008; the Trust was established by a non-resident settlor, governed by laws outside of North Carolina, operated by a non-resident trustee, and did not make any distributions to a beneficiary residing in North Carolina during the pertinent period. The Trust requested that the court declare General Statutes, section 105-160.2 unconstitutional and order a refund of all taxes and penalties paid by the Trust.

The Department also filed a motion for summary judgment. In it, the Department acknowledged that all of the Trust assets were intangibles, and that during the pertinent years, the Trust beneficiaries received no distributions from the Trust. However, quoting a case from the State of Connecticut, *Chase Manhattan Bank v. Gavin*, 249 Conn. 172, 204–05, 733 A.2d 782, 802 (1999), the Department stated:

> [J]ust as the state may tax the undistributed income of a trust based on the presence of the trustee in the state because it gives the trustee the protection and benefits of its laws; *it may tax the same income based on the domicile of the sole noncontingent beneficiary because it gives her the same protections and benefits.*

(emphasis added).

A summary judgment hearing was held in Wake County Superior Court before the Honorable Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases. In an order entered 23 April 2015, Judge McGuire granted the motion for summary judgment filed on behalf of the Trust and denied the Department's motion. Judge McGuire concluded that N.C. Gen. Stat. § 105-160.2 was unconstitutional as applied and ordered the Department to refund any taxes and penalties paid pursuant to that statute. The Department appeals.

On appeal, the Department argues that the Trust cannot meet its burden to prove it is entitled to a refund of state taxes paid on its accumulated income. Specifically, the Department contends that the

Business Court erred when it concluded that taxation of the Trust based on the residence of the beneficiary violated (A) due process under both the federal and state constitutions, as well as (B) the Commerce Clause of the federal constitution. We disagree.

Standard of Review

> When assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the constitution. . . . In performing our task, we begin with a presumption that the laws duly enacted by the General Assembly are valid. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). North Carolina courts have the authority and responsibility to declare a law unconstitutional, but only when the violation is plain and clear. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). Stated differently, a law will be declared invalid only if its unconstitutionality is demonstrated beyond reasonable doubt. *Baker*, 330 N.C. at 334–35, 410 S.E.2d at 889.

Hart v. State, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

Due Process

The Department contends that the trial court erred when it concluded that taxation of the Trust based solely on the residence of the beneficiaries violated due process under both the federal and state constitutions.

"The Fourteenth Amendment to the United States Constitution provides that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]' U.S. Const. amend. XIV." *Johnston v. State*, 224 N.C. App. 282, 304, 735 S.E.2d 859, 875 (2012) (alteration in original), *writ allowed*, *review on additional issues denied*, 366 N.C. 562, 738 S.E.2d 360, *aff'd*, 367 N.C. 164, 749 S.E.2d 278 (2013). "No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. " 'The term "law of the land" as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with "due process of law" as used in the Fourteenth Amendment to the Federal Constitution.' " *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976)). "For purposes of taxation, 'the requirements of . . . "due process" are, for all practical purposes, the same under both the State and Federal Constitutions.' " *In re appeal of*

Blue Ridge Hous. of Bakersville LLC, 226 N.C. App. 42, 58, 738 S.E.2d 802, 813 (2013) (citation omitted) (quoting *Leonard v. Maxwell*, 216 N.C. 89, 93, 3 S.E.2d 316, 320 (1939)) .

> In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court. We also look for guidance to the decisions of the North Carolina Supreme Court construing federal constitutional and State constitutional provisions, and we are bound by those interpretations. *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749, (2006) ("The Supreme Court of the United States is the final authority on federal constitutional questions.")[.] We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

Johnston, 224 N.C. App. at 288, 735 S.E.2d at 865.

> The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 305–306, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). . . . The "broad inquiry" subsumed in both constitutional requirements is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state—that is, whether the state has given anything for which it can ask return.

MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24–25, 170 L. Ed. 2d 404, 412 (2008) (citations and quotations omitted). "The Due Process Clause requires [(1)] some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and [(2)] that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Quill Corp. v. N. Dakota*, 504 U.S. 298, 306, 119 L. Ed. 2d 91, 102 (1992).

Minimum Contacts

As to the question of whether there exists some minimum connection between a state and the . . . property . . . it seeks to tax, *see id.*, "[our

Supreme Court has] framed the relevant inquiry as whether a [party] had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Id.* at 307, 119 L. Ed. 2d at 103 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)).

> Application of the "minimum contacts" rule will vary with the quality and nature of the [party's] activity, but it is essential in each case that there be some act by which the [party] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Skinner v. Preferred Credit, 361 N.C. 114, 123, 638 S.E.2d 203, 210–11 (2006) (citation and some quotation marks omitted).

On this point, we note that Judge McGuire made the following unchallenged findings of fact:

> 23. [N]othing in the record indicates, and [the Department] does not argue, that [the Trust] maintained any physical presence in North Carolina during the tax years at issue. The undisputed evidence in this matter shows that [the Trust] never held real property located in North Carolina, and never invested directly in any North Carolina based investments. . . . The record also indicates that no trust records were kept or created in North Carolina, or that the trust could be, in any other manner, said to have a physical presence in the State. Moreover, because the trustee's usual place of business where trust records were kept was outside the State, it is clear from the record that [the Trust's] principal place of administration was not North Carolina.
>
> . . .
>
> 26. [The Department] concedes that the only "connection between the [Plaintiff] trust and North Carolina in the case at hand is the residence of the beneficiaries."

The Department supports its argument that the residence of the beneficiaries is sufficient to satisfy the minimum contacts criteria of the Due Process Clause by citing to state court opinions from Connecticut and California: *Chase Manhattan Bank v. Gavin*, 249 Conn. 172, 733 A.2d 782 (1999), and *McCulloch v. Franchise Tax Bd.*, 61 Cal. 2d 186, 390 P.2d 412 (1964).

In both *Gavin* and *McCulloch*, the state appellate court noted that the United States Supreme Court had previously upheld the taxation of trust income based on the domicile of the *trustee*, citing *Greenough v. Tax Assessors*, 331 U.S. 486, 91 L. Ed. 1621 (1947). And the *Gavin* and *McCulloch* courts reasoned that similar to the benefits and protections provided by a state to a trustee, the state of the beneficiary's domicile provided benefits and protections sufficient to satisfy the minimum contacts criteria of due process for taxation of the trust. *See Gavin*, 249 Conn. at 204–05, 733 A.2d at 802 ("[J]ust as a state may tax all of the present income of a domiciliary, . . . a state may . . . tax the income of an inter vivos trust that is accumulated for the ultimate benefit of a noncontingent domiciliary, and that is subject to her ultimate power of disposition."); *McCulloch*, 61 Cal. 2d at 196, 390 P.2d at 419 ("[T]he beneficiary's state of residence may properly tax the *trust* on income which is payable in the future to the beneficiary, although it is actually retained by the trust, since that state renders to the beneficiary that protection incident to his eventual enjoyment of such accumulated income."). On this basis, the Department contends that its taxation of the Trust, predicated solely on the residency of Kimberley Kaestner in North Carolina did not violate due process.

Representatives of the Trust, on the other hand, assert that the Department's contention that a beneficiary's domicile alone is sufficient to satisfy the minimum contacts requirement of the Due Process Clause and allow the state to tax a non-resident trust conflates what the law recognizes as separate legal entities—the trust and the beneficiary. "[W]e do not forget that the trust is an abstraction, . . . [and] the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions." *Anderson v. Wilson*, 289 U.S. 20, 27, 77 L. Ed. 1004, 1010 (1933). In other words, for income tax purposes the trust has a separate existence. *Id.*

In support of their position, the Trust representatives direct our attention to *Greenough*, 331 U.S. 486, 91 L. Ed. 1621, a United States Supreme Court opinion. *Greenough* upheld a Rhode Island law authorizing the levy of an *ad valorem* tax upon a resident *trustee* based on a proportionate legal interest of a foreign trust, finding no violation of due process. *Greenough* was a decision from which four justices, including the Chief Justice, dissented. We note with particular interest the dissent of Justice Rutledge, who wrote that "if the beneficiary's residence alone is insufficient to sustain a state's power to tax the corpus of the trust, *cf. Brooke v. Norfolk*, 277 [U.S.] 27, 72 [L. Ed.] 767, 48 [S. Ct.] 422, it would seem that the mere residence of one of a number of trustees

hardly would supply a firmer foundation." *Id.* at 503, 91 L. Ed. at 1633 (footnote omitted). After a careful look at *Brooke*, 277 U.S. 27, 72 L. Ed. 767 (1928), we find it to be not only relevant to the instant case, but also controlling.

In *Brooke*, the petitioner—a Virginia resident and trust beneficiary—appealed to the United States Supreme Court after the City of Norfolk and the State of Virginia assessed taxes upon the corpus of a trust created by a Maryland resident. *Id.* at 28, 72 L. Ed. at 767–78. The petitioner contended that the assessment of the taxes was contrary to the Fourteenth Amendment. *Id.* at 28, 72 L. Ed. at 767. The Maryland resident created a testamentary trust and bequeathed to it $80,000.00, naming petitioner as beneficiary. The trustee, Safe Deposit & Trust Company of Baltimore, was directed to pay income from the trust to the petitioner for life. *Id.* at 28, 72 L. Ed. at 768. The Court noted that "[t]he property held in trust has remained in Maryland and no part of it is or ever has been in Virginia." *Id.*

> The petitioner has paid without question a tax upon the income received by her. But the doctrine contended for now is that the petitioner is chargeable as if she owned the whole. . . . But here the property is not within the state, does not belong to the petitioner and is not within her possession or control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. *See Wachovia Bank & T. Co. v. Doughton*, 272 U. S. 567, 575, 71 L. [E]d. 413, 419, 47 Sup. Ct. Rep. 202.

Id. 28–29, 72 L. Ed. at 768.

The strong similarities between the facts in *Brooke* and the instant case cannot be ignored. While the trust in *Brooke* was a testamentary trust and the Trust here an *inter vivos* trust, both were created and governed by laws outside of the state assessing a tax upon the trust. The trustee for both trusts resided outside of the state seeking to tax the trust. The beneficiary of the trust who resided within the taxing state had no control over the trust during the period for which the tax was assessed. And, the trusts did not own property in the taxing state.[2] In the instant case, the Trust's beneficiary did not receive a taxable distribution from the Trust during the years for which the Department has assessed a tax.

2. In *Brooke*, it was duly noted that the petitioner paid tax assessments in Virginia on the distributions made to her as a resident of the state; however, she had no duty

In determining that the authority as set forth by the United States Supreme Court in *Brooke* controls the analysis and outcome of this issue, we must decline the Department's request that we accept as persuasive the authority as set out by the California Supreme Court, *McCulloch*, 61 Cal. 2d 186, 390 P.2d 412, or the Connecticut Supreme Court, *Gavin*, 249 Conn. 172, 733 A.2d 782. Thus, because of *Brooke*, we hold that based on the facts of the instant case, the connection between North Carolina and the Trust was insufficient to satisfy the requirements of due process. Therefore, the Department's assessment of an income tax levied pursuant to the authority set out in General Statutes, section 105-160.2 was in violation of the Due Process Clause of the United States Constitution, and the Law of the Land Clause of the North Carolina Constitution. Accordingly, we affirm Judge McGuire's order granting summary judgment for the Trust and directing that the Department refund any and all taxes and penalties paid by the Trust pursuant to section 105-160.2 with interest.

As a consequence, we do not address the Department's contention that the Business Court erred when it concluded taxation of the Trust based on the residence of the beneficiary violated the Commerce Clause of the federal constitution.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

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under the law (or constitution) to pay taxes on the *corpus* of the trust which existed in another state and over which she had no control. *See* 277 U.S. at 28–29, 72 L. Ed. at 768.

KING FA, LLC v. CHEN

[248 N.C. App. 221 (2016)]

KING FA, LLC, PLAINTIFF
v.
MING XEN CHEN, DEFENDANT

No. COA16-47

Filed 5 July 2016

1. Jurisdiction—standing—LLC—confusion of parties—ratification

An LLC had standing to bring an action and the trial court had jurisdiction where there had been confusion between the LLC and its members in the signing of commercial lease documents and court papers. The tenants' actions in the trial court, to wit, seeking substitution, failing to repudiate the action, and participating actively in the prosecution of the matter, constituted an implicit ratification of the action such that they agreed to be bound by the proceeding.

2. Appeal and Error—parties aggrieved—notice of appeal—confusion between LLC and members

An appeal was dismissed where there was confusion over the proper parties between an LLC and its members in the underlying commercial lease and in court documents. The LLC, despite its name appearing in the caption of most of the documents in this matter, was in no way aggrieved by the final order or the amended order, each of which affected the legal rights only of the real parties in interest in this matter, the tenants. Furthermore, the notice of appeal did not properly name the parties taking the appeal.

Appeal by Plaintiff from orders entered 13 May and 8 September 2015 by Judge Theodore Kazakos in Forsyth County District Court. Heard in the Court of Appeals 9 June 2016.

Scott Law Group, PLLC, by Harvey W. Barbee, Jr., for Plaintiff.

Wake Forest University School of Law Community Law Clinic, by Prof. Steven M. Virgil, for Defendant.

STEPHENS, Judge.

This appeal arises from a dispute between a landlord and his tenants concerning, *inter alia*, which party was responsible for making and paying for necessary repairs under the terms of a commercial lease for a restaurant space. Because the notice of appeal filed in this matter does

not comply with the requirements of Rule of Appellate Procedure 3, we lack jurisdiction to hear this appeal and must dismiss it.

Factual and Procedural History

On 11 October 2013, Saungor Tse and Nap Kin Cheung (collectively, "the tenants") entered into a commercial lease with Defendant Ming Xen Chen for use of certain premises on Randolph Street in Thomasville which the parties intended would be operated as the Mandarin Express restaurant. Before signing the lease, Tse had inspected the building on the premises and Chen informed her about past issues with the roof leaking. However, the lease was silent regarding Chen's responsibility to fix the roof or make any other repairs during the term of the lease. In December 2013, Tse hired a contractor to undertake repairs on the roof at a cost of $1,000. Tse then offset this expense by reducing her January 2014 rental payment to Chen by $1,000. The contractor's repair was inadequate, however, and the restaurant's roof continued to leak. On 21 January 2014, King Fa, LLC ("the LLC") filed a complaint against Chen in Forsyth County District Court alleging breach of contract and breach of the covenant of quiet enjoyment. The LLC is a North Carolina limited liability company organized on 16 October 2013 with the tenants as its only members. The complaint alleged, *inter alia*, that Chen failed to fix the roof leak and to undertake other repairs to the restaurant, and also that Chen requested a review by the health department in hopes that the restaurant would be closed down.[1] On 20 March 2014, the LLC filed an amended complaint asserting the same claims and alleging substantially the same facts.

In his motion to dismiss and answer filed 22 May 2014, Chen moved to dismiss the amended complaint on the basis that the LLC was not a real party in interest as to the lease and thus lacked standing to bring the action. On 26 September 2014, Chen filed a motion for leave to file an amended answer and counterclaim, alleging breach of the lease by nonpayment of rent. In his motion, Chen again asserted that the tenants were the real parties in interest regarding the lease, but expressed concern that if the court determined instead that the LLC was the real party in interest, Chen would be barred from later bringing his compulsory counterclaim for breach of contract. On 9 October 2014, the LLC filed a motion in opposition to Chen's motion to dismiss in which it argued that the LLC was a real party in interest and, in the alternative, moved to

1. Following a health department inspection on 20 February 2014, the restaurant was ordered closed.

substitute the tenants as plaintiffs if the trial court determined that the LLC was not the real party in interest.

The matter came on for trial on 4 February 2015 in Forsyth County District Court, the Honorable Theodore Kazakos, Judge presiding. At that time, the court reserved judgment to allow the parties to file memoranda on their claims and counterclaim. On 12 February 2015, the LLC moved to amend its amended complaint to add claims for constructive eviction and conversion of personal property. The parties apparently appeared again before the trial court on 6 April 2015 to present further arguments, although the only transcript in the record on appeal is from the 4 February 2015 hearing. On 13 May 2015, the court entered an order ("the final order") that, *inter alia*, (1) allowed the tenants[2] to amend their amended complaint to add a claim for constructive eviction, but denied their request to add a claim for conversion; (2) otherwise ruled against the tenants on their claims against Chen for constructive eviction, breach of contract, and breach of the covenant of quiet enjoyment; and (3) decreed that the tenants breached the lease, awarding Chen damages in the amount of $1,800. The final order includes findings of fact that Chen moved to dismiss the LLC's complaint and that the LLC filed a motion opposing the motion to dismiss or in the alternative to substitute parties, but does not contain any ruling regarding either of those motions.

On 18 June 2015, the LLC moved for amended findings of fact and to set aside the final order pursuant to Rule of Civil Procedure 60(b). In that motion, the LLC's counsel explained the following: that he had reviewed the proposed order drafted by Chen's counsel and had requested certain changes to the findings of fact. Some of the changes were made by Chen's counsel and the amended proposed order was again sent to the LLC for review. The LLC requested additional revisions, but Chen's

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2. The final order, which was prepared by a third-year student at Wake Forest University School of Law practicing under the supervision of Chen's trial counsel, a law school professor, is captioned "Saungor Tse and Nap Kin Cheung, Plaintiffs, v. Ming Xen Chen, Defendant/Counterplaintiff[.]" Accordingly, although as discussed in detail later in this opinion, the complaint was brought by the LLC, we use the term "the tenants" here. The final order is the only filing in the record on appeal that lists the tenants as the plaintiffs in this matter, other than a small claims court complaint for money owed filed in Davidson County by Chen against Tse on 8 January 2014 and the order dismissing that complaint on 10 April 2014. Further, much if not all of the post-trial communication between the parties' trial counsel involved the student on behalf of Chen's licensed attorney. However, for ease of reading, we hereafter refer to both the student and his supervising attorney as "Chen's counsel."

counsel submitted the amended proposed order to the court without the LLC's consent. The court then signed the amended proposed order and filed it as the final order on 13 May 2015. Following a hearing on the LLC's motion at the 25 June 2015 session of Forsyth County District Court, the court entered an "Order Amending Findings of Fact" on 8 September 2015 ("the amended order"). The amended order noted that the LLC had withdrawn its Rule 60 motion and also ordered that the final order be amended to clarify portions of two of its findings of fact.

On 24 September 2015, the LLC filed written notice of appeal from the final order entered 13 May 2015 and from the amended order entered 8 September 2015. On 5 October 2015, Chen also filed a written notice of appeal from both orders. However, Chen did not include any proposed issues on appeal in the record before this Court and brings forward no appellant's arguments on appeal, having filed only an appellee's brief. Accordingly, Chen has waived any appellate review arising from his notice of appeal. *See* N.C.R. App. P. 28(a).

Standing

[1] Chen first argues that this appeal must be dismissed for lack of standing by the LLC to bring forward this appeal. Essentially, Chen contends that the LLC lacks standing to bring this appeal because the correct plaintiffs in the matter are the tenants, who, Chen notes, were the named plaintiffs in the final order drafted by his counsel. We agree, but before addressing Chen's argument regarding standing to bring this appeal, we first consider the LLC's standing to bring this action in the trial court.

Standing refers to "a party's right to have a court decide the merits of a dispute[,]" and provides the courts of this State subject matter jurisdiction to hear a party's claims. *Teague v. Bayer AG*, 195 N.C. App. 18, 23, 671 S.E.2d 550, 554 (citation and internal quotation marks omitted), *disc. review denied*, 363 N.C. 381, __ S.E.2d __ (2009). "As a general matter, the North Carolina Constitution confers standing on those who suffer harm: All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . ." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2008) (citation, internal quotation marks, and brackets omitted). However, our General Statutes also mandate that "[e]very claim shall be prosecuted *in the name of the real party in interest* . . . ." N.C. Gen. Stat. § 1A-1, Rule 17(a) (2015) (emphasis added). In the context of a breach of contract claim, the parties who *execute* an agreement are real parties in interest and have standing to

sue.[3] *See, e.g.*, *Accelerated Framing, Inc. v. Eagle Ridge Builders, Inc.*, 207 N.C. App. 722, 724, 701 S.E.2d 280, 283 (2010).

As noted *supra*, the original and amended complaints in this matter were filed by the LLC, although the LLC did not execute and was not a party to the lease. While the tenants are the only two members of the LLC, the tenants signed the lease in their individual capacities and not on behalf of the LLC as evidenced by the fact that the LLC was not organized, and thus did not exist, until five days *after* the lease was signed. In addition, while "[a]n action arising out of contract generally can be assigned[,]" *see, e.g.*, *Horton v. New S. Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (citation and internal quotation marks omitted), *disc. review and cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996), nothing in the record before this Court indicates that the tenants ever assigned their rights or claims under the lease to the LLC.

However, Rule 17 further provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for *ratification of commencement of the action by, or joinder or substitution of*, the real party in interest . . . .

N.C. Gen. Stat. § 1A-1, Rule 17(a) (emphasis added). Here, as discussed *supra*, the LLC filed a motion seeking substitution of the tenants for the LLC in the event that the trial court determined that the LLC was not a real party in interest. However, nothing in the record on appeal indicates that the trial court ever ruled on either Chen's motion to dismiss or on the LLC's alternative motion to substitute parties. Given the court's eventual entry of the final order and amended order, it obviously did not grant Chen's motion to dismiss for lack of standing. Further, with the exception of its reply to Chen's counterclaim filed 19 November 2014, the LLC designated itself, and not the tenants, as the plaintiff in all filings in file number 14 CVD 395, including the notice of appeal to this Court. This suggests that the LLC did not believe that the tenants were ever joined or substituted as plaintiffs by the trial court.

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3. In addition, while not pertinent to this matter, "an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina." N.C. Gen. Stat. § 1A-1, Rule 17(a).

However, "Rule 17(a) [also] permits the real party in interest to ratify the action after its commencement and to have the ratification relate back to the commencement." *Burcl v. N.C. Baptist Hosp., Inc.*, 306 N.C. 214, 230, 293 S.E.2d 85, 95 (1982). "Ratification is defined as the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Bell Atl. Tricon Leasing Corp. v. DRR, Inc.*, 114 N.C. App. 771, 776, 443 S.E.2d 374, 377 (1994) (citation and internal quotation marks omitted). "Ratification may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act." *Id.* at 776-77, 443 S.E.2d at 377 (citation, internal quotation marks, and ellipsis omitted). Here, although the real parties in interest—the tenants—did not *explicitly* ratify commencement of the action as is the more common practice under Rule 17(a), *see, e.g.*, *S. R. Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 8-9, 318 S.E.2d 872, 876 (1984) (holding that real parties in interest had ratified the action under 17(a) where they "indicated in writing that they agreed to be made parties, that they ratified and adopted the proceedings up to that point[,] and that they agreed to be bound by the judgment in the case"), we hold that the tenants' actions in the trial court, to wit, seeking substitution, failing to repudiate the action, and participating actively in the prosecution of the matter, constituted an implicit ratification of the action such that they agreed to be bound by the proceeding. Thus, the trial court had subject matter jurisdiction over the matter.

[2] However, we agree with Chen's contention that, because "[n]o legally protected interest belonging to [the] LLC is implicated by" the final order or the amended order, the LLC cannot show an injury and has no right of appeal. Essentially, Chen's argument is that the LLC is not a "party aggrieved" by the final order or the amended order. Only a "party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal." N.C.R. App. P. 3(a). In turn, our General Statues provide that "[*a*]*ny party aggrieved* may appeal . . . ." N.C. Gen. Stat. § 1-271 (2015) (emphasis added). "A 'party aggrieved' is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court." *Selective Ins. Co. v. Mid-Carolina Insulation Co.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997) (citations omitted). As discussed *supra*, the LLC was not a party to the lease and thus had no legal rights or obligations related thereto. Likewise, the LLC, despite its name appearing in the caption of most of the documents in this matter,

is in no way aggrieved by the final order or the amended order, each of which affects the legal rights only of the real parties in interest in this matter—the tenants.

Rule of Appellate Procedure 3 further specifies that "the notice of appeal required to be filed and served by subsection (a) of this rule *shall specify the party or parties taking the appeal* . . . ." N.C.R. App. P. 3(d) (emphasis added). The notice of appeal states that the appeal is being taken by "King Fa, LLC," and neither of the tenants is named in it.[4] "Without proper notice of appeal, this Court acquires no jurisdiction." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (citation and internal quotation marks omitted). "A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008); *see also Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 408 (1991) (*per curiam*) ("If the [notice of appeal] requirements of [Rule 3 of the North Carolina Rules of Appellate Procedure] are not met, the appeal must be dismissed."). Accordingly, this appeal is

DISMISSED.

Judges McCULLOUGH and ZACHARY concur.

4. Recognizing the apparent deficiency of the notice of appeal, on 5 April 2016, counsel for the LLC filed in this Court a "Motion to Substitute Parties in the Alternative[,]" which was denied by order entered 19 April 2016.

TU N. NGUYEN, PLAINTIFF
v.
ALICIA HELLER-NGUYEN, DEFENDANT

No. COA15-1186

Filed 5 July 2016

1. Child Custody and Support—support—modification—contention dismissed

Defendant's contention that the trial court did not have jurisdiction to modify child support in a June order was dismissed where the trial court modified plaintiff's child support obligation in a March order and did not modify child support in June.

2. Appeal and Error—dismissal of contentions—issues not ripe

Contentions concerning a parenting coordinator moving to modify child custody as an interested party were not ripe for review and were dismissed. It is not the duty of the appellate court to supplement appellant's brief with legal authority or arguments not contained therein.

3. Child Custody and Support—parenting coordinator—reappointed

The trial court did not abuse its discretion by reappointing a parenting coordinator, considering the binding and uncontested findings of fact and the trial court's required statutory findings.

4. Child Custody and Support—support arrears—offset

There was error in a child custody order to the extent that it allowed plaintiff to offset vested child support arrears owed to defendant. The trial court was directed to review the procedural requirements and exceptions enumerated in N.C.G.S. § 50-13.10(a) (2015).

Appeal by Defendant from an order entered 11 June 2015 by Judge Anna E. Worley in Wake County District Court. Heard in the Court of Appeals 13 April 2016.

No appellee brief filed by Plaintiff.

Gailor Hunt Jenkins Davis & Taylor, PLLC, by Carrie B. Tortora and Jonathan S. Melton, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Alicia Heller-Nguyen ("Defendant") appeals following an order on Tu N. Nguyen's ("Plaintiff") motion for reappointment of a Parenting Coordinator, Parenting Coordinator Sydney Batch's motion for an order terminating her parenting coordinator appointment and awarding her past due fees, and Parenting Coordinator Sydney Batch's Notice of a Determination that Requires a Court Hearing. On appeal, Defendant contends (1) the trial court did not have jurisdiction to modify child support, (2) erred in reappointing Parenting Coordinator Batch, and (3) erred in offsetting Plaintiff's child support arrears. We affirm in part and remand in part.

I. Factual and Procedural History

Plaintiff and Defendant married on 19 June 1993. They had four children during their marriage, three boys and one girl, ages eleven, twelve, fifteen, and seventeen. They separated on 31 October 2010.

Thereafter, Defendant filed a domestic violence protective order ("DVPO") against Plaintiff on 12 November 2010. The DVPO gave Defendant sole custody of the minor children and prohibited Plaintiff from contacting his children "whatsoever . . . at any time."

On 22 November 2010, Plaintiff filed a verified complaint for joint legal custody and primary physical custody of the children. He alleged the children's best interests would be best served by having the trial court award him temporary and permanent physical custody, with Defendant having visitation rights. Additionally, he moved to have Defendant submit to a psychiatric evaluation.

On 10 January 2011, Defendant filed a verified answer and raised counterclaims for child custody and child support. On 29 January 2011, Defendant filed a verified amended answer and amended counterclaims for child custody, child support, equitable distribution, post separation support, alimony, and moved to have the trial court impose a temporary restraining order on Plaintiff to prevent him from transferring assets, and moved to have Plaintiff submit to a psychiatric evaluation. On 24 February 2011, Plaintiff filed a reply and objected to Defendant's motion for a temporary restraining order and psychiatric evaluation.

On 25 August 2011, the trial court issued a temporary child custody order and found it was in the children's best interests to award the parties joint legal custody and to award Plaintiff physical custody every Wednesday night, and every other Thursday, Friday, and Saturday. The trial court gave Defendant physical custody on all other days and nights. The trial court ordered both parties to undergo psychiatric evaluations.

On 11 October 2011, the trial court appointed Helen Oliver to serve a two-year parenting coordinator term. On 23 December 2011, Plaintiff and Defendant divorced. On 23 July 2012, Parenting Coordinator Oliver moved to be relieved from her duties because Plaintiff failed to pay her for her services.

On 24–25 September 2012, the trial court heard Plaintiff on his complaint and Defendant on her counterclaims. After hearing the testimony of several witnesses and reviewing the evidence, the trial court issued a 27 March 2013 order and found it was in the children's best interests to award the parties joint legal custody. The trial court gave Defendant residential and primary physical custody and gave Plaintiff secondary custody with visitation rights set out in the order. The trial court ordered Plaintiff to pay $2,740.94 on the fifth day of every month as temporary child support, and found him to be in arrears of $7,705.00. The trial court ordered Helen Oliver, or a substitute, to continue serving as a Parenting Coordinator.

On 11 April 2013, the trial court issued an order awarding Defendant $2,982.00 per month in alimony. Further, the trial court found Plaintiff was in $74,550.00 of alimony arrears.

On 8 May 2013, the trial court amended its 27 March 2013 order, corrected typographical errors, and recalculated Plaintiff's arrears based upon medical expenses he paid without being reimbursed. Plaintiff's child support obligation remained the same at $2,740.94 per month.

On 29 August 2013, Plaintiff filed a verified motion to modify child support and alimony. He alleged, "there has been a substantial change in circumstances warranting a reduction of [his] child support obligation and his alimony obligation in that: [his] business and source of income . . . has received a substantially decreased revenue from two major customers . . . which was in no way foreseeable." Further, his business, Healthy Home Insulation, Inc., took on wage and tax expenses, which decreased his income.

On 13 March 2014, the trial court entered a consent order and appointed Sydney Batch to serve as Parenting Coordinator for one year. On 18 June 2014, Parenting Coordinator Batch moved to terminate her appointment because "Defendant has never been able to pay the initial retainer for parenting coordination services," and "[t]o date Defendant has only been able to make one payment of $500.00."

On 25 June 2014, Plaintiff filed a verified motion to modify child custody. He alleged "there has been a substantial change in circumstances

affecting the welfare of the minor children warranting a modification of the [children's] custodial arrangements." He alleged the following, *inter alia:*

> A. The parties agreed to the appointment of Sydney Batch as Parenting Coordinator. Ms. Batch has been in the case since approximately March 13, 2014. Ms. Batch has tried to arrange for the engagement of counselors or therapists to assist with the rehabilitation of Plaintiff's relationship with [his child], which has been alienated and destroyed by Defendant and, upon information and belief, Defendant's mother. Ms. Batch has also attempted to arrange for [two of the other children] to see a counselor. Ms. Batch has researched and recommended counselors and therapists for the parties to consider and approve, but Defendant has found an excuse as to why each counselor should not be used. Plaintiff believes that Defendant does not want the children to see counselors or therapists. Upon information and belief, Defendant has threatened to sue at least one of the therapists if he met with the children.
>
> B. Defendant's behaviors and attitudes towards Plaintiff are toxic, hostile, aggressive, and full of anger, and the intensity of their behaviors and attitudes has grown since the entry of the Custody Order. This has had a direct impact on the minor children and their relationship with Plaintiff.

Plaintiff alleged the 8 May 2013 amended child custody and child support order "does not serve the minor children's best interests" because "[custody] [e]xchanges need to be as few as possible, and the minor children need consistent time and more time with their father." He asked the trial court to modify the 8 May 2013 custody order to give him more time with the children. This motion was made in addition to Plaintiff's 29 August 2013 motion to modify child support.

On 20–22 August 2014, the trial court heard the parties on Plaintiff's 29 August 2013 motion to modify child support and alimony, and his 25 June 2014 motion to modify child custody. Plaintiff argued to reduce child support and alimony based upon a substantial change in circumstances. The trial court did not immediately enter an order following the hearing.

On 15 September 2014, Parenting Coordinator Batch filed, pursuant to N.C. Gen. Stat. § 50-97, Wake County Domestic Form 26, "Parenting

Coordinator's Notice of Determination that Requires a Court Hearing," with the trial court. In the sworn form, Parenting Coordinator Batch "determined that [she] [was] not qualified to address or resolve certain issues in the case," specifically:

> 1. The ordering of reunification therapy and appointment of a reunification therapist for [two] minor children . . . .
>
> 2. The ordering of therapy and appointment of therapists for [the four] minor children . . . .
>
> 3. The ordering of communication between the parties via the Our Family Wizard website.
>
> 4. The modification of the Amended Child Custody and Child Support Order to allow for a change of Wednesday drop-off time.

Parenting Coordinator Batch requested the trial court resolve these issues.

On 3 November 2014, Plaintiff moved to reappoint Parenting Coordinator Batch for "at least another two years." He alleged the following:

> 8. This case has a long and tortuous history. Defendant's behaviors and attitudes towards Plaintiff are toxic, hostile, aggressive, and full of anger, and, upon information and belief, spill over into her parenting and the children's behavior, emotions, and attitudes suffer as a result. The children's mental and emotional wellbeing hangs in the balance, and they are under a tremendous amount of stress while residing with Defendant.
>
> 9. Defendant has successfully alienated [two of the four children] from Plaintiff. Plaintiff has not seen [these two children] in over 10 months, and . . . 6 months [respectively]. . . .
>
> 11. As a result of Defendant's behaviors, the parties have had to employ therapists for each child and [a] reunification therapist so that [two of the children] can be reunified with Plaintiff. . . .
>
> 13. Ms. Batch's services and judgment have been required throughout her appointment. Without her involvement, it is highly unlikely that the reunification process would

be in its current position; additionally, it is highly unlikely that the children would be as active as they are in therapy.

14. This case is a "high conflict case" within the meaning of N.C. Gen. Stat. § 50-90. . . .

17. It would serve the children's best interest for this Court to reappoint Ms. Batch as parenting coordinator for at least another two years, so that Ms. Batch can continue to monitor the children's mental and emotional well being and continue to assist the children in improving and maintaining their relationship with [Plaintiff].

18. The parties are able to pay the cost of a parenting coordinator. The parties should be ordered to pay the costs of a parenting coordinator as deemed appropriate and fair by the Court.

On 4 November 2014, Parenting Coordinator Batch filed a verified motion to terminate her appointment and collect her past due fees. According to Parenting Coordinator Batch, Defendant stated she could only "afford to pay $80.00 per month" towards her outstanding balance of parenting coordinator fees, even though Plaintiff paid Defendant "over $25,000.00 in the past two months." Parenting Coordinator Batch asked the trial court to remove her as parenting coordinator, order Defendant to pay the past due fees, and sought "any other relief that the Court deems just and proper."

On 6 March 2015, the trial court issued an order on Plaintiff's motions to modify child support and child custody. The trial court found a substantial change in circumstances that affects the children's best interests and warranted a modification of Plaintiff's child support obligation. Further, the trial court found "Defendant was employed by Wake County in its EMS department" and voluntarily quit her job during litigation. The trial court found Plaintiff sold his assets in Healthy Home Insulation, Inc. in July 2014 and began working for Healthy Home's purchaser. The trial court found Plaintiff's gross monthly income decreased by 40–50% and his reasonable monthly expenses including child support were $4,565.00. The trial court found Plaintiff paid Defendant's parenting coordinator fees, totaling $5,382.50. The trial court made the following conclusions of law, *inter alia*:

1. This Court has personal and subject matter jurisdiction to enter this Consent Order.

> 2. Each party has the present ability to comply with the provisions of this Order.
>
> 3. Since the entry of the [11 April 2013] Alimony Order, there has been a substantial change in circumstances warranting a modification of Plaintiff's alimony obligation set forth herein, and said modification is [in] in the minor child's best interests.
>
> 4. Since the entry of the [8 May 2013 Amended] Child Support Order, there has been a substantial change in circumstances warranting a modification of Plaintiff's child support obligation as set forth herein, and said modification is in the minor's best interests.

Based upon the substantial change in circumstances, the trial court reduced Plaintiff's alimony obligation to $900.00 per month, and using Worksheet B, reduced his child support obligation to $1,802.46 per month. The trial court concluded Plaintiff's child support arrears totaled $59,826.42, and his alimony arrears totaled $73,407.72.

On 10 March 2015, the trial court heard the parties on Plaintiff's motion for reappointment of a parenting coordinator, and Parenting Coordinator Batch's "Notice of Determination that Requires a Court Hearing" to terminate her services, collect past fees owed to her by Defendant, to order therapy, appoint therapists, order the parties to use the Our Family Wizard website, and change the custody order to allow for Wednesday drop off times. On 11 June 2015, the trial court issued an order on Plaintiff's motion and Parenting Coordinator Bach's motion. The trial court made the following findings of fact and conclusions of law, *inter alia*:

> 18. This case is a complex custody case which has a long, unfortunate history of extremely high conflict and domestic violence. The Court is concerned that the stress and discord between the parties will have a lasting negative affect on the minor children. . . .
>
> 23[–26]. [Each of the four children has been assigned a therapist].
>
> 37. Defendant refused to sign a release for the PC to speak with Defendant's therapist.
>
> 38. Both parties have been inconsistent in bringing the minor children to therapy for scheduled appointments.

39. Defendant has threatened mental health providers with legal action if they saw the children.

40. It is unclear whether Defendant sincerely desires the minor children to have a productive and healthy relationship with Plaintiff.

41. When the PC was appointed, Defendant followed most of the PC's directives. Defendant does not abide by some of the PC's decisions, and the Court considered issuing a show cause [sic] to Defendant from the bench due to her lack of compliance. Defendant has obstructed the therapy process and compounded the problems in this case by refusing to sign releases or by revoking her consent for therapists to speak with one another and/or the PC. Defendant has at times been rude, hostile, and uncooperative in her communications with the PC and other mental health providers. Defendant has not made any progress in deescalating the conflict between the parties, and Defendant believes that at times the PC has been rude, hostile, and biased in her communications with her.

42. Plaintiff wants a relationship with his children, but his efforts are and continue to be frustrated by Defendant. Plaintiff has made progress in understanding the need for therapy for his children, and he has been cooperative with the therapists involved in this case. He has signed all releases requested of him. . . .

46. The PC does not have any impairment which would prohibit her from communicating effectively with either party, and each party has the ability to participate with the PC. There is no indication of favoritism or prejudice for or towards either party by the PC in her interactions with the parties and decisions in this case, and there is certainly no indication that the PC is biased in any way based upon who is paying her fee. . . .

48. The PC's appointment did not expire prior to the hearing, and the appointment should be extended via reappointment as set forth below. . . .

50. Defendant has failed to pay her share of the PC's fees. She owes the PC $5,225.86. Plaintiff is willing to pay Defendant's share of the PC's fees so long as he is

credited, dollar for dollar, with each payment he makes on her behalf as a credit against his outstanding child support arrearage of approximately $30,000.00.

51. Defendant received a lump-sum payment from Plaintiff in the amount of $25,000[.00] in the Fall of 2014 for child support arrears, which she used to pay back taxes, living expenses, and health insurance. . . .

56. The Court has concerns about whether the minor children should remain in the primary custody of Defendant.

CONCLUSIONS OF LAW

3. This is a high conflict custody case.

4. Good cause has been shown to the Court for reappointment of Sydney J. Batch as Parenting Coordinator as authorized by N.C. Gen. Stat. § 50-99(b).

The trial court appointed Parenting Coordinator Batch for one year, and ordered the following:

1. Plaintiff's Motion for Reappointment of Parenting Coordinator is GRANTED.

2. The parties are operating under the following custody/visitation order: Amended Child Custody and Child Support Order entered on May 8, 2013. . . .

7. [Parenting Coordinator] General Authority: The authority of the Parenting Coordinator shall be as delineated herein and shall be limited to matters that will aid the parties in:

A. Identifying disputed issues;

B. Reducing misunderstandings;

C. Clarifying priorities;

D. Exploring possibilities for compromise;

E. Developing methods of collaboration in parenting; and

F. Complying with the Court's order of custody, visitation, or guardianship, including the Custody Order.

8. Areas of Domain of General Authority: If a dispute arises concerning one of the following checked areas, the

Parenting Coordinator has the authority to make minor changes to the custody/visitation order or to make decisions to resolve a dispute if the issue was not addressed in the custody/visitation order:

A. Transition time/pickup/delivery

B. Sharing of vacations and holidays

C. Method of pick up and delivery

D. Transportation to and from visitation . . . .

17. Parenting Coordinator Fees:

A. The parents have the financial capacity to pay for the Parenting Coordinator. The parties shall pay the Parenting Coordinator for all of her time and costs incurred in processing the case. . . . Nonpayment of fees may subject the nonpaying parent to prosecution for indirect contempt of Court for failure to abide by the Order. . . .

B. The Parenting Coordinator's hourly fee shall be paid as follows: Father shall pay 50% and Mother shall pay 50%. . . .

C. If one parent pays 100% of the Parenting Coordinator fee, then that party has a right of indemnification against the other parent up to the percentage allocation for which the other parent was responsible. This reimbursement may be enforced by contempt.

D. If Plaintiff pays for Defendant's share of the Parenting Coordinator's fee, then each dollar paid by Plaintiff on behalf of Defendant shall reduce Plaintiff's child support arrearage by the amount so paid by Plaintiff on Defendant's behalf (since this is a direct benefit for the minor children). . . .

28[–29]. Defendant shall not interfere with the reunification therapy for [the children] with Plaintiff. . . .

39. [I]f Plaintiff pays for Defendant's share of the Parenting Coordinator's fee or a therapist's fee, then each dollar paid by Plaintiff on behalf of Defendant shall reduce Plaintiff's child support arrearage by the amount so paid by Plaintiff on Defendant's behalf (since this is a direct benefit for the minor children), or Plaintiff may seek reimbursement from Defendant for said expense . . . .

> 41. The PC is hereby authorized to speak to all therapists, service providers, doctors, and any other professionals working with the Heller-Nguyen family . . . .

On 2 July 2015, Defendant filed her notice of appeal. On appeal, she contests the 11 June 2015 order. On 7 August 2015, Defendant moved pursuant to Rule 62(d) to stay all custody proceedings in this matter. On 25 September 2015, the trial court granted Defendant's motion to stay.

II. Standard of Review

"In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact." *Peters v. Pennington*, 210 N.C. App. 1, 12–13, 707 S.E.2d 724, 733 (2011) (citations omitted). "The trial court is vested with broad discretion in child custody cases, and thus, the trial court's order should not be set aside absent an abuse of discretion." *Dixon v. Gordon*, 223 N.C. App. 365, 371, 734 S.E.2d 299, 304 (2012) (citation omitted).

III. Analysis

Defendant contends (1) the trial court did not have jurisdiction to modify child support in its 11 June 2015 order (hereinafter "June Order"), (2) erred in reappointing Parenting Coordinator Batch, and (3) erred in offsetting Plaintiff's child support arrears. We affirm in part and remand in part.

Defendant does not challenge the trial court's findings of fact, and therefore, the findings are binding on appeal. *Peters*, 210 N.C. App. at 13, 707 S.E.2d at 733 (citations omitted).

A. Jurisdiction to Modify Child Support

[1] Defendant contends the trial court did not have jurisdiction to modify child support in the June Order because "[t]here was no motion before the trial court to modify child support." However, Defendant does not challenge the trial court's jurisdiction to modify child custody.

Under North Carolina law, a child support order "may be modified or vacated at any time, upon [a] motion in the cause and showing of changed circumstances by either party or anyone interested subject to the limitations of [N.C. Gen. Stat. §] 50-13.10." N.C. Gen. Stat. § 50-13.7(a) (2015). "Once 'the threshold issue of substantial change in

circumstances has been shown' by a preponderance of the evidence, the trial court then 'proceeds to follow the [North Carolina Child Support] Guidelines and to compute the appropriate amount of child support.' " *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 535–36 (1995) (citation omitted); *see also Armstrong v. Droessler*, 177 N.C. App. 673, 675, 630 S.E.2d 19, 21 (2006) (citation omitted). If a trial court follows this two-step process by making such a finding and calculating the child support obligation under the North Carolina Child Support Guidelines, then the trial court modifies the child support obligation.

The record shows Plaintiff moved to modify child support on 29 August 2013. Through its 6 March 2015 order, the trial court granted Plaintiff's motion and changed his monthly child support obligation from $2,740.94 to $1,802.46. Plaintiff's child support obligation has remained unchanged and the June Order does not modify that amount. Notwithstanding the second issue concerning Plaintiff's child support arrears, we dismiss Defendant's contention because the trial court did not modify Plaintiff's child support obligation.

[2] Additionally, this Court observes there are no jurisdictional issues concerning modification of child custody. Prior to the June Order, Parenting Coordinator Batch, using Wake County Domestic Form 26, requested the trial court modify custody to allow for Wednesday drop off times. Parenting Coordinator Batch's request seems to contemplate the requirements set out by N.C. Gen. Stat. § 50-13.7 (2015), "Modification of order for child support or custody." This tends to raise unanswered questions as to whether a parenting coordinator can move as an interested party to modify a child support or child custody order under N.C. Gen. Stat. § 50-13.7, and whether standard forms like Wake County Domestic Form 26 can qualify as a "motion in the cause . . . showing a changed circumstances." N.C. Gen. Stat. § 50-13.7(a). However, these concerns are not ripe for consideration in the case *sub judice* because "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005). Moreover, the trial court exercised its discretion under N.C. Gen. Stat. § 50-92(b), and gave Parenting Coordinator Batch authority to resolve disputes surrounding transition time, pickup, delivery, and transportation to and from visitation, instead of granting Parenting Coordinator Batch's motion as a motion to modify child custody.[1] *See* N.C. Gen. Stat. § 50-92(b) (2015)

1. "Notwithstanding the appointment of the parenting coordinator, the court shall retain exclusive jurisdiction to determine fundamental issues of custody, visitation, and support, and the authority to exercise management and control of the case." N.C. Gen. Stat. § 50-91(c) (2015).

("[T]he court may authorize a parenting coordinator to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve."). Accordingly, we dismiss Defendant's first contention.

B. Reappointing Parenting Coordinator Batch

[3] Under North Carolina law, "the [trial] court may appoint a parenting coordinator at any time during the proceedings of a child custody action involving minor children . . . if all parties consent to the appointment." N.C. Gen. Stat. § 50-91(a) (2015). If the parties do not consent to the appointment of a parenting coordinator, "the court may appoint a parenting coordinator . . . upon entry of a parenting plan only if the court also makes specific findings that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator." N.C. Gen. Stat. § 50-91(b) (2015). Alternatively, for good cause shown, the trial court may terminate or modify a parenting coordinator's appointment "upon motion of either party[,] at the request of the parenting coordinator, upon the agreement of the parties and the parenting coordinator, or by the court on its own motion." N.C. Gen. Stat. § 50-99(a) (2015).

Here, the trial court made the required statutory findings: (1) this is a high conflict case; (2) reappointing Parenting Coordinator Batch serves the best interests of the children; and (3) the parties are able to pay for Parenting Coordinator Batch's services. Defendant contends the trial court found she is able to pay for Parenting Coordinator Batch's services solely because the trial court allowed Plaintiff to pay such fees on her behalf. This contention is not supported by the record. In the uncontested findings of fact, the trial court found "[t]he parties are able to pay the costs of the [Parenting Coordinator]," and noted Plaintiff paid Defendant a lump sum of $25,000.00 in Fall 2014, in addition to monthly alimony and child support payments. Further, the trial court voiced concern about Defendant's interference with her children's therapists, and her continued hostility towards Plaintiff and Parenting Coordinator Batch. Therefore, based upon the binding and uncontested findings of fact and the trial court's required statutory findings, we hold the trial court did not abuse its discretion in reappointing Parenting Coordinator Batch.

C. Offsetting Child Support Arrears

[4] N.C. Gen. Stat. § 50-13.10 (2015), "Past due child support vested; not subject to retroactive modification; entitled to full faith and credit," protects vested child support arrears and defines when child

support obligations become past due arrears. Section 50-13.10 sets out the following:

> (a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:
>
> (1) Before the payment is due or
>
> (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded. . . .
>
> (d) For purposes of this section, a child support payment or the relevant portion thereof, is not past due, and no arrearage accrues:
>
> (1) From and after the date of the death of the minor child for whose support the payment, or relevant portion, is made;
>
> (2) From and after the date of the death of the supporting party;
>
> (3) During any period when the child is living with the supporting party pursuant to a valid court order or to an express or implied written or oral agreement transferring primary custody to the supporting party;
>
> (4) During any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment. . . .
>
> (e) When a child support payment that is to be made to the State Child Support Collection and Disbursement Unit is not received by the Unit when due, the payment is not a past due child support payment for purposes of this section, and no arrearage accrues, if the payment is actually made to and received on time by the party entitled

> to receive it and that receipt is evidenced by a canceled check, money order, or contemporaneously executed and dated written receipt. Nothing in this section shall affect the duties of the clerks or the IV-D agency under this Chapter or Chapter 110 of the General Statutes with respect to payments not received by the Unit on time, but the court, in any action to enforce such a payment, may enter an order directing the clerk or the IV-D agency to enter the payment on the clerk's or IV-D agency's records as having been made on time, if the court finds that the payment was in fact received by the party entitled to receive it as provided in this subsection.

Id.

In the instant case, the trial court found Parenting Coordinator Batch's services directly serve the best interests of the children. On appeal, this uncontested finding of fact is binding.

N.C. Gen. Stat. § 50-95 states, "The parenting coordinator shall be entitled to reasonable compensation from the parties for services rendered and to a reasonable retainer." N.C. Gen. Stat. § 50-95(a) (2015). The trial court may appoint a parenting coordinator "contingent upon the parties' payment of a specific fee . . . ." N.C. Gen. Stat. § 50-95(b) (2015). In the event the parties do not pay the parenting coordinator, "[t]he parenting coordinator shall not begin any duties until the fee has been paid." *Id.*

In North Carolina, the child's welfare "is the 'polar star' in the matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs." *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967) (citation omitted). To achieve this end, the trial court declared, "If Plaintiff pays for Defendant's share of the Parenting Coordinator's fee, then each dollar paid by Plaintiff on behalf of Defendant shall reduce Plaintiff's child support arrearage by the amount so paid by Plaintiff on Defendant's behalf (since this is a direct benefit for the minor children)." This is error to the extent that it allows Plaintiff to offset vested child support arrears owed to Defendant. *See* N.C. Gen. Stat. § 50-13.10(a) (2015).

The trial court may, in its discretion, consider offsetting future advances on Plaintiff's child support obligations. The trial court is directed to review the procedural requirements and exceptions enumerated in N.C. Gen. Stat. § 50-13.10(a) (2015), and to consider other

alternatives to continue Parenting Coordinator Batch's services to best serve the children's interests.

We note in passing that this issue may also be resolved through a civil contempt proceeding against Defendant.

IV. Conclusion

For the foregoing reasons we affirm in part and remand in part.

AFFIRMED IN PART, REMANDED IN PART.

Judges CALABRIA and TYSON concur.

SOUTH CAROLINA TELECOMMUNICATIONS GROUP HOLDINGS, D/B/A SPIRIT COMMUNICATIONS, PLAINTIFF
v.
MILLER PIPELINE LLC, DEFENDANT

No. COA15-969

Filed 5 July 2016

1. Negligence—summary judgment—affidavit—excavation work

The trial court did not err by granting defendant's motion for summary judgment on a negligence claim. An affidavit failed to create a genuine issue of material fact on the issue of whether defendant was negligent and further demonstrated that defendant complied with all relevant portions of the Underground Damage Prevention Act in performing its excavation work.

2. Trespassing—motion for summary judgment—excavation activities—legal authority

The trial court did not err by granting defendant's motion for summary judgment on a trespassing claim. There was no suggestion in the record that defendant lacked legal authorization to conduct the pertinent excavation activities. The impact with the cable was not intentional and instead resulted by accident as a result of the fact that the cable was not properly marked.

Appeal by plaintiff from order entered 2 June 2015 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2016.

Matthew E. Cox, LLC, by Matthew E. Cox, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Jeffrey D. Keister and Joseph D. Budd, for defendant-appellee.

DAVIS, Judge.

South Carolina Telecommunications Group Holdings, d/b/a Spirit Communications ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of Miller Pipeline LLC ("Defendant"). On appeal, Plaintiff contends that the trial court erred by granting Defendant's motion for summary judgment despite the existence of a genuine issue of material fact. After careful review, we affirm the trial court's order.

Factual Background

Plaintiff provides Internet, data, and voice communication services to consumers in South Carolina, North Carolina, and Georgia. To facilitate this service, Plaintiff relies, in part, upon underground fiber optic cables to transmit data. One such fiber optic cable, designated as "NC-W5 Huntsville to Shelby" ("the Cable"), was buried along Highway 27 outside of Bolger City, North Carolina.

On 26 February 2013, Defendant, a company that installs pipelines, entered into a contract with Monroe Roadways Contractors, Inc. to install "a force main, gravity sewer and pump station" in Lincoln County. The project required excavation in the area where the Cable was buried along Highway 27.

Prior to beginning the excavation, Defendant contacted North Carolina's One-Call system ("the One-Call System") in accordance with the provisions of the Underground Damage Prevention Act ("the Act"), formerly codified as N.C. Gen. Stat. § 87-100 *et seq.*,[1] to ensure that all entities with underground utility lines in the vicinity would be provided with notice and afforded the opportunity to clearly mark their underground lines with surface paint in order to minimize the likelihood that Defendant's excavation work would damage them. Plaintiff, upon receiving this notice, hired a company called Synergy One to mark the Cable.

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1. We note that 2013 N.C. Sess. Laws ch. 407, §§ 1-2 repealed and replaced the Act with the Underground Utility Safety and Damage Prevention Act, codified as N.C. Gen. Stat. § 87-115 *et seq.*, effective 1 October 2014. However, the Act was still in effect at the time of the 7 March 2013 incident giving rise to the present appeal.

After all of the underground lines in the vicinity had been marked but before Defendant began its excavation work, rain washed away a significant portion of the surface paint marking the Cable and various other underground lines. Defendant again contacted the One-Call System, and the underground lines in the vicinity — including the Cable — were once again marked with surface paint.

On 7 March 2013, Defendant's employees began their excavation work. At approximately 9:28 a.m. on that same day, an employee of Defendant struck the Cable, damaging it and rendering it out of service for approximately 16 hours before it could be repaired.

On 26 August 2014, Plaintiff filed a complaint against Defendant in Mecklenburg County Superior Court alleging negligence and trespass in connection with the damage caused to the Cable. On 17 April 2015, Defendant filed a motion to dismiss and, in the alternative, a motion for summary judgment. In support of its motion for summary judgment, Defendant filed the affidavits of Eugene Hamilton ("Hamilton"), the lead driller for Defendant, and Richard Bowles ("Bowles"), Defendant's safety and quality coordinator. Plaintiff responded to Defendant's motion by submitting the affidavit of Michael Baldwin ("Baldwin"), Plaintiff's vice-president of legal affairs.

Defendant's motion was heard before the Honorable Jesse B. Caldwell on 19 May 2015. At the conclusion of the hearing, the trial court granted Defendant's motion for summary judgment. A written order reflecting the trial court's ruling was filed on 2 June 2015. Plaintiff gave timely notice of appeal on 15 June 2015.

Analysis

I. Negligence Claim

[1] Plaintiff first argues that the trial court erred in granting summary judgment in favor of Defendant on Plaintiff's negligence claim because Baldwin's affidavit raised a genuine issue of material fact that required resolution by a factfinder at trial. We disagree.

"The entry of summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. An order granting summary judgment is reviewed *de novo* on appeal." *Martin Marietta Materials, Inc. v. Bondhu, LLC*, __ N.C. App. __, __, 772 S.E.2d 143, 145 (2015) (internal citation and quotation marks omitted).

It is well settled that

> [o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. It is also clear that the opposing party is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact. More than allegations are required because anything less would allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Van Reypen Assocs., Inc. v. Teeter, 175 N.C. App. 535, 540, 624 S.E.2d 401, 404-05 (internal citations and quotation marks omitted), *disc. review improvidently allowed*, 361 N.C. 107, 637 S.E.2d 536 (2006).

Rule 56(e) of the North Carolina Rules of Civil Procedure addresses the requirements for affidavits submitted in connection with a motion for summary judgment and provides, in pertinent part, as follows:

> (e) Form of affidavits; further testimony; defense required. — Supporting and opposing affidavits *shall be made on personal knowledge*, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

N.C.R. Civ. P. 56(e) (emphasis added).

In applying Rule 56(e), our appellate courts have held that

> [a]ffidavits supporting a motion for summary judgment must be made on personal knowledge. Although a Rule 56 affidavit need not state specifically it is based on personal knowledge, its content and context must show its material parts are founded on the affiant's personal knowledge. Our courts have held affirmations based on personal awareness, information and belief, and what the affiant thinks, do not comply with the personal knowledge requirement of Rule 56(e). Knowledge obtained from the review of

> records, qualified under Rule 803(6), constitutes personal knowledge within the meaning of Rule 56(e).

Hylton v. Koontz, 138 N.C. App. 629, 634-35, 532 S.E.2d 252, 256 (2000) (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001).

This Court has previously stated that

> [t]he Act addresses logistical problems which arise when excavation is necessary in the vicinity of a utility company's underground cable lines. . . . For a utility to undertake excavations, it must know the position of other cables or lines in an area. The Act outlines the framework that should be followed prior to excavating in an area where underground utility lines are present. Generally, a person planning to excavate near underground utility lines must provide at least two days' notice to the utility. Once notified, the onus is on the utility company to locate and describe all of its lines to the excavating party. *Failure to identify proprietary cable lines, after a proper request by the excavating party, absolves an excavator from liability for damage to the notified utility's line.*

Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 179, 468 S.E.2d 66, 68 (1996) (internal citations omitted and emphasis added).

In the present case, the resolution of Plaintiff's negligence claim hinged on whether the marking procedure contemplated by the Act was followed. In essence, Plaintiff alleges that the Cable was properly marked at the time of the injury, while Defendant has presented evidence to the contrary.

At the summary judgment stage, Defendant submitted the affidavit of Hamilton, its lead driller at the site of the 7 March 2013 excavation, who testified based on his personal knowledge that (1) advance notice was provided by Defendant to the owners of underground utilities in the area; (2) all lines in the area were marked with surface paint applied to the surface of the ground; and (3) "[t]here were no locate markings within 2½ feet (plus the width of the underground line) of the point of impact with the underground line as set forth hereinabove. In fact, the nearest marking was at least 6 feet from this particular point of impact."

Defendant also offered the affidavit of Bowles, who stated that he too had personal knowledge of the events of 7 March 2013 and that (1) "[t]here were no lines, paint, marks, locates or other indication anywhere

in the vicinity of the point of impact with the fiber optic line to notify [Defendant] or others that the line was buried in that location"; and (2) "[t]here were no locate markings within 2½ feet (plus the width of the underground line) of the point of impact with the underground line as set forth hereinabove. In fact, there were no locates at all in the vicinity of this particular point of impact."

The only evidence offered by Plaintiff in response to Defendant's summary judgment motion was the affidavit of Baldwin.[2] In his affidavit, Baldwin simply makes the conclusory statement that "[a]ccording to photographs and video, the fiber optic cables were clearly marked and delineated." Nowhere in the affidavit does Baldwin explain the specific "photographs and video" to which he is referring. Nor does the affidavit provide any indication that he actually possessed personal knowledge on this issue or that the statements in his affidavit were based upon records he reviewed that were admissible under Rule 803(6) of the North Carolina Rules of Evidence.

We find our opinion in *Eugene Tucker Builders, Inc. v. Ford Motor Co.*, 175 N.C. App. 151, 622 S.E.2d 698 (2005), *cert. denied*, 360 N.C. 479, 630 S.E.2d 926 (2006), instructive. In that case, the plaintiff leased a vehicle manufactured by Ford Motor Company ("Ford") from an authorized Ford dealership. Ford provided an express warranty for the vehicle only covering damage resulting from the installation of parts manufactured by *Ford-authorized* manufacturers. *Id.* at 152, 622 S.E.2d at 699.

The plaintiff had an anti-theft device installed in the vehicle that was manufactured by Directed Electronics, Inc. ("DEI"). The device caused severe damage to the vehicle's electronics system, and the plaintiff sued Ford based on the express warranty. *Id.* Ford filed a motion for summary judgment supported by the affidavit of Jim Cooper, a parts supplier for Ford, who testified that DEI was not a Ford-authorized manufacturer and that, for this reason, the anti-theft device was not covered under the express warranty. *Id.* at 155, 622 S.E.2d at 701. In response, the plaintiff submitted the affidavit of James Rhyne, a former manager of the third-party company that installed the DEI anti-theft device, stating his *belief* that DEI was an authorized manufacturer of Ford electronic systems. *Id.* at 153-55, 622 S.E.2d at 699-701. The trial court granted Ford's motion. *Id.* at 153, 622 S.E.2d at 699-700.

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2. We note that Baldwin's job title is vice-president of legal affairs for Plaintiff.

On appeal, we affirmed the trial court's order.

> After carefully reviewing the record, we conclude that plaintiff's affidavit does not create an issue of material fact regarding whether the manufacturer of the anti-theft device, DEI, was a Ford-authorized manufacturer. When affidavits are offered in opposition to a motion for summary judgment, they must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Here, Mr. Rhyne's affidavit does not indicate how he had personal knowledge that DEI is an authorized Ford parts manufacturer. It appears that the source of Mr. Rhyne's information is an exhibit attached to his affidavit, which is a diagram published by DEI illustrating how to wire an anti-theft bypass to a Ford vehicle. This document does not establish that DEI is a Ford-authorized manufacturer. The document was not published by Ford, and Mr. Rhyne avers no other affiliation with Ford Motor Company or Ford-authorized manufacturers. Also, Mr. Rhyne does not assert that his knowledge is based upon business records that he reviewed in the course of his employment. As the content of the Rhyne affidavit does not satisfy the personal knowledge requirement of Rule 56(e), it could not have been considered by the trial court in ruling on the summary judgment motion.

Id. at 156, 622 S.E.2d at 701 (internal citations, quotation marks, brackets, and ellipses omitted).

In our opinion, we contrasted Rhyne's affidavit with the affidavit from Cooper, noting that Cooper's affidavit "reveals that the affiant has personal knowledge of Ford-authorized manufacturers through employment positions. As the moving party, defendant has established that a non-Ford part was installed on plaintiff's vehicle and that this part is excluded from coverage under the express warranty." *Id.* at 156, 622 S.E.2d at 702.

Similarly, in the present case, Baldwin's affidavit does not state or otherwise provide any indication that his testimony was based on his personal knowledge of the marking of the Cable or of Defendant's excavation activities on 7 March 2013. Moreover, Baldwin's affidavit consists almost entirely of verbatim (or almost verbatim) recitations of the allegations set forth in Plaintiff's complaint. The affidavit is

replete with conclusory statements — many of which contain purely legal conclusions.

We dealt with a similar situation in *Campbell v. Bd. of Educ. of Catawba Cty. Sch. Admin. Unit*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 878 (1986), in which we held as follows:

> Plaintiff's affidavit merely restating the allegations of the complaint consists of conclusory allegations, unsupported by facts. It thus does not suffice to defeat a motion for summary judgment. When the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment.

Id. at 498-99, 333 S.E.2d at 510 (internal citations, quotation marks, and brackets omitted).

We similarly conclude here that Baldwin's affidavit failed to create a genuine issue of material fact on the issue of whether Defendant was negligent. Unlike Baldwin, Hamilton and Bowles offered testimony based on their own personal knowledge, and their testimony established that the location of the Cable had not been properly marked. Their affidavits further demonstrate that Defendant complied with all relevant portions of the Act in performing its excavation work. Therefore, summary judgment was properly granted for Defendant as to Plaintiff's negligence claim.

II. Trespass Claim

[2] In a related argument, Plaintiff argues that the trial court erred in granting summary judgment to Defendant on its trespass claim. Once again, we disagree.

The elements of a trespass claim are "(1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass." *Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 289, 618 S.E.2d 768, 772 (2005) (citation and quotation marks omitted), *aff'd per curiam*, 360 N.C. 397, 627 S.E.2d 462 (2006). "[I]n the absence of negligence, trespass to land requires that a defendant intentionally enter onto the plaintiff's land." *Rainey v. St. Lawrence Homes, Inc.*, 174 N.C. App. 611, 614, 621 S.E.2d 217, 220 (2005).

As with its negligence claim, Plaintiff has failed to show a genuine issue of material fact with regard to its trespass claim. There is no suggestion in the record that Defendant lacked legal authorization to conduct the excavation activities at issue. Moreover, as discussed above, the admissible evidence of record established that the impact with the Cable was not intentional and instead resulted by accident as a result of the fact that the Cable was not properly marked. Moreover, Plaintiff tacitly acknowledged Defendant's right to engage in excavation activities by twice hiring a third-party to mark the Cable so that it would not be disturbed during Defendant's excavation activities. Accordingly, no valid trespass claim exists on these facts.[3]

Conclusion

For the reasons stated above, we affirm the order of the trial court granting summary judgment in favor of Defendant.[4]

AFFIRMED.

Judges CALABRIA and TYSON concur.

3. Given the unrebutted evidence that Plaintiff failed to properly mark the Cable, Defendant is also absolved from liability for damages on either of Plaintiff's theories due to the provision of the Act providing that "[f]ailure to identify proprietary cable lines, after a proper request by the excavating party, absolves an excavator from liability for damage to the notified utility's line." *Lexington Tel. Co.*, 122 N.C. App. at 179, 468 S.E.2d at 68.

4. Based on our resolution of this appeal on the grounds set forth herein, we need not address Defendant's alternative argument that Plaintiff was required to produce expert testimony as to the applicable standard of care Defendant should have employed in conducting its excavation activities. *See Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 196, 614 S.E.2d 396, 403 (2005) ("Since our determination of the foregoing issues [is] dispositive of this case on appeal, we need not address plaintiff's remaining assignments of error.").

STATE OF NORTH CAROLINA
v.
BRIAN JACK FRAZIER

No. COA15-1089

Filed 5 July 2016

1. Homicide—felony murder—instruction on premeditation denied—no intent to kill

Defendant was not entitled to an instruction on premeditation and deliberation in a felony murder prosecution where the victim was an infant who was repeatedly struck when she would not stop crying. There was no evidence of any specific intent to kill and the evidence did not support the requested instruction. Moreover, there was no theory that would have supported conviction on any lesser-included offense.

2. Homicide—instructions—underlying offense—automatism—evidence not sufficient

In a felony murder prosecution in which defendant was charged with killing a crying baby after he "snapped" and began punching the baby, there was not a conflict in the underlying evidence supporting a lesser-included offense where defendant's argument was based on the trial court's inclusion of an instruction on automatism. The only evidence of defendant's possible unconsciousness came from his statement to detectives; however, that statement, along with the autopsy evidence, was sufficient to raise a reasonable doubt about defendant's consciousness. Furthermore, defendant's inability to explain why he did certain things does not equate to being in a state of unconsciousness when he did them. Defendant gave a detailed confession, including a description of his actions, which was sufficient to prove he was conscious.

3. Homicide—felony murder—felonious child abuse—specific intent

The trial court did not err by denying defendant's request to instruct the jury on the intent required for the predicate felony (child abuse) in a felony murder prosecution. Felonious child abuse does not require any specific intent.

4. Homicide—felony murder—predicate offense—felonious child abuse—merger doctrine

The trial court did not err in a prosecution for felony murder based on felonious child abuse by denying defendant's motion to dismiss the felony murder charge under the felony murder merger rule. Felonious child abuse does not merge with first-degree murder because felonious child abuse requires proof of elements not required to prove first-degree murder and the merger rule does not apply to the motion to dismiss. The felony murder merger doctrine can apply to sentencing. Here, there was not a separate indictment or separate verdict for felonious child abuse, and the trial court properly sentenced defendant only for first-degree murder.

5. Homicide—felony murder—predicate felony—felonious child abuse

The trial court did not err in a prosecution for felony murder based on felonious child abuse by denying defendant's requested instruction that a single assault on a single victim could not serve as the predicate for felony murder. It is well settled that felonious child abuse with a deadly weapon (defendant's hands) may serve as the predicate felony for felony murder.

Appeal by defendant from judgment entered 8 April 2015 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 8 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

BRYANT, Judge.

Where the trial court did not err in instructing the jury on first-degree felony murder and the intent required for felonious child abuse as a predicate felony to felony murder, and where the trial court properly denied defendant's motion to dismiss based on the felony merger doctrine, we affirm the verdict of the jury and find no error in the judgment of the trial court.

In November 2012, twenty-year-old defendant Brian James Frazier was living with his girlfriend, Stefany Ash, in High Point, North Carolina.

Defendant and Ash had two children together, an eighteen-month-old boy and a thirteen-day-old baby boy named Kahn.[1] Defendant had taken time off from high school to help Ash with Baby Kahn, but had stayed up all night for several nights playing video games.

On the afternoon of 27 November 2012, around 3:00 PM, Guilford County Emergency Medical Services ("EMS") received a 911 call to respond to what they believed was the cardiac arrest of an approximately one-month-old child. EMS, High Point Fire Department, and Officer Matthew Blackmon of the High Point Police Department all responded to the call shortly after 3:00 PM. When the responders arrived, they had to knock and wait for defendant to unlock the door and let them in.

Defendant led EMS and Officer Blackmon to a room at the back of the house. They found a bruised infant, Baby Kahn, lying on its back in a bassinet. The 911 call had indicated that the baby's breathing difficulties had just occurred. However, Baby Kahn was cold to the touch, had no pulse, and rigor mortis had already set in. He was also very pale and bloated, with bruises on his chest.

Upon seeing Baby Kahn's body, Officer Blackmon concluded the child's death had not just occurred, and started an investigation. He called the violent crimes supervisor, set in motion the application for a search warrant, and asked defendant to step into the kitchen in order to separate him from Stefany Ash, who was also present and appeared upset.

Detectives Leonard and Meyer of the major crimes unit arrived at the house at approximately 3:30 PM. They took about five minutes to observe garbage, half-eaten food, and raw meat lying on the floor of the house, as well as a sink filled with dirty water, an open refrigerator, and a dirty or moldy high chair. Detective Meyer interviewed Ash while Detective Leonard asked defendant for background information about what occurred.

Defendant stated that the night before he had been playing video games all night until about 5:00 AM. As soon as defendant laid down to go to sleep, Baby Kahn began to stir and cry, and defendant explained that at this point he snapped and lost control. Defendant said he grabbed Baby Kahn by the neck with one hand while he struck him several times with his other hand. Defendant said he hit the baby in the head, body,

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1. The victim in this case is a deceased murder victim. Rules 3.1 and 4(e) of the Rules of Appellate Procedure therefore do not apply in this case. The surviving minor child is not named herein.

and arms. At this point in the conversation, defendant dropped his head in his hands and began to cry.

Defendant was taken to the police department. There he was arrested, then taken to an interview room where he waived the *Miranda* warnings given by Detectives Leonard and Meyer. Defendant talked at length and in detail regarding the manner in which he had caused his son's death. On 11 February 2013, defendant was indicted on one count of first-degree murder. The case came on for jury trial at the 30 March 2015 Session of the Guilford County Superior Court, the Honorable Richard L. Doughton, Judge presiding.

Defendant's interview with Detectives Leonard and Meyer was videotaped and played for the jury at trial and admitted into evidence as State's Exhibit 12. During the taped interview, defendant said he "snapped" and lost control, striking the baby in the head, body, and arms. Defendant said he was in high school, but had been staying home to take care of Baby Kahn and the other minor child while Ash healed from surgery after giving birth by C-section. Defendant told the detectives about several social workers and a doctor who regularly came to the house to help them, stating that these visits started after the first baby was born because someone had anonymously reported that the house they were living in had black mold.

Defendant recounted the events of the night before, saying he had stayed up all night playing video games for the past three or four nights, and right when he went to lay down to go to sleep, the baby woke up and started fussing. Defendant said he "guessed he just couldn't take it," "snapped," and "lost control." Defendant said he was not thinking; he was so exhausted he claimed it was as if he had blacked out. Defendant stated that he had never lost control like this with either of the children before, he did not use drugs or alcohol, and he had never been in trouble. He also did not think he had hurt Baby Kahn because the baby seemed to be breathing normally when defendant laid back down to go to sleep.

Defendant slept until about 2:00 PM the next afternoon. Ash got up first and said she was going to check on Baby Kahn and feed him. When she told defendant that Baby Kahn looked pale, defendant walked over to look at him and found the baby dead. After they discovered the baby was dead, Ash attempted to convince defendant to flee, but defendant claimed he did not want to do that, he knew he had done wrong and needed to pay for it.

Dr. Lauren Scott, a forensic pathologist in the Office of the Chief Medical Examiner, testified that she performed an autopsy on Baby

Kahn on 28 November 2012. The body had several external bruises: two bruises on the left forehead, one bruise to the side of the left eye, a small bruise on the right eyelid, a larger bruise on the central chest, a smaller bruise to the right of the center chest, and a small bruise on the left abdomen. There were also tiny hemorrhages in the lining of the eyes.

The internal examination revealed bruising within the abdominal cavity underlying the bruise on the outside. There was a tear or laceration on the underside of the liver and some bleeding from that tear into the capsule that surrounds the liver and into the abdominal cavity. Inside the scalp were several small bruises on the left forehead region and a large area of bleeding from the back to the top of the head across the midline, injuries consistent with blunt force trauma. There was also bleeding between the two membranes that surround the brain and between the brain surface and inner membrane. The distribution of bleeding on the brain indicated there were at least two different applications of blunt force injury to the head.

Dr. Scott's opinion as to the cause of death was blunt force trauma to the abdomen and head. Her opinion was that there were at least three instances of blunt force trauma applied to Baby Kahn—at least two separate injuries to the head and at least one, and up to three, injuries to the abdomen and chest region. Dr. Scott opined that death would likely have been instantaneous given the significant bleeding and injuries in the head.

At the close of the State's evidence and at the close of all the evidence at trial, defendant moved to dismiss the charge of felony murder, based on the State's asserted failure to provide evidence of the required *mens rea*, and based on the felony merger doctrine. Defendant also argued that the submission of the charge of felony murder would violate the Fifth, Sixth, and Fourteenth Amendments. The trial court denied these motions to dismiss.

On 8 April 2015, the jury found defendant guilty of first-degree murder. The trial court entered a sentence of life imprisonment without parole. Defendant appeals.

On appeal, defendant contends that the trial court erred by (I) denying defendant's requests for certain jury instructions on premeditation and deliberation; (II) instructing the jury that defendant did not need to intend to seriously injure the child; (III) denying defendant's motion to dismiss based on the felony merger doctrine; and (IV) denying

defendant's request to instruct the jury that a single assault on a single victim cannot serve as the predicate felony for felony murder.

I

[1] Defendant first argues that the trial court erred by denying defendant's request to instruct the jury on first-degree murder based on premeditation and deliberation and on other lesser included offenses. He also argues that an instruction based on premeditation and deliberation was appropriate because the evidence of the underlying felony was in conflict. We disagree.

"Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) (citation omitted). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Epps*, 231 N.C. App. 584, 586, 752 S.E.2d 733, 734 (2014) (alteration in original) (citation omitted), *aff'd*, 368 N.C. 1, 769 S.E.2d 838 (2015). Here, defendant was tried and convicted for first-degree murder based on felony murder.

Felony murder is defined as "[a] murder which shall be . . . committed in the perpetration or attempted perpetration of [certain named felonies] . . . with the use of a deadly weapon" and is considered "murder in the first degree . . . ." N.C. Gen. Stat. § 14-17(a) (2015). "[P]remeditation and deliberation are not elements of the crime of felony-murder." *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976).

During the charge conference, defendant requested that the jury be instructed on premeditation and deliberation with lesser offenses included, as well as on felony murder. Defendant argued that preventing the defense from arguing premeditation and deliberation "denie[d] [defendant] due process, equal protection, cruel and unusual punishment . . . ." The trial court denied defendant's request.

We hold that the trial court did not err in denying defendant's request for an instruction on premeditated first-degree murder, because there was no evidence that defendant possessed a "specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (citations omitted). "Specific intent to kill . . . is . . . a necessary constituent of the elements of premeditation and deliberation." *State v. Jones*, 303 N.C.

500, 505, 279 S.E.2d 835, 838–39 (1981) (citation omitted); *see also State v. Holt*, 342 N.C. 395, 397–98, 464 S.E.2d 672, 673 (1995) ("Premeditation and deliberation are necessary elements of first-degree murder based on premeditation and deliberation . . . . Premeditation means that the defendant thought out the act beforehand for some length of time, however short. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.").

Indeed, defense counsel, in requesting the instruction, acknowledged that the evidence did not meet the sufficiency standard for first-degree murder: "I'm not suggesting [the facts are] sufficient to convict [on first-degree murder], but I think there's enough from which a juror -- jury may want to address it . . . ." Defendant's counsel argued during the charge conference that because the choking and strangling of Baby Kahn took place after defendant heard the baby making noises, this might mean defendant was not unconscious or "blacked out" and therefore there was premeditation and deliberation on the part of defendant. Notwithstanding defendant's argument, which was rejected by the trial court, all of the evidence at trial tended to show that defendant "snapped," not that his actions were premeditated. Further, the evidence showed that even when defendant was pressed by the detectives to admit he planned his actions, defendant insisted he did not plan them, that he was not thinking, and that he "just snapped."

Here, there was no evidence of any specific intent to kill. Rather, the evidence consistently showed that defendant "lost control" and punched two-week-old Baby Kahn. Because there was no evidence of specific intent to kill, the existing evidence was insufficient to support an instruction on first-degree murder based on premeditation and deliberation.

In addition, there was no theory that would have supported conviction of any lesser-included offense (second-degree murder, involuntary or voluntary manslaughter) of first-degree murder. Second-degree murder cannot be a lesser-included offense of first-degree murder based on felony murder alone, because malice is not an element of felony murder. *State v. Golden*, 143 N.C. App. 426, 434–35, 546 S.E.2d 163, 169 (2001) (citing *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982), *overruled on other grounds*, *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). There is also no offense of second-degree felony murder in this jurisdiction. *Id.* at 435, 546 S.E.2d at 169 (citation omitted).

We realize defendant argued zealously at trial, and now on appeal, that the trial court should have given a first-degree murder instruction based on premeditation and deliberation, and further realize that defendant's trial counsel's only reason for pressing for the instruction was to have the option of lesser-included offenses—second-degree murder, manslaughter, etc.—presented to the jury for their consideration. However, defendant's arguments, no matter how strongly stated, do not change the law. Felony murder was the only first-degree murder theory on which the trial court could properly instruct the jury.

"[W]hen the law and evidence justify the use of the felony murder rule," as it does here, "the State is not required to prove premeditation and deliberation, and neither is the [trial] [c]ourt required to submit to the jury second degree murder or manslaughter unless there is evidence to support [such lesser offenses]." *See State v. Strickland*, 307 N.C. 274, 292, 298 S.E.2d 645, 657 (1983) (citation and quotation mark omitted), *overruled on other grounds*, 317 N.C. 193, 344 S.E.2d 775 (1986). Defendant's argument that he was entitled to an instruction on premeditation and deliberation is overruled.

[2] Defendant also argues that because the underlying felony (here, child abuse) was in conflict, such conflicting evidence supports a lesser-included offense. When the State proceeds on a theory of felony murder only, the question "turns on whether the evidence of [the underlying felony] was in conflict." *State v. Gwynn*, 362 N.C. 334, 337, 661 S.E.2d 706, 707 (2008) (citation omitted). Specifically, defendant contends that because the trial court submitted the pattern jury instruction on automatism, it must have found evidence that supported the jury's possible finding of lack of *mens rea* required for the underlying felony.

"The practical effect of automatism is that the 'absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.' " *State v. Boggess*, 195 N.C. App. 770, 772, 673 S.E.2d 791, 793 (2009) (quoting *State v. Fields*, 324 N.C. 204, 208, 376 S.E.2d 740, 742 (1989)). "The rule in this jurisdiction is that where a person commits an act without being conscious thereof, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious." *State v. Jerrett*, 309 N.C. 239, 264, 307 S.E.2d 339, 353 (1983) (citations omitted). "[A]utomatism . . . is a complete defense to a criminal charge . . . and . . . the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence . . . ." *State v. Cadell*, 287 N.C. 266, 290, 215 S.E.2d 348, 364 (1975).

Here, the only evidence of defendant's possible unconsciousness arose from defendant's statement to detectives where he indicated he was exhausted from playing video games and it "was if he blacked out." However, defendant's statements to detectives, along with the medical evidence of the condition of Baby Kahn's body at autopsy, was sufficient to show beyond a reasonable doubt that defendant was conscious when he hit Baby Kahn.

Furthermore, a defendant's inability to explain why he did certain criminal acts does not equate to having been in a state of unconsciousness at the time he committed those acts. In other words, defendant's inability to explain *why* he assaulted the child did not render him unable to explain *what* he did to Baby Kahn. *See State v. Boyd*, 343 N.C. 699, 714, 473 S.E.2d 327, 334–35 (1996) (finding the defendant failed to support defense of automatism where he had given a detailed recollection of his actions to police on the day of the murder and only later claimed not to recall the events); *State v. Fisher*, 336 N.C. 684, 705, 445 S.E.2d 866, 877–78 (1994) (holding defendant's detailed statement the day of the murder belied his claim of unconsciousness).

In the instant case, defendant gave a detailed confession to police, including a description of his actions—how he held the baby around the neck with one hand while punching him with the other. We think defendant's own detailed statement is sufficient evidence to prove defendant was conscious when he committed the acts charged. Even on appeal, defendant highlights only his inability to articulate a *reason* for the assault and not any inability to *recall* the events. Defendant's asserted defense of automatism does not render any element of felonious child abuse in conflict in this case. Accordingly, where defendant's proposed instruction was not supported by the evidence, defendant has shown no error. This argument is overruled.

II

[3] Defendant next argues that the trial court erred by denying defendant's request to instruct the jury on the intent required for the predicate felony to felony murder. Specifically, defendant contends the trial court was required to instruct the jury that defendant must have intended to inflict serious physical injury on the child, as opposed to intentionally assaulting the child which proximately resulted in serious physical injury, and the trial court's failure to so instruct violated defendant's constitutional right to due process and to be free of cruel or unusual punishment. We disagree.

To sustain a conviction for felonious child abuse, the State must prove that defendant is "[a] parent or any other person providing care to *or* supervision of a child less than 16 years of age" and that the defendant "intentionally inflict[ed] any serious physical injury upon or to the child or . . . intentionally commit[ed] an assault upon the child which result[ed] in any serious physical injury to the child." N.C. Gen. Stat. § 14-318.4(a) (2015) (emphasis added). "In felonious child abuse cases, the State is not required to prove that the defendant specifically intended that the injury be serious." *State v. Krider*, 145 N.C. App. 711, 713, 550 S.E.2d 861, 862 (2001) (citations and quotation marks omitted). " 'This crime does not require the State to prove any specific intent on the part of the accused.' " *State v. Perry*, 229 N.C. App. 304, 319, 750 S.E.2d 521, 533 (2013) (quoting *State v. Pierce*, 346 N.C. 471, 494, 488 S.E.2d 576, 589 (1997)).

Felony murder where the predicate felony is felonious child abuse requires the State to prove that "the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon." *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. "When a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." *Id.* Furthermore, to support a felony murder conviction based on felonious child abuse, the State does not have to show that a defendant intended for the injury to be serious; the State must only show that the defendant intended to assault the child, which resulted in serious injury. *See Perry*, 229 N.C. App. at 319, 750 S.E.2d at 533 (holding "that the record contained sufficient circumstantial evidence to support a determination that [the d]efendant used his hands as a deadly weapon" on a 14-month-old child).

Indeed, in *Perry*, the defendant appealed his conviction for first-degree murder to this Court, arguing that " 'felony child abuse is not a viable underlying felony' sufficient to support a conviction for first degree murder under the felony murder rule[,]" while at the same time acknowledging " 'that this issue has been decided adversely [to his position] by the Court of Appeals[.]' " *Id.* at 322, 750 S.E.2d at 534 (alteration in original); *see Krider*, 145 N.C. App. at 714, 550 S.E.2d at 863 (affirming the defendant's conviction for first-degree murder based on the felony murder rule where "defendant actually intended to commit the underlying offense (felonious child abuse) with the use of her hands as a deadly weapon").

As defendant's argument on this point is practically identical to the defendant's argument in *Perry*, and because of well-established precedent that "the State is not required to prove any specific intent on the part of the accused" for the crime of felony murder based on child abuse, we overrule defendant's argument.

III

[4] Defendant next argues that the trial court erred by denying his motion to dismiss the felony murder charge for insufficiency of the evidence because the felony murder merger doctrine prevents conviction of first-degree murder when there is only one victim and one assault. Defendant contends the trial court's failure to dismiss the felony murder charge violated his constitutional rights as he was deprived of life and liberty without due process of law. We disagree.

Felony murder elevates a homicide to first-degree murder if the killing is committed in the perpetration or attempted perpetration of certain felonies or any "other felony committed or attempted with the use of a deadly weapon[.]" N.C.G.S. § 14-17(a); *see also State v. Abraham*, 338 N.C. 315, 331–32, 451 S.E.2d 131, 139 (1994) ("[T]he legislature clearly *intended* . . . that felony murder included a killing committed during the commission or attempted commission of a felony 'with the use of a deadly weapon.' " (emphasis added) (quoting *State v. Wall*, 304 N.C. 609, 614, 286 S.E.2d 68, 72 (1982)). "Felony murder, by its definition, does not require intent to kill as an element that must be satisfied for a conviction." *State v. Cagle*, 346 N.C. 497, 517, 488 S.E.2d 535, 548 (1997) (citation and quotation marks omitted).

Here, the offense of felonious child abuse, where defendant's hands were a deadly weapon, served to elevate the killing to first-degree murder under the felony murder rule. Felonious child abuse does not merge with first-degree murder because the crime of felonious child abuse requires proof of specific elements which are not required to prove first-degree murder: that the victim is a child under sixteen, and that defendant was a parent or any other person providing care to or supervision of the child. The crime of felonious child abuse is among those offenses that address specific types of assaultive behavior that have special attributes distinguishing the offense from other assaults that result in death. *See, e.g.*, *State v. Coria*, 131 N.C. App. 449, 456–57, 508 S.E.2d 1, 6 (1998) (holding a defendant may be convicted of and punished for assault with a deadly weapon with intent to kill and for assault with a firearm on a law enforcement officer arising out of the same shooting because each offense contains an element not present in the other). Therefore, our

courts have declined to apply the "merger doctrine" in cases where the underlying felony (here, child abuse) was not an offense included within the murder.

However, defendant's merger argument might apply to sentencing (as opposed to his motion to dismiss). "The felony murder merger doctrine provides that when a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction" for purposes of sentencing. *State v. Rush*, 196 N.C. App. 307, 313–14, 674 S.E.2d 764, 770 (2009) (citation and quotation marks omitted). Therefore, "when the sole theory of first-degree murder is the felony murder rule, a defendant cannot be *sentenced* on the underlying felony in addition to the *sentence* for first-degree murder[.]" *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996) (emphasis added) (citation omitted), *abrogated by State v. Millsaps*, 365 N.C. 556, 572 S.E.2d 770 (2002).

> The merger doctrine does not preclude indictments for both the murder and the underlying felony, nor a guilty verdict for both; rather it requires that, *if a defendant is found guilty of both felony murder and the underlying felony*, the judgment on the underlying felony is arrested, and "merges" into the felony murder conviction.

State v. Juarez, ___ N.C. App. ___, ___, 777 S.E.2d 325, 329 (2015), *review allowed*, *writ allowed*, ___ N.C. ___, 781 S.E.2d 473 (2016).

In the instant case, there was no separate indictment and no separate verdict for the underlying offense of felony child abuse. The jury had only to decide whether defendant was guilty of first-degree murder. The verdict was guilty as to one count of first-degree murder. Defendant was sentenced accordingly. Thus, to the extent that defendant's argument is that he cannot be convicted of felony murder where the underlying felony is child abuse, we reaffirm our analysis in Section II and overrule defendant's argument. *See Perry*, 229 N.C. App. at 322, 750 S.E.2d at 534 (upholding felony murder based on felonious child abuse where hands used as deadly weapon); *Krider*, 145 N.C. App. at 714, 550 S.E.2d at 863 (affirming the "defendant's conviction for first-degree murder based on the felony rule" where "the State proved be-yond a reasonable doubt that the defendant actually intended to commit the under-lying offense (felonious child abuse) with the use of her hands as a deadly weapon").

The trial court did not *sentence* defendant for both first-degree murder and felonious child abuse as the underlying offense of felonious child

abuse was an element of first-degree murder and merged with defendant's first-degree murder conviction. Accordingly, as the trial court did not err in denying defendant's motion to dismiss, and properly sentenced defendant on felony murder, defendant's argument is overruled.

IV

[5] Lastly, defendant argues that the trial court erred by denying defendant's request to instruct the jury that a single assault on a single victim cannot serve as the predicate felony for felony murder. Defendant contends the trial court's denial of this request to instruct the jury that separate and distinct acts were necessary to find felony murder violated defendant's constitutional rights to a fair trial by a unanimous verdict, due process of law, and freedom from cruel and unusual punishment. We disagree.

Defendant had filed a written request for a special jury instruction that a single assault on a single victim cannot serve as the predicate felony for felony murder. The trial court denied defendant's request.

"[R]equested instructions need only be given in substance if correct in law and supported by the evidence." *State v. McNeill*, 360 N.C. 231, 250, 624 S.E.2d 329, 341–42 (2006) (alteration in original) (quoting *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004)). The trial court's failure to give a requested instruction is reviewed *de novo*. *Osorio*, 196 N.C. App. at 466, 675 S.E.2d at 149.

As shown in Section III, *supra*, it is well-settled that felonious child abuse with a deadly weapon (here, defendant's hands) may serve as the predicate felony for felony murder. *See Perry*, 229 N.C. App. at 322, 750 S.E.2d at 534; *Krider*, 145 N.C. App. at 714, 550 S.E.2d at 863; *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. Accordingly, the trial court did not err by denying defendant's requested instruction as it was not a correct statement of the law. Defendant's argument is overruled.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
JAMISON CHRISTOPHER GOINS

No. COA15-1183

Filed 5 July 2016

Search and Seizure—traffic stop—suspicion of drug activity

Where officers in a marked, visible patrol vehicle observed defendant's car slowly drive through an apartment complex toward a building that had been identified as a place frequently used for drug sale and distribution, and they simultaneously observed a male appear in front of the building, see their patrol vehicle, and make a loud warning noise, immediately after which the vehicle accelerated and quickly exited the complex, the Court of Appeals held that the trial court erred by denying defendant's motion to suppress evidence obtained in a subsequent stop of defendant by the officers.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 29 May 2015 by Judge Richard S. Gottlieb in Superior Court, Guilford County. Heard in the Court of Appeals 31 March 2016.

Attorney General Roy Cooper, *by Assistant Attorney General Shawn R. Evans*, *for the State.*

Willis Johnson & Nelson PLLC, *by Drew Nelson*, *for Defendant.*

McGEE, Chief Judge.

Jamison Christopher Goins ("Defendant") was indicted on 8 September 2014 for possession of a firearm by a felon, possession with intent to sell or deliver marijuana, felony possession of marijuana, and possession of drug paraphernalia. The charges against Defendant resulted from evidence obtained following a stop of Defendant's vehicle, a Hyundai Elantra ("the Elantra"), just after midnight on the morning of 14 July 2014. Officer A.T. Branson ("Officer Branson") and Officer T.B. Cole ("Officer Cole") (together, "the officers"), of the Greensboro Police Department, were patrolling in the vicinity of the Spring Manor Apartment Complex ("the apartment complex") late on 13 July 2014 and

into 14 July 2014. At some time prior to 14 July 2014, Officer Branson was talking to the manager of the apartment complex concerning an unrelated matter when the manager stated to him: " 'The apartment complex is getting bad again,' . . . and she also mentioned that she received word from residents in the apartment complex that the occupants of Apartment 408 were involved in both the sale and use of illegal narcotics." "Apartment 408" was actually a building comprised of multiple apartments. Both officers testified the apartment complex was situated in a high-crime drug area, and Officer Cole referred to the apartment complex as "basically an open-air drug market."

Just after midnight on 14 July 2014, the officers were driving a marked police car ("the police car") and decided to drive through the parking lot of Spring Valley Shopping Center ("the shopping center"), which was directly across the street from the apartment complex. Officer Branson was driving the police car, and he turned the police car so that its headlights were focused in the direction of the apartment complex. At the suppression hearing, Officer Cole testified:

> Not long after I began looking, we noticed a white Hyundai Elantra pull into the [apartment] complex and proceed very slowly through.
>
> I observed no one out in the parking lot, no other vehicles running. As I made – as I watched the Elantra and it came around the u-shaped driveway, I noticed an individual [("the man")] standing outside building 408. I advised Officer Branson to pay attention to [the man] and the [Elantra].
>
> As [the Elantra] came around the corner and became – or drove closer to [the man] and that building, 408, I noticed [the man] turn and look towards our police car, because our headlights at that point had basically turned to the point that we were lighting his direction.
>
> He looked at us, looked back at the Elantra, looked at us again, and then shouted something at the passenger side, whatever – that was the side facing him – toward the Elantra. At that point [the man] began to back away and head back into the apartment complex.
>
> The [Elantra] sped up and pulled out of the parking lot. I told Officer Branson to stick with the [Elantra], because you can't get both. After that we decided, based on the

> totality of the circumstances and the reasonable suspicion that we had at that time, that we would go ahead and conduct a traffic stop on the [Elantra].[1]

Officer Branson testified he observed the Elantra driving slowly around the "U-shaped" drive of the apartment complex parking lot; observed the man standing outside building 408, illuminated by the headlights of the police car; observed the man "look in [the] direction [of the police car] and look back at the . . . Elantra, which was [by then] almost in front of [the man;]" was informed by Officer Cole that Officer Cole had "heard someone yell[;]" then observed the Elantra increase its speed and "quickly" exit the apartment complex parking lot; and observed the man turn around and enter apartment building 408. The officers then initiated the stop of the Elantra based upon a belief that there was reasonable suspicion that the occupants of the Elantra and the man were about to conduct an illegal drug transaction.[2] As a result of this stop, the officers discovered that Defendant was in possession of a firearm, marijuana, and drug paraphernalia.

Defendant moved to suppress all evidence obtained as a result of the stop based upon his argument that there was not reasonable suspicion sufficient to justify the stop. Defendant's motion was heard on 13 April 2015, and was denied by order entered 15 April 2015. Defendant preserved his right to appeal the denial of his motion to suppress, and entered guilty pleas for the charges of possession of a firearm by a felon, possession with intent to sell or distribute marijuana, and possession of drug paraphernalia. The charge of possession of marijuana was dismissed pursuant to the plea agreement. Defendant was sentenced to a cumulative eighteen to forty months, the sentences were suspended, and Defendant was placed on supervised probation. Defendant appeals.

Defendant argues that the trial court erred in denying his motion to suppress all evidence obtained pursuant to the stop of the Elantra on 14 July 2014. We agree.

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1. The dissenting opinion cites additional testimony by Officer Cole that the man standing in front of building 408 "warned [Defendant] that we were across the street, and they drove out and left[,]" and that the man "yelled something to them, which caused them to speed up and leave the complex[.]" It is clear from all the testimony that Officer Cole suspected or believed that the man may have warned Defendant of police presence. There is not record evidence to support any definitive statement that the man warned Defendant of police presence, or that Defendant understood any "yell" from the man to be a warning of police presence.

2. The officers could not see inside the Elantra, so they did not know how many occupants it contained, nor could they observe any actions of Defendant, who was in fact the sole occupant.

Defendant specifically argues the following: (1) the record evidence did not support the trial court's finding that Defendant's actions constituted "flight," (2) that the trial court erred in that there was insufficient evidence of any nexus between the police presence and Defendant's action in exiting the parking lot of the apartment complex – and that there was no evidence, nor finding, that Defendant noticed the officers across the street, and (3) there was insufficient evidence supporting reasonable suspicion that criminal activity was afoot.

Our standard of review is as follows:

> "[T]he scope of appellate review of [a denial of a motion to suppress] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." A trial court's factual findings are binding on appeal "if there is evidence to support them, even though the evidence might sustain findings to the contrary." We review the trial court's conclusions of law *de novo*.

State v. Mello, 200 N.C. App. 437, 439, 684 S.E.2d 483, 486 (2009) (citations omitted).

Our Supreme Court has discussed the obligations and prerequisites for making a vehicle stop consistent with the Fourth Amendment:

> The Fourth Amendment protects individuals "against unreasonable searches and seizures." The North Carolina Constitution provides similar protection. A traffic stop is a seizure "even though the purpose of the stop is limited and the resulting detention quite brief." Such stops have "been historically viewed under the investigatory detention framework first articulated in *Terry v. Ohio*[.]" Despite some initial confusion following the United States Supreme Court's decision in *Whren v. United States*, . . . courts have continued to hold that a traffic stop is constitutional if the officer has a "reasonable, articulable suspicion that criminal activity is afoot."
>
> Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." Only " 'some minimal level of objective justification' " is required. This

> Court has determined that the reasonable suspicion standard requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." Moreover, "[a] court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists.

State v. Barnard, 362 N.C. 244, 246-47, 658 S.E.2d 643, 645 (2008) (citations omitted). "[T]he 'constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation[.]' " *State v. Heien*, 366 N.C. 271, 276, 737 S.E.2d 351, 354 (2012) (citations omitted). The trial court's determination of whether the totality of the circumstances supports a reasonable suspicion that the defendant might be engaged in criminal activity is a conclusion of law subject to *de novo* review. *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002). Furthermore, the trial court's conclusions of law based on the totality of circumstances " 'must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 121 (2002) (citations omitted).

In order to evaluate the trial court's conclusion that the stop in the present case was justified, we begin with the United States Supreme Court opinion *Illinois v. Wardlow*, 528 U.S. 119, 145 L. Ed. 2d 570 (2000), which recognized that "flight" from police presence can be a factor in support of finding reasonable suspicion:

> On September 9, 1995, Officers Nolan and Harvey were working as uniformed officers in the special operations section of the Chicago Police Department. The officers were driving the last car of a four-car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions. The officers were traveling together because they expected to find a crowd of people in the area, including lookouts and customers.
>
> As the caravan passed 4035 West Van Buren, Officer Nolan observed respondent Wardlow standing next to the building holding an opaque bag. Respondent looked in the direction of the officers and fled. Nolan and Harvey turned their car southbound, watched him as he ran through the gangway and an alley, and eventually cornered him on the street.

Id. at 121-22, 145 L. Ed. 2d at 574-75.

It was in this context that Officer Nolan decided to investigate Wardlow after observing him flee. An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a "high crime area" among the relevant contextual considerations in a *Terry* analysis.

In this case, moreover, it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. We conclude Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.

Such a holding is entirely consistent with our decision in *Florida v. Royer*, 460 U.S. 491 (1983), where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with

> the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Id. at 124-25, 145 L. Ed. 2d at 576-77 (citations omitted). In *Wardlow*, the uniformed officers involved were part of a four-car caravan entering an area of "heavy narcotics trafficking" for the purpose of policing illegal drug activity. The officers anticipated there would be large numbers of people in the area and expected "lookouts" to be present, ready to alert those persons of police presence. The officers observed the defendant standing near a building holding an opaque bag in his hands. When the defendant noticed the officers, he fled on foot. The United States Supreme Court discussed this behavior by the defendant as follows: "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* at 124, 145 L. Ed. 2d at 576. The *Wardlow* Court then clarified how this behavior was different than that in earlier opinions, in which it had made clear that, absent reasonable suspicion to detain a person, "[t]he person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 497-98, 75 L. Ed. 2d 229, 236 (1983) (citation omitted). Refusing to stop for the police and "going about one's business" cannot, absent more, justify detention. However:

> Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Wardlow, 528 U.S. at 125, 145 L. Ed. 2d at 577.

In the present matter, the trial court heard the testimonies of the officers. Officer Branson testified that he based his reasonable suspicion on the following:

> Time of night, prior info given by the manager about Apartment 408, and knowing that the complex is a high drug crime area, as well as the business in that intersection, suspicious travel, nobody entering or exiting the [Elantra] as it traveled through the apartment complex, being alerted, that an individual called out as the [Elantra] was traveling through and once that call was made by the individual the [Elantra] exited more rapidly than it began -- or than it was traveling, and then the quick exit upon that.

Officer Cole testified as follows:

> Not long after I began looking, we noticed a white Hyundai Elantra pull into the complex and proceed very slowly through. I observed no one out in the parking lot, no other vehicles running. As I made -- as I watched the Elantra and it came around the u-shaped driveway, I noticed an individual standing outside building 408. I advised Officer Branson to pay attention to that subject and the [Elantra]. As it came around the corner and became -- or drove closer to that subject and that building, 408, I noticed the subject turn and look towards our police car, because our headlights at that point had basically turned to the point that we were lighting his direction. He looked at us, looked back at the Elantra, looked at us again, and then shouted something at the passenger side, whatever -- that was the side facing him -- toward the Elantra. At that point he began to back away and head back into the apartment complex. The [Elantra] sped up and pulled out of the parking lot. I told Officer Branson to stick with the [Elantra], because you can't get both. After that we decided, based on the totality of the circumstances and the reasonable suspicion that we had at that time, that we would go ahead and conduct a traffic stop on the [Elantra].

As in *Wardlow*, the officers in the present case testified that Defendant was in an area of high crime and drug activity. However, the testimony in *Wardlow* suggested a much more active drug scene than the testimony in the present case. Officer Branson testified that the manager of the apartment complex had informed him:

> "The apartment is getting bad again," referring -- I'm assuming that she was referring to general activity, but she made specific mention to building 408 and that she believes the individuals, through what other residents have told her, that they are involved in the use and sale of illegal narcotics.

In *Wardlow*, the defendant was seen holding an opaque bag, which officers believed might contain illegal drugs. In the present case, although Defendant was seen driving in the direction of the apartment building that officers had been told might be the site of drug transactions, officers did not observe Defendant, nor the man, in possession of a container typical of the type used to carry illegal drugs.

Defendant's mere presence in an area known for criminal narcotics activity could not, standing alone, have provided the reasonable suspicion necessary for the officers to initiate the stop of the Elantra. As in *Wardlow*, the outcome in the present case is determined by the presence or absence of *additional* circumstances sufficient to rise to the level of reasonable suspicion. In *Wardlow*, the defendant fled on foot after observing uniformed police officers approaching, and the causal link between the approach of the police and the "unprovoked flight" of the defendant was easily drawn. In the present case, that link is not as readily ascertainable. Officers Branson and Cole both testified they could not see Defendant in his vehicle; they could not observe Defendant's behavior or actions, other than by observing the Elantra itself.

> Q. At the point that you were looking at . . . my client driving around the parking lot there. Did you see him with any guns or drugs?
>
> A. No, sir. I was across the street.
>
> Q. Okay. Did you see him with any paraphernalia?
>
> A. No, sir.
>
> Q. Okay. Did you see him with any money?
>
> A. This is why I conducted the investigative stop.
>
> Q. Did you see him try to destroy anything?
>
> A. No, sir.
>
> Q. Did you see him try to conceal anything?
>
> A. No, sir. But this all stems back to I can't see inside of a vehicle from across West Meadowview Road.

Further, there was no evidence to indicate Defendant personally observed the police car across the street before he left the parking lot of the apartment complex.

Evidence of flight is much clearer in situations such as those in *Wardlow*, where a defendant's actions consisted of running away from police on foot, than is the evidence in the present matter. Officer Branson testified that Defendant's driving "raised [his] *suspicion* to fleeing upon police presence, although there wasn't like a running flight or extreme changing from driving slowly through the [apartment] complex to speeding up as our police vehicle was observed." (Emphasis added). Defendant did not break any traffic laws in his exit from the apartment

complex; the stop of the Elantra was based solely on the officers' suspicion that Defendant had been driving through the apartment complex in order to make a drug-related transaction. As this Court has stated in *Mello*,

> merely leaving a drug-ridden area in a normal manner is not sufficient to justify an investigatory detention. *See In re J.L.B.M.*, 176 N.C. App. 613, 619–22, 627 S.E.2d 239, 243–45 (2006) (holding that information that a suspicious person wearing baggy clothes had been seen in a drug-ridden area and that he walked away upon the approach of law enforcement officers did not suffice to support an investigatory detention); *State v. Roberts*, 142 N.C. App. 424, 430, n. 2, 542 S.E.2d 703, 708, n. 2 (2001) (stating that "evidence that Defendant walked away from [a police officer] after he asked Defendant to stop is not evidence that Defendant was attempting to flee from [the police officer] and, thus, indicates nothing more than Defendant's refusal to cooperate"); *State v. Rhyne*, 124 N.C. App. 84, 89–91, 478 S.E.2d 789, 791–93 (1996) (holding that an officer lacked reasonable suspicion to frisk a defendant who was sitting in an area known to be a center of drug activity without taking evasive action or otherwise engaging in suspicious conduct); *State v. Fleming*, 106 N.C. App. 165, 170–71, 415 S.E.2d 782, 785 (1992) (holding that the fact that defendant was standing in an open area between two apartment buildings and walked away upon the approach of law enforcement officers did not justify an investigatory detention).

Mello, 200 N.C. App. at 449-50, 684 S.E.2d at 492.

In *Mello*, this Court held that the challenged stop was proper based upon the following facts:

> At approximately 10:30 a.m. on 26 August 2006, Officer Pritchard was patrolling the area of Chandler and Amanda Place when he observed a vehicle driven by Defendant stop about fifteen to twenty yards away. At that time, Officer Pritchard watched "two other individuals approach the vehicle putting their hands into the vehicle;" however, he did not see any exchange or transfer of money. Officer Pritchard had not previously seen Defendant, but he recognized the two men standing outside the vehicle. He did not, however, know their names or whether he had previously arrested

> them. Officer Pritchard characterized the area of Chandler and Amanda Place as "a very well-known drug location" where he had previously made drug-related arrests.
>
> Based on his observation of the interaction between Defendant and the two individuals who approached his vehicle, Officer Pritchard suspected that he had witnessed a "drug transaction," something he had seen on numerous prior occasions. After seeing the episode at Defendant's automobile, Officer Pritchard drove a short distance before turning around. At that point, the two individuals fled the area, with one of them quickly entering a house. In addition, Defendant started driving away from the area in the opposite direction from that in which Officer Pritchard was traveling. According to Officer Pritchard, Defendant did not commit any traffic offense as he attempted to drive away. Officer Pritchard turned around again and stopped Defendant's vehicle.

Id. at 438, 684 S.E.2d at 485. The *Mello* Court reasoned:

> The fact that the two pedestrians fled in the immediate aftermath of an interaction with Defendant that could be reasonably construed as a hand-to-hand drug transaction which took place in "a well[-]known drug location with high drug activity" would clearly have raised a reasonable suspicion in the mind of a competent and experienced law enforcement officer that further investigation was warranted; the fact that Defendant did not drive away at a high rate of speed or take some other obvious evasive action himself does not change that fact. The federal and state constitutions do not, under existing decisional authority, require more in order for a valid investigatory detention to take place.

Id. at 450-51, 684 S.E.2d at 492-93. These factors are similar to those relied upon in *Wardlow* – except that the flight from the police was by the defendant in *Wardlow*, whereas in *Mello* the flight was by the individuals who were conducting the suspicious activity with the defendant.

By contrast, in the present case, the officers suspected that Defendant *might* be approaching the man outside building 408 to conduct a drug transaction, but unlike in *Mello*, Defendant and the man were not observed conducting any suspicious activity together. The man standing

outside building 408 did not approach the Elantra and did not reach his hand inside the Elantra. Although Officer Cole testified he suspected the man saw the police car and then yelled a warning to Defendant, the man and Defendant were never in close contact with each other. As with the defendant in *Mello*, Defendant in the present case drove away from the scene in a lawful manner. However, unlike in *Mello*, the man standing near the Elantra did not flee upon seeing the police – he simply turned around and walked into the apartment building. The manner in which Defendant left the parking lot of the apartment complex cannot be reasonably described as "headlong flight." In *Wardlow*, *Mello*, and other cases in which "flight" has been used to render legal a stop that would have otherwise been illegal, the officers readily observed actual flight, and based their reasonable suspicion of criminal activity upon a totality of circumstances which included actual observed flight.

The dissenting opinion objects to our distinction between "actual flight" and "suspected flight." We simply make a distinction between evidence sufficient to support a finding that a defendant was attempting to evade police contact and evidence that can only support a suspicion or conjecture that a defendant was attempting to evade police contact. Suspicion or conjecture that a defendant might have been attempting to flee police presence, absent additional suspicious circumstances, is insufficient to support reasonable suspicion that someone leaving a known drug area was engaged in criminal activity. *See*, *e.g.*, *In re J.L.B.M.*, 176 N.C. App. 613, 621-22, 627 S.E.2d 239, 245 (2006); *State v. Fleming*, 106 N.C. App. 165, 170-71, 415 S.E.2d 782, 785 (1992). In each of the cases cited in the dissenting opinion there were additional elements involved, which served to raise what could have been categorized as a mere suspicion of alleged flight to a reasonable inference that flight had actually occurred. *State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850 (2015) (emphasis added) ("In making this determination, we are mindful of the dangers identified by defendant in his brief and at oral argument of making the simple act of walking in one's own neighborhood a possible indication of criminal activity. Here, defendant was walking in, and "the stop occurred in[,] a 'high crime area' [which is] among the relevant contextual considerations in a *Terry* analysis." However, we do not hold that those circumstances, standing alone, suffice to establish the existence of reasonable suspicion. Here, in contrast, the trial court based its conclusion on more than defendant's presence in a high crime and high drug area. The findings of fact show defendant stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions that had been the *site of many narcotics investigations*; defendant and Benton *split up and walked in opposite directions*

upon seeing a marked police vehicle approach; they came back very near to the same location once the patrol car passed; and they walked apart a second time upon seeing Officer Brown's return.[3] We conclude that these facts go beyond an inchoate suspicion or hunch[.]"); *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (emphasis added) ("1) defendant was seen in the midst of a group of people congregated on a corner known as a 'drug hole'; 2) Hedges had had the *corner under daily surveillance for several months*; 3) Hedges knew this corner to be a center of drug activity because he had made *four to six drug-related arrests there in the past six months*; 4) Hedges was aware of other arrests there as well; 5) defendant was a *stranger* to the officers [who had been surveilling this corner for months]; 6) *upon making eye contact* with the uniformed officers, defendant *immediately moved away*,[4] behavior that is evidence of flight[.]"); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (emphasis added) ("Defendant left a suspected drug house *just before the search warrant was executed*. Defendant set out on foot and took *evasive action* when he *knew he was being followed*. And, at the suppression hearing, Detective Sholar testified that defendant had *exhibited nervous behavior*."). Each of these cases presents additional indicia of potential criminal activity and flight absent from the case presently before us.

Further, there must be some nexus between a suspect's "flight" and the presence of the police, and that "flight" must reasonably demonstrate "evasive action." *State v. White*, 214 N.C. App. 471, 479-80, 712 S.E.2d 921, 928 (2011); *see also J.L.B.M.*, 176 N.C. App. at 622, 627 S.E.2d at 245 (holding there was no reasonable suspicion where an officer "relied solely on the dispatch that there was a suspicious person at the Exxon gas station, that the juvenile matched the 'Hispanic male' description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car"); *Fleming*, 106 N.C. App. at 170-71, 415 S.E.2d at 785 ("In the case now before us, at the time Officer Williams first observed defendant and his companion, they

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3. In *Jackson*, the defendant and his companion *twice* split up and walked away from a known high drug transaction location upon seeing the police car approaching. The evidence that the defendant in *Jackson* was engaging in evasive behavior was much stronger than the evidence presently before us.

4. In *Butler*, there was direct evidence of cause and effect between the defendant noticing the officers and his immediate decision to move away from the officers. Further, there was additional non-flight evidence supporting a finding of reasonable suspicion. In the present case, there is only conjecture that Defendant might have seen the police car across the street.

were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. The officer observed no overt act by defendant at this time nor any contact between defendant and his companion. Next, the officer observed the two men *walk* between two buildings, out of the open area, toward Rugby Street and then begin *walking* down the public sidewalk in front of the apartments. These actions were not sufficient to create a reasonable suspicion that defendant was involved in criminal conduct, it being neither unusual nor suspicious that they chose to walk in a direction which led away from the group of officers."); *cf.*, *State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850-51 (2015) (citation omitted) (Supreme Court reversed this Court's determination that no reasonable suspicion existed because "the trial court based its conclusion on more than defendant's presence in a high crime and high drug area. The findings of fact show defendant stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions that had been the site of many narcotics investigations; defendant and Benton split up and walked in opposite directions upon seeing a marked police vehicle approach; they came back very near to the same location once the patrol car passed; and they walked apart a second time upon seeing Officer Brown's return. We conclude that these facts go beyond an inchoate suspicion or hunch and provide a 'particularized and objective basis for suspecting [defendant] of [involvement in] criminal activity.' ").

In the present case, the officers observed activity which made them suspect that Defendant's actions in leaving the apartment complex might constitute flight, and then this *suspicion* of flight was used in turn to support the suspicion that criminal activity was afoot. We hold that the record evidence does not support the trial court's finding that Defendant "fled" from the officers. We further hold, on these facts, that the *suspicion* of flight from an area of known illegal narcotics activity, in the form of accelerating the Elantra in a lawful manner and driving away from the apartment complex, *without more*, did not justify the stop of the Elantra and the detention of Defendant. Contrary to the assertion in the dissenting opinion, our holding is not based solely upon the insufficiency of the evidence to support the trial court's finding of "flight," but upon the totality of the circumstances in this case. The circumstances in the present case do not include the kind of additional suspicious activity required to form a reasonable suspicion – unlike the circumstances present in *Wardlow*, *Jackson*, *Butler*, *Willis*, and similar opinions. We reverse the trial court's denial of Defendant's motion to suppress and remand to the trial court for further action consistent with this opinion.

REVERSED AND REMANDED.

Judge INMAN concurs.

Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

These experienced officers had reasonable, articulable, and objective suspicion to initiate a lawful investigatory stop of Defendant's vehicle, based upon the totality of the circumstances. The trial judge's underlying findings of fact are supported by competent evidence, and are conclusively binding on appeal. These findings support the trial judge's ultimate conclusions of law to deny Defendant's motion to suppress.

The majority's conclusion to reverse the trial court's order is unduly focused upon their characterization of Defendant's flight, while disregarding the "totality of the circumstances." Their conclusion ignores or minimizes all the surrounding factors, and is contrary to controlling decisions of the Supreme Court of the United States, the Supreme Court of North Carolina, and this Court. *See United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). I respectfully dissent.

I. Standard of Review

> [T]he scope of appellate review of [a denial of a motion to suppress] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted).

A trial court's findings of fact are binding on appeal "if there is evidence to support them, *even though the evidence might sustain findings to the contrary*." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (emphasis supplied) (citations and quotation marks omitted).

II. Analysis

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting

Brown v. Texas, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). A court must consider "the totality of the circumstances—the whole picture" to determine whether reasonable suspicion to make an investigatory stop exists. *Cortez*, 449 U.S. at 417, 66 L. Ed. 2d at 629.

An investigatory stop is reviewed for "specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Mello*, 200 N.C. App. 437, 443-44, 684 S.E.2d 483, 488 (2009) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *Mello*, 200 N.C. App. at 444, 684 S.E.2d at 488 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)).

The Supreme Court of the United States has held an individual's mere presence in a neighborhood frequented by drug users is an insufficient basis, standing alone, for concluding a defendant himself is engaged in criminal activity. *Brown*, 443 U.S. at 52, 61 L. Ed. 2d at 362-63. However, an individual's flight from uniformed law enforcement officers is an additional factual circumstance, within "the totality of the circumstances" which may be used to support a reasonable suspicion of criminal activity. *See State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 722-23 (1992) (holding defendant's presence on specific corner known for drug activity, coupled with fact that "defendant immediately moved away" upon making eye contact with officers, was sufficient suspicion for officers to make a lawful stop).

At Defendant's suppression hearing, Officer Cole testified he observed a vehicle enter the Spring Manor apartment complex. Officer Cole stated: "The car proceeded through the parking lot slowly, never stopping, though, at any particular building. Once I noticed the individual standing outside of [building] 408, it appeared that he was waiting on that vehicle." No other individuals were outside of building 408, the immediate area or in the parking lot at that time after midnight.

Officer Cole continued to testify: "As that car came around the corner, that's when [the individual standing outside] noticed us and looked at the vehicle. When the vehicle made the turn he yelled something to them, which caused them to speed up and leave the complex, and he backed up and went back into the apartment."

Officer Cole testified he believed "that car was coming to visit that individual standing outside 408" and intended "to either purchase or sell illegal drugs." The individual outside of building 408 "warned [Defendant]

that [the officers] were across the street, and they drove out and left and [the individual standing outside] went back into his apartment." These articulated and reasonable suspicions are an unbroken chain of events and were based on Officer Cole's training and experience. Officer Cole testified to "seven-plus years as an experienced Greensboro police officer" and had prior knowledge of illegal narcotics being sold out of apartment building 408.

Officer Branson also testified he was aware of illegal activities taking place in the Spring Manor apartment complex, prior to the date in question. Officer Branson testified the apartment complex manager reported other residents had specifically mentioned individuals in building 408 were involved in the use and sale of illegal narcotics.

Officer Branson testified he observed "the individual [outside of building 408] yelling and then looking back at [Defendant's] vehicle, and at that point [Defendant] increased his speed and exited the parking lot much more rapidly than he was traveling initially." After the yell, he saw the unbroken sequence of the vehicle "chang[e] from driving slowly through the complex to speeding up as our police vehicle was observed." The person who had yelled, "backed up and went back into the apartment [408]." Officer Branson testified this behavior "raised [his] suspicion to fleeing upon police presence." From the time of the event until the stop, the officers never lost sight of the vehicle with Defendant inside.

Based on these officers' testimonies, the trial court made the following pertinent findings of fact:

> 5) . . . Officers Branson and Cole were in a highly visible, marked, Greensboro Police Department patrol vehicle and located in the Spring Valley Shopping Center parking lot area, directly across the street from the Spring Manor apartment complex.
>
> 6) Prior to 14 July 2014, Officer Cole had made numerous illegal drug arrests in the Spring Manor apartment complex and in the immediate area of the Spring Manor apartment complex.
>
> 7) As of 14 July 2014, Officer Cole knew that the Spring Manor apartment complex and its immediate surrounding area was an "open air drug market."
>
> 8) Prior to 14 July 2014, the manager of the Spring Manor apartment complex informed Officer Branson that the Spring Manor apartments were getting worse, and

specifically identified apartment [building] 408 as a place for using illegal drugs and for the sale and distribution of illegal drugs.

9) Prior to 14 July 2014, Officer Branson was aware of numerous crimes that had been committed in the Spring Manor apartment complex.

10) As of 14 July 2014, Officers Branson and Cole knew that the Spring Manor apartment complex was in a high drug and crime-ridden area.

. . . .

12) On Monday morning at approximately 12:15 a.m. on 14 July 2014, Officers Branson and Cole observed a white, Hyundai Elantra ("Elantra"), enter the Spring Manor apartment complex parking lot, circling the parking lot at a very slow rate of speed.

13) Officers Branson and Cole observed that the Elantra never pulled into any parking space or stopped anywhere but instead drove at a very slow rate of speed toward the area of Spring Manor apartment [building] 408.

14) Almost simultaneously to observing the Elantra as set forth above, Officers Branson and Cole observed a male directly in front of Spring Manor apartment [building] 408.

15) Thereafter, Officers Branson and Cole observed said male directly in front of Spring Manor apartment [building] 408 look directly at their highly visible, marked, Greensboro Police Department patrol vehicle that was in plain view and only a short distance away from said male.

16) Officers Branson and Cole next observed said male, after identifying their Greensboro Police Department patrol vehicle as set forth above, look directly at the Elantra, which was by then only a short distance away from said male, and make a loud warning noise, which was heard by Officer Cole.

17) Immediately after making said warning noise as set forth above, Officers Branson and Cole observed the Elantra accelerate and quickly exit the Spring Manor apartment complex and flee the area unprovoked, and flee from Officers Branson and Cole unprovoked.

Based on these findings of fact, the trial court concluded:

> 1) Based on the totality of the circumstances, the State has proven by a preponderance of the credible and believable evidence that the investigatory stop of the Elantra driven by Defendant in this case was based on specific and articulable facts, as well as the rational inferences from those facts as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.
>
> 2) Based on the totality of the circumstances, . . . the investigatory stop of the Elantra driven by Defendant was legal and valid, and that Officers Branson and Cole had a reasonable and articulable suspicion for making the investigatory stop of said Elantra.
>
> 3) Based on the totality of the circumstances, . . . Officers Branson and Cole had a reasonable suspicion supported by articulable facts that criminal activity may be afoot.

Considering these undisputed facts and the officers' testimonies at Defendant's suppression hearing, the trial court's findings of fact, particularly that the officers "observed [Defendant] accelerate and quickly exit the Spring Manor apartment complex and flee the area," are amply supported by competent record evidence. These findings of fact in turn support the trial court's conclusion of law that the officers had "a reasonable suspicion . . . that criminal activity may be afoot" to justify their investigative stop of Defendant's vehicle. *Mello*, 200 N.C. App. at 439, 684 S.E.2d at 486.

The majority's protestations to the contrary, their reversal of the trial court's ruling apparently turns on a notion of, and fictional distinction between, "suspected" versus "actual" flight and not from the "totality of the circumstances." No precedents lend support to this contrived distinction. *See State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850 (2015) (holding reasonable suspicion justified investigatory stop where defendant stood "in a specific location known for hand-to-hand drug transactions" and defendant and another "split up and walked in opposite directions upon seeing a marked police vehicle approach); *Butler*, 331 N.C. at 234, 415 S.E.2d at 722-23 (holding defendant's presence in neighborhood frequented by drug users, coupled with him immediately leaving the corner and walking away after making eye contact with officers, constituted reasonable suspicion to conduct investigatory stop); *In re I.R.T.*, 184 N.C. App. 579, 585-86, 647 S.E.2d 129, 134-35 (2007)

(holding officer had reasonable grounds to conduct investigatory stop where juvenile in known high drug area began walking away as officer approached him, while keeping his head turned away from officer); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (holding officers had reasonable suspicion to conduct investigatory stop of defendant where he was seen leaving a suspected drug house and officers observed him "exhibit[ing] nervous behavior" when he knew he was being followed). Whether Defendant's speed exceeded the posted speed limit or violated some other motor vehicle law is not determinative of Defendant's flight from the known drug area.

Considering the past history of drug activity and arrests at the Spring Manor Apartments, the time, place, manner, the unbroken sequence of observed events, Defendant's actions upon being warned and the "totality of the circumstances," the officers' testimonies and the trial court's findings of fact "go beyond an inchoate suspicion or hunch and provide a particularized and objective basis for suspecting defendant of involvement in criminal activity." *Jackson*, 368 N.C. at 80, 772 S.E.2d at 850-51 (citation and internal quotation marks omitted). The trial court correctly found and concluded the officers had a reasonable and articulable suspicion, based upon the totality of the circumstances, to conduct a lawful investigatory stop of Defendant's vehicle. The trial court did not err by denying Defendant's motion to suppress evidence recovered as a result of the lawful investigatory stop.

III. Conclusion

The trial court's findings of fact are supported by competent testimonial and record evidence. These findings of fact are "conclusively binding on appeal[.]" *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. These findings of fact in turn support the trial court's ultimate conclusions citing the "totality of the circumstances" that the officers had reasonable suspicion to conduct a lawful investigatory stop of Defendant's vehicle. The trial court's findings of fact are binding upon this Court on appeal where "there is evidence to support them, even though the evidence might sustain findings to the contrary." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503.

I vote to affirm the trial court's denial of Defendant's motion to suppress and find no error in Defendant's convictions or the judgment entered thereon. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JUSTIN KYLE MILLS

No. COA16-64

Filed 5 July 2016

1. Appeal and Error—jurisdiction—failure to designate court—writ of certiorari

The Court of Appeals, in its discretion, granted certiorari where defendant's notices of appeal did not designate the court to which the appeal was taken.

2. Criminal Law—self-defense—instruction not given

The trial court properly refused to instruct the jury on self-defense in a prosecution for assault with a deadly weapon inflicting serious injury where defendant left his property and entered the victim's property with a rifle which he had retrieved and loaded; there was no evidence that the victim had a weapon or that defendant had a good faith belief that the victim was armed; and defendant fired before the victim made any threatening movement.

3. Criminal Law—prosecutor's argument—personal belief—weakness of defendant's case

Defendant did not establish any gross impropriety in the prosecutor's opening statement that defendant's claim of self-defense would be shot down (to which defendant did not object). Defendant failed to show that the State's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

Appeal by defendant from judgment entered 6 May 2015 by Judge W. Douglas Parsons in Carteret County Superior Court. Heard in the Court of Appeals 7 June 2016.

Attorney General Roy Cooper, by Assistant Attorney General Roberta A. Ouellette, for the State.

William D. Spence for defendant-appellant.

TYSON, Judge.

Justin Kyle Mills ("Defendant") appeals from a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury. We find no error in Defendant's conviction or judgment entered thereon.

I. Background

On 29 October 2014, Michael LeClair ("Mr. LeClair") lived on his father's lot at the Lakeview Mobile Home Estates in Carteret County, North Carolina. Mr. LeClair's niece, Heather Davis ("Ms. Davis"), lived with Defendant on an adjoining lot within the same mobile home park. The two lots are separated by a row of large bushes.

That evening, Defendant and Ms. Davis arrived home and heard their dogs barking loudly. Mr. LeClair heard Defendant and Ms. Davis yelling at the dogs and at each other. He subsequently yelled at Defendant and Ms. Davis from his lot, instructing them to "knock it off." Defendant and Mr. LeClair exchanged verbal insults and threats with one another from their respective properties. Defendant and Mr. LeClair had previously engaged in physical altercations and made verbal threats to each other.

Defendant went inside his trailer and retrieved a 30.06 bolt-action rifle. Armed with the rifle, Defendant went over to Mr. LeClair's lot and confronted Mr. LeClair. Mr. LeClair was not armed with a weapon during the altercation. After an additional exchange of words, Defendant fired a warning shot into the ground. Mr. LeClair testified he moved toward Defendant in order to take the rifle from him. When Mr. LeClair was approximately ten feet away from Defendant, Defendant shot Mr. LeClair in the groin. Defendant called 911, and was later arrested.

Ms. Davis testified, on the evening in question, Mr. LeClair continually yelled at Defendant to "[g]et your ass over here." Ms. Davis testified Defendant carried the rifle with him upon entering onto Mr. LeClair's property because "he was afraid for his life," and had the rifle with him "just in case." The defense asserts, when Mr. LeClair ran towards Defendant, Defendant had no choice but to shoot Mr. LeClair. At trial, Defendant requested a jury instruction on self-defense. The trial court declined to instruct the jury on self-defense.

The jury returned a verdict finding Defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to an active term of a minimum of 33 months and a maximum of 52 months imprisonment.

II. Jurisdiction

[1] On 6 May 2015, Defendant filed a handwritten notice of appeal. His notice failed to designate this Court as the court to which the appeal was taken, and it was not served on the District Attorney as required by Rule 3(d) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 3(d). Defendant's trial attorney also filed a written notice of appeal and served it on the District Attorney's Office on 7 May 2015. This notice of appeal also failed to designate the court to which the appeal was taken. Defendant's failure to designate the court to which his appeal is taken violates Rule 3(d). *Id.* The trial court prepared the Appellate Entries noticing the appeal and appointing appellate counsel on 7 May 2015.

On 17 February 2015, Defendant petitioned this Court issue its writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. "This Court has liberally construed this requirement and has specifically held that a failure to designate this Court in its notice of appeal is not fatal where the . . . intent to appeal can be fairly inferred and the [appellees] are not mislead by the . . . mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011); *see also State v. Springle*, __ N.C. App. __, __, 781 S.E.2d 518, 520-21 (2016).

The State neither filed any response to Defendant's petition, nor argues on appeal that it has incurred any prejudice from Defendant's errors in filing his notice of appeal. In our discretion, we grant Defendant's petition and issue writ of certiorari to permit review of the substantive issues presented in Defendant's appeal.

III. Issues

Defendant argues the trial court erred by: (1) failing to instruct the jury on self-defense; and (2) failing to intervene *ex mero motu* during the District Attorney's opening statement.

IV. Jury Instruction on Self-Defense

A. Standard of Review

"Whether evidence is sufficient to warrant an instruction on self-defense is a question of law; therefore, the applicable standard of review is *de novo*." *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54 (citing *State v. Lyons*, 340 N.C. 646, 662-63, 459 S.E.2d 770, 778-79 (1995), *aff'd*, 346 N.C. 417, 700 S.E.2d 222 (2010)). The trial court's choice of jury instructions rests within its discretion and will not be overturned absent

a showing of abuse of discretion. *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002).

"However, an error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citations and internal quotation marks omitted).

B. Analysis

[2] To determine whether an instruction on self-defense must be given, "the evidence is to be viewed in the light most favorable to the defendant." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). When the defendant's evidence, taken as true, is sufficient to show that he acted in self-defense, the instruction "must be given even though the State's evidence is contradictory." *Id.*

Where a defendant is charged with assault with a deadly weapon, a jury instruction on self-defense should be given "only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm." *State v. Whetstone*, 212 N.C. App. 551, 558, 711 S.E.2d 778, 784 (2011) (citation omitted); *State v. Spaulding*, 298 N.C. 149, 154, 257 S.E. 2d 391, 394-95 (1979) (holding there must be a real or apparent necessity for the defendant to kill in order to protect himself).

In 2011, the General Assembly enacted several statutes related to self-defense and individual rights related to firearms. 2011 N.C. Sess. Laws 1002. N.C. Gen. Stat. § 14-51.3 describes the circumstances under which deadly force may be used in self-defense. N.C. Gen Stat. § 14-51.4 clarifies when the justification for defensive force is available. Neither statute has been amended since it was enacted.

N.C. Gen. Stat. 14-51.3 provides in pertinent part:

> (a) . . . [A] person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . .
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

N.C. Gen. Stat. 14-51.3 (2015).

N.C. Gen. Stat. § 14-51.4 provides in pertinent part:

> [J]ustification [for defensive force] is not available to a person . . . who:
>
> (2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:
>
> a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.
>
> b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

N.C. Gen. § 14-51.4 (2015).

Defendant argues the evidence he presented at trial required the trial court to provide a self-defense instruction to the jury. Specifically, Defendant asserts Mr. LeClair had an aggressive nature and provoked the confrontation with Defendant. Ms. Davis testified Mr. LeClair had attacked Defendant about a year prior to the shooting. Ms. Davis stated Mr. LeClair had entered Defendant's property and grabbed Defendant "by the neck with one hand." Ms. Davis also testified, on the night of the shooting, Mr. LeClair yelled to Defendant: "Get over here, you pu—y," and threatened, "I will slit your f—king throat right in front of your kid."

However, the evidence tends to show Defendant provoked the confrontation at issue here. Defendant willingly and voluntarily left his property and entered onto Mr. LeClair's property with a loaded rifle. Defendant was not forced into the confrontation. Defendant escalated the confrontation by affirmatively opting to retrieve his rifle, load it, and carry it with him onto Mr. LeClair's property. There is no evidence, tending to show either Mr. LeClair possessed a weapon on his person during the altercation or Defendant had a good faith belief Mr. LeClair

was armed with a weapon. Defendant fired the first shot before Mr. LeClair made any threatening movement.

The evidence, viewed in the light most favorable to Defendant, does not show Defendant was "in imminent danger of death or serious bodily harm[.]" N.C. Gen. Stat. § 14-51.3; N.C. Gen. Stat. 14-51.4. Defendant did not communicate an intent to "withdraw[], in good faith, from physical contact with" Mr. LeClair or a "desire to withdraw and terminate the use of force" at any time. N.C. Gen. Stat. § 14-51.4(2)(b).

In this case, Defendant was not justified under N.C. Gen. Stat. § 14-51.3 or N.C. Gen. Stat. § 14-51.4 to use deadly force against Mr. LeClair and claim self-defense as an affirmative defense. A person of ordinary firmness, in the Defendant's position, could not have reasonably believed that shooting Mr. LeClair in the groin was necessary in order to escape "imminent danger of death or serious bodily harm." N.C. Gen. Stat. § 14-51.4; *see also Whetstone*, 212 N.C. App. at 558, 711 S.E.2d at 784.

In *State v. Plemmons*, 29 N.C. App. 159, 223 S.E.2d 549 (1976), the victim fired a gun into the air while in front of his mobile home, after the defendant had fired a shotgun near the victim. The defendant had already driven a short distance away from the victim's property when the victim fired his gun. *Id.* After the victim fired his gun, the defendant exited his vehicle and fired another shot at the victim. This shot struck the victim in the face. *Id* at 160, 223 S.E.2d at 560.

This Court held, although the evidence showed the victim had fired a shot in the direction of the defendant, the defendant had fired the first shot, and had not abandoned or withdrawn from the altercation. Therefore, "[a]n instruction on self-defense was not warranted by the evidence and the court properly omitted it from his charge." *Id.* at 162-63, 223 S.E.2d at 551.

Here, as in *Plemmons*, Defendant never abandoned or withdrew from the altercation. *See also* N.C. Gen. Stat. § 14-51.4(b) (requiring a clear indication to withdraw and terminate the use of force in order to justify use of deadly force against the person who was provoked). Mr. LeClair was unarmed and had not physically engaged with Defendant before or at the time Defendant shot him. Viewing the evidence in the light most favorable to Defendant, the trial court properly refused to instruct the jury on self-defense. *Moore* at 796, 688 S.E.2d at 449. We find no error in the trial court's ruling.

V. *Ex Mero Motu*

[3] Defendant argues the prosecutor expressed his personal belief about the weakness of Defendant's case during his opening remarks. Defendant failed to object to this statement at trial, but asserts the trial court should have intervened *ex mero motu*. Defendant contends this statement deprived him of a fair trial before a partial, unbiased jury. Defendant also argues the prosecutor's remarks improperly shifted the State's burden of proof onto Defendant.

A. Standard of Review

"The standard of review when a defendant fails to object at trial is whether the closing argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. McCollum*, 177 N.C. App. 681, 685, 629 S.E.2d 859, 861-62 (2006) (citation and internal quotation marks omitted). "In determining whether the prosecutor's argument was . . . grossly improper, this Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

B. Analysis

In his opening statement, the prosecutor stated, "[T]he only thing [D]efendant can rely on to escape this is some self-defense claim. And I contend to you that what Judge Parsons tells you what this is in North Carolina, that will be shot down also."

To determine whether a statement was grossly improper, this Court must examine the context in which the remarks were made and the factual circumstances to which they refer. *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998). In order to demonstrate prejudicial error, a defendant must show "[t]here is a reasonable possibility that, had the error in question not been committed, a different result would have

been reached at the trial out of which the appeal arises. The burden of showing such prejudice . . . is upon the defendant." N.C. Gen. Stat. § 15A-1443(a) (2015).

In this case, the prosecutor contended to the jury that a claim of self-defense would be "shot down" and Defendant failed to object. In *State v. Braxton*, 352 N.C. 158, 202, 532 S.E.2d 428, 454 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001), which was decided prior to the enactment of the use of defensive force statutes, the prosecutor argued to the jury as follows:

> And then you move to the third element of what this cowardly bully has to have to come in here and hang his hat on a valid principle of law of self-defense, and it besmirches and degrades self-defense. It's spitting in the eye of the law. It's vomit. It's vomit on the law of North Carolina for this man to try to use self-defense because he's got to show, in addition to the other two, that he was not the aggressor.

This Court held the prosecutor's statement "constitutes a permissible expression of the State's position that, in light of the overwhelming evidence of defendant's guilt, the jury's determination that the defendant acted in self-defense would be an injustice." *Id.* at 203, 532 S.E.2d at 454. Therefore, "the prosecutor's statement was not so grossly improper as to require the trial court to intervene *ex mero motu*." *Id.* As in *Braxton*, the prosecutor's statement in the present case was a permissible expression of the State's position. *Id.*

Defendant retrieved his rifle and fired the first shot before Mr. LeClair moved toward Defendant in an attempt to disarm him. Mr. LeClair was not armed with a weapon, nor did he provoke Defendant, to justify his use of deadly force. As discussed *supra*, the evidence, viewed in the light favorable to Defendant, did not warrant a jury instruction on self-defense. There is not a "reasonable possibility" the Defendant would have prevailed had the trial court intervened. N.C. Gen. Stat. § 15A-1443(a).

Defendant has failed to establish any gross impropriety in the State's opening statement in order to warrant a new trial. Defendant failed to show the State's comments "so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). We find no error.

VI. Conclusion

Viewing the evidence in the light most favorable to Defendant, the trial court properly refused to instruct the jury on self-defense. Defendant has failed to carry his burden of showing any gross impropriety in the State's opening remarks.

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon.

NO ERROR.

Judges BRYANT and INMAN concur.

STATE OF NORTH CAROLINA
v.
KELVIN LEANDER SELLERS, DEFENDANT

No. COA 15-1163

Filed 5 July 2016

1. Fraud—financial card theft—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of financial card theft where the card was stolen from its rightful owner, someone other than the owner swiped the card at two stores later on the same day, there was surveillance video from one store showing defendant in the store when the card was swiped, and the store owner testified that defendant attempted to use a card with another person's name. The State presented sufficient evidence that defendant obtained the card from its owner without her consent and with intent to use the card.

2. Possession of Stolen Property—indictment—elements missing—knowledge that property was stolen

There was a facial defect in an indictment for possession of stolen property where the indictment did not allege the essential elements that the listed personal property was stolen or that defendant knew or had reason to know that the property was stolen.

3. Constitutional Law—effective assistance of counsel—motion for appropriate relief required

A claim for ineffective assistance of counsel was dismissed without prejudice to the right to file a motion for appropriate relief. Claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not directly on appeal.

Appeal by Defendant from judgments entered 2 April 2013 by Judge L. Todd Burke and Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 9 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Kimberly P. Hoppin, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Defendant appeals from judgments entered 2 April 2013 by Judges L. Todd Burke and V. Bradford Long after a jury convicted him of financial card theft, possession of stolen property, and the status of being an habitual felon. Our review of the indictment reveals the indictment did not contain all of the elements of possession of stolen property. Therefore, we vacate the judgment as it pertains to Defendant's conviction for possession of stolen property. Defendant contends the trial court erred in denying his motion to dismiss the charges of financial card theft because the State failed to present sufficient evidence of those offenses. Defendant also argues he was denied the effective assistance of counsel, though he did not file a motion for appropriate relief with the trial court. We hold the trial court did not err in part, but we vacate the conviction of possession of stolen goods, and dismiss the ineffective assistance of counsel claims without prejudice for Defendant to file a motion for appropriate relief with the trial court.

I. Factual and Procedural Background

On 3 October 2011, a grand jury charged Defendant with breaking and entering a motor vehicle, financial card theft, and possession of stolen property. For the charge of possession of stolen property, the indictment reads as follows:

> And the jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully,

> willfully, and feloniously did possess one handbag containing personal items, one wallet, one Wachovia debit/credit card, one social security card, one check book, and $30.00 in United States currency.

Defendant's case came for a jury trial 2 April 2013 in superior court. The State's evidence tended to show the following.

Sabrina McMasters, a service manager for Wells Fargo, testified as follows: On 12 May 2011, while taking her daughter to daycare in Trinity, North Carolina, from her home in Greensboro, it began to rain. At approximately 8 a.m., she parked in a small parking lot in front of the building. Because of the rain, she rushed to get her daughter inside of the daycare center which took five to eight minutes.

On her return, the glove box was open and her pocketbook, containing her driver's license, checkbook, social security card, house keys, pictures of her daughter, and a debit card, was missing. McMasters ran into the daycare office and called the police. Approximately ten minutes later, Officer Andrews arrived.

Billy Andrews, a police officer for the City of Archdale, responded to a larceny call at Trendel Children's Center. When he arrived at 8:20 a.m., he saw McMasters standing next to her vehicle, a white Dodge Durango, crying. McMasters told him her pocketbook, containing bank cards, two checkbooks, and three social security cards was stolen.

After this conversation, McMasters called her bank to report her debit card had been stolen. The bank's records showed recent purchases on her card at a gas station, The Pantry, and Food Lion. McMasters drove to The Pantry, where she spoke with the owner, Andrew Lee. After she explained her circumstances, she searched around the store, but she did not find her pocketbook or any of its contents. She then drove to Food Lion, where she walked around the premises to search for her pocketbook. She found nothing.

McMasters told Officer Andrews her debit card was used that morning. The bank reported someone swiped McMasters' debit card at Food Lion at 8:16 a.m. and subsequently at The Pantry around 8:34 a.m. to purchase gas and to make a cash withdrawal. Officer Andrews testified Suzie Sellers, a daycare employee, informed him she saw a white man in his forties that morning sitting across the street from the daycare and smoking a cigarette. No other daycare employees reported any unusual activity at or around the daycare that morning.

Later that afternoon, David Jones, a sergeant in investigations with the City of Archdale, began investigating McMasters' file. His investigation revealed someone swiped McMasters' debit card at a Food Lion at 8:16 a.m. for $114. This Food Lion is located one-half mile from Defendant's home. At 8:34 a.m., the debit card was at The Pantry for $40.01 to buy gasoline. Someone then attempted to use the card inside the store to make a withdrawal from the ATM, but that withdrawal was unsuccessful.

Detective Jones obtained a surveillance video from The Pantry dated 12 May 2011 and played a copy of the video for the jury. The video is not contained in the record on appeal. The next day, Detective Jones went to Defendant's house, and questioned him about these events. Defendant explained he was home alone that day, and had been home alone for two weeks due to a medical issue. Hanging on the banister just inside the front door of Defendant's townhome, Detective Jones saw a green baseball cap. He recognized the cap from the surveillance video from The Pantry. During this discussion, Detective Jones obtained a lottery ticket from the Defendant's person which was purchased at 10 a.m. on 13 May 2011, during the time which Defendant said he did not leave his home. Detective Jones did not attempt to obtain surveillance video from Food Lion because "Food Lion is one of the tougher businesses to get video from and to work with." He said it generally takes six months to one year to obtain video from Food Lion.

Describing the video from The Pantry, Detective Jones explained Defendant placed two fruit drinks on the counter in front of Lee. In the video, Defendant attempted to pay. At that time, Lee and Defendant discussed tornado damage in Alabama and scratch off tickets. Defendant asked for a $100 gift card, but Lee refused because he would only accept cash. Lee told Defendant he needed to use the ATM. At that time, the time stamp on the video showed it was 8:34 a.m. Defendant walked away from the counter and out of the screen, presumably toward the ATM. Defendant left the store without returning to the counter to make a purchase.

The State rested. At that time, Defendant moved to dismiss all charges because the State failed to meet its burden. The court denied Defendant's motion.

Defendant testified on his own behalf. Defendant works part-time at Kohl's and Bitlocks and is a pastor at the Second Chance Community Mission. Defendant had prostate surgery 27 April 2011, and returned to the doctor to have his staples removed 4 May 2011.

Defendant went to The Pantry on the morning of 12 May 2011, shortly after his wife left for work. Defendant missed Mother's Day because of his surgery, so he went to The Pantry to get his wife a gift card as well as a drink and a newspaper for himself. At the register, Defendant spoke with Lee, who he knows personally. Defendant goes to The Pantry every Thursday or Friday to cash his check. When Lee told him he could not purchase a gift card unless he paid with cash, Defendant left the store through the back door near the drink machine. Defendant drove home and remained at home for the rest of the day. On cross-examination, Defendant agreed he misled the police by telling them he did not leave his house that day. The defense rested.

Lee, the owner of The Pantry, testified for the State in rebuttal. Lee remembered Defendant coming into his store on 12 May 2011. He remembers Defendant attempting to use someone else's card that day, but the transaction was denied. Lee knows Defendant, whose first name is Kelvin. The name on the card was not Kelvin, but he does not remember the name on the card.

The Defendant renewed his motion to dismiss at the close of all of the evidence. The trial court granted Defendant's motion as to breaking and entering a motor vehicle, but denied the motion as to possession of stolen goods and financial card theft. The jury returned guilty verdicts for financial card theft and misdemeanor possession of stolen goods.

Subsequently, the trial court dismissed the jury. The court stated:

> At this juncture it's a transcript of plea to fill out whether or not you are – attained a habitual felon status. I will be perfectly honest with you. You can contest that if you wanted to. You can contest it and say I am not a habitual felon. State's going to bring a clerk up or either he is going to – the DA's going to admit your prior convictions where you have been charged with an offense, convicted of an offense, charged with another offense, convicted of it, charged with another offense, and then convicted of it.
>
> We can have a hearing on that or you can just fill out a transcript of the plea acknowledging or admitting or pleading guilty to being a habitual felon and then the Court's going to sentence you. It's up to you.
>
> You want to go ahead and admit that you are a habitual felon or do you want to have a trial on that?

Defendant's trial attorney, Biggs, accepted the plea on behalf of Defendant. Then, the following exchange occurred:

> The Court: Are you satisfied with your lawyer's services?
>
> Defendant: At this point right now going to prison I am not satisfied.
>
> The Court: Whether you are satisfied or not, do you still want to enter this plea to being habitual felon.
>
> Defendant: Yes.

Defendant stipulated there was a factual basis for the plea. Judge L. Todd Burke entered judgment against Defendant on 2 April 2013, sentencing him to 76 to 104 months imprisonment. The same day, Judge V. Bradford Long entered a corrected judgment against Defendant, correcting the maximum sentence to 101 months. Defendant asked for an appellate defender, but did not file a timely written notice of appeal.

II. Jurisdiction

Defendant filed a *pro se* handwritten petition for writ of certiorari on 27 March 2015. This Court granted certiorari for the purpose of "reviewing the judgment entered on 2 April 2013 by Judge L. Todd Burke." We amend our grant of certiorari to include review of the judgment entered 2 April 2013 by Judge V. Bradford Long, a judgment entered to correct a clerical error in sentencing from the previous judgment entered by Judge L. Todd Burke.

III. Standard of Review

This Court reviews the denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Upon a defendant's motion for dismissal, the question for the trial court is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d. 150 (2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). Upon review of a motion to dismiss, we review all of the evidence, including circumstantial evidence, in the light most favorable to the State. *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002), *cert. denied*, 537 U.S. 10085, 154 L. Ed. 2d 403 (2002).

We also review the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). Where an indictment is allegedly facially invalid, the indictment may be challenged at any time, even if it was uncontested in the trial court. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000).

IV. Analysis

A. Financial Card Theft

[1] A person is guilty of financial transaction card theft if he "[t]akes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it[.]" N.C. Gen. Stat. § 14-113.9(a)(1) (2015). Defendant contends the evidence was insufficient to prove Defendant took or obtained Ms. McMasters' financial transaction card with the intent to use it. The surveillance video, Defendant argues, places Defendant in The Pantry at the time the card was used, but does not show him using the ATM.

The theft charges here relate to a card stolen from McMasters, the card's rightful owner. The evidence presented at trial tended to show that someone stole the card from McMasters' car the morning of 12 May 2011. The same day, someone other than McMasters swiped the card at Food Lion and The Pantry. The State presented surveillance video from The Pantry showing Defendant in the store at the time the card was swiped. Lee testified Defendant attempted to use a card with another person's name on its face. Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence Defendant obtained the card from McMasters without her consent and with intent to use the card. The trial court did not err by denying the Defendant's motion to dismiss and allowing the charge to proceed to the jury.

B. Possession of Stolen Goods

[2] As with all courts, both trial and appellate, the initial duty of a judge is to determine whether the court has jurisdiction. Whether it is by motion to dismiss from one of the parties or by the court *sua sponte*, this initial responsibility of the court stems from the duty of the courts to provide the efficient and fair administration of justice. If the parties to a litigation are put to the expense of a trial on issues in which the court lacks the authority to determine, the time and cost of the proceedings and other scarce judicial resources are misapplied.

In a trial or appellate court setting, the burden of establishing jurisdiction is placed upon the party seeking to invoke the trial court's jurisdiction. *See Marriott v. Chatham County*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007), *appeal denied*, 362 N.C. 472, 666 S.E.2d 122 (2008). "[I]t is [appellant's] burden to produce a record establishing the jurisdiction of the court from which appeal is taken, and his failure to do so subjects [the] appeal to dismissal." *State v. Phillips*, 149 N.C. App. 310, 313–314, 560 S.E.2d 852, 855 (2002). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). "When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *Id.* at 176, 273 S.E.2d at 711.

A court must have subject matter jurisdiction in order to decide a case. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]" *Id.* (citing *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)). As a result, subject matter jurisdiction may be raised at any time, whether at trial or on appeal, *ex mero motu*. *See In re S.F.*, 190 N.C. App. 779, 781–782, 660 S.E.2d 924, 926 (2008). "A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882 (2000).

"Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. 1, § 22. An indictment must charge the "essential elements of the offense" to confer subject matter jurisdiction. *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). "[T]he evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense." *State v. Walston*, 140 N.C. App. 327, 334, 536 S.E.2d 630, 635 (2000). The purpose of an indictment is to give defendant reasonable notice of the charges against him so that he may prepare for his upcoming trial. *State v. Campbell*, __ N.C. __, __, 772 S.E.2d 440, 443 (2015) (citing *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)). "North Carolina law has long provided that there can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (citation and internal quotation marks omitted).

Knowing possession of stolen property valued at not more than $1000 is a misdemeanor. N.C. Gen. Stat. § 14-71.1, 14-72(a) (2015). The elements of possession of stolen goods are: "(1) possession of personal property; (2) which has been stolen, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose." *State v. Tanner*, 364 N.C. 229, 232, 695 S.E.2d 97, 100 (2010) (quoting *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982)).

Here, the indictment states: "[T]he defendant named above unlawfully, willfully and feloniously did possess one handbag containing personal items, one wallet, one Wachovia debit/credit card, one social security card, one check book, and $30.00 in United States currency." The indictment does not allege the essential elements that the listed personal property was stolen or that Defendant knew or had reason to know the property was stolen, creating a facial defect in the indictment. Accordingly, Defendant's conviction for possession of stolen goods must be vacated.

C. Ineffective Assistance of Counsel

[3] Lastly, Defendant contends the final judgment should be vacated because he received ineffective assistance of counsel. Generally, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not directly on appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted). "Our Supreme Court has instructed that should the reviewing court determine the [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent MAR proceeding." *Id.* at 554, 557 S.E.2d at 547 (internal quotation marks and citation omitted). Therefore, we dismiss this claim without prejudice to the right of Defendant to file a motion for appropriate relief with the trial court.

V. Conclusion

For the foregoing reasons, we find no error in part, vacate in part, and dismiss in part without prejudice.

NO ERROR IN PART; VACATE IN PART; DISMISS IN PART.

Judges ELMORE and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JULY 2016)

COVINGTON v. ALAN VESTER MOTOR CO., INC. No. 15-1002	Halifax (10CVS560)	Dismissed
EDWARDS v. TR. OF HAYWOOD CMTY. COLL. No. 15-1227	Haywood (14CVS557)	Affirmed
IN RE N.J.D. No. 16-24	Forsyth (15JB28)	Affirmed in part; vacated and remanded in part
JORDAN v. BRADSHER No. 15-808	Wake (14CVD5121)	Reversed and Remanded
MESSER v. POLLACK No. 15-1351	Haywood (09CVD589)	No Error
NEREIM v. CUMMINS No. 15-1253	Mecklenburg (14CVS15968)	Affirmed
STATE v. ALLEN No. 16-29	Union (14CRS53345)	No Error
STATE v. BLACK No. 15-1283	Wake (13CRS220893)	No error in part; no prejudicial error in part
STATE v. BLACKMON No. 15-1374	Sampson (14CRS395) (14CRS395)	No Error
STATE v. BLAZEVIC No. 15-1343	Mecklenburg (13CRS223087) (13CRS223092) (13CRS223094) (13CRS223095)	No Error
STATE v. BRYANT No. 15-1325	Forsyth (13CRS58009)	No Error
STATE v. CALLAHAN No. 15-1140	Mecklenburg (14CRS202901-04)	Vacated and Remanded
STATE v. COREY No. 15-1207	Caldwell (14CRS52929)	Vacated

STATE v. DOVE No. 15-1379	Onslow (13CRS55009-10)	REMANDED FOR RESENTENCING; MOTION FOR APPROPRIATE RELIEF REMANDED; RESTITUTION ORDER AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.
STATE v. EDWARDS No. 15-1336	Buncombe (13CRS59305)	Vacated and Remanded
STATE v. FRIONE No. 15-1143	Columbus (13CRS53114) (13CRS53115) (13CRS956)	No Error and No Plain Error
STATE v. HAIZLIP No. 15-886	Guilford (11CRS24788) (11CRS87042)	NO PREJUDICIAL ERROR
STATE v. HARDY No. 15-1122	Wayne (11CRS52676)	No Error
STATE v. HOLLOMAN No. 15-1261	Wayne (12CRS2103) (12CRS50170)	No plain error
STATE v. HOOKER No. 15-1175	Forsyth (14CRS53193) (14CRS53209) (14CRS53210) (14CRS53211) (14CRS55775) (14CRS57004)	Affirmed in Part; Remanded in Part.
STATE v. McEACHIN No. 15-1256	Johnston (12CRS54812)	Affirmed
STATE v. MOSTELLER No. 16-9	Cleveland (14CRS50812)	No error in part, vacated and remanded in part
STATE v. PETERS No. 16-34	Forsyth (12CRS55855-56) (12CRS805)	No Error

STATE v. PETWAY No. 15-1386	Nash (15CRS637)	Affirmed
STATE v. POTEAT No. 15-603	Cabarrus (12CRS54882-83)	Vacated in part, no error in part; remanded for resentencing
STATE v. ROBINSON No. 15-1312	Mecklenburg (13CRS209503) (13CRS209505) (13CRS209507) (13CRS209509) (13CRS209510) (13CRS209512)	Affirmed
STATE v. WELLS No. 16-206	Edgecombe (12CRS52140)	No Error
STATE v. WESTERN No. 15-1264	Wayne (14CRS50650)	Affirmed
STATE v. WHITLEY No. 15-1246	Wake (11CRS229725)	No error in part; no plain error in part; vacated and remanded in part
STATE v. WOODS No. 16-23	Alamance (13CRS57662-63)	Affirmed
TILLERY v. TILLERY No. 15-506	Wilson (14CVS980)	Affirmed
TOWN OF BEECH MOUNTAIN v. MILLIGAN No. 15-1267	Watauga (14CVS271)	Affirmed
TRUDEL v. TCI ARCHITECTS/ ENG'RS/ CONTRACTOR No. 15-1297	N.C. Industrial Commission (14-723693)	Affirmed
USHER v. CHARLOTTE- MECKLENBURG HOSP. AUTH. No. 15-880	Mecklenburg (11CVS21847)	Affirmed
WRIGHT v. WAL-MART, INC. No. 15-888	N.C. Industrial Commission (W66377)	Vacated and Remanded

DAVIDSON CTY. BROAD. CO., INC. v. IREDELL CTY.

[248 N.C. App. 305 (2016)]

DAVIDSON COUNTY BROADCASTING COMPANY INC., LARRY W. EDWARDS, AND WIFE, SHIRLEY EDWARDS, PETITIONERS
v.
IREDELL COUNTY, RESPONDENTS
v.
WAYNE MCCONNELL, RUSTY N. MCCONNELL, ANN AND DON SCOTT, BILL MITCHELL AND DAVID LOWERY, INTERVENING RESPONDENTS

No. COA15-959

Filed 19 July 2016

1. Zoning—standard of review—level of review—appellate

In a zoning case, the local municipal board, the superior court, and the appellate court each have a particular standard of review. The appellate review is to determine whether the superior court properly used the appropriate standard.

2. Zoning—special use permit—standard of review—de novo

The superior court appropriately and properly used the de novo standard of review when reviewing a board of adjustment decision concerning a special use permit for a broadcast tower.

3. Zoning—radio tower—effect on community

There was sufficient evidence for the superior court to conclude that a proposed radio tower was not in harmony with the surrounding area where the court considered photos of the property; a diagram showing that the tower would be a height comparable to the Empire State Building; and there was testimony that the tower would change the rural landscape, that strobe lights from the tower would be visible in bedrooms, and that the construction of the tower would change the character of the community.

4. Zoning—comprehensive land plan—special permit—broadcast tower

The superior court properly determined that that a comprehensive land plan existed and that the special use permit application provided a standard for granting the permit which incorporated the plan of development for the county. The superior court appropriately applied the de novo standard of review to the issue of whether the land use plan was relevant to the determination of general conformity.

5. Zoning—special use permit—superior court review—whole record test—not arbitrary and capricious

The superior court applied the appropriate standard of review (whole record), and applied it appropriately, in a zoning case involving a special use permit for a broadcast tower.

6. Constitutional Law—due process—zoning—expert witness not accepted

Petitioners' due process rights were not violated in a zoning case involving a special use permit for a broadcast tower where their witness was accepted as an expert on land appraisal but not on harmony with the surrounding area. There is no violation of due process rights when petitioners are given the right to offer testimony, cross-examine witnesses, and inspect documents.

Appeal by petitioners from order entered 12 March 2015 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 26 January 2016.

Allegra Collins Law, by Allegra Collins, for petitioner-appellants.

Pope McMillan Kutteh & Schieck, P.A, by Lisa Valdez, for respondent-appellee Iredell County.

Smith Moore Leatherwood LLP, by Thomas E. Terrell, Jr. and Kip D. Nelson, for intervening respondent-appellees.

BRYANT, Judge.

Where petitioners were unable to show they were entitled to a special use permit for their proposed tower which was determined to not be in conformity with the county's plan of development and not in harmony with the area, the Board's denial was proper, and the Superior Court utilized the appropriate standard of review in upholding the Board's decision. Further, where the Superior Court properly applied the appropriate standard of review, we affirm the order of the Superior Court.

On 18 November 2013, petitioners Larry W. Edwards and Shirley M. Edwards, on behalf of Davidson County Broadcasting Company, Inc., (the Broadcasting Company) filed an application for a special use permit with the Iredell County Zoning Board of Adjustment (the Board or the Board of Adjustment). Per the application, the Broadcasting Company broadcast an FM radio signal from a 1,014-foot tower in Davidson

County and proposed the construction of a 1,130-foot lattice radio tower, plus a sixty-foot antenna, in Iredell County, on the property of Larry W. Edwards and Shirley M. Edwards. The Edwards owned 133 acres of property, with 91.07 acres located in Iredell County. The property was "zoned R-A (Residential Agricultural District)." Per the Iredell County Land Development Code, radio transmission towers greater than 300 feet were eligible for placement on R-A property, with the approval of a special use permit by the Board of Adjustment. The Broadcasting Company asserted the following as factors relevant to the issuance of the special use permit:

> (A) THE USE REQUESTED, I.E. A RADIO TOWER IS AN ELIGIBLE SPECIAL USE IN A R-A DISTRICT IN WHICH THE EDWARDS' PROPERTY IS LOCATED.
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> . . .
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> (B) THE SPECIAL USE "WILL NOT MATERIALLY ENDANGER THE PUBLIC HEALTH OR SAFETY" IF LOCATED ON THE EDWARDS' PROPERTY AS PROPOSED ON THE ATTACHED SITE PLAN AND DEVELOPED ACCORDING TO THE PROPOSED PLAN.
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> . . .
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> (C) THE PROPOSED SPECIAL USE MEETS ALL REQUIRED CONDITIONS AND SPECIFICATIONS OF THE IREDELL COUNTY LAND DEVELOPMENT CODE . . . .
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> . . .
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> (D) THE CONSTRUCTION, OPERATION AND MAINTENANCE OF THE RADIO TOWER AS HEREIN DESCRIBED, WILL NOT SUBSTANTIALLY INJURE THE VALUE OF ADJOINING OR ABUTTING PROPERTY.
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> . . .
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> (E) THE LOCATION AND CHARACTER OF THE SPECIAL USE, DEVELOPED ACCORDING TO THE PROPOSED PLAN . . . IS IN HARMONY WITH THE AREA IN WHICH IT IS LOCATED, AND IN GENERAL CONFORMITY WITH THE IREDELL COUNTY LAND USE AND DEVELOPMENTAL PLAN.

A public hearing on the petition was held before the Board of Adjustment on 19 December 2013 and 23 January 2014. On 20 March 2014, the Board issued an order denying petitioners' request for a special use permit, finding that "[t]he Special Use [would not] be in harmony with the area in which it is to be located and [would not] be in general conformity with the plan of development of the county." The Board concluded that "there [was] an absence of material, competent, and substantial evidence supporting all necessary findings for the application in the affirmative . . . ."

On 21 April 2014, petitioners filed a petition for writ of certiorari in Iredell County Superior Court seeking review of the decision of the Board of Adjustment. Specifically, petitioners argued that the Board of Adjustment erroneously adopted the conclusion that the evidence presented in opposition to their application for a special use permit was sufficient to rebut the prima facie showing of harmony.

Upon the issuance of a writ of certiorari, a complete record of the proceedings before the Board was prepared and submitted for review by the trial court. The appeal was heard during the 2 March 2015 Civil Session of Iredell County Superior Court before the Honorable Joseph N. Crosswhite, Judge presiding. On 12 March 2015, the court issued its order affirming the Board's decision denying petitioners a special use permit for a broadcast tower.

Petitioners appeal.

On appeal, petitioners argue (I) that the Board's denial of the special use permit was erroneous as a matter of law and arbitrary and capricious. Furthermore, petitioners argue (II) that the Board violated petitioners' due process rights.

Standard of review

[1] A local municipal board, a superior court, and this Court each have a particular standard of review. When it considers an application for a special use permit, a board of adjustment sits as the finder of fact. *Cook v. Union Cnty. Zoning Bd. of Adjust.*, 185 N.C. App. 582, 585–86, 649 S.E.2d 458, 463 (2007). Upon the issuance of a writ of certiorari, a superior court reviews the decision of the board in the posture of an appellate court. *Bailey & Assoc., Inc. v. Wilmington Bd. of Adjust.*, 202 N.C. App. 177, 189, 689 S.E.2d 576, 585 (2010). And, in that capacity, the court is tasked with the following:

> (1) Reviewing the record for errors in law,
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> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
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> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
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> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
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> (5) Insuring that decisions are not arbitrary and capricious.

Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 12–13, 565 S.E.2d 9, 16 (2002) (citation omitted); *see also* N.C. Gen. Stat. § 160A-393(k) (2015) ("Appeals in the nature of certiorari").

[2] Where a party appeals the superior court's order to this Court, we review the order to "(1) determine whether the superior court exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly." *Cook*, 185 N.C. App. at 587, 649 S.E.2d at 464 (citation, quotation marks, and brackets omitted).

> The standard of review [exercised by the superior court] depends on the nature of the error of which the petitioner complains. If the petitioner complains that the Board's decision was based on an error of law, the superior court should conduct a de novo review. If the petitioner complain[ed] that the decision was not supported by the evidence or was arbitrary and capricious, the superior court should apply the whole record test. The whole record test requires that the trial court examine all competent evidence to determine whether the decision was supported by substantial evidence.

Morris Commc'ns Corp. v. Bd. of Adjust. of Gastonia, 159 N.C. App. 598, 600, 583 S.E.2d 419, 421 (2003) (citation omitted).

I

[3] Petitioners argue that the Board's denial of petitioners' application for a special use permit was error as a matter of law, and was also arbitrary and capricious. Petitioners contend that there was a legal presumption the proposed tower would be in harmony with the area and that

there was no evidence to support the Board's finding to the contrary. We disagree.

> It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition 'that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community.'

City of Durham v. Eno Cotton Mills, 141 N.C. 615, 639 (141 N.C. 480, 497), 54 S.E. 453, 461 (1906). "For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances." N.C. Gen. Stat. § 153A-340(a) (2015). "The regulations may . . . provide that the board of adjustment . . . may issue special use permits . . . in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits." *Id.* § 153A-340(c1). Zoning ordinances and special use permits also act as limitations to "forbid arbitrary and unduly discriminatory interference with property rights in the exercise of [a municipality's delegated authority]." *Heaton v. City of Charlotte*, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971) (citation omitted). A special use permit allows uses which the zoning ordinance authorizes under stated conditions upon proof that those conditions, as detailed in the ordinance, exist. *Mann Media, Inc.*, 356 N.C. at 10, 565 S.E.2d at 15.

The Iredell County Land Development Code, a zoning ordinance, allowed for the use of radio transmission towers on property zoned R-A (Residential-agricultural), with the approval of a special use permit by the Board of Adjustment. In granting a special use permit, the ordinance required that the Board make affirmative findings that the special use will not materially endanger the public health, will meet all required conditions and specifications, will not substantially injure the value of abutting property, and "will be in harmony with the area in which it is to be located and will be in general conformity with the plan of development of the county." Iredell County Land Development Code, section 12.2.4 (D.).

The plan of development at issue here—the 2030 Horizon Plan—is a comprehensive land use plan. The Horizon Plan was adopted on 15 September 2009 (updated in November 2013). Thereafter, on 1 July 2011, the Iredell County Land Development Code was enacted to codify the Horizon Plan.

A.

Petitioners contend that "the ordinance was sufficient evidence of harmony as a matter of law, the Board committed legal error by ignoring the legal presumption of harmony and finding that it 'did not hear sufficient evidence that the proposed tower would be in harmony with the area.' " However, we note the findings of the trial court on *de novo* review that the ordinance before the Board, as set forth in the Board's order, "w[ere] sufficient to overcome the legal presumption that listing the proposed broadcast tower as an allowed use in the zoning district established a prima facie case that the tower would be harmonious with the area."

In the petition for writ of certiorari to the Superior Court, petitioners argued that

> the inclusion of the Use of radio/broadcast towers as a special use in the R-A District [as established by the Iredell County Land Development Code] establishes a prima facie case that the said permitted use was in fact in harmony with the general zoning plan and in general conformity with the plan of development of Iredell County.

"The opponents of the [Special Use Permit] failed to present competent material and substantial evidence to rebut the Petitioner's evidence." "Contrary to law, the Board adopted a 'Conclusion of Law[]' that the evidence presented in opposition by the opponents was sufficient to rebut the prima facie showing of harmony." "It was an error of law for the Board of Adjustment to conclude that . . . Petitioners 'failed to present substantial evidence showing how the proposed tower was in general conformity with the plan of development of the County . . . .' " "It was an error of law for the Board of Adjustment to find that the proposed tower would be prominently seen and therefore inconsistent with the surrounding parcels when its own Land Development Code provides that a radio/broadcast tower is an eligible Special Use in a R-A District . . . ." And, "[i]t was an error of law for the Board of Adjustment to find and hold that the lighting of the tower would negatively impact nearby property owners when . . . Respondent's own Land Development Code requires . . . that radio towers have a Determination of No Hazard from the Federal Aviation Administration, which governs the lighting of the tower."

In its order, after having granted certiorari, the Superior Court firmly concluded there was no legal error committed by the Board on any of the bases raised by petitioner.

> The [Superior] Court . . . finds upon de novo review that the evidence presented by Respondents and cited by the Board in its Order was sufficient to overcome the legal presumption that listing the proposed broadcast tower as an allowed use in the zoning district established a prima facie case that the tower would be harmonious with the area. *Vulcan Materials Co. v. Guilford County Bd. of County Comm'rs.*, 115 N.C App. 319, 444 S.E.2d 639 (1994).
>
> The [Superior] Court further finds, upon de novo review, that the Board did not commit legal error when [it] found that it "did not hear sufficient evidence [from the Petitioner] that the proposed tower would be in harmony with the area," nor when it found that the tower "would be prominently seen and inconsistent with its surrounding parcels." The [Superior] Court further finds it was not legal error for the Board to find, based upon the evidence in the Record, that the lighting of the tower would not be in harmony with the area.

As stated, where petitioners challenged the Board's decision on the basis of an error of law, the Superior Court utilized *de novo* review. We hold this to be the appropriate standard. *See Morris Commc'ns Corp.*, 159 N.C. App. at 600, 583 S.E.2d at 421 ("If the petitioner complains that the Board's decision was based on an error of law, the superior court should conduct a de novo review." (citation omitted)). We now consider whether the court applied the standard properly.

"[T]he inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan." *Mann Media, Inc.*, 356 N.C. at 19, 565 S.E.2d at 20 (citation and quotation marks omitted). "If a *prima facie* case is established, a denial of the permit then should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.* at 12, 565 S.E.2d at 16 (citation and quotation marks omitted).

In its order, the court cites *Vulcan Materials Co.*, 115 N.C App. 319, 444 S.E.2d 639, in support of its conclusion that "the evidence . . . was sufficient to overcome the legal presumption that listing the proposed broadcast tower as an allowed use in the zoning district established a prima facie case that the tower would be harmonious with the area." In *Vulcan Materials Co.*, this Court reasoned that "[i]f . . . competent, material, and substantial evidence reveals that the use contemplated is not in

fact in 'harmony with the area in which it is to be located' the Board may so find." *Id.* at 324, 444 S.E.2d at 643 (citations omitted).

Reviewing the record before this Court, it appears that the Superior Court considered competent, material, and substantial evidence presented before the Board before concluding that such evidence was sufficient to overcome the legal presumption that the tower would be harmonious with the area, including the following: the 2030 Horizon Plan; photos of the subject property; a diagram showing the height of the radio broadcast tower to be comparable to that of the Empire State Building; testimony from nearby property owners on the tower's height, industrial appearance, and lighting, including testimony that an 1,130-foot industrial steel tower would change the rural landscape; that its overbearing height—eighty times taller than the height of the average building—would be an overbearing change to the skyline; that the strobe lights from the tower would be visible from the bedroom of some neighbors; and that construction of the tower would change the character of the small rural community. Therefore, we hold the superior court utilized the appropriate standard of review, *de novo*, in reviewing the Board's decision for an error of law and did so properly. Accordingly, petitioner's argument on this point is overruled.

B.

[4] Next, petitioners contend that the tower would be in general conformity with the surrounding area and the county development plan where there was a legal presumption of conformity pursuant to the county zoning ordinance. Petitioners contend that the 2030 Horizon Plan, Iredell County's land use plan—a policy statement—was not relevant to the determination of general conformity. Thus, petitioners assert that the Board erred as a matter of law in utilizing the 2030 Horizon Plan as a measure of general conformity and, further, lacked competent, material, and substantial evidence to rebut the presumption of harmony. We disagree.

In its 12 March 2015 order, the Superior Court ruled that "the Board did not commit legal error when it found the 2030 Horizon Plan to be of critical relevance in addressing [the question of whether the proposed broadcast tower was 'in general conformity with the plan of development of the county.']" In reaching its conclusion, the court made the following findings.

> Exercising de novo review, the [c]ourt is persuaded by the following[:] . . . First, N.C. Gen. Stat. § 153A-341 provides that "Zoning regulations shall be made in accordance with

> a comprehensive plan." No party contests that the 2030 Horizon Plan is the comprehensive land use plan adopted by Iredell County.
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> Second, while a special use permit application does not have the force of law, it is noted that the County signaled its expectations to . . . [p]etitioner in the way its application articulates this standard ("Is the location and character of the special use developed according to the proposed plan in harmony with the area in which it is proposed to be located and in general conformity with the Iredell County Land Use and Development Plan?")
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> Third, special use permit Standards 1 and 3 specifically address the issue of conformity with the Land Development Plan ("(1) The Use is among those listed as an eligible Special Use in the District in which the subject property is located; (3) The Special use meets all required conditions and specifications"). Under Standard 1, the Land Development Code addresses the legal presumption of harmony and compatibility as a threshold inquiry, yet provides that being a listed use in the zoning district only makes the proposed use "eligible" to be considered for a special use permit. Consequently, Standard [3] ("That the location and character of the Special use . . . will be in general conformity with the plan of development of the County") requires something more than indicating a second time whether a use is listed in the zoning ordinance as a permitted use in that district.

In addressing the issue, the Superior Court considered the relationship between zoning regulations and a comprehensive land use plan, as provided by our General Statutes, *see* N.C. Gen. Stat. § 153A-341 (2015), and properly determined that the 2030 Horizon Plan was Iredell County's comprehensive land use plan, and that the special use permit application provides a standard for granting the permit which incorporates the plan of development for Iredell County. This Court has upheld the use of a comprehensive land use plan as an advisory instrument for a body tasked with interpreting a zoning ordinance in the process of issuing a special use permit. *See Piney Mountain Neighborhood Ass'n v. Town of Chapel Hill*, 63 N.C. App. 244, 251, 304 S.E.2d 251, 255 (1983) ("Taking due note of the advisory nature of the Comprehensive Plan, we find that the above material and competent evidence, taking contradictions into account, substantially supports the finding that the development

conforms with the general plans for physical development of the Town."). In the instant case, the comprehensive plan—2030 Horizon Plan—was determined to be relevant to the Board's determination of whether the proposed special use was in conformity with the area and with the plan. Consistent with the precedent of this Court, we hold the Superior Court appropriately applied the *de novo* standard of review to the issue of whether the land use plan was relevant to the determination of general conformity. In addition, we note we have already determined there was sufficient evidence to rebut the legal presumption of harmony. Accordingly, we overrule petitioners' argument.

[5] Furthermore, in response to petitioners' contention that the Board's denial of a special use permit was arbitrary and capricious, we hold that that the Superior Court applied the appropriate whole record review standard. *See Morris Commc'ns Corp.*, 159 N.C. App. at 600, 583 S.E.2d at 421 ("If the petitioner complain[ed] that the decision . . . was arbitrary and capricious, the superior court should apply the whole record test. The whole record test requires that the trial court examine all competent evidence to determine whether the decision was supported by substantial evidence." (citation omitted)). And, upon review of the record, including what appeared to be competent, material, and substantial evidence of nonconformity, we hold that the Superior Court applied the whole record test appropriately. Accordingly, we affirm the order of the Superior Court.

II

[6] Next, petitioners argue that the Board violated petitioners' due process rights by denying petitioners the opportunity to present testimonial evidence regarding the proposed tower and its harmoniousness with the surrounding area. We disagree.

> Our Supreme Court has made clear that the task of a court reviewing a decision of a municipal body performing a quasi-judicial function, such as the Board of Adjustment's decision here, includes:
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> . . .
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents . . . .

Fehrenbacher v. City of Durham, ___ N.C. App. ___, ___, 768 S.E.2d 186, 191 (2015) (citation omitted).

The record indicates that during the hearing before the Board, petitioners called Scott Robinson as a witness. Robinson was presented as an expert real estate appraiser: he had twenty years of experience in real estate appraisal; had earned MAI and RSA designations; had performed eighteen tower impact studies; and served as an expert witness in "numerous cases involving towers." Robinson provided the Board with a study setting forth his review of the market impact the presence of similar towers had on existing residential, commercial, and rural markets. Robinson's assessment considered the performance of the buyers and sellers based on sales data from residential and rural areas adjacent, in close proximity, and/or in view of towers of similar size and visual impact. Intervening respondents had raised an objection that Robinson was not qualified to testify to the tower's harmony with the surrounding area where his impact study examined only data assessing property value and use, not harmony. The Board accepted Robinson as an expert on the issue of land appraisal and heard his testimony that the tower would not substantially devalue adjoining property. However, Robinson was not allowed to testify to his opinion on the issue of harmony with the surrounding area.

In its 12 March 2015 order affirming the Board's denial of petitioners' request for a special use permit, the superior court acknowledged petitioners' challenge to the Board's ruling to preclude Robinson from giving opinion testimony on the proposed tower's harmony with the surrounding area.

> Exercising do novo review, the [Superior] Court finds that Mr. Robinson had not been properly qualified or accepted as an expert in a field that would qualify him to express an opinion at the hearing on the matter of the broadcast tower's harmony with the surrounding area, and the Board's ruling was not in error. The Court notes that Mr. Robinson's opinion on the question of harmony was fully expressed in his written report, which was not objected to by counsel for Intervening-Respondents and which therefore was accepted by the Board. . . .
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> Further exercising de novo review, and based in part on Mr. Robinson's full expression of his opinion in his written report, the Court finds that Petitioners' rights of due process were not violated as alleged.

Where the record shows petitioners were given the right to offer testimony, cross-examine witnesses, and inspect documents, there

was no violation of due process rights. Accordingly, we overrule petitioner's argument.

In this case, we hold that the Superior Court exercised the appropriate standard of review in upholding the Board's denial of petitioners' special use permit and did so appropriately. We therefore affirm the judgment of the Superior Court.

AFFIRMED.

Judges DILLON and ZACHARY concur.

GARY DELLINGER, VIRGINIA DELLINGER, AND TIMOTHY S. DELLINGER, PETITIONERS
v.
LINCOLN COUNTY, LINCOLN COUNTY BOARD OF COMMISSIONERS, AND STRATA SOLAR, LLC, RESPONDENTS
AND
TIMOTHY P. MOONEY, MARTHA MCLEAN, AND THE SAILVIEW OWNERS ASSOCIATION, INTERVENOR RESPONDENTS

No. COA15-1370

Filed 19 July 2016

1. Zoning—conditional use permit—solar farm—prima facie showing—harmony with surrounding area—value of adjoining property not injured

An applicant for a conditional use for a solar farm produced substantial, material, and competent evidence to establish its prima facie case for a conditional use permit where the applicant produced substantial, material, and competent evidence that the solar farm would be in harmony with the area and would not substantially injure the value of adjoining or abutting properties.

2. Zoning—conditional use permit—hearing—participation of new commissioner—no error

There was no error in the hearing of a conditional use application on remand where a new commissioner participated. The new commissioner had the opportunity to read and review all of the evidence previously considered, and the change in the Board's membership had no effect upon the petitioner's ability to present its arguments. Furthermore, petitioners failed to show any prejudice from the participation of the new commissioner.

3. Zoning—conditional use application—burden of proof

An improper burden of proof was imposed on an applicant for a conditional use permit for a solar farm where one of the commissioners stated that the applicant had not proven its case beyond a reasonable doubt and the Board in its findings stated that, although the applicant had met its burden of production, its evidence was not persuasive. Once the applicant presents a prima facie case, the Board's decision not to issue the permit must be based on contrary findings supported by competent, material, and substantial evidence that appears in the record.

Appeal by petitioners from order entered 17 July 2015 by Judge Yvonne Mims Evans in Lincoln County Superior Court. Heard in the Court of Appeals 24 May 2016.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Jason White, for petitioners-appellants.

Scarbrough & Scarbrough, PLLC, by James E. Scarbrough and John F. Scarbrough, for intervenor respondents-appellees.

TYSON, Judge.

Gary Dellinger, Virginia Dellinger, and Timothy S. Dellinger (collectively, "the Dellingers" or "Petitioners") appeal from order affirming the decision of the Lincoln County Board of Commissioners ("the Board") to deny Strata Solar, LLC's application for a conditional use permit. We affirm in part, reverse in part, and remand.

I. Factual Background

The Dellingers own three tracts of real property in Denver, Lincoln County, North Carolina, which total approximately fifty-four acres. In May 2013, the Dellingers contracted with Strata Solar, LLC ("Strata Solar") for it to lease a portion of their property for the installation and operation of a solar energy facility. The Dellingers' property was zoned for residential-single family use ("R-SF") under the Lincoln County Unified Development Ordinance ("the Ordinance"). The properties directly adjoining or abutting the Dellingers' property are zoned as planned development-residential ("PD-R") and general industrial ("I-G").

The Ordinance schedules the operation of a solar energy farm as a permitted use on properties with this zoning classification, upon

application for a conditional use permit. According to the Ordinance, an applicant for a conditional use permit must meet four conditions:

> (1) The use will not materially endanger the public health or safety if located where proposed and developed according to the plan;
>
> (2) The use meets all required conditions and specifications;
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> (3) The use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity; and
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> (4) The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will be in general conformity with the approved Land Development Plan for the area in question.

On 23 July 2013, Strata Solar filed its conditional use permit application to construct a solar energy facility on a 35.25-acre portion of the land owned by the Dellingers. Strata Solar presented evidence in support of its application to the Lincoln County Planning Board during quasi-judicial hearings conducted on 9 September and 25 November 2013. The Lincoln County Planning Director reviewed the application, found it satisfied the four conditions, and recommended issuance of the permit. The Lincoln County Planning Board voted 4-4 on its recommendation to the Board of Commissioners for the conditional use permit.

On 2 December and 16 December 2013, the Board of Commissioners held quasi-judicial hearings for consideration of and a final determination on Strata Solar's application. One commissioner recused himself from the vote. Twenty-four witnesses testified at the 2 December hearing.

The hearing resumed on 16 December, and after the testimony and evidence was presented, the Board of Commissioners voted 3 to 1 to deny Strata Solar's application. The Board concluded Strata Solar had met the first two conditions in order to issue the conditional use permit. However, the Board voted against Strata Solar's application on not meeting the third and fourth conditions: (3) "[t]he use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity;" and, (4) "[t]he location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is located and will be in general conformity with the approved Land Development Plan for the area in question."

The Dellingers filed a Notice of Appeal and Petition for Writ of Certiorari in the Lincoln County Superior Court on 17 January 2014. The superior court also entered an order, which permitted property owners Timothy P. Mooney, George Gerard Arena, Martha McLean, and the Sailview Owners Association (collectively, "Intervenors-Respondents") to intervene in this action. One of the intervenors, George Gerard Arena, subsequently took a voluntary dismissal and withdrew from the case, after he sold his residence within the Sailview subdivision during the pendency of the action. No evidence was presented on the value of, or factors surrounding, this sale within Sailview.

On 7 August 2014, the superior court entered an order limiting the Dellingers' appeal to exclude "matters that could have been raised at the quasi-judicial hearing." The superior court concluded:

> The Petitioners, [the Dellingers,] by their failure to participate in the quasi-judicial hearing, waived their rights on appeal to complain of or object to those issues which could have been raised in the quasi-judicial hearing such that the scope of review is now limited to whether the Lincoln County Board of Commissioners' decision was supported by substantial competent evidence in view of the entire record and/or whether the Board's decision was arbitrary or capricious using the "whole record" test.

The Dellingers' appeal was heard on 26 January 2015. The superior court entered a written order on 25 February 2015, in which the court concluded it was "unable to determine whether the Board's decision on the third requirement was supported or unsupported by substantial competent evidence in view of the entire record." The superior court also held "[t]he Board did not make sufficient findings of fact regarding the third requirement," and "remand[ed] the matter to the Board for additional findings of fact regarding its decision to find in the negative as to the third requirement that 'the use will not substantially injure the value of adjoining property unless the use is a public necessity.' "

The superior court also reversed the Board's decision concerning Strata Solar's compliance with the fourth condition. The superior court concluded: "After reviewing the entire record, . . . there is not substantial evidence to support the Board's decision that the use is not in harmony with the area." This ruling on Strata Solar's compliance with the fourth condition was not appealed from, and is binding upon all parties.

Following the superior court's remand, the matter came before the Board of Commissioners for the second time on 16 March 2015. No new

testimony or additional evidence was taken. The membership of the Board had changed to include two new members since the initial decision was rendered on 16 December 2013.

The Chair of the Board had originally recused himself, and did so once again. New Commissioner Beam, the Vice-Chair, also recused himself, against the advice of the County Attorney, and stated he was not a member of the Board when it issued its original decision. Commissioner Martin Oakes ("Commissioner Oakes"), another new member of the Board, stated he had reviewed the entire record of the prior proceedings and participated in the 16 March vote.

The Board voted 2 to 1 to deny the conditional use permit application in a written decision dated 20 March 2015. The Dellingers filed a second Notice of Appeal and Petition for Writ of Certiorari. The Lincoln County Superior Court issued a second writ of certiorari on 16 April 2015. The superior court permitted the Intervenors-Respondents to intervene in the second action by order entered 8 June 2015.

The Dellingers' appeal was heard on 26 May 2015. The superior court entered its Decision on Appeal on 17 July 2015, which affirmed the Board's denial of the conditional use permit. The Dellingers gave timely notice of appeal to this Court. While Lincoln County and its Board of Commissioners are listed as party-defendants, neither filed a brief on appeal nor was either entity represented during oral arguments before this Court.

II. Issues

The Dellingers argue the superior court erred by affirming the Board's decision because: (1) the application for a conditional use permit was supported by competent, material, and substantial evidence; (2) the Board erred by allowing Commissioner Oakes to participate in the hearing and vote, and by requiring an improper burden of proof; and, (3) the Board's denial of the conditional use permit was not supported by competent, material, and substantial evidence.

III. Standard of Review

"A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body." *Sun Suites Holdings, LLC v. Bd. of Alderman of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000).

Our Supreme Court has recognized, "[d]ue process requirements mandate that certain *quasi-judicial* [land use] decisions comply with all fair trial standards when they are made." *County of Lancaster v. Mecklenburg Cty.*, 334 N.C. 496, 506, 434 S.E.2d 604, 611 (1993) (emphasis supplied). In addition to prior notice and an impartial decision-maker, our Supreme Court has explained these "fair trial standards" also include "an evidentiary hearing with the right of the parties to offer evidence; cross-examine adverse witnesses; inspect documents; have sworn testimony; and have written findings of fact supported by competent, substantial, and material evidence." *Id.* at 507-08, 434 S.E.2d at 612 (citations omitted).

The Board's decisions "shall be subject to review of the superior court in the nature of certiorari[,]" N.C. Gen. Stat. § 160A-381(c) (2015), in which "the superior court sits as an appellate court, and not as a trier of facts." *Tate Terrace Realty Inv'rs, Inc. v. Currituck Cty.*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848 (citation omitted), *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997).

The role of the superior court in reviewing the decision of a Board of Commissioners, sitting as a quasi-judicial body, has been defined as follows:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs of Town of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

"This Court's task on review of the superior court's order is twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *SBA, Inc. v. City of Asheville City Council*,

141 N.C. App. 19, 23, 539 S.E.2d 18, 20 (2000) (citations and internal quotation marks omitted).

> In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported that court's order but whether the evidence before the [county] board was supportive of its action. In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the [county] board.

Coastal Ready-Mix, 299 N.C. at 626, 265 S.E.2d at 383.

When a party alleges the Board of Commissioners' decision was based upon an error of law, both the superior court, sitting as an appellate court, and this Court reviews the matter *de novo*, considering the matter anew. *Humane Soc'y of Moore Cty., Inc. v. Town of S. Pines*, 161 N.C. App. 625, 629, 589 S.E.2d 162, 165 (2003) (citation omitted).

When a party challenges the sufficiency of the evidence or when the Board's decision is alleged to have been arbitrary and capricious, this Court employs the whole record test. "The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *SBA, Inc.*, 141 N.C. App. at 26, 539 S.E.2d at 22 (citations and internal quotation marks omitted). "The reviewing court should not replace the [Board's] judgment as between two reasonably conflicting views; while the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency." *Id.* (citation and internal quotation marks omitted).

IV. Analysis

A. Strata Solar's *Prima Facie* Case

Petitioners first argue the superior court erred by affirming the Board's decision and asserts Strata Solar's application for a conditional use permit was supported by competent, substantial, and material evidence. We agree.

Our Supreme Court has stated:

> Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms. It has been held that well-founded doubts as to the meaning

> of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property.

Yancey v. Heafner, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (citation and quotation marks omitted); *see also Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952) ("Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined . . . ."); *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 354, 578 S.E.2d 688, 691 (2003) ("Zoning ordinances derogate common law property rights and must be strictly construed in favor of the free use of property.").

"When an applicant for a conditional use permit produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a *prima facie* showing of entitlement to a permit." *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002) (citation and internal quotation marks omitted). Material evidence is "[e]vidence having some logical connection with the facts of consequence or the issues." Black's Law Dictionary 638 (9th ed. 2009). Substantial evidence is "evidence a reasonable mind might accept as adequate to support a conclusion." *Humane Soc'y of Moore Cty.*, 161 N.C. App. at 629, 589 S.E.2d at 165 (citation and quotation marks omitted). "It must do more than create the suspicion of the existence of the fact to be established. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 471, 202 S.E.2d 129, 137 (1974) (citation, internal quotation marks, and alterations omitted).

Our Supreme Court held:

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Id. at 468, 202 S.E.2d at 136 (citations omitted).

"[W]hether competent, material and substantial evidence is present in the record is a conclusion of law." *Clark v. City of Asheboro*, 136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (1999) (internal quotation marks

omitted). "[W]e review *de novo* the initial issue of whether the evidence presented by [P]etitioner[s] met the requirement of being competent, material, and substantial. The [county's] ultimate decision about how to weigh that evidence is subject to whole record review." *American Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 641, 731 S.E.2d 698, 701 (2012), *disc. review denied*, 366 N.C. 603, 743 S.E.2d 189 (2013). *See also SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 23-29, 539 S.E.2d 18, 20-24 (2000) (determining petitioner did not present sufficient evidence under *de novo* review and employing whole record test to find respondent properly weighed the evidence before it).

As discussed *supra*, the Ordinance requires an applicant to meet four conditions prior to issuance of a permit. In order for Strata Solar to make a *prima facie* showing of entitlement to a conditional use permit, it was required to present competent, substantial, and material evidence to meet the four conditions enumerated in the Ordinance. There is no dispute on appeal that Strata Solar's evidence met Conditions (1), (2), and (4) of the Ordinance. We focus our analysis on Condition (3).

[1] We first consider whether Strata Solar made a *prima facie* showing of entitlement to a conditional use permit on Condition (3). At the hearings on 2 and 16 December 2013, the Board of Commissioners heard evidence in favor of and against the application for the conditional use permit for the proposed solar farm.

Strata Solar produced "evidence that a solar farm would not emit noise, odors, or generate traffic, things that are considered to affect or reduce value to neighboring properties." Strata Solar presented the testimony and report of Richard Kirkland ("Mr. Kirkland"), a licensed and certified real estate appraiser, who has achieved the National Appraisal Institute's highest designation as a Member of the Appraisal Institute ("MAI"). Mr. Kirkland was tendered and admitted as an expert witness without objection, and testified the proposed solar farm would be in harmony with the area and its presence would not substantially injure the value of adjoining or abutting properties.

Mr. Kirkland's testimony was based upon his market review and analysis of paired and matched sales of real property, which adjoin a solar farm, in order to determine whether the solar farm's presence impacted the value of the adjoining or abutting properties. Mr. Kirkland specifically examined sales of homes in the Spring Garden subdivision, located in Goldsboro, North Carolina. Mr. Kirkland analyzed five sales in Spring Garden— two of which had occurred since the announcement of the solar farm, and three of which occurred after the solar farm was

constructed. Of these five homes, four of them "back up to," *i.e.* "adjoin or abut," the property hosting the solar farm.

Mr. Kirkland explained the results of the matched pair data analysis demonstrated the properties sold for similar prices both before and after the construction of the solar farm. Mr. Kirkland stated: "The prices being paid for are pretty much what the builder is asking." Based on these results, Mr. Kirkland testified, in his professional opinion, that proximity to a solar farm did not have a negative impact upon the value of the adjoining or abutting property.

Mr. Kirkland acknowledged the average value of homes in Spring Garden are $220,000.00 to $240,000.00, while the houses located within one mile of Strata Solar's proposed solar facility average more than $460,000.00. Mr. Kirkland testified he also "looked at some property in Chapel Hill," where a home which was adjacent to a solar farm was under contract for approximately $750,000.00, within the same price range of the homes in the Sailview subdivision.

Strata Solar also submitted into the record evidence the sworn affidavit of Mr. Kirkland. In his affidavit, Mr. Kirkland attested, in his professional opinion, "the proposed solar farm will not substantially injure the value of adjoining property and is in harmony with the area in which it is located." This expert testimony and affidavit were not objected to, were properly admitted into evidence, and constitute competent, material, and substantial evidence to support a *prima facie* showing of Strata Solar's compliance with Condition 3 of the Ordinance and entitlement to the permit.

Strata Solar also elicited testimony from Damon Bidencope ("Mr. Bidencope"), another licensed and certified real estate appraiser, who had also achieved the MAI designation. Mr. Bidencope testified the Sailview subdivision was designed and landscaped to form "an insulated enclave," which is isolated from other properties and developments in the area. He also testified the proposed solar facility would likely not be visible to those traveling on Webbs Road, or by residents or visitors from within the Sailview subdivision, due to the multiple layers of landscaping and fencing surrounding the proposed solar farm.

Mr. Bidencope testified he reviewed seven different solar farms in and around the area "because we were also trying to look and locate information that showed a significant or any deleterious effect on properties. We were unable to find it in our research."

The Board found Strata Solar had met its "burden of production" but "found the evidence unpersuasive." The Board denied the conditional use permit and concluded Strata Solar failed to satisfy Condition (3) — that the use would not substantially injure "the value of adjoining or abutting property." The Board voted 2 to 1 that Strata Solar had failed to make out its *prima facie* case under Condition (3).

The superior court reiterated: "[T]here was not substantial, material and competent evidence submitted by the Applicant, Strata Solar, to support a conclusion that issuance of a conditional use permit would not substantially injure the value of adjoining or abutting property." In light of the evidence summarized above, we hold that the superior court erred by upholding the Board's conclusion that Strata Solar failed to present substantial, material, and competent evidence to make a *prima facie* showing it was entitled to issuance of the conditional use permit.

The record shows Strata Solar produced substantial, material, and competent evidence to establish its *prima facie* case of entitlement for issuance of the conditional use permit. We reverse that portion of the superior court's order, which affirmed the Board's decision that Strata Solar had failed to present substantial, material, and competent evidence to establish a *prima facie* case of meeting Condition (3) to warrant issuance of the conditional use permit.

B. Commissioner Martin Oakes' Participation and Improper Burden of Proof

1. Commissioner Oakes' Participation

[2] Petitioners argue the Board erred by allowing Commissioner Oakes to participate in the Board's vote on remand, because he was not on the Board when it rendered its original decision to deny issuing Strata Solar's conditional use permit. We disagree.

In *Brannock v. Zoning Bd. of Adjustment*, 260 N.C. 426, 132 S.E.2d 758 (1963), the petitioners argued a special use permit was improperly granted because, *inter alia*, the membership of the Zoning Board of Adjustment changed between the original hearing and the final approval of the application. In a *per curiam* opinion, our Supreme Court affirmed the grant of the special use permit because "[t]he new members had access to the minutes and records of the various hearings and the required majority participated and joined in all decisions." *Id.* at 427, 132 S.E.2d at 759.

Here, although the addition of two new Board members had changed the membership composition of the Board from the time of the initial hearings in December 2013 to the time the Board reviewed the matter on 16 March 2015 after remand, both new Board members had an opportunity to read and review all of the evidence previously considered. Commissioner Oakes stated he "reviewed the entire record of the prior proceedings" before participating in the 16 March vote.

The change in Board membership composition had no effect upon Petitioners or Strata Solar's ability to present its arguments in favor of issuance of the conditional use permit. *See Cox v. Hancock*, 160 N.C. App. 473, 483, 586 S.E.2d 500, 507 (2003) (holding "access to the minutes and exhibits from the earlier meeting" assured petitioners were provided with due process and change in Board membership had no effect on petitioners' ability to present arguments).

Petitioners have failed to show any prejudice by new Commissioner Oakes' participation in the hearing and vote on remand. *See Baker v. Town of Rose Hill*, 126 N.C. App. 338, 342, 485 S.E.2d 78, 81 (1997) (holding petitioners failed to show prejudice where four of five members of Town Board voted in favor of resolution to issue conditional use permit). This argument is overruled. The superior court's ruling on this issue is affirmed.

2. Improper Burden of Proof

[3] Petitioners argue an improper burden of proof was imposed and their Due Process rights were violated because Commissioner Patton stated he was voting against issuing the permit because the applicant did not prove its case "beyond a doubt," and Commissioner Oakes and the Board's findings of fact stated "[a]lthough [Strata Solar] did meet its burden of production and provided evidence as to this element, we found the evidence unpersuasive." We review this alleged error of law *de novo*. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000) ("If a petitioner contends the Board's decision was based on an error of law, *de novo* review is proper."), *aff'd*, 354 N.C. 298, 554 S.E.2d 634 (2001).

The above-mentioned statements were made during the Board's 16 March 2015 deliberations upon remand from the superior court. The transcript of the 16 March deliberations and the record before us support Petitioners' argument that the Board's decision was based upon holding Strata Solar to an improper burden and legal standard. The superior court concluded "there were no procedural errors in the Board of Commissioners' decision on remand" and Commissioner Patton's

statement "does not suggest to the Court that he applied the wrong legal standard, but rather that he merely used a layman's term."

"This Court must examine the trial court's order for error of law just as with any other civil case." *Tate Terrace*, 127 N.C. App. at 219, 488 S.E.2d at 849 (citation and internal quotation marks omitted). Based on the evidence presented, the Board found "the applicant has failed to meet its burden of proof. Although it did meet its burden of *production* and provided evidence as to this element, we found the evidence unpersuasive." (emphasis supplied).

In *Woodhouse v. Bd. of Comm'rs of Nags Head*, 299 N.C. 211, 217, 261 S.E.2d 882, 887 (1980), our Supreme Court noted: "It is well settled [sic] that an applicant has the initial burden of showing compliance with the standards and conditions required by the ordinance for the issuance of a conditional use permit." Our Supreme Court further stated:

> To hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit. An applicant need not negate every possible objection to the proposed use. Furthermore, once an applicant shows that the proposed use is permitted under the ordinance and presents testimony and evidence which shows that the application meets the requirements for a special exception, the burden . . . falls upon those who oppose the issuance of a special exception.

Id. at 219, 261 S.E.2d at 887-88 (citations and internal quotation marks omitted).

Commissioner Patton's reference to holding Strata Solar to a "beyond a doubt" standard during the deliberations, in addition to Commissioner Oakes stating and the Board's order denying Strata Solar's permit because it "failed to meet its burden of proof" tends to show the Board imposed an improper standard or failed to recognize the requisite burden-shifting to the Intervenors-Respondents after Strata Solar had made its *prima facie* case for entitlement. *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136 (citations omitted).

Once Strata Solar established its *prima facie* case, the Board's decision not to issue the permit must be "based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.*

Here, the Board not only required Strata Solar to meet its burden of production to make its *prima facie* case, but one decision-maker apparently imposed a "beyond a doubt" burden of proof on Strata Solar. The Board also incorrectly implemented a "burden of persuasion" upon Strata Solar after Strata Solar it presented a *prima facie* case, rather than shifting the burden to the Intervenors-Respondents to produce rebuttal evidence contra to overcome Strata Solar's entitlement to the conditional use permit.

The Board's requirements are contrary to our Supreme Court's holdings in *Humble Oil* and *Woodhouse*, and as consistently applied in their progeny. *See Cumulus Broad., LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C. App. 424, 427, 638 S.E.2d 12, 15-16 (2006) ("When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it." (citation and quotation marks omitted)); *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227 ("Once an applicant makes [its *prima facie*] showing, the burden . . . falls upon those who oppose the issuance of the permit." (citation omitted)).

The superior court's order is reversed on this issue and remanded to that court for further remand to the Board for additional quasi-judicial proceedings, utilizing the proper legal procedures and standards, which hold Strata Solar and Intervenors-Respondents to their respective burdens of proof. In light of this decision, we need not address Petitioners' remaining argument that the Board's denial of Strata Solar's conditional use permit was not supported by competent, substantial, and material evidence.

V. Conclusion

Strata Solar produced substantial, material, and competent evidence to establish a *prima facie* case of entitlement to the issuance of a conditional use permit by Lincoln County.

Petitioners have failed to carry their burden to show they were prejudiced or denied Due Process by new Commissioner Oakes' participation in the Board's decision upon remand. Petitioners' argument that Strata Solar was held to an improper burden of proof and that the Board failed to shift the burden of proof to the Intervenors-Respondents is supported by the record.

The order of the superior court, which upheld the Board's denial of Strata Solar's application for a conditional use permit, is reversed

and remanded with further instructions to remand to the Board for further proceedings consistent with this opinion. *See* N.C. Gen. Stat. § 160A-393(k)(3) (2015), *Dobo v. Zoning Bd. of Adjustment of Wilmington*, 149 N.C. App. 701, 712-13, 562 S.E.2d 108, 115-16 (2002) (Tyson, J., dissenting), *rev'd per curiam*, 356 N.C. 656, 576 S.E.2d 324 (2003).

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

Judges BRYANT and INMAN concur.

JOHN NEWTON, HARRY SCHATMEYER, CHERYL SCHATMEYER, JUANVELASQUEZ, ROBERT THOMPSON, KRISTI THOMPSON, DALE F. CAMARA, A.J. RICE, VIOLANE RICE, RANDALL SLAYTON, MARIE PALADINO, MARCAR ENTERPRISES, INC., MAYNARD SIKES, NANCY SIKES, BILLY BACON, BEVERLY BACON, SABINA HOULE, KENNETH COURNOYER, LAWANNA COURNOYER, GARY GROSS, ELKE GROSS, JACK DONNELLY, AND JOSEPH KINTZ, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED, PLAINTIFFS

AND RICHARD B. SPOOR, PLAINTIFF

v.

JOHN BARTH, JR., AND JOHN BARTH, (SR.), DEFENDANTS

DIORIO FOREST PRODUCTS, INC., 919 MARKETING COMPANY, INC., AND JAMES B. ENTERPRISES, INC., FORMERLY EPPERSON LUMBER SALES, INC., ON BEHALF OF THEMSELVES AND ALL ENTITIES SIMILARLY SITUATED, PLAINTIFFS

AND RICHARD B. SPOOR, PLAINTIFF

v.

JOHN BARTH, JR., AND JOHN BARTH (SR.), DEFENDANTS

Nos. COA15-1209, COA15-1210

Filed 19 July 2016

1. Jurisdiction—standing—subject matter jurisdiction—class action—bankruptcy—fraudulent misrepresentations

The trial court erred in two class action lawsuits by determining the Newton and Diorio plaintiffs lacked standing to sue. The injuries arising from the alleged fraudulent misrepresentations that induced each class member's individual contract were separate and distinct from any injury to AmerLink or any other creditor of the bankruptcy estate.

2. Statutes of Limitation and Repose—fraud—unfair and deceptive trade practices

The trial court erred in two class action lawsuits by granting defendants' Rule 12(b)(6) motion to dismiss Newton and Diorio plaintiffs' claims based on an alleged failure to bring suit within the applicable statute of limitations. Because they filed their respective complaints well within three years of Spoor's initial complaint, the Newton and Diorio Plaintiffs commenced their actions within the three-year statute of limitations for fraud claims and the four-year statute of limitations for unfair and deceptive trade practices claims.

Appeals by Plaintiffs John Newton, et al., from Order and Judgment entered 8 June 2015 and Plaintiffs Diorio Forest Products, Inc., *et al.*, from Order and Judgment entered 18 June 2015 by Judge Robert T. Sumner in Wake County Superior Court. Heard in the Court of Appeals 9 June 2016.

Barry Nakell, and Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, for Plaintiffs.

Manning Fulton & Skinner, P.A., by Judson A. Welborn and J. Whitfield Gibson, for Defendant John M. Barth, Jr.

Wilson & Ratledge, PLLC, by Reginald B. Gillespie, Jr., and N. Hunter Wyche, Jr., and Foley & Lardner LLP, by Michael J. Small and David B. Goroff, for Defendant John M. Barth.

STEPHENS, Judge.

Plaintiffs John Newton, *et al.*, and Diorio Forest Products, Inc., *et al.*, appeal from the trial court's Orders and Judgments dismissing their claims against Defendants John M. Barth, Jr. ("Junior"), and John M. Barth ("Senior"), based on lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Plaintiffs argue that the trial court erred in determining they lacked standing to assert their claims and that their claims were barred by the applicable statutes of limitations. We agree, and we consequently reverse the trial court's Orders and Judgments.

Factual Background and Procedural History

This case arises from two separate class action lawsuits filed in Wake County Superior Court alleging claims for fraud, unfair and

deceptive trade practices ("UDTP"), civil conspiracy, and punitive damages against Junior and Senior by the customers, vendors, and suppliers of AmerLink, Ltd., a North Carolina corporation that engaged in the business of selling materials and contracts for the construction of log homes. The Newton Plaintiffs were customers of AmerLink, and the Diorio Plaintiffs were vendors and suppliers of AmerLink. Junior was AmerLink's president and CEO from 2006 to 2008. Senior is Junior's father, and although he never held any formal position with AmerLink, the Newton and Diorio Plaintiffs allege that beginning in 2007 and continuing until October 2009, Junior and Senior engaged in a fraudulent scheme to acquire control of AmerLink at a depreciated price by falsifying financial statements and other documents, secretly infusing over $2 million into AmerLink to prop up the corporation and conceal the falsified financial statements, and misrepresenting AmerLink's distressed financial condition.

The facts underlying the allegations of the Newton and Diorio Plaintiffs' complaints were previously discussed at length in this Court's opinion in a related action brought against Junior and Senior by AmerLink's founder, chairman, and former majority shareholder, Richard B. Spoor. *See Spoor v. Barth*, __ N.C. App. __, 781 S.E.2d 627, *disc. review and cert. denied*, __ N.C. __, __ S.E.2d __ (2016). As detailed therein, after becoming president and CEO of AmerLink in September 2006, Junior sought to purchase Spoor's controlling interest in the company using funds from Senior, who inspected AmerLink's facilities, inquired into the company's financial situation with its principal lender, and drafted terms for a potential purchase agreement in 2007. *Id.* at __, 781 S.E.2d at 629. No agreement was reached at that time, but Junior and Spoor eventually agreed to form a new corporation which would serve as a vehicle for Junior to purchase Spoor's majority interest in AmerLink using $8 million in funds from Senior in exchange for shares Spoor deposited into the new corporation. *Id.* at __, 781 S.E.2d at 629-30. Spoor alleged that by January 2008, "Junior became aware that based on his mismanagement, AmerLink was facing financial difficulty," and he thereafter took steps to conceal this from Spoor and others by falsifying sales and delivery reports. *Id.* at __, 781 S.E.2d at 629. In June 2008, "Junior became aware that AmerLink was insolvent and was unable to purchase materials to fulfill its contracts," but he nevertheless continued to falsify financial and delivery reports, "directed AmerLink staff to encourage customers to enter into sales agreements with AmerLink, to send deposits and additional funds to AmerLink, and to schedule deliveries," and infused funds in excess of $2 million to prop up the company, with half of those funds coming from Senior. *Id.* In October 2008, after Spoor discovered

Junior had been falsifying reports to conceal AmerLink's rapidly deteriorating financial situation, Junior was removed from his position as CEO but remained president, promised Senior would loan the corporation up to $3 million, and directed staff to continue to tell customers that new investment funds were on the way. *Id.* at __, 781 S.E.2d at 630. However, Senior provided only $300,000 in funding, and on 15 December 2008, Spoor shut down AmerLink after learning its financial situation was even worse than Junior had represented in October. *Id.* at __, 781 S.E.2d at 631.

On 12 February 2009, AmerLink filed for Chapter 11 bankruptcy. *Id.* In the months that followed, Junior continued to represent that additional investments of up to $8 million would be forthcoming from Senior, and at one point forged a bank statement to reflect that such loans had been deposited. *Id.* However, in August 2009, Senior informed AmerLink's bankruptcy attorney that he had no intention of providing any further financing for the company. *Id.* Thereafter, AmerLink's Chapter 11 bankruptcy proceeding was converted to a Chapter 7 bankruptcy proceeding, and, on 13 May 2010, Junior pleaded guilty to felony bankruptcy fraud. *Id.* at __, 781 S.E.2d at 631-32. On 23 April 2011, AmerLink's bankruptcy trustee filed an adversary proceeding against Junior, Senior, Spoor, and other AmerLink directors alleging claims for, *inter alia*, fraudulent conveyances, preferential transfers, breach of fiduciary duties, constructive trust, unjust enrichment, and civil conspiracy. *Id.* at __, 781 S.E.2d at 636. These charges were based on the trustee's allegations that Junior, Spoor, and other AmerLink directors

> engaged in the creation of new companies and transfer of assets to companies in an effort to sell a substantial portion of [Spoor's] ownership interest in AmerLink. The trustee also alleged that an employee stock option plan was adopted at the urging of [Spoor] and Junior effective 1 October 2005 and that [Spoor], Junior, and AmerLink's directors' actions were solely for the purpose of creating a means for [Spoor] to extract as much cash as possible from the business and for Junior to be in a position to take control of the company. This adversary proceeding was settled on 6 September 2011. The trustee dismissed with prejudice all claims and causes of action against Senior, Junior, and [Spoor] and released them from claims by the trustee or bankruptcy estate.

Id. Although the bankruptcy settlement included a waiver by Spoor releasing all claims against AmerLink's bankruptcy estate, on 5 October

2011, Spoor filed a complaint alleging claims against Junior in his individual capacity for, *inter alia*, breach of contract, breach of contract as third party beneficiary, breach of fiduciary duty, fraud, punitive damages, UDTP, and civil conspiracy. *Id.* at __, 781 S.E.2d at 632. On 14 February 2012, Spoor filed his first amended complaint adding Senior as a defendant. *Id.*

That same day, the Newton Plaintiffs filed a complaint in Wake County Superior Court alleging their claims for fraud, UDTP, civil conspiracy, and punitive damages against Junior and Senior in their individual capacities. The Newton Plaintiffs voluntarily dismissed their complaint without prejudice on 23 May 2013, refiled their complaint on 22 May 2014, and filed an amended complaint on 9 June 2014. The Diorio Plaintiffs filed a substantially similar complaint on 30 July 2014. In their complaints, the Newton and Diorio Plaintiffs alleged that by infusing funds into AmerLink, falsifying corporate financial statements, and directing AmerLink staff to assure customers, vendors, and suppliers that AmerLink would either comply with its contracts or receive funds that would allow it to comply with those contracts, Junior and Senior intentionally misrepresented and concealed AmerLink's financial distress in order to deceive and induce the Newton and Diorio Plaintiffs into entering into contracts with and providing funds, materials, and services to AmerLink, thus leaving them unable to protect themselves from the company's financial problems. The Newton and Diorio Plaintiffs also alleged that they could not have discovered the facts constituting Junior's and Senior's alleged fraud and UDTP through the exercise of reasonable diligence before 1 January 2012, given that much of the information supporting those facts was not produced until after Spoor filed his lawsuit against Junior and Senior.[1]

On 11 July and 19 August 2014, our Supreme Court's Chief Justice entered separate orders designating these cases as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. Junior and Senior subsequently filed motions to dismiss both complaints pursuant to Rules 12(b)(1) and 12(b)(6) of our State's Rules of Civil Procedure. Specifically, Junior and Senior contended that: (1) the Newton and Diorio Plaintiffs lacked standing to sue, thereby depriving the trial court of subject matter jurisdiction, because the claims they alleged in their complaints were wholly derivative of claims that

1. Although Spoor was included as a plaintiff in the initial complaints filed by both the Newton and Diorio Plaintiffs, the Newton and Diorio Plaintiffs voluntarily dismissed Spoor without prejudice from both actions on 15 October 2014.

properly belonged to the corporation and were already asserted, litigated, and settled by the adversary proceeding that had been brought by AmerLink's bankruptcy trustee; and (2) the claims were barred by the applicable statutes of limitations, failed to comply with the heightened pleading requirements for alleging fraud as required by N.C.R. Civ. P. 9(b), and otherwise failed to state any basis upon which relief could be granted.

After a hearing held in Wake County Superior Court on 2 March 2015, the Honorable Robert T. Sumner, Judge presiding, the trial court concluded that the Newton and Diorio Plaintiffs lacked standing and that their claims were barred by the applicable statutes of limitations, and consequently dismissed their claims with prejudice by written orders entered 8 and 18 June 2015. The Newton and Diorio Plaintiffs filed timely notice of appeal to this Court.

Analysis

A. Standing

[1] The Newton and Diorio Plaintiffs argue first that the trial court erred in dismissing their claims against Junior and Senior based on its conclusion that they lacked standing to sue. Specifically, the Newton and Diorio Plaintiffs contend that the adversary proceeding filed by the AmerLink bankruptcy trustee does not preclude their claims for fraud, UDTP, civil conspiracy, and punitive damages against Junior and Senior in their individual capacities because these claims were never asserted during the adversary proceeding and because these claims belong to the Newton and Diorio Plaintiffs, rather than the AmerLink bankruptcy estate. We agree.

"In order for a court to have subject matter jurisdiction to hear a claim, the party bringing the claim must have standing." *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C. App. 102, 106, 744 S.E.2d 130, 133 (2013) (citation omitted). "[S]tanding to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer*, 209 N.C. App. 369, 379, 705 S.E.2d 757, 765 (citation and internal quotation marks omitted), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). "[T]his Court's review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*." *Munger v. State*, 202 N.C. App. 404, 410, 689 S.E.2d 230, 235 (2010), *disc. review improvidently allowed*, 365 N.C. 3, 705 S.E.2d 734 (2011).

"When a corporation enters bankruptcy, any legal claims that could be maintained *by the corporation* against other parties become part of the bankruptcy estate, and claims that are part of the bankruptcy estate may only be brought by the trustee in the bankruptcy proceeding." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 25, 560 S.E.2d 817, 822 (citations omitted; emphasis in original), *disc. review denied and appeal dismissed*, 356 N.C. 164, 568 S.E.2d 196 (2002). Federal law authorizes the bankruptcy trustee to: (1) bring suit on behalf of the bankruptcy estate; and (2) avoid or recover fraudulent conveyances of property from the bankrupt debtor for the benefit of all creditors of the bankruptcy estate. *See* 11 U.S.C. §§ 541(a), 544, 548 (2012). However, as the United States Supreme Court recognized in *Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416, 433-34, 32 L. Ed. 2d 195, 206-07 (1972), the trustee's authority to bring suit on behalf of the bankruptcy estate does not extend to state law claims by the estate's creditors against third parties.[2] Thus, an action that is "personal" to a creditor is not property of the bankruptcy estate. *See, e.g.*, *In re Bostic Constr., Inc.*, 435 B.R. 46, 60 (M.D.N.C. 2010). The issue of whether a claim is personal to a creditor depends on state law. *See id.*; *see also Keener*, 149 N.C. App. at 26, 560 S.E.2d at 822.

The North Carolina Supreme Court has recognized that, as a general matter, a corporate officer "can be held personally liable for torts in which he actively participates," even when such torts were "committed when acting officially" and "regardless of whether the corporation is liable." *Wilson v. McLeod Oil Co., Inc.*, 327 N.C. 491, 518, 398 S.E.2d 586, 600 (1990) (citations omitted), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991). In the context of a bankruptcy proceeding,

> [s]hareholders, creditors, or guarantors of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation. Recovery is available, naturally, when the defendant owes an individual shareholder, creditor, or guarantor a special duty, or when the individual suffered an injury separate and distinct from that suffered by other shareholders, creditors, or guarantors.

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2. Although *Caplin* was decided prior to the enactment of the federal Bankruptcy Code, it remains good law, *see, e.g.*, *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 986 (11th Cir. 1990) ("*Caplin* has been held to remain the law under the revised bankruptcy statutes."), and was recently cited by the United States Court of Appeals for the Second Circuit to support its holding that the bankruptcy trustee in proceedings arising from the liquidation of Bernie Madoff's investment firm lacked standing to sue several third parties on behalf of individual customers defrauded by Madoff's Ponzi scheme. *See In re Bernard L. Madoff Inv. Secs. LLC*, 721 F.3d 54, 67 (2d Cir. 2013).

Barger v. McCoy Hillard & Parks, 346 N.C. 650, 660, 488 S.E.2d 215, 220-21 (1997) (citations and ellipsis omitted). Therefore, the creditors of a bankruptcy estate may prosecute individual actions against a third party if they "can show either (1) that the wrongdoer owed [them] a special duty, or (2) that the injury suffered by the [creditors] is personal to [them] and distinct from the injury sustained by the corporation itself." *Id.* at 661, 488 S.E.2d at 221.

In the present case, the Newton and Diorio Plaintiffs do not allege that Junior or Senior owed them any special duty, so our analysis on the standing issue focuses solely on whether the injuries they have alleged are personal and belong to them. During the hearing on their motion to dismiss and in their briefs and oral arguments to this Court, Junior and Senior argued that the Newton and Diorio Plaintiffs lacked standing to bring these claims because the harms they alleged were generalized injuries to AmerLink and had already been litigated by the bankruptcy estate trustee during the adversary proceeding. However, this Court rejected a strikingly similar argument in *Spoor v. Barth*, where we reversed the trial court's grant of summary judgment in favor of Junior and Senior, based in part on our conclusion that the court erred in concluding that Spoor lacked standing to bring suit. *See Spoor*, __ N.C. App. at __, 781 S.E.2d at 636. As demonstrated in *Spoor*, the adversary proceeding brought by the AmerLink bankruptcy trustee focused on allegations that by setting up an employee stock option plan and creating and transferring assets into new companies in order to facilitate the sale of Spoor's majority ownership interest in AmerLink, Junior, Senior, and Spoor improperly diverted corporate assets for their own benefit. *See id.* Because these claims for, *inter alia*, fraudulent conveyances and preferential transfers were rooted in conduct that depleted the AmerLink bankruptcy estate at the expense of all its creditors, they properly belonged to the trustee. However, there was no indication that the AmerLink bankruptcy trustee ever settled, brought, or even discovered, any claims based on the fraudulent acts that Spoor alleged in his complaint as the basis for his breach of contract, fraud, and UDTP claims against Junior and Senior. *See id.* Indeed, because Spoor's claims were based on Junior's and Senior's conduct in their individual capacities to mislead Spoor by concealing AmerLink's dire financial condition and induce Spoor, in his individual capacity, to invest his majority interest in AmerLink into a newly created company in exchange for $8 million Junior and Senior promised but never paid, we concluded that the injuries Spoor alleged were separate and distinct from any generalized harm suffered by AmerLink or its shareholders. *See id.* We therefore held that the claims belonged to Spoor alone, and we consequently rejected Junior's and Senior's argument that

AmerLink's bankruptcy trustee had any, let alone exclusive, standing to bring those claims. *See id.*

Here, the Newton and Diorio Plaintiffs' claims against Junior and Senior in their individual capacities arise from essentially the same set of facts as alleged in *Spoor*—namely, the cash infusions and falsified financial statements Junior and Senior engaged in throughout 2008 to conceal AmerLink's financial distress, as well as Junior's repeated assurances to Spoor and AmerLink's staff, customers, vendors, and suppliers that the company would receive additional funds and continue to perform its contractual obligations. As in *Spoor*, despite characterizations by Junior and Senior to the contrary, there is no indication in the record before us that the AmerLink bankruptcy trustee brought or settled any action related to, or ever discovered, the facts underlying these allegations.

Junior and Senior nevertheless contend that, unlike in *Spoor*, the injuries the Newton and Diorio Plaintiffs allege are injuries to AmerLink itself, shared by all its creditors, and therefore properly belonged to the bankruptcy trustee. In support of their argument, Junior and Senior rely on cases holding that bankruptcy estate creditors were barred from suing third parties for injuries arising from pre-bankruptcy conveyances of corporate assets because such fraudulent conveyances and preferential transfers resulted in injuries to the corporations themselves, and thus, were injuries shared in common by every creditor to the bankruptcy estate, for which federal law expressly vests the trustee with exclusive standing to bring suit. *See*, *e.g.*, *Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999) (holding that sureties of bankrupt corporation lacked standing to sue third party to whom corporate property was conveyed prior to bankruptcy filing because their claim had the same underlying focus as the bankruptcy trustee's claim for avoiding the conveyance), *cert. denied*, 528 U.S. 1156, 145 L. Ed. 2d 1073 (2000); *In re Bridge Info. Sys.*, *Inc.*, 344 B.R. 587, 594 (E.D. Mo. 2006) (finding no standing for bankruptcy estate creditors to bring claims for fraud against corporate shareholders, who prior to bankruptcy caused the corporation to acquire a target company and then transferred the corporation's interest in that company to themselves, because their suit was no different from the bankruptcy trustee's claim for fraudulent conveyance).

We are not persuaded. To be sure, the allegations in the Newton and Diorio Plaintiffs' complaints do relate to conduct that undoubtedly harmed AmerLink itself. However, the gravamen of the Newton and Diorio Plaintiffs' fraud and UDTP claims is not merely that they were injured by AmerLink's collapse and the resulting breach of its

contractual obligations to them, but instead that they *never would have suffered any injury* if they had not been fraudulently induced into entering into contracts with AmerLink as a result of misrepresentations made by AmerLink staff acting at Junior's direction throughout 2008, when Junior was already aware of the company's financial distress. In their complaints, the Newton and Diorio Plaintiffs detail how each member of their respective classes of AmerLink's customers, vendors, and suppliers relied on the alleged misrepresentations when entering into their individual contracts with AmerLink on various dates and for varying amounts, thereby resulting in injuries to themselves in their individual capacities. Junior and Senior argue that these alleged injuries are not separate and distinct because nearly every creditor of AmerLink had a contract that AmerLink breached, and they complain that if the Newton and Diorio Plaintiffs have standing to pursue their claims, then so could every other creditor exposed to AmerLink's financial distress, which they insinuate would undermine the central purpose of bankruptcy to provide an orderly process for disposing of claims against the estate. But this argument ignores the fact that the United States Supreme Court expressly contemplated exactly this sort of creditor class action suit when it reasoned in *Caplin* that there was no need to empower a bankruptcy trustee to bring actions on behalf of creditors against third parties because "Rule 23 of the Federal Rules of Civil Procedure, which provides for class actions, avoids some of the[] difficulties" that would ensue from allowing individual creditors to sue separately. *Caplin*, 406 U.S. at 433, 32 L. Ed. 2d at 206. Moreover, Junior and Senior cite no authority to support their implicit premise that the AmerLink bankruptcy proceeding ought to somehow immunize them from liability for prior acts of fraud undertaken in their individual capacities. Because we conclude that the injuries arising from the alleged fraudulent misrepresentations that induced each class member's individual contract are separate and distinct from any injury to AmerLink or any other creditor of the bankruptcy estate, we hold that these claims belong to the Newton and Diorio Plaintiffs, rather than the AmerLink trustee. Consequently, we hold that the Newton and Diorio Plaintiffs have standing to sue, and that the trial court erred in granting Junior's and Senior's motion to dismiss for lack of subject matter jurisdiction.

B. Statute of limitations

[2] The Newton and Diorio Plaintiffs argue next that the trial court erred in granting Junior's and Senior's Rule 12(b)(6) motion to dismiss their claims because they failed to bring suit within the applicable statute of limitations. We agree.

This Court reviews *de novo* an order dismissing an action pursuant to N.C.R. Civ. P. 12(b)(6). *See State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010). In doing so, we must "determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. In ruling upon such a motion, the complaint is to be liberally construed." *Id.* (citation, internal quotation marks, and ellipsis omitted). "Dismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim." *Id.* (citation omitted).

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises." *Pierson v. Buyher*, 330 N.C. 182, 186, 409 S.E.2d 903, 905 (1991) (citation and ellipsis omitted). An action alleging claims for fraud and related conspiracy must be brought within three years, and "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud . . . ." N.C. Gen. Stat. § 1-52(9) (2015). "For purposes of [section] 1-52(9), discovery means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (internal quotation marks omitted). "[W]here a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for purposes of the statute of limitations." *Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984). "Ordinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances. This is particularly true when the evidence is inconclusive or conflicting." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 386. The statute of limitations for a UDTP claim is four years. N.C. Gen. Stat. § 75-16.2 (2015). "Under North Carolina law, an action [for UDTP] accrues at the time of the invasion of [the] plaintiff's right. For actions based on fraud, this occurs at the time the fraud is discovered or *should have been discovered* with the exercise of reasonable diligence." *Nash v. Motorola Commc'ns & Elecs., Inc.*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989) (citations and internal quotation marks omitted; emphasis in original), *affirmed per curiam*, 328 N.C. 267, 400 S.E.2d 36 (1991).

In the trial court, Junior and Senior argued that the Newton and Diorio Plaintiffs' actions were barred by the statute of limitations

since they should have discovered the conduct underlying their fraud and UDTP claims in December 2008 when AmerLink closed its doors, because it was clear at that point that AmerLink would breach its contractual obligations to them. We rejected a similar argument in *Spoor*. There, we reversed the trial court's grant of summary judgment in favor of Senior based on a lapse of the statute of limitations, reasoning based on our Supreme Court's holding in *Forbis* that because the evidentiary forecast presented a genuine issue of material fact as to when Spoor discovered or should have discovered the alleged fraudulent conduct, the issue was one for the jury's determination. __ N.C. App. at __, 781 S.E.2d at 635.

Here, we reach a similar result. The Newton and Diorio Plaintiffs are suing for fraud and UDTP based on a conspiratorial course of conduct by Junior and Senior that they allege began in 2007, continued until at least August 2009, and could not have been discovered until 1 January 2012. While the injuries the Newton and Diorio Plaintiffs suffered may have been apparent once they learned that AmerLink could not perform its contractual obligations in December 2008, our General Statues make clear that the statute of limitations is triggered not upon discovery of an injury, but upon "the discovery by the aggrieved party of the facts constituting the fraud . . . ." N.C. Gen. Stat. § 1-52(9). We find it difficult to discern how AmerLink's mere act of closing its doors somehow laid plain the existence of a fraudulent scheme that the Newton and Diorio Plaintiffs allege had not even been completed yet, especially in light of the fact that neither the AmerLink bankruptcy trustee, who brought the adverse proceeding, nor the United States Attorney, who prosecuted Junior for bankruptcy fraud, discovered the actions underlying these claims, either. In their complaints, the Newton and Diorio Plaintiffs allege that as corporate outsiders, they could not have discovered any of the facts underlying their claims before Spoor, a corporate insider, exposed them by filing his initial complaint against Junior in October 2011 and his first amended complaint adding Senior as a defendant in February 2012. Taking these allegations as true—as we must, given the procedural posture of this case, *see State Emps. Ass'n of N.C., Inc.*, 364 N.C. at 210, 695 S.E.2d at 95—we conclude that because they filed their respective complaints well within three years of Spoor's initial complaint, the Newton and Diorio Plaintiffs commenced their actions within the three-year statute of limitations for fraud claims and the four-year statute of limitations for UDTP claims. Consequently, we hold that the trial court erred in granting Junior's and Senior's motion to dismiss based on a lapse of the applicable statutes of limitations.

Junior and Senior present a series of related arguments as independent bases to uphold the trial court's dismissal pursuant to N.C.R. Civ. P. 12(b)(6), but they are unavailing. Specifically, Senior contends that dismissal of the fraud claims was proper as to him because the Newton and Diorio Plaintiffs' complaints failed to allege their claims for fraud with sufficient particularity as required by N.C.R. Civ. P. 9(b). "The elements of fraud are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 609, 659 S.E.2d 442, 449 (2008) (citation omitted); *see also Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981) ("[I]n pleading actual fraud the particularity requirement [imposed by N.C.R. Civ. P 9(b)] is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations."). Senior argues that the Newton and Diorio Plaintiffs failed to state a claim for fraud against him because their complaints contain no specific allegations that Senior himself ever personally made any representations to, intended to deceive, deceived, or caused any injury to any member of the plaintiff classes in either action. Senior contends that the UDTP claims against him fail to state a UDTP claim "for the same reasons."

These two arguments both depend on the validity of Senior's argument that the Newton and Diorio Plaintiffs also failed to properly plead their claims for civil conspiracy. Our case law makes clear that "to state a claim for civil conspiracy, a complaint must allege a conspiracy, wrongful acts done by certain of the alleged conspirators, and injury." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 416, 537 S.E.2d 248, 265 (2000) (citations and internal quotation marks omitted), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 14, *appeal withdrawn*, 354 N.C. 219, 553 S.E.2d 684 (2001). Moreover, it is well established that "[i]f two or more persons conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common design; the fact that one conspirator is the instigator and dominant actor is immaterial on the question of the guilt of the other." *Curry v. Staley*, 6 N.C. App. 165, 169, 169 S.E.2d 522, 525 (1969) (citations omitted). Senior's argument on this point appears to be based on selective quotations from the subsections in both complaints that formally allege causes of action for civil conspiracy by stating:

> The acts and agreements of [Senior] and [Junior] constitute a civil conspiracy, which existed for wrongful acts to be committed, and which were actually committed, by said [Senior] and [Junior] for the purpose of said civil conspiracy.

Senior contends these allegations are conclusory and legally insufficient because they fail to allege any specific details of any conspiratorial agreement he made with Junior. This argument fails, however, because it ignores the fact that the relevant paragraphs in both complaints expressly incorporate all prior allegations made, including, *inter alia*, that Junior and Senior "acted in concert and each acted as the agent of the other in a plan or scheme" to acquire Spoor's majority stake in AmerLink. The complaints also provide dozens of paragraphs of allegations extensively detailing the specific actions both Junior and Senior took over a period of several years to further this scheme by concealing AmerLink's financial distress, as well as Junior's directions to AmerLink staff throughout 2008, when he knew the company was nearly insolvent, to continue entering into contracts with the Newton and Diorio Plaintiffs and to assure them that AmerLink had or would soon receive funds that would allow it to honor its contractual obligations to them. The allegations in both complaints further outline the specific dates when the Newton and Diorio Plaintiffs entered their contracts and the specific amounts of damages suffered by each member of the class when Junior's and Senior's scheme finally unraveled. Because the complaints are "replete with allegations of a conspiracy by and between the defendants, acts done by some or all of the defendants in furtherance of that alleged conspiracy, and injury" to the Newton and Diorio Plaintiffs, we reject Senior's argument that their complaints failed to state a claim for civil conspiracy. *Norman*, 140 N.C. App. at 416, 537 S.E.2d at 265. Further, given the extensive details provided in the complaints regarding the nature and circumstances surrounding Junior's misrepresentations and the injuries the Newton and Diorio Plaintiffs suffered as a result, we also reject Senior's argument that the complaints failed to state a claim for fraud with sufficient particularity, as well as Senior's argument that the Newton and Diorio Plaintiffs failed to state a claim for UDTP. *See*, *e.g.*, *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) ("The case law applying Chapter 75 holds that a plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred. Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts.") (citation, internal quotation marks, and ellipsis omitted).

Finally, we reject Junior's and Senior's argument that the claims for civil conspiracy and punitive damages must be dismissed. Junior and Senior are correct that these cannot survive as separate causes of action. *See*, *e.g.*, *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) ("[T]here is not a separate civil action for civil conspiracy in North Carolina.") (citation omitted), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 249 (2006); *Watson v. Dixon*, 352 N.C. 343, 348, 532 S.E.2d 175, 178 (2000) ("As a rule, you cannot have a cause of action for punitive damages by itself. If the complainant fails to plead or prove his cause of action, then he is not allowed an award of punitive damages because he must establish his cause of action as a prerequisite for a punitive damage award."). However, their argument on this point fails because it presumes the trial court was correct in determining that the Newton and Diorio Plaintiffs' complaints for fraud and UDTP should be dismissed.

Accordingly, we hold that the trial court erred in dismissing the Newton and Diorio Plaintiffs' complaints, and that its Orders and Judgments must be, and hereby are,

REVERSED.

Judges McCULLOUGH and ZACHARY concur.

IN THE MATTER OF E.R., E.R., I.L.

No. COA16-116

Filed 19 July 2016

Child Abuse, Dependency, and Neglect—permanency placement plan—non-relatives—grandmother not considered

The trial court erred in a child neglect proceeding by choosing guardianship with non-relatives as the permanent plan without making specific findings explaining why placement with the paternal grandmother was not in the children's best interest.

Appeal by respondent-father from order entered 12 November 2015 by Judge Roy Wijewickrama in Swain County District Court. Heard in the Court of Appeals 20 June 2016.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred for respondent-appellant father.

No brief filed by petitioner-appellee Swain County Department of Social Services.

No brief filed by guardian ad litem.

INMAN, Judge.

Respondent-father appeals from the trial court's "Review and Permanency Planning Review Order" placing his sons E.R. ("Elvin") and E.R. ("Ervin")[1] in the guardianship of non-relatives Mr. and Mrs. B. Petitioner-appellee Swain County Department of Social Services ("DSS") and the guardian *ad litem* ("GAL") concede that the court erred by failing to make findings of fact regarding a potential placement for the two boys with their paternal grandmother, as required by N.C. Gen. Stat. § 7B-903(a)(2)(c) (repealed effective Oct. 1, 2015) and N.C. Gen. Stat. § 7B-903(a1) (effective Oct. 1, 2015). *See* N.C. Sess. Laws 2015-136, §§ 10, 18 (July 2, 2015).[2] Because we concur with the parties, we reverse the order in pertinent part and remand for further proceedings.

Elvin and Ervin are the minor children of respondent-father and respondent-mother, who are unmarried. Respondent-mother has a third son I.L. ("Ivan") by another father. Ivan is an enrolled member of the Eastern Band of Cherokee Indians ("EBCI"). Elvin and Ervin are eligible for tribal membership but remained unenrolled at the time of these proceedings. Accordingly, the trial court has determined "[t]hat the Indian Child Welfare Act [('ICWA')] applies in this matter." *See* 25 U.S.C.S. § 1903(4) (2016) (defining "Indian child" for purposes of the ICWA as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe").

On 13 June 2014, DSS filed petitions alleging that Elvin, Ervin, and Ivan were neglected juveniles, in that they did not receive proper care, supervision, or discipline and lived in an environment injurious to their

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1. The parties stipulated to the use of these pseudonyms to protect the juveniles' privacy. In his brief to this Court, respondent-father refers to the younger of his two boys as Ervin.

2. The hearing that resulted in the order was held on 28 September 2015, prior to the effective date of N.C. Sess. Laws 2015-136, § 10. The court entered its order on 12 November 2015, after the law's effective date. Because the substance of the relevant provisions are identical, we will refer to the current version of the statute, N.C. Gen. Stat. § 7B-903(a1), for purposes of our discussion.

welfare.[3] The petitions described, *inter alia*, a history of domestic violence and drug use by respondents in the presence of the children, and noted that Ivan's father was incarcerated. Although respondent-mother had agreed to place the children in kinship care with Ivan's paternal cousin ("Mrs. B.")[4] and her husband ("Mr. B.") on 4 April 2014, DSS alleged that she and respondent-father subsequently failed to cooperate with in-home services offered by the department.

The trial court adjudicated the three children to be neglected juveniles on 2 March 2015. In its dispositional order entered 16 July 2015, the court continued the children's kinship placement with Mrs. B. and ordered respondents to submit to drug screens, work on their case plans, and cooperate with DSS in completing the application for Elvin and Ervin to enroll as members of the EBCI.

After a hearing on 28 September 2015, the trial court entered a "Review and Permanency Planning Review Order" on 12 November 2015, finding that respondent-mother and both fathers had failed to address their substance abuse issues or maintain regular contact with DSS. The court further found that respondent-father was incarcerated for failure to register as a sex offender, and Ivan's father was incarcerated for violating his parole. Citing the success of the kinship placement, the court determined that it was in the best interests of Elvin, Ervin, and Ivan to change their permanent plan from reunification to guardianship with Mr. and Mrs. B. The court relieved DSS of further reunification efforts and appointed Mr. and Mrs. B. as guardians of the three children.

Respondent-father filed timely notice of appeal from the order. He now contends that the trial court violated N.C. Gen. Stat. § 7B-903(a1) by awarding guardianship of Elvin and Ervin to non-relatives without properly considering a proposed relative placement with their paternal grandmother. DSS and the guardian *ad litem* have communicated to this Court their concession to the error assigned by respondent-father.

Section 7B-903 of the Juvenile Code prescribes the dispositional alternatives available to the trial court following an adjudication of juvenile abuse, neglect, or dependency. N.C. Gen. Stat. § 7B-903 (2015). Subsection (a1) of this statute provides, *inter alia*, as follows:

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3. Although the record on appeal lacks a copy of the petition filed in 14 JA 27 pertaining to Ivan, it appears DSS included the same factual allegations in all three petitions.

4. Mrs. B. "is a first-descendent of the Eastern Band of Cherokee Indians" but "not an enrolled member."

> In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. . . .

N.C. Gen. Stat. § 7B-903(a1). This Court has held that the priority accorded to an available relative placement under N.C. Gen. Stat. § 7B-903(a1) applies to all subsequent review and permanency planning hearings, not just the initial dispositional hearing. *See In re L.L.*, 172 N.C. App. 689, 700-03, 616 S.E.2d 392, 399-401 (2005) (construing earlier version of N.C. Gen. Stat. § 7B-903 and precursor statute to N.C. Gen. Stat. § 7B-906.1 (2015) governing permanency planning hearings, N.C. Gen. Stat. § 7B-906). We have further held that the trial court's "[f]ailure to make specific findings of fact explaining the placement with the relative is not in the juvenile's best interest will result in remand." *In re A.S.*, 203 N.C. App. 140, 141-42, 693 S.E.2d 659, 660 (2010) (citing *In re L.L.*, 172 N.C. App. at 704, 616 S.E.2d at 401).

The parties agree that Mr. and Mrs. B. are non-relatives of Elvin and Ervin. Mrs. B. is related to Ivan's father.[5] The GAL submitted a written report to the trial court at the 28 September 2015 hearing. Finding its contents "uncontroverted," the court adopted the entirety of the GAL report "by direct reference" as findings of fact in its written order. *Inter alia*, the GAL reported having met with the paternal grandmother on 24 July 2015 while she visited with Elvin and Ervin at their great-grandmother's house. The paternal grandmother informed the GAL "that she would like custody of the two . . . boys and felt it would be best for [Ivan] and [Elvin] not to be living together and competing all the time."[6] Mrs. B. testified that Elvin and Ervin's paternal grandmother assists her by babysitting the boys and speaks with Mrs. B. about them "[a] lot."

The DSS report admitted into evidence at the hearing further states that respondent-father "stated that he would like his children to go to his

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5. The "Review and Permanency Planning Review Order" includes a finding that Mrs. B. "is the paternal great-aunt of the minor child [Ivan]." As noted by respondent-father, the record indicates that Mrs. B. is a cousin of Ivan's father, not his aunt.

6. The GAL personally observed "competition between [Ivan] and [Elvin]" during a visit with Ivan's paternal grandmother on 27 July 2015.

mother" during a meeting with the social worker on 7 August 2015. The social worker confirmed when cross-examined by respondent-father's counsel at the 28 September 2015 hearing:

> Q. Has my client made you aware of his preference for there to be a kinship placement with his mother?
>
> A. Yes, sir.
>
> Q. And have you looked into whether she's suitable for that placement?
>
> A. Yes, sir. We did. We contacted the Centralized Department of Children and Families, I believe, in Tennessee to try and get a home study done and they said that we would have to submit an ICPC[7] in order to make that happen.
>
> Q. And is there a reason the ICPC has not been submitted?
>
> A. I was informed that it would be---- because the state does not have custody of the children, that the judge would have to sign off on that ICPC form making the judge financially responsible and so that was something that we weren't exactly sure how to proceed on.
>
> . . . .
>
> Q. Are you waiting for guidance as to how to fulfill that requirement?
>
> A. Yes, sir.

But cf. In re J.E., 182 N.C. App. 612, 616, 643 S.E.2d 70, 73 (2007) (holding that former permanency planning statute N.C. Gen. Stat. § 7B-907(c) (repealed effective Oct. 1, 2013)[8] and guardianship statute N.C. Gen. Stat. § 7B-600(c) (2015) make the ICPC inapplicable to an award of guardianship to an out-of-state relative in a permanency planning review order).

James Burch Sanders, ICWA coordinator for the EBCI, testified as an expert in Indian culture and child rearing. Mr. Sanders affirmed that the existing placement with Mr. and Mrs. B. met the requirements of

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7. Interstate Compact on the Placement of Children.

8. N.C. Sess. Law 2013-129, §§ 25, 41 (June 19, 2013). Current N.C. Gen. Stat. § 7B-906.1(i) (2015) contains substantially similar language to that found in former N.C. Gen. Stat. 7B-907(c).

the ICWA and that he believed awarding guardianship to Mr. and Mrs. B. was in the children's best interests. On cross-examination, however, Mr. Sanders acknowledged that he had lacked sufficient information to assess Elvin and Ervin's potential placement with their paternal grandmother.

Elvin and Ervin's paternal grandmother attended the hearing but did not testify. At the conclusion of the hearing, counsel for respondent-father explicitly argued that "[m]y client's children are entitled to have my client's mother considered for guardianship of [Ervin] and [Elvin]." After hearing from all parties' counsel, the trial court rebuffed an offer by respondent-father's counsel to present the paternal grandmother as a witness:

> MR. HASELKORN: Your Honor, to the degree –
>
> THE COURT: – in closing.
>
> MR. HASELKORN: – it would help you in making your decision, my client's mother, [the paternal grandmother] is here--- enough to call her to the stand.
>
> [DSS COUNSEL]: Objection, Your Honor.
>
> THE COURT: I think we're – with all due respect, Mr. Haselkorn, I gave your client an opportunity – not you, but I gave your client an opportunity to present evidence and your client at the time made the decision that he did not wish to put on any evidence, so we can't –
>
> [RESPONDENT-MOTHER'S COUNSEL]: Thank you, Your Honor.
>
> THE COURT: – go back on that.

The trial court then made the following written findings related to the guardianship award:

> 25. That the [B.] family provides a safe, stable home for the minor children. [Mr. and Mrs. B.] have 2 children of their own, ages 18 and 14.
>
> . . . .
>
> 27. That both Mr. and Mrs. [B.] can provide the necessary financial support for each of the minor children in this case.

. . . .

> 29. . . . Mr. Sanders is satisfied with the juveniles' placement at the [B.s'] home. He has opined that the three juveniles require permanency at this time.
>
> . . . .
>
> 31. That it is in the best interest of the minor children that the permanent plan be changed to guardianship with [Mr. and Mrs. B.]

The order's only reference to Elvin and Ervin's paternal grandmother appears in the following decretal provision: "the paternal grandmother of [Elvin and Ervin] may continue to be used as a resource for childcare of those minor children."

We now join the parties in concluding that the trial court's "[f]ailure to make specific findings of fact explaining [why] the placement with the [paternal grandmother] is not in [Elvin and Ervin's] best interest" requires this Court to reverse the order as to respondent-father's children and remand for a new hearing. *In re A.S.*, 203 N.C. App. at 141-42, 144, 693 S.E.2d at 660, 662. We recognize that the court was duly mindful of its responsibilities under the ICWA. *See*, *e.g.*, 25 U.S.C.S. § 1915(b) (2016). Indeed, because the court ended a voluntary kinship placement arranged by respondent-mother and DSS and placed the children in guardianship, "the proceeding qualifies as a 'foster care placement' and thus, a 'child custody proceeding' " subject to the ICWA. *In re E.G.M.*, 230 N.C. App. 196, 199, 750 S.E.2d 857, 860 (2013). Such concerns, however, do not obviate the need for findings of fact under N.C. Gen. Stat. § 7B-903(a1) if the court chooses a nonrelative placement for a juvenile.

REVERSED AND REMANDED IN PART.

Judges CALABRIA and DILLON concur.

IN RE K.J.B.

[248 N.C. App. 352 (2016)]

IN THE MATTER OF K.J.B.

No. COA16-159

Filed 19 July 2016

Child Abuse, Dependency, and Neglect—neglect—necessary findings—supporting evidence lacking

The trial court erred by adjudicating a child neglected. The trial court could not make the necessary findings of fact absent evidence that the child suffered physical, mental, or emotional impairment, or that he was at a substantial risk of such impairment.

Appeal by Respondent-mother from orders entered 5 November 2015 by Judge Christine Strader in Rockingham County District Court. Heard in the Court of Appeals 5 July 2016.

No brief filed for Petitioner-Appellee Rockingham County Department of Social Services.

Leslie Rawls for Respondent-Appellant mother.

Poyner Spruill LLP, by Caroline P. Mackie and Carrie V. McMillan, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent-mother appeals from orders adjudicating her child K.J.B. ("Kenneth")[1] to be a neglected juvenile and placing him in the custody of Rockingham County Department of Social Services ("DSS"). We reverse the trial court.

Kenneth was born in November 2014. Shortly after Kenneth's birth through early December 2014, Respondent and Kenneth lived with Respondent's cousin, Ms. Reynolds.[2] On the night of 9 December 2014, Ms. Reynolds returned home from work to find Respondent and Respondent's boyfriend passed out nude on the couch. Empty beer bottles and cans were laying in the living room and kitchen, and a table

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

2. Respondent's cousin is referred to by a pseudonym to protect the identity of the juvenile.

was broken. Ms. Reynolds tried to awaken the couple for several minutes, and when the couple woke up, Ms. Reynolds made them leave the house for the night. When Ms. Reynolds asked them where Kenneth was, Respondent stated she knew where he was, but would not tell Ms. Reynolds with whom.

The following morning at 6:00 a.m., Kenneth's babysitter appeared at Ms. Reynolds's house with Kenneth. She stated she was looking for Respondent. Ms. Reynolds took Kenneth and went to her sister's house. At 7:00 a.m., Respondent went to Ms. Reynolds's sister's house with a friend, and demanded they give her Kenneth. Respondent's friend pried Kenneth from Ms. Reynolds's arms, and Respondent and her friend left the house with Kenneth.

On 10 December 2014, DSS filed a juvenile petition alleging Kenneth was neglected and dependent. The same day, a non-secure custody order was entered placing Kenneth in DSS's custody. Following a hearing, the trial court entered an order 5 November 2015 and adjudicated Kenneth as neglected, but did not conclude Kenneth was a dependent juvenile. On 5 November 2015, the trial court entered a separate dispositional order and gave DSS continual custody of Kenneth. Respondent timely appealed from the trial court's orders.

Respondent argues the trial court erred in concluding Kenneth was neglected. We agree.

On appeal, an adjudication order is reviewed to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citations, quotation marks, and brackets omitted), *modified and aff'd*, 362 N.C. 446, 665 S.E.2d 54 (2008). Findings supported by clear and convincing evidence "are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* at 343, 648 S.E.2d at 523. Unchallenged findings are binding on appeal. *In re A.R.*, 227 N.C. App. 518, 520, 742 S.E.2d 629, 631 (2013). Conclusions of law are reviewable *de novo*. *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (internal quotation marks and citation omitted).

North Carolina law defines a "neglected" juvenile as follows:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile,

> it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2015).

"In order to adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment or a substantial risk of such impairment." *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (citation omitted). Similarly, in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). A trial court's failure to make specific findings regarding a child's impairment or risk of harm will not require reversal where the evidence supports such findings. *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003).

Respondent contends the evidence introduced at the hearing did not demonstrate Kenneth suffered harm or was at a substantial risk of suffering harm, and that, to the extent the trial court found harm or a substantial risk of harm to Kenneth, those findings lacked evidentiary support and could not support the conclusion that Kenneth is a neglected juvenile. To this end, Respondent contends findings of fact eleven and twelve are unsupported by clear and convincing evidence. The challenged findings state, in pertinent part:

> 11. . . . [Respondent] acknowledged that a child died of unknown causes while in her care in Rockingham County, North Carolina.
>
> 12. [Kenneth] is a neglected juvenile because his mother has not provided proper care and he has resided in an injurious environment with her. After substance abuse led to termination of her parental rights of two other children, [Respondent] has continued to drink alcohol to excess. [Respondent's] substance abuse problem prevents her from safely caring for [Kenneth] at this time.

As an initial matter, the provision in finding twelve that Kenneth "is a neglected juvenile" is actually a conclusion of law and will be treated

as such on appeal. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675–76.

We agree the statement in finding eleven regarding the death of a child while in Respondent's care is not supported by clear and convincing evidence. First, no evidence was presented regarding where the child died. Second, the evidence at the hearing showed the child died of Sudden Infant Death Syndrome ("SIDS"), not from unknown causes. Third, Respondent did not stipulate that these statements were true. We disregard this unsupported finding for purposes of our review.[3]

The statements in finding of fact twelve that Respondent "has not provided proper care and [Kenneth] has resided in an injurious environment with her," and that Respondent's "substance abuse problem prevents her from safely caring for [Kenneth] at this time" are not supported by clear and convincing evidence. Assuming *arguendo* that the evidence supported the finding that Respondent continued to have a substance abuse problem, there was a lack of clear and convincing evidence that Respondent's substance abuse had an adverse impact on Kenneth's well-being.

In *In re E.P.*, 183 N.C. App. 301, 645 S.E.2d 772, *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007), this Court held a parent's substance abuse problem alone could not support an adjudication of neglect. *Id.* at 304–05, 645 S.E.2d at 774. In so holding, the Court distinguished *In re Leftwich*, 135 N.C. App. 67, 73, 518 S.E.2d 799, 803 (1999), in which the evidence showed the mother's alcoholism resulted in her children lacking age-appropriate social skills and toilet training. *In re E.P.*, 183 N.C. App. at 306, 645 S.E.2d at 775. In *Leftwich*, "the adjudication of neglect was based upon *the harm to the children* as a result of respondent's substance abuse; it was not based solely upon respondent's substance abuse." *Id.* at 306, 645 S.E.2d at 775 (emphasis in original). By contrast, the trial court in *In re E.P.* could not adjudicate neglect where "there was no substantial evidence of any connection between the substance abuse and domestic violence and the welfare of [the] two children." *Id.* at 306, 645 S.E.2d at 775 (internal quotation marks omitted) (alteration in original).

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3. We note that while the death of another child in the home can be relevant to a determination that the juvenile is neglected, such is the case only where the child "died as a result of suspected abuse or neglect." N.C. Gen. Stat. § 7B-101(15). No evidence was presented in this case demonstrating that the child's death was suspected to be the result of abuse or neglect.

Here, as in *In re E.P.*, there is no substantial evidence to show Kenneth suffered any physical, mental, or emotional impairment, or that he was at a substantial risk of suffering such impairment, as the result of Respondent's substance abuse. *See In re C.M.*, 183 N.C. App. at 210, 644 S.E.2d at 592. While Respondent admitted to drinking alcohol on the evening of 9 December 2014, she left Kenneth in the care of another adult that evening. Respondent sought to retrieve Kenneth the following morning, and there is no evidence Respondent was intoxicated at that time. Without evidence showing Respondent cared for Kenneth while intoxicated, or showing the babysitter did not or could not properly care for Kenneth, the events of 9–10 December 2014 do not demonstrate harm or a substantial risk of harm to Kenneth.

The only evidence suggesting Respondent cared for Kenneth while under the influence is her statement to Ms. Reynolds on 5 December 2014, in which she stated she "almost dropped" Kenneth because she was "a little tipsy." While this evidence is not to be ignored, the strength of the evidence is undercut by Respondent's subsequent statement that she was "just playing" with Ms. Reynolds. Also, we note Ms. Reynolds testified the only time she saw Respondent intoxicated, during the time they lived together, was the night of 9 December 2014. Respondent's off-hand comment about "almost dropping" Kenneth is not sufficient to demonstrate a substantial risk of harm.

In adjudicating Kenneth neglected, the trial court relied upon its finding, "substance abuse led to termination of [Respondent's] parental rights to two other children." Under the statutory definition of "neglect," "it is relevant whether the juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15) (2015). Here, the trial court found "substance abuse" led to the termination of Respondent's parental rights to her two other children. However, there was no evidence presented to prove these children were in fact abused or neglected, or that the termination of Respondent's parental rights was due to abuse or neglect. Without such evidence, the trial court cannot not logically infer the previous termination cases support a conclusion that Kenneth is, or is likely to be, neglected in this case. *See In re J.C.B.*, ___ N.C. App. ___, ___, 757 S.E.2d 487, 489, *disc. review denied*, 367 N.C. 524, 762 S.E.2d 313 (2014) (holding that, when a trial court relies on instances of past abuse or neglect to other children in adjudicating a child neglected, the court is required to find "the presence of other factors to suggest that the neglect or abuse will be repeated").

Absent evidence Kenneth suffered physical, mental, or emotional impairment, or that he was at a substantial risk of such impairment, the trial court could not make the necessary findings of fact to adjudicate him neglected. Thus, the trial court committed error in adjudicating Kenneth neglected, and we reverse the adjudication order. Because we reverse the adjudication order, the disposition order must also be reversed. *In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2011).

REVERSED.

Judges Elmore and McCullough concur.

IN THE MATTER OF ALEX SHACKLEFORD

No. COA15-1266

Filed 19 July 2016

1. Appeal and Error—mootness—involuntary commitment—commitment period expired

A respondent's appeal from an involuntary commitment order was not moot even though the commitment period had expired. This commitment might form the basis of a future commitment and there could be other collateral legal consequences.

2. Appeal and Error—record—involuntary commitment—verbatim transcript—not available

A respondent appealing an involuntary commitment was entitled by statute to receive a verbatim transcript of the involuntary commitment hearing, but the unavailability of the transcript does not automatically constitute reversible error in every case. Prejudice must be demonstrated, but general allegations of prejudice are not sufficient. There must be a determination of whether respondent made sufficient efforts to reconstruct the hearing. In this case that burden was carried in that respondent wrote to people present at the hearing.

3. Appeal and Error—record—involuntary commitment—hearing transcript—not available—adequate alternative

There was not an adequate alternative to a verbatim transcript of an involuntary commitment hearing where the entire transcript was

missing (rather than the transcript being partially unavailable) and the hearing was reconstructed from bare bone, partially legible notes taken by one person.

4. Appeal and Error—record—involuntary commitment—verbatim transcript not available—meaningful appellate review

Meaningful appellate review of an involuntary commitment proceeding was denied where the required verbatim transcript in its entirety was missing and could not be entirely reconstructed.

5. Appeal and Error—record—involuntary commitment—lack of required verbatim transcript—prejudice

The respondent in an appeal from an involuntary commitment was prejudiced by the lack of a verbatim transcript even though he did not identify any specific errors or defects. The transcript was missing in its entirety and could not be adequately reconstructed; the prejudice was the inability to determine whether an appeal was appropriate and which arguments should be raised.

Appeal by respondent from order entered 16 May 2015 by Judge V.A. Davidian, III in Wake County District Court. Heard in the Court of Appeals 30 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for respondent-appellant.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe and Varsha D. Gadani, for Holly Hill Hospital.

DAVIS, Judge.

Alex Shackleford ("Respondent") appeals from the trial court's order involuntarily committing him to Holly Hill Hospital ("Holly Hill") for a period of inpatient treatment. On appeal, Respondent argues that the lack of a verbatim transcript of his commitment hearing has deprived him of the opportunity for meaningful appellate review of the commitment order and entitles him to a new hearing. After careful review, we vacate the trial court's order and remand for a new hearing.

Factual Background

On 1 May 2015, Dr. Yi-Zhe Wang ("Dr. Wang") filed an affidavit and petition for involuntary commitment in which he alleged Respondent was mentally ill and dangerous to himself and others. A magistrate ordered Respondent to be held for examination at Holly Hill that same day. A hearing was held on 14 May 2015 before Judge V.A. Davidian III in Wake County District Court. On 16 May 2015, the trial court entered an order containing the following findings and conclusions:

> A. Respondent is a 22 year old male. Respondent was admitted to Holly Hill Hospital on April 25, 2014.
>
> B. Dr. Wang is Respondent's treating physician at Holly Hill Hospital. Dr. Wang has examined the patient six out of seven days per week, beginning on April 27, 2015. Respondent stipulated at the hearing that Dr. Wang is an expert in the field of psychiatry.
>
> C. Respondent has a mental illness and diagnosis of anti-social personality disorder. Respondent presents with impulsiveness, unlawfulness, deceitfulness, agitation, anger, and lack of remorse.
>
> D. Respondent has been prescribed Depakote for his illness. Dr. Wang testified that Respondent was initially compliant with medication but has refused medication in the two days prior to the hearing. Respondent's medication regimen is not stable at this point.
>
> E. Respondent's grandmother, whom he has lived with since birth, testified that one week prior to the hearing, Respondent threatened to kill her and her husband and burn their house down. Respondent's grandmother also testified about an instance in which Respondent wrestled with his grandmother in an attempt to get to her money. Respondent has also told his grandmother about a voice in his head. Respondent's grandmother also testified about a number of occasions in which Respondent has demonstrated deceitfulness, impulsiveness, and a lack of remorse regarding his grandmother's job and property. His grandmother is concerned that Respondent will injure himself or another person if he is discharged from the hospital.
>
> F. Dr. Wang testified that continued inpatient treatment is necessary. Treatment at a lower level of care would

> be inappropriate at this time since Respondent has not been cooperative with treatment and has no insight into his illness.
>
> G. Respondent presents a danger to himself and others. Respondent is in need of further treatment at a 24-hour facility for up to 90 days to stabilize his condition and to prepare him to ultimately step down to a lower level of care.

The trial court ordered that Respondent be committed to Holly Hill for a period of time not to exceed 90 days. Respondent entered written notice of appeal on 5 June 2015. Following the entry of notice of appeal, Respondent's appointed appellate counsel, who did not represent him at the commitment hearing, was informed by the court reporting manager for the Administrative Office of the Courts that no transcript of the hearing could be prepared because the recording equipment in the courtroom had failed to record the hearing and there had not been a court reporter present in the courtroom.

Analysis

[1] The only issue presented in this appeal is whether Respondent is entitled to a new involuntary commitment hearing because the lack of a verbatim transcript of the underlying hearing denied him his right to meaningful appellate review. Initially, we note that although Respondent's commitment period has expired, his appeal is not moot given the "possibility that [R]espondent's commitment in this case might . . . form the basis for a future commitment, along with other obvious collateral legal consequences[.]" *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977).

[2] An order of involuntary commitment is immediately appealable. N.C. Gen. Stat. § 122C-272 (2015). Pursuant to N.C. Gen. Stat. § 122C-268, the respondent is entitled on appeal to obtain a transcript of the involuntary commitment proceeding, which must be provided at the State's expense if the respondent is indigent. N.C. Gen. Stat. § 122C-268(j) (2015).

Our caselaw contemplates the possibility that the unavailability of a verbatim transcript may in certain cases deprive a party of its right to meaningful appellate review and that, in such cases, the absence of the transcript would itself constitute a basis for appeal. *See State v. Neely*, 21 N.C. App. 439, 441, 204 S.E.2d 531, 532 (1974) ("If the circumstances so justify, [the appellant] might . . . assert as an assignment of error that he is unable to obtain an effective appellate review of errors committed

during the trial proceeding because of the inability of the Reporter to prepare a transcript.").

However, the unavailability of a verbatim transcript does not *automatically* constitute reversible error in every case. Rather, to "prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006). General allegations of prejudice are insufficient to show reversible error. *Id.* Moreover, "the absence of a complete transcript does not prejudice the defendant where alternatives are available that would fulfill the same functions as a transcript and provide the [appellant] with a meaningful appeal." *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000), *cert. denied*, 531 U.S. 1083, 148 L.Ed.2d 684 (2001); *see also In re Bradshaw*, 160 N.C. App. 677, 681, 587 S.E.2d 83, 86 (2003) (denying request for new trial where "respondent in this case has made no attempt to reconstruct the evidence . . . ."); *In re Clark*, 159 N.C. App. 75, 83, 582 S.E.2d 657, 662 (2003) (rejecting request for new hearing where "respondent has made no attempt to . . . provide a narration of the evidence . . . .").

Thus, in accordance with the legal framework set out above, we must first determine whether Respondent made sufficient efforts to reconstruct the hearing in the absence of a transcript. In this regard, Respondent's appellate counsel sent letters to the following persons present at the hearing: Judge Davidian; Dr. Wang; Lori Callaway ("Callaway"), the deputy clerk; Varsha Gadani ("Gadani"), counsel for Holly Hill; Kristen Todd ("Todd"), Respondent's counsel; and Respondent. In these letters, Respondent's appellate counsel requested that each of the recipients provide him with their recollections of the hearing and any notes they possessed regarding the proceeding.

Respondent's appellate counsel received a response from each recipient except for Respondent. Judge Davidian's reply stated as follows: "I do not have any additional memories of the case, other than presented in the order, nor did I retain any notes from the case." Callaway replied that she did not have any notes from the hearing. Appellate counsel for Holly Hill responded on behalf of both Dr. Wang and Gadani, stating that "they believe that the findings of fact accurately reflect their recollection of the evidence presented at the hearing" and that "[a]ny notes regarding the hearing would be protected under the work product doctrine. In any event, our notes from the hearing would not shed any light on the testimony presented at trial." The only recipient of the letter who made any attempt to help reconstruct the events of the hearing was Todd, who provided to Respondent's appellate counsel her notes from the hearing.

We find our decision in *State v. Hobbs*, 190 N.C. App. 183, 660 S.E.2d 168 (2008), to be particularly instructive on the question of whether Respondent has "satisfied his burden of attempting to reconstruct the record." *Id.* at 186, 660 S.E.2d at 170. In *Hobbs*, the court reporter's audiotapes and handwritten notes from the entire evidentiary stage of the defendant's criminal trial were lost in the mail. *Id.* at 184, 660 S.E.2d at 169-70. In an effort to reconstruct the proceedings, the defendant's appellate counsel sent letters to the defendant's trial counsel, the trial judge, and the prosecutor asking for their accounts of the missing testimony. The defendant's trial counsel stated that he had little memory of the charges or the trial, possessed no notes from the trial, and was unable to assist in reconstructing the proceedings. The trial judge stated that she had no notes from the case, and the prosecutor never responded to the inquiry. In light of these efforts, we determined that the appellant had satisfied his burden of attempting to reconstruct the record. *Id.* at 186-87, 660 S.E.2d at 170-71.

In the present case, Respondent's appellate counsel took essentially the same steps as the appellant's attorney in *Hobbs*. Therefore, we similarly conclude that Respondent has satisfied his burden of attempting to reconstruct the record.

[3] We next address whether Respondent's reconstruction efforts produced an adequate alternative to a verbatim transcript — that is, one that "would fulfill the same functions as a transcript . . . ." *Lawrence*, 352 N.C. at 16, 530 S.E.2d at 817. As discussed more fully below, we are unable to conclude that the limited reconstruction — consisting solely of Todd's notes — of the evidence presented at the hearing was sufficient to allow for meaningful appellate review.

We note that in virtually all of the cases in which we have held that an adequate alternative to a verbatim transcript existed, the transcript of the proceeding at issue was only *partially* incomplete, and any gaps therein were capable of being filled. *See, e.g.*, *Bradshaw*, 160 N.C. App. at 681, 587 S.E.2d at 86 ("[A] review of the transcript indicates that much of the missing testimony was clearly referenced and repeated by the witnesses, including respondent[.]"); *State v. Owens*, 160 N.C. App. 494, 499, 586 S.E.2d 519, 523 (2003) ("[A] review of the transcript reveals that all of the questions posed by counsel prior to and comments made immediately following the missing responses are included in the transcript and at no point was such a missing response followed by an objection from defense counsel. Because the context of the questioning and the likely responses that were elicited from the potential jurors are therefore ascertainable from the record, defendant was not denied

meaningful appellate review[.]"); *State v. Hammonds*, 141 N.C. App. 152, 167, 541 S.E.2d 166, 177 (2000) (holding that while trial "transcript is incomplete in places . . . . it is possible to reconstruct the substance of what was said, even if the precise words are lost"), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001).

While the State cites *Lawrence* in support of its argument that Respondent's appellate counsel was, in fact, able to compile an adequate substitute for a verbatim transcript, we believe the State's reliance on *Lawrence* is misplaced. In *Lawrence*, as a result of a mechanical malfunction, the trial transcript was missing the testimony of one of the State's witnesses in its entirety along with a portion of the testimony from another witness. *Lawrence*, 352 N.C. at 16, 530 S.E.2d at 817. On appeal, the State set out in narrative form the unrecorded testimony as permitted under N.C.R. App. P. 9(c)(1). During a hearing to settle the record, the witnesses whose testimony was missing from the transcript testified that the State's narrative was accurate. In addition, the court reporter from the trial responded that, according to her trial notes, no objections had been made during the omitted portions of testimony. Under these circumstances, our Supreme Court held that "[t]he State's narrative constitute[d] an available alternative that is 'substantially equivalent' to the complete transcript[.]" *Id.*

We find *Lawrence* to be materially distinguishable from the present case. In *Lawrence*, (1) the transcript was missing the complete testimony of only one witness and the partial testimony of another witness — neither of whose testimony was relevant to the focus of the defendant's defense[1]; (2) the State provided a narrative of the missing testimony, which the relevant witnesses confirmed was accurate; and (3) the court reporter confirmed that no objections had been made during the omitted portions of testimony.

Here, conversely, the transcript of the e*ntire* proceeding is unavailable, and the only independent account of what took place at the hearing consists of five pages of bare-bones handwritten notes that — in addition to not being wholly legible — clearly do not amount to a comprehensive account of what transpired at the hearing. While these notes could conceivably assist in recreating the hearing if supplemented by other sources providing greater detail, they are not in and of themselves "substantially equivalent to the complete transcript[.]" *Id.* at 16,

1. The Supreme Court explained that "[i]nasmuch as defendant admitted shooting the victim, the focus of his defense was his intent. The missing part of the transcript was not relevant to this issue." *Id.* at 17, 530 S.E.2d at 817.

530 S.E.2d at 817 (quotation marks omitted). Accordingly, we cannot conclude that these notes from Respondent's trial counsel constitute an adequate alternative to a verbatim hearing transcript "that would fulfill the same functions as a transcript . . . ." *Id.*

[4] Finally, we must determine whether the lack of an adequate alternative to a verbatim transcript of the hearing served to deny Respondent meaningful appellate review such that a new hearing is required. *See Hobbs*, 190 N.C. App. at 187, 660 S.E.2d at 171 ("Without an adequate alternative, this Court must determine whether the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review, in which case a new trial would be warranted." (citation and quotation marks omitted)).

We have previously recognized the importance of a transcript on appeal.

> [A]s any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law.

Id. at 185, 660 S.E.2d at 170 (quoting *Hardy v. United States*, 375 U.S. 277, 288, 11 L.Ed.2d 331, 339 (1964) (Goldberg, J., concurring)).

In *Hobbs*, the missing portion of the transcript encompassed the entire testimonial portion of the trial, which included an unknown number of witnesses over three days. *Id.* at 187, 660 S.E.2d at 171. We held that the appellant's ability to litigate the appeal was "hindered by the total unavailability of either a transcript or an acceptable alternative for a *majority* of [the] defendant's trial." *Id.* at 187-88, 660 S.E.2d at 171. Thus, we concluded that the appellant had been "unable to procure meaningful appellate review of his trial" and was entitled to a new trial. *Id.* at 188, 660 S.E.2d at 172.

Similarly, in *State v. King*, 218 N.C. App. 347, 721 S.E.2d 336 (2012), a transcript was unavailable for nearly the entire habitual felon phase of a criminal proceeding. We remanded for a new habitual felon hearing, holding that the "almost complete lack of a transcript or adequate alternative narration of the habitual felon phase of the proceedings in the lower court precludes our ability to review defendant's contentions on the habitual felon hearing and precludes any meaningful appellate review." *Id.* at 356, 721 S.E.2d at 343.

The present action provides an even clearer case of prejudice than that existing in either *King* or *Hobbs*. It bears repeating that here we are not called upon to determine how significant a missing *portion* of the transcript is to the appellant's ability to obtain meaningful review. Instead, we are dealing with a case in which the transcript *in its entirety* is missing and cannot be adequately reconstructed.

Holly Hill cites to *In re Wright*, 64 N.C. App. 135, 306 S.E.2d 825 (1983), in support of its argument that Respondent has failed to establish prejudice. In *Wright*, the respondents challenged the constitutionality of several statutory provisions providing for the termination of parental rights. On appeal, the respondents asserted that they were entitled to a new hearing due to an equipment malfunction that rendered unintelligible the entire recording of their termination hearing, thereby requiring the parties to reconstruct the record. We held that the respondents had failed to demonstrate that the lack of a hearing transcript prejudiced them given that it was "apparent from the pleadings and assignments of error that [the appellants'] reliance from the outset has been on the unconstitutionality of the statutes proceeded under, rather than on any evidence of their's or any weakness in the petitioner's evidence." *Id.* at 138, 306 S.E.2d at 827.

Thus, the issues raised by the appellants in *Wright* were unrelated to the substance of the evidence actually presented at the hearing. Here, conversely, Respondent is expressly contending that the unavailability of a transcript prejudiced him by depriving him of the ability to determine whether any potentially meritorious issues exist for appellate review.

[5] Finally, we reject Holly Hill's argument that Respondent has failed to demonstrate prejudice because he did not identify any specific errors or defects in the involuntary commitment order. In its brief, Holly Hill makes the following assertions in support of this proposition: "The purpose of a verbatim transcript is to be able to review the entire proceeding and determine whether there was error during the trial. Without an allegation of error in [the] trial or in the order, there is no need for a transcript." (Internal citation omitted).

Under this circular logic, an appellant would never be able to show prejudice in cases where — as here —the absence of a transcript renders the appellant unable to determine whether any errors occurred in the trial court that would necessitate an appeal in the first place. In such cases, the prejudice is the inability of the litigant to determine whether an appeal is even appropriate and, if so, what arguments should be raised. *See Neely*, 21 N.C. App. at 441, 204 S.E.2d at 532.

Accordingly, we conclude that Respondent has demonstrated that he was prejudiced by the lack of a verbatim transcript from the 14 May 2015 hearing and, as a result, is unable to obtain meaningful appellate review of his involuntary commitment. Therefore, he is entitled to a new hearing.

Conclusion

For the reasons stated above, we vacate the trial court's 16 May 2015 order and remand for a new commitment hearing.

VACATED AND REMANDED.

Judges ELMORE and HUNTER, JR. concur.

IN THE MATTER OF T.D. AND J.D.

No. COA 15-1393

Filed 19 July 2016

Constitutional Law—ineffective assistance of counsel—termination of parental rights—remanded to trial court for hearing

Because it could not be discerned from the record on appeal whether respondent mother received ineffective assistance of counsel at trial during the proceedings to terminate her parental rights, the case was remanded to the trial court for a hearing on this issue.

Appeal by respondent-mother from orders entered 9 September 2015 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 27 June 2016.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for petitioner-appellee Orange County Department of Social Services.

Assistant Appellate Defender J. Lee Gilliam for respondent-appellant mother.

Hutchison, PLLC, by Brandon J. Huffman, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent appeals from orders terminating her parental rights to her minor children, T.D. ("Thomas") and J.D. ("Jackson").[1] Because we cannot discern from the record on appeal whether respondent received ineffective assistance from her trial counsel during the proceedings to terminate her parental rights, we remand to the trial court for a hearing on this issue.

Respondent has a long history of abusing controlled substances, entering and completing substance abuse programs, but then relapsing. Orange County Department of Social Services ("DSS") initiated the underlying juvenile case on 17 September 2012 by filing a petition alleging Thomas and Jackson were neglected and dependent juveniles. Respondent had been arrested for driving while impaired by cocaine and failing to properly restrain the children in her car. DSS did not seek to obtain non-secure custody of the juveniles, as respondent voluntarily placed them with a friend ("Ms. Gomez"). The trial court heard the petitions on 1 November 2012 and entered an order adjudicating the children to be dependent juveniles. The court continued custody of the juveniles with respondent, subject to their placement with Ms. Gomez, and ordered respondent to participate in drug treatment therapy and in the Family Drug Treatment Court if accepted into the program.

Respondent successfully engaged in her drug treatment therapy, and the juveniles returned to her home in August 2013. Respondent graduated from Family Drug Treatment Court in February 2014, and she continued working with DSS to monitor her ability to abstain from illicit substances with less formal support. By order entered after a permanency planning hearing on 15 May 2014, the trial court closed the case for further review and relieved DSS and the guardian ad litem of further responsibility.

However, in the spring of 2014, respondent showed signs she misused prescribed pain medication. In July 2014, she began using marijuana. Although respondent re-engaged with her substance abuse therapy providers, she relapsed in September 2014 and used crack cocaine. On 10 September 2014, DSS obtained non-secure custody of the juveniles and filed new juvenile petitions alleging Thomas and Jackson were neglected and dependent juveniles. The trial court entered an adjudication and disposition order on 22 December 2014, adjudicating the children to be dependent juveniles. Respondent entered and left multiple inpatient drug treatment programs between October 2014 and January 2015. Doctors diagnosed respondent with depression and

1. We use pseudonyms throughout for ease of reading and to protect the juveniles' privacy.

post-traumatic stress disorder. Doctors admitted her to an adult psychiatric unit at the University of North Carolina, where she began experiencing suicidal ideation and auditory hallucinations, which were treated by adjusting some of her medications.

After a permanency planning hearing on 15 January 2015, the trial court entered orders setting the permanent plan for the juveniles as adoption with a concurrent plan of custody with a parent. The court directed respondent to attend a residential substance abuse treatment program and comply with all recommended treatments. The court ordered DSS to prepare and file motions to terminate respondent's parental rights if she failed to commit to the residential treatment program or if she produced a positive drug screen prior to entering the program.

Respondent did not enter any inpatient treatment program and failed to contact DSS regarding her case or her children. On 20 February 2015, DSS filed motions to terminate respondent's parental rights to Thomas and Jackson on the grounds of neglect and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (6) (2015). After a hearing on 20 August 2015, the trial court entered orders on 9 September 2015 terminating respondent's parental rights based on the grounds alleged in the motions. Respondent filed timely written notices of appeal.

Respondent's sole argument on appeal is she received a fundamentally unfair hearing because her trial counsel failed to assist her in defending against the termination of her parental rights to the juveniles. Respondent contends she received ineffective assistance of counsel when her appointed counsel did not advocate on her behalf during the hearing to terminate her parental rights. We remand for further findings of fact regarding counsel's representation in this matter.

" 'When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.' " *In re K.N.*, 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed.2d 599, 606 (1982)). The procedures established by the North Carolina Juvenile Code for terminating parental rights provide "[p]arents have a statutory right to counsel in all proceedings dedicated to the termination of parental rights. This statutory right includes the right to effective assistance of counsel." *In re Dj.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (internal citations and quotation marks omitted); *see also* N.C. Gen. Stat. §§ 7B-1101.1, 1109(b) (2015). "A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair

hearing." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996).

Respondent argues her counsel's total failure to advocate on her behalf is evident in that her counsel: (1) uttered fewer than fifty words during the entire termination hearing, most of which were irrelevant to the proceeding; (2) did not introduce any evidence at either the adjudication or the disposition stage of the hearing; and (3) never objected to the trial court finding termination of parental rights in the juveniles' best interests. Respondent contends her counsel made absolutely no contribution to the proceedings and in no way advocated on her behalf at the hearing. *See In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010) ("It is well established that attorneys have a responsibility to advocate on the behalf of their clients.").

Respondent's characterizations of her trial counsel's actions, or lack thereof, over the course of the nineteen-minute hearing to terminate her parental rights are fully supported by the record before us. The record raises serious questions as to whether respondent was afforded the proper procedures to ensure her rights were protected during the hearing. We note this is not a case where respondent was absent from the hearing; indeed, counsel's longest statement to the trial court during the hearing was when she stated respondent would like to address the court. Counsel also did not state he was unable to contact respondent while trying to prepare for the hearing. As a result, he may not have known how respondent wished to proceed at the hearing. Nonetheless, we are hesitant to hold that counsel's relative silence during the hearing constitutes *per se* ineffective assistance of counsel. *Cf. State v. Taylor*, 79 N.C. App. 635, 637, 339 S.E.2d 859, 861 (1986) ("While we find the absence of positive advocacy at the sentencing hearing troublesome, we do not believe we can hold, on this record, that it constituted deficient performance prejudicial to the defendant."). Accordingly, we remand for a determination by the trial court whether counsel's representation of respondent at the termination of parental rights hearing constitutes deficient performance, and if so, whether the deficient performance prejudiced respondent such that she is entitled to a new termination of parental rights hearing.

REMANDED.

Judges ELMORE and McCULLOUGH concur.

JOHN H. SESSIONS, PLAINTIFF
v.
MICHAEL SLOANE, TRACEY KELLY, SUSAN EDWARDS & PHILLIP SLOANE, AS INDIVIDUALS, AND CRUISE CONNECTIONS CHARTER MANAGEMENT 1, LP, A NORTH CAROLINA LIMITED PARTNERSHIP, AND CRUISE CONNECTIONS CHARTER MANAGEMENT GP, INC., DEFENDANTS

No. COA 15-1095

Filed 19 July 2016

1. Appeal and Error—interlocutory orders and appeals—substantial right—privilege

The trial court did not err by denying defendant's motion to dismiss an appeal from a discovery order. Defendants provided a document privilege log describing the privilege relating to each withheld document, and thus, their assertion of privilege affected a substantial right allowing for an immediate appeal.

2. Discovery—compelling production—burden of proof—documents under seal not provided for review

The trial court did not abuse its discretion by compelling the production of documents withheld by defendants based on a failure to meet the burden of proof. There was no evidence to determine if the claims of privilege were bona fide. The documents were not provided under seal to the Court of Appeals for review, and thus, appellants ran the risk of providing insufficient evidence for the Court to make the necessary inquiry.

3. Discovery—compelling production—joint defense privilege—work product doctrine—emails

The trial court did not abuse its discretion by failing to make findings of fact regarding whether pertinent documents withheld by defendants were prepared in anticipation of litigation. The burden rested on defendants to demonstrate the emails fell within the shield of the work product or joint defense doctrines.

4. Discovery—compelling production—attorney-client privilege—subject line of email

The trial court did not abuse its discretion by requiring defendants to produce the subject lines of the pertinent emails. The same five-part test applies for the subject line of an email as it does for any communication allegedly protected under attorney-client privilege. There was no evidence defendants met their burden.

5. Discovery—compelling production—in camera review

The trial court did not abuse its discretion by failing to conduct an in camera review prior to issuing its order compelling discovery. There was no evidence defendants made a request for an in camera inspection of the documents at trial or submitted the documents for inspection.

Appeal by Defendants from order entered 2 June 2015 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 30 March 2016.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Matthew H. Bryant and Wyche, P.A., by Henry L. Parr, Jr. (admitted pro hac vice) and Sarah Sloan Batson, for plaintiff-appellee.

Wilson, Helms & Cartledge, LLP, by G. Gray Wilson and Lorin J. Lapidus and Strauch Green & Mistretta, P.C., by Jack M. Strauch and Stanley B. Green, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendants appeal from an order compelling discovery. The trial court ordered Defendants to produce documents withheld by the Defendants based on their assertions that the documents were prepared in anticipation of litigation and were therefore subject to confidentiality based on application of the attorney-client privilege, the work product doctrine or the joint defense privilege. After careful examination of the record and the procedures which the Defendants used to assert these privileges, we hold the trial court did not abuse its discretion in compelling the production of the withheld communications.

I. Factual and Procedural Background

Defendants Cruise Connections Charter Management GP, Inc. ("Cruise Corporation") and Cruise Connections Charter Management 1 LP ("Cruise Limited Partnership") planned to bid $50,575,000 on a government contract with the Royal Canadian Mounted Police (the "Mounties") to supply three cruise ships to house security police forces during the 2010 Winter Olympic Games. In order to show financial strength to perform this task, bidders to the government contract had to provide a letter of credit for ten percent (10%) of their total bid amount with their proposal. Proposals were due on 23 May 2008. If they won, Defendants Cruise Corporation and Cruise Limited Partnership expected to make a net profit of at least $14,000,000.

As of 17 May 2008, Defendants had not secured a letter of credit for ten percent (10%) of their overall bid. Defendants asked Plaintiff Sessions to provide a letter of credit for their bid in the amount of $5,057,500 in order to meet this bid requirement. On 22 May 2008, Sessions agreed to provide Defendants a letter of credit in consideration for $5,057,500 from contract proceeds should Defendants be awarded the contract. Defendants signed a letter of intent agreeing to Sessions' terms. The letter of intent reads in part:

> In exchange for providing an unredeemable, nonpayable Letter of Credit in the amount of $5,057,500, Mr. Sessions shall be granted assignable rights to receive Warrants at no cost to him for special limited partnership interest in the Partnership which he or his assignee solely at their election may either cause the Partnership to redeem or convert to special limited partnership interests.
>
> If the Partnership is the successful bidder and enters into a contract providing services for the Royal Canadian Mounted Police (the "RCMP Contract"), and if Sessions or his assignee elects to exercise his right to receive a special limited partnership interest in the Partnership or demand that the Partnership redeem the Warrants, Sessions or his assignee shall receive allocations and distributions from the Partnership in an amount equal to the sum of (i) $5,057,500.00 plus (ii) two (2) times the amount of additional capital advanced, loaned, or provided by Mr. Sessions or his nominee together with the principal amount so advanced, loaned, or provided with his assistance. For example, if Sessions or his assignee provides $275,000 for working capital, then the original $275,000 is paid back plus an additional $275,000, prior to any distributions to the other partners of the Partnership or payments of any kind to the other parties to this agreement or to any entity in which they are associated.
>
> If the Partnership is the successful bidder and enters into the contract contemplated herein, the Partnership shall pay Sessions' choice of either the redemption for special limited partnership interest or if the Warrants are exercised allocations and distributions of the amounts described above within 10 days after the Partnership receives its initial payment from the Royal Canadian Mounted Police or Government of Canada or the contracting authority

whomever that should be (currently expected to be 75% of the total project fee) (the "Initial Fee Installment").

Sessions, through his company Carolina Shores Leasing LLC,[1] obtained a letter of credit from Southern Community Bank & Trust on 22 May 2008. The letter of credit dated 22 May 2008 in the amount of $5,057,500 lists Cruise Connections Charter as the applicant with Carolina Shores Leasing as the co-applicant, and Her Majesty the Queen in Right of Canada as the beneficiary. Sessions transferred $5,057,500 to the bank as security for the letter of credit and paid a fee of $25,000 to obtain the letter of credit.

The same day, Sloane, a partner and chief financial officer of Cruise Connections Charter Management, hand delivered the letter of credit from Winston-Salem, North Carolina to Seattle, Washington. Sloane gave the letter to Kelly, who then delivered the letter of credit to Edwards in Canada. Defendant Cruise Limited Partnership was awarded the contract on or about 30 May 2008. Subsequently, Defendants attempted to renegotiate the agreement with Sessions, but the agreement was not amended.

On 26 November 2008, Cruise Limited Partnership and Cruise Corporation filed suit against the Attorney General of Canada, representing the Mounties in United States District Court for the District of Columbia for breach of contract (hereinafter the "Canadian lawsuit"). On 9 September 2013, the Court granted summary judgment in favor of Cruise Limited Partnership and Cruise Corporation. On 21 July 2014, the Court entered an order for monetary damages against the Canadian government in the amount of $19,001,077. Defendants then entered into a settlement agreement with Canada on 12 December 2014 for the payment of $16,900,000 by 12 January 2015.

In the Canadian lawsuit, Defendants alleged they have no obligation to pay Sessions. Sessions was not a party to the Canadian lawsuit. After filing the Canadian lawsuit, all of the parties in this case entered into a forbearance and escrow agreement. The agreement recognizes a dispute between Sessions and Cruise Connections, but states the parties to the agreement are "willing to forbear from enforcing or taking other action on the Claims until the Canada Lawsuit is resolved . . . ." The parties also agreed to deposit all proceeds arising out of the Canadian lawsuit into the trust account of Strauch Fitzgerald & Green. Thereafter, Strauch

1. Although Carolina Shores Leasing was named as the co-applicant on the letter of credit, they are not a party to this action.

Fitzgerald & Green would pay itself litigations costs and attorneys fees, and then deposit thirteen percent (13%) of the net proceeds up to a maximum of $5,000,000 into an escrow account. Since the settlement agreement, Defendants have not paid or agreed to pay Sessions.

On 31 December 2014, Sessions filed a verified complaint and writ of attachment seeking damages for breach of contract and injunctive relief preventing the parties or their agents from disbursing the escrow funds *pende lite*. This complaint named the following as parties: Michael Sloane, Tracy Kelly, Susan Edwards, and Phillip Sloane in their individual capacities as well as Cruise Connections Charter Management 1, LP and Cruise Corporation as Defendants. The complaint also named as parties Strauch Green & Mistretta, a North Carolina law firm, as the settlement and escrow agent. Kelly, Sloane, and Edwards are partners in Cruise Limited Partnership, and Sloane is Cruise Limited Partnership's chief financial officer. In his complaint, Sessions claims the Defendants anticipatorily repudiated the contract and sought damages in excess of $25,000.

Sessions sought a writ of attachment alleging some Defendants are out of state residents and would likely remove the escrow money from North Carolina upon payment by the Canadian government. Sessions sought the writ to prohibit Strauch, Green, & Mistretta, Defendants' counsel, from disbursing the funds in an amount that would leave less than $5,457,500 in its trust account. Attached to the complaint, Sessions provided a copy of P. Sloane's affidavit dated 15 January 2013 from the Canadian lawsuit. The affidavit stated the following:

> 5. When Cruise Connections approached Mr. Sessions, another individual who was supposed to provide a letter of credit for the bid had just backed out, and the deadline for submitting the bid was fast approaching. Mr. Sessions knew that Cruise Connections was in a bad bargaining position, since Cruise Connections had no other viable alternatives for getting a letter of credit before its bid was due. Mr. Sessions took advantage of the situation, repeatedly raising the price for providing the letter of credit until he eventually demanded a price equal to the amount of the letter of credit ($5,057,500). Since we were out of time and out of options, Cruise Connections acceded to Mr. Sessions' demand. Given the fact that Mr. Sessions used his vastly superior bargaining position to force these unfair terms upon Cruise Connections, I have serious doubts as to the enforceability of the Letter of Intent.

> 6. Even if it is ultimately enforceable, the Letter of Intent does not create a debt obligation on the part of Cruise Connections. Instead, if Cruise Connections' bid was successful, Mr. Sessions was to be granted an option to receive a limited partnership interest, pursuant to which he would be able to receive funds in the form of partnership distributions. Cruise Connections did not intend to make distributions to partners until such time as it had confirmed that there was sufficient cash available to cover any current or future costs or other financial obligations related to the Vancouver Olympic project, so any partnership distributions would have only been distributions of profits. If Cruise Connections' bid was not accepted, or Cruise Connections ultimately did not realize a profit, then Mr. Sessions would have recovered nothing.
>
> 7. Aside from providing the letter of credit that Cruise Connections submitted to the RCMP in conjunction with its bid, John Sessions provided no other capital or other financing to Cruise Connections, including working capital, so Cruise Connections owed Mr. Sessions no debt whatsoever.

On 27 January 2015, Sessions filed a Rule 41 voluntary dismissal with prejudice as to all claims against Strauch Green & Mistretta. On 13 March 2015, Defendants M. Sloane, Cruise Limited Partnership, and Cruise Corporation filed an unverified answer generally denying Sessions is entitled to any relief. Additionally, Defendants raised fifteen affirmative defenses including failure of consideration, indefiniteness, unconscionability, mutual mistake, duress, and estoppel.

On 19 March 2015, Sessions served identical sets of written discovery requests on each defendant. As an example, Sessions requested all "documents sent to, received from, or concerning John Sessions." Defendants objected, stating:

> Defendant objects to this request to the extent it calls for documents containing information protected from disclosure pursuant to the work product doctrine or the attorney opinion work product doctrine. Defendant further objects to this request to the extent it calls for documents containing information protected from disclosure pursuant to the attorney-client privilege or joint defense privilege. Without waiving any of its objections, Defendant will produce non-privileged documents responsive to this request.

Defendants responded with similar objections to Sessions' other discovery requests.

On 30 March 2015, Defendants M. Sloane, Cruise Limited Partnership, and Cruise Corporation filed an amended answer and motion to dismiss alleging three additional defenses: Sessions' claims are barred by the doctrine of accord and satisfaction, novation, and the statute of limitations. On 1 April 2015, Defendants Kelly, Edwards, and P. Sloane filed an unverified answer generally denying they owe Sessions money.

Cathy Holleman, a paralegal at Strauch Green & Mistretta, mailed a privilege log to Sessions' counsel on 16 April 2015. The privilege log listed documents requested in discovery and the associated privilege Defendants invoked in response to the request to produce that document. Below is a representative sample of the privilege log.

Document Number	Document Date	Author	Recipient	Description	Privilege
CCPRIV000016	6-09-08	Tracey Kelly	Defendants	Email created in anticipation of litigation and legal advice	Work Product Doctrine; Joint Defense Privilege
CCPRIV000019	6-09-08	Tracey Kelly	Defendants	Email created in anticipation of litigation and legal advice	Work Product Doctrine; Joint Defense Privilege
CCPRIV000020	5-15-08	Phillip Sloane	Defendants and Jack Strauch	Email seeking or containing legal advice	Attorney-Client Privilege
CCPRIV000021	5-18-08	Phillip Sloane	Jack Strauch	Email seeking or containing legal advice	Attorney-Client Privilege

On 15 May 2015, Sessions filed a motion to compel Defendants to provide full and complete responses to Sessions' discovery requests pursuant to Rules 34 and 37 of the North Carolina Rules of Civil Procedure. In his motion, Sessions requested the trial court to order Defendants to produce the following:

> (1) To produce all the documents or portions thereof withheld from production solely based on a claim of "work product/joint defense privilege" where the items are communications solely among the defendants themselves without the participation of counsel.
>
> (2) In the alternative to item one, to provide the Court for in camera review [of] the documents, or portions thereof, that Defendants have withheld based on a claim of privilege under the "work product doctrine," even though (a) no attorney was involved in creating the information withheld and (b) the documents were created long before there was any hint of litigation between Plaintiff Sessions and the defendants. The in camera review would allow the Court to determine whether these documents or portions thereof may properly be withheld from plaintiff . . . .
>
> (3) Produce to plaintiff the "To, From, CC, BCC, and Subject" lines of the documents or portions thereof that Defendants have withheld based on attorney client privilege, so that the Plaintiff may make his own independent assessment as to the validity of the claim of privilege . . . .
>
> (4) Pay plaintiff his reasonable expenses incurred in obtaining these orders, including attorney's fees, as provided in Rule 37(a)(4) of the North Carolina Rules of Civil Procedure.

Attached to the motion to compel, Sessions attached eight emails or email chains partially withheld under the work product doctrine as examples of illegitimate use of the work product doctrine. For example, in an email from Edwards to Kelly dated 16 July 2008, the email provided to Sessions read:

> Subject: Tried Calling
>
> HI
> Back from the Tribunal and have tried calling, no luck.
>
> 1. So I would not send the email I just sent – but it needs to be said. We need support on this team and to not question performance.
>
> 2. How was the Bank mtg. Very keen to hear.
>
> [Redacted]
>
> Cheers, Sue

Another email to Edwards from Kelly dated 22 September 2008 read:

> Subject: Throwing it out there….
>
> Hi Tracey/Mike:
> I suspect that we can prioritize the #'s so that the Partners and all Subcontractor needs can be met.
>
> Priorities:
> [Redacted]
> 493,125 RBC
> Partner Lump Sum
> [Redacted]
> 1,200. Cardinal Law
> 6,450. Insurance
> 8,000. Port Agent
> 30,000 Partner draw per month
>
> 574,025 as opposed to: 670,575
>
> [Redacted] At that time, all other Sub-Contractors can be deposited with.
>
> Therefore, I see the opportunity to allow the Partners a lump sum draw immediately.
> Amount??
>
> Sue

In response to Sessions' motion to compel, Defendants provided an affidavit of Kelly dated 27 May 2015. In his affidavit, Kelly stated he and his partners exchanged "several" drafts of a potential agreement with Sessions. Kelly and his partners "hired Will Joyner and Jack Strauch of Womble Carlyle Sandridge & Rice, PLLC to represent [them] with regard to, among other things, potential litigation related to the third party who had reneged on the financing deal as well as the negotiations with Mr. Sessions." The parties exchanged emails with red-lined changes to the document until, at approximately 1:35 p.m. on 21 May 2008, Sessions emailed Kelly and his partners a version of the document with no added red-lined changes. Sessions indicated the agreement needed to be signed "immediately" in order to obtain a letter of credit the same day. Kelly signed the agreement. Upon review of the document, Kelly found "wholesale changes to the material terms of the proposed agreement from the version that had been circulated earlier." As a result, Kelly believed litigation over the document was possible. Kelly and his

partners "began to focus on the Sessions' dispute as well as legal strategy regarding the dispute in or around June 9, 2008."

The trial court held a hearing on the motion 1 June 2015. Because there was no court reporter present at the hearing, a transcript is not included in the record. Instead, the parties provide a summary of the hearing in the record on appeal. On 2 June 2015, the trial court granted in part and denied in part Sessions' motion to compel. The court ordered Defendants produce the following on or before 9 June 2015:

> (1) Produce to plaintiff all the documents or portions thereof withheld from production based on a claim of "work product doctrine, joint defense privilege" where the items are communications involving the defendants themselves without the participation of counsel.
>
> (2) Produce to plaintiff the "To, From, CC, BCC, and Subject" lines of the documents or portions thereof that Defendants have withheld based on attorney client privilege, so that the Plaintiff may make his own independent assessment as to the validity of the claim of privilege.

On 11 June 2015, Sessions' counsel emailed Cecilia Gordon, the trial court administrator, asking for a meeting with Judge Burke and asking about a motion for reconsideration filed by Defendants. In response, Gordon wrote: "Pursuant to conversation with Judge Burke, will not hear Mr. Greene's motion for reconsideration and advise that he comply with the court's ruling. Should Mr. Greene not comply he may be subject to the contempt power of the court. Judge Burke is not available to meet with parties."

Defendants timely filed a Notice of Appeal from the order granting in part and denying in part Sessions' motion to compel. Pursuant to Rule 62 of the North Carolina Rules of Civil Procedure, Defendants filed a motion to stay the enforcement of the order granting in part and denying in part the motion to compel. On 29 June 2015, the trial court granted the stay pending disposition of the appeal of that order.

On 15 July 2015, Defendants filed a motion for a protective order with the trial court pursuant to Rule 26 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 1-294, requesting the court enter a protective order staying the noticed depositions of Defendants. Defendants argued the subject matter of the depositions would be tangled with matters involved in the order on appeal to this Court. The trial court allowed Defendant's motion for a protective order, staying depositions pending

disposition of the appeal. The court ordered Defendants to pay any cancellation fees, including air fare, related to the stay of the depositions.

In this Court, on 21 December 2015, Sessions filed a motion to dismiss the appeal for lack of jurisdiction alleging the order appealed is interlocutory and does not affect a substantial right. Defendants filed a response to the motion to which Sessions filed a reply brief on the motion. Defendants filed a motion to strike Sessions' reply brief. Both the motion to dismiss and the motion to strike were referred to this panel.

II. Jurisdiction

[1] An interlocutory order is an order made "during the pendency of an action" which does not dispose of the entire case, but instead requires further action by the trial court. *Duquesne Energy, Inc. v. Shiloh Indus. Contractors*, 149 N.C. App. 227, 229, 560 S.E.2d 388, 389 (2002). Generally, interlocutory orders are not immediately appealable. *Id.* The purpose behind preventing interlocutory appeals is to prevent undue delay in the administration of justice by allowing fragmented and premature appeals. *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578–579 (1999) (citing *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)).

However, an interlocutory order is immediately appealable "(1) if the trial court has certified the case for appeal under Rule 54(b) of the Rules of Civil Procedure; and (2) when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Campbell v. Campbell*, __ N.C. App. __, __, 764 S.E.2d 630, 632 (2014) (citations and quotations omitted). An order compelling discovery is interlocutory in nature and is usually not immediately appealable because such orders generally do not affect a substantial right. *Sharpe*, 351 N.C. at 163, 522 S.E.2d at 579 (citing *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988)). When "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Id.* at 162, 522 S.E.2d at 579. This Court has applied the reasoning of *Sharpe* to include attorney-client privilege, the work product doctrine, and the common interest or joint defense doctrine. *See K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 446, 717 S.E.2d 1, 4 (2011); *Cf. Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 44 (2005) (denying defendant's motion to dismiss as interlocutory and reviewing order compelling discovery involving claims of attorney-client privilege and a tripartite attorney-client relationship).

Here, Defendants asserted attorney-client privilege, the work product doctrine, and the joint defense privilege at the hearing in response to the motion to compel discovery. If the assertion of privilege is not "frivolous or insubstantial" then a substantial right is affected and the order compelling discovery is immediately appealable. A blanket, general objection is considered to be frivolous or insubstantial, but objections "made and established on a document-by-document basis" are sufficient to assert a privilege. *See K2 Asia Ventures*, 215 N.C. App. at 447–48, 717 S.E.2d at 4–5. Defendants provided a document privilege log describing the privilege relating to each withheld document. As a result, their assertion of privilege is not frivolous or insubstantial and a substantial right is affected. We therefore hold this interlocutory order is immediately appealable. We deny Sessions' motion to dismiss the appeal based on its interlocutory nature.

Sessions submitted to this Court a reply brief in support of his motion to dismiss Defendants' appeal, and Defendants thereafter filed a motion to strike Sessions' reply brief. Defendants contend, pursuant to Rule 37(b) of the North Carolina Rules of Appellate Procedure, a motion may "be acted upon at any time, despite the absence of notice to all parties." However, the Rule refers to this Court's ability to act upon a motion at any time, not the ability of a party to do so. Although Rule 28(h) of the North Carolina Rules of Appellate Procedure permits a party to file reply briefs in certain circumstances, Rule 37, which governs motions, does not expressly allow reply briefs. Sessions provides no additional authority to support his ability to file a reply brief to a motion and therefore we decline to consider his reply brief to the motion to dismiss.

III. Standard of Review

"Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Patrick v. Wake Cnty. Dep't of Human Servs.*, 188 N.C. App. 592, 595, 655 S.E.2d 920, 923 (2008). We also review the trial courts' application of the work product doctrine and of attorney-client privilege under an abuse of discretion standard. *Hammond v Saini*, 229 N.C. App. 359, 370, 748 S.E.2d 585, 592 (2013); *Evans v. United Services. Auto. Ass'n*, 142 N.C. App 18, 27, 541 S.E.2d 782, 788 (2001). Under an abuse of discretion standard, this Court may only disturb a trial court's ruling if it was "manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Hammond*, 229 N.C. App. at 370, 748 S.E.2d at 592 (quoting *K2 Asia Ventures*, 215 N.C. App. at 453, 717 S.E.2d at 8).

IV. Analysis

Generally, parties may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2015). If a party claims a document is privileged, the burden lies with that party to "(i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected will enable other parties to assess the claim." *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(5)(a) (2015).

A. Determination of Validity

[2] When this motion came on for hearing, Judge Burke had Defendants' privilege log and the Kelly affidavit before him. According to Defendants, at the hearing on the motion, Defendants orally requested an *in camera* review but did not tender to Judge Burke the documents to be examined. Lacking the documents, the only evidence before Judge Burke was the privilege log which on its face lacked sufficient evidence for the trial court to assess their claim of privilege. In their brief, Defendants argue the trial court failed to make necessary determinations as required by *Hall v. Cumberland County Hospital System, Inc.* 121 N.C. App. 425, 466 S.E.2d 317 (1996). They contend a finding of validity of their Rule 26 claim is mandatory and should have been included in the order for the order to be legally enforceable. Appellants read *Hall* to say the motion, affidavit, and privilege log alone are sufficient to support a finding of validity of their Rule 26 claim. Defendants contend an *in camera* review should occur following a determination of validity. We disagree.

The Rules of Civil Procedure are not so clear. The better practice in privilege controversies would be to submit a motion, affidavit, privilege log, request for findings of fact and an *in camera* review together with a sealed record of the documents to be reviewed. Defendants concede they made no formal request for *in camera* review. Using the method followed by Defendants, if the trial court has questions regarding the factual basis of the alleged privileged documents, the court would not have a basis to resolve its questions. Lacking the documents, there is no evidence to determine if the claims of privilege are *bona fide*. Moreover, if the documents are not provided under seal to this Court for our review, appellants run the risk of providing insufficient evidence for this Court to make the necessary inquiry. It is therefore problematic for the Defendants to meet their burden of proof at trial or on appeal.

B. Joint Defense Privilege and Work Product Doctrine

[3] Defendants argue the trial court did not make a finding whether the documents withheld under the work product doctrine or joint defense privilege were prepared in anticipation of litigation. Instead, the trial court summarily ordered the production of all documents where the communications involve the Defendants themselves without participation of counsel. Citing *Evans v. United Servs. Auto Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782 (2011), Defendants contend the work product doctrine does not require "direct involvement of an attorney" to apply.

The joint defense privilege, also known as the common interest doctrine, takes the attorney-client privilege and extends it to other parties that "(1) share a common interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential." *Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, __ N.C. App. __, __, __ S.E.2d __, __ (2016). Thus, the joint defense privilege is not actually a separate privilege, but is instead an exception to the general rule that the attorney-client privilege is waived when the client discloses privileged information to a third party. *Id.* It is generally recognized when parties communicate to form a joint legal strategy. *Id.*

The work product doctrine protects materials prepared in anticipation of litigation from discovery. *In re Ernst & Young*, 191 N.C. App. 668, 678, 663 S.E.2d 921, 928 (2008). Materials prepared in the regular course of business are, however, not protected. *Cook v. Wake Cnty. Hosp. Sys., Inc.*, 125 N.C. App. 618, 623, 482 S.E.2d 546, 550 (1997). The test for whether a document was prepared in anticipation of litigation or in the regular course of business is:

> whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.

Id. at 624, 482 S.E.2d at 551 (emphasis removed).

Pursuant to Rule 52 of the North Carolina Rules of Civil Procedure "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested by a party

and as provided by Rule 41(b)." N.C. Gen. Stat. § 1A-1, Rule 52 (a)(2) (2015). Rule 41, governing dismissal of claims, does not apply to this case. *See* N.C. Gen. Stat. § 1A-1, Rule 41 (2015). If the trial court is not required to make findings of fact and conclusions of law and does not do so, then we presume the trial court found facts sufficient to support its judgment. *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986) (citations omitted). Although findings of fact and conclusions of law are helpful for meaningful review by our appellate courts, if a party did not request the court to make findings of fact, then it is within the discretion of the trial court whether to make findings. *Evans*, 142 N.C. App. at 26–27, 541 S.E.2d at 788; *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987).

The burden at trial rests on the party claiming privilege under the work product doctrine to show the emails were prepared in anticipation of litigation instead of in the regular course of business. *Evans*, 142 N.C. App. at 28–29, 541 S.E.2d at 789–90. And, "[b]ecause work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose." *Id.* at 29, 541 S.E.2d at 789.

The record on appeal lacks a transcript from the hearing on the motion to compel. The parties included a summary of the hearing, but the summary does not mention a request for factual findings. Additionally, the record contains no response to the motion to compel other than Kelly's affidavit. As a result, there is no evidence in the record that indicates Defendants requested the trial court make findings of fact. Accordingly, the trial court was not required to make findings of fact, and we presume the trial court found facts sufficient to support its judgment. The trial court did not abuse its discretion by failing to make findings of fact regarding whether the documents at issue were prepared in anticipation of litigation.

While we agree with Defendants that the work product doctrine does not require the direct involvement of an attorney to apply, the work product doctrine does require documents be prepared in anticipation of litigation instead of in the regular course of business. The burden rested on Defendants in the trial court to demonstrate the documents in question fell within the shield of the work product or joint defense doctrines. To meet their burden, Defendants needed to show the documents were prepared in anticipation of litigation. In opposition to the motion to compel, Defendants produced only Kelly's affidavit. The affidavit established Defendants' anticipated litigation as of the dates of the emails at issue. However, Defendants did not meet their burden to show

the specific emails at issue were actually prepared or obtained because of the prospect of litigation. Defendants did not demonstrate the emails were exchanged for the purpose of pending litigation instead of during the regular course of business. Although Defendants provided evidence to show litigation was anticipated at the time of the email exchanges, any business-related communication during that time is not protected. Defendants did not meet their burden to show the communications "can fairly be said to have been prepared or obtained because of the prospect of litigation." *See Cook*, 125 N.C. at 624, 482 S.E.3d at 551.

Defendants could have met their burden by showing the documents were prepared in anticipation of litigation. Defendants should have given the trial court more information about the nature of the withheld documents and the factual situation surrounding them instead of a broad claim of privilege. The best practice would have been for Defendants to turn over the documents to the trial court for an *in camera* review. On the facts before us, we hold the trial court did not abuse its discretion by ordering Defendants to produce the emails at issue under the work product and joint defense doctrines.

C. Attorney-Client Privilege

[4] Attorney-client privilege is based upon the reasoning that "full and frank" communications between a client and his attorney allow the attorney to best represent his client. *In re Miller*, 357 N.C. 316, 329, 584 S.E.2d 772, 782 (2003) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L.Ed.2d 584, 591 (1981)). The privilege is rooted in the English common law, with its earliest recorded instance in 1577. *See generally Berd v. Lovelace*, 21 Eng. Rep. 33 (1577). Today, the attorney-client privilege protects "all confidential communications made by the client to his attorney." *Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013) (citations omitted). "When the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship are privileged and may not be disclosed." *In re Miller*, 357 N.C. at 328, 584 S.E.2d 782 (citations omitted). The burden lies with the party claiming attorney-client privilege to establish each essential element of the privilege. *Id.* at 336, 584 S.E.2d at 787. The Supreme Court of North Carolina recognizes a five-part test to determine whether the privilege applies to a certain communication:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally

> consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Id. at 335, 584 S.E.2d at 786.

Defendants challenge the trial court's order as it relates to 80 emails between Defendants and their attorneys. The trial court ordered Defendants to produce the "To, From, CC, BCC, and Subject lines" of the emails withheld by Defendants on the basis of attorney-client privilege. Defendants contend revealing the subject lines of the emails will reveal protected information. Quoting a case from Illinois, Defendants state: "Header information may contain information subject to the attorney-client privilege or the work product doctrine." *Shuler v. Invensys Bldg. Sys. Inc.*, 2009 U.S. Dist. LEXIS 13067 (N.D. Ill. 2009).

After reviewing the relevant case law, we believe the question of whether subject lines of emails must be protected from discovery under attorney-client privilege is a question of first impression in North Carolina. However, just because the form of the document or communication is new or different does not mean we must look outside our jurisdiction for authority. We hold the same five-part test applies for the subject line of an email as it does for any communication allegedly protected under attorney-client privilege.

Defendants bear the burden of establishing each essential element of the privilege pursuant to the five-part test recognized by our Supreme Court. To support their claim of privilege, Defendants produced a privilege log containing the document dates, authors, recipients, a description, and the privilege asserted. Descriptions of the withheld emails include the following: "email created in anticipation of litigation" and "email seeking or containing legal advice." The record provides no evidence Defendants met their burden at trial to show the subject lines of the emails contained privileged information by meeting the test. The record only reflects Defendants claimed the emails, including their subject lines, are protected by attorney-client privilege. Accordingly, the trial court did not abuse its discretion by requiring Defendants to produce the subject lines of the emails.

D. *In Camera* Review

[5] Finally, Defendants contend the trial court should have conducted an *in camera* review prior to issuing its order compelling discovery. However, the decision whether to conduct an *in camera* review to

determine whether documents are shielded from discovery by the assertion of a privilege is within the sound discretion of the trial court. *See Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 736, 294 S.E.2d 386, 387 (1982).

Based on the record before us, we see no evidence Defendants made a request for an *in camera* inspection of the documents at trial or submitted the documents for inspection. We note that Plaintiff Sessions did make a request for an *in camera* inspection but this was only requested in the alternative in the event that the court did not rule that the documents were privileged. The decision to conduct an *in camera* inspection, without a request for such inspection, lies within the discretion of the trial court, and we have no record evidence Defendants requested an *in camera* inspection. Unless the court is given the documents to inspect, Defendants will have difficulty meeting their burden to show any specific emails were prepared or obtained because of the prospect of litigation. Defendants took a strategic risk in not submitting the documents to be sealed for *in camera* review.

V. Conclusion

For the foregoing reasons, we hold the trial court did not abuse its discretion by ordering Defendants to produce documents or portions thereof. We therefore affirm the trial court's order.

AFFIRMED.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
RICO LAMAR BARNES, DEFENDANT

No. COA15-1173

Filed 19 July 2016

Confessions and Incriminating Statements—probationer—motion to suppress—Miranda warnings—handcuffs—totality of circumstances

The trial court did not err in a possession with intent to manufacture, sell, and deliver cocaine case by denying defendant probationer's motion to suppress his statements to a parole officer based on its conclusion that defendant was not "in custody" for *Miranda* purposes. Based on the totality of circumstances, a reasonable person in defendant's situation, although in handcuffs, would not believe his restraint rose to a level associated with a formal arrest. This decision does mean that a person on probation is never entitled to the protections of *Miranda*.

Appeal by Defendant from judgment entered 1 June 2015 by Judge Robert T. Sumner in Gaston County Superior Court. Heard in the Court of Appeals 30 March 2016.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Yvonne B. Ricci, for the State.

Linda B. Weisel for the Defendant.

DILLON, Judge.

Rico Lamar Barnes ("Defendant") entered an *Alford* plea to the offense of possession with intent to manufacture, sell, and deliver cocaine and received a suspended sentence. Defendant reserved the right to appeal the trial court's denial of his motion to suppress.

I. Background

In January 2013, Defendant visited his cousin Territon Lewis at Mr. Lewis' home. At the time, both men were on supervised probation. During Defendant's visit, Mr. Lewis' parole officer arrived to conduct a search of the residence. City police officers accompanied the parole officer to provide security during the search. Upon entering the residence,

the parole officer found Defendant and recognized him as a probationer, which Defendant confirmed. The officer advised Defendant that he was also subject to the warrantless search because of his probation status, and then placed Defendant in handcuffs "for officer safety." Both Defendant and Mr. Lewis were placed in chairs on the front porch of the residence while officers conducted a search of the residence. Defendant and Mr. Lewis were kept on the porch of the residence, in handcuffs, for approximately forty-five (45) minutes to one hour.

During the search of Mr. Lewis' residence, the parole officer discovered a black leather jacket with what appeared to be crack cocaine concealed in a cigarette pack inside a pocket. After removing the substance from the jacket, the officer stepped onto the porch and asked Defendant and Mr. Lewis who the jacket belonged to. Defendant responded that the jacket was his. The officer then advised Defendant of what she had found inside the jacket, and Defendant stated that he had borrowed the jacket from someone else.

Defendant was charged with possession with intent to manufacture, sell, and deliver cocaine. Defendant filed a motion to suppress his statements made to the parole officer, arguing that the officer failed to advise him of his *Miranda* rights. The trial court denied Defendant's motion to suppress, concluding that although Defendant was handcuffed during the questioning, he was not "in custody" for purposes of *Miranda*. Defendant entered an *Alford* plea, reserving his right to appeal the trial court's denial of his motion to suppress.

II. Analysis

The sole issue on appeal is whether the trial court properly denied Defendant's motion to suppress his statements to the parole officer by concluding that Defendant was not "in custody" for *Miranda* purposes. Although Defendant was in handcuffs, we hold that, based on the totality of the circumstances, the trial court correctly concluded that Defendant was not "in custody" for purposes of *Miranda* when he made the statements. Therefore, we affirm.[1]

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1. Whether someone is "in custody" for purposes of *Miranda* is a "mixed question of law and fact." *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004). Defendant acknowledges in his brief that "virtually all of the operative facts in this case are uncontested." As a result, these facts are binding on appeal, *State v. Brown*, 199 N.C. App. 253, 256-57, 681 S.E.2d 460, 463 (2009), and our review is limited to whether the trial court's conclusions of law are legally accurate and "reflect a correct application of law to the facts found." *Garcia*, 358 N.C. at 391, 597 S.E.2d at 733.

Both the United States Constitution and the North Carolina Constitution protect a person's privilege against compulsory self-incrimination. *See* U.S. Const. amend. V; N.C. Const. art. 1 § 23. Regarding this privilege, in its landmark *Miranda* decision, the United States Supreme Court established the rule that statements obtained from a defendant through interrogation *while the defendant is in custody* are inadmissible when the defendant has not first been informed of his constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (emphasis added). As our own Supreme Court has explained, "the initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.' " *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001). Therefore, our inquiry, here, is whether Defendant was "in custody" for purposes of *Miranda*.

Whether an individual is "in custody" depends on the context. "Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Howes v. Fields*, 132 S. Ct. 1181, 1189 (2012). For instance, a prisoner is certainly "in custody" in a general sense; however, a prisoner serving his term is not always "in custody" for *Miranda* purposes. *Id.* at 1191 (stating that "service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody"). In sum, the term "in custody" for *Miranda* purposes, "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Id.* at 1189.

Our Supreme Court has explained that a person is "in custody" for purposes of *Miranda* "when it is apparent from the totality of the circumstances that there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Garcia*, 358 N.C. at 396, 597 S.E.2d at 736. *See California v. Beheler*, 463 U.S. 1121, 1125 (1983) (citing *State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001)) (internal marks and citations omitted). And this determination must be made from the point of view of an objectionably reasonable person in the suspect's position, described by our Supreme Court as follows:

> [T]he United States Supreme Court has stressed that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. Unless they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or

> interview, and thus cannot affect the *Miranda* custody inquiry . . . . [An officer's] unarticulated plan has no bearing on the question [of] whether a suspect was in custody at a particular time; *the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.*

Buchanan, 353 N.C. at 341-42, 543 S.E.2d at 829 (emphasis added).

In the present case, Defendant was clearly restrained when questioned about the jacket. He was seated on his cousin's front porch in handcuffs. And our Supreme Court has recognized that being handcuffed is a circumstance "supporting an objective showing that one is 'in custody[.]' " *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. Although, as the United States Supreme Court has explained, "[d]etermining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Howes*, 132 S. Ct. at 1189.

Based on the totality of the circumstances, we conclude that a reasonable person in Defendant's situation, though in handcuffs, would *not* believe his restraint rose to a level of restraint associated with a formal arrest. *See Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828. The regular conditions of probation in North Carolina include the requirement that a probationer "[s]ubmit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision." N.C. Gen. Stat. § 15A-1343(b)(13) (2015). During the search of Mr. Lewis' residence, Defendant was informed by law enforcement officers that he would be placed in handcuffs for the purpose of officer safety. He was never informed, at any point, that his detention would not be temporary. Further, as a probationer subject to random searches as a condition of probation, Defendant would objectively understand the purpose of the restraints and the fact that the period of restraint was for a temporary duration. Indeed, at the hearing on his motion to dismiss, Defendant testified that at the time of the search of Mr. Lewis' residence, he had been on probation for about two years. Defendant also testified that at the time he was placed on probation, the court explained to him the conditions of probation, including the possibility that he or his residence could be subject to warrantless searches. *See Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (holding that a probationer who is required to meet with his parole officer and answer questions is not "in custody" for

Miranda purposes even though his freedom of movement is curtailed during the questioning).

We believe this case is distinguishable from *State v. Johnston*, cited by Defendant, in which we held that a defendant was "in custody" for purposes of *Miranda* where the defendant was handcuffed. *State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002). In that case, the officers told the defendant that he was in "secure custody" rather than under arrest. Our Court, however, concluded that "a reasonable person [in the defendant's] circumstances would believe that he was under arrest." *Id.* Specifically, in that case, not only was the defendant handcuffed, he was also ordered out of the vehicle at gunpoint and placed in the back of a police car where he was interrogated. In the present case, though, Defendant was not ordered at gunpoint to submit to handcuffs and he was allowed to remain on the front porch of his cousin's residence rather than forced into the back of a police vehicle.

Defendant argues that the *purpose* of Defendant's custody changed after officers discovered the jacket and suspected contraband, as evidenced by the testimony of an officer that "the purpose of [her conduct] was to determine who [the jacket] and the contraband belonged to." Defendant contends that this entitled him to *Miranda* protections. However, *Miranda* is limited to *custodial* interrogations. Where the indicia of formal arrest are absent, the fact that "police have identified the person interviewed as a suspect and that the interview was designed to produce incriminating responses from the person are not relevant in assessing whether that person was in custody for *Miranda* purposes." *In re W.R.*, 363 N.C. 244, 248, 675 S.E.2d 342, 344 (2009).

III. Conclusion

Based on the totality of the circumstances, including the fact that Defendant was on probation during the search of Mr. Lewis' residence, we conclude that Defendant was not subjected to a formal arrest or a restraint on his freedom of movement of the degree associated with formal arrest. Therefore, we agree with the trial court that Defendant was not "in custody" for purposes of *Miranda*. Accordingly, the trial court properly denied Defendant's motion to suppress. We note that our decision does *not* stand for the proposition that a person on probation is *never* entitled to the protections of *Miranda*. *See Murphy*, 465 U.S. at 426.

AFFIRMED.

Judges CALABRIA and DIETZ concur.

STATE OF NORTH CAROLINA
v.
LUIS ALBERTO VILLA CAMPOS

No. COA16-49

Filed 19 July 2016

1. Criminal Law—jury instructions—flight—intentional assault

The trial court erred in a child abuse case by giving a flight instruction to the jury. There existed no evidence upon which a reasonable theory of flight could be based. Because intentional assault was required for a felony child abuse conviction, it was reasonably possible that the jury returned a felony conviction based on the erroneous instruction. A new trial was warranted.

2. Criminal Law—jury instructions—intentional assault—handling—child abuse

The trial court did not err or commit plain error in a child abuse case by its use of the term "handling" to describe for the jury the element of intentional assault, which was required for his felony conviction. The trial court's decision was appropriate as it adequately explained the law as it applied to the evidence. Further, defendant failed to object to the proffered language and characterized the trial court's language of "handling" in describing the assault as the most reasonable proposal defendant has heard.

Appeal by defendant from judgment entered 24 August 2015 by Judge Jeffrey P. Hunt in Catawba County Superior Court. Heard in the Court of Appeals 9 June 2016.

Attorney General Roy A. Cooper, by Assistant Attorney General Caroline Farmer, for the State.

Glover & Petersen, P.A. by Ann B. Petersen, for defendant-appellant.

McCULLOUGH, Judge.

Luis Alberto Villa Campos ("defendant") appeals from judgment entered upon his conviction of one count of intentional child abuse resulting in serious physical injury to a child. For the reasons stated herein, we grant a new trial.

I. Background

At the time of the incident giving rise to this case, the victim ("infant") was a three-month-old infant. She lived primarily with defendant's mother, Maria Campos Jimenez ("Jimenez"), who cared for the infant and defendant's two children, a two-year-old boy and a six-year-old girl. Although defendant did not live at Jimenez's home on a regular basis, he did help care for the children.

Defendant was in a relationship with Ruby Hoard ("Hoard"), the mother of his children. Hoard was also the mother of the infant, who was not biologically related to defendant despite his belief otherwise at the time of the incident.

On 1 April 2014, defendant returned the infant to Jimenez's home after she spent a few days with defendant and Hoard at Hoard's residence. Upon her arrival to Jimenez's home, the infant was asleep in her car seat. As Jimenez stood in the kitchen preparing dinner, she heard the infant begin to cry persistently. In checking the infant, Jimenez took her out of the car seat, placed her on the sofa, and gently undressed her, causing the crying to intensify. After removing the infant's clothing, Jimenez noticed swelling on the infant's leg. The infant continued crying to a degree that convinced Jimenez to take the infant to the Emergency Department at Catawba Valley Medical Center ("CVMC"). Jimenez spoke with defendant en route to the hospital and inquired about the cause of the infant's swollen leg. Defendant said he was not sure what caused the swelling.

Dustin Otterberg ("Otterberg"), a physician assistant at CVMC trained in patient examination, evaluated the infant when she was admitted to the Emergency Department. Otterberg confirmed the significant swelling on the infant's lower right leg and found further swelling on both of the infant's forearms. Anytime Otterberg handled these areas, the infant would grimace in pain and cry, leading Otterberg to order a full-body X-ray of the infant. The results of the X-ray showed a fracture to the infant's right tibia, fractures to both the ulna and radius bones in her left forearm, and a slight bend in the bone of her right forearm, known as a plastic deformity.

CVMC transferred the infant to Wake Forest Baptist Medical Center ("WFBMC"), where Dr. Stacy Briggs ("Dr. Briggs"), a pediatrician and member of the Child Protection Team, which evaluates children in cases of non-accidental trauma, reviewed the X-ray of the infant with a pediatric radiologist and confirmed the injuries. Dr. Briggs testified that the injuries were non-accidental due to the infant's inability as a

three-month-old baby to walk, roll over, or move in a manner that could conceivably cause multiple fractures to her arms and leg. The infant remained at WFBMC from 1 April until 3 April, when she was discharged to the Catawba County Department of Social Services ("DSS").

While the infant was evaluated at CVMC on the evening of 1 April, Investigator Jason Reynolds ("Reynolds") traveled to Jimenez's home for photo documentation and subsequently met defendant around 10:00 p.m. after passing him in his vehicle. Reynolds asked defendant if he would voluntarily come to the Sheriff's Office that night to discuss the events surrounding the infant's admission to CVMC. After initially agreeing, defendant later chose not to appear at the Sheriff's Office.

Between 1 April and 11 April, the record indicates no attempt in which Reynolds tried to locate defendant. According to defendant, Hoard had a criminal court date on 12 April and both Hoard and he reserved a hotel room in Catawba County for 11 April to better facilitate Hoard's arrival at the courthouse the following day. The Catawba County Sheriff's Office learned that defendant and Hoard were located at the hotel, and police officers arrested both that day. The record on appeal indicates that an arrest warrant for child abuse was not issued until 17 April 2014.

While in jail, defendant spoke with Jennifer Owen ("Owen"), a forensic investigator with DSS, and recounted what he thought could have caused the injuries to the infant. According to defendant, he was arguing with Hoard over her apathy and refusal to help with the children at some point during the last few days of March 2014. Defendant told Hoard he was taking the infant and the children back to Jimenez's home. After defendant placed the infant into her car seat, he turned to pick up the diaper bag, when Hoard suddenly gripped the infant's arms around the bicep area and attempted to pull her out of the car seat. Defendant swung back around and struggled with Hoard over the infant. Defendant and Hoard continued pulling and pushing on the infant for approximately twenty seconds. Defendant admitted that Hoard's and his contact with the infant during their argument could have resulted in the infant's injuries.

On 7 July 2014, a Catawba County Grand Jury indicted defendant on one count of intentional child abuse resulting in serious physical injury. On 18 May 2015, the case came on for trial in Catawba County Superior Court before the Honorable Jeffrey P. Hunt.

At the close of evidence, the trial court instructed the jury on the elements of felony child abuse and the lesser-included offense of

misdemeanor child abuse. The pattern instruction for felony child abuse required an intentional assault, but failed to include a definition for assault. The court, therefore, instructed on assault and stated in part:

> Ladies and gentlemen, I instruct you that as to assault which is mentioned in the earlier instruction I just gave, there are two elements to an assault under North Carolina law.
>
> First, . . . the State would have to prove beyond a reasonable doubt that the defendant assaulted the victim by handling the alleged victim in such a manner as to cause or result in the various injuries, including broken bones, testified to in this case.
>
> And second, the State would have to prove as a second element beyond a reasonable doubt that the defendant acted intentionally.

The second element of the assault instruction prompted the court to deliver an explanation of intent to the jury as follows:

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw . . . .

Over defendant's objections, the court then instructed on flight, which it deemed a "close call":

> Now, the State contends and the defendant denies, that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show of a consciousness of guilt. However, proof of this circumstance is not sufficient, in and of itself, to establish the defendant's guilt.

The jury proceeded to deliberate, and shortly thereafter asked the court for a definition of "intentionally" - the second of the two elements of assault required to convict defendant on felony child abuse. In response, the court read its original instruction on intent.

On 20 May 2015, the jury returned a verdict finding defendant guilty of intentional child abuse resulting in serious physical injury. On 24 August 2015, the trial court entered judgment sentencing defendant

to a term of 64 months to 89 months imprisonment. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant only raises issues regarding the trial court's instructions to the jury. Specifically, defendant argues that the trial court (1) erred in using the term "handling" to describe the required element of assault for intentional child abuse, and (2) erred in giving an instruction on flight. We address defendant's arguments in reverse order.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

A. Flight Instruction

[1] Defendant contends that the trial court erred in giving a flight instruction to the jury. We agree with defendant and find the flight instruction erroneous and prejudicial.

"A trial court may properly instruct on flight where there is 'some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged.' " *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625 (2001) (quoting *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997)) (internal quotation marks omitted); *see also State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). However, the evidence must show that the defendant took steps to avoid apprehension. *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991). Importantly, "[e]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so . . . should not be left to the jury." *State v. Lee*, 287 N.C. 536, 540, 215 S.E.2d 146, 149 (1975) (quoting *State v. Vinson*, 63 N.C. 335, 338 (1869)) (deciding that a poorly conducted search for defendant resulted in mere speculation of flight and did not warrant a flight instruction at trial); *see also State v. Duncan*, 264 N.C. 123, 127, 141 S.E.2d 23, 27 (1965) ("[I]t is an established rule of trial procedure . . . that an abstract

proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury.").

In the present case, there exists no evidence upon which a reasonable theory of flight could be based. Shortly after 10:00 p.m. on the night of 1 April 2014, Reynolds briefly spoke with defendant and asked if he would voluntarily meet Reynolds at the Sheriff's Office to discuss the infant's injuries. Defendant initially agreed, but later chose not to meet Reynolds. Defendant, who remained in Catawba County throughout the time leading up to his arrest, was not required to meet Reynolds and was entirely within his rights to decline the offer at any time.

Additionally, nothing in the record shows Reynolds or the Catawba County Sheriff's Office engaged in any search for defendant between 1 April and 11 April, when defendant was arrested. There is no indication in the record of any inquiries made regarding defendant's whereabouts, and the State did not obtain an arrest warrant for defendant on intentional child abuse until 17 April 2014, six days after defendant was arrested. Based on these facts, no evidence exists in the record that could "reasonably support[ ] the theory that the defendant fled after the commission of the crime charged." *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997) (internal citation omitted). What the trial court deemed a "close call" in terms of defendant's alleged flight amounted to mere conjecture. Therefore, the instruction on flight was erroneous.

The State improperly relies on *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), in contending that a failure to communicate with law enforcement is sufficient for an instruction on flight. In *Abraham*, a patrol officer heard gunshots near his location, observed the defendant moving away from the murder scene shortly after the fatal shooting occurred, and approached the defendant, who then took a detour away from the officer. 338 N.C. at 362, 451 S.E.2d at 156. Upon confronting the defendant, the officer asked about the shooting, and the defendant denied hearing any gunshots while continuing to walk away. *Id.* The defendant was discovered three weeks later at an apartment complex hiding in a closet under a pile of clothes and was arrested. *Id.* at 362, 451 S.E.2d 156-57. The evidence in *Abraham* was fully present in the record and taken together to support a flight instruction. In this case, the State failed to enter into evidence any fact reasonably supporting a theory of flight, but instead relied on defendant's decision not to speak with Reynolds on the night of 1 April as exemplary of flight. However, simply refusing to speak with law enforcement on a voluntary, pre-arrest basis cannot be used as evidence supporting defendant's guilt. *State v. Mendoza*, 206 N.C. App. 391, 397, 698 S.E.2d 170, 175 (2010). Moreover,

defendant spoke with Reynolds on the night of 1 April, and no evidence in the record details any other attempt by the State to obtain information from defendant prior to his arrest. Reynolds had every opportunity to continue his conversation with defendant where they originally met on 1 April. In fact, Reynolds testified that he concluded the conversation with defendant and then asked defendant to voluntarily meet at the Sheriff's Office to further discuss the infant's injuries. Hence, the State's reliance on *Abraham* is unfounded.

The State also argues that defendant deviated from his normal pattern of behavior and cites that deviation to indicate defendant's avoidance of apprehension. However, the record is less than sparse with facts supporting the State's contention. Reynolds testified that officers arrested defendant and Hoard at a hotel in Catawba County, the same county in which they were residing, on 11 April. Defendant confirmed this in his interview after waiving his *Miranda* rights and voluntarily speaking with Reynolds after his arrest. The State, however, put forward no further evidence relating to the length of the hotel reservation, and the lack of such evidence from 1 April until defendant presumably arrived at the hotel with Hoard on the day of his arrest does not support an inference of flight. Thus, defendant's case is distinguishable from *State v. Hope*, 189 N.C. App. 309, 657 S.E.2d 909 (2008), which the State uses to strengthen its argument in this instance. In *Hope*, trial testimony established that the defendant hurriedly left the murder scene, had a taxi drive him to Durham from a Raleigh hotel less than an hour later, and was found and arrested in a city ninety miles from Raleigh thirty-four days later. *Id.* at 319-20, 657 S.E.2d at 915. Clearly the facts in *Hope* could be, and were, used to support a theory of flight. Contrarily, the record in this case leads only to weak "conjecture, speculation and surmise" regarding defendant's flight and "should not [have been] left to the jury." *Lee*, 287 N.C. at 539-40, 215 S.E.2d at 149 (internal quotation marks omitted).

If a trial court erroneously proffers a flight instruction to the jury, the instruction must also sufficiently prejudice the defendant before a new trial can be granted on appeal. *State v. Weaver*, 123 N.C. App. 276, 286, 473 S.E.2d 362, 368 (1996). To demonstrate prejudice, a defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2015). Furthermore, when an erroneous and prejudicial instruction allows a jury to reach a verdict upon a state of facts not supported by the evidence contained in the record, a defendant is entitled to a new trial. *Lee*, 287 N.C. at 541, 215 S.E.2d at 149.

In this case, there exists a reasonable possibility that the flight instruction caused the jury to reach a felony conviction. Thus, the erroneous instruction was prejudicial. In order to obtain a conviction for intentional child abuse, the State must prove - and the jury must find - an intentional assault on the child. During its deliberation, the jury members asked for a definition of "intentional," to which the court responded with no explanation apart from its original instruction. This decision certainly left the jury's confusion unassuaged and conceivably vulnerable to the inclusion of the ill fated flight instruction. Permitting the jury to consider defendant's flight "together with all other facts and circumstances . . . to . . . show . . . a consciousness of guilt" created a reasonable possibility that the jury deemed "consciousness of guilt" synonymous with "intentional," thereby allowing it to insert the former as proof of the latter. Because intentional assault is required for a felony child abuse conviction, it is reasonably possible that the jury returned a felony conviction based on the erroneous instruction. Thus, had the jury *not* received the instruction on flight, it is reasonably possible that it would have reached an alternative verdict.

B. Assault Instruction

[2] Although a new trial is warranted due to the erroneous flight instruction, we briefly address defendant's argument on the assault instruction.

Defendant contends that the trial court erred in its use of the term "handling" to describe for the jury the element of intentional assault, which was required for his felony conviction. We do not agree. We have reviewed the trial court's instructions regarding assault and find that the court fairly and adequately explained the law in its relation to intentional assault. We further note that defendant failed to object to the proffered language, and in fact characterized the trial court's language of "handling" in describing the assault as "the most reasonable [proposal defendant has] heard."

When a defendant fails to object to a jury instruction at trial, that instruction is subject to plain error review. N.C. R. App. P. 10(a)(4) (2015); *see also State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice - that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is

> to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted). Notably, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977).

Trial courts are given discretion regarding choice of jury instructions. *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152 (2002). After proffering general instructions pertaining to the charges against a defendant, a trial court may choose to supplement those instructions with additional, explanatory instructions. *State v. Bartlett*, 153 N.C. App. 680, 685, 571 S.E.2d 28, 31 (2002) (stating that those explanatory instructions "will not be overturned absent abuse of [the trial court's] discretion"); *see also State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986) ("[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations[.]").

Defendant relies on *State v. Lineberger*, 115 N.C. App. 687, 446 S.E.2d 375 (1994), to support his contention that the trial court erred in defining assault using the term "handling." In *Lineberger*, the defendant was convicted for assaulting a police officer. 115 N.C. App. at 687, 446 S.E.2d at 376. At the close of evidence, the trial court gave the following assault instruction: "that the defendant assaulted [the officer] by intentionally and without justification or excuse, *striking or bumping* against him with his shoulder." *Id.* at 689, 446 S.E.2d at 377 (emphasis added). Before reaching a verdict, the jury asked the trial court for a definition of assault, but was instead given an instruction identical to the original instruction. *Id.* at 690, 446 S.E.2d at 377-78. Because the jury required a definition of assault in order to reach a verdict, "the omission of the definition of assault was prejudicial error" resulting in a new trial for the defendant. *Id.* at 692, 446 S.E.2d at 379.

The case at bar is distinguishable. First, the jury in this case did not inquire as to the definition of assault and, therefore, did not need a definition in order to return a verdict upon completion of deliberations. Second, the court's instruction was sufficient to "otherwise explain" the term of assault as it relates to this case. To "otherwise explain" the meaning of assault, the trial court may describe the victim's injuries and their genesis if the description leaves the jury with enough information so that it has no question regarding the meaning of assault.

State v. Springs, 33 N.C. App. 61, 64, 234 S.E.2d 193, 195 (1977) (deciding that the trial court did not err in defining assault as "shooting [the victim] in the . . . chest with a shotgun"). Here, after receiving the assault instruction in which the court said, "the State would have to prove beyond a reasonable doubt that the defendant assaulted the victim by handling the alleged victim in such a manner as to cause or result in the various injuries, including broken bones," the jury did not ask the court for further information or instruction regarding the force element of assault. Therefore, the court "otherwise explain[ed]" this particular element and committed no error in instructing on assault using the term "handling."

Moreover, the trial court's decision to instruct using "handling" to characterize assault was appropriate as it adequately explained the law as it applied to the evidence. "The primary purpose of a jury charge is to inform the jury of the law as it applies to the evidence 'in such manner as to assist the jury in understanding the case and in reaching a correct verdict.' " *State v. Holmes*, 120 N.C. App. 54, 71, 460 S.E.2d 915, 925 (1995) (quoting *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971)). "[T]he manner in which it chooses to do so is within its discretion." *Id.* To avoid potential jury confusion regarding the general assault element of consent - since a three-month-old infant is incapable of withholding consent - the trial court chose to forego the general instruction and, instead, provided the pattern jury instruction for simple assault after instructing the jury on both intentional child abuse and the lesser-included offense of misdemeanor child abuse. The trial court was well within its discretion to do so. *State v. Daniels*, 38 N.C. App. 382, 384, 247 S.E.2d 770, 772 (1978) (defining assault as defendant "[striking victim] over the head with a blackjack" was "sufficient to define and explain the law arising on the evidence"); *see also State v. Hewitt*, 34 N.C. App. 152, 153, 237 S.E.2d 338, 339 (1977) (emphasis in original) (instructing the jury that assault occurred "by intentionally shooting [the victim] with a pistol . . . explained the term assault and applied the law to the evidence"). Therefore, the trial court's use of "handling" in its description of assault was not error, much less plain error.

III. Conclusion

For the reasons stated, we hold that the trial court erred in offering a flight instruction to the jury, but did not commit plain error in instructing the jury on assault. Defendant is awarded a new trial.

NEW TRIAL.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
BOBBY LEE GORDON, JR., DEFENDANT

No. COA15-820

Filed 19 July 2016

1. Kidnapping—first-degree—victim not released in safe place

Where defendant took the victim by gunpoint to a secluded area in the woods off of Interstate 85, sexually assaulted her, and then abandoned her in the place of the assault, there was sufficient evidence to permit a reasonable juror to infer that the victim was not released by defendant in a safe place and therefore the trial court did not err by denying defendant's motion to dismiss the first-degree kidnapping charge.

2. Criminal Law—prosecutor's arguments—credibility of witness

In defendant's trial for charges related to sexual assault and kidnapping, the trial court did not err when it did not give the jury a curative instruction after sustaining defense counsel's objection to the prosecutor's allegedly improper statement during closing argument or when it did not intervene ex mero motu to a subsequent allegedly improper statement. Defendant did not request a curative instruction, and the trial court had issued proper general instructions to the jury at the outset of the trial; further, the additional statement by the prosecutor provided clarification as to the prosecutor's prior statement asking jurors to use their common sense and experience in determining a witness's credibility.

Appeal by Defendant from judgment entered 17 December 2014 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 16 December 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General David N. Kirkman, for the State.

Parish & Cooke, by James R. Parish, for Defendant-Appellant.

INMAN, Judge.

Bobby Lee Gordon, Jr. ("Defendant") appeals from a judgment after a jury found him guilty of attempted first-degree rape, first-degree

kidnapping, and first-degree sexual offense. On appeal, Defendant argues that the trial court erred by failing to dismiss the charge of first-degree kidnapping based upon insufficient evidence that the victim was not released in a safe place, failing to give the jury a curative instruction after sustaining defense counsel's objection to the prosecutor's allegedly improper statement during closing argument, and failing to intervene *ex mero motu* to an additional allegedly improper statement. After a thorough review of the record, relevant law, and arguments of the parties, we hold that Defendant received a trial free from error; as such, we affirm the judgment against him.

Factual & Procedural History

The State's evidence tended to show:

On 27 April 2009, Sue[1] was walking on Main Street in High Point, filling out job applications at various businesses. Defendant stopped the white truck he was driving a couple of times to ask Sue if she wanted a ride. She responded that she did not need a ride.

When Sue started walking home, she observed the white truck pass her and turn around. Defendant pulled up beside her, pointed a gun at her head, and said, "Get into the truck and do what I tell you to do and I won't kill you." Sue got in the truck and Defendant said, "We are going to go see my girlfriend. I just want to make her jealous." While he drove, Defendant kept the gun pointed at Sue. She begged him to let her go. After about six or seven minutes of driving, Defendant turned onto an access ramp off Interstate 85. He eventually stopped the truck in "a little

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1. To preserve the privacy of the victim, we hereinafter refer to her by the pseudonym "Sue." In his brief on appeal, Defendant refers to the victim as "Sue" in an effort to follow the preferred policy of this Court. The State, however, chose to use the victim's full name throughout.

Traditionally, the practice of employing pseudonyms for victims of sexual offenses has been limited to instances involving minors, in accordance with N.C. R. App. P. 4(e) (2009). Although it has never been officially ruled or codified by any court in this State, we find it good practice to preserve the privacy of victims, regardless of age, in appeals from sexual offense cases. *See State v. Henderson*, 233 N.C. App. 538, 538, 756 S.E.2d 860, 861 (2014) ("[I]t is the policy of the North Carolina Indigent Defense Services 'to shield the identities of victims of sexual crimes in appellate filings' regardless of age. . . . We recommend that the State also observe such a policy.") (brackets omitted).

The victim, although often a key witness in a criminal action, is not a named party. Furthermore, the identity of the victim may be protected on appellate review at no critical risk to a defendant's case. Criminal cases based upon sexual assault are worthy of the State's attention and concern matters of a sensitive and highly personal nature for which there may be a risk of retaliatory physical or mental harm to the victim.

dirt patch area" in a "very wooded area" that was "almost impossible to see from the highway." Defendant told Sue to take her clothes off.

Sue opened the door to Defendant's truck, whereupon he grabbed her throat. The two then wrestled to the ground. Defendant placed his hands around Sue's neck and strangled her for a couple of minutes. While they were on the ground, Defendant fired his gun near Sue's left ear. Sue testified that the gun was about one foot away from her head when it fired. She stopped fighting because she "thought he was going to kill [her] at that point." Sue noticed that Defendant's gun had a white or pearl handle.

Defendant asked Sue for her belt. She refused to give it to him and said that she was not going to take off her clothes. Defendant then tried to rip off her pants and Sue took off her belt. Defendant continued his efforts to remove Sue's clothes and told her that he would let her go if he saw her private parts. When she refused, the struggle resumed. Defendant inserted his fingers into Sue's vagina. Defendant's pants were down and he attempted to penetrate Sue with his penis; however, Sue, who was on her back, continued to kick and push him. Sue testified that the struggle lasted fifteen to twenty minutes.

Defendant stopped struggling with Sue and allowed her to put her clothes on. He took her belt and driver's license and said, "I know where you live. If you tell anybody I will come back and I will kill you." He asked Sue whether she had made any calls on her cell phone. She showed Defendant her recent call history. Defendant got in his truck. Sue ran into the wooded area and watched Defendant's truck drive away. She then ran across the four-lane highway into her back yard. Sue immediately called her roommate and explained what had just transpired. He called the police, who arrived at Sue's apartment in about ten minutes. Sue gave the officer a statement of the events.

Because she was afraid to stay in High Point, Sue moved to Jacksonville, Florida a couple of months after the incident. Sue testified that she had never met Defendant before the day he assaulted her, and did not know his name until she was contacted two years later by Detective Melanie Leonard. Detective Leonard, the detective handling the case, asked Sue to view a photo lineup, which officers in Florida administered. Sue selected Defendant's photograph. Subsequently, Detective Leonard called Sue and asked her to rate on a scale of one to ten her certainty that the photo she selected was that of her assailant. Sue responded that it was a "seven." At trial, Sue testified that Defendant "is the man that held [her] at gunpoint in 2009."

Detective Mark Barnes of the Davidson County Sheriff's Office testified that on 28 December 2012, he assisted the High Point Police Department in executing a search warrant at Defendant's address. Defendant asked what the search was about, and Detective Barnes responded that he did not know. Defendant then explained that he knew what it was about, that it involved a girl who was walking down the street in High Point about two years earlier. He said that he had stopped and picked her up, that they bought some drugs, and then went back to his place and partied. He said that he gave her $30.00 and "took her down the road and put her out."

Officers searched a Buick LeSabre parked in Defendant's yard. They found a silver handgun with a pearl grip handle. While the officers were searching Defendant's residence, Defendant's mother pulled up in a white pickup truck.

Defendant's evidence tended to show:

Defendant's sister, Julie Ann Gordon Quick, testified that Defendant brought Sue into her place of work in January or February 2009. After Defendant's arrest in 2013, Ms. Quick was able to identify Sue as her brother's date back in 2009 by searching her name on Facebook. The prosecutor elicited from Ms. Quick that she never told law enforcement that her brother had dated Sue in early 2009. She further testified that her mother owned a GMC Sonoma truck in April 2009.

Defendant's mother, Gloria Elaine Gordon, testified that around Easter of 2009, her son brought Sue by her house. She did not see Sue again until she testified at Defendant's trial. She further testified that she owned a 1995 GMC Sonoma pickup truck in April of 2009, but it had been in Deborah Wright's transmission shop on 22 April 2009. She explained that she paid Ms. Wright by check for the repairs on 5 May 2009. She testified that she had located the work ticket that Deborah Wright had produced when the clutch job on the truck was paid for. The work ticket, Defendant's Exhibit 7, identified the vehicle as a Chevrolet S-10 and bore no date. Deborah Wright testified that she had no way of knowing when she worked on Ms. Gordon's truck because it had been "several years."

On 27 December 2012, Defendant was charged with first-degree kidnapping, attempted first-degree rape, assault by strangulation, and first-degree sexual offense against a female. On 11 March 2013, he was indicted on the same charges. On 15 December 2014, the charges were joined for trial before Judge R. Stuart Albright. Defendant pled not guilty and was tried before a jury. On 17 December 2014, the jury found

Defendant guilty of attempted first-degree rape, first-degree kidnapping, and first-degree sexual offense. Defendant was acquitted of assault by strangulation. The trial court sentenced Defendant to consecutive terms of 288 to 355 months imprisonment for the first-degree sexual offense conviction, 189 to 236 months for the attempted first-degree rape conviction, and 100 to 129 months for the first-degree kidnapping conviction. Defendant gave timely notice of appeal.

Analysis

I. First-Degree Kidnapping

[1] Defendant argues that the trial court erred in failing to dismiss the charge of first-degree kidnapping because there was insufficient evidence that Sue was not released in a safe place. Defendant asserts that because the State failed to show that Sue was not released in a safe place, this Court should vacate his conviction for first-degree kidnapping and send the case back to the trial court with instructions to enter a judgment of second-degree kidnapping. We disagree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "In deciding whether sufficient evidence was presented from which the jury could reasonably infer that the victim was not released in a safe place, we consider the evidence in the light most favorable to the State, giving the State every reasonable inference to be drawn therefrom." *State v. White*, 127 N.C. App. 565, 572, 492 S.E.2d 48, 52 (1997).

B. Analysis

North Carolina General Statute § 14-39(b) creates two degrees of kidnapping:

> If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person

> kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39(b) (2015).

The indictment for first-degree kidnapping alleged that Sue was not released in a safe place and was sexually assaulted; however, during the instruction conference, the State indicated that it would not proceed on the allegation that Sue was sexually assaulted as a predicate for first-degree kidnapping. The trial court submitted to the jury the charge of first-degree kidnapping based on the allegation that Sue was not released in a safe place.

"[T]he General Assembly has neither defined nor given guidance as to the meaning of the term 'safe place' in relation to the offense of first-degree kidnapping." *State v. Sakobie*, 157 N.C. App. 275, 282, 579 S.E.2d 125, 130 (2003). "Further, the cases that have focused on whether or not the release of a victim was in a safe place have been decided by our Courts on a case-by-case approach, relying on the particular facts of each case." *Id.* at 280, 579 S.E.2d at 129. "Releasing a person in a safe place implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." *State v. Karshia Bliamy Ly*, 189 N.C. App. 422, 428, 658 S.E.2d 300, 305 (2008) (internal quotation marks and citations omitted). "Mere relinquishment of dominion or control over the person is not sufficient to effectuate a release in a safe place." *Id.*

Defendant argues Sue was "released" in a safe place because she was "released in daylight hours; in an area she was familiar with; with her clothes, and her cell phone; and was able to walk from the wooded area she was familiar with across a highway into her back yard to her apartment." However, Defendant left Sue in a clearing in the woods located near, but not easily visible from, a service road that extended off an exit ramp for Business Interstate 85. Deputies described the area as "very, very remote" and "very, very secluded . . . at that time of the year, it was a very, very wooded area, it's almost impossible to see from the highway[.]" After the assault concluded, Sue, in a traumatized state, had to walk out of the clearing, down an embankment, and across a four-lane highway to get to her apartment. Defendant did not take any affirmative steps to release Sue in a location where she was no longer exposed to harm. He chose to abandon Sue in the same secluded location he had chosen to assault her.

We hold that this evidence is sufficient to permit a reasonable juror to infer that the victim was not "released by the defendant in a safe place" within the meaning and intent of that phrase as used in N.C. Gen. Stat. § 14-39(b). Therefore, the trial court did not err by denying Defendant's motions to dismiss the first-degree kidnapping charge.

II. Curative Jury Instruction/ *Ex Mero Motu* Intervention

[2] Defendant contends that the trial court erred in: (1) failing to give the jury a curative instruction after sustaining defense counsel's objection to the prosecutor's allegedly improper statement, and (2) failing to intervene *ex mero motu* to remedy the statement.

A. Standard of Review

The North Carolina Supreme Court "has firmly established that 'trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court.' " *State v. Thomas*, 350 N.C. 315, 360, 514 S.E.2d 486, 513 (1999) (quoting *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992)). "The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu*." *State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975).

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (internal citations omitted).

B. Analysis

Section 15A-1230 of the North Carolina General Statutes provides in pertinent part:

> (a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230 (2015).

Defendant contends that the prosecutor interjected his personal opinions in violation of N.C. Gen. Stat. § 15A-1230 and the trial court erred in its inactions, first, to give a curative instruction and, second, to intervene *ex mero motu* to an additional improper statement. Specifically, Defendant argues that the prosecutor's statement was improper because he expressed his personal belief as to the truthfulness or falsity of the evidence. The statement Defendant contends was improper, however, is one portion of a sentence, quoted outside the context of the entire sentence. The North Carolina Supreme Court has held that "[i]n determining possible prejudice arising from improper arguments, we consider an allegedly improper statement in its broader context, as particular prosecutorial arguments are not viewed in an isolated vacuum." *State v. Peterson*, 361 N.C. 587, 603, 652 S.E.2d 216, 227 (2007) (internal quotation marks and citations omitted); *see also State v. Cummings*, 352 N.C. 600, 621, 536 S.E.2d 36, 52 (2000) ("To determine the propriety of the prosecution's argument, the Court must review the argument in context and analyze the import of the argument within the trial context, including the evidence and all arguments of counsel."). We therefore review the challenged portion of the prosecutor's closing argument in this broad context.

Early in the argument, the prosecutor stated:

> Now, I asked everybody a question during jury selection, do you have common sense. Everybody always says yes. No shocker. I've never had a no answer to that. But that's what we're looking for here today. Use your common sense. And it's not just about these items. It's about your everyday interactions with people. It's about what you have learned and picked up through your development

> and maturity as a human being. It's about what you know about people that makes you think they're telling the truth.

The prosecutor went on to discuss the relevant facts of the case and asked the jury whether it made sense that Sue would contrive the facts that she reported to her roommate and the police in April of 2009 to assist the State in charging and convicting her unknown assailant years later. He then discussed how Sue may have appeared during her testimony:

> And you know, maybe she could have done a little bit better. Maybe she would have presented better. Maybe she could have taken some drama classes or some speech therapy or whatever it would take to make her present better. But you know, she's genuine. She's absolutely genuine. And when you sit there and you watch her testify, and you watch the fear in her eyes when she sits over there and looks at him, even though he has changed his appearance since then, apparently for you-all, you're entitled to go, based on my reason, my common sense and my interactions with people as I have grown to be as old as I am, I think she is telling the truth.

The defense attorney objected and the trial court sustained his objection. The prosecutor then clarified that, "I'm just arguing they should think she's telling the truth. I'm sorry, Judge, I misstated. You should be able to say, after watching her testify, that you think she is telling the truth."

At the outset, we consider the propriety of the prosecutor's statement that, "based on my reason, my common sense and my interactions with people as I have grown to be as old as I am, I think she is telling the truth." Because the defense counsel objected to this statement, we must determine whether the remark was "not warranted by either the evidence or the law, or . . . [was] calculated to mislead or prejudice the jury." *Monk*, 286 N.C. at 516, 212 S.E.2d at 131. A review of the transcript reveals that one theme of the prosecutor's closing argument was about employing one's common sense and experience to determine the credibility of the witnesses. Taken in context, the sentence follows a second person narrative:

> And when you sit there and you watch her testify, and you watch the fear in her eyes when she sits over there and looks at him, even though he has changed his appearance since then, apparently for you-all, you're entitled to go,

> based on my reason, my common sense and my interactions with people as I have grown to be as old as I am, I think she is telling the truth.

Viewed in a broader context, the prosecutor's statement refers to the jurors' perspective on the testimony. The prosecutor's use of the introductory phrase "you're entitled to go," demonstrates that the prosecutor was urging jurors to weigh Sue's testimony for themselves. Additionally, the prosecutor clarified the issue instantaneously by stating, "I am just arguing they should think she's telling the truth. I'm sorry, Judge. I misstated." Under these circumstances, we hold that the prosecutor's statement, which was further clarified, was not in violation of the law or calculated to mislead or prejudice the jury.

Exercising an abundance of caution, the trial court sustained defense counsel's objection and the prosecutor clarified what he meant. Defendant contends that the trial court erred in failing to give a curative instruction to the jury after sustaining defense counsel's objection. We reject this argument because the North Carolina Supreme Court and this Court have held "it is not error for the trial court to fail to give a curative jury instruction after sustaining an objection, when defendant does not request such an instruction." *State v. Williams*, 350 N.C. 1, 24, 510 S.E.2d 626, 642, *cert. denied*, 528 U.S. 880, 145 L.Ed.2d 162 (1999); *see also State v. Hunter*, 208 N.C. App. 506, 517, 703 S.E.2d 776, 784 (2010); *State v. Williamson*, 333 N.C. 128, 423 S.E.2d 766 (1992). Moreover, we note that that the trial court issued general instructions to the jury at the outset of the trial:

> It is the right of the attorneys to object when testimony or other evidence is offered that the attorney believes is not admissible. When the Court sustains an objection to a question, you must disregard the question and the answer, if one has been given, and draw no inference from the question or answer or guess as to what the witness would have said if permitted to answer.

This Court has held that such "instructions are sufficient to cure any prejudicial effect suffered by defendant regarding evidence to which an objection was raised and sustained." *State v. Vines*, 105 N.C. App. 147, 153, 412 S.E.2d 156, 161 (1992). For these reasons, the trial court did not err by failing to give a curative instruction.

Defendant next contends that the trial court erred by not intervening *ex mero motu* to the prosecutor's clarifying statement that, "I'm just arguing they should think she's telling the truth. I'm sorry, Judge, I

misstated. You should be able to say, after watching her testify, that you think she is telling the truth." Because defense counsel did not object to this statement, we review "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. This statement did not interject the prosecutor's personal belief but instead provided further clarification as to the prosecutor's prior statement asking jurors to use their own common sense and experience in determining a witness's credibility. Furthermore, Defendant has failed to show that he was prejudiced by the prosecutor's statements. *See State v. Brown*, 182 N.C. App. 277, 285, 641 S.E.2d 850, 855 (2007) ("[The] defendant has failed to show this Court how the prosecutor's statements prejudiced him and resulted in a jury verdict which would not have been reached absent the statements. Therefore, we hold the trial court did not abuse its discretion in denying defendant's motion."). We hold that the prosecutor's jury argument was not so grossly improper as to require the trial court's intervention *ex mero motu*.

Conclusion

For the aforementioned reasons, we hold that Defendant received a fair trial, free from error.

NO ERROR.

Judges STEPHENS and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
ARVIN ROSCOE HAYES, DEFENDANT

No. COA16-207

Filed 19 July 2016

Indecent Exposure—misdemeanor statute—precluded from guilt for both misdemeanor and felony

Although there was no error in finding defendant guilty of felony indecent exposure in the presence of a female victim under the age of sixteen, the trial court erred by convicting defendant of misdemeanor indecent exposure. The misdemeanor statute precluded him from being found guilty of both misdemeanor and felonious indecent exposure even though there were multiple witnesses for actions stemming from the same conduct. The case was remanded to the trial court for resentencing.

Appeal by Defendant from judgments entered 17 September 2015 by Judge R. Stuart Albright in Wilkes County Superior Court. Heard in the Court of Appeals 6 June 2016.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for the Defendant.

DILLON, Judge.

Arvin Roscoe Hayes ("Defendant") appeals from a jury verdict finding him guilty of felony indecent exposure in the presence of a female victim under the age of sixteen (16) and misdemeanor indecent exposure in the presence of an adult female victim. We find no error in Defendant's conviction for felony indecent exposure. However, for the following reasons, we arrest judgment on the conviction of misdemeanor indecent exposure and remand this case to the trial court for resentencing.

I. Background

The evidence tended to show the following: In July 2014, S.C. ("Mother") and her three daughters were shopping at a retail store in Wilkesboro. Mother and her thirteen-year-old daughter, D.C.

("Daughter"), noticed that Defendant was following them from aisle to aisle and that he was staring at them. At one point, while Defendant was standing two feet away from Mother and Daughter, Mother saw him grabbing and rubbing his penis, part of which was sticking out of his pants. Mother and her daughters went to the store clerk and asked the clerk to call the police. Defendant was later apprehended in a nearby store and identified by Mother.

Defendant was charged and convicted of felony indecent exposure (for exposing himself to Daughter) and misdemeanor indecent exposure (for exposing himself to Mother). The jury returned guilty verdicts for all charges, and Defendant was sentenced accordingly. Defendant timely appealed.

II. Standard of Review

If a trial court enters judgment on multiple charges, in violation of a statutory mandate, that issue is automatically preserved for appeal. *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000). Issues of statutory construction are questions of law which we review *de novo* on appeal, "consider[ing] the matter anew and freely substitut[ing] our judgment for the judgment of the lower court." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014).

III. Analysis

The central question to this appeal is whether Defendant's one instance of exposing himself to multiple people, one of which was a minor, may result in both a felony and a misdemeanor charge. Defendant argues that the misdemeanor statute precludes him from being found guilty of both misdemeanor and felonious indecent exposure. We agree.

This question is one of statutory interpretation. "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature . . . is accomplished. Legislative purpose is first ascertained from the plain words of the statute." *State v. Anthony*, 351 N.C. 611, 614, 528 S.E.2d 321, 322 (2000). A statute's words carry their "natural and ordinary meaning" when an alternative meaning is not provided within the statute and those words are "clear and unambiguous." *Lunsford*, 367 N.C. at 623, 766 S.E.2d at 301 (citing *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978)).

Defendant was convicted of misdemeanor indecent exposure pursuant to N.C. Gen. Stat. § 14-190.9(a) (the "Misdemeanor Statute"), which provides as follows:

> (a) *Unless the conduct is punishable under subsection (a1) of this section*, any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons . . . shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat § 14-190.9(a) (2013) (emphasis added). Under the plain words of the statute, Defendant's conduct in the present case subjects him to criminal liability for a single misdemeanor count, even though multiple "persons" may have witnessed his behavior, *unless* his conduct is otherwise punishable as a felony under subsection (a1) of that statute (the "Felony Statute"). The Felony Statute provides as follows:

> (a1) Unless the conduct is prohibited by another law providing greater punishment, any person at least 18 years of age who shall willfully expose the private parts of his or her person in any public place in the presence of any other person less than 16 years of age for the purpose of arousing or gratifying sexual desire shall be guilty of a Class H felony.

N.C. Gen. Stat § 14-190.9(a1) (2013). And here, Defendant was, in fact, convicted of a felony under subsection (a1) since one of the witnesses (Daughter) was under 16 years of age.[1]

The State argues that well-established North Carolina law permits a defendant to be punished for multiple crimes resulting from conduct that had multiple victims. For common law crimes such as assault and armed robbery, we have upheld the constitutionality of pursuing multiple charges resulting from the same conduct. *State v. Nash*, 86 N.C. 650, 652 (1882); *State v. Johnson*, 23 N.C. App. 52, 55-56, 208 S.E.2d 206, 208-09 (1974). Using the "same evidence" doctrine, we allow multiple indictments for the same general course of conduct if the State would require different evidence to prove each offense. *State v. Hicks*, 233 N.C. 511, 516, 64 S.E.2d 871, 875 (1951). For example, an assault on multiple people would require separate showings that each person in the crowd was, in fact, assaulted. *See State v. Church*, 231 N.C. 39, 43, 55 S.E.2d 792, 796 (1949).

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1. In fact, the statute does not even require the victim to see the defendant's exposed body part; it only requires for the defendant to be "in the presence" of a victim. Our Court recently considered this issue in *State v. Waddell*, in which the defendant was convicted of felony indecent exposure for exposing himself to a woman, her mother, and her fourteen-month-old son. *See State v. Waddell*, ___ N.C. App. ___, ___, 767 S.E.2d 921, 924 (2015) (noting that "[i]n order to convict a defendant of indecent exposure in public, the exposure need only be in the *presence* of another person; it need not be seen by, let alone directed at, another person").

We recognize that under the "same evidence" doctrine, both Defendant's felony and misdemeanor convictions would likely stand. The State would have to prove that Daughter was present when Defendant exposed himself in order to support the felony charge, and would have to prove that Mother was present when Defendant exposed himself in order to support the misdemeanor charge. These two crimes would require different evidence to prove each count. However, we are faced with a question of statutory interpretation, not a double jeopardy challenge. *See State v. Mansfield*, 207 N.C. 233, 176 S.E. 761 (1934). The Misdemeanor Statute plainly forbids conduct from being the basis of a misdemeanor conviction if it is also punishable as felony indecent exposure.

If a trial court improperly convicts a defendant under two statutes for actions stemming from the same conduct, the proper relief is arrestment of the judgment and remand for resentencing. *See State v. Coakley*, ___ N.C. App. ___, ___, 767 S.E.2d 418, 426 (2014). Accordingly, we arrest judgment on Defendant's conviction of misdemeanor indecent exposure and remand this matter for resentencing.

JUDGMENT ARRESTED AND REMANDED IN PART, NO ERROR IN PART.

Chief Judge McGEE and Judge HUNTER, JR., concur.

STATE OF NORTH CAROLINA
v.
CLAYTON MICHAEL JONES

No. COA15-1239

Filed 19 July 2016

1. Constitutional Law—right to trial by jury—waiver—date of arraignment

The trial court was constitutionally authorized to accept defendant's waiver of his right to a jury trial where his arraignment occurred after the effective date of the constitutional amendment and session law that allowed criminal defendants to waive their right to a trial by jury in non-capital cases.

2. Criminal Law—bench trial—confession suppressed before trial—judge aware of confession

Defendant could not argue that he had been prejudiced in a non-jury trial where the same judge that had suppressed his confession before trial conducted the trial, so that the judge as fact finder was aware of the confession. Defendant chose to waive his right to a trial by jury with the knowledge that the same judge who had suppressed the confession had would serve as the judge in the bench trial.

3. Criminal Law—bench trial—inadmissible—presumed ignored

Defendant did not rebut the presumption that the judge in a bench trial ignores inadmissible evidence in a prosecution in which the trial judge had suppressed defendant's confession before trial and was thus aware of the confession. No prejudice exists by virtue of the simple fact that evidence was made known to the judge.

4. Indictment and Information—variance between indictment and evidence—time of offense—not fatal

There was not a fatal variance between the indictment and the evidence in a prosecution for second-degree sexual exploitation of a minor where the indictment and the evidence did not list the same date for the receipt of pornographic images. Time is an element of second-degree sexual exploitation of a minor, and defendant did not attempt to advance a time-based defense.

5. Sexual Offenses—sexual exploitation of minor—second-degree—evidence of knowledge—sufficient

There was sufficient circumstantial evidence of defendant's knowledge of the contents of computer files in a prosecution for second-degree sexual exploitation of a minor.

Appeal by defendant from judgment entered 15 May 2015 by Judge John O. Craig, III in Randolph County Superior Court. Heard in the Court of Appeals 30 March 2016.

Roy Cooper, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State.*

Clifford Clendenin & O'Hale, *LLP*, *by Daniel A. Harris and Locke T. Clifford*, *for defendant-appellant.*

DAVIS, Judge.

Clayton Michael Jones ("Defendant") appeals from his convictions for two counts of second-degree sexual exploitation of a minor. On appeal, he contends that the trial court (1) lacked the authority to grant his request for a waiver of his right to a trial by jury; (2) improperly considered inadmissible evidence that had been suppressed before trial; (3) erred in denying his motion to dismiss the charges against him due to a fatal variance between the date of the offenses listed on the indictments and the date established by the evidence at trial; and (4) improperly denied his motions to dismiss. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 18 October 2009, images of child pornography were downloaded to a computer later established as belonging to Defendant. The street address associated with the IP address for the computer was the home of Defendant's parents on Osborn Mill Road in Randolph County, North Carolina.

The images were downloaded via a "peer-to-peer" file sharing software program known as "Gnutella," which — by means of a download engine — allows its users to download image files from other users of the program. Gnutella utilizes a search function where users type in a description of the image file for which they are searching using descriptive terms and language. A list of results is then displayed from which

users may select the files they want to download. Those files are then downloaded directly onto their computer.

Detective Bernie Maness ("Detective Maness") with the Randolph County Sheriff's Office detected the images being downloaded to the computer's IP address through a software program used by law enforcement officials called "Peer Spectre," which monitors downloads occurring on various peer-to-peer software platforms, including Gnutella. The images downloaded to the IP address were flagged as known child pornography, and Detective Maness procured a search warrant for the Osborn Mill Road address.

On 17 December 2009, Detective Maness, along with Detective Jason Chabot ("Detective Chabot") and several deputies, went to the Osborn Mill Road address to execute the search warrant. Defendant was not present when the detectives arrived, but his parents were at home and let the detectives inside.

Upon entering Defendant's bedroom, Detectives Maness and Chabot observed a white Apple MacBook laptop (the "MacBook") partially concealed underneath Defendant's mattress. The detectives seized the MacBook and continued their search.

While the search was still ongoing, Defendant returned home and encountered the detectives. Detective Maness identified himself to Defendant and informed him that he and Detective Chabot were executing a search warrant for child pornography. After hearing Detective Maness make this statement, Defendant "hung his head."

Detective Maness subsequently conducted a forensic examination of the MacBook using specialized software that allows law enforcement officers to view, but not alter, the contents of computers. During his examination of the MacBook, Detective Maness noted that there was only one user — "Clay" — listed on the laptop login screen. Contained in the MacBook's "trash bin" — where deleted files are stored prior to their permanent deletion — were two image files depicting child pornography that had been downloaded from the Gnutella software program.

On 12 July 2010, Defendant was indicted on two counts of second-degree sexual exploitation of a minor. On 7 March 2011, Defendant moved to suppress certain statements he had made to Detective Maness outside his parents' house during the execution of the search warrant in which he confessed that he had, in fact, downloaded the child pornography to his MacBook from the Gnutella program. A hearing on Defendant's motion to suppress was held on 21 March 2011 before the Honorable

John O. Craig, III. At the hearing, Defendant argued that the statements he provided to Detective Maness had been coerced and were therefore involuntary. On 18 January 2012, the trial court entered an order granting Defendant's motion and suppressing the challenged statements.

On 11 May 2015, a jury trial was scheduled before Judge Craig in Randolph County Superior Court. Shortly after the case was called for trial, Defendant informed the court that he was voluntarily waiving his right to a jury trial pursuant to Article I, § 24 of the North Carolina Constitution and N.C. Gen. Stat. § 15A-1201. A bench trial then took place with Judge Craig presiding. At the conclusion of the trial, Judge Craig found Defendant guilty of both charges. The trial court sentenced Defendant to 19-32 months imprisonment, suspended the sentence, and placed Defendant on 36 months of supervised probation. Defendant gave oral notice of appeal in open court.

Analysis

I. Waiver of Right to Jury Trial

[1] Defendant first argues that the trial court lacked the authority to allow him to waive his right to a trial by jury. We disagree.

Effective 1 December 2014, the North Carolina Constitution was amended by the citizens of North Carolina to allow criminal defendants to waive their right to a trial by jury in non-capital cases. Article I, Section 24 of the North Carolina Constitution now reads as follows:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

N.C. Const. art. I, § 24.

This provision of our Constitution was ratified as a result of legislation passed by the General Assembly calling for the amendment to be submitted to North Carolina voters for approval. Chapter 300 of the 2013 North Carolina Session Laws, which authorized the ballot measure, provided that "[i]f the constitutional amendment proposed in Section 1 is approved by the voters, Section 4 of this act *becomes effective December*

1, 2014, and applies to criminal cases *arraigned in superior court on or after that date*." 2013 N.C. Sess. Laws 821, 822, ch. 300, § 5 (emphasis added). Section 4 reads, in pertinent part, as follows:

> (b) A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact shall be heard and judgment given by the court.

2013 N.C. Sess. Laws 821, 822, ch. 300, § 4(b). This provision was subsequently codified in N.C. Gen. Stat. § 15A-1201.

Defendant contends that because he should have been arraigned shortly after he was indicted on 12 July 2010 — well before the 1 December 2014 effective date of the constitutional amendment and the accompanying session law — the trial court lacked the authority to grant his request for a waiver of his right to a trial by jury.

N.C. Gen. Stat. § 15A-941 provides, in pertinent part, as follows:

> (a) Arraignment consists of bringing a defendant in open court or as provided in subsection (b) of this section before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead. The prosecutor must read the charges or fairly summarize them to the defendant. If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty.
>
> . . . .
>
> (d) A defendant will be arraigned in accordance with this section *only* if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment. If a bill of indictment is not required to be served pursuant to G.S. 15A-630, then the written request for arraignment must be filed not later than 21 days from the date of the return of the indictment as a true bill. Upon the return of the indictment as a true bill, the court must immediately cause notice of the 21-day time limit within which

> the defendant may request an arraignment to be mailed or otherwise given to the defendant and to the defendant's counsel of record, if any. If the defendant does not file a written request for arraignment, then the court shall enter a not guilty plea on behalf of the defendant.

N.C. Gen. Stat. § 15A-941(a), (d) (2015) (emphasis added).

Thus, N.C. Gen. Stat. § 15A-941 provides a formal mechanism for arraignments that a criminal defendant may elect to invoke. However, it is not uncommon for a defendant to forego the procedure set out in § 15A-941 and for his arraignment to take place more informally.

Such was the case here. Defendant never requested a formal arraignment pursuant to N.C. Gen. Stat. § 15A-941. Thus, his right to be formally arraigned by means of this statutory procedure was deemed waived on or about 2 August 2010 — 21 days after he was indicted. Defendant's arraignment did not occur until the first day of his trial on 11 May 2015.

> MR. ROSENTRATER: Nothing further as far as pretrial motions. Just for the sake of the record, let's go ahead and identify where we are.
>
> This is page 2 of the trial section of the calendar, Mr. Clayton Jones, charged with three [sic] counts of second-degree exploitation of a minor. I suppose technically I would move to join those.
>
> MR. ROOSE: No objection.
>
> THE COURT: Motion granted.
>
> MR. ROSENTRATER: And to those charges, Mr. Roose, how does your client plead?
>
> MR. ROOSE: The Defendant pleads not guilty.

At no time did Defendant object in the trial court to the absence of a more formal or earlier arraignment. Instead, he simply pled not guilty at which point the trial proceeded. Moreover, at oral argument in this Court counsel for Defendant conceded that Defendant was, in fact, arraigned on 11 May 2015 and has not raised in this appeal any argument suggesting that the 11 May 2015 arraignment was in any way legally deficient. Therefore, because Defendant's arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept Defendant's waiver of his right to a jury trial.

II. Consideration by Trial Court of Inadmissible Evidence

[2] Defendant next asserts that because Judge Craig served both as the factfinder at trial and as the judge who ruled on Defendant's pre-trial motion *in limine*, he was necessarily aware of Defendant's involuntary confession to downloading the images at issue. Therefore, Defendant argues, Judge Craig's ability to serve as a fair and impartial factfinder at Defendant's trial was "tainted" by his knowledge of Defendant's suppressed statements.

It is important to note that Defendant *chose* to waive his right to a trial by jury and proceed with a bench trial. He did so with full knowledge that the same trial judge who had ruled on his motion *in limine* would also serve as the judge at his bench trial. Therefore, Defendant cannot now argue on appeal that he was prejudiced as a result of his own strategic decision to waive his right to a trial by jury and allow Judge Craig to serve as the factfinder at his bench trial. *See State v. Cook*, 218 N.C. App. 245, 249, 721 S.E.2d 741, 745 ("[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." (citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, __ N.C. __, 724 S.E.2d 917 (2012).[1]

[3] Furthermore, Defendant's argument ignores the well-established principle that "the trial court is presumed to disregard incompetent evidence in making its decisions as a finder of fact." *State v. Jones*, 186 N.C. App. 405, 411, 651 S.E.2d 589, 593 (2007); *see also In re Cline*, 230 N.C. App. 11, 14, 749 S.E.2d 91, 94 (2013) ("Where the matter was heard without a jury, it is presumed that the trial court considered only admissible evidence[.]"), *disc. review denied*, 367 N.C. 293, 753 S.E.2d 781, *cert. denied*, __ U.S. __, 190 L.Ed.2d 100 (2014).

Because trial judges are presumed to ignore inadmissible evidence when they serve as the finder of fact in a bench trial, no prejudice exists simply by virtue of the fact that such evidence was made known to them absent a showing by the defendant of facts tending to rebut this presumption. Here, Defendant has failed to make any such showing. Therefore, Defendant's argument on this issue is meritless.

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1. We note that the record is devoid of any indication that Defendant expressed concern in the trial court over Judge Craig serving as his trial judge after having also ruled on Defendant's motion *in limine*.

III. Fatal Variance

[4] Defendant next argues that a fatal variance existed between his indictments and the evidence presented at trial. Specifically, he contends that while the indictments stated that he received the pornographic images on 17 December 2009, the evidence at trial established the date of receipt as 18 October 2009. As a result, he asserts he was prejudiced.

> Pursuant to N.C. Gen. Stat. § 14-190.17, a person commits second-degree sexual exploitation of a minor when, knowing the nature or content of the material, he
>
> > (1) Records, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or
> >
> > (2) Distributes, transports, exhibits, *receives*, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

State v. Williams, 232 N.C. App. 152, 156, 754 S.E.2d 418, 421 (citation omitted and emphasis added), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014).

Defendant argues that the inconsistency between the date of his purported receipt of the images as listed in the indictments and the date established by the evidence at trial constitutes a fatal variance, contending that time is an essential element of the offense of second-degree sexual exploitation of a minor.

> An indictment must include a designated date or period of time within which the alleged offense occurred. However, this Court has recognized that a judgment should not be reversed when the indictment lists an incorrect date or time if time was not of the essence of the offense, and the error or omission did not mislead the defendant to his prejudice. Generally, the time listed in the indictment is not an essential element of the crime charged. This general rule, which is intended to prevent a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense.

> We have held that a variance as to time becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense.

State v. Stewart, 353 N.C. 516, 517-18, 546 S.E.2d 568, 569 (2001) (internal citations, quotation marks, brackets, and ellipses omitted).

In support of his position, Defendant relies upon *State v. Riffe*, 191 N.C. App. 86, 661 S.E.2d 899 (2008) — a case involving multiple counts of *third*-degree sexual exploitation of a minor.[2] In *Riffe*, the date of the offenses contained in the indictments was inconsistent with the date of the offenses established at trial. *Id.* at 93, 661 S.E.2d at 904-05. The defendant's computer had already been seized and was in the possession of the Sheriff's Office on 30 August 2004 — the day that the indictments stated he was in possession of child pornography found on his computer. The evidence at trial, however, showed that the files were saved on the computer's hard drive and last accessed by the defendant on 11 February 2004. During the second day of trial, the State moved to amend the indictments in order to reflect the proper date of the offenses, and the trial court allowed the amendment over the defendant's objection. *Id.* at 93, 661 S.E.2d at 905.

On appeal, we stated the following on this issue:

> In order to prevail, defendant must show a fatal variance between the offense charged and the proof as to an essential element of the offense. In the instant case, the amendment was made regarding the time of the alleged criminal conduct. Thus, if time is not an essential element of N.C. Gen. Stat. § 14-190.17A(a), an amendment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment. As we have set out above, the elements of N.C. Gen. Stat. § 14-190.17A(a) include only the elements of knowledge and possession.

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2. We have held that third-degree sexual exploitation of a minor and second-degree sexual exploitation of a minor are separate and distinct offenses. *See State v. Williams*, 232 N.C. App. 152, 159-60, 754 S.E.2d 418, 424 ("[W]e believe that the Legislature's criminalization of both receiving and possessing such images was not intended merely to provide for the State a position to which to recede when it cannot establish the elements of the greater offense, but rather to prevent or limit two separate harms to the victims of child pornography." (internal citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014).

> A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense.

Id. at 93-94, 661 S.E.2d at 905 (internal citations, quotation marks, brackets, ellipses, and emphasis omitted). We concluded that because "defendant did not present an alibi defense and time is not an element of the offense, we therefore find no error as to this issue." *Id.* at 94, 661 S.E.2d at 905.

Thus, *Riffe* establishes that time is *not* an element of third-degree sexual exploitation of a minor. We decline Defendant's invitation to read into *Riffe* any sort of implicit holding that — unlike the case with *third*-degree sexual exploitation of a minor — time is, in fact, an element of *second*-degree sexual exploitation of a minor.

While *Riffe* reiterates the general rule that a variance as to time becomes material if it deprives the defendant of his ability to prepare a defense, Defendant did not attempt to advance an alibi defense or any other time-based defense at trial. Nor has he argued on appeal that he would have done so had the indictment listed the date of the offense as 18 October 2009. *See State v. Hensley*, 120 N.C. App. 313, 324-25, 462 S.E.2d 550, 556-57 (1995) ("Defendant asserts the presence of a fatal variance between the indictment and the proof offered at trial with respect to the date of the alleged offense. This argument cannot be sustained. . . . [W]e note defendant suffered no prejudice as his defense was based upon complete denial of the charge rather than upon alibi for the date set out in the indictment."). Accordingly, Defendant's argument on this issue is overruled.

IV. Motions to Dismiss

[5] Defendant's final argument on appeal is that the trial court erred by denying his motions to dismiss at the close of the State's evidence and at the close of all the evidence. Specifically, Defendant contends that the State failed to establish the knowledge element of the offense of second-degree sexual exploitation of a minor. We disagree.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.

State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

"Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation, quotation marks, ellipses, and emphasis omitted). When ruling on a motion to dismiss, the trial court should only be concerned with whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

Defendant contends that the only evidence presented at trial tending to show that he was aware of the contents of the pornographic files found on his computer was the fact that he "hung his head" when Detective Maness informed him that he and Detective Chabot were executing a search warrant of his parents' home for child pornography.

However, even putting aside the question of whether — and to what extent — body language can in appropriate circumstances serve as admissible evidence of a person's state of mind, other competent evidence was presented by the State at Defendant's trial on the knowledge element of the offense. The State's evidence showed that (1) the files in question had been manually downloaded directly to Defendant's computer using the Gnutella software file-sharing program; (2) the files downloaded had titles clearly indicating that they contained pornographic images of children; (3) the only user listed on the computer login screen was "Clay"; (4) the files were manually transferred from the Gnutella program to the computer's trash bin; and (5) the MacBook was found in Defendant's room partially concealed under his mattress.

It is well established that "[k]nowledge and intent, as processes of the mind, are often not susceptible of direct proof and in most cases can be proved only by inference from circumstantial evidence." *State v. Sink*, 178 N.C. App. 217, 221, 631 S.E.2d 16, 19, *disc. review denied*, 360 N.C. 581, 636 S.E.2d 195 (2006). We believe the above-referenced evidence

constitutes sufficient circumstantial evidence of Defendant's knowledge of the contents of the files discovered on his computer. Consequently, the trial court did not err in denying Defendant's motions to dismiss.[3]

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and HUNTER, JR. concur.

HARSHA TANKALA, Plaintiff
v.
SHAKUNTHALA S. PITHAVADIAN, Defendant

No. COA15-755

Filed 19 July 2016

Child Custody and Support—order requiring weekend visitation or family therapy camp—additional dates and locations for visitation—within scope of existing comprehensive custody order

Where the trial court entered an order requiring weekend visitation between a father and his minor son and requiring the divorced parents and the son to attend a family therapy camp if they failed to comply, the Court of Appeals affirmed the order. By requiring the parties to participate in a specific method of treatment within the scope of an existing comprehensive child custody order, the trial court's order did not modify the terms of custody and therefore did not require a finding of changed circumstances or a motion to modify the governing order. The provision of additional dates and locations for custodial visitation also was not inconsistent with the governing order.

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3. Because Defendant only challenges the sufficiency of the evidence to support the knowledge element of the second-degree sexual exploitation of a minor charges, we need not address the remaining elements of this offense.

Appeal by Defendant from Order entered 12 March 2015 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 2 December 2015.

Montgomery Family Law, by Charles H. Montgomery and Laura Esseesse, for Defendant-appellant.

No brief filed on behalf of Plaintiff-appellee.

INMAN, Judge.

In this case we hold that a trial court's order requiring the parties to participate in a specific method of treatment within the scope of an existing comprehensive child custody order does not modify the terms of custody and therefore does not require a finding of changed circumstances or a motion to modify the governing order. We also hold that a trial court's order providing additional dates and locations for custodial visitation not inconsistent with the governing child custody order is not a modification of the terms of custody.

Shakunthala S. Pithavadian (Defendant, "Mother") appeals an Order requiring weekend visitation between her minor child and his father, Harsha Tankala (Plaintiff, "Father") and ordering the parties and their child to attend a family therapy camp if the parties and their son fail to comply with the ordered visitation. After careful review, we affirm the trial court's Order.

I. Factual and Procedural Background

Father and Mother were married on 6 March 1998 and divorced on 27 October 2003. They had one child together, Peter,[1] a son born 26 July 1999, who is now sixteen years old. The Judgment of Divorce, entered 31 October 2003 by the New York Supreme Court, Kings County, included a stipulation of settlement covering, among other things, child custody and child support. At the time of the stipulation, Mother resided in New York and Father resided in Delaware. A few weeks after entry of the divorce judgment, Mother notified Father that she was moving with Peter to North Carolina.

On 22 July 2004, a few days before Peter's fifth birthday, the New York Supreme Court, Kings County, entered an order ("the New York Custody Order") modifying the child custody settlement. The New

1. A pseudonym is used to protect the identity of the minor child.

York Custody Order allowed Mother to move with Peter to Morrisville, North Carolina and granted Father visitation with Peter on alternate weekends. The New York Custody Order also required Mother, at her sole cost and expense, to bring Peter to meet Father at the airport in Baltimore, Maryland or Hartford, Connecticut, as specified by Father, and for Father to bring Peter home, or to the homes of Father's brothers.

On 23 June 2010, Father filed in Wake County District Court an Amended Petition for and Notice of Registration of Foreign Child Custody Order. The petition asserted that Father resided in Dover, Delaware and Mother resided in Cary, North Carolina. On 26 July 2010, which coincidentally was Peter's eleventh birthday, the trial court entered an order confirming registration of the New York Custody Order. The order was served on Mother at her home address in Cary. On that same date, Father filed motions to modify child custody, for appointment of a parenting coordinator, and for an Order to Show Cause why Mother should not be held in contempt for violating the New York Custody Order. On 30 July 2010, Father filed a motion seeking a custody evaluation. Father's motions alleged that he had not been allowed any visitation for nearly four months and that Peter refused to visit with him or even speak to him by phone; that Mother was "actively alienating" Peter from Father; and that a custody evaluation was necessary to assess "the mental health status of the parties and child."

On 30 July 2010, the trial court entered an Order to Appear and Show Cause, finding probable cause that Mother had violated the terms of the New York Custody Order and requiring Mother to appear in October 2010 regarding the contempt allegations. Before any further hearing, however, on 26 October 2010, the parties, their respective counsel, and Judge Debra Sasser signed consent orders for a custody evaluation and the appointment of a guardian *ad litem* to protect Peter's interests. An evaluation report that recommended individual mental health treatment for Peter and each of his parents and reunification therapy for Peter and Father was issued on 18 January 2011. The other pending motions were scheduled for hearing in March 2011.

Following a three-day hearing, the trial court entered a twenty-one-page order ("the North Carolina Custody Order") on 6 June 2011, finding that a substantial change of circumstances affecting the welfare of Peter had occurred since the entry of the New York Custody Order. The court made specific findings of fact regarding Mother's interference with Father's visitation, Father's physical and verbal aggression toward Peter, and Peter's anxiety and emotional distress. The court found, *inter*

alia, that as of March 2011, Peter "did not appreciate the need to have a relationship with his father" and that Mother had "overly nurtured" Peter and had "stunted [Peter]'s social and emotional development" in the years since relocating with Peter to North Carolina. The court also found that the appointment of a parenting coordinator was appropriate because "this is a high-conflict case."

On the same date as it entered the North Carolina Custody Order, the trial court entered an order ("the Contempt Order") finding that Mother had willfully violated the New York Custody Order by depriving Father of weekend and holiday custody and excluding Father from information and decisions about Peter's education and health care. The court concluded that Mother was in willful contempt but stayed a sentence of imprisonment on the condition that Mother comply with all orders of the trial court including the North Carolina Custody Order.

The North Carolina Custody Order granted the parties joint custody, granting Mother primary physical custody and granting Father periodic weekend and holiday visitation, contingent upon approval by a psychologist whom the trial court designated as a reunification therapist and also designated to treat Peter in individual therapy. The trial court specifically ordered as follows:

> [Father] and [Peter] shall engage in reunification therapy, with Eli Jerchower as the reunification therapist. The reunification therapy shall begin at the time recommended by Dr. Jerchower, and *the timing and methods of this reunification therapy (including whether and to what extent [Mother] takes part) shall be at the discretion of the therapist*. [Father] and [Mother] shall both follow all of the recommendations of Dr. Jerchower regarding the reunification therapy, and this reunification therapy shall continue for so long as the therapist continues to recommend it.

(Emphasis added.) The trial court also ordered that the parties equally divide all of the costs of the reunification therapy not covered by insurance. The trial court required that Mother and Father each participate in individual counseling with different therapists, providing that therapists for each of the parents and Peter be authorized to communicate with one another, with the parenting coordinator, and with the guardian *ad litem* for Peter. The trial court further directed all therapists to read a particular paragraph of the custody evaluation report regarding therapy services recommended for Peter and his parents.

Neither party appealed the North Carolina Custody Order.

The reunification therapist, Dr. Jerchower, worked with Peter individually and in joint sessions with Peter and Father, but observed in a report to the parties, the parenting coordinator, and the trial court that Peter "maintained a defiant oppositional stance when it came to his father and engaging with him in any way." By the spring of 2012, in the view of the reunification therapist, "it was clear that [Peter] was no longer making progress in reunification with seeing his father" and the therapist believed that a "more intensive treatment approach" was necessary.

On or about 16 May 2012, nearly a year after entry of the North Carolina Custody Order, the reunification therapist recommended that Peter and both of his parents attend a four-day high-conflict divorce camp called "Overcoming Barriers" in California beginning six weeks later, on 29 June 2012. The camp cost $9,000 per family. The court-appointed parenting coordinator at the time, V.A. Davidian, agreed with the therapist's recommendation and on 4 June 2012 he instructed Mother and Father to apply for the camp and make arrangements to attend with Peter. In response, Mother asked the parenting coordinator to reconsider his recommendation, and when that request was denied, Mother filed a Motion for Expedited Review of Parenting Coordinator's Decision. The motion argued that requiring the parties to attend the camp was not consistent with the terms of the North Carolina Custody Order; exceeded the authority of the parenting coordinator; was not an appropriate fit for the parties; was not in Peter's best interest; and that the one-month time frame between the recommendation and the camp dates was too short for the parties and Peter to prepare and make travel arrangements. The motion also asserted that Mother could lose her job if she missed work for the camp. It appears from the record, however, that Mother did not seek to have her motion calendared for hearing, that neither Father nor the parenting coordinator sought to have the motion calendared for hearing, and that the motion was never heard by the trial court. The parties did not attend the camp.

A little over a year later, in an order dated 16 July 2013, shortly before Peter's fourteenth birthday, the trial court appointed a new parenting coordinator, Genevieve Sims ("Ms. Sims"). On 23 September 2014, Ms. Sims filed a Notice of Determination that Requires a Court Hearing pursuant to N.C. Gen. Stat. § 50-97, attaching a report recommending, *inter alia*, that Peter and his parents attend the out-of-state camp for families dealing with high-conflict divorce. The report stated that Ms. Sims agreed with the reunification therapist's assessment that Mother

"has engaged in behaviors demonstrating a lack of commitment to the reunification process and those behaviors have been communicated to Peter in thought and actions." Ms. Sims asked the trial court to accept the reunification therapist's recommendations, which were attached to and incorporated within her report. The recommendations included the "Overcoming Barriers" camp that the reunification therapist had recommended two years earlier. Ms. Sims advised the trial court that, consistent with the recommendation of her predecessor and the reunification therapist, she "strongly recommend[ed] that . . . the parties and child attend a minimum of a four-day intensive reunification camp."

Ms. Sims also filed on 23 September 2014 a Notice of Hearing and Calendar Request for three hours on 13 February 2015 for the trial court to consider her recommendations. Counsel for both parties and Ms. Sims attended the hearing and, after reviewing Ms. Sims' report and attached materials, and considering the arguments of counsel, the trial court agreed with Ms. Sims' recommendation, including specifically the camp, and asked for recommendations from counsel for each of the parties as an alternative to the camp. Father's counsel proposed requiring Peter to visit with his paternal cousins in Delaware on weekends beginning in March 2015, providing Father the opportunity to see Peter for brief periods during those visits. Mother's counsel agreed with the proposed visitation schedule. The court instructed counsel to confer with the reunification therapist as well as the therapists for Father and Mother, all of whom were on telephone standby to testify at the hearing, to discuss the proposed alternative. However, the trial court admonished the parties that if they could not agree on an alternative, "you're going to camp."

The hearing resumed that same day, after counsel for the parties conferred with the therapists. Ms. Sims reported to the trial court that the plan approved by all therapists was for Peter to visit Father's family in the Washington, D.C./Maryland area, and to see Father over gradually increasing segments of time during those family visits, and that "if that does not go well, then the parties will immediately attend the first available four-day intensive camp." To prepare for that contingency, the reunification therapist would assist Mother and Father in immediately applying for the camp, including sharing the cost of a $100 application fee for the next available camp session, scheduled for April 2015 in Arizona. Counsel for Mother confirmed Ms. Sims' report of the plan approved by all therapists and asked the trial court if the camp would take priority over all of Peter's other plans, including attending school. The trial court responded that "camp is number one on the priority list if

things don't . . . work out." The trial court elaborated that "if we have an issue where weekends go well and there's no camp in April and then for some reason things go downhill and decline, we're going back to camp." The trial court reiterated that if the scheduled visits "don't progress according to the likes of the health care providers with those weekends in the manner in which they're going to set them out, then the first time that there's any resistance and everything comes off the track, everybody's going to camp."

On 10 March 2015, Ms. Sims submitted a proposed order. The trial court judge made modifications and entered an Order on 12 March 2015 ("the Order"). The Order, which is the basis for this appeal, provided for Peter to visit on weekends with paternal family members and Father on a recurring basis, with visitations beginning in March 2015 in locations alternating between the D.C./Maryland area and the Cary, North Carolina area. If the court-ordered visits were "not progressing," the trial court ordered the parties and Peter to attend the Overcoming Barriers Family Camp. The trial court concluded that "[t]he Parenting Coordinator has the authority to order the parents to attend the Overcoming Barriers Family Camp or any similar therapeutic 'camp' or intensive weekend experience offered by Overcoming Barriers." Further, the trial court added, "[a]ttendance for the weekend visits and/or [camp] shall take priority over any other activity in which Peter is scheduled to be involved."

Mother filed a Notice of Appeal and a Motion for Stay of Proceedings. In her motion for a stay of proceedings, Mother alleged, *inter alia*, that the findings of fact were unsupported by sufficient evidence because no evidence was presented at the hearing, there was no motion to modify the existing custody order, Mother was entitled to (and did not receive) ten-day notice prior to a hearing to modify custody per N.C. Gen. Stat. § 50-13.5, and the trial court did not find that there had been a substantial change in circumstances. The trial court denied the motion.

II. Analysis

A. Appellate Jurisdiction.

Before addressing the merits of the appeal, we must first address the issue of appellate jurisdiction. The Order is a permanent order and thus fully reviewable on appeal.

"A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, 54(a) (2015).

> A final judgment is one which disposes of the case as to all the parties, leaving nothing to be judicially determined

> between them in the trial court. An interlocutory order does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Washington v. Washington, 148 N.C. App. 206, 207, 557 S.E.2d 648, 649 (2001) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950)) (editing marks omitted). "In general, there is no right to appeal from an interlocutory order." *Mills Pointe Homeowner's Ass'n v. Whitmire*, 146 N.C. App. 297, 298–99, 551 S.E.2d 924, 926 (2001) (citations and editing marks omitted).

In the context of child custody orders, "a distinction is drawn in our statutes and in our case law between 'temporary' or 'interim' custody orders and 'permanent' or 'final' custody orders." *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998) (citation omitted). "Temporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody." *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000). "Normally, a temporary child custody order is interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits." *Brewer*, 139 N.C. App. at 227, 533 S.E.2d at 546 (internal quotation marks and citation omitted). "[A]n order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). "If the order does not meet any of these criteria, it is permanent." *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011).

The Order does not meet any of the three requirements of a temporary order. The Order was entered with prejudice to both parties and did not state a clear and specific reconvening time. It only states that "[t]he Court retains jurisdiction for the entry of further Orders[,]" which does not satisfy the "clear and specific" requirement or the "reasonably brief" interval requirement. *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. Finally, the Order determined all the issues before the trial court at the hearing. The issue of child custody had already been resolved per the North Carolina Custody Order entered 6 June 2011. The Order addresses all the issues presented by the parenting coordinator and leaves none unresolved. Accordingly, this Court has jurisdiction to review Mother's appeal from the Order.

During the hearing resulting in the Order, counsel for Mother did not raise objections based on any of the issues she raises in this appeal, including modification of the visitation schedule or the requirement of the parties and Peter to attend the out-of-state reunification camp on the ground that it constituted a modification of the governing custody terms. For issues other than the camp, Defendant's attorney stated: "For the record, I do not object to the recommendations of the plaintiff. I accept Your Honor's recommendations and agree that that seems to be a prudent way to proceed." Regarding the camp, Defendant made no objection for lack of a motion to modify, notice of a motion to modify, or finding of substantial change in circumstances necessary to modify the North Carolina Custody Order. However, these issues concern subject matter jurisdiction and can be raised for the first time on appeal. *Hart v. Thomasville Motors*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956). Accordingly, Mother's appeal is properly before us.

1. Standard of review.

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.").

B. The Order did not modify the North Carolina Custody Order and is not procedurally defective.

Mother argues that the Order requiring the parties and Peter to attend the high-conflict divorce camp and requiring additional visitation was invalid because it modified a prior custody order without the required motion to modify and findings and conclusions regarding a change in circumstances to justify such modification. We disagree.

Disputes over variations in custody arrangements including timing, location, and treatment often lead to costly and time-consuming litigation that can hinder progress in child custody cases and cause delays which are detrimental to the best interests of the children involved. To avoid such delays, trial courts prepare comprehensive child custody

orders, like the North Carolina Custody Order governing the parties in this case, and appoint parenting coordinators authorized to facilitate the parties' compliance with court orders without having to seek additional orders from the court in every instance. In cases involving minor children requiring mental health treatment, trial courts often delegate to therapists control over treatment and visitation, but remain available to assert the court's authority if needed. *See Peters*, 210 N.C. App at 18–20, 707 S.E.2d at 737–38 (affirming the trial court's delegation to the custodial parent, in conjunction with the minor children's therapist, control over the non-custodial parent's supervised visitation: "Because a neutral third party is vested with authority to control therapeutic visitation, the visitation arrangement does not present the problems inherent in custodian-controlled visitation."); *Cox v. Cox*, 133 N.C. App. 221, 230, 515 S.E.2d 61, 67–68 (1999) (upholding the trial court's order that a physician could "suspend or terminate counseling, treatment, and supervised visitation if he determine[d] that [one parent] [was] not progressing or working honestly toward improvement").

The Order does not modify the terms of custody, but rather provides specific requirements within the scope of the North Carolina Custody Order. The Order does not modify the earlier award of primary custody to Mother and visitation to Father. The requirement that the parties and Peter attend the high-conflict divorce camp as recommended by the reunification therapist and the parenting coordinator is consistent with the requirement in the earlier order that the parties abide by those professionals' recommendations for treatment and visitation scheduling. Although the North Carolina Custody Order did not mention an out-of-state therapeutic camp for the family, it specifically ordered reunification therapy and provided that the timing and methods of therapy were left to the reunification therapist to decide. Similarly, specific provisions for Peter's visitation with Father and Father's family in the Order do not conflict with provisions in the North Carolina Custody Order. Accordingly, no motion for custody modification was required, and the trial court was not required to find or conclude that circumstances affecting the welfare of Peter had substantially changed since the entry of the North Carolina Custody Order.

Furthermore, Mother's argument that she received inadequate notice of a hearing concerning the out-of-state camp rings hollow in light of the record in this case. Nearly five months before the hearing which resulted in the Order, the court-appointed parenting coordinator filed a notice that a court hearing was required to review her determination that the parties and Peter should be required to attend the camp recommended

by the reunification therapist within the scope of authority delegated in the North Carolina Custody Order. As a practical matter, Mother had more than two years' notice of the reunification therapist's recommendation and the parenting coordinator's determination that Peter and his parents attend the camp, but she successfully avoided that treatment method by opposing the initial notice in 2012 and failing to seek a hearing. The record does not indicate that Father or the parenting coordinator sought court intervention following Mother's objection and refusal to participate in the camp.

1. Parenting coordinators.

North Carolina's parenting coordinator statutes were first adopted in 2005 as Article 5 of Chapter 50 of our General Statutes. *See* Act of July 27, 2005, 2005 N.C. Sess. Laws 228 ("An Act to Establish the Appointment of Parenting Coordinators in Domestic Child Custody Actions"). N.C. Gen. Stat. § 50-91(a)–(b) (2015) provides that a "court may appoint a parenting coordinator at any time during the proceedings of a child custody action . . . if all parties consent to the appointment[,]" or "if the court also makes specific findings that the action is a high-conflict case, that the appointment . . . is in the best interests of any minor child in the case, and that the parties are able to pay for the cost . . . ." A parenting coordinator has the limited authority to engage in matters that will help the parties:

> (1) Identify disputed issues.
>
> (2) Reduce misunderstandings.
>
> (3) Clarify priorities.
>
> (4) Explore possibilities for compromise.
>
> (5) Develop methods of collaboration in parenting.
>
> (6) Comply with the court's order of custody, visitation, or guardianship.

N.C. Gen. Stat. § 50-92(a)(1)–(6) (2015). A trial court "may authorize a parenting coordinator to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve. The parties must comply with the parenting coordinator's decision until the court reviews the decision." N.C. Gen. Stat. § 50-92(b) (2015).

North Carolina's parenting coordinator statutes have been largely unexplored by the appellate courts. This case demonstrates the potential

utility of parenting coordinators as well as the procedural safeguards that, if the parties assume the responsibility of seeking the court's intervention, ensure the trial court remains involved in resolving disputes between the parenting coordinator and one or both parents. However, the failure of the trial court and the parenting coordinator in this case to obtain the parties' compliance with the North Carolina Custody Order for a period of nearly four years demonstrates the shortcomings of family court proceedings in which fundamental disputes languish while the child approaches adulthood. As a result of inaction, this high-conflict child custody dispute was not resolved any more quickly than it likely could have been without a parenting coordinator.

2. The Order is not a child support order.

In her final challenge to the Order, Mother contends that because the Order compels her and Peter to participate in the camp at some financial expense, and because the Order compels her to facilitate Peter's travel to visit Father, it is an invalid modification of the parties' child *support* obligations, which are beyond the scope of the trial court's jurisdiction. This argument is unsupported by the record and the law.

Mother correctly notes that although Father registered the New York Custody Order with the trial court in this case, neither party registered the initial judgment of divorce filed in New York in 2003, so that the trial court has no jurisdiction over the terms of that order. However, Mother erroneously contends that because uninsured mental health expenses and travel expenses may, in the trial court's discretion, be allocated as "extraordinary expenses" for the purpose of determining child support, the trial court here had no authority to require Mother to pay these expenses as part of the Order. The New York Custody Order, which was registered by the trial court below, required Mother to pay all travel expenses incurred by Peter and by Father for visitation. The North Carolina Custody Order found that neither Father nor Mother remained living in New York, that Mother and Peter had resided in North Carolina for more than six months preceding Father's motion to modify custody, that North Carolina had become Peter's home state, that the trial court had jurisdiction to modify child custody, and that no other state had sought to modify the custody arrangements. The North Carolina Custody Order, which included findings of a substantial change in circumstances, provided that "[e]ach party shall bear the costs of his or her own travel related to custody exchanges, and the parties shall equally divide the cost of [Peter]'s travel related to custody exchanges." The North Carolina Custody Order made similar provisions for all costs of individual and reunification therapy not covered by insurance. The decisions by this

Court cited by Mother as requiring that travel and mental health treatment costs be determined within a child support order do not so hold. *See Peters*, 210 N.C. App. at 23, 707 S.E.2d at 739; *Mackins v. Mackins*, 114 N.C. App. 538, 548, 442 S.E.2d 352, 358 (1994); *Lawrence v. Tise*, 107 N.C. App. 140, 149–50, 419 S.E.2d 176, 182–83 (1992).

III. Conclusion

We conclude that the trial court had jurisdiction to enter the Order from which this appeal arises and that the trial court did not abuse its discretion. The order of the trial court is

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

MASIVI TUWAMO, Plaintiff
v.
SITA R. TUWAMO, Defendant

No. COA15-356

Filed 19 July 2016

Trusts—resulting trust—home titled in brother-in-law's name—dismissal of claims

Where plaintiff learned upon her husband's death that her home with her husband was titled in the name of her husband's brother (defendant), and plaintiff subsequently commenced an action against defendant for the claims of resulting trust, specific performance, injunctive relief, and declaratory relief, the Court of Appeals affirmed the trial court's sua sponte dismissal of her complaint for failure to state a claim upon which relief may be granted. Whether the Court of Appeals considered only the face of plaintiff's complaint to support the dismissal, or whether it also considered the forecast of evidence as would be proper upon summary judgment motions, there was no genuine issue of material fact and plaintiff's claims failed as a matter of law.

Appeal by plaintiff and cross-appeal by defendant from order entered 21 August 2014 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Court of Appeals 4 November 2015.

Pamela A. Hunter for plaintiff-appellant/cross-appellee.

Cowley Law Firm, by Jorge Cowley, for defendant-appellee/cross-appellant.

STROUD, Judge.

Plaintiff Masivi Tuwamo appeals from the superior court's order denying her motion for summary judgment and dismissing all of the claims in her complaint, arguing that a "constructive/resulting" trust was created. Defendant Sita R. Tuwamo cross-appeals from the same order denying his motion for summary judgment, arguing that plaintiff's summary judgment motion was properly denied, but his motion should have been granted. Defendant also argues that the trial court properly dismissed plaintiff's claims *sua sponte*. Because plaintiff's complaint fails to state any legally cognizable claim, we find that the trial court properly dismissed plaintiff's claims with prejudice *sua sponte*. Accordingly, we affirm the superior court's order dismissing her claims.

Facts

Plaintiff's complaint tended to show the following facts. Plaintiff relocated to North Carolina from her native country, Zaire, formerly the Congo, in 1989. She married her now deceased husband, Tuwamo Mengika, on 23 March 1991 in Charlotte, North Carolina. Plaintiff and her husband operated a convenience store in Mecklenburg County. In 1993, plaintiff's husband began engaging in acts of domestic violence toward her and "law enforcement became involved." Plaintiff and her husband subsequently reconciled, and they purchased a house located in Charlotte, North Carolina in 1997 ("the Property"). Plaintiff and her husband made all mortgage payments on the Property and paid off the mortgage in 2009. Plaintiff's husband died intestate on 13 March 2010.[1]

Plaintiff lived in the house on the Property from 1997 through the time of her husband's death. On 18 September 2013, plaintiff received notice that defendant, the natural brother of her deceased husband, had commenced a proceeding in Summary Ejectment against her. After

1. While plaintiff's complaint initially states that her husband died intestate on 13 March 2012, it later references "the untimely death of her deceased husband in 2010." During her deposition, plaintiff clarified that he died in 2010. Moreover, the trial court made a finding, in the order being appealed, that her husband died on 13 March 2010. Accordingly, we refer to 13 March 2010, rather than 2012, as his date of death.

receiving the notice, plaintiff discovered that the Property was legally titled in defendant's name.

Plaintiff commenced this action by filing a complaint against defendant on 8 October 2013. Plaintiff's complaint alleged that a resulting trust of the Property was established in favor of plaintiff and her deceased husband. Plaintiff asked for specific performance, injunctive relief, and declaratory relief, all based upon a theory of resulting trust. In his answer to plaintiff's complaint, defendant denied that the trial court had jurisdiction over the matter, alleging that "[t]he consideration must be advanced prior to the acquisition of the title by the alleged trustee for a resulting trust to arise. Payment of a consideration after title is acquired by the asserted trustee does not give rise to a resulting trust."

The parties conducted discovery and depositions, and on 7 May 2014, plaintiff moved for summary judgment, arguing that no genuine issues of material fact or law exist and that she was entitled to summary judgment in her favor. On 30 May 2014, defendant also filed a motion for summary judgment. At the end of his summary judgment motion, defendant requested "that the Court enter summary judgment in its favor as to the Plaintiff's claims against him and that Plaintiff's Complaint be dismissed with prejudice." Plaintiff subsequently filed another motion for summary judgment on 21 July 2014. The case was scheduled for a jury trial on 4 August 2014, but both parties agreed that the trial court should first consider their summary judgment motions. At the conclusion of the hearing, the trial court noted that "[b]oth parties brought forward motions for summary judgments. The defense also had in their prayer motion to dismiss the plaintiff's cause of action." The trial court announced this rationale for its ruling and that plaintiff's case was dismissed, and thus no trial occurred.

On 25 August 2014, the court entered an order denying both plaintiff's and defendant's motions for summary judgment and dismissing all of plaintiff's claims. In its order, the trial court found as fact that plaintiff's husband died on 13 March 2010 and that they both had lived on the Property. The court also found that the deed of trust for the Property was filed in the Mecklenburg County Register of Deed's office on 6 January 1997 between defendant, as the grantor, and Integrity Mortgage Corporation as the beneficiary. The trial court attached the deed as an exhibit and incorporated it by reference into the order. The court noted further that the general warranty deed between Don Galloway Homes of North Carolina, LLC, and defendant for the same Property was also filed on 6 January 1997 with the Mecklenburg County Register of Deeds, once again attaching it as an exhibit and incorporating it by reference. The

trial court found no other written documents relating to the ownership of the Property.

The trial court then concluded that the general warranty deed established *prima facie* title to the Property. The court once again noted that the only documents presented were the general warranty deed and the deed of trust, and the court concluded that any discussions relating to individuals whose interests are barred by North Carolina's Dead Man's Statute would have been inadmissible at trial.[2] Ultimately, the trial court concluded that the findings of fact listed in its order were "the only facts . . . present and undisputed" in the case and then proceeded to deny summary judgment for both parties and dismiss all of plaintiff's claims with prejudice.

Plaintiff filed timely notice of appeal to this Court on 19 September 2014. On 24 October 2014, defendant filed his notice of appeal for a cross-appeal based on plaintiff's notice, while also indicating that he never received proper service of plaintiff's notice.[3] Both plaintiff and defendant were granted an extension of time to file their briefs with this Court.

Discussion

I. Overview and Appropriate Standard of Review

We have had some difficulty determining the correct standard of review for this case, thanks to the odd procedural posture of this case and the rather unusual order which denies both motions for summary judgment, makes findings of fact, and *sua sponte* dismisses plaintiff's claims. On appeal, plaintiff argues that the trial court committed reversible error when it denied her motion for summary judgment and when it dismissed her complaint *sua sponte*. Defendant also cross-appeals and argues that the trial court erred in denying his motion for summary

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2. Plaintiff raises no argument on appeal regarding the Dead Man's statute so we do not address the trial court's ruling on this issue.

3. The record does not indicate that plaintiff served her notice of appeal on defendant, but since defendant filed his own notice of appeal and filed multiple briefs on appeal, plaintiff's failure to provide service is deemed waived. *See Hale v. Afro-American Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (per curiam) ("[A] party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal, as did the plaintiff here."). Moreover, since defendant was never served a notice of appeal from plaintiff, the time restraints in Rule 3 of the Rules of Civil Procedure do not apply and defendant's notice is deemed timely.

judgment, although of course he does not challenge the trial court's denial of plaintiff's motion or the dismissal of plaintiff's claims.

While the hearing started out as a summary judgment hearing and the trial court's order does deny the summary judgment motions, the order on appeal is not really a summary judgment order. Typically, "[t]he denial of a motion for summary judgment is an interlocutory order which ordinarily would not be subject to immediate appellate review." *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008). Since, however, the trial court also ultimately dismissed plaintiff's claims for failing to state a legally cognizable claim, rendering its order a final judgment on the merits, the appeal is not interlocutory.

The order does not specify the legal basis for the trial court's dismissal of all of plaintiff's claims, although the hearing transcript shows that the trial judge had noted that "[t]he defense also had in their prayer motion to dismiss the plaintiff's cause of action." Defendant argues that the trial court's *sua sponte* order was a ruling under Rule 41(b) of the Rules of Civil Procedure, noting that the rule provides in part that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits." Although the trial court did not refer to any particular rule in ordering dismissal, we believe it is clear from the entire transcript and order that the trial court dismissed the complaint under Rule 12(b)(6) of the Rules of Civil Procedure for "[f]ailure to state a claim upon which relief can be granted[.]"

This Court has found that "[c]ourts have continuing power to supervise their jurisdiction over the subject matter before them, including the power to dismiss *ex mero motu*." *Narron v. Union Camp Corp.*, 81 N.C. App. 263, 267, 344 S.E.2d 64, 67 (1986). *See also Amazon Cotton Mills Co. v. Duplan Corp.*, 246 N.C. 88, 89, 97 S.E.2d 449, 449 (1957) (" 'If the cause of action, as stated by the plaintiff, is inherently bad, why permit him to proceed further in the case, for if he proves everything that he alleges he must eventually fail in the action.' " (quoting *Maola Ice Cream Co. of N.C., Inc., v. Maola Milk & Ice Cream Co.*, 238 N.C. 317, 324, 77 S.E.2d 910, 916 (1957))). Furthermore, our Supreme Court has noted that "[w]hen the complaint fails to state a cause of action, a defect appears upon the face of the record proper. On appeal, the Supreme Court will take notice of it and will *ex mero motu* dismiss the action." *May v. S. Ry. Co.*, 259 N.C. 43, 49, 129 S.E.2d 624, 628-29 (1963). "When

the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint must be dismissed." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001).

We conclude, therefore, that the trial court in this case similarly concluded that the complaint failed to state a cause of action and then decided to dismiss the action *ex mero motu*. For this reason, we review the order as a dismissal under Rule 12(b)(6).

> "The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim."

Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A., 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (quoting *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007)). "On appeal from an order granting or denying a motion filed pursuant to N.C. Gen. Stat. § 1A–1, Rule 12(b)(6), we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Glynne v. Wilson Med. Ctr.*, 236 N.C. App. 42, 47, 762 S.E.2d 645, 649 (2014) (internal quotation marks omitted), *review dismissed by agreement*, 367 N.C. 811, 768 S.E.2d 115 (2015).

II. Analysis

a. Uncontested Findings

On appeal, plaintiff focuses primarily on why the trial court erred in denying her summary judgment motion and simply argues that the trial court had "no authority" to dismiss her complaint sua sponte. Thus, plaintiff makes no challenges to the trial court's factual findings or legal conclusions. Of course, neither an order for dismissal under Rule 12(b)(6) nor a summary judgment order should include findings of fact. *See, e.g.*, *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 258 (2012) ("[F]indings of fact are generally not binding

on appeal from a trial court's ruling on motion to dismiss under Rule 12. The purpose of a motion to dismiss is to test law of a claim, not to resolve evidentiary conflicts. As resolution of evidentiary conflicts is not within the scope of Rule 12, we are not bound by the trial court's findings." (citation, quotation marks, brackets, and ellipses omitted)); *Winston v. Livingstone College, Inc.*, 210 N.C. App. 486, 487, 707 S.E.2d 768, 769 (2011) ("The appellate courts of this state have on numerous occasions held that it is not proper to include findings of fact in an order granting summary judgment.").

In this case, however, it seems that the trial court was simply setting out a summary of the uncontested facts as a basis for its determination that plaintiff had not stated a claim upon which relief could be granted. In any event, the findings are not what we would typically consider to be "findings of fact" and no evidence was presented upon which findings could be based. Furthermore, it is clear from the pleadings, discovery responses, depositions, and arguments before the trial court that there was no real dispute about the facts but only a legal question was presented. The undisputed facts show that defendant was the title owner of the Property from the date of its purchase in 1997. Plaintiff does not know why defendant is the title owner. Neither plaintiff nor her deceased husband ever held title to the Property.

b. Resulting Trust

Although defendant holds legal title to the Property, plaintiff contends that the trial court erred in denying her motion for summary judgment because a resulting trust exists in favor of plaintiff, creating equitable ownership of the Property. This Court has previously explained:

> "[a] resulting trust arises when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. . . . A trust of this sort does not arise from or depend upon any sort of agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another.
>
> The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for the land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the

> trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the same time the legal title passes."

Bissette v. Harrod, 226 N.C. App. 1, 12, 738 S.E.2d 792, 800 (2013) (quoting *Cury v. Mitchell*, 202 N.C. App. 558, 562-63, 688 S.E.2d 825, 828-29 (2010)).

Here, although plaintiff alleged generally that she and her deceased husband "subsequently reconciled and purchased property in 1997[,]" her forecast of evidence was that her deceased husband actually made all of the mortgage payments on the Property. Other than the allegation that her husband died intestate, plaintiff's complaint contains no further information regarding his estate and his estate is not a party to this action. In addition, plaintiff and her deceased husband are not the same person, even if he did make all of the payments, including the down payment.

Plaintiff's arguments focus largely on the fact that defendant did not make any mortgage payments, a fact which is not disputed. At issue with a resulting trust, however, is whether consideration was given at or before the trust was created. *See, e.g.*, *Anderson v. Anderson*, 101 N.C. App. 682, 685, 400 S.E.2d 764, 766 (1991) ("While an agreement is not necessary to create a resulting trust, the resulting trust must arise *in the same transaction in which legal title passes*. Consideration to support the resulting trust must have been paid *before or at the time legal title passes*, and not after legal title has passed." (quotation marks omitted)). Here, plaintiff's complaint lacks any allegations regarding the actual purchase transaction while also indicating that plaintiff has no idea how defendant's name came to be on the deed and deed of trust. Plaintiff's complaint does not allege who paid the down payment on the Property and just generally alleges that she and her husband made all of the mortgage payments.[4] In any event, it is obvious that plaintiff did not give any consideration "before or at the time legal title passes" -- even if her deceased husband did -- since she does not know how the defendant ended up as the title owner. Plaintiff has failed to meet the necessary requirements to state a claim for relief as a resulting trust and has failed to demonstrate under *Cline* that a resulting trust was created.

Plaintiff argues that "[t]he indisputable evidence of record is that plaintiff's husband was attempting to circumvent the laws of equitable

4. And even if we look beyond the complaint to her deposition testimony, plaintiff testified that her husband made all of the payments; she did not make any payments.

distribution in accordance with the State of North Carolina in case plaintiff and her deceased husband became divorced." But neither her complaint nor the court's order address this issue. Plaintiff made no allegations and offered no evidence supporting such statement, and any motive of this sort would only have existed in the mind of her deceased husband. In addition, plaintiff's complaint does not even go so far as to allege that she and her husband ever legally separated or that equitable distribution was an issue between them. Her only allegation was that her husband engaged in unspecified "domestic acts of violence" against her in 1993 and that "law enforcement" was involved. This would imply that plaintiff's husband may have been criminally prosecuted for domestic violence, but the complaint does not allege that either plaintiff or her deceased husband ever filed or even contemplated filing any equitable distribution action. In any event, plaintiff's complaint does not specify when she and her husband "reconciled," but rather it indicates that the purchase of the Property was four years after the domestic violence issue and that they continued to live together until his death 13 years later.

We also note that although plaintiff refers to the Property as "marital property," marital property is a legal term used in equitable distribution proceedings which is not applicable unless or until married parties separate. *See* N.C. Gen. Stat. § 50-20(b)(1) (2015) (" 'Marital property' means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection."). It does not apply to property owned while the parties are married and not separated. Plaintiff and her deceased husband were married at the time he died and neither plaintiff's complaint nor the record as a whole contains any allegations of separation at any relevant time. Liberally construed, we understand plaintiff's allegations to mean that she now believes that her husband had arranged to put title to the home in his brother's name to circumvent any claim she may ever have to the home in equitable distribution, if and when they had separated. Yet, as noted above, plaintiff alleges that she did not know how or why the home was actually titled to defendant and she and her husband never separated after the Property was purchased. Accordingly, the trial court correctly concluded that plaintiff's complaint failed to state a valid claim for resulting trust.

We understand that plaintiff was apparently treated unfairly by both her deceased husband and her brother-in-law, defendant. Furthermore,

we recognize the hardship and distress which she and her children have likely suffered from both her husband's death and the loss of their home, in which they had lived since 1997. We also realize that in plaintiff's homeland of Zaire, the laws, mores, and customs regarding ownership of property and family obligations relating to property are likely very different from those in the United States. Nevertheless, although we sympathize with plaintiff's position, we must agree with the trial court that her claims are not legally cognizable.

c. Constructive Trust

Plaintiff also argues that the trial court should not have dismissed her complaint because she has a claim for imposition of a constructive trust. Plaintiff's brief conflates the issues by arguing that "[b]ased upon all of the facts that we have in this situation, there exists a constructive/resulting trust regarding the equitable ownership of this property in favor of the plaintiff[,]" but actually these are two different types of trusts and they are created in different ways. "A constructive trust . . . arises when one obtains the legal title to property in violation of a duty he owes to another. Constructive trusts ordinarily arise from actual or presumptive fraud and usually involve the breach of a confidential relationship." *Fulp v. Fulp*, 264 N.C. 20, 22, 140 S.E.2d 708, 711 (1965).

We first note that plaintiff's complaint did not include any claim for constructive trust. It included four titled claims: (1) Resulting trust; (2) Specific performance; (3) Injunctive relief; and (4) Declaratory relief. All four of the claims are premised upon a resulting trust theory, and the complaint makes no mention of a constructive trust. Even if we look beyond the titles of the claims, the complaint makes no allegations of any fraud or misrepresentation by defendant and no allegation of any sort of legal duty owed to plaintiff by defendant that could create a constructive trust. Plaintiff's complaint does not state any claim for constructive trust and the trial court did not err by dismissing it.

d. Denial of Summary Judgment

Plaintiff asserts that since the trial court denied both parties' motions for summary judgment, it must have found genuine issues of material fact for both sides and argues that she is entitled to a jury trial to determine those factual issues. As noted above, we are treating this appeal as a ruling upon a motion to dismiss and not a summary judgment motion, but we will address plaintiff's argument briefly. Unlike a motion to dismiss, however, a motion for summary judgment is properly

granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). Thus, when ruling on the summary judgment motions in the case at hand, the trial court could consider, in addition to plaintiff's complaint, the depositions and any additional discovery information.

As noted above, the procedural posture of this case is confusing, but ultimately the trial court's ruling was legally correct. Perhaps it would have been less confusing and procedurally more appropriate if the trial court had instead denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment, dismissing plaintiff's complaint as requested by defendant, on the basis that even after considering all of the discovery and depositions, there was no genuine issue of material fact and plaintiff's claims fail as a matter of law. The effect would be the same but the wording of the court's order would be slightly different.

Here, the trial court's order notes that it "reviewed and considered all the evidence presented[.]" As a general rule, a court can only consider the face of the complaint when considering a motion to dismiss for failure to state a claim. Because the parties were proceeding upon their competing summary judgment motions, the court considered discovery documents and depositions in addition to the pleadings. Yet to the extent that the court based its ruling upon any matter outside of the pleadings, it is obvious that the court properly considered all evidence in the light most favorable to plaintiff.

Even after reviewing that evidence, the trial court concluded that plaintiff's complaint should be dismissed with prejudice. In other words, whether we consider only the face of plaintiff's complaint to support the dismissal, or if we also consider the forecast of evidence as would be proper upon summary judgment motions, there truly was no genuine issue of material fact and plaintiff's claims fail as a matter of law. Therefore, we affirm the trial court's *sua sponte* dismissal of the complaint for failure to state a claim upon which relief may be granted. *See also Shoffner Industries, Inc. v. W.B. Lloyd Const. Co.*, 42 N.C. App. 259, 263, 257 S.E.2d 50, 54 (1979) ("When a court decides to dismiss an action pursuant to Rule 12(b)(6), any pending motion for summary judgment against the claimant may be treated as moot and therefore not be decided.").

Conclusion

In conclusion, the trial court had authority to dismiss plaintiff's complaint *sua sponte* since the complaint failed to state a claim upon which relief could be granted. And even looking beyond the complaint and taking the plaintiff's forecast of evidence in the light most favorable to her, plaintiff failed to show any genuine issue of material fact as to her claim for resulting trust or any legal basis for the imposition of a resulting trust. Accordingly, we conclude that the court's dismissal was proper.

AFFIRMED.

Judges STEPHENS and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JULY 2016)

AIR ACCURACY, INC. v. CLARK No. 15-1206	Guilford (14CVS3631)	Affirmed
GRAHAM v. GULLETTE No. 15-1327	Durham (14CVS2230)	Affirmed
HARVELL v. NORRIS No. 16-115	Brunswick (15CVD485)	Dismissed
IN RE A.O.A. No. 15-802	Wayne (14JB126)	Vacated
IN RE A.S. No. 15-604	Orange (14JB95)	Affirmed
IN RE B.L.C. No. 16-135	Forsyth (15JT20)	Affirmed
IN RE D.L.F. No. 16-18	Harnett (13JT189-191)	Affirmed
IN RE E.R.D. No. 16-79	Chatham (13JT21)	Affirmed
IN RE G.R. No. 15-658	Orange (14JB92)	Dismissed
IN RE J.A. No. 15-1255	Madison (12JT27) (12JT28)	Affirmed
IN RE J.D.C. No. 15-1395	Forsyth (15JT61)	Affirmed
IN RE K.B. No. 16-66	Durham (13JT199)	Affirmed
IN RE N.J. No. 15-1241-2	Johnston (15JA25-26)	Affirmed in Part and Reversed in Part
IN RE O.D.S. No. 15-1213	Orange (14JT14)	Affirmed
IN RE S.L.C. No. 15-1174	Buncombe (13JT396)	Affirmed

IN RE S.S.L.B. No. 16-41	Wilkes (15JT139)	Affirmed
IN RE J.K.L. No. 16-127	Robeson (15JT89)	Affirmed
IN RE M.K-M.K No. 16-25	Cumberland (12JT492)	Affirmed
LYTLE v. N.C. DEP'T OF PUB. SAFETY No. 15-1117	N.C. Industrial Commission (TA-23470)	Affirmed
OSMAN v. AL JAHER No. 15-1170	Guilford (15CVD5113)	Affirmed
PITTSBORO MATTERS, INC. v. TOWN OF PITTSBORO No. 16-28	Chatham (14CVS914)	Affirmed
SAWYER v. SAWYER No. 15-1142	Swain (13CVS102)	Affirmed in Part and Reversed in Part
STATE v. ARCHIE No. 16-90	Guilford (14CRS67802) (14CRS67804) (14CRS703666)	Dismissed as moot in part; vacated in part and remanded
STATE v. CAIN No. 15-1208	Guilford (13CRS100207) (14CRS24555)	No Error
STATE v. CLAPP No. 15-1079	Guilford (13CRS97697) (13CRS97700-02) (14CRS24044)	No prejudicial error.
STATE v. DAWSON No. 15-1399	Scotland (12CRS50540) (12CRS909)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. DAYE No. 16-74	Mecklenburg (12CRS243622)	No Error
STATE v. FLAKE No. 15-1361	Madison (11CRS50106) (11CRS50107) (12CRS491-492)	NO PREJUDICIAL ERROR IN PART, NO ERROR IN PART, REMANDED IN PART
STATE v. FOX No. 15-1392	Haywood (13CRS933) (13CRS937)	No Error in part; No Plain Error in part.

STATE v. GIBSON No. 16-36	Forsyth (13CRS50970) (13CRS5895)	No Error
STATE v. HOLLAND No. 16-13	Rowan (14CRS2493) (14CRS51790) (14CRS51791)	No Error
STATE v. LAMPKINS No. 15-1009	Forsyth (12CRS17241) (12CRS54990)	No Error in part; Dismissed in part.
STATE v. LUTZ No. 15-1081	Watauga (13CRS50843) (14CRS1382)	No Error
STATE v. RICH No. 15-1204	Sampson (13CRS50372)	No Error
STATE v. SABBAGHRABAIOTTI No. 15-1028	Forsyth (14CRS51869)	New Trial
STATE v. STYERS No. 15-1345	Surry (10CRS51987) (10CRS51994-96) (10CRS51999) (10CRS52268)	Affirmed in part, vacated in part, reversed and remanded in part.
STATE v. WINSLOW No. 15-1181	Mecklenburg (09CRS19490) (09CRS37207)	Affirmed
STATE v. YAW No. 16-32	Pitt (13CRS61011) (14CRS1158)	No Error
TURCHIN v. ENBE, INC. No. 15-1236	Avery (14CVS213)	Affirmed
WILSON v. WILSON No. 15-1141	Durham (10CVD720)	Dismissed

ACTS RETIREMENT-LIFE COMMUNITIES, INC., PLAINTIFF
v.
TOWN OF COLUMBUS, NORTH CAROLINA, DEFENDANT

No. COA15-1333

Filed 2 August 2016

Statutes of Limitation and Repose—reclassification of water meters—continual ill effects—not continuing wrong

The statute of limitations barred plaintiff's claim that defendant's reclassification of water meters (which resulted in a higher monthly bills) was arbitrary, capricious, unreasonable, and discriminatory. Although plaintiff claimed that the continuing wrong doctrine applied, there were only continual ill effects from the reclassification. Defendant did not reclassify the water meters each month.

Appeal by plaintiff and defendant from judgment entered 18 June 2015 by Judge Jeffrey P. Hunt in Polk County Superior Court. Heard in the Court of Appeals 11 May 2016.

Parker, Poe, Adams & Bernstein L.L.P., by Benjamin Sullivan, for plaintiff.

Cranfill Sumner & Hartzog LLP, by Ryan D. Bolick and Virginia M. Wooten, for defendant.

ELMORE, Judge.

In June 2002, the Town Council in the Town of Columbus, North Carolina (defendant) voted to reclassify two water meters from commercial to residential at Tryon Estates, a retirement facility owned and operated by ACTS Retirement-Life Communities, Inc. (plaintiff). In response, plaintiff filed a complaint in February 2011. After a bench trial, the trial court ordered that the June 2002 reclassification and concurrent change in billing methodology was arbitrary, capricious, unreasonable, and unreasonably discriminatory in violation of N.C. Gen. Stat. § 160A-314. Defendant appeals and plaintiff has filed a cross appeal. Because we conclude that the statute of limitations bars plaintiff's complaint, we reverse and remand.

I. Background

Tryon Estates has received water and sewer services from defendant since it opened in 1992. From 1992 through June 2002, defendant billed Tryon Estates at the commercial rates for such services. On 18 June 2002, the Town Council held a meeting in which it decided that two of the six water meters at Tryon Estates should be classified as residential, not commercial, for billing purposes. One of the relevant two meters serves, *inter alia*, 276 individual apartment units, and the other meter serves ten villas, all located within the Tryon Estates community. The reclassification took effect on 1 July 2002 and, based on defendant's fee schedule which contained different rates for residential and commercial water and sewer services, resulted in plaintiff receiving higher monthly water and sewer bills.

On 9 February 2011, plaintiff filed a complaint in Polk County Superior Court seeking a declaration that defendant's decision to charge Tryon Estates the commercial rate for some water and sewer services but the residential rate for others (1) violated defendant's Charter; (2) violated Article I, Section 1 of the North Carolina Constitution; (3) was a form of discriminatory taxation in violation of Article I, Section 1 and Article V, Section 2 of the North Carolina Constitution as well as the Fourteenth Amendment to the United States Constitution; and (4) violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Plaintiff also alleged a claim for relief based on unjust enrichment and requested a permanent injunction requiring defendant to reclassify the two water meters as commercial.

After defendant filed a notice of removal to the United States District Court for the Western District of North Carolina, the federal district court filed a Memorandum of Decision and Order remanding the matter to Polk County Superior Court due to lack of subject matter jurisdiction under the Johnson Act, 28 U.S.C. § 1342. Subsequently, plaintiff filed a notice of dismissal of some of its claims under Rule 41(a), dismissing its third, fourth, and sixth claims, solely to the extent they relied on the United States Constitution or federal law. Prior to trial, defendant filed a motion to dismiss and both parties filed motions for summary judgment, all of which were denied. Finally, after a bench trial, the Honorable Jeffrey P. Hunt entered a judgment in which he ordered the following:

> By way of DECLARATORY JUDGMENT, this COURT rules hereby that [defendant's] June 2002 reclassifications and

> concurrent changes in billing methodology, including the application of base monthly charges per each individual villa and apartment unit, is arbitrary, capricious, and unreasonable and, in its effects on [plaintiff], is unreasonably discriminatory, all in violation of N.C.G.S. sec. 160A-314,[1] et seq. and the case law of North Carolina.

The trial court awarded plaintiff compensatory damages in the amount of $947,813.27, "representing the total of monthly overpayments paid by [plaintiff] since February 2008, together with interest on that total from the date of the filing of this action." The trial court did not rule on plaintiff's claims based on the North Carolina Constitution, and it denied plaintiff's request for injunctive relief. Both plaintiff and defendant appeal.

II. Analysis

"It is well settled that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether the conclusions of law were proper in light of such facts. A trial court's conclusions of law, however, are reviewable *de novo*." *Anthony Marano Co. v. Jones*, 165 N.C. App. 266, 267–68, 598 S.E.2d 393, 395 (2004) (citations omitted).

At the outset, defendant claims that the trial court erred in concluding as a matter of law that plaintiff's complaint is not barred by the statute of limitations. Defendant argues that the three-year statute of limitations in N.C. Gen. Stat. § 1-52(2) and (5) (2009) began to run immediately after the June 2002 reclassification took effect, and because plaintiff did not file suit until 9 February 2011, plaintiff's complaint is time-barred.

Plaintiff argues that the continuing wrong doctrine applies and that "[t]he limitations period for [its] claims was not triggered by the Council's June 2002 decision to change billing practices for Tryon Estates. That limitations period was triggered only when [defendant] *injured* [plaintiff] by repeatedly sending bills that overcharged for water and sewer." Thus, plaintiff claims that "[e]ach illegal bill was a separate wrong that triggered its own limitations period."

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1. N.C. Gen. Stat. § 160A-314(a) (2015) states, "A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise." Moreover, "Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city." *Id.*

In North Carolina, "[o]nce a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citations omitted). The parties do not contest that a three-year statute of limitations applies to plaintiff's claims, but they disagree as to when plaintiff's claims accrued.

"A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) (citations omitted); *see also* N.C. Gen. Stat. § 1-15(a) (2015). Our courts have accepted the "continuing wrong" or "continuing violation" doctrine as an exception to that general rule. *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003) (citing *Faulkenbury v. Teachers' & State Employees' Ret. Sys.* (*Faulkenbury II*), 345 N.C. 683, 694–95, 483 S.E.2d 422, 429–30 (1997)). In order for the doctrine to apply, there must be a continuing violation, which "is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Id.* (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)) (quotations omitted). This Court, however, has "acknowledge[d] that the distinction between on-going violations and continuing effects of an initial violation is subtle[.]" *Faulkenbury v. Teachers' & State Employees' Ret. Sys.* (*Faulkenbury I*), 108 N.C. App. 357, 369, 424 S.E.2d 420, 425 (holding that the plaintiffs were suffering from the continuing effects of the defendants' original action of amending the statute),[2] *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993).

To determine whether plaintiff is suffering from a continuing violation, we consider "the policies of the statute of limitations and the nature of the wrongful conduct and the harm alleged." *Id.* at 368, 424 S.E.2d at 425 (citing *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)). " '[I]f the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation . . . .' " *Williams*, 357 N.C. at 179–80, 581 S.E.2d at 423 (quoting *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733 (5th Cir. 1983)).

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2. See *Liptrap v. City of High Point*, 128 N.C. App. 353, 358–61, 496 S.E.2d 817, 820–22 (1998), for a thorough analysis on the history of *Faulkenbury I* and *Faulkenbury II* and the continuing wrong doctrine.

Here, the trial court did not specifically rely on the continuing wrong doctrine but appears to have applied it. Regarding the statute of limitations, the trial court concluded as a matter of law the following:

> For purposes of the applicable statute of limitations asserted by [defendant] herein, each monthly invoice presented by [defendant] to [plaintiff] since [defendant's] June 2002 reclassification and billing methodology change was an additional independent wrongful act committed by [defendant]. The three-year statute of limitations applies and does not act to bar the claims for relief of [plaintiff] herein. However, [plaintiff] may only recover damages against [defendant] for overcharges asserted by [plaintiff], and paid by [plaintiff] under [defendant's] June 2002 reclassification and changes in billing methodology, for that period of time beginning three years before the date upon which [plaintiff] filed the Complaint in this action.

Before we analyze whether the continuing wrong doctrine applies, we must first determine when plaintiff's cause of action accrued. Under the general rule regarding the statute of limitations stated above, plaintiff's cause of action accrued on 1 July 2002 when the reclassification took effect and plaintiff had the right to institute and maintain a suit. *See Penley*, 314 N.C. at 20, 332 S.E.2d at 62. Accordingly, based on the three-year statute of limitations, plaintiff would have had to file suit prior to 1 July 2005.

On appeal, plaintiff argues, consistent with the trial court's conclusion, that each monthly bill was a "separate wrong," and based on the continuing wrong doctrine, plaintiff's February 2011 complaint is not time-barred.

In determining if the continuing wrong doctrine applies, we consider "the policies of the statute of limitations and the nature of the wrongful conduct and the harm alleged." *Faulkenbury I*, 108 N.C. App. at 368, 424 S.E.2d at 425. Our Supreme Court has stated, "Statutes of limitation are intended to afford security against stale claims." *Estrada v. Burnham*, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989). "With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed; and it is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action." *Id.*

While plaintiff submits a number of cases on the continuing wrong doctrine and a series of hypotheticals indicating that the statute of limitations defense cannot "grandfather repeated wrongdoing," we agree with defendant that plaintiff has mischaracterized its own claims to attempt to avoid the statute of limitations. On appeal, plaintiff argues that defendant had a continuing legal duty to comply with N.C. Gen. Stat. § 160A-314, which grants a city the authority to establish and revise "schedules of rates," and each monthly bill violated that duty. Yet, the actual wrongdoing of which plaintiff complained was defendant's decision to reclassify two water meters at Tryon Estates from commercial to residential, which occurred in June 2002.

Moreover, as stated throughout the trial court's judgment, the relief granted "invalidat[ed]" the June 2002 reclassification. In relevant part, the trial court made the following conclusions of law:

> 3. [Defendant's] June 2002 reclassification of two of [plaintiff's] meters and [defendant's] concurrent changes in its billing methodology . . . unreasonably discriminate against [plaintiff], which ultimately result in overcharging of [plaintiff] each month . . . .
>
> 4. Likewise, just as [defendant's] June 2002 reclassification of two of [plaintiff's] meters and [defendant's] concurrent changes in its billing methodology . . . is unreasonably discriminatory in its effects on [plaintiff,] these actions by [defendant] were arbitrary, capricious, [and] unreasonable . . . .
>
> 5. As a result, [plaintiff] has been overbilled and has overpaid each billing period, for water and sewer services since [defendant] implemented its June 2002 reclassification and concurrent changes in billing methodology, as described herein.
>
> . . . .
>
> 13. [Plaintiff] is entitled to recover the amount of overpayments it has paid each month as a result of [defendant's] reclassifications . . . .
>
> 14. [Plaintiff] has carried its burden of proof in showing that [defendant] has acted arbitrarily, capriciously, and unreasonably in its June 2002 reclassifications and the changes in its monthly billing methodology and the implementations thereof; as well as showing that the same was,

> in its effect as to [plaintiff], unreasonably discriminatory; as well as showing its damages.

In sum, the trial court concluded that the reclassification and change in billing was unlawful. The overcharges were resulting damages. Such a conclusion, however, is inconsistent with our application of the continuing wrong doctrine.

We conclude that there was not a continuing violation, "occasioned by continual unlawful acts," but rather only "continual ill effects from an original violation." *Williams*, 357 N.C. at 179–80, 581 S.E.2d at 423. The only alleged unlawful act was the June 2002 reclassification. The higher monthly bills constituted the continual ill effects from that reclassification. The Town Council did not reclassify the water meters at Tryon Estates as residential or commercial each month. Because the same alleged violation was not committed each month, the limitations period cannot begin anew. *See id.* at 179, 581 S.E.2d at 423.

Plaintiff waited over eight-and-a-half years to challenge the Town Council's decision to reclassify two meters at Tryon Estates. Since the June 2002 decision, three new town managers have served, there were four changes to the Town Council, and plaintiff had paid over one hundred monthly bills. Plaintiff had the option, which it pursued, to attempt to negotiate with defendant.[3] However, plaintiff cannot now challenge the Town Council decision by claiming that it is affected by a continuing wrong. Accordingly, we hold that the statute of limitations bars plaintiff's claims.

III. Conclusion

Because we conclude that the statute of limitations bars plaintiff's claims, we reverse and remand the trial court's order, and we do not reach the parties' additional arguments.

REVERSED AND REMANDED.

Judges McCULLOUGH and ZACHARY concur.

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3. We note that the federal district court concluded that "[p]laintiff was given notice and a chance to be heard on the change in classification[;]" that "[d]efendant acknowledge[d] that it met and communicated with the [p]laintiff's representatives before making the reclassification[;]" and that "after the initial reclassification, the [p]laintiff repeatedly communicated with the [d]efendant to request that the meters be reclassified as commercial." *ACTS Ret.-Life Cmtys., Inc. v. Town of Columbus*, No. 1:11CV50, 2012 WL 727033, at *6 (W.D.N.C. Mar. 6, 2012). Plaintiff represented to the federal district court that it had "ample notice and an opportunity to be heard," as the Johnson Act only applied "if a rate order was 'made after reasonable notice and hearing.' " *Id.* (citing 28 U.S.C. § 1342).

ADAMS v. STATE OF N.C.

[248 N.C. App. 463 (2016)]

RODNEY K. ADAMS, ELIZABETH I. ALLEN, JOSEPH J. BATEMAN, WILLIAM PAUL BATEMAN, GILBERT A. BREEDLOVE, DEBRA D. CARSWELL, JASON GRAY CHEEK, CHRISTOPHER E. DUCKWORTH, BRYAN G. FARLEY, MELISSA FERREL, JAMES ROBERT FREEMAN, JOSHUA PHILLIP GRANT, WANDA M. HAMMOCK, MARLENE HAMMOND, THOMAS MURPHY HARRIS, RONALD E. HODGES, THOMAS W. HOLLAND, GARY H. LITTLETON, LINDA B. LONG, PANSY K. MARTIN, SHARON S. McLAURIN, BRUCE A. McPHERSON, THOMAS G. MILLER, JEFFREY MITCHELL, DONALD D. PASCHALL, SR., ROBERT WARREN PEARCE, CONNIE C. PEELE, JULIAN R. POTEAT, MARGARET L. RATHBONE, RONALD RAYMOND ROBERTS, JR., RAE RENEE ROTHROCK, SUZANNE SHEEHAN, SUSAN B. SMEVOG, KENNETH SPEARS, STEVEN R. STORCH, CECIL LYNN WEBB, EMILY ALICIA WESTOVER, WILLIAM ERIC WHITTEN, AND WILLIAM T. WINSLOW, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, PLAINTIFFS

v.

THE STATE OF NORTH CAROLINA, PATRICK L. McCRORY, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY, LEE HARRIS ROBERTS, STATE BUDGET DIRECTOR, IN HIS OFFICIAL CAPACITY, AND DR. LINDA MORRISON COMBS, STATE CONTROLLER, IN HER OFFICIAL CAPACITY, DEFENDANTS

No. COA15-1275

Filed 2 August 2016

1. Public Officers and Employees—magistrates—salary steps—suspended—no breach of contract

The trial court correctly granted defendants' motion to dismiss under Rule 12(b)(6) where plaintiffs were a class of magistrates to whom the Legislature's suspension of salary step increases applied. Plaintiffs failed to meet their burden of showing that the Salary Statute created a binding contractual right to receive a salary in the future for work performed in the future.

2. Constitutional Law—takings—magistrates—salary steps—not a vested contract right

The trial court correctly granted defendants' motion to dismiss under Rule 12(b)(6) a takings claim under the Law of the Land Clause of the North Carolina Constitution. The case arose from the freezing of plaintiffs' salary steps by the Legislature. Plaintiffs did not establish the presence of a vested contractual right.

Appeal by Plaintiffs from order entered 13 July 2015 by Judge Michael O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 14 April 2016.

Cloninger, Barbour, Searson, & Jones, PLLC, by Frederick S. Barbour and W. Scott Jones, and the Law Office of David A. Wijewickrama, by David A. Wijewickrama, for the Plaintiffs-Appellants.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Marc Bernstein, for the Defendants-Appellees.

DILLON, Judge.

Plaintiffs appeal from the trial court's order granting Defendants' motion to dismiss and entering final judgment dismissing Plaintiffs' claims for (1) breach of contract, (2) impairment of contract under Article I, Section 10 of the United States Constitution, (3) violations of Article I, Sections 18 and 19 of the North Carolina Constitution, and (4) specific performance.

I. Background

Plaintiffs are all employed by the State of North Carolina as magistrates.[1] The office of magistrate was created by constitutional amendment in 1962 as part of a comprehensive revision of the North Carolina court system spearheaded by Governor Luther H. Hodges and leaders of the North Carolina Bar Association.[2] The North Carolina Constitution provides that "[t]he General Assembly shall prescribe and regulate the . . . salaries . . . of all officers provided for in [] Article [IV]," N.C. Const. art. IV, § 21, which includes the salaries of magistrates. *See* N.C. Const. art. IV, § 10.

The General Assembly enacted a salary schedule for magistrates in 1977. Since 1977, this salary schedule has been amended numerous times. The current version is codified in N.C. Gen. Stat. § 7A-171.1 (the "Salary Statute") and provides for the salaries of magistrates as follows:

> (1) A full-time magistrate shall be paid the annual salary indicated in the table set out in this subdivision. . . . Initial appointment shall be at the entry rate. A magistrate's salary shall increase to the next step every two years on

1. The class of Plaintiffs consists of all magistrates employed by the State of North Carolina at any time between 30 June 2009 and 1 July 2014, who had not, as of 1 July 2014, reached Step 6 of the pay schedule set forth in N.C. Gen. Stat. § 7A-171.1.

2. In a special message to the General Assembly in March 1959, Governor Hodges encouraged the North Carolina Bar Association to "take the lead in making a thorough and objective study of our courts," and to "show our State what should be done to improve the administration of justice in North Carolina." Special Message of Governor Luther H. Hodges to the North Carolina General Assembly, Article IV—Judicial Department (March 12, 1959), *in Journal of the House of Representatives of the General Assembly of the State of North Carolina*, at 209 (1959) (available at http://digital.ncdcr.gov/u?/p249901coll22,558990).

> the anniversary of the date the magistrate was originally appointed for increases to Steps 1 through 3, and every four years on the anniversary of the date the magistrate was originally appointed for increases to Steps 4 through 6.
>
> Table of Salaries of Full-Time Magistrates
>
> | Step Level | Annual Salary |
> |---|---|
> | Entry Rate | $35,275 |
> | Step 1 | 37,950 |
> | Step 2 | 40,835 |
> | Step 3 | 43,890 |
> | Step 4 | 47,550 |
> | Step 5 | 51,960 |
> | Step 6 | 56,900 |

N.C. Gen. Stat. § 7A-171.1(a)(1) (2015).

On 1 July 2009, the General Assembly enacted legislation suspending the step increases under the Salary Statute for fiscal years 2009-2010 and 2010-2011, such that no magistrate could ascend to a higher step of the pay schedule during those years. The step increases were again suspended by the General Assembly in 2011 for the 2011-2013 fiscal biennium[3] and in 2013 for the 2013-2015 fiscal biennium. On 1 July 2014, however, the General Assembly fully reinstated the pay schedule and step increases.

Plaintiffs filed suit against the State of North Carolina in May 2014, alleging that when they accepted employment as magistrates, the pay schedule set forth in the Salary Statute became a vested contractual right and that the State committed a breach of contract by suspending the step increases. Plaintiffs also asserted related constitutional claims, as well as claims for specific performance and declaratory judgment.

Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (6). The trial court granted Defendants' motion to dismiss, specifically concluding that Plaintiffs' complaint "failed to state a claim upon which relief can be granted[.]" *See* N.C. Gen.

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3. However, in 2012, the General Assembly granted magistrates and most other state employees a 1.2% pay increase and increased the entire salary schedule in N.C. Gen. Stat. § 7A-171.1 by 1.2%. 2012 N.C. Sess. Laws 142, § 25.1A(b) & (g).

Stat. § 1A-1, Rule 12(b)(6) (2015). In its order, the trial court specifically concluded that N.C. Gen. Stat. § 7A-171.1 did not create any contractual right for the Plaintiffs to receive step increases, and therefore Plaintiffs' claims were barred by the doctrine of sovereign immunity. We agree, and therefore affirm the trial court's order granting Defendants' motion to dismiss.

II. Analysis

[1] On appeal from a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, this Court conducts a *de novo* review of "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory."[4] *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). Plaintiffs argue that their complaint did, in fact, state a claim for breach of contract entitling them to relief. Plaintiffs also contend that they are entitled to relief under the Contract Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution.[5] We address each of these arguments in turn.

A. Principles Governing Contracts With the State

It is well established in North Carolina that "an appointment or election to public office does not establish contract relations between the person[s] appointed or elected and the State." *Smith v. State*, 289 N.C. 303, 307, 222 S.E.2d 412, 416 (1976); *see also Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903). Unless specifically prohibited by our Constitution, as a general rule, "[t]he Legislature may reduce or increase the salaries of such officers . . . during their term of office, but cannot deprive them of the whole." *Cotton v. Ellis*, 52 N.C. 545, 545 (1860). "[I]f the Legislature should increase the duties and responsibilities, or diminish the emoluments of the office, the officer must submit. Clearly any other rule would subordinate the public welfare to the interest of the officer. [The officer] takes subject to the power of the Legislature to change [the] duties and emoluments as the public good may require." *State ex rel. Bunting v. Gales*, 77 N.C. 283, 285 (1877).

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4. We consider the merits of Plaintiffs' contract claim because the trial court specifically dismissed their complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

5. Plaintiffs did not address the trial court's dismissal of their remaining claims on appeal, and these claims are therefore deemed abandoned. N.C. R. App. P. 28(a).

The relationship between magistrates and the State is contractual in nature in one respect in that the magistrates are employees who provide labor in exchange for wages and benefits. And it is true that a statute enacted by our General Assembly can create a vested contractual right where the statute provides a benefit for work already performed. For instance, our Supreme Court has clearly stated:

> . . . that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits *if those persons fulfilled the conditions*. When they did so, the contract was formed.

Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina, 345 N.C. 683, 691, 483 S.E.2d 422, 427 (1997) (emphasis added). That is, the Supreme Court has concluded that if an employee fulfills certain conditions under a statute and thereby becomes entitled to a benefit, the benefit is considered "vested" and may not be taken from the employee by legislative action. *Id.* at 692, 483 S.E.2d at 428.

However, our Supreme Court more recently has reiterated the principle that there is a strong presumption that a statute does not create contractual rights. *N.C. Ass'n of Educators v. State*, ___ N.C. ___, ___, 786 S.E.2d 255, 262 (2016). Specifically, the Court stated as follows:

> The United States Supreme Court has recognized a presumption that a state statute is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. This presumption is rooted in the long-standing principle that the primary function of the legislature is to make policy rather than contracts. A party asserting that a legislature created a statutory contractual right bears the burden of overcoming that presumption by demonstrating that the legislature manifested a clear intention to be contractually bound. Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals. We are deeply reluctant to limit drastically the essential powers of a

> legislative body by finding a contract created by statute without compelling supporting evidence.

Id. at ___, 786 S.E.2d at 262-63 (internal marks and citations omitted).

In the present case, we hold that Plaintiffs failed to meet their burden of showing that the Salary Statute creates a binding contract right for magistrates to receive a certain salary in the future *for work performed in the future*. Rather, the General Assembly is free to amend the Salary Statute so long as, in doing so, the General Assembly does not reduce a magistrate's salary for work already performed. The General Assembly's suspension of raises under the Salary Statute is much different than the legislation at issue in *Faulkenbury*, which reduced the amount of future pension benefits State employees would receive for work *already performed*. *See Faulkenbury*, 345 N.C. at 691, 483 S.E.2d at 427 ("[P]ensions for teachers and state employees [are] delayed salaries.").

Although our Supreme Court concluded in the recent case of *N.C. Ass'n. of Educators* that the Career Status Law itself did not create a contractual right to tenure, the Court did conclude that the individual teacher contracts contained an implied right to tenure for those who had already attained career status. *N.C. Ass'n of Educators*, ___ N.C. at ___, 786 S.E.2d at 264 (concluding that the repeal of the Career Status Law "unlawfully infringe[d] upon the contract rights of teachers *who had already achieved career status*" (emphasis added)). And our Court concluded that teachers who had not yet worked the requisite years to attain career status had no contractual right to receive tenure in the future by completing the requisite years of service, an issue which was not considered or otherwise disturbed by our Supreme Court. *N.C. Ass'n of Educators*, ___ N.C. App. ___, ___, 776 S.E.2d 1, 23-24 (2015). The magistrates here are much like the teachers in *N.C. Ass'n. of Educators* who had not yet worked the requisite number of years to have a contractual right to career status. Here, a magistrate could not have a contractual right to receive a higher salary in a future year simply until the magistrate completed work in that future year. The actions of the General Assembly in suspending step increases *for future work* did not take away any benefit already earned by Plaintiffs, whereas in *N.C. Ass'n of Educators*, the successful plaintiffs had already worked the requisite years to earn career status. *See Schimmeck v. City of Winston-Salem*, 130 N.C. App. 471, 475, 502 S.E.2d 909, 912 (1998) (holding that a statute in force at the time plaintiff police officer began employment allowing disabled officers with five years of service to retire with benefits did not apply to plaintiff because the legislature amended the statute to provide for disabled officers to be transferred to other departmental duties prior

to plaintiff's rights vesting with five years of service.) Accordingly, we hold that the trial court properly concluded that the General Assembly is free to alter the salary schedule before the work supporting each step increase is actually performed by a magistrate.

Plaintiffs also argue that the pay schedule and the representations of agents and employees of the State of North Carolina regarding their pay became contractual terms because they relied on these representations by accepting their positions as magistrates. While our Court has previously held that representations of an employer regarding benefits of employment can form supplementary employment contracts, we also noted that the plaintiffs in that case were "not seeking to prevent the city from changing the benefits to be earned in the future[.]"[6] *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 552-53, 344 S.E.2d 821, 826 (1986). Rather, they sought to recover "for benefits allegedly already conferred on them by virtue of the ordinance and their contracts for services previously rendered[.]" *Id.* at 553, 344 S.E. 2d at 826.

In fact, if we were to find the presence of a contract in this case, it would still be true that even "[i]f an Act prescribing the duties and compensation of a public officer can in any case be held to be a contract, . . . it is a contract *subject to the general law*, and therefore containing within itself a provision that such duties and compensation may be changed by any general law whenever the Legislature shall think a change required by the public good." *State ex rel. Bunting v. Gales*, 77 N.C. 283, 286-87 (1877) (emphasis added); *see also Mills v. Deaton*, 170 N.C. 386, 87 S.E. 123, 124 (1915) (noting that the legislature may, "within reasonable limits[,] diminish the emoluments of an office . . . by reducing the salary or the fees, for the incumbent takes the office subject to the power of the Legislature to make such changes as the public good may require"). Because the Plaintiffs in this case did not have a vested right to every step pay increase, they had no contractual right for their future salaries as set forth in the Salary Statute.

B. Constitutional Claims

[2] Because we have determined that Plaintiffs did not have a contractual right to the future pay schedule in the Salary Statute, Plaintiffs' arguments regarding the Contract Clause of the United States Constitution have no merit on appeal. *See Bailey v. State*, 348 N.C. 130, 141, 500 S.E.2d

6. In addition, the ordinance which created the benefit at issue in *Pritchard* "clearly contemplate[d] that the . . . benefit program would assist in recruiting city employees and would become part of their contracts." *Pritchard*, 81 N.C. App. at 552, 344 S.E.2d at 826.

54, 60 (1998); *see also U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977). Plaintiffs' remaining argument on appeal is for an unconstitutional taking claim based on the Law of the Land Clause of the North Carolina Constitution, which has been used in our State to allow "taking challenges on the basis of constitutional and common-law principles." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 179, 594 S.E.2d 1, 14 (2004); *see also* N.C. Const., art. I, § 19. For an unconstitutional taking to occur, Plaintiffs must have a recognized property interest for the State to take. *See e.g.*, *Rhyne*, 358 N.C. at 179, 594 S.E.2d at 14-15. Although we recognize that vested contractual rights are property and are protected by the Law of the Land Clause of our Constitution, *Bailey*, 348 N.C. at 154, 500 S.E.2d at 68, we reject Plaintiffs' taking argument because they have failed to establish the presence of a vested contractual right to the future pay schedule set forth in the Salary Statute.

III. Conclusion

We conclude that the Salary Statute does not create vested contractual rights for magistrates to receive future salary increases for work not already performed. Therefore, the General Assembly was free to suspend step increases under the Salary Statute. Accordingly, we hold that the trial court did not err in dismissing Plaintiffs complaint for failure to state any claim upon which relief could be granted, and we affirm the ruling of the trial court.

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

BROOKSBY v. N.C. ADMIN. OFFICE OF COURTS

[248 N.C. App. 471 (2016)]

CRAIG BROOKSBY & PAM GUNDERSON, INDIVIDUALS, AND THE ESTATES LLC, A UTAH LIMITED LIABILITY COMPANY, PLAINTIFFS
v.
NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, JOHN W. SMITH, II, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS; AND PAMELA HILL, IN HER OFFICIAL CAPACITY AS THE CLERK OF RANDOLPH COUNTY SUPERIOR COURT, DEFENDANTS

No. COA15-1397

Filed 2 August 2016

Public Records—mass request—reasonable accommodation

Summary judgment was properly granted for defendants in an action under the Public Records Act where plaintiff made a request for a mass search of all records and defendants made reasonable accommodations to allow plaintiff timely access.

Appeal by Plaintiffs from an order entered 26 June 2015 by Judge W. Erwin Spainhour in Randolph County Superior Court. Heard in the Court of Appeals 6 June 2016.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for Plaintiff-Appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Craig Brooksby, Pam Gunderson, and The Estates LLC (collectively "Plaintiffs"), appeal following an order awarding the North Carolina Administrative Office of the Courts, John W. Smith, II, and Pamela Hill (collectively "Defendants") summary judgment on Plaintiffs' North Carolina Public Records Act ("Public Records Act") claim. On appeal, Plaintiffs contend the trial court erred in awarding Defendants summary judgment. We disagree and affirm the trial court.

I. Factual and Procedural Background

Plaintiff The Estates LLC ("The Estates") is a Utah real estate company that buys and sells distressed properties in North Carolina; Plaintiffs Brooksby and Gunderson work for The Estates. In the course of The Estates' business, it contacted clerks' offices in ninety North Carolina counties. In these counties, the Clerks of Court allowed The Estates to copy and scan public foreclosure records using its "staff and

equipment." The Estates uses its staff to pull foreclosure records, then scan the records using cell phone cameras, digital cameras, and tablet cameras to copy "[twenty] files at a time per [staff] person," to save time and money.

On 5 June 2013, Plaintiffs traveled to the Randolph County Clerk's Office, where Pamela Hill ("Hill") is the Clerk of Court. Plaintiffs requested all foreclosure records from 2010 to present, and asked Hill if they could use their staff and scanning equipment. Hill denied their request.

On 30 August 2013, Plaintiffs made a written request to come into Hill's office, and copy records on 30 September and 1 October 2013 using their staff and equipment, and once per week thereafter until they copied all of their desired documents. In the alternative, Plaintiffs told Hill, "If, you prefer to do this yourself then we request pursuant to N.C. Gen. Stat. § 132-6.2, that these records be provided in digital pdf format (CD, DVD or digital copy) or by fax within 15 days . . . ." Hill denied Plaintiffs' request through counsel on 20 September 2014. Hill's counsel stated, on her behalf, "she does not have sufficient staff so that someone could supervise such an operation and ensure the integrity of the court's records." Hill proposed a compromise and offered to provide fifteen to twenty records to Plaintiffs on a weekly basis. Plaintiffs did not accept Hill's offer and on 9 October 2013 they filed a complaint against Hill and others, raising a public records action.

Defendants answered on 14 November 2013 and generally denied the allegations and admitted some facts. Defendants stated they acted in accordance with the Public Records Act and did not deny Plaintiffs access to the foreclosure documents. To their answer, Defendants attached an email between them and Plaintiffs' counsel in which Defendants offered to produce weekly records to Plaintiffs in lieu of giving Plaintiffs the autonomy they desired.

On 3 January 2014, the trial court ordered the parties to attend a mediated settlement conference. The parties met on 5 May 2014 and they agreed to Plaintiffs' use of a handheld scanner to copy foreclosure records but they did not agree "as to the specific mechanics and terms." The parties failed to reduce their agreement to writing. Following the mediation conference, Plaintiffs agreed to obtain five foreclosure records at a time from Hill using a handheld scanner approved by the Randolph County Sheriff. Although the parties used this method to obtain records "without issue" for months, Plaintiffs persisted in their demand "to pull [fifteen] copies [or more of public records] at a time," based on their proposed terms. Hill again denied their request.

On 26 May 2015, Defendants moved for summary judgment pursuant to Rule 56. Defendants contended Plaintiffs' Public Records Act claim should be dismissed because "there are no issues of material fact remaining."

The trial court heard the parties on the Defendants' motion for summary judgment on 8 June 2015. At the hearing, Defendants submitted the following documents: (1) an administrative order from the Randolph County Courthouse, which bars the use of cell phones in the courthouse; (2) an email sent from Plaintiffs to Defendants on 30 August 2013 requesting independent access to public records; and (3) an affidavit from J. Denton Adams, Plaintiffs' former counsel, who attended the 5 May 2014 mediation conference. Defendants also submitted an affidavit from Diana Brown, Assistant Clerk of Superior Court in Randolph County and supervisor of the foreclosure records in question, which stated the parties agreed to Plaintiffs' use of a digital imaging wand that the Randolph County Sheriff approved. At the summary judgment hearing, Plaintiffs and Defendants agreed there "is no genuine issue as to any material fact." Based upon the record evidence, the trial court granted summary judgment in Defendants' favor and dismissed Plaintiffs' claims with prejudice on 26 June 2015. Plaintiffs timely filed notice of appeal on 14 July 2015.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Analysis

Plaintiffs contend the trial court "erred in holding that the Clerk of Court may prohibit the Plaintiffs from inspection [sic] copying of the Randolph County Special Proceeding files through the use of digital cameras, cell phone cameras and/or tablet cameras." They contend there is a genuine issue of material fact as to whether Defendants unreasonably restricted their access to public records. We disagree.

Pursuant to Rule 56, summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

> The party moving for summary judgment has the burden of establishing the lack of any triable issue. The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.* All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.

Collingwood v. Gen. Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted) (emphasis added).

Under the North Carolina Public Records Act, "[e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law." N.C. Gen. Stat. § 132-6(a) (2015); N.C. Gen. Stat. § 132-1 *et. seq.* (2015). The Public Records Act provides the following:

> Persons requesting copies of public records may elect to obtain them in any and all *media in which the public agency is capable of providing them.* No request for copies of public records in a particular medium shall be denied on the grounds that the *custodian* has made or prefers to make the public records available in another medium. The public agency may assess different fees for different media as prescribed by law.

N.C. Gen. Stat. § 132-6.2(a) (2015) (emphasis added).

To establish a *prima facie* case under the Public Records Act, a plaintiff must show: "(1) a person requests access to or copies of public records from a government agency or subdivision, (2) for the purposes of inspection and examination, and (3) access to or copies of the requested public records are denied." *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 207, 695 S.E.2d 91, 93 (2010). Our Supreme Court held "it is clear that the legislature intended to provide that, as a general rule, the public would have liberal access

to public records." *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984) (citation omitted).

Here, Plaintiffs failed to forecast evidence of a *prima facie* case under the Public Records Act because they failed to show that "access to or copies of the requested public records [was] denied." *State Emps. Ass'n of N.C., Inc.*, 364 N.C. at 207, 695 S.E.2d at 93. Plaintiffs' evidence shows they were not allowed to access the Clerk's Office on the explicit terms they requested. While the Court recognizes that there may be circumstances where public officials deny access to records on grounds of resources as a pretext for frustrating the intent of the law to provide open access, we hold under these circumstances no such factual question has been raised. Under the limitations of the Clerk's Office and the availability of its employees, Defendants made reasonable accommodations to allow Plaintiffs access to the documents in a timely manner.

The issues raised here regard a request for mass records search of all records. The need for the records custodian to maintain the integrity of the records for its own use and the use of others, the custodian's fiscal responsibility in maintaining the records, the duty to the public, the protection of public resources, and the exigency of the public's need for the information are some, but not all, of the factors that shape a court's inquiry in a records request. We note both parties conceded this matter was appropriate for summary judgment. This indicates the presence of a pure question of law.

After reviewing the record *de novo* in the light most favorable to Plaintiffs, we hold Defendants are entitled to summary judgment.

IV. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Judges CALABRIA and DILLON concur.

THOMAS DAVID DION, PLAINTIFF
v.
WILLIAM ROBERT BATTEN, SR., DEFENDANT

No. COA16-63

Filed 2 August 2016

1. Workers' Compensation—subrogation lien—standing

In an action arising from a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies, N.C.G.S. § 97-10.2(j) conferred standing upon Foremost Insurance Company as a third party for determination of the subrogation amount.

2. Workers' Compensation—subrogation lien—subject matter jurisdiction

The trial court possessed subject matter jurisdiction to rule on Foremost Insurance Company's application to determine the subrogation amount in a case involving a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies. The Court of Appeals declined to draw a distinction between "determining" the amount of a subrogation lien under N.C.G.S. § 97-10.2(j) and "reducing" or "eliminating" the lien. The amount of a subrogation lien cannot exceed the amount of the proceeds recovered from third-party tortfeasors.

3. Workers' Compensation—subrogation lien—amount

The trial court did not err in calculating the amount of a subrogation lien in a case arising from a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies.

4. Workers' Compensation—subrogation lien—amount—finding

The trial court did not abuse its discretion in determining the amount of the workers' compensation subrogation lien. The trial court made findings cogently identifying the parties and explaining the proceedings, and conclusions demonstrating its thorough consideration of the necessary statutory factors. The court then excluded court costs, attorney fees, and interest from the judgment.

5. Attorney Fees—negligence and workers' compensation actions—findings—cost of third-party litigation

In an action arising from a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance

companies, the trial court's findings adequately addressed the required consideration of the amount of the cost of third-party litigation to be shared between the employer and employee. The trial court considered the amount that plaintiff and his attorney had and would receive as a result of the third-party litigation, took into account the court costs that had been paid, and noted that the employer and its servicing agent intended to exclude plaintiff's attorney fees from the amount of the workers' compensation subrogation lien.

Appeal by Plaintiff and Unnamed Defendants Neuwirth Motors and Brentwood Services, Inc. from order entered 4 June 2015 by Judge W. Allen Cobb, Jr. in Superior Court, Duplin County. Heard in the Court of Appeals 6 June 2016.

Baker & Slaughter, by H. Mitchell Baker, for Plaintiff.

Teague Campbell Dennis & Gorham, LLP, by Bruce A. Hamilton, Matthew W. Skidmore, and Justin G. May, for Unnamed Defendants Neuwirth Motors and Brentwood Services, Inc.

Hoof & Hughes, PLLC, by J. Bruce Hoof, for Unnamed Defendant Foremost Insurance Company.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Ellen P. Wortman, for Unnamed Defendant Government Employees Insurance Company.

McGEE, Chief Judge.

Thomas David Dion ("Plaintiff"), Neuwirth Motors ("Neuwirth"), and Brentwood Services, Inc. ("Brentwood") appeal from an order determining the amount of a workers' compensation subrogation lien on a judgment obtained by Plaintiff against William Robert Batten, Sr. ("Defendant"). We affirm.

I. Background

Plaintiff was employed by Neuwirth as a servicing agent. In the course and scope of his employment with Neuwirth, Plaintiff was driving on Oriole Drive in Wilmington, North Carolina on 20 March 2008, when the vehicle he was driving was struck by a vehicle driven by Defendant, who had failed to stop at a red light. As a result of the crash, Plaintiff sustained multiple injuries. Because the crash occurred during the course and scope of Plaintiff's employment with Neuwirth, Plaintiff

was entitled to, and filed a claim for, workers' compensation benefits pursuant to Chapter 97 of the North Carolina General Statutes. Plaintiff, Neuwirth, and Neuwirth's workers' compensation servicing agent, Brentwood, agreed that Plaintiff was entitled to $528,665.61 for injuries sustained in the crash. The agreement between Plaintiff, Neuwirth, and Brentwood was approved by the Industrial Commission by order entered 14 November 2012.[1] Pursuant to N.C. Gen. Stat. § 97-10.2(f), Neuwirth and Brentwood asserted a lien against any third party recovery.

In addition to the workers' compensation claim, Plaintiff filed the present lawsuit against Defendant on 16 November 2010, asserting a claim of negligence. After the complaint was filed, and as permitted by N.C. Gen. Stat. § 20-279.21(b)(4), a trio of interested insurance companies entered the lawsuit by filing answers as unnamed defendants: Nationwide Mutual Insurance Company ("Nationwide"); Foremost Insurance Company ("Foremost"); and Government Employees Insurance Company ("GEICO"). Defendant maintained a policy with Nationwide that provided liability insurance coverage in the amount of $30,000.00, and underinsured motorist coverage ("UIM coverage") in the amount of $100,000.00. Plaintiff maintained insurance policies with Foremost and GEICO that provided UIM coverage for damages Defendant was entitled to in excess of the limits of Defendant's Nationwide policy.

Sometime after filing an answer to Plaintiff's complaint, Nationwide tendered its policy limits of $100,000.00.[2] Disbursement of the funds was approved by the Industrial Commission by order entered 9 December 2011, and provided that the $100,000.00 would be dispersed in equal shares to: (1) Plaintiff; (2) Plaintiff's counsel, for attorney's fees; and (3) Neuwirth and Brentwood. The order also stated that "[n]othing contained in this Order shall be construed as a waiver of . . . defendant/workers' compensation carrier's lien. Plaintiff and defendant/workers' compensation carrier explicitly acknowledge the defendant/workers' compensation carrier's

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1. The Industrial Commission's order provided that Plaintiff's attorney was to receive a fee of $50,000.00, to be paid out of the total recovery.

2. UIM coverage "is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy." N.C. Gen. Stat. § 20-279.21(b)(4) (2015). The limit of UIM coverage "applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted policy . . . and the limit of [UIM coverage] applicable to the motor vehicle involved in the accident." *Id.* Accordingly, Nationwide paid $30,000.00 under the "exhausted policy," and $70,000.00 in UIM coverage, for a total of $100,000.00.

right to assert a lien against the proceeds of any additional third-party funds paid to [P]laintiff." Plaintiff's insurance policies with Foremost and GEICO each provided that either party had the option to require arbitration. Plaintiff, Foremost, and GEICO decided to exercise that option, and the matter was referred to arbitration. Arbitration began on 8 April 2015 and, on 13 April 2015, the arbitration panel decided Plaintiff was entitled to recover $285,000.00 from Defendant for personal injuries sustained in the 20 March 2008 crash.

The trial court entered the arbitration award as a judgment on 12 May 2015. In entering the judgment, the trial court determined that the arbitration award "should be reduced by the amount of $100,000.00 which had previously been paid to Plaintiff" by Nationwide. The trial court awarded interest on the full amount, $285,000.00, from 16 November 2010, when the lawsuit was filed, to 9 December 2011, when Nationwide tendered its policy limits. The trial court also awarded interest on the reduced amount, $185,000.00, from 10 December 2011 through 1 May 2015.

Foremost filed a motion on 4 May 2015 to determine the subrogation amount pursuant to N.C.G.S. § 97-10.2(j), and the trial court held a hearing on Foremost's motion three days later. Following the hearing, the trial court entered a written order on 4 June 2015 "determin[ing]" the appropriate amount of Neuwirth's and Brentwood's workers' compensation subrogation lien. The trial court concluded as a matter of law that the

> rights to, and the amount of the employers and workers['] compensation carrier's lien under [N.C.G.S. §] 97-10.2 were created by, and set forth and defined in, and are limited by [N.C.G.S. §] 97-10.2 and specifically sub-sections (f)(1)c. and (j)[.] . . . As that lien is a creature of statute, employers and workers['] compensation carriers necessarily have no right to recover any amount of money by reason of such lien which is greater than, or other than such amount as provided by [N.C.G.S.] § 97-10.2(f)(1)c. and (h).

The trial court further concluded that although Neuwirth and Brentwood paid workers' compensation benefits to Plaintiff totaling $528,665.61, "their workers[']compensation subrogation lien [could not] exceed $285,000.00, that being the total amount of the [j]udgment obtained by [Plaintiff] in this lawsuit in compensation for his injuries." Accordingly, the trial court found the amount of the workers' compensation subrogation lien to be "$190,000.000, which is calculated by subtracting attorney's

fees ($95,000.00), interest ($74,291.50) and court costs ($160.00) from the judgment amount obtained by Plaintiff [] by [j]udgment in this lawsuit ($359,451.50)." Plaintiff, Brentwood, and Neuwirth appeal.

II. Analysis

Plaintiff, Brentwood, and Neuwirth (collectively, "Appellants") present two jurisdictional arguments: (1) Foremost – as a "third party," and not an "employer" or "employee" – lacked standing to apply for a determination of the subrogation amount; and (2) even if Foremost did have standing, the trial court nevertheless acted outside of its subject matter jurisdiction when ruling on Foremost's motion. In the alternative, Appellants contend the trial court: (1) misinterpreted N.C. Gen. Stat. § 97-10.2(j); (2) abused its discretion by reducing the amount of the workers' compensation lien from the "statutory amount;" and (3) erred by failing to make findings of fact that adequately evidenced the trial court's consideration of a statutorily required factor.

(A) Standing

[1] Appellants contest Foremost's standing to apply for a determination of the subrogation amount. Standing "refers to whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter." *Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Ctr.*, 153 N.C. App. 176, 179, 568 S.E.2d 883, 886 (2002) (citing *Sierra Club v. Morton*, 405 U.S. 727, 31 L. Ed. 2d 636 (1972)).[3] "Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (citation omitted). Whether a party has standing is a question of law that this Court reviews *de novo*. *Indian Rock Ass'n v. Ball*, 167 N.C. App. 648, 650, 606 S.E.2d 179, 180 (2004). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that" of the trial court. *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and internal quotation marks omitted).

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3. While Appellants did not challenge Foremost's standing in the trial court, "subject matter jurisdiction exists only if a plaintiff has standing and subject matter jurisdiction can be raised at any time in the court proceedings, including on appeal." *Village Creek Prop. Owners' Ass'n, Inc. v. Town of Edenton*, 135 N.C. App. 482, 485 n.2, 520 S.E.2d 793, 795 n.2 (1999) (citation omitted).

In determining whether N.C.G.S. § 97-10.2(j) confers standing upon Foremost to apply for a determination of the subrogation amount, we begin with the text of the statute. *See Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) ("Statutory interpretation properly begins with an examination of the plain words of the statute." (citation omitted)). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted); *see also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) ("It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." (citation omitted)).

The statute at issue in this case, N.C.G.S. § 97-10.2(j), provides in relevant part:

> Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, *either party may apply* to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount.

N.C. Gen. Stat. § 97-10.2(j) (2015) (emphasis added). Considering the words as they appear in the statute, and giving those words their plain and ordinary meaning, it is clear that N.C.G.S. § 97-10.2(j) permits Foremost to apply for a determination of the subrogation amount. The statute provides that when an "employee" – such as Plaintiff – obtains a judgment against, or arrives at a settlement with, a "third party," then "either party may apply . . . to determine the subrogation amount." *Id.* Under subsection (j), either the "employee" or the "third party" may apply for a determination of the subrogation amount. Thus, whether Foremost could apply for a determination of the subrogation amount turns on whether it was a "third party" as that term is used in the statute.

Subsection (a) of the same statute confirms that Foremost is, indeed, a "third party" with standing to make the motion. Subsection (a) describes who qualifies as a "third party":

> The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be

> affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party."

N.C. Gen. Stat. § 97-10.2(a) (2015). Foremost, as the underinsured motorist carrier liable for payment of damages for the injuries Defendant caused Plaintiff, meets that statutory definition. *See Levasseur v. Lowery*, 139 N.C. App. 235, 238, 533 S.E.2d 511, 513-14 (2000) (noting that "under N.C. Gen. Stat. § 97-10.2, payments made by the UIM carrier as well as the tort-feasor are from a 'third party' " (citation omitted)); *Creed v. R.G. Swaim and Son, Inc.*, 123 N.C. App. 124, 128-29, 472 S.E.2d 213, 216 (1996) (same). This reading of N.C.G.S. §§ 97-10.2(a) and (j) is reinforced by N.C. Gen. Stat. § 20-279.21(b)(4), which provides that underinsured motorist insurers "shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party." N.C. Gen. Stat. § 20-279.21(b)(4) (2015).

Appellants contend this reading of the statutory text is foreclosed by this Court's decision in *Easter-Rozzelle v. City of Charlotte*, ___ N.C. App. ___, 780 S.E.2d 244 (2015). Specifically, Appellants point to the following excerpt from *Easter-Rozzelle*:

> Pursuant to subsection (j) of [N.C. Gen. Stat. § 97-10.2], following the employee's settlement with the third party, *either the employee or the employer may apply* to a superior court judge to determine the subrogation amount. N.C. Gen. Stat. § 97-10.2(j) (2013). "After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien."

Easter-Rozzelle, ___ N.C. App. at ___, 780 S.E.2d at 248 (emphasis added). We agree that this quotation, standing alone, appears to provide that only an "employer" or an "employee" – but not a "third party" – may move to determine the subrogation amount. It is well settled that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

However, it is equally well settled that "[l]anguage in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (citations omitted); *see also Baker v. Smith*, 224 N.C. App. 423, 431 n.5, 737 S.E.2d 144, 149 n.5 (2012).

> Our Supreme Court has stressed: "[I]t is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision."

MLC Auto., LLC v. Town of Southern Pines, 207 N.C. App. 555, 564, 702 S.E.2d 68, 75 (2010) (quoting *State v. Jackson*, 353 N.C. 495, 500, 546 S.E.2d 570, 573 (2001)).

An examination of *Easter-Rozelle* reveals that the quote Appellant's urge us to follow is *obiter dictum*. *Easter-Rozelle* involved the question of whether an employee, injured during the course and scope of his employment, could seek worker's compensation benefits after he had settled a personal injury claim with a third-party tortfeasor without the employer's or the Industrial Commission's knowledge or consent. *Easter-Rozelle*, ___ N.C. App. at ___, 780 S.E.2d at 246-50. Which parties had standing to apply for a determination of the subrogation amount was not a question presented for adjudication in *Easter-Rozelle*. *See id.*

In the present case, by contrast, Plaintiff properly filed for workers' compensation benefits, and received the Industrial Commission's approval for disbursement of third party funds. And, unlike in *Easter-Rozelle*, the standing issue is squarely presented for adjudication in the case now before us. Accordingly, we find the above-quoted passage from *Easter-Rozelle* to be *obiter dictum*, by which we are not bound. We do not lightly disregard any statement in a prior published opinion of this Court. However, applying fundamental principles of statutory construction, discussed above, we hold that N.C.G.S. § 97-10.2(j) confers standing upon Foremost, as a "third party," to apply for a determination of the subrogation amount.

(B) Subject Matter Jurisdiction

[2] Appellants argue that, notwithstanding Foremost's standing to move for a determination of the subrogation amount, the trial court lacked subject matter jurisdiction to rule on Foremost's motion. Appellants

contend the amount of the workers' compensation lien is statutorily set and, thus, the trial court has extremely circumscribed ability to reduce the amount of the lien. Subject matter jurisdiction refers to a court's "power to pass on the merits of the case," *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983), and is "conferred upon the courts by either the North Carolina Constitution or by statute." *Dare Cnty. v. N.C. Dep't of Ins.*, 207 N.C. App. 600, 610, 701 S.E.2d 368, 375 (2010) (citation and quotation marks omitted). Whether a trial court has subject matter jurisdiction is a question of law, which is reviewed *de novo* on appeal. *Phillips v. Orange County Health Dep't*, ___ N.C. App. ___, ___, 765 S.E.2d 811, 815 (2014).

In the present case, the relevant statute provides that if: (1) a judgment is obtained by the employee in an action against a third party; or (2) a settlement has been agreed upon by the employee and the third party,

> either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, *to determine the subrogation amount*. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, *the judge shall determine*, *in his discretion*, *the amount*, *if any*, *of the employer's lien*[.]

N.C.G.S. § 97-10.2(j) (emphasis added). In the present case, a judgment was obtained by Plaintiff against Defendant, and Foremost applied – as it was entitled, *see supra* at 5-11 – for a determination of the subrogation amount. Under the plain language of the statute, the authority of the trial court was triggered, allowing it to exercise discretion in determining the subrogation amount. Therefore, the trial court possessed subject matter jurisdiction pursuant to N.C.G.S. § 97-10.2(j) to determine the subrogation amount.

Appellants ask us to draw a distinction between "determining" the amount of a subrogation lien – which, in their view, a trial court lacks subject matter jurisdiction over because the amount of the lien is statutorily set – and "reducing" or "eliminating" the lien – over which, according to Appellants, a trial court possesses subject matter jurisdiction, but only in a limited set of circumstances. We find no support for this argument in the text of N.C.G.S. § 97-10.2(j) or this Court's precedent.

N.C.G.S. § 97-10.2(j) itself uses the word "determine," and states that, after a proper party has applied to a judge "to *determine* the subrogation amount," the judge "shall *determine*, in his discretion, the amount, if any, of the employer's lien." N.C.G.S. § 97-10.2(j) (emphases supplied). It is true, as Appellants note, that cases from this Court have used an assortment of verbs, sometimes in the same case, to describe the trial court's powers under N.C.G.S. § 97-10.2(j). *See, e.g.*, *Alston v. Fed. Express Corp.*, 200 N.C. App. 420, 424-25, 684 S.E.2d 705, 708 (2009) (stating the trial court has discretion under N.C.G.S. § 97-10.2(j) to "adjust" the amount of a workers' compensation lien"); *Childress v. Fluor Daniel, Inc.*, 172 N.C. App. 166, 168-69, 615 S.E.2d 868, 869-70 (2005) (stating an employer's lien on third party recovery can be "reduced or eliminated" pursuant to N.C.G.S. § 97-10.2); *id.* at 169, 615 S.E.2d at 870 (noting that N.C.G.S. § 97-10.2(j) explicitly gives the trial court jurisdiction to "set" the amount of the workers' compensation subrogation lien). However, cases from this Court and our Supreme Court have also used "determine," the statutory term. *Johnson v. Southern Industrial Constructors*, 347 N.C. 530, 535, 495 S.E.2d 356, 358 (1998); *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 326 (1996); *Holden v. Boone*, 153 N.C. App. 254, 259, 569 S.E.2d 711, 714 (2002); *Levasseur*, 139 N.C. App. at 238, 533 S.E.2d at 513-14. Given use of the term "determine" by both appellate courts to describe the trial court's powers under N.C.G.S. § 97-10.2(j), and use of that term by the General Assembly in drafting N.C.G.S. § 97-10.2(j), we decline to draw an unyielding distinction between "reducing" or "eliminating" a workers' compensation subrogation lien, and "determining" the amount of such a lien. Pursuant to N.C.G.S. § 97-10.2(j), the trial court possessed subject matter jurisdiction to rule on Foremost's application to "determine" the subrogation amount.

C. Interpretation of N.C.G.S. § 97-10.2

[3] Appellants argue the trial court erred in its interpretation of N.C.G.S. § 97-10.2. They contend the trial court miscalculated the statutory amount of a workers' compensation subrogation lien, and erred by concluding that a workers' compensation lien cannot exceed the amount of proceeds recovered against the third party tortfeasor. We review the trial court's statutory interpretation *de novo*. *A&F Trademark, Inc. v. Tolson*, 167 N.C. App. 150, 153, 605 S.E.2d 187, 190 (2004) (citations omitted). Statutory interpretation begins with the plain meaning of the words of the statute. *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997) (citation omitted).

The present case involves a situation in which the amount paid by the employee and its workers' compensation servicing agent is much

greater than the amount of the third party recovery; while Neuwirth and Brentwood paid $528,665.61 in workers' compensation benefits, Plaintiff was awarded a substantially smaller sum, $285,000.00, in his third party suit against Defendant. Appellants argue that the amount of the lien may exceed the amount of proceeds recovered against a third party tortfeasor. We disagree.

N.C.G.S. § 97-10.2 provides, as relevant to this argument:

> (f)(1) . . .if an award final in nature in favor of the employee has been entered by the Industrial Commission, then *any amount obtained by any person* by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> . . .
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
>
> . . .
>
> (h) In any . . . settlement with the third party, every party to the claim for compensation *shall have a lien to the extent of his interest under (f) hereof upon any payment made* by the third party by reason of such injury . . . and such lien may be enforced against any person receiving such funds.

N.C.G.S. §§ 97-10.2(f)(1), (h) (emphasis added). A reading of N.C.G.S. §§ 97-10.2(f)(1) and (h) confirms that the amount of a workers' compensation subrogation lien cannot exceed the amount of proceeds recovered from third party tortfeasors. N.C.G.S. §97-10.2(h) gives an employer who has paid workers' compensation benefits a "lien to the extent of his interest *under (f) hereof upon any payment made* by the third party[.]" N.C.G.S. § 97-10.2(h) (emphasis added). N.C.G.S. § 97-10.2(f)(1), in turn, states that the only funds subject to the lien are the "amount obtained . . . from the third party[.]" Intuitively, the Industrial Commission cannot disburse, and the employer cannot have a lien on, an amount larger than the amount actually recovered from the third party tortfeasor, in this

case $285,000.00. *See also Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 374, 553 S.E.2d 89, 91-92 (2001) ("If [an] employee is injured by a third party, the non-negligent employer must still pay workers' compensation benefits, but can claim a subrogation lien *on any proceeds the employee wins in a subsequent lawsuit* against the third party." (emphasis added) (citation omitted)); George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance* § 1:12 n.4 (2015-16 ed.) (noting that N.C.G.S. §§ 97-1 et seq. "gives the employer and its workers' compensation insurer a lien *on payments made* to the injured employee by any third-party tortfeasor, to the extent of the workers' compensation benefits paid to the employee. (emphasis added)). Accordingly, we hold that where the amount of workers' compensation benefits paid by the employer and their servicing agent to an employee is greater than all amounts obtained by the employee from a third party tortfeasor, the amount of the workers' compensation lien is equal to the amount of the judgment, and shall be disbursed pursuant to N.C.G.S. § 97-10.2.

D. Abuse of Discretion

[4] Appellants next argue the trial court abused its discretion in determining the amount of the workers' compensation subrogation lien to be $190,000.00. N.C.G.S. § 97-10.2(j) "grants the trial court discretion to determine the amount of a workers' compensation lien and the trial court's decision is reviewed on appeal under an abuse of discretion standard." *Kingston v. Lyon Constr., Inc.*, 207 N.C. App. 703, 711, 701 S.E.2d 348, 354 (2010) (citation omitted). "In exercising its discretion, the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported by findings of fact and conclusions of law sufficient to provide for meaningful appellate review." *Id.* (quotation marks, ellipses, and citation omitted).

In its order determining the amount of Neuwirth's and Brentwood's workers' compensation subrogation lien, the trial court made fourteen findings of fact cogently identifying the parties and explaining the proceedings, both in this case and in the workers' compensation case between Plaintiff, Neuwirth, and Brentwood. The trial court then made eleven conclusions of law that demonstrate its thorough consideration of the necessary statutory factors. Beginning with the amount of the judgment – $285,000.00 – the trial court correctly identified that court costs, attorney's fees, and interest are not subject to the workers' compensation subrogation lien. *See* N.C.G.S. § 97-10.2(f)(1)a.–b. (providing that a judgment against a third party tortfeasor "shall be disbursed" first to the "payment of actual court costs" and second to the payment of the "fee of the attorney representing the person making settlement or

obtaining judgment"); *Bartell v. Sawyer*, 132 N.C. App. 484, 486, 512 S.E.2d 93, 94 (1999) (holding that a workers' compensation lien holder is not entitled to "a pro-rata share of the pre-judgment interest [a] plaintiff received on his third party recovery").

Nevertheless, Appellants argue that the trial court abused its discretion by determining the workers' compensation subrogation lien was $190,000.00, because doing so "effectively releas[ed] Foremost and GEICO from liability[.]" We do not agree. Foremost and GEICO contractually obligated themselves to provide Plaintiff with UIM coverage in satisfaction of the judgment obtained against Defendant. The arbitration panel decided Plaintiff was entitled to $285,000.00 in compensation for injuries he sustained – not $528,665.61. The trial court – in accordance with N.C.G.S. §§ 97-10.2(f)(1)(2) and *Bartell* – then excluded court costs, attorney's fees, and interest from the amount of the judgment, and determined the amount of Neuwirth's and Brentwood's workers' compensation subrogation lien to be $190,000.00. The trial court did not abuse its discretion in doing so.

E. Sufficiency of the Trial Court's Findings of Facts

[5] Finally, Appellants argue the trial court failed to make statutorily-required findings of fact in its 4 June 2015 order. Alleged violation of a statutory mandate presents a question of law, which we review *de novo* on appeal. *See Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998). N.C.G.S. § 97-10.2(j) provides in relevant part:

> After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, *and the amount of cost of the third-party litigation to be shared between the employee and employer.* The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

N.C.G.S. § 97-10.2(j) (emphasis added). Appellants contend that N.C.G.S. § 97-10.2(j) mandates a finding by the trial court regarding the "amount

of costs of the third-party litigation to be shared between the employee and employer" (the "cost sharing consideration"), and that, in the present case, the trial court's order is incomplete for failing to make any findings of fact regarding the cost sharing consideration. While we agree with Appellants that, under our precedents, an order must contain a finding of fact regarding the cost of the third party litigation to be shared between the employee and employer, we conclude that the trial court's order in the present case adequately addressed this required consideration.

Subsection (j) consists of four sentences; the second and third sentences (quoted above) are relevant to this argument. Whether N.C.G.S. § 97-10.2(j) requires findings of fact regarding the cost of third-party litigation to be shared between an employer and employee was squarely addressed by this Court in *In re Estate of Bullock*, 188 N.C. App. 518, 655 S.E.2d 869 (2008). In *Bullock*, this Court quoted the second and third sentences of subsection (j), and held that "it is clear from the use of the words 'shall' and 'and' in subsection (j), that the trial court must, at a minimum, consider the factors that are expressly listed in the statute. Otherwise, such words are rendered meaningless." 188 N.C. App. at 526, 655 S.E.2d at 874. The Court then went on to describe "the cost of litigation to be shared between [employee] and [employer]" as a "mandated statutory factor[]," and faulted the trial court in that case for not making a finding nor giving "any indication" that the factor was "considered." *Id.* In accord with *Bullock*, a trial court determining the amount of a workers' compensation subrogation lien is required, at a minimum, to take into consideration the cost of the third party litigation to be shared between the employee and employer.[4]

In the present case, we conclude that the trial court's order gives sufficient indication that the "mandatory statutory factor" regarding the cost of the third party litigation to be shared between the employee and employer was considered. The trial court's order notes that: (1) the arbitration panel found that Plaintiff was entitled to recover $285,000.00 against Defendant; (2) the court costs were $160.00; (3) Plaintiff's attorney's fees as of the date of the order totaled $83,333.33 – $50,000.00 of which is attributed to work done as part of the workers' compensation case, and the other $33,333.33 originating from Nationwide's payment of

4. In its brief, GEICO contends a plain reading of N.C.G.S. § 97-10.2(j) shows there is no such requirement, and urges this Court to disregard cases which hold to the contrary. Of course, "[w]e have no authority to overrule this Court's prior decision" in *Bullock*. *Wells v. Cumberland Cty. Hosp. Sys., Inc.*, 181 N.C. App. 590, 593, 640 S.E.2d 400, 403 (2007); *see also In the Matter of Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. We therefore decline GEICO's invitation to do so.

$100,000.00 in the third-party litigation; (4) Plaintiff's attorney's fee agreement with Plaintiff "relative to the civil action is one third (1/3) of the amount paid on the judgment in this case, after litigation expenses and costs are paid;" and (5) the "workers[']compensation carrier intend[ed] to allow [Plaintiff's attorney] to recover his agreed upon attorney fee and . . . exclude[d] that attorney fee from the amount of the Employer/Workers['] Compensation carrier's subrogation lien."

In its order, the trial court considered the amount Plaintiff and his attorney had received, and would receive in the future, as a result of the third party litigation; took into account the court costs that had been paid; and noted that Neuwirth and Brentwood intended to exclude Plaintiff's attorney's fees from the amount of the workers' compensation subrogation lien. Taken together, these findings of fact are sufficient to show that the trial court considered "the amount of cost of the third-party litigation to be shared between the employee and employer." N.C.G.S. § 97-10.2(j); *see also Bullock*, 188 N.C. App. at 526, 655 S.E.2d at 874.

III. Conclusion

For the reasons stated, Foremost had standing to apply for a determination of the subrogation amount, and the trial court possessed subject matter jurisdiction to determine the amount. The trial court's 4 June 2015 order determining the amount of Neuwirth's and Brentwood's workers' compensation subrogation lien is affirmed.

AFFIRMED.

Judges HUNTER JR. and DILLON concur.

HATCHER v. MATTHEWS

[248 N.C. App. 491 (2016)]

BRYANT HATCHER, PLAINTIFF
v.
RENEE MATTHEWS, DEFENDANT

No. COA15-1167

Filed 2 August 2016

Child Custody and Support—child custody modification—improper best interests analysis—substantial change in circumstances required

The trial court erred in a child custody modification case by failing to apply the correct legal standard. It conducted a best interests analysis without first determining whether a substantial change in circumstances had occurred. The case was vacated and remanded.

Appeal by plaintiff from order entered 27 April 2015 by Judge Michelle Fletcher in Guilford County District Court. Heard in the Court of Appeals 11 April 2016.

Samuel S. Spagnola for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

DAVIS, Judge.

Plaintiff Bryant Hatcher ("Hatcher") appeals from a custody order determining that the best interests of his children required that they remain in the primary physical custody of their mother, Defendant Renee Matthews ("Matthews"). After careful review, we vacate the order and remand for further proceedings.

Factual Background

Hatcher and Matthews were married in 1998 and divorced in 2009. Following their divorce, the Circuit Court of Fairfax County, Virginia entered an order captioned "Final Custody Order" (the "Virginia Order") on 10 December 2010 giving Matthews sole legal custody and primary physical custody of their children and specifying regular visitation periods for Hatcher.[1] The order was registered in North Carolina on 22 July 2011.

1. We note that the Virginia Order references an earlier custody order entered January 2009 in which the same Virginia trial court had placed sole legal custody and primary physical custody with Matthews. While the January 2009 order is not contained in the record on appeal, its absence does not preclude us from addressing the issues raised in this appeal.

Upon Matthews' 26 August 2011 motion filed in Guilford County District Court for an emergency *ex parte* custody order, the trial court entered an emergency custody order on 30 August 2011 and then a temporary custody order on 23 November 2011, adjusting Hatcher's visitation pending a new custody hearing. On 20 April 2012, Hatcher filed a motion to modify custody. In his motion, he provided factual allegations in support of his assertion that Matthews had "done everything in her power to completely alienate any form of a relationship between [him] and the minor children[.]" He also claimed that because no final custody order had ever been entered in the case he was not required to show a substantial change in circumstances in order to modify custody. However, he contended that even assuming such a finding was, in fact, necessary, Matthews' recent conduct constituted a substantial change in circumstances.

After the issuance of two temporary orders by the trial court, a hearing was held beginning 29 January 2015 before the Honorable Michelle Fletcher in Guilford County District Court. At the hearing, the trial court heard testimony from each of the parties and admitted into evidence a child custody evaluation that had been conducted at the court's direction.

The trial court issued a new custody order on 27 April 2015, which (1) gave the parties joint legal custody of the children; (2) determined that it was "in the best interests of the minor children that their primary [physical] custody remain with [Matthews]"; and (3) adjusted Hatcher's visitation rights with the children. Hatcher filed a timely notice of appeal.

Analysis

On appeal, Hatcher argues that the trial court erred in awarding primary physical custody to Matthews because (1) its findings of facts did not support its legal conclusion that the best interests of the children would be served by Matthews retaining primary physical custody; and (2) at least one of its findings of fact was not supported by competent evidence in the record.

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). If so, we "must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254. The issue of whether a trial court has utilized the correct legal standard in ruling on a request for modification of custody is a question of law that we review *de novo*. *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011).

N.C. Gen. Stat. § 50-13.7(b) addresses the modification of out-of-state custody orders.

> [W]hen an order for custody of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and a showing of changed circumstances, enter a new order for custody which modifies or supersedes such order for custody.

N.C. Gen. Stat. § 50-13.7(b) (2015).

However, this requirement that a party seeking modification of custody must show a substantial change in circumstances applies only when the preexisting custody order is a permanent (or final) order rather than merely a temporary one.

> If a child custody order is final, a party moving for its modification must first show a substantial change of circumstances. If a child custody order is temporary in nature . . . the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances.

LaValley v. LaValley, 151 N.C. App. 290, 292, 564 S.E.2d 913, 914-15 (2002) (internal citations and footnote omitted).

The issue of whether an order is temporary or final in nature is a question of law that is reviewed *de novo* on appeal. *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009). An order is temporary "if either (1) it is entered without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Id.* (citation, quotation marks, and brackets omitted). If an order does not meet any of these criteria, it is considered permanent. *Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734. A trial court's designation of an order as "temporary" or "permanent" is not dispositive or binding on an appellate court. *Smith*, 195 N.C. App. at 249, 671 S.E.2d at 582.

In determining whether the trial court conducted the correct legal analysis in its 27 April 2015 order, we must first determine whether the Virginia Order was a temporary or permanent custody order. Based on the factors set out above, we conclude that the Virginia Order was a permanent custody order as it (1) was not entered into without prejudice to either party; (2) did not state a reconvening time; and (3) determined all of the issues, including legal and physical custody and ongoing visitation.

Thus, because the Virginia Order was a permanent custody order, the trial court was required to engage in a two-step analysis in addressing Hatcher's motion to modify custody. First, the court had to determine whether a substantial change in circumstances affecting the welfare of the children had occurred. If — and only if — the trial court expressly found such a change in circumstances was it then permitted to determine whether a modification of custody would be in the best interests of the children. *See West v. Marko*, 141 N.C. App. 688, 690-91, 541 S.E.2d 226, 228 (2001) ("Permanent custody orders can only be modified by *first* finding that there has been a substantial change of circumstances affecting the welfare of the child. Once the trial court makes the threshold determination that a substantial change has occurred, the trial court then must consider whether a change in custody would be in the best interests of the child." (internal citations omitted and emphasis added)).

"There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified." *Hibshman v. Hibshman*, 212 N.C. App. 113, 124, 710 S.E.2d 438, 445 (2011) (citation and emphasis omitted). As such, "the trial court commits reversible error by modifying child custody absent any finding of substantial change of circumstances affecting the welfare of the child." *Cox v. Cox*, __ N.C. App. __, __ 768 S.E.2d 308, 316 (2014) (citation omitted).

We conclude that the trial court here did not apply the correct legal standard in that it conducted a best interests analysis without first determining whether a substantial change in circumstances had occurred. The court's 27 April 2015 order contains no findings regarding a change in circumstances and instead proceeds straight into a best interests analysis. Moreover, the trial court's order, without explanation, purported to change the children's legal custody — which the Virginia Order had vested solely with Matthews — to joint legal custody between Matthews and Hatcher.

In his brief to this Court, Hatcher acknowledges that the trial court would have been required to find a substantial change in circumstances before modifying custody and that its order did not expressly do so. He argues, however, that *Raynor v. Odom*, 124 N.C. App. 724, 478 S.E.2d 655 (1996), supports his contention that "a trial court need not use the term 'substantial change of circumstances' for a substantial change of circumstances to exist and to be documented in the court's order."

However, Hatcher misreads our decision in *Raynor*. In that case, the issue was whether "the properly supported legal conclusion of the trial

court that the natural mother is an unfit parent satisf[ied] the statutory requirement of finding a change in circumstances . . . ." *Id.* at 733, 478 S.E.2d at 661. We held that

> [u]nder the [initial custody order] plaintiff was found to be a fit and proper parent; therefore, a finding of unfitness in a subsequent order is a substantial change in circumstances. Furthermore, because the standard for finding unfitness is much higher than the standard for finding a change in circumstances, it would seem absurd for a finding of unfitness to not be considered a change of circumstances . . . .

Id. at 734, 478 S.E.2d at 661.

Thus, the trial court's specific finding in *Raynor* that the mother had become unfit to serve as a parent to her child constituted such a fundamental change in circumstances that an explicit supplemental finding that there had been a "substantial change in circumstances" was unnecessary. In the present case, Hatcher has failed to identify any portion of the trial court's order containing a finding as to Matthews comparable to the one in *Raynor*.

Therefore, because the trial court applied an incorrect legal standard in its 27 April 2015 order, we must vacate the order and remand for further proceedings. *See Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.*, 187 N.C. App. 658, 661, 654 S.E.2d 495, 498 (2007) ("We hold that the trial court applied an incorrect legal standard in ruling on this motion and we remand this portion of the case for further proceedings."); *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 543, 485 S.E.2d 867, 869 (1997) (reversing and remanding "for findings and conclusions using the proper standard"); *see also McMillan v. Town of Tryon*, 200 N.C. App. 228, 238, 683 S.E.2d 747, 754 (2009) ("[W]e remand the matter to the trial court for imposition of the proper standard of review . . . .").

On remand, we direct the trial court to enter a new order containing express findings as to whether a substantial change in circumstances has occurred. If the court determines that a substantial change has, in fact, occurred, then a best interests analysis will be necessary.[2] If, conversely, the trial court finds that no substantial change in circumstances

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2. Because of our holding that the trial court failed to apply the correct legal standard, we decline to address Hatcher's arguments regarding whether competent evidence supported the trial court's findings of fact and whether those findings supported its conclusions of law.

has occurred, then modification of custody would be inappropriate. We leave it to the trial court's discretion whether the receipt of new evidence and a new hearing are required.

Conclusion

For the reasons stated above, we vacate the trial court's 27 April 2015 order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Chief Judge McGEE and Judge STEPHENS concur.

DENISE MALLOY HUBBARD, Plaintiff
v.
NORTH CAROLINA STATE UNIVERSITY and ANITA STALLINGS
in her individual and official capacity, Defendants

No. COA16-38

Filed 2 August 2016

1. Employer and Employee—whistleblower claim—causal connection—retaliatory motive

The trial court properly granted summary judgment for defendants in a whistleblower action arising from the termination of plaintiff's employment from N.C. State. Assuming that plaintiff reported a protected activity, she could not produce evidence to support causal connection, an essential element of her claim. A mixed motive analysis was not appropriate because plaintiff failed to present any direct evidence of a retaliatory motive, and plaintiff failed to raise a factual issue regarding whether the proffered reasons for the discharge were pretextual.

2. Employer and Employee—whistleblower claim—dismissal—tortious interference with contract

The trial court did not err by awarding summary judgment to defendants for tortious interference with contract following a whistleblower claim and dismissal. Although plaintiff argued that her supervisor (Stallings) acted without justification when she induced her employer (NCSU) to discharge her, plaintiff could not establish that Stallings acted without justification, an essential element of her claim.

3. Employer and Employee—whistleblower report—free speech —adequate state law remedy

Plaintiff's claim under N.C.G.S. § 126-84 arising from a whistleblower report and dismissal was an adequate state law remedy, and the trial court properly granted summary judgment for defendants on plaintiff's constitutional claim.

Appeal by plaintiff from Judgment entered 7 October 2015 by Judge James K. Roberson in Wake County Superior Court. Heard in the Court of Appeals 8 June 2016.

NICHOLS, CHOI & LEE, PLLC, by M. Jackson Nichols and Catherine E. Lee, for plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Laura H. McHenry, for defendants.

ELMORE, Judge.

Following termination from her employment, Denise Malloy Hubbard (plaintiff) filed a complaint on 12 November 2014 against North Carolina State University (NCSU) and Anita Stallings (Stallings) in her official and individual capacities (collectively defendants). Plaintiff appeals from the trial court's 7 October 2015 award of summary judgment in favor of defendants. We affirm.

I. Background

In October 2004, plaintiff began working as the Director of Development in the College of Physical and Mathematical Sciences, which became the College of Sciences in July 2013. Throughout plaintiff's employment at NCSU, Stallings was plaintiff's direct supervisor. Toward the end of 2013, plaintiff began to report alleged misconduct by Stallings. Such reporting formed the basis of plaintiff's lawsuit.

On 24 April 2014, Dan O'Brien, Senior Employee Relations Strategic Partner, and Stallings met with plaintiff and gave her a letter signed by Warwick A. Arden, Provost and Executive Vice Chancellor, which stated that her at-will employment with NCSU would be terminated, effective 24 July 2014. Subsequently, plaintiff filed a complaint in Wake County Superior Court on 12 November 2014, alleging (1) a violation of the North Carolina Whistleblower Act against NCSU and Stallings in her individual and official capacities; (2) wrongful termination in violation of public policy against NCSU and Stallings in her official capacity; (3) tortious

interference with contract against Stallings in her individual capacity; and (4) a direct constitutional claim against NCSU and Stallings in her official and individual capacities.

On 13 January 2015, defendants filed an answer and motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of our Rules of Civil Procedure. On 7 April 2015, the trial court entered an order granting defendants' motion to dismiss plaintiff's claim for wrongful termination in violation of public policy. The trial court denied defendants' motion with respect to plaintiff's other three claims. Subsequently, on 5 August 2015, defendants filed a motion for summary judgment. After a hearing, the trial court entered an order on 7 October 2015 granting defendants' motion for summary judgment on plaintiff's remaining three claims. Plaintiff appeals from that order.

II. Analysis

"The standard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (citing *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972)). "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980) (citations omitted).

A. North Carolina Whistleblower Act Claim

[1] In order to maintain a claim under the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84, *et seq.*, a plaintiff must prove by a preponderance of the evidence the following three elements: "(1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005).

N.C. Gen. Stat. § 126-84(a) (2015) states,

> (a) It is the policy of this State that State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:
>
> (1) A violation of State or federal law, rule or regulation;
>
> (2) Fraud;
>
> (3) Misappropriation of State resources;
>
> (4) Substantial and specific danger to the public health and safety; or
>
> (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

Here, plaintiff alleged that she reported protected activity as follows: On 2 December 2013, plaintiff met with NCSU Human Resources representatives Alicia Robinson (now Alicia Lecceardone) and Joyce Stevens, and reported the following concerns: accounting irregularities involving transfers of donor funds, which Stallings authorized, from restricted endowments to an unrestricted endowment; Stallings' extravagant personal expenses funded by unrestricted accounts; nepotism by Stallings; age and gender discrimination by NCSU and Stallings; EPA (Exempt from the State Personnel Act) designations for employees performing under SPA (Subject to the State Personnel Act) descriptions; and fear of retaliation by Stallings for reporting such concerns. On 6 January 2014, plaintiff met with Lecceardone and Ursula Hairston, Assistant Vice Provost for Equal Opportunity in the Office for Institutional Equity and Diversity (OIED), to discuss the same concerns she raised during the 2 December 2013 meeting. The following day, on 7 January 2014, plaintiff met with Cecile Hinson, Director of Internal Audit (IA), and Leo Howell, Assistant Director of IA at the time, and alleged that Stallings had improperly transferred donor funds among accounts, incurred excessive travel expenses, and extravagantly spent donor funds. IA commenced a thorough investigation, and it concluded in a final report that plaintiff's allegations could not be substantiated.

Assuming that plaintiff reported protected activity, the trial court properly granted summary judgment in favor of defendants because plaintiff cannot produce evidence to support an essential element of

her claim, causal connection.[1] Relevant here, a plaintiff may seek to establish a causal connection between the protected activity and adverse employment action through "circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual." *Newberne*, 359 N.C. at 790, 618 S.E.2d at 207 (citation omitted). Such cases are commonly referred to as "pretext" cases. *Id.*

Or, "when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken." *Id.* at 791, 618 S.E.2d at 208 (citation and quotations omitted). Such cases are commonly referred to as "mixed-motive" cases. *Id.* (citations and quotations omitted).

Here, plaintiff claims that she has direct evidence of a retaliatory motive and this case is, therefore, governed by the "mixed-motive" analysis. The "direct evidence" required in a mixed-motive case has been defined as "evidence of conduct or statements that both reflect directly the alleged [retaliatory] attitude and that bear directly on the contested employment decision." *Id.* at 792, 618 S.E.2d at 208–09 (citation omitted). Because plaintiff has failed to present any direct evidence of a retaliatory motive, a mixed-motive analysis is not appropriate.

Alternatively, plaintiff also claims that circumstantial evidence establishes that the adverse action was retaliatory under the "pretext" analysis and the burden shifting schemes developed by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The *Newberne* Court described the analysis as follows:

> Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a prima facie case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. *See Burdine*, 450 U.S. at 252–53, 67 L. Ed. 2d at 215 (citing *McDonnell Douglas*, 411 U.S. at 802, 36 L. Ed. 2d at 677–78). If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. *Id.* (citing

1. The parties do not dispute that NCSU terminated plaintiff's employment, satisfying the second element, adverse action.

> *McDonnell Douglas*, 411 U.S. at 804, 36 L. Ed. 2d at 679). The ultimate burden of persuasion rests at all times with the plaintiff. *Id.*

Newberne, 359 N.C. at 791, 618 S.E.2d at 207–08.

"[U]nder the *McDonnell Douglas/Burdine* burden-shifting proof scheme, in order to survive summary judgment, Plaintiff would have to raise a factual issue regarding whether these proffered reasons for firing Plaintiff were pretextual." *Manickavasagar v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, ___, 767 S.E.2d 652, 659 (Dec. 31, 2014) (COA14-757). " 'To raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's non-retaliatory motive.' " *Id.* at ___, 767 S.E.2d at 659 (quoting *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 317, 567 S.E.2d 803, 811 (2002)).

Plaintiff argues that defendants' alleged reasons for terminating her employment were pretextual because she was meeting development goals; she followed Stallings' direction on fundraising; she received no coaching or mentoring related to alleged low performance; she did not incur unexpected or excessive absences or tardiness; and she did not engage in inappropriate communications, create divisions, or behave disrespectfully. Plaintiff's argument hinges on her belief that Stallings personally decided to terminate plaintiff's employment on 21 March 2014, following Stallings' 19 March 2014 interview with IA and the fact that Stallings cancelled a meeting on 20 March 2014, citing a personnel issue.

Defendants argue, "Plaintiff's suspicions about when Stallings began discussing Plaintiff's discontinuation with HR are irrelevant; the affidavits, exhibits and deposition testimony supporting Defendants' motion for summary judgment indicate that the process began long before the cancelled meeting[.]" Defendants contend that "Stallings had absolutely no knowledge" about plaintiff's reports, and plaintiff's "conclusory allegations and unsupported speculation are insufficient to discredit Defendants' legitimate non-retaliatory explanation for Plaintiff's discontinuation[.]" Defendants maintain that "[p]laintiff was discontinued as a result of her failure to meet performance goals and pattern of unprofessional conduct over a significant period of time[.]"

Assuming that plaintiff can establish a *prima facie* case of unlawful retaliation, defendants have met their burden of articulating a lawful reason for the employment action at issue. Plaintiff cannot meet

her burden of demonstrating that defendants' proffered explanation is pretextual. *Newberne*, 359 N.C. at 791, 618 S.E.2d at 207–08. Here, the record evidence shows that Stallings expressed dissatisfaction with plaintiff's job performance and behavior in the workplace for around eighteen months before officially recommending that NCSU discontinue her employment. Plaintiff's own statements reveal that issues had been ongoing since the summer of 2012. Stallings repeatedly discussed the issues with Human Resources and the Dean of the College of Sciences, and allowed a time period for possible improvement, to no avail.

Stallings' "Documentation of Issues with Denise Hubbard" detailed with specificity numerous problem areas, including, *inter alia*, plaintiff's low performance, unacceptable behavior with team members as well as other staff and donors, resistance in taking direction particularly involving directives to focus on individual giving as opposed to corporate fundraising, failure to engage in "quality" visits and properly record such visits, decision to implement her own agenda rather than the agenda set by the Dean, failure to timely submit contact reports, decision to inform a donor about a committee that had not been approved regarding a fund that she had been told was not "high priority," and attempting to undermine Stallings' authority in front of other staff members.

Jo-Ann Cohen, Associate Dean for Academic Affairs in the College of Sciences, averred that she felt plaintiff was the source of dissension between the Office of Diversity and Student Services, and the Advancement Office. During the fall of 2013, she informed Daniel Solomon, then Dean of the College of Sciences, and O'Brien of her concerns and belief that plaintiff's actions were creating a divisive atmosphere across the Academic Affairs and Advancement units. Solomon's and O'Brien's affidavits confirm that Cohen reported such concerns at that time. Cohen also averred that Stallings told her that plaintiff's employment was going to be discontinued before Stallings learned that the Office of Advancement would be audited, and Stallings believed it was only a routine audit.

In Lecceardone's affidavit, she stated that during the 2 December 2013 meeting with plaintiff and Stevens, plaintiff shared concerns about her salary being less than that of younger male co-workers, and she mentioned that she had received poor annual reviews from Stallings even though she was "making her numbers." Plaintiff gave Lecceardone a packet of notes at the meeting, outlining her concerns. In plaintiff's packet of notes, under "Exclusions," she stated that she helped create the Alumni and Friends Advisory Board, SCOPE Academy, and ACCESS Day, but when Marla Gregg was hired, Gregg was given responsibility

for all three. Under "Additional," she stated that in the past two years, she had been excluded from events with donors, luncheons to introduce new department heads, and prospect strategy sessions for events. She also noted, "Without my input, Stallings redesigned the geographical areas and departments of responsibility for the Development Officers." Under "Reason for Current Concerns," plaintiff stated, "Relationship with Stallings has been deteriorating for the past 18 months. Stallings has excluded me from planning and areas of responsibility which I had previously been an active participant." Moreover, plaintiff noted, "I am currently scheduled for a 'mid-year review,' an event that had never occurred in my prior 9 years at NCSU. . . . After Stallings met with Dan O'Brien . . . on 11/22, she cancelled my participation in the 12/2/13 meeting and scheduled the 'mid-year review' for 12/5/13."

Lecceardone also averred that during the 6 January 2014 meeting with plaintiff and Hairston, plaintiff again claimed that Stallings had been leaving her out of meetings about assignments, and plaintiff complained that she was not invited to football games with donors. Plaintiff stated that she knew Stallings was having "secret HR meetings" with O'Brien, and she was aware that they had met on 22 November 2013. Lecceardone stated that based on the wide range of topics discussed and the dated issues, "[i]t was clear to me that Plaintiff believed her job to be in jeopardy and she was bringing forth anything and everything relating to her supervisor." In Hairston's affidavit, she stated that during the meeting, plaintiff "indicated to us that she thought her job was at risk because she was receiving criticism for her 'low numbers.' " Hairston's handwritten notes from the meeting reveal that one of plaintiff's concerns was that she was "no longer included in decision making for games."

In Hinson's affidavit, she stated that on 7 January 2014, "plaintiff admitted during the meeting that there was a breakdown in her relationship with Defendant Stallings." Hinson also stated, "It is my practice and that of members of the Office of Internal Audit to never inform any person or department being investigated as to whom initiated the complaint."

Mike Dickerson, Director of Information and Accounting Systems in Foundations Accounting and Investments, averred that Stallings contacted him in February 2014 and asked if she should be concerned about the audit. Dickerson told Stallings that IA had been planning to restart its randomized audits, "that they must be getting started back on that endeavor[,] . . . [and] that she need not be concerned about the audit[.]"

O'Brien averred that Stallings contacted him in the summer of 2013 to discuss plaintiff's performance and behavioral issues. At that time, he and Stallings discussed the possibility of discontinuing plaintiff's at-will employment. Stallings stated that a readiness report completed by consultant Charles Witzleben confirmed her suspicions about plaintiff's productivity. Witzleben's affidavit reveals that plaintiff's "time spent on corporate donors was not producing the results relative to time expended[.]" O'Brien stated that Stallings sought guidance on how to move forward with plaintiff, and Stallings suggested giving plaintiff six to twelve months to improve, unless plaintiff's performance and behavioral issues worsened, in which case she would move to discontinue plaintiff's employment. Based on his experience working in human resources, he stated that six to twelve months was more than enough time for an employee to show or fail to show improvement. O'Brien stated that he and Stallings discussed developing an improvement plan and conducting a mid-year review for plaintiff.

O'Brien also averred that he met with Stallings on 22 November 2013 regarding an altercation with plaintiff the previous day, which was prompted by a conflict about an upcoming football game. According to O'Brien, Stallings stated that plaintiff was unprofessional and disrespectful, and her behavior was impacting the well-being, efficiency, and effectiveness of the office. O'Brien and Stallings again discussed discontinuing plaintiff's employment. O'Brien and Stallings met on 5 February 2014 regarding continued problems with plaintiff's performance. O'Brien stated that at this meeting, Stallings indicated she was ready to begin the process to discontinue plaintiff's employment.

In Solomon's affidavit, he stated that beginning in 2011, Stallings had concerns about plaintiff and her reluctance to shift her fundraising focus from corporate gifts to individual giving of major gifts. By the summer of 2013, plaintiff did not adjust her focus, and Stallings again relayed her concerns about plaintiff's performance. Plaintiff began having negative interactions with Stallings and others in the Advancement Office, requiring Stallings to seek guidance from Human Resources and specifically, O'Brien, in Employee Relations. Solomon stated that in February 2014, Stallings informed him that she wanted to discontinue plaintiff's employment. Solomon stated that he gave his approval for Stallings to initiate the steps to move forward with discontinuation. He further stated that Stallings' decision was based on her assessment that plaintiff was no longer adding value to the unit and was not taking steps to work on deficiencies.

In March 2014, Stallings provided Solomon with a written overview of the efforts she made over the last eighteen months to work with plaintiff. Solomon, O'Brien, and Stallings met in April 2014 to discuss plaintiff's departure, noting that because of her involvement with donors, "it was important to ensure that the discontinuation was handled appropriately and that a plan was in place to notify individual donors with whom Plaintiff had worked over the years." Additionally, he stated that "the timing of discontinuation was affected by a vacation that Plaintiff had planned around that same time period." Solomon averred that he "was completely comfortable making the recommendation to the Provost to discontinue Plaintiff's employment."

Based on the above sworn statements of multiple individuals, as well as plaintiff's own admissions in her reports, the issues that ultimately prompted NCSU to terminate plaintiff's employment arose around eighteen months prior to the IA investigation. The record evidence shows that Stallings allotted a specific time period for plaintiff to improve, which did not prove successful, and that the decision to terminate plaintiff's employment was based on plaintiff's performance and behavior. Moreover, Stallings made the recommendation to terminate plaintiff's employment prior to being interviewed by IA and prior to learning that plaintiff alleged misconduct. Plaintiff's "belief" to the contrary, without more, does not constitute specific, non-speculative facts, discrediting defendants' non-retaliatory motive. *Manickavasagar*, ___ N.C. App. at ___, 767 S.E.2d at 659. The official letter from the Provost informing plaintiff that her employment was terminated came several weeks later because multiple levels of approval were required. The delay was also due to the need to individually inform certain donors as well as plaintiff's scheduled vacation.

Plaintiff has failed to raise a factual issue regarding whether the proffered reasons for terminating her employment were pretextual. *Manickavasagar*, ___ N.C. App. at ___, 767 S.E.2d at 659. Accordingly, because defendants met their burden of showing that plaintiff cannot produce evidence to support an essential element of her claim—that there is a causal connection between the protected activity and the adverse action taken against her—the trial court properly granted summary judgment in favor of defendants. *Newberne*, 359 N.C. at 788, 618 S.E.2d at 206.

B. Tortious Interference With Contract Claim

[2] Next, plaintiff claims that the trial court erred in awarding defendants summary judgment on her tortious interference with contract claim.

To survive a motion for summary judgment on a claim of tortious interference with contract, a plaintiff must forecast evidence of the following elements:

> (1) A valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person;
>
> (2) the outsider had knowledge of the plaintiff's contract with the third person;
>
> (3) the outsider intentionally induced the third person not to perform his contract with the plaintiff;
>
> (4) in doing so the outsider acted without justification; and
>
> (5) the outsider's act caused the plaintiff actual damages.

See Varner v. Bryan, 113 N.C. App. 697, 701, 440 S.E.2d 295, 298 (1994) (citing *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181–82 (1954)).

In *Smith v. Ford Motor Company*, our Supreme Court explained that the term "outsider" "appears to connote one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof." 289 N.C. 71, 87, 221 S.E.2d 282, 292 (1976). A "non-outsider," however, "is one who, though not a party to the terminated contract, had a legitimate business interest of his own in the subject matter." *Id.* Nonetheless, "one who is not an outsider to the contract may be liable for interfering therewith if he acted maliciously." *Varner*, 113 N.C. App. at 701–02, 440 S.E.2d at 298. "It is not enough, however, to show that a defendant acted with actual malice; the plaintiff must forecast evidence that the defendant acted with legal malice." *Id.* at 702, 440 S.E.2d at 298. "A person acts with legal malice if he does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties." *Id.*

At issue here is the fourth element of a claim. Plaintiff argues that "Stallings acted without justification when she induced NCSU to discharge [plaintiff.]" Further, plaintiff argues that although defendants attempt to justify plaintiff's discharge, "[s]ufficient evidence exists to raise a genuine issue of material fact as to the truth of each purported reason."

"In order to demonstrate the element of acting without justification, the action must indicate 'no motive for interference other than malice.' " *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 523, 586 S.E.2d 507, 510 (2003) (quoting *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 674, 541 S.E.2d 733, 738 (2001)). Here, plaintiff cannot

establish that Stallings acted without justification. For the reasons stated in the previous section, the affidavits and record evidence show that Stallings had legitimate reasons to recommend that plaintiff's employment be terminated. Accordingly, because defendants have shown that plaintiff cannot produce evidence to support an essential element of her claim, the trial court properly granted summary judgment in favor of defendants.

C. Constitutional Claim

[3] Lastly, plaintiff claims that the trial court "erred in dismissing [her] *Corum* claim." Plaintiff argues that she "presented evidence that her protected activity was a substantial or motivating factor in Defendants' decision to discharge her. Defendants cannot establish, by a preponderance of the evidence, that they would have discharged [her] in the absence of her protected activity."

Plaintiff alleged a direct constitutional claim against NCSU and Stallings in both her official and individual capacities for violating plaintiff's right to freedom of speech. It is well established, however, that a "plaintiff may assert his freedom of speech right only against state officials, sued in their official capacity." *Corum v. Univ. of North Carolina*, 330 N.C. 761, 788, 413 S.E.2d 276, 293 (1992) ("[P]laintiff cannot rely on the Constitution to support a claim for money damages against individuals, acting in their personal capacities for the alleged violation of freedom of speech rights recognized under the Constitution."); *Swain v. Elfland*, 145 N.C. App. 383, 391, 550 S.E.2d 530, 536 (2001) ("To the extent that plaintiff alleges a *Corum* claim against defendants in their individual capacity, the claim must be dismissed."). Accordingly, the trial court properly granted summary judgment in favor of Stallings based on the claim against her in her individual capacity.

In *Corum*, our Supreme Court held, "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. In *Swain v. Elfland*, this Court held that a claim based on an alleged violation of North Carolina's Whistleblower Act was an adequate state remedy that precluded a direct cause of action for a violation of a plaintiff's right to free speech under the North Carolina Constitution. 145 N.C. App. at 391, 550 S.E.2d at 536. Even though the plaintiff was unsuccessful on the Whistleblower Act claim, we held that the trial court properly dismissed the constitutional claim because the plaintiff had an adequate state law remedy available to him, which he pursued. *Id.*

Here, plaintiff's claim under N.C. Gen. Stat. § 126-84 is an adequate state law remedy for her alleged free speech violation. Accordingly, the trial court properly granted summary judgment in favor of defendants on plaintiff's constitutional claim.

III. Conclusion

The trial court did not err in granting defendants' motion for summary judgment on plaintiff's Whistleblower Act claim, tortious interference with contract claim, and constitutional claim.

AFFIRMED.

Judges DAVIS and DIETZ concur.

IN THE MATTER OF K.C. & W.G.

No. COA16-87

Filed 2 August 2016

Child Abuse, Dependency, and Neglect—permanency planning hearing—lack of notice

The trial court erred by holding a permanency planning review hearing without providing respondent mother with the statutorily required notice. The trial court scheduled a custody review but changed it to a permanency planning hearing, and respondent objected to the lack of notice.

Appeal by respondent from orders entered 26 October 2015 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 5 July 2016.

Richard Croutharmel for respondent-appellant.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for petitioner-appellee Orange County Department of Social Services.

Administrative Office of the Courts, by Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

ELMORE, Judge.

Respondent, the mother of the juveniles K.C. (Karen) and W.G. (Walter),[1] appeals from orders (1) awarding custody of Karen to her paternal grandparents, and (2) placing Walter in the guardianship of his paternal aunt and uncle. After careful review, we vacate and remand.

I. Background

On 28 April 2015, the Orange County Department of Social Services (DSS) filed a petition alleging that Walter was an abused, neglected, and dependent juvenile, and a separate petition alleging that Karen was a neglected and dependent juvenile. DSS alleged that it received a report that Walter had been taken to the hospital by a family friend after she discovered marks and bruises on his body. Respondent reported that her babysitter's boyfriend had fallen while holding Walter. Walter "was observed to have bruising from the mid-back area to the bottom of the buttocks and bruising from the left hip to the right hip. [Walter] had abrasions on both cheeks and deeper abrasions on the nose, lip, and forehead." The bruises were reportedly less than twenty-four hours old. The hospital report cast doubt on respondent's claims regarding the cause of the bruising. Respondent stayed with Walter at the hospital, but reportedly "slept most of the time and was not attentive to [Walter's] needs."

DSS further alleged that Walter was staying with a family friend in Sanford, and resided with respondent "sporadically." Karen had been residing with a family in Durham for about a month, but there was very little interaction between respondent and the family, and there was no plan in place regarding the child. DSS claimed that the juveniles were "left by mother with baby-sitters who are known drug users and live in a 'crack house.' " DSS further claimed that respondent had a history of cocaine abuse, she prostituted herself for drugs and money, and she was living with a man who was reportedly using drugs. DSS asserted that the juveniles had no stability and were at high risk of harm if left in respondent's custody.

DSS obtained non-secure custody of the juveniles. On 9 July 2015, the trial court adjudicated both juveniles neglected and dependent. Karen was placed with her paternal grandparents, while Walter was placed with his paternal aunt and uncle. On 26 October 2015, the court entered permanency planning review orders. The trial court awarded custody of Karen to her paternal grandparents and granted respondent visitation rights. The trial court then closed the juvenile matter and

1. We use these pseudonyms to protect the identities of the minor children and to promote ease of reading.

transferred the case to a Chapter 50 civil custody action. In a separate order, the trial court ceased reunification efforts between Walter and respondent, changed the permanent plan for Walter to guardianship with a relative, and granted guardianship of Walter to his paternal aunt and uncle. Respondent appeals from both orders.

II. Discussion

Respondent first argues that the trial court erred by holding a permanency planning review hearing without providing her with the statutorily required notice that the court intended to conduct such a hearing. We agree.

"In any [juvenile] case where custody is removed from a parent, guardian, or custodian, the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter." N.C. Gen. Stat. § 7B-906.1(a) (2015). In addition, "a review hearing designated as a permanency planning hearing" must be held "[w]ithin 12 months of the date of the initial order removing custody." *Id.* " 'The purpose of a permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time.' " *In re D.C.*, 183 N.C. App. 344, 355, 644 S.E.2d 640, 646 (2007) (citing former N.C. Gen. Stat. § 7B-907(a) (2005)). By statute, a parent is entitled to fifteen days' notice of a permanency planning hearing. N.C. Gen. Stat. § 7B-906.1(b) (2015).[2]

In this case, after the dispositional hearings the trial court scheduled a "Custody Review" for Karen and Walter on 6 August 2015. The same "Review" hearings were continued to 1 October 2015. DSS notified respondent on 23 September 2015 that a "Permanency Planning hearing" for Karen and Walter would be conducted on 1 October 2015. At the beginning of the hearing, respondent's counsel objected to the holding of the permanency planning review hearing. Counsel argued that she had received "no notice that this was changed to a permanency planning hearing," she had not received reports from DSS or the guardian *ad litem*, and therefore, she was not prepared to proceed. The trial court responded as follows:

> THE COURT: What I'm gonna [sic] do is I'm going to hear it, but I'm not going to commit today to anything regarding a permanent plan. I'm just saying that now. You know—

2. The former N.C. Gen. Stat. § 7B-907(a) also required fifteen days' notice of a permanency planning hearing.

> [RESPONDENT'S COUNSEL]: Thank you. That would be sufficient.
>
> THE COURT: —I don't know what I'm going to feel once I read it. But right now, I'm not making any commitment. Okay.

At the conclusion of the hearing, however, the trial court found that "it's in the best interest of the minor children for this hearing to be a permanency planning hearing."

The record shows that respondent received only eight days' notice that the 1 October 2015 hearing would be a permanency planning review hearing. Counsel objected to the hearing on the basis of the lack of notice, and thus respondent did not waive the lack of notice. *See In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004) (stating that a party waives its right to notice under section 7B-907(a) by attending the hearing in which the permanent plan is created, participating in the hearing, and failing to object to the lack of notice). Therefore, respondent was not afforded adequate notice of the 1 October 2015 hearing and its purpose.

III. Conclusion

We must vacate the 26 October 2015 permanency planning review orders and remand the matter for proper permanency planning hearings after providing respondent with the requisite notice. *See In re D.C.*, 183 N.C. App. at 356, 644 S.E.2d at 646–47 (reversing a permanency planning review order where, among other reasons, respondent was not provided with "statutorily required notice that the trial court would consider a permanent plan for [the juvenile]"). Because we vacate the orders, it is not necessary for us to address the additional issues presented by respondent on appeal.

VACATED AND REMANDED.

Judges HUNTER, JR. and McCULLOUGH concur.

IN THE MATTER OF W.R.D., III

No. COA15-1316

Filed 2 August 2016

1. Appeal and Error—mootness—involuntary commitment

An appeal from an involuntary commitment order was not moot where the commitment period had lapsed. The commitment might form the basis for a future commitment, along with other legal consequences.

2. Mental Illness—involuntary commitment—danger to self or others—findings

The trial court erred in an involuntary commitment by determining that respondent was a danger to himself and others. The record did not support the findings that respondent was a danger to himself or others; the involuntary commitment statute expressly requires the trial court to record the facts upon which its ultimate findings are based.

Appeal by respondent from order entered 11 June 2015 by Judge Andrea Dray in Buncombe County District Court. Heard in the Court of Appeals 25 May 2016.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth Guzman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for respondent.

DIETZ, Judge.

Respondent appeals from the trial court's order of involuntary commitment. Following a hearing, the trial court found that Respondent was a danger to himself and others and ordered him to be institutionalized for 30 days.

As explained below, we reverse the commitment order. The record indicates that Respondent suffers from schizophrenia; that he refused to take his prescription medication both for his mental illness and an unrelated heart condition; that he lost some "unknown amount" of weight but remained at a healthy weight; that he warned his guardian to stay

away from him or he would sue him; and that he was angry and rude to hospital staff after being involuntarily committed.

This evidence cannot support the trial court's ultimate findings that Respondent posed a danger to himself or others. Our holding today does not mean that Respondent is competent, or that he cannot properly be committed at some future hearing. We simply hold that the evidence in the record on appeal is insufficient to satisfy the statutory criteria for involuntary commitment. Accordingly, we reverse the trial court's order.

Facts and Procedural History

In 2003, Respondent was diagnosed with schizophrenia. Respondent always has disputed this diagnosis and continues to do so today.

Because of Respondent's health issues and his failure to attend to his basic needs, Respondent's mother was appointed as his guardian and Social Security payee. She continued in that capacity until 2015, when Hope for the Future, an organization that offers guardianship services, began working with Respondent and ultimately assigned Kevin Connor to serve as his guardian.

Respondent refused to meet with Connor, who was a complete stranger to him. Connor tried to arrange an in-person meeting with Respondent on four different occasions with no success. Respondent spoke to Connor several times on the phone. During those calls, Respondent denied having a mental illness and denied needing any assistance from Connor. According to Connor, Respondent also left him voice messages, which included statements such as "You'd better back off, Jack," and "Don't you come around me. I will sue you into the ground."

On 29 May 2015, Connor filed an affidavit and petition to have Respondent involuntarily committed. Respondent was hospitalized at Mission Hospital Copestone in Asheville. Dr. Martha Moore examined Respondent upon admission to the hospital and recommended he receive inpatient treatment for 30 days. Dr. Trace Fender performed a second examination on 1 June 2015 and also concluded that Respondent was in need of inpatient treatment for 30 days. Three days later, on 4 June 2015, Connor had his first and only in-person meeting with Respondent.

The trial court held a hearing on the involuntary commitment petition on 11 June 2015. Three witnesses testified at the hearing. First, the Court heard from Connor, Respondent's guardian. Connor testified that Respondent had acted in a "menacing" way towards representatives from Hope for the Future, although he conceded Respondent was never

violent and never threatened violence. He also testified that Respondent had allegedly written and left a letter for his ex-wife at her home despite not being permitted onto his ex-wife's property. Finally, Connor testified that Respondent was not taking his medications to treat his schizophrenia and a serious heart condition. Connor conceded on cross-examination that Respondent had never shown any indications of physical violence and had never engaged in any self-harming behavior.

Respondent also testified. He expressed confusion regarding his hospitalization. He claimed that he had "not broken any law or anything," and he thought that his hospitalization stemmed from an issue with his Social Security payments. He testified that he was no longer in need of a guardian; that he had plenty of food in his house; that he was able to work odd jobs to earn additional money; that he had purchased his own vehicle; and that he was willing to take his heart medication but would not take any medication prescribed to treat mental illness.

Finally, Dr. Frederick Weigel, a staff psychiatrist at Copestone, testified as an expert witness in general psychiatry. He testified that in his opinion Respondent was schizophrenic and that he was unable to "maintain his own nourishment and medical care." Dr. Weigel's opinion concerning Respondent's nourishment was based solely on his understanding that Respondent had lost some "unknown amount" of weight before his involuntary commitment. Dr. Weigel acknowledged that Respondent's current weight was not unsafe. Dr. Weigel's opinion that Respondent could not maintain his own medical care was based on Respondent's refusal to take his prescription medications for schizophrenia and his heart condition.

At the conclusion of the hearing, the trial court found that Respondent "is mentally ill, poses a threat to himself and others, is unable to take [sic] maintain his nutrition, that it is not medically safe for Respondent to live outside of an inpatient commitment setting, and that no less restrictive treatment measure than inpatient treatment would be medically appropriate." As a result, the trial court ordered Respondent to undergo 30 days of involuntary commitment at Mission Hospital Copestone. Respondent timely appealed.

Analysis

[1] Respondent argues that the trial court's determination that he is a danger to himself or others is not supported by competent record evidence. As explained below, we agree and therefore reverse the trial court's commitment order.

As an initial matter, we note that Respondent's appeal is not moot although his 30-day commitment period has lapsed. The possibility that Respondent's commitment might "form the basis for a future commitment, along with other obvious collateral legal consequences," preserves his right to appellate review despite the expiration of his commitment period. *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977).

[2] To support an involuntary commitment order, the trial court is required to "find two distinct facts by clear, cogent, and convincing evidence: first that the respondent is mentally ill, and second, that he is dangerous to himself or others." *In re Lowery*, 110 N.C. App. 67, 71, 428 S.E.2d 861, 863–64 (1993); N.C. Gen. Stat. § 122C–268(j). These two distinct facts are the "ultimate findings" on which we focus our review. *See In re Moore*, 234 N.C. App. 37, 43, 758 S.E.2d 33, 37–38 (2014). But unlike many other orders from the trial court, these "ultimate findings," standing alone, are insufficient to support the order; the involuntary commitment statute expressly requires the trial court also to "record the facts upon which its ultimate findings are based." *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980); N.C. Gen. Stat. § 122C–268(j).

We review the trial court's commitment order to determine whether the ultimate finding concerning the respondent's danger to self or others is supported by the court's underlying findings, and whether those underlying findings, in turn, are supported by competent evidence. *See In re Booker*, 193 N.C. App. 433, 437, 667 S.E.2d 302, 305 (2008).

I. Danger to Self

Respondent first challenges the trial court's ultimate finding that he was "dangerous to himself." To find danger to self in these circumstances, the trial court must find that Respondent "would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety" and that "there is a reasonable probability of his suffering serious physical debilitation within the near future" without involuntary commitment. N.C. Gen. Stat. § 122C–3(11).

The trial court's commitment order contains only two findings of fact that could be construed to support these statutory criteria. First, the trial court found that "it is not medically safe for Respondent to live outside of an inpatient commitment setting" because "Respondent maintains a belief that another doctor is his treating physician and will not be treated by Dr. Weigel"; "Respondent is diagnosed with paranoid

schizophrenia, for which Respondent has refused treatment"; and "Respondent has heart health related issues, for which he is not compliant with prescribed medical treatment." Second, the trial court found that Respondent was "unable to take [sic] maintain his nutrition." The trial court did not include any additional findings of fact concerning Respondent's nutrition.

Neither of these findings is sufficient to support the trial court's ruling. With respect to Respondent's refusal to acknowledge his mental illness, and refusal to take his prescription medication, the record does not demonstrate a "reasonable probability of his suffering serious physical debilitation within the near future" without immediate, involuntary commitment. To be sure, Dr. Weigel testified that Respondent's refusal to take his heart medication "could be deadly," but he did not testify that ceasing that medication would create this serious risk "within the near future." In similar cases, this Court has held that the evidence must demonstrate "a reasonable probability" that the health risk will occur in the "near future," not simply that it could place the respondent at risk at some future time. *See*, *e.g.*, *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012). Here, there is no evidence that Respondent's refusal to take his medication creates a serious health risk in the near future.

Second, the trial court's finding that Respondent was unable to "maintain his nutrition" is not supported by competent evidence. It is apparently based solely on the following opinion testimony of Dr. Weigel:

> Q: Have you reached a conclusion, to a degree of medical certainty, as to the respondent's ability to maintain his own nourishment and medical care?
>
> A: I do not think he can maintain that independently.

In an involuntary commitment proceeding like this one, "the premises underlying an expert's opinion must be made known to the trier of fact in order that the trier of fact may properly evaluate the opinion." *In re Collins*, 49 N.C. App. at 247, 271 S.E.2d at 75. In the record, Dr. Weigel's only testimony concerning Respondent's "nourishment" is that he lost some "unknown amount" of weight but that his current weight was safe. That testimony is not sufficient to support a finding that Respondent could not "satisfy his need for nourishment" and faced a "reasonable probability of his suffering serious physical debilitation" without involuntary commitment. Accordingly, the trial court's findings concerning Respondent's inability to "maintain his nutrition" are not supported by competent evidence.

II. Danger to Others

We next turn to the trial court's finding that Respondent posed a danger to others. Under N.C. Gen. Stat. § 122C–3(11)(b), an individual is "dangerous to others" if "within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property" and "there is a reasonable probability that this conduct will be repeated."

The trial court's commitment order contains only two findings of fact that could be construed to support these statutory criteria. First, the trial court found that "Respondent made a threat, although not of physical violence, towards Mr. Connor." Second, the trial court found that "Respondent displayed hostile, aggressive behaviors in interviews" at the hospital. But, importantly, neither of these findings of fact indicates that Respondent "inflicted," "attempted to inflict," "threatened to inflict," or "acted in such a way as to create a risk of serious bodily harm" to another. Indeed, the first finding expressly acknowledges that the "threat" Respondent made to Connor was *not* a threat of "physical violence," much less "serious bodily harm." Rather, Respondent warned Connor to stay away or "I'll sue you into the ground." While one might experience some emotional (or metaphorical) pain from being sued, the threat to sue someone simply cannot be viewed as a threat to inflict "serious bodily harm."

Likewise, Dr. Weigel's testimony concerning Respondent's "intrusive" and "aggressive" behavior does not support the trial court's finding that he is a danger to others. Dr. Weigel testified, in essence, that Respondent was angry and rude after being institutionalized, and refused to cooperate with the hospital staff:

> [Respondent] has been persistently hostile and intrusive and aggressive with [hospital] staff. He has been refusing treatment or medications. He has largely refused to be interviewed . . . . He was very hostile repeatedly sticking his finger in our face yelling paranoid thoughts that his guardian—well, that he had no guardian; that his guardian was sent by the government to take pictures of his house and steal his money; was very forcefully insistent that he would refuse treatment and fight it if it was given to him.

Nothing in this testimony indicates that Respondent "has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another." *See* N.C. Gen. Stat. § 122C–3(11)(b).

Simply put, the record does not support the trial court's findings that Respondent was a danger to himself or others. Accordingly, we reverse the trial court's commitment order. We note that our holding today does not mean that Respondent is competent, or that he cannot properly be committed at some future hearing. We hold only that, on the record in this appeal, the trial court's findings are insufficient to satisfy the statutory criteria for involuntary commitment. Accordingly, we reverse the trial court's order.

Conclusion

The trial court's involuntary commitment order is

REVERSED.

Judges ELMORE and DAVIS concur.

KAY I. KIMLER, CARY F. KIMLER, LOIS K. ADAMS, LAURA R. NOTTINGHAM, AS TRUSTEE OF THE NOTTINGHAM JOINT TRUST OF OCTOBER 25, 2005, RONALD E. MACK, JUSTAMONA MACK, JAMES C. DAVIDSON, POLLY P. DAVIDSON, ALMOND E. SHEW, ELISABETH A. SHEW, JAMES C. HORNE, SR., HELEN A. HORNE, LANCE COTTRELL, NORIKA COTTRELL, TOMMY R. PENSON, EDNA S. PENSON, KENNETH F. HODGE, DONNA B. BENTLEY, BARBRA M. BUTLER, MARK S. WILSON, AND EUGENIA L. SEXTON, PETITIONERS

v.

THE CROSSINGS AT SUGAR HILL PROPERTY OWNER'S ASSOCIATION, INC., DONALD F. ASKEY, JR., SHELLY C. ASKEY, WILLIAM B. LYNN, JAMES R. FRAMPTON, ELIZABETH A. FRAMPTON, GORDON L. JOHNSON, JANINA F. JOHNSON, HASKELL S. DAWSON, CARNEY N. DAWSON, A/K/A HELEN CARNEY DAWSON LIVING TRUST, DENNIS E. BROWN, PATRICIA A. BROWN, BARRY E. HOUGH, ANNE S. HOUGH, THOMAS P. STIVES, NORMA P. STIVES, JANE F. HUMPHREYS, PHILLIP W. TATLER, JR., SALLY L. TATLER, RONNIE MANGUM, MELODY MANGUM, CAROL C. THOMAS, GINA R. DICICCO, WENDY D. RHODES, DAVID W. VERMILYEA, JOYCE A. VERMILYEA, JOSHUA DELL OLIVER, KRISTEN GREEN OLIVER, ANTOINETTE WILLIAMS, PEYTON A. FOSTER, CAROLYN D. FOSTER, DENISE C. AMMONS, RICHARD G. KOHLER, DAVID M. VINTON, ELIZABETH D. VINTON, BLAND WAGERS, JANET W. COUNTS, GEARY B. MILLS, DEBORAH A. MILLS, LARRY K. BRADHAM, KATHY G. BRADHAM, RANDY GREER, RALPH S. TEAL, BETTY W. TEAL, ROBERT R. TYLER, JR., ROBERT KELLEY, LESLIE KELLEY, ALAN C. NEDRICH, SUZETTE R. NEDRICH, LYLE D. MALZAHN, CHRISTINE L. MALZAHN, LAWRENCE M. LOMONACO, STEVEN COPE, OLGA CADILLA-SAYRES, ROLANDO PRIETO-SOLIS, JEANETTE GONZALEZ, WILLIAM L. LITTLE, BARBARA B. LITTLE, FRANK GODZIK, SANDRA GODZIK, CARL D. KICKERT, KATHY P. KICKERT, JOHN G. MASSARO, CRAIG E. METZ, PAMELA A. METZ, FREDDIE M. SETTLEMYRE, ELIZABETH O. SETTLEMYRE, RICHARD E. LEE, CAROL L. LEE, JON A. MAZEY, ELENA V. MAZEY, ERNEST SANTIUSTE, ANTONIA SANTIUSTE AND RICHARD M. GETTY, RESPONDENTS

KIMLER v. CROSSINGS AT SUGAR HILL PROP. OWNER'S ASS'N, INC.

[248 N.C. App. 518 (2016)]

No. COA15-1301

Filed 2 August 2016

1. Associations—homeowners'—declaration/covenants—amendment

A homeowners' association that was formed prior to 1999 was authorized to amend the declaration/covenants where there was nothing in the declaration or the articles of incorporation which expressly prohibited the application of N.C.G.S. § 47F-2-117. N.C.G.S. § 47F-2-117 applies to pre-1999 planned communities where either the terms of the declaration or articles of incorporation do not provide to the contrary or the association has adopted the terms of the Planned Community Act.

2. Associations—homeowners'—declarations/covenants—amendment—reasonable

An amendment to declarations/covenants by the homeowners' association (HOA) was not unreasonable where the intent of the amendment was to clarify a paragraph of the covenants as originally written. The issue involved a clause allowing the purchasers of contiguous lots from the developer to pay dues based on only one lot; the deeds from the developer in most instances did not describe the exempt lots, as the declaration required, and the practice of the HOA had been to exempt all of the owners of multiple lots from paying dues on more than one lot, whether they purchased the lots from the developer or not.

Appeal by Petitioners from orders entered 3 February 2015 and 6 May 2015 by Judge Alan Z. Thornburg in McDowell County Superior Court. Heard in the Court of Appeals 12 May 2016.

Johnson Law Firm, P.A., by Gene B. Johnson, for the Petitioners-Appellants.

Roberts & Stephens, P.A., by Ann-Patton Hornthal and Phillip T. Jackson, for Respondent-Appellee, The Crossings at Sugar Hill Property Owners' Association, Inc.

DILLON, Judge.

The Crossings at Sugar Hill ("Sugar Hill") is a residential subdivision in McDowell County. The Respondent-Appellee is Sugar Hill's

homeowners' association ("Sugar Hill HOA"). The Petitioners-Appellants are owners of lots within Sugar Hill.

Sugar Hill was developed in the 1990's by Mountain Creek Land Company, Inc. ("Developer"). Prior to development, the Developer recorded declarations/covenants (the "Declaration"), which provided for the formation of the Sugar Hill HOA and stipulated that certain owners of multiple lots would only be required to pay dues on one lot. This civil action involves a dispute concerning whether the Sugar Hill HOA acted within its authority when it amended the Declaration in 2012 (the "2012 Amendment"). The Declaration originally provided that any individual purchasing more than one contiguous lot *from the Developer* would only be obligated to pay dues on a single lot so long as the "exempt" lot was not sold or occupied by a dwelling or camping unit. For the first fifteen years, from 1997-2012, the Sugar Hill HOA, not only billed those purchasing multiple contiguous lots *from the Developer* for one lot, but also only billed multiple lot owners *who did not purchase all their lots from the Developer* for one lot. In 2012, the Sugar Hill HOA began billing the second group on a per-lot basis, and some in that group strongly objected. These objections prompted the Sugar Hill HOA to enact the 2012 Amendment to the Declaration to clarify that it was authorized to bill those who owned multiple contiguous lots *not purchased from the Developer* on a per-lot basis (rather than only for a single lot), as it should have been doing all along. The trial court concluded that the Sugar Hill HOA acted within its authority in enacting the 2012 Amendment. For the following reasons, we affirm.

I. Factual Background

In 1996, the Developer recorded the Declaration which provided, in part, the following: (1) that any one person/entity purchasing more than one contiguous lot from the Developer be initially required to pay dues on only one lot; (2) that the Developer could modify, change, or amend any provision in the Declaration at any time while the Declaration remained in effect; and (3) that the Declaration would remain in effect until 2021 and would continue beyond 2021, "unless prior [to the 2021 renewal date] an instrument signed by the owners of a majority of lots subject to this Declaration agreeing to terminate, amend, or modify the Declaration shall have been recorded[.]"

The Declaration provided that the Sugar Hill HOA would be set up with "the power to enforce" the collection of dues and compliance with covenants and restrictions. The Declaration, however, did *not* contain any provision conferring on the Sugar Hill HOA the authority to amend

the Declaration. The Declaration further provided that the Sugar Hill HOA would be initially controlled by the Developer until *either* the Developer decided to turn governing power over to the lot owners *or* when 75% of the lots were sold, at which time control of the Sugar Hill HOA would automatically vest in the lot owners.

In February 1997, the Developer signed the Articles of Incorporation for the Sugar Hill HOA. The Articles did *not* contain any provision conferring authority on the Sugar Hill HOA to amend the Declaration.

In September 1997, the Developer recorded a document turning over control of the Sugar Hill HOA to the lot owners. This document, however, did not contain any provision transferring to the Sugar Hill HOA the Developer's authority to amend the Declaration. Shortly after the document was filed, the Sugar Hill HOA held its first meeting. The minutes from the meeting reflect that a statement was made that more burdensome restrictions could not be placed on the property except by agreement of 100% of the lot owners. However, there was no motion made or vote recorded as to this "statement."

In 1999, the General Assembly enacted the Planned Community Act (the "PCA"), which applies to some planned communities. The PCA provides in part that, except in certain situations, the declaration of a planned community covered by the PCA could be amended by the vote of 67% of the owners.

In January 2012, with 71% of lot-owner approval, the Sugar Hill HOA passed the 2012 Amendment, which stated that only those owners of contiguous lots *who purchased their contiguous lots directly from the Developer* would be allowed to pay dues on a single lot, while those multiple-lot owners who did not purchase all their contiguous lots from the Developer would be required to pay dues for each lot owned.

II. Procedural Background

In August 2012, Petitioners-Appellants commenced this action seeking (1) declaratory relief to the effect that *all* individuals owning contiguous lots were exempt from paying dues on more than one lot by virtue of the Declaration, and (2) injunctive relief to enjoin the Sugar Hill HOA from collecting dues on a per-lot basis from owners of contiguous lots not purchased from the Developer.

On 3 February 2015, after a bench trial on the matter, the trial court entered an order which declared, in relevant part, that the statement made at the initial Sugar Hill HOA meeting in 1997 regarding a

requirement unanimity to amend the Declaration was not legally binding; and that the 2012 Amendment (authorizing the Sugar Hill HOA to bill on a per-lot basis those contiguous lots who did not purchase their lots from the Developer) was valid and enforceable. On 6 May 2015, the trial court denied Petitioners-Appellants' motion to amend the first order. Petitioners-Appellants timely appealed from both orders.

III. Analysis

A. The PCA Authorizes the Sugar Hill HOA To Amend the Declaration

[1] The PCA was enacted in 1999 by our General Assembly. It applies to most "planned communities"[1] created within North Carolina *after* 1999. N.C. Gen. Stat. § 47F-1-102(a) (2015).

Additionally, certain provisions of the PCA apply to planned communities created *prior* to 1999, "unless the articles of incorporation or the declaration expressly provides to the contrary." N.C. Gen. Stat. § 47F-1-102(c) (2015). Two such provisions of the PCA which apply to pre-1999 created planned communities are found in N.C. Gen. Stat. § 47F-2-103 (2015), which deals with the construction and validity of a declaration, and in N.C. Gen. Stat. § 47F-2-117 (2015), which deals with the process of amending a declaration. Based on these two provisions and the language in the Declaration, we conclude that the Sugar Hill HOA – though formed prior to 1999 – is authorized to amend the Declaration, as otherwise allowed by law, by agreement of lot owners representing 67% of the votes.

N.C. Gen. Stat § 47F-2-103(a) states that "[t]o the extent not inconsistent with the provisions of this Chapter, the declaration, bylaws, and articles of incorporation form the basis for the legal authority for the planned community to act as provided in [those documents], and [those documents] are enforceable by their terms." The interpretation of the Declaration in the present case is one for the courts, and not for a jury, *see Runyon v. Paley*, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992), and therefore is reviewable *de novo* on appeal.

Here, the Declaration provides that it may be amended by the Developer. The Declaration does not provide that it may be amended by

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1. "Planned community" is defined by the PCA in N.C. Gen. Stat. § 47F-1-103(23) as real estate whereby a person's ownership of a lot expressly obligates that person by a declaration "to pay real property taxes, insurance premiums, or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration." Sugar Hill falls within this definition. For instance, the Declaration provides that lot owners are obligated to pay dues for the "maintenance of roads, common areas," etc.

the Sugar Hill HOA, but only that the Declaration may expire in 2021 by vote of the Sugar Hill HOA.

However, we must read N.C. Gen. Stat. § 47F-2-103 in conjunction with N.C. Gen. Stat. § 47F-2-117, which provides for the process by which a declaration may be amended. Specifically, subsection (a) provides, in pertinent part, as follows:

> Except in cases of amendments that may be executed by a declarant under the terms of the declaration . . . , the declaration may be amended only by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated, or any larger majority the declaration specifies or by the declarant if necessary for the exercise of any development right.

N.C. Gen. Stat. § 47F-2-117(a) (2015). For those planned communities to which this statutory provision applies, even if not authorized by the declaration, an owners' association may amend the declaration by a sixty-seven percent (67%) vote[2] and a declarant may amend the declaration if necessary to exercise a development right.[3] This grant of authority to an owners' association to amend the declaration applies to the Sugar Hill HOA in the present case, though the HOA was formed prior to 1999, because there is nothing in the Declaration or articles of incorporation which "*expressly* provides to the contrary." N.C. Gen. Stat. § 47F-1-102(c) (2015) (emphasis added) (providing for the application of N.C. Gen. Stat. § 47F-2-117 to pre-1999 formed planned communities). Specifically, there is nothing in the Declaration which *expressly* states that the Sugar Hill HOA is not authorized to amend the Declaration.[4]

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2. We note that N.C. Gen. Stat § 47F-2-117(a) provides that the declaration may provide that a larger supermajority than 67% be required to amend. Here, however, the Declaration does not contain any provision which even addresses the Sugar Hill HOA's authority to amend the Declaration. There is evidence that a statement was made at the Sugar Hill HOA's 1997 initial meeting that a 100% vote would be required. However, this statement is not part of the Declaration, and we affirm the trial court's conclusion that this "statement" is unenforceable.

3. Under N.C. Gen. Stat. § 47F-2-117, a developer's authority to amend the declaration is limited to those amendments deemed necessary for the exercise of any development right unless the declaration itself authorizes the developer to amend the declaration affecting other matters.

4. We note that even if the declaration of a planned community formed prior to 1999, expressly prohibits the owners' association from amending the declaration, the PCA allows the owners' association to amend the declaration to make all of the provisions of

Therefore, in conclusion, N.C. Gen. Stat. § 47F-2-117 applies to pre-1999 formed planned communities where (1) *either* the terms of the declaration or articles of incorporation do not expressly provide to the contrary pursuant to N.C. Gen. Stat. § 47F-1-102(c), *or* (2) the association has adopted the terms of the PCA pursuant to N.C. Gen. Stat. § 47F-1-102(d). Here, although the Sugar Hill HOA has not adopted the PCA pursuant to N.C. Gen. Stat. § 47F-1-102(d), there is nothing in the Declaration or the Articles of Incorporation which expressly prohibit the application of N.C. Gen. Stat. § 47F-2-117. Accordingly, the Sugar Hill HOA is authorized to amend the Declaration by a vote of at least 67%.

B. The 2012 Amendment Is Valid

[2] Sugar Hill HOA's authority to amend the Declaration is not unlimited. Rather, our Supreme Court has held that an owners' association's authority to amend a declaration is limited to those amendments which are "reasonable[.]" *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 548, 633 S.E.2d 78, 81 (2006). "Reasonableness may be ascertained from the language of the declaration, deeds, and plats, together with the other objective circumstances surrounding the parties' bargain, including the nature and character of the community." *Id.*

Here, the Sugar Hill HOA enacted an amendment by 71% vote that amended paragraph 8(c) of the Declaration, which dealt with the assessment of dues when one owns multiple contiguous lots. The original provision stated as follows:

> Any one person(s), or entity purchasing and owning two (2) or more contiguous lots in [Sugar Hill] (whether in a single deed, or in separate deeds, and whether such purchases are simultaneous or otherwise) will be required to pay Association dues on only one lot per year, as provided in this Declaration; provided, however, that the deed from the [Developer] shall designate which lot or lots in excess of one are the exempt lot or lots, and such exempt lot or lots will maintain an exempt status unless or until (a) the

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the PCA applicable to its planned community by affirmative vote of 67%. This rules applies even if the declaration prohibits the association from making any amendments to the declaration. N.C. Gen. Stat. § 47F-1-102(d). Therefore, where a declaration in a planned community formed prior to 1999 expressly prohibits its owners' association from amending the declaration, the association may still vote to amend the declaration to adopt the provisions of the PCA. *Id.* And once the provisions of the PCA are so adopted, the association may then amend the declaration in other ways pursuant to its authority under N.C. Gen. Stat. § 47F-2-117.

> lot is sold, or (b) a living or camping unit is placed upon it, and in the event of either (a) or (b) above the exemption will be lost forever.

As stated above, it is the duty of the courts to construe the terms of the Declaration. *See Runyon*, 331 N.C. at 305, 416 S.E.2d at 186. Our Supreme Court has further instructed that we are to construe the declaration based on the intent of the parties. *Id.* We conclude that paragraph 8(c) was intended to provide that anyone buying contiguous lots *from the Developer* would only be initially obligated to pay dues based on one of the lots and that the other lots would be exempt until sold or occupied by a living or camping unit. We also conclude that it was not intended that the exemption be lost simply because the Developer failed to state in the conveyance which lots were to be exempt, but that in such case the lot on which the buyer initially built would be the lot to be assessed.

In practice, in most instances where a buyer purchased more than one contiguous lot from the Developer, the Developer failed to designate which lot(s) would initially be exempt from dues. Further, the evidence shows and the trial court found that for the first fifteen years (until 2012), the Sugar Hill HOA billed *all* owners of contiguous lots for only a single lot, even those who did not acquire their lots directly from the Developer. Beginning in 2012, the Sugar Hill HOA began collecting dues on a per-lot basis from those multi-lot owners whose contiguous lots were *not* conveyed to them by the Developer. Several such owners refused to comply, which prompted the Sugar Hill HOA to amend paragraph 8(c) to provide as follows:

> Any one person(s) or entity purchasing two or more contiguous lots originally conveyed from [the Developer] (whether in a single deed, or separate deeds, and whether such purchases are simultaneous or otherwise) will be required to pay Association dues on only one lot per year as provided for in this Declaration and such exempt lot or lots will remain exempt unless and until (a) the lot is sold, or (b) a living or camping unit is placed upon it, and in the event of either (a) or (b) the above exemption will be lost permanently.
>
> All contiguous lots that were not conveyed by [the Developer] shall not be designated as exempt from association dues henceforth.

We conclude that the intent of the 2012 Amendment was largely to clarify paragraph 8(c) as originally written, but without the requirement that

the deed from the Developer recite *which lot(s)* would be exempt. We do not believe that the change is unreasonable based on our Supreme Court's decision in *Armstrong*. Accordingly, the 2012 Amendment is valid and enforceable.

We do not believe that the Sugar Hill HOA is barred by estoppel or laches from enacting the 2012 Amendment to collect dues on a per-lot basis from owners of multiple contiguous lots that were not conveyed by the Developer. It is of no consequence that the Sugar Hill HOA did not collect dues from these owners on a per-lot basis prior to the passage of the 2012 Amendment. The Sugar Hill HOA is not currently collecting dues in accordance with the original 1997 provision that it failed to enforce, but rather in accordance with the more recent 2012 Amendment, which we have held the Sugar Hill HOA was empowered to enact.

IV. Conclusion

We affirm the trial court's conclusion that the statement recorded in the minutes of the 1997 Sugar Hill HOA meeting, requiring a 100% vote to amend the Declaration, is unenforceable. We affirm the trial court's conclusion that the provisions of N.C. Gen. Stat. § 47F-2-117 apply to the Sugar Hill HOA, empowering the Sugar Hill HOA to amend the Declaration by a 67% vote. And we affirm the trial court's conclusion that the 2012 Amendment is valid and enforceable.

AFFIRMED.

Judges DAVIS and ZACHARY concur.

LOVIN v. CHEROKEE CTY.

[248 N.C. App. 527 (2016)]

RONALD KEITH LOVIN, PLAINTIFF
v.
CHEROKEE COUNTY, RANDY WIGGINS, COUNTY MANAGER, IN HIS OFFICIAL CAPACITY, CANDY R. ANDERSON, CHEROKEE COUNTY FINANCE DIRECTOR, IN HER OFFICIAL CAPACITY, MELODY JOHNSON, CHEROKEE COUNTY HUMAN RESOURCES DIRECTOR, IN HER OFFICIAL CAPACITY, AND ROY G. DICKEY; DANIEL M. EICHENBAUM; DAVID F. MCKINNON (C.B. MCKINNON); CALVIN H. STILES; GARY W. WESTMORELAND, CHEROKEE COUNTY-COUNTY COMMISSIONERS, EACH IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS, DEFENDANTS

No. COA15-1350

Filed 2 August 2016

Police Officers—retirement—service with multiple agencies

The trial court erred by granting partial summary judgment to plaintiff law enforcement officer in an action to determine the amount of his retirement where he had served in different agencies. Plaintiff was an elected Sheriff when he retired but had been a local police officer and state trooper, and as such, had been a member of the Teachers' and State Employees Retirement System (TSERS). However, he began a beneficiary of TSERS, and thus not a member, before he retired as sheriff. His special separation allowance from the County was therefore based only on his service with the County.

Appeal by defendants from order entered 14 October 2015 by Judge Jeff Hunt in Cherokee County Superior Court. Heard in the Court of Appeals 25 May 2016.

Frank G. Queen, PLLC, by Frank G. Queen, and David A. Wijewickrama for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, LLP, by Sean F. Perrin, for defendants-appellants.

ELMORE, Judge.

Defendants appeal from the trial court's order of partial summary judgment awarding plaintiff a special separation allowance for 36 years of creditable service through two North Carolina retirement systems: TSERS and LGERS. On appeal, defendants argue that because plaintiff was not a member of TSERS when he retired, he was not entitled to receive a special separation allowance for his service under TSERS. We agree and reverse the trial court's order.

I. Background

Ronald Keith Lovin (plaintiff) served as a Hickory police officer for 14 months and a North Carolina state trooper for 22 years and 10 months. During this time, plaintiff was a member of the Teachers' and State Employees' Retirement System (TSERS). In 2009, however, he began drawing his retirement benefits from TSERS.

In 2002, plaintiff was elected sheriff of Cherokee County where he served for approximately 12 years. As sheriff, plaintiff was a member of the Local Government Employment Retirement System (LGERS). His term ended on 1 December 2014, and he retired in January 2015. Upon plaintiff's retirement, the Cherokee County human resources director, Melody Johnson, determined that he was eligible for a special separation allowance under N.C. Gen. Stat. § 143-166.42. The County paid plaintiff based on his 12 years of LGERS service, but excluded his nearly 24 years of TSERS service because he was not a member of TSERS when he retired.[1]

Plaintiff sued the County and various County officials (defendants), alleging that defendants miscalculated the correct amount of his special separation allowance. Plaintiff argued that his special separation allowance should be based on 36 years of creditable service, representing the 12 years of LGERS service and the 24 years of TSERS service. The parties moved for partial summary judgment on plaintiff's claim for declaratory relief. The trial court granted plaintiff's motion, concluding that plaintiff's special separation allowance should be based on his 36 years of total service and not merely his 12 years of service as a member of LGERS.

Defendants appealed, arguing that the trial court erred in granting plaintiff's motion for partial summary judgment and denying defendants' motion for the same. The court certified the order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Because the judgment was final as to plaintiff's claim for declaratory relief, we have jurisdiction to review the merits. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015); *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979).

II. Discussion

The sole issue is whether plaintiff's special separation allowance should be based on 36 years of service, which includes 24 years of state

1. Plaintiff had 23.6667 years of service with TSERS and 12.0833 years of service with LGERS. We have rounded these numbers to 24 and 12, respectively, for ease of reading.

service through TSERS and 12 years of local government service through LGERS, or just 12 years of service through LGERS.

We review the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment "is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Id.* (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

This case begins and ends with the statutory language. "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). "[A] statute clear on its face must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419–20, 451 S.E.2d 284, 289 (1994) (citation omitted). If a statute "contains a definition of a word used therein, that definition controls." *In re Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974) (citation omitted).

Chapter 143, Article 12D grants a special separation allowance for qualifying law enforcement officers upon their retirement. N.C. Gen. Stat. § 143-166.40–42 (2015). An eligible officer is entitled to receive, beginning in the month he retires, "an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to him *for each year of creditable service*." N.C. Gen. Stat. § 143-166.42(a) (2015) (emphasis added). "Creditable service" is defined as "the service for which credit is allowed *under the retirement system of which the officer is a member*." N.C. Gen. Stat. § 143-166.42(b) (2015) (emphasis added). The two retirement systems in issue are TSERS and LGERS.

A. Teachers' and State Employees' Retirement System (TSERS)

Defendants argue that because plaintiff was not a "member" of TSERS when he retired, he was not entitled to receive a special separation allowance for his service through TSERS as a police officer and a state trooper.

A TSERS "member" is "any teacher or State employee included in the membership of the System." N.C. Gen. Stat. § 135-1(13) (2015). "System," as that term is used in Chapter 135, refers specifically to TSERS. N.C. Gen. Stat. § 135-1(22) (2015). If a member withdraws his accumulated contributions or becomes a beneficiary, he is no longer a

member of TSERS. N.C. Gen. Stat. § 135-3(3) (2015). "Beneficiary" is defined as "any person in receipt of a pension, an annuity, a retirement allowance or other benefit as provided by this Chapter." N.C. Gen. Stat. § 135-1(6) (2015).

In 2009, prior to his retirement from the sheriff's department, plaintiff began receiving retirement benefits from TSERS. At that point, he became a "beneficiary" and ceased to be a "member" of TSERS. Plaintiff essentially concedes that he was not a member of TSERS when he retired, but argues that "creditable service," as defined in section 143-166.42(b), should be interpreted as "service for which credit is allowed under the retirement system of which the officer is a member *when the credit is accumulated*." But that is not how the statute is written.

Based on its definition, membership in TSERS is not perpetual. Instead, it may terminate upon the happening of some event, e.g., withdrawing contributions or receiving retirement benefits. Subsections 143-166.42(a) and (b) couch creditable service in terms of *current membership* in the system at the time of retirement. The legislature could have easily defined creditable service under Chapter 143 in the manner urged by plaintiff, but it did not. In computing plaintiff's creditable service, therefore, his 24 years of service under TSERS should have been excluded.

B. Local Government Employees' Retirement System (LGERS)

Defendants do not dispute that plaintiff is a member of LGERS. Accordingly, for the purpose of calculating the special separation allowance, we must determine plaintiff's creditable service under LGERS.

In LGERS, "creditable service" means the sum of three things: (1) "prior service"; (2) "membership service"; and (3) "service, both noncontributory and purchased, for which credit is allowable as provided in G.S. 128-26." N.C. Gen. Stat. § 128-21(8) (2015). "Prior service" means "the service of a member rendered before the date he becomes a member of the [LGERS], certified on his prior service certificate and allowable as provided by G.S. 128-26." N.C. Gen. Stat. § 128-21(17), (21) (2015). "Membership service" means "service as an employee rendered while a member of the [LGERS] or membership service in a North Carolina Retirement System that has been transferred into [LGERS]." N.C. Gen. Stat. § 128-21(14), (21) (2015). Section 128-26 gives participating employers the option to "allow prior service credit to any of its employees" for "earlier service to the aforesaid employer; or their earlier service to any other employer as . . . defined in G.S. 128-21(11); or, their earlier service to any state, territory, or other governmental subdivision of the United

States other than this State." N.C. Gen. Stat. § 128-26(a) (2015). The statute also allows members to transfer to LGERS their credits for membership and prior service in TSERS, N.C. Gen. Stat. § 128-34(b) (2015), and provides for situations in which an employee may purchase creditable service, *see e.g.*, N.C. Gen. Stat. § 128-26(h1) (2015).

Plaintiff has 12 years of membership service in LGERS, calculated from the time he became sheriff in December 2002 until his retirement in January 2015. According to the undisputed statements in Ms. Johnson's affidavit, however, the County never issued plaintiff a prior service certificate pursuant to section 128-26(e), plaintiff never transferred membership of his TSERS service to LGERS pursuant to section 128-34, and the County never gave plaintiff credit for prior service pursuant to section 128-26(a). Plaintiff does not dispute these facts or otherwise claim any prior service or service allowable under section 128-26. Therefore, plaintiff's creditable service under LGERS is limited to his 12 years of membership service as sheriff.

III. Conclusion

The trial court erred in granting partial summary judgment in favor of plaintiff. His special separation allowance should have been based on 12.0833 years of creditable service because plaintiff was not a member of TSERS when he retired. The trial court's order is reversed.

REVERSED.

Judges DAVIS and DIETZ concur.

OCRACOMAX, LLC, PLAINTIFF-APPELLEE
v.
CHRISTOPHER M. DAVIS AND WIFE, JENNIFER L. DAVIS, OCRACOKE HORIZONS UNIT OWNERS ASSOCIATION, INC., DEFENDANTS-APPELLANTS

No. COA15-1171

Filed 2 August 2016

Declaratory Judgments—judgment on pleadings—standing—statute of limitations—estoppel—laches—waiver

The trial court did not err in a declaratory judgment action by granting plaintiff's motion for judgment on the pleadings and denying defendants' motion to dismiss. Plaintiff had standing to sue defendant homeowners' association, and plaintiff's complaint was not barred by the statute of limitations. Defendant's affirmative defenses of estoppel, laches, and waiver were inapplicable.

Appeal by defendants from Order entered 18 June 2015 by Judge Wayland J. Sermons, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 28 April 2016.

L. Phillip Hornthal III for plaintiff-appellee.

Vandeventer Black LLP, by Kevin A. Rust and Wyatt M. Booth, for defendants-appellants.

ELMORE, Judge.

Ocracomax, LLC (plaintiff) filed a complaint on 26 February 2015 against Christopher M. Davis and wife, Jennifer L. Davis, and Ocracoke Horizons Unit Owners Association, Inc. (defendants) seeking a declaratory judgment and a mandatory injunction. Defendants appeal from the trial court's order granting plaintiff's motion for judgment on the pleadings and denying defendants' motion to dismiss. After careful review, we affirm.

I. Background

The issue in this case involves two condominium unit owners at Ocracoke Horizons Condominiums who were unable to reach an agreement regarding two parking spaces in the covered garage in their shared building. Ocracoke Horizons Condominiums is a condominium complex on Ocracoke Island and was created pursuant to Chapter 47C of the

North Carolina General Statutes (The North Carolina Condominium Act) and by virtue of a Condominium Declaration (Declaration), recorded 30 July 1991 in the Hyde County Register of Deeds.

Plaintiff recorded its deed for unit 1B on 20 May 2011, and the Davises recorded their deed for unit 1A on 19 January 2012. Both deeds contain the following language: "Each Unit is conveyed subject to that 'Condominium Declaration' and all the terms and provisions thereof as recorded in Book 140, beginning at page 834, Hyde County Registry[.]" The Declaration lists "Limited Common Elements" in Article III, Section 1, including "one parking space large enough for two average-sized (10' x 20' each) passenger cars per Unit[.]" The shared, covered garage for units 1A and 1B contains two adjacent parking spaces, as described above. There is no specific allocation or assignment of a particular parking space as between units 1A and 1B.

In plaintiff's complaint, it alleged the following: The Davises' predecessor, who originally owned both units, built a shed on part of one of the parking spaces. The Davises maintain ownership of the shed and claim they are entitled to both the full parking space and the portion of the second parking space that contains the shed. The Davises' concurrent use of the shed and full parking space is contrary to plaintiff's property rights afforded in the limited common elements as defined by Article III of the Declaration. The Association, through its President John D. Wooton, the law partner of Christopher Davis, has declined to enforce plaintiff's right to parking or take action against the Davises.

Accordingly, plaintiff alleged it "is entitled to a judgment declaring that the nonconforming shed is a change in the appearance of the Common Elements or the exterior appearance of a Unit . . . as prohibited by the Declaration." Additionally, "plaintiff is entitled to a judgment declaring its right to a parking space appurtenant to plaintiff's unit . . . and/or requiring defendants Davis to remove the non-conforming structure, the shed." In its second claim, plaintiff alternatively requests a mandatory injunction ordering the Davises or the Association to remove the shed.

In defendants' answer and motion to dismiss, they argue that plaintiff lacks standing to sue the Association and that plaintiff's complaint is barred by the statute of limitations. Defendants also assert the affirmative defenses of estoppel, the doctrine of laches, and waiver. Plaintiff moved for judgment on the pleadings, and after a hearing on the motions, the Hyde County Superior Court entered an order on 18 June 2015 as follows:

(1) Defendant's Motion to dismiss is DENIED;

(2) Plaintiff's Motion for Judgment on the Pleadings is GRANTED;

(3) The Court declares that the prior built shed referencedin the pleadings in the garage serving Units 1A and 1B of Ocracoke Horizons Condominiums was a change in the appearance and use of the limited common areas as set forth in Article III of Section 1 of the Condominium Declaration recorded July 30, 1992[1] in Volume 140, Page 834 of the Hyde County Registry.

(4) The Court further declares and orders that the plaintiff is entitled to one parking place large enough for two averaged-sized (ten feet by twenty feet) passenger cars, and that plaintiff is entitled to that parking within the confines of that limited common area denominated as "Garage" for Units 1A and 1B as shown on sheet three of the plat for Ocracoke Horizon Condominiums, as recorded in Condominium Cabinet C, page 383-C, which has not been altered by the erection of a shed.

(5) Costs are taxed to the defendants.

(6) Defendant's oral motion for stay of this Order pending appeal is DENIED.

Defendants appeal.

II. Analysis

Pursuant to Rule 12(c) of our Rules of Civil Procedure, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2015). "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Groves v. Cmty. Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (citing *Flexolite Elec. v. Gilliam*, 55 N.C. App. 86, 88, 284 S.E.2d 523, 524 (1981)). Therefore, the motion " 'should only be granted when the movant clearly establishes that no material issue of fact remains to be resolved and that the

1. The record reveals the Declaration was recorded 30 July 1991.

movant is entitled to judgment as a matter of law.' " *New Bar P'ship v. Martin*, 221 N.C. App. 302, 306, 729 S.E.2d 675, 680 (2012) (quoting *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 201–02, 528 S.E.2d 372, 378, *aff'd per curiam*, 353 N.C. 257, 538 S.E.2d 569 (2000)). We review a trial court's order granting a motion for judgment on the pleadings *de novo*. *Id.* at 307, 729 S.E.2d at 680.

The authority of a court to enter a declaratory judgment is provided for in N.C. Gen. Stat. § 1-253 (2015), which provides,

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Furthermore,

> [a]ny person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity . . . and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2015).

Our General Assembly has provided that Article 26, governing declaratory judgments, "is to be liberally construed and administered." N.C. Gen. Stat. § 1-264 (2015). "[I]ts purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]" *Id.* Our Supreme Court has stated, "While the statute does not expressly so provide, this Court has held on a number of occasions that courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute." *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984) (citations omitted).

As stated above, pursuant to Article III of the Declaration, the limited common elements consist of, *inter alia*, "one parking space large enough for two average-sized (10' x 20' each) passenger cars per Unit . . . . The above listed Common Elements are located outside the Unit's boundaries, designed to serve a single Unit and allocated exclusively

to that Unit." Article V, entitled "Regulations and Restrictions," provides, "A unit owner may not change the appearance of the Common Elements or the exterior appearance of a Unit or any other portion of the Condominium without permission of the Association as provided in the Bylaws."

The Bylaws provide, "The failure of . . . a Unit Owner to enforce any right, provision, covenant or condition which may be granted by the Condominium Instruments or the Condominium Act shall not constitute a waiver of the right of the . . . Unit Owner to enforce such right, provision, covenant or condition in the future." The Bylaws further state,

> Failure to comply with any of the Condominium Instruments and the Rules and Regulations shall be grounds for relief, including without limitation, an action to recover any sum due for money damages, injunctive relief, . . . any other relief provided for in these Bylaws or any combination thereof and any other relief afforded by a court of competent jurisdiction, all of which relief may be sought . . . by any aggrieved Unit Owner[.]"

A. Waiver

Defendants argue that plaintiff waived its right to enforce the Declaration because it had actual knowledge of the shed prior to purchasing unit 1B, utilized the shed for a number of years, and made no objection to the shed's existence until over three years after its purchase. Defendants claim that any right not illegal or contrary to public policy may be waived. Plaintiff responds by citing the "No Waiver of Rights" clause in the Bylaws and by noting that its primary relief sought was "its right to parking."

Defendants' argument relies on two restrictive covenants cases. In *Medearis v. Trustees of Myers Park Baptist Church*, 148 N.C. App. 1, 13–14, 558 S.E.2d 199, 207–08 (2001), the plaintiffs were deemed to have waived their rights to enforce residential restrictions, which would have imposed an undue hardship on the defendants, who already spent over $1.5 million in acquiring property and with whom the plaintiffs negotiated repeatedly to redesign the construction plans. In *Rodgerson v. Davis*, 27 N.C. App. 173, 179, 218 S.E.2d 471, 475 (1975), this Court stated, "Where restrictions have been imposed according to a general plan, one of the grantees of lots subject thereto, who has himself violated such restrictions, will not be allowed in equity to complain against similar violations by other grantees."

Here, in contrast, plaintiff is not attempting to enforce a restrictive covenant. The trial court granted plaintiff's primary relief requested, that is, a declaratory judgment acknowledging its right to one parking space large enough to fit two passenger cars. Per the Bylaws listed above, plaintiff's alleged failure to immediately enforce its delineated right shall not constitute a waiver of its right to enforce it in the future. As defendants point out, plaintiff's purchase agreement states, "[T]he storage shed immediately adjacent to unit 1A is the property of unit 1A." Plaintiff's failure to object to the shed, however, did not waive plaintiff's separate right to one parking space, which remained available in the covered garage despite the shed.

In defendants' reply brief, they assert that plaintiff "had actual or constructive notice of the shed and parking issues prior to purchase." As plaintiff's counsel stated at the hearing, though, "the notice that [plaintiff] had was that there was a shed that the Davises claimed they owned that sat in the middle of a parking place, so what does that tell [plaintiff]? 'Oh, we're good. We've got the other side, so we got what we want, no problem[.]' " Regardless of whether plaintiff had notice of "parking issues," such fact does not waive plaintiff's right, under the Declaration, to one full parking space.

B. Quasi-Estoppel

Defendants argue that plaintiff's complaint is barred by the doctrine of quasi-estoppel or estoppel by benefit because plaintiff has used the shed and is now taking an inconsistent position after accepting a benefit.

Under a quasi-estoppel or estoppel by benefit theory, "a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 881–82 (2004) (citations omitted).

Here, it is undisputed that the Davises, as owners of Unit 1A, own the shed. There is no evidence, however, that plaintiff accepted a benefit under a transaction or an instrument. The record reveals only that plaintiff's purchase agreement stated that "the storage shed immediately adjacent to unit 1A is the property of unit 1A." The record does not reveal that plaintiff received a benefit under the purchase agreement or that plaintiff is taking a position inconsistent with a prior acceptance of that or any other instrument. Accordingly, plaintiff is not estopped from seeking a declaration of its right to one parking space.

C. Standing

Defendants claim that plaintiff lacks standing to sue the Association, citing N.C. Gen. Stat. § 55A-7-40(a). Plaintiff responds by citing the Declaration, which provides that relief may be brought by any aggrieved unit owner.

Chapter 55A of our General Statutes contains the North Carolina Nonprofit Corporation Act, and N.C. Gen. Stat. § 55A-7-40 covers derivative proceedings. "A derivative proceeding is a civil action brought by a shareholder in the right of a corporation, . . . while an individual action is one a shareholder brings to enforce a right which belongs to him personally." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000) (citations and quotations omitted). As this is not a derivative proceeding, N.C. Gen. Stat. § 55A-7-40 does not apply. As stated above, the Bylaws specifically provide that any aggrieved unit owner may seek relief for failure to comply with any of the condominium instruments, rules, and regulations, including injunctive relief and any other relief afforded by a court of competent jurisdiction. Accordingly, defendants' argument fails.

D. Doctrine of Laches

Defendants argue that the doctrine of laches bars plaintiff's claims because plaintiff waited nearly four years after purchasing the unit to bring suit.

This Court has previously stated,

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209–10, 558 S.E.2d 197, 198 (2001) (citations omitted).

Here, defendants argue, "Plaintiff could have easily raised this issue at the time of their purchase, or at any time shortly thereafter. Instead, Plaintiff waited until nearly four (4) years after the Davis Defendants purchased their unit to bring this action." Defendants focus only on the passage of time. It is well established, however, that "the mere passage of time is insufficient to support a finding of laches." *MMR Holdings, LLC*, 148 N.C. App. at 209, 558 S.E.2d at 198. Defendants fail to allege that plaintiff's delay worked to their disadvantage, injury, or prejudice. Rather, as counsel for defendants conceded at the hearing, the shed was built "fifteen years ago before [the Davises] ever owned it." Accordingly, defendants' defense fails.

E. Statute of Limitations

Lastly, defendants claim that the trial court erred in granting plaintiff's motion because its complaint is barred by the statute of limitations. Defendants state that the statute of limitations for an action for injury to any incorporeal hereditament under N.C. Gen. Stat. § 1-50(a)(3) is six years. Defendants reason that, because the shed has existed for more than six years, the statute of limitations has run, citing *Duke Energy Carolinas, LLC v. Gray*, ___ N.C. App. ___, 766 S.E.2d 354 (COA 14-283) (Dec. 2, 2014), *review allowed*, 772 S.E.2d 857 (2015) and 773 S.E.2d 57 (2015). Plaintiff argues that an incorporeal hereditament is a restriction on use and does not apply here. Further, plaintiff claims that even if it did apply, plaintiff brought suit within six years of purchasing unit 1B.

"The application of any statutory or contractual time limit requires an initial determination of when that limitations period begins to run. A cause of action generally accrues when the right to institute and maintain a suit arises." *Duke Energy Carolinas, LLC*, ___ N.C. App. at ___, 766 S.E.2d at 358 (quoting *Register v. White*, 358 N.C. 691, 697, 599 S.E.2d 549, 554 (2004)) (quotations omitted).

The term "incorporeal hereditament" has been defined as:

> Anything, the subject of property, which is inheritable and not tangible or visible. A right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. A right growing out of, or concerning, or annexed to, a corporeal thing, but not the substance of the thing itself.

Karner v. Roy White Flowers, Inc., 134 N.C. App. 645, 649, 518 S.E.2d 563, 567 (1999) (quoting Black's Law Dictionary 726 (6th ed. 1990)), *rev'd in part on other grounds*, 351 N.C. 433, 527 S.E.2d 40 (2000).

In *Duke Energy Carolinas, LLC v. Gray*, the plaintiff was granted a 200-foot easement in 1951. ___ N.C. App. at ___, 766 S.E.2d at 356. In 2006, Wieland Homes built a house on a lot, which included a strip of land located within the plaintiff's easement. *Id.* The house was complete by 11 October 2006, the date the County issued a Certificate of Occupancy for the house, and the defendant purchased the house in 2007. *Id.* The plaintiff wrote to the defendant in 2010, informing him of the encroachment, however, the plaintiff did not file suit until 12 December 2012. *Id.* at ___, 766 S.E.2d at 356–57. This Court affirmed the trial court's grant of summary judgment in favor of the defendant, holding "that the statute of limitations for a claim based on injury to an easement runs from the time that the claim accrues, even if a plaintiff is not aware of the injury at that time." *Id.* at ___, 766 S.E.2d at 359. Accordingly, we rejected the plaintiff's argument that "the statute of limitations does not begin to run until the encroachment on an easement is known or should reasonably be known." *Id.*

Relying on that holding, defendants claim "the Shed has been in existence at its current location for more than six (6) years. In fact, the Shed has existed for some fifteen (15) year period prior to Plaintiff's purchase of its unit. As such, the statute of limitations on Plaintiff's Complaint has run." (Internal citations omitted). We acknowledge that plaintiff's primary relief requested was its right to one full parking space. A significant distinction between the facts of *Duke Energy Carolinas, LLC* and the facts of this case is that here, plaintiff did not own its unit when the shed was built. Unlike in *Duke Energy Carolinas, LLC* where the plaintiff had continuously maintained the easement when the encroachment occurred, here plaintiff did not acquire an ownership interest in its unit until roughly fifteen years after the shed was built.

We agree with plaintiff that, assuming the six year statute of limitations applies, it could not begin to run until plaintiff purchased unit 1B, which was in May 2011. As counsel for plaintiff stated, when the shed was built, "[t]here was unity of ownership, so there was no damage to anybody. The same guy owned both places." Accordingly, because plaintiff filed its complaint within six years of purchasing unit 1B, its claim is not barred by the statute of limitations.

F. Motion to Dismiss

Defendants briefly argue that the trial court erred in denying their motion to dismiss. An order denying a motion to dismiss, however, is generally not appealable. *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (citing *Country Club of Johnston*

County, Inc. v. U.S. Fidelity and Guar. Co., 135 N.C. App. 159, 519 S.E.2d 540 (1999)). Accordingly, this portion of defendants' appeal is not properly before us, and we are precluded from reviewing the merits.

III. Conclusion

For the reasons stated throughout, the trial court did not err in granting plaintiff's motion for judgment on the pleadings.

AFFIRMED.

Judges DILLON and ZACHARY concur.

VIRGINIA RADCLIFFE, PLAINTIFF
v.
AVENEL HOMEOWNERS ASSOCIATION, INC., CARMELO (TONY) BUCCAFURRI, STEPHEN MURRAY, THOMAS DINERO, DAVID HULL, RICHARD PROGELHOF, AND RON ZANZARELLA, DEFENDANTS

No. COA15-884

Filed 2 August 2016

1. Appeal and Error—interlocutory orders—common factual nexus—possibility of inconsistent verdicts

The Court of Appeals had jurisdiction over plaintiff's appeal and defendants' cross-appeal even though they were both from an interlocutory order. Plaintiff sufficiently alleged a common factual nexus between all her claims such that there existed a possibility of inconsistent verdicts absent immediate appeal of the trial court's orders.

2. Tort Claims Act—discrimination based on race, religion, ethnicity, or gender—collateral estoppel

The trial court did not err by dismissing plaintiff's claim under N.C.G.S. § 99D-1 involving motivation by either a racial, religious, ethnic, or gender-based discriminatory animus. Plaintiff was collaterally estopped from asserting this claim because this issue was already fully determined in the federal action.

3. Emotional Distress—intentional infliction of emotional distress—statute of limitations—tolled claims

The trial court did not err by dismissing plaintiff's claims for intentional infliction of emotional distress (IIED) against defendant

homeowners' association based on expiration of the pertinent statute of limitations. However, the trial court erred by dismissing IIED claims against defendant individuals because those actions were tolled during the pendency of the federal action.

4. Assault—dismissal of claims—expiration of statute of limitations

The trial court did not err by dismissing plaintiff's assault claims against defendants Zanzarella, Progelhof, Buccafurri, and Hull, and all but one of her assault claims against defendant Murray based on expiration of the pertinent statute of limitations.

5. Wrongful Interference—tortious interference with economic advantage—statute of limitations—tolled claims

The trial court did not err by dismissing plaintiff's tortious interference with prospective economic advantage (TIPEA) claims against defendant homeowners' association and defendant Dinero as time barred. However, the trial court erred by dismissing plaintiff's TIPEA claims against defendants Hull, Progelhof, Zanzarella, Murray, and Buccafurri because those actions were tolled during the pendency of the federal action.

6. Wrongful Interference—tortious interference with economic advantage—prospective employment

The trial court erred by dismissing plaintiff's tortious interference with prospective economic advantage claims against defendants Hull, Progelhof, Zanzarella, and Murray based on plaintiff's prospective employment with the United Methodist Church.

7. Wrongful Interference—tortious interference with economic advantage—prospective employment—failure to make specific factual allegations

The trial court did not err by dismissing plaintiff's tortious interference with prospective economic advantage (TIPEA) claims against defendants Hull, Progelhof, Zanzarella, and Murray based on plaintiff's prospective employment with the Boys and Girls Home. Plaintiff failed to make specific factual allegations.

8. Emotional Distress—negligent infliction of emotional distress—motion to dismiss—intentional conduct

The trial court did not err by dismissing plaintiff's negligent infliction of emotional distress claims. Plaintiff's allegations in her second amended complaint repeatedly referenced a pattern of intentional conduct by defendants.

9. Parties—necessary party—personal claims—trust

The trial court did not err by denying defendants' Rule 12(b)(7) motions to dismiss based on an alleged failure to join a necessary party. Plaintiff's claims were personal and unique to her, and thus, the trust could not be characterized as a necessary party.

Appeal by plaintiff and cross-appeal by defendants from orders entered 21 August 2014 and 4 February 2015 by Judge D. Jack Hooks, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 13 January 2016.

Hester, Grady & Hester, P.L.L.C., by H. Clifton Hester, for Virginia Radcliffe.

StephensonLaw, LLP, by James B. Stephenson II and Philip T. Gray, for Avenel Homeowners Association, Inc.

Ennis, Baynard, Morton, & Medlin, PA, by Donald W. Ennis, for Carmelo Buccafurri and Stephen Murray.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Clay Allen Collier, for Thomas Dinero.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Reid Russell, and Brown, Crump, Vanore & Tierney, L.L.P., by Derek M. Crump, for David Hull.

Anderson, Johnson, Lawrence, & Butler, LLP, by Stacey E. Tally, for Richard Progelhof.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Jeffrey H. Blackwell, for Ron Zanzarella.

DAVIS, Judge.

Virginia Radcliffe ("Plaintiff") initiated this action alleging a violation of her civil rights and the infliction of various types of tortious conduct against her by the Avenel Homeowners Association, Inc. ("the Association"), Carmelo Buccafurri ("Buccafurri"), Stephen Murray ("Murray"), Thomas Dinero ("Dinero"), David Hull ("Hull"), Richard Progelhof ("Progelhof"), and Ron Zanzarella ("Zanzarella") (collectively "Defendants"). Plaintiff appeals from two orders of the trial court

dismissing a number of the claims asserted by her in this action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we (1) affirm the trial court's 21 August 2014 order; (2) reverse the portions of the trial court's 4 February 2015 order dismissing (a) Plaintiff's claims for intentional infliction of emotional distress against Buccafurri, Hull, Dinero, Progelhof, Zanzarella, and Murray; and (b) Plaintiff's tortious interference with prospective economic advantage claims (related to her prospective employment with the United Methodist Church) against Hull, Murray, Progelhof, and Zanzarella; and (3) remand for further proceedings.

Factual and Procedural Background

I. Allegations of Plaintiff's Second Amended Complaint

We have summarized below the allegations of Plaintiff's second amended complaint,[1] which we take as true in reviewing the trial court's Rule 12(b)(6) orders. *Feltman v. City of Wilson*, __ N.C. App. __, __, 767 S.E.2d 615, 617 (2014).

In March of 2001, Plaintiff moved to the Avenel subdivision ("Avenel") in New Hanover County, North Carolina in order to pursue a career with the United Methodist Church ("the UMC"). Plaintiff had prospects for employment with a local chapter of the UMC and was a certified candidate for ordination as a minister, having recently graduated from Yale Divinity School.

As a resident of Avenel, Plaintiff was required to join the Association and be subject to its covenants and restrictions. In return, Plaintiff was entitled to utilize certain common areas within Avenel, including a pier, a floating dock, a gazebo, an entrance driveway, and several parking lots.

During the time period in which Plaintiff lived in Avenel, the individual Defendants held various positions on the Association's board of directors. Three of the individual Defendants — Buccafurri, Murray, and Hull — were also Plaintiff's neighbors. Beginning in the spring of 2003, Defendants allegedly embarked on a campaign to force Plaintiff to leave Avenel and "engaged in a systemic pattern of harassment, threats, violence, and intimidation" designed to induce Plaintiff to move out of the subdivision.

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1. Because of the numerous incidents of harassment described throughout Plaintiff's second amended complaint, we reference only a portion of them here as representative samples of her allegations. At various times throughout this opinion, we discuss other incidents alleged by Plaintiff.

On 27 March 2003, Plaintiff was walking on the street in front of her house when Zanzarella drove an SUV directly at her while Progelhof sat in the front passenger seat. Buccafurri and Murray confronted Plaintiff at the Avenel gazebo on or about 25 May 2003. They verbally berated her, stating that they (1) "had a plan to get rid of [her] or to cause her to leave Avenel"; (2) "were going to ruin [her] reputation and her career in Christian ministry"; (3) "would turn all of [her] friends against her"; (4) "would fix it so [she] could not walk the streets of Avenel unmolested"; (5) "would drive [her] into a depression so deep that she would commit suicide"; and (6) "would kill [her] to get her out of her house."

Hull and Progelhof on several occasions told Plaintiff that "they did not want a 'helpless female' living in the neighborhood." On 20 December 2003, Zanzarella yelled at her: "Hey you fat pig, you better get out of the neighborhood." On another occasion, Zanzarella, Dinero, Murray, and Buccafurri told Plaintiff to " '[e]at s*** and die[.]' " At one point, Hull also said to Plaintiff that "he could fix it so he could legally take her house away from her and there would be nothing she could do to stop him[.]" In addition, he uttered racial epithets towards her.

At one point in December of 2003, Buccafurri and Dinero shouted disparaging remarks at Plaintiff based on her religious beliefs while she was washing her car in her driveway. That same day, Buccafurri, Dinero, and Murray strung Christmas lights on the bushes outside of Murray's and Buccafurri's home (facing Plaintiff's house) that "[w]hen illuminated . . . [were] about 20 feet long and 8 feet high and read WWJD (standing for What Would Jesus Do)." On one or more occasions, Plaintiff was told by various Defendants that "she was one of those 'born again' Christians who would bring other undesirable people into the Avenel community."

On 31 December 2003, Buccafurri accosted Plaintiff while she was walking in Avenel and chased her, yelling "I'm gonna kill you, you Christian B****." Plaintiff ran to a nearby neighbor's house and called the police.

On 24 February 2004, the Association held a meeting, which Plaintiff and some or all of the individual Defendants attended. During the meeting, Zanzarella shouted that "[Plaintiff] doesn't deserve to live in Avenel[.]" He and Murray then both yelled "[e]veryone thinks you are crazy" at Plaintiff. Murray shouted "[l]et's get rid of her" to the other attendees of the meeting. At that point, Zanzarella approached Plaintiff with clenched fists and had to be physically removed from the meeting space and taken to the parking lot.

On 8 April 2004, Murray cornered Plaintiff as she was walking on the pier by the Avenel boat facility. He made "crude, sexual, and violent gestures toward [her] while making threats." Murray proceeded to "beat [Plaintiff and] then shouted at [her] 'You'll never be a minister now' after he battered [her]." Murray threw Plaintiff to the ground, kicked her, and jumped on her. Plaintiff was transported to a local hospital via ambulance where she was informed she needed surgery for broken ribs, torn knee ligaments, deep bruising, bone contusions, and other related injuries. That same day, Murray filed a lawsuit against her in which he falsely claimed she had assaulted and battered him.

On 29 May 2004, Buccafurri and Zanzarella accosted Plaintiff and a friend of hers at the Avenel gazebo, shouting obscenities and threats. They followed Plaintiff and her friend as they were walking back to her house, continuing to shout at and threaten her along the way.

On 23 June 2004, while Plaintiff was at the Avenel gazebo, Hull, Zanzarella, and Progelhof surrounded her and "physically prevented" her from leaving while shouting disparaging and threatening remarks at her. Plaintiff called 911 and received an escort home from law enforcement officers. The following day, Progelhof and Zanzarella instituted criminal proceedings against Plaintiff in which they falsely accused her of communicating threats. That same day, Buccafurri filed false charges against Plaintiff for trespass.

On 18 October 2004, Buccafurri and Murray shouted loudly at Plaintiff and her friend as they stood in Plaintiff's driveway. They "began waving their arms wildly and chased [Plaintiff] and her friend from [her] yard."

At some point in time, Buccafurri sent a packet of documents to UMC representatives containing false information about Plaintiff that was damaging to her reputation "in order to prevent [Plaintiff's] ordination[.]" The UMC did, in fact, revoke Plaintiff's ordination candidate certification on 2 February 2005.[2]

Plaintiff was also denied employment by the Boys and Girls Home of North Carolina ("Boys and Girls Home") — an organization that was a "local Christian ministry." Plaintiff had sought a position as a "mentor supervisor" at the Boys and Girls Home but was denied a job offer on 1 July 2005 due to the false criminal charges previously filed against her

2. An ordination certification is a prerequisite to becoming an ordained minister in the UMC.

by Buccafurri, Progelhof, and Zanzarella. On 18 July 2005, Buccafurri accosted Plaintiff at a local grocery store and stated "that he would make sure she never got a job anywhere."

II. Prior Lawsuits Brought by Plaintiff or on Her Behalf

On 14 June 2006, the North Carolina Human Relations Commission ("the NCHRC") brought a lawsuit ("the NCHRC Lawsuit") on Plaintiff's behalf in Wake County Superior Court asserting a cause of action against Defendants for interference with Plaintiff's civil rights in violation of N.C. Gen. Stat. § 99D-1. On 4 January 2007, the NCHRC lawsuit was voluntarily dismissed.

On 26 March 2007, Plaintiff filed a complaint in the United States District Court for the Eastern District of North Carolina ("the Federal Action") against all of the same individuals and entities named as Defendants in the present action. In her federal complaint, Plaintiff alleged claims for (1) violation of the Fair Housing Act ("FHA") against all Defendants; (2) interference with Plaintiff's civil rights pursuant to N.C. Gen. Stat. § 99D-1 against all Defendants; (3) assault and battery against Murray relating to the 8 April 2004 incident at the pier in which he physically beat her; (4) false imprisonment against Hull, Zanzarella, and Progelhof; (5) malicious prosecution against Murray, Progelhof, Zanzarella, and Buccafurri; (6) intentional infliction of emotional distress ("IIED") against the individual Defendants; (7) negligent infliction of emotional distress ("NIED") against all Defendants; and (8) tortious interference with a prospective economic advantage against Buccafurri, Murray, Hull, Progelhof, and Zanzarella.

All of the defendants filed motions for summary judgment, and on 12 February 2013, the Honorable James C. Fox entered an order granting summary judgment in favor of Defendants on Plaintiff's FHA claim. Having disposed of the only claim asserted by Plaintiff arising under federal law, Judge Fox expressly declined to rule on Plaintiff's supplemental state law claims and dismissed these claims without prejudice.

III. The Present Lawsuit

On 14 March 2013, Plaintiff initiated the present action in New Hanover County Superior Court. On 10 May 2013, Plaintiff filed her first amended complaint, and she amended her complaint once more on 5 August 2013. In her second amended complaint, Plaintiff alleged the following causes of action: (1) IIED claims against all Defendants; (2) assault claims against Progelhof and Zanzarella related to the SUV incident occurring on 27 March 2003 in which Zanzarella drove his

SUV directly at Plaintiff, causing her to run away ("the First SUV Incident"); (3) an assault claim against Zanzarella regarding the incident occurring on 2 June 2004 in which Zanzarella once again drove his SUV toward Plaintiff ("the Second SUV incident"); (4) an assault claim against Buccafurri based on the incident in which he chased her on 31 December 2003 ("the First Chasing Incident"); (5) assault claims against Buccafurri and Murray in connection with the incident in which they chased her on 18 October 2004 ("the Second Chasing Incident"); (6) assault claims against Buccafurri and Zanzarella for the incident occurring at the gazebo on 29 May 2004 where they yelled obscenities at Plaintiff and her friend and followed them home while continuing to verbally berate them ("the First Gazebo Incident"); (7) an assault claim against Murray regarding the incident at the pier on 8 April 2004 during which he physically beat her while simultaneously verbally berating her ("the Pier Incident"); (8) a battery claim against Murray for the Pier Incident; (9) assault claims against Hull, Zanzarella, and Progelhof for the incident at the gazebo on 23 June 2004 during which they prevented her from leaving, requiring her to call 911 for assistance ("the Second Gazebo Incident"); (10) false imprisonment claims against Hull, Zanzarella, and Progelhof for the Second Gazebo Incident; (11) tortious interference with prospective economic advantage claims against all Defendants for interfering with her potential employment contract with the UMC; (12) tortious interference with prospective economic advantage claims against the Association, Buccafurri, Hull, Progelhof, and Zanzarella based on their interference with her potential employment with the Boys and Girls Home; (13) a malicious prosecution claim against Murray due to his filing of criminal charges against Plaintiff for assault and battery shortly after the Pier Incident; (14) a malicious prosecution claim against Progelhof based on his filing of a communicating threats charge against her on 24 June 2004; (15) a malicious prosecution claim against Zanzarella in connection with his filing on 24 June 2004 of a communicating threats charge against her; (16) a malicious prosecution claim against Buccafurri due to his filing of a trespass claim against her on 24 June 2004; (17) NIED claims against all Defendants; and (18) a claim under N.C. Gen. Stat. § 99D-1 against all Defendants alleging a violation of her civil rights.

On 6 September 2013, the Association filed an answer and motion to dismiss Plaintiff's second amended complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted and Rule 12(b)(7) based on Plaintiff's alleged failure to join a necessary party. The individual Defendants subsequently filed answers containing similar motions.

On 16 June 2014, a hearing was held before the Honorable D. Jack Hooks, Jr. On 21 August 2014, Judge Hooks entered an order denying Defendants' Rule 12(b)(7) motions and granting Defendants' motions to dismiss Plaintiff's claims under N.C. Gen. Stat. § 99D-1 pursuant to Rule 12(b)(6).

A second hearing was held before Judge Hooks on 25 September 2014. On 4 February 2015, Judge Hooks entered an order dismissing (1) Plaintiff's IIED claims; (2) all of her assault claims against Progelhof, Zanzarella, Buccafurri, and Hull and all but one of her assault claims against Murray; (3) Plaintiff's tortious interference with prospective economic advantage claims against all Defendants except for Buccafurri with regard to Plaintiff's potential employment with the UMC; (4) her tortious interference with prospective economic advantage claims in connection with her potential employment with the Boys and Girls Home; and (5) Plaintiff's NIED claims.

Plaintiff filed a notice of appeal as to both of Judge Hooks' orders on 5 March 2015. On 18 March 2015, Defendants filed a notice of cross-appeal as to the 21 August 2014 order.

Analysis

I. Appellate Jurisdiction

[1] Initially, we must determine whether we have jurisdiction over Plaintiff's appeal and Defendants' cross-appeal. *See Hous. Auth. of City of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) ("As an initial matter, we must address the extent, if any, to which Defendant's appeal is properly before us. An appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." (citation, quotation marks, and brackets omitted)).

On 15 October 2015, Defendants filed a joint motion to dismiss Plaintiff's appeal on the ground that it is an impermissible interlocutory appeal from orders that are not final judgments. For the reasons set out below, we deny Defendant's motion.

It is undisputed that the present appeal is interlocutory. *See Mecklenburg Cty. v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 667, 704 S.E.2d 48, 51 (2010) ("An order is interlocutory when it does not dispose of the entire case but instead, leaves outstanding issues for further action at the trial level."), *appeal dismissed and disc. review denied*, 365 N.C. 187, 707 S.E.2d 231 (2011). Generally, there is no right of immediate appeal from an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory

order may be appealed, however, if the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment."[3] *Keesee v. Hamilton*, __ N.C. App. __, __, 762 S.E.2d 246, 249 (2014). It is the appealing party's burden to establish that a substantial right would be jeopardized unless an immediate appeal is allowed. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

Our caselaw makes clear that a substantial right is affected "where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, __ N.C. App. __, __, 727 S.E.2d 311, 314 (2012) (citation and quotation marks omitted).

> To demonstrate that a second trial will affect a substantial right, [the appellant] must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials *and* (2) the possibility of inconsistent verdicts on those issues exists.

Id. at __, 727 S.E.2d at 314-15 (citation, quotation marks, and brackets omitted).

We have further held that "so long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 168, 684 S.E.2d 41, 47 (2009) (citation and quotation marks omitted). "Issues are the 'same' if facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton v. Mortg. Info. Serv., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011).

We are satisfied that Plaintiff has sufficiently alleged a common factual nexus between all of her claims such that there exists a possibility of inconsistent verdicts absent immediate appeal of the trial court's

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3. An interlocutory order may also be appealed where the trial court certifies the order for immediate appeal pursuant to Rule 54(b). *See Tands, Inc. v. Coastal Plains Realty, Inc.*, 201 N.C. App. 139, 142, 686 S.E.2d 164, 166 (2009) ("[A]n interlocutory order can be immediately appealed if the order is final as to some but not all of the claims and the trial court certifies there is no just reason to delay the appeal pursuant to North Carolina Rules of Civil Procedure, Rule 54(b)." (citation, brackets, and ellipses omitted)). However, in the present case, neither of the trial court's orders contain any such certification.

orders. *See Carcano*, 200 N.C. App. at 168, 684 S.E.2d at 47 ("Because there are overlapping factual issues, inconsistent verdicts could result. We hold, thus, that . . . plaintiff's appeal is properly before us.").

Defendants also argue that Plaintiff's appeal from the trial court's 21 August 2014 order is time-barred. As a result, Defendants contend, the portion of her appeal arising from that order must be dismissed.

Plaintiff filed a notice of appeal on 5 March 2015 that referenced both of the trial court's orders. Therefore, while her appeal of the 4 February 2015 order was timely, her notice of appeal as to the 21 August 2014 order was filed well beyond the applicable thirty-day deadline. *See* N.C.R. App. P. 3(c) ("In civil actions and special proceedings, a party must file and serve a notice of appeal . . . within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure[.]").

However, because of the factually overlapping nature of Plaintiff's claims, we elect in the interest of judicial economy to exercise our discretion under Rule 21 of the North Carolina Rules of Appellate Procedure and treat Plaintiff's appeal of the trial court's 21 August 2014 order as a petition for *certiorari*. *See Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007) ("[B]ecause the case *sub judice* is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order, we will treat the appeal as a petition for a writ of certiorari and consider the order on its merits."); *In re I.S.*, 170 N.C. App. 78, 84, 611 S.E.2d 467, 471 (2005) ("Failure to comply with the requirements of Rule 3 of our Rules of Appellate Procedure requires the dismissal of the appeal as this rule is jurisdictional. However, under appropriate circumstances this Court is authorized to issue a writ of certiorari to review the orders of a trial tribunal when the right of appeal has been lost due to failure to take timely action. This Court can exercise its discretion and treat an appellant's appeal as a petition for a writ of certiorari." (internal citations omitted)).

Defendant's cross-appeal — which is based entirely on the trial court's 21 August 2014 order denying their motions to dismiss under Rule 12(b)(7) — is also interlocutory. The trial court's order was not certified for immediate appeal pursuant to Rule 54(b), and Defendants have failed to show a substantial right that would be lost if they had to wait until entry of a final judgment to appeal the denial of their Rule 12(b)(7) motions.

Nevertheless, in furtherance of the principles of equity and fairness to the parties, we elect to similarly treat Defendant's cross-appeal as a petition for *certiorari* and consider the merits of the cross-appeal. Therefore, we proceed to address the merits of both Plaintiff's appeal and Defendants' cross-appeal.

II. Plaintiff's Appeal

The only claims left undisturbed by the trial court's 21 August 2014 and 4 February 2015 orders are Plaintiff's (1) assault claim against Murray in connection with the Pier Incident; (2) battery claim against Murray in connection with the Pier Incident; (3) false imprisonment claims against Progelhof, Hull and Zanzarella related to the Second Gazebo Incident; (4) tortious interference with prospective economic advantage claim against Buccafurri relating to her potential employment with the UMC; and (5) malicious prosecution claims against Murray, Progelhof, Zanzarella, and Buccafurri.[4] On appeal, Plaintiff contends that the trial court's dismissal of her remaining claims constituted error.

> The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Feltman, __ N.C. App. at __, 767 S.E.2d at 619 (citation omitted). "Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

A. Applicability of Statute of Limitations to Plaintiff's Claims

Before we discuss Plaintiff's specific claims for relief, it is necessary to address the threshold issue of whether the running of the statute

4. The question of whether the trial court properly denied Defendants' motions to dismiss these claims pursuant to Rule 12(b)(6) is not before us in this appeal.

of limitations has been tolled or otherwise rendered inapplicable to Plaintiff's claims. The specific incidents set out in Plaintiff's second amended complaint all occurred approximately nine years before the present action was filed. Defendants contend on appeal that many of Plaintiff's claims were properly dismissed as time barred.

All Defendants asserted the statute of limitations as an affirmative defense in their answers. It is well established that

> [o]nce a defendant has properly [pled] the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action.

Waddle v. Sparks, 331 N.C. 73, 85-86, 414 S.E.2d 22, 28-29 (1992) (citation and quotation marks omitted).

Plaintiff asserts that the statute of limitations defense is inapplicable in this case based on two theories. First, she attempts to invoke the continuing wrong doctrine. Second, she contends that the running of the applicable limitations periods for her claims was tolled by virtue of her filing the Federal Action. We discuss each of these arguments in turn.

With regard to the continuing wrong doctrine, our Supreme Court has recognized this

> doctrine as an exception to the general rule that a claim accrues when the right to maintain a suit arises. For the continuing wrong doctrine to apply, the plaintiff must show a continuing violation by the defendant that is occasioned by continual unlawful acts, not by continual ill effects from an original violation. Courts view continuing violations as falling into two narrow categories. One category arises when there has been a long-standing policy of discrimination. In the second continuing violation category, there is a continually recurring violation.

Birtha v. Stonemor, N.C., LLC, 220 N.C. App. 286, 292, 727 S.E.2d 1, 7 (2012) (internal citations, quotation marks, and ellipses omitted), *disc. review denied*, 366 N.C. 570, 738 S.E.2d 373 (2013).[5] We do not believe that either of these categories applies here.

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5. "Under the continuing wrong doctrine, the statute of limitations does not start running until the violative act ceases." *Marzec v. Nye*, 203 N.C. App. 88, 94, 690 S.E.2d 537, 542 (2010) (citation and quotation marks omitted).

First, Plaintiff was not subjected to a longstanding policy of discrimination for purposes of the doctrine. While her second amended complaint alleges insulting language and threats referencing her religion and gender that were made by Defendants, Judge Fox's order in the Federal Action — as discussed below — expressly rejected Plaintiff's argument that the tortious conduct she alleged was motivated by discrimination based on her gender or religious beliefs. While Plaintiff contends that the wrongful acts giving rise to this action all derive from Defendants' common scheme to force her to leave Avenel, we do not believe this allegation is sufficient to invoke the continuing wrong doctrine.

Nor does the second category of conduct referred to in *Birtha* apply here. Plaintiff has alleged the commission of various intentional torts by Defendants as opposed to a series of separate obligations all stemming from the same original contractual — or other — legal obligation. *See Marzec v. Nye*, 203 N.C. App. 88, 94-95, 690 S.E.2d 537, 542 (2010) (failure to make each successive monthly salary payment as it became due following defendant's breach of original payment obligation constituted new continuing wrong); *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008) (trustee's recurring refusal to make distributions under trust constituted continuing wrong), *disc. review denied*, 363 N.C. 257, 676 S.E.2d 900 (2009).

Therefore, the continuing wrong doctrine is inapplicable to the present case. *See Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 499-500, 451 S.E.2d 650, 655 (finding "no evidence to support the application of the continuing wrong doctrine" where plaintiffs alleged violation of constitutional rights under 42 U.S.C. § 1983 based on several years of sexual harassment and discrimination by defendant (internal citations and quotation marks omitted)), *appeal dismissed and disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995).

With regard to Plaintiff's tolling argument, this Court has recently addressed the application of tolling principles to situations where a plaintiff's state court action is filed following a federal court's dismissal without prejudice of the plaintiff's state law claims in a federal lawsuit arising out of the same nucleus of facts.

> According to 28 U.S.C. § 1367(d), the period of limitations for any supplemental state law claim asserted in a federal action . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period. As a result of the fact that North Carolina does not provide for a longer tolling

> period than the thirty day interval specified in 28 U.S.C. § 1367(d), this Court has interpreted 28 U.S.C. § 1367(d) to provide that, in the event that the statute of limitations applicable to a plaintiff's state law claim expires while a federal action in which that claim has been asserted is pending, the plaintiff has thirty days following the dismissal of the federal action to reassert his or her state law claims in the General Court of Justice.

Glynne v. Wilson Med. Ctr., __ N.C. App. __, __, 762 S.E.2d 645, 649 (2014) (internal citations, quotation marks, brackets, and ellipses omitted).[6]

The tolling provision of 28 U.S.C. § 1367(d), however, applies only to state law claims that were actually asserted in a federal lawsuit. It does *not* apply to claims arising out of the same set of facts that could have been brought in the federal lawsuit but were not. Instead, the statute of limitations for such claims continues to run during the pendency of the federal action.

Our decision in *Renegar v. R.J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 549 S.E.2d 227, *disc. review denied*, 354 N.C. 220, 554 S.E.2d 344 (2001) is instructive. In *Renegar*, the plaintiff was fired from his job with the defendant. He brought several federal claims against the defendant in federal court as a result of the termination of his employment. *Id.* at 78-79, 549 S.E.2d at 229. He later voluntarily dismissed the federal action without prejudice and then filed a lawsuit in North Carolina superior court for wrongful discharge in violation of public policy — a claim arising under State law. The trial court granted summary judgment in favor of the defendant on statute of limitations grounds. The court reasoned that because the plaintiff had failed to assert his wrongful discharge claim as a supplemental claim in his federal action, the limitations period for that claim had not been tolled during the pendency of the federal action. *Id.* at 79, 549 S.E.2d at 229.

On appeal, we affirmed the trial court's ruling, holding that

> the claims set forth in plaintiff's federal and state actions arose from the same event, his discharge by [the defendant]. However, the claim of wrongful discharge alleged in the state action and the federal statutory and constitutional claims alleged in the federal action each constitute

6. Here, Judge Fox dismissed Plaintiff's state law claims without prejudice on 12 February 2013 and Plaintiff filed her initial complaint in the present action on 14 March 2013 — exactly 30 days later.

> independent causes of action with unique elements which must be proven by plaintiff, and [the defendant] thus was not placed on notice by plaintiff's federal action that it would be asked to defend plaintiff's state wrongful discharge claim within the time required by the statute of limitations. In short, plaintiff's state action thus was not based on the same claims alleged in his federal action. . . . [Therefore, the p]laintiff's state action . . . was not timely filed, and the trial court properly granted summary judgment in favor of [the defendant].

Id. at 85, 549 S.E.2d at 232-33 (internal citations, quotation marks, and brackets omitted).

Thus, the limitations period for any claim that Plaintiff is asserting in the present action against a particular Defendant that she also asserted against that Defendant in the Federal Action was tolled until thirty days after the Federal Action was dismissed. However, such tolling would *not* apply to any claims asserted by Plaintiff in the present action against a particular Defendant that were not brought in the Federal Action. Furthermore, because (1) the Federal Action was not filed until 26 March 2007; and (2) all of Plaintiff's tort claims are governed by a three-year statute of limitations, only claims for relief based on acts that occurred on or after 26 March 2004 would not be time barred.[7]

B. Plaintiff's Claims

With these principles in mind, we next consider whether those claims in Plaintiff's second amended complaint dismissed by the trial court were properly subject to dismissal.

1. Claims under N.C. Gen. Stat. § 99D-1

[2] We first address Plaintiff's argument that the trial court erred in dismissing her claim under N.C. Gen. Stat. § 99D-1. Defendants contend that the dismissal of this claim was proper based on collateral estoppel. We agree.

The doctrine of collateral estoppel prevents issues that were actually litigated and necessary to the outcome of a prior suit from being relitigated in a later action between the original parties or their privies.

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7. As discussed throughout the remainder of this opinion, we conclude that the statute of limitations does, in fact, bar a number of the claims Plaintiff has asserted in this action.

Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., __ N.C. App. __, __, 762 S.E.2d 865, 871 (2014). The party alleging collateral estoppel must demonstrate

> that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.

Tucker v. Frinzi, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (citation and brackets omitted). Collateral estoppel only applies to "matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008) (citation, quotation marks, and emphasis omitted), *appeal dismissed and disc. review denied*, 363 N.C. 123, 672 S.E.2d 685 (2009).

N.C. Gen. Stat. § 99D-1 provides, in pertinent part, as follows:

> (a) It is a violation of this Chapter if:
>
> (1) Two or more persons, motivated by race, religion, ethnicity, or gender, but whether or not acting under color of law, conspire to interfere with the exercise or enjoyment by any other person or persons of a right secured by the Constitutions of the United States or North Carolina, or of a right secured by a law of the United States or North Carolina that enforces, interprets, or impacts on a constitutional right; and
>
> (2) One or more persons engaged in such a conspiracy use force, repeated harassment, violence, physical harm to persons or property, or direct or indirect threats of physical harm to persons or property to commit an act in furtherance of the object of the conspiracy; and
>
> (3) The commission of an act described in subdivision (2) interferes, or is an attempt to interfere, with the exercise or enjoyment of a right, described in subdivision (1), of another person.

N.C. Gen. Stat. § 99D-1(a) (2015). Therefore, § 99D-1 expressly provides that in order for a claim to arise thereunder, the defendant's conduct

must be motivated by either a racial, religious, ethnic, or gender-based discriminatory animus.

In the Federal Action, Judge Fox dismissed Plaintiff's FHA claim based on the following reasoning:

> In this case, Plaintiff asserts direct evidence of discrimination. However, for over a year before any of the complained of behavior occurred, Plaintiff and her neighbors tolerated, and in some instances were friendly with, one another. Then, on or after December 2, 2002, the relationships soured and the above-described feud ensued. It is abundantly clear that much animosity existed between Plaintiff and Defendants. Further, it may well be that, because of their quarrel with Plaintiff, some derogatory gender-specific, religious-specific, and disability-specific comments were made by one or more Defendants. However, the evidence contained in the record demonstrates that these comments were made, not because Defendants were intentionally discriminating against women, Christians, or disabled persons, or retaliating against Plaintiff for filing a discrimination claim, but rather because they knew such comments would personally offend Plaintiff. In this case, the prior amicable relationships, the several individuals in Avenel similarly situated to Plaintiff but not harassed, and the fact that some Defendants, rather than Plaintiff, have since moved from their homes, belie the contention of Plaintiff that the actions of Defendants were motivated by illegal discrimination or retaliation. As such, the Court finds that Plaintiff's evidence is insufficient for a reasonable jury to conclude that the hostility was a product of genuine discriminatory or retaliatory animus rather than the kind of personality conflict that exists in neighborhoods across the country. Accordingly, Plaintiff cannot prove the third and fourth elements of her FHA claim. The Court will therefore grant Defendants' motions for summary judgment with regard to Plaintiff's claim under the FHA.

In *McCallum v. N.C. Co-op. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 542 S.E.2d 227, *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001), the plaintiff brought retaliatory discharge and equal protection claims against the defendants based on the United States Constitution, claims for racial discrimination and

retaliation in violation of Title VII of the Civil Rights Act of 1964, and a claim alleging violation of his rights under several provisions of the North Carolina Constitution. The defendants removed the case to federal court and later moved for summary judgment. *Id.* at 49, 542 S.E.2d at 230.

The federal court granted summary judgment on all claims arising under federal law and dismissed without prejudice the claims alleging violations of the North Carolina Constitution. In its order, the federal court ruled that the plaintiff had failed to show any discriminatory intent by the defendants. *Id.* at 49-50, 542 S.E.2d at 230.

Approximately one month later, the plaintiff filed a new complaint in North Carolina superior court in which he once again alleged that his discharge had been based on discrimination and retaliation in violation of the North Carolina Constitution. The defendants moved for summary judgment, contending that these claims were barred by collateral estoppel because of the federal court's ruling. The trial court denied the motion and defendants appealed. *Id.* at 50, 542 S.E.2d at 230.

In reversing the trial court, we held as follows:

> In the instant case, the issue of whether defendants intentionally discriminated against plaintiff was fully litigated in the federal court. After reviewing all of the evidence, the federal court found that plaintiff failed to present any direct evidence of a purpose by defendants to discriminate against plaintiff or circumstantial evidence of sufficiently probative force to raise a genuine issue of material fact. The federal court then granted defendants' motion for summary judgment on plaintiff's claim for racial discrimination. We hold that the issue of discriminatory intent by defendants was conclusively determined in the federal court, and thus plaintiff is collaterally estopped from relitigating that issue in this action.
>
> Plaintiff's failure in federal court to establish discriminatory intent by defendants also bars litigation of his equal protection violation claim in state court. In order to prevail upon an equal protection violation claim under the North Carolina Constitution, the burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies. As the federal court has already conclusively ruled against plaintiff upon the issue of discriminatory intent by defendants, collateral estoppel prevents the plaintiff from proceeding on this claim.

. . . .

> [T]he federal court ruled against plaintiff on the exact issue that plaintiff now raises in state court. Plaintiff is therefore collaterally estopped from seeking a state court resolution on the issue of a causal connection between plaintiff's constitutionally protected activities and the adverse employment action taken by defendants. Because the lack of a causal connection is fatal to plaintiff's claim for retaliatory discharge, defendants are entitled to summary judgment on this claim.
>
> The issues of defendants' discriminatory intent and improper motivation were tried in the federal court after full discovery; resolution of those issues was material and necessary to the judgment in that court. The doctrine of collateral estoppel therefore bars the re-litigation of these issues in our state trial courts. Because plaintiff cannot, as a matter of law, succeed on his claims, the trial court erred when it refused to grant defendants' motion for summary judgment on plaintiff's claims of racial discrimination, equal protection violations, and retaliatory discharge.

Id. at 54-56, 542 S.E.2d at 233-34 (internal citation, quotation marks, and brackets omitted).

Plaintiff's § 99D-1 claims in the present case are based upon the same facts and circumstances that were before the federal court in its consideration of her FHA claims. Therefore, we conclude that the issue of whether Plaintiff was discriminated against by Defendants based upon her religious beliefs or gender has already been fully determined in the Federal Action and decided adversely to her. Accordingly, we hold that Plaintiff is collaterally estopped from asserting her § 99D-1 claims in the present action and that the trial court correctly dismissed these claims.

2. IIED Claims

[3] Plaintiff next contends that the trial court erred in dismissing her claims for IIED against all Defendants. "The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Holleman v. Aiken*, 193 N.C. App. 484, 501, 668 S.E.2d 579, 590 (2008) (citation and quotation marks omitted). "The tort may also exist where defendant's actions indicate a reckless indifference to

the likelihood that they will cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981).

"Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. The determination of whether conduct rises to the level of extreme and outrageous is a question of law." *Johnson v. Colonial Life & Acc. Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872-73 (2005) (internal citations and quotation marks omitted), *disc. review denied*, 360 N.C. 290, 627 S.E.2d 620 (2006).

a. The Association

In the Federal Action, Plaintiff did not assert an IIED claim against the Association and, therefore, based on the tolling principles discussed above, her deadline for asserting this claim against the Association was not tolled. "The statute of limitations for [an] intentional infliction of [emotional] distress [claim] is three years." *Waddle*, 331 N.C. at 85, 414 S.E.2d at 28. Accordingly, because the present action was not filed until 2013, her IIED claim against the Association is barred by the statute of limitations. *See Renegar*, 145 N.C. App. at 85, 549 S.E.2d at 232-33.

b. Buccafurri, Dinero, Hull, Progelhof, Zanzarella, and Murray

Plaintiff's IIED claims against Buccafurri, Dinero, Hull, Progelhof, Murray, and Zanzarella were, conversely, tolled during the pendency of the Federal Action because these claims were asserted by Plaintiff in that lawsuit. As a result, we must determine whether Plaintiff has stated viable IIED claims against these individual Defendants based on acts alleged by her to have been committed on or after 26 March 2004.

After carefully reviewing the allegations contained in her pleadings, we conclude that Plaintiff has, in fact, pled valid claims for IIED against each of the individual Defendants. Even excluding from our consideration her references to conduct by these Defendants occurring prior to 26 March 2004, she has alleged a virtually unending barrage of abuse, harassment, threats, scorn, and derision heaped upon her by these Defendants — acts that at times spilled over into physical confrontation and attack — lasting until June 2006. Her allegations in support of her IIED claims include the following:

- Buccafurri, Murray, Dinero, Hull, Progelhof and Zanzarella habitually threatened, harassed, and intimidated Plaintiff. Murray,

Buccafurri, Zanzarella, and Dinero shouted at Plaintiff that "she was a Christian B**** and a Christian C***" and "threatened [her] by saying [w]hat would Jesus do if we screwed your Christian C***" and "what would Jesus do if we sodomized you[?]"

- Murray, Buccafurri, Zanzarella, Dinero, Progelhof, and Hull told Plaintiff she "was one of those 'born again' Christians who would bring other undesirable people into the Avenel community[.]"
- Murray, Buccafurri, Zanzarella, Dinero, Progelhof, and Hull "threatened [Plaintiff] not to bring her African-Americans or low-income friends and associates from Christian Ministries into Avenel because they did not want those kind of people in Avenel[.]"
- Zanzarella, Dinero, Murray, and Buccafurri shouted at her to "[e]at s*** and die[.]"
- On one occasion while Plaintiff was walking her dog, Zanzarella and Hull shouted: "Look there is a pig walking a dog[.]"
- Murray and Buccafurri told her "she better lose weight in a hurry and marry an already married white male friend of hers or else[.]"
- At one point, Hull told Plaintiff "he could fix it so he could legally take her house away from her and there would be nothing she could do to stop him[.]" On another occasion, he uttered racial epithets at Plaintiff and "asked if she was going to marry an African-American male who was at that time a guest at [her] home[.]"
- Buccafurri mocked Plaintiff at one point by asking her "if she would still have large breasts if she lost weight[.]" On another occasion he "followed [Plaintiff] inside a grocery store yelling loudly, 'I'll keep on making sure you never get a job anywhere!' "
- Defendants charged Plaintiff with false crimes five times over a two year period.
- On or about April 8, 2004 Murray physically beat Plaintiff and then shouted at her "[y]ou'll never be a minister now[.]" Plaintiff was then transported to the hospital via ambulance where she was informed her injuries would require surgery.
- On 23 June 2004, while Plaintiff was sitting at the Avenel gazebo, Hull, Zanzarella, and Progelhof surrounded her, thereby

physically preventing her from leaving, while simultaneously shouting insults and threats at her. Plaintiff was forced to call 911 as a result and be escorted home by law enforcement officers.

- On 18 October 2004, Defendants saw Plaintiff meeting a friend for coffee. While they were having coffee, Defendants "placed a dismembered doll on the car belonging to Plaintiff's friend. [Plaintiff] and her friend were standing in [her] driveway discussing the dismembered doll when Defendants Buccafurri and Murray shouted at them. Defendants Buccafurri and Murray taunted and chased [Plaintiff] and her friend from [Plaintiff's] yard. [Plaintiff] and her friend were forced to drive away."
- On 13 February 2005, Plaintiff returned home from church to find her back door — which had been bolted and locked — open. Upon inspection, she observed that "[s]omeone had written inside of her large picture window by the open door, the letters 'MUR.' [Her] private detective showed her a videotape that shows Defendant Murray running across her back property on this same day[.]"
- On 18 July 2005, Buccafurri accosted Plaintiff at a local grocery store, threatened her, and told her that he would make sure she never got a job anywhere.
- Zanzarella drove by Plaintiff on another occasion and "called [her] a b**** and shouted at her to '[g]et out of the neighborhood.' "
- At one point "Hull accosted [her] at her home and told her she should move because he did not want a 'helpless female' with medical problems living alone next door to him."
- Murray contacted Plaintiff's former husband and requested any information he possessed regarding her that could be used to blackmail her into leaving Avenel.
- On 2 April 2006, while Plaintiff was sitting at the gazebo, Zanzarella accosted Plaintiff and screamed at her. Hull subsequently told Plaintiff that "the authorities would not help [her] because he was a close personal friend of the New Hanover County district attorney and sheriff."
- Buccafurri sent a package of documents to UMC officials containing false information about her in order to prevent her ordination.

In analyzing the validity of her IIED claims, we are guided by our decision in *Wilson v. Pearce*, 105 N.C. App. 107, 412 S.E.2d 148, *disc. review denied*, 331 N.C. 291, 417 S.E.2d 72 (1992). In *Wilson*, the plaintiffs brought an IIED claim against their next door neighbors, Carl and Wanda Pearce. The defendants, who believed that the plaintiffs' fence was impermissibly encroaching on their property, engaged in a campaign of harassment for several years in an attempt to cause the plaintiffs to move the fence. *Id.* at 110-11, 412 S.E.2d at 149-50.

The plaintiffs presented evidence at trial of the following acts by the defendants: (1) Mr. Pearce would stand in his yard and raise his fists at Plaintiffs while making obscene gestures and loudly cursing at them; (2) Mr. Pearce frequently stood in front of his window in full view of Mrs. Wilson and "made obscene gestures with his 'private parts' at her and then laughed at her reaction" while simultaneously mouthing obscene words; (3) "[the d]efendants have for several years piled firewood against the Wilsons' fence to the point that the firewood is taller than the fence and bulges the fence into the Wilsons' yard" despite the fact that the defendants did not own a fireplace; (4) Mr. Pearce threw broken glass into the plaintiffs' yard; (5) the defendants filed false police reports against the plaintiffs; (6) Mr. Pearce threatened to kill Mr. Wilson by "knock[ing] his god damned brains out" with a rock; (7) Mr. Pearce fired his handgun past Mr. Wilson into his yard; and (8) the defendants regularly left their lawnmower running outside of the plaintiffs' bedroom window at 6:00 a.m. in the morning. *Id.* at 115-16, 412 S.E.2d at 152-53.

On appeal, we summarized the plaintiffs' evidence as follows: "Generally, defendants . . . cursed and threatened plaintiffs, reported them to the City of Durham for untrue and alleged violations of city ordinances, threw items into plaintiffs' yard, made obscene gestures to plaintiffs and their children and generally disturbed their peace." *Id.* at 111, 412 S.E.2d at 150. We proceeded to

> hold that the above behaviors by the Pearces are extreme and outrageous conduct which intentionally or recklessly caused severe emotional distress to Mr. (and Mrs.) Wilson. . . . No one in a civilized society should be expected to take the kind of harassment the evidence shows the Pearces have forced upon the Wilsons . . . .

Id. at 117, 412 S.E.2d at 153.

We believe the alleged acts of Buccafurri, Dinero, Hull, Progelhof, Murray, and Zanzarella in the present case are analogous to the

defendants' conduct in *Wilson*. Plaintiff has alleged that the individual Defendants perpetuated a prolonged multi-year campaign of harassment, threats, and abuse that grossly exceeded the bounds of propriety.

We find Plaintiff's allegations distinguishable from the cases relied upon by Defendants in which this Court rejected IIED claims. *See Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 355, 595 S.E.2d 778, 783 (2004) (affirming summary judgment on IIED claim by supervisor against former employee where "[the supervisor] confronted [the employee], [and] he [responded by] threaten[ing] to make accusations against her, yelled at her, walked off his assignment and then, when he returned, threw a package of papers at [the supervisor]" and "[t]he next day [the employee] filed a complaint of sexual harassment against [the supervisor]"); *Guthrie v. Conroy*, 152 N.C. App. 15, 24, 567 S.E.2d 403, 410 (2002) (affirming summary judgment in favor of defendant on plaintiff's IIED claim where defendant "(1) held plaintiff from behind, and touched or rubbed her neck and shoulders; (2) 'irritated' her by placing a lampshade on her head when she fell asleep with her head on her desk; (3) threw potting soil and water on plaintiff while she was planting flowers at work, remarking when he threw a cup of water on plaintiff that he'd 'always wanted to see [her] in a wet T shirt'; and (4) placed a Styrofoam 'peanut' and other small objects between the legs of a 'naked man' statuette that plaintiff displayed on her windowsill at work and asked her 'how she liked it' with the addition"); *Johnson v. Bollinger*, 86 N.C. App. 1, 5-6, 356 S.E.2d 378, 381-82 (1987) (IIED claim properly dismissed where defendant approached plaintiff in angry and threatening manner while carrying pistol, shook his hand in plaintiff's face, and said in loud voice, "I will get you"); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 493-94, 340 S.E.2d 116, 122-23 (affirming summary judgment for defendants as to IIED claims where allegations involved screaming and shouting, name-calling, throwing menus, and various hostile acts toward pregnant employee), *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986).

We cannot agree with Defendants that *Smith-Price*, *Guthrie*, *Johnson*, or *Hogan* compel the dismissal of Plaintiff's IIED claims in the present case. In none of these cases was the conduct of the defendants akin to the multi-year systematic pattern of harassment, intimidation, and abuse alleged to have been inflicted upon Plaintiff by the individual Defendants here. While Defendants are correct that isolated incidents of insults, threats, and similar conduct are insufficient to support a claim for IIED under North Carolina law, *see Chidnese v. Chidnese*, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011), Plaintiff has alleged far more

here. Although some of her allegations of insults and indignities would not by themselves rise to the level of extreme and outrageous conduct necessary for an IIED claim, her allegations — when considered in their entirety — assert not merely isolated insults but rather unrelenting abuse that involved her being beaten, physically restrained, threatened, and subjected to extraordinarily vulgar and offensive comments. For these reasons, Plaintiff has satisfied the pleading requirements for this tort. Her allegations describe a prolonged exposure to intolerable conduct that no human being should be forced to endure.[8]

Consequently, we hold that the acts of Buccafurri, Murray, Hull, Dinero, Progelhof, and Zanzarella as alleged by Plaintiff are sufficient to form the basis for IIED claims against them.[9] Therefore, we reverse the trial court's dismissal of Plaintiff's IIED claims as to these Defendants.

3. Assault Claims

[4] Plaintiff also argues that the trial court erred by dismissing her assault claims against Zanzarella, Progelhof, Buccafurri, and Hull and all but one of her assault claims against Murray.[10] The statute of limitations for an assault claim is three years. N.C. Gen. Stat. § 1-52(19) (2015). The most recent incident she alleges in support of these assault claims occurred in 2004. In the Federal Action, Plaintiff did not assert any assault claims except for the one brought against Murray in relation to the Pier Incident, and, for this reason, her deadline for asserting the remaining assault claims was not tolled. Consequently, since the present action was not filed until 2013, these assault claims are barred by the statute of limitations and were correctly dismissed by the trial court. *See Renegar*, 145 N.C. App. at 85, 549 S.E.2d at 232-33.

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8. In her second amended complaint, Plaintiff alleges that "[she] is now disabled, in pain, suffers from post-traumatic stress disorder and major depression from the attacks and harassment against her, and is unemployable in her field. . . ." Defendants do not argue that Plaintiff has failed to sufficiently plead the third element of an IIED claim.

9. It remains to be seen, of course, whether Plaintiff will be able to offer admissible evidence in support of these allegations at the summary judgment stage or at trial.

10. Multiple assault claims were asserted by Plaintiff against Murray, but the only one left undisturbed by the trial court's 4 February 2015 Order was the assault claim related to the Pier Incident.

4. Claims for Tortious Interference with Potential Economic Advantage

[5] Plaintiff next contends that the trial court erred in dismissing her two claims for tortious interference with prospective economic advantage ("TIPEA"). Plaintiff asserted these claims based on two separate theories.

Her first claim was brought against all Defendants and was based on their alleged interference with Plaintiff's job opportunity with the UMC. The trial court dismissed this claim as to all Defendants except Buccafurri. Plaintiff's second TIPEA claim was brought only against the Association, Buccafurri, Hull, Progelhof, and Zanzarella and concerned her potential employment with the Boys and Girls Home as a mentor supervisor.

"An action for tortious interference with prospective economic advantage is based on conduct by the defendants which prevents the plaintiffs from entering into a contract with a third party." *Walker v. Sloan*, 137 N.C. App. 387, 392-93, 529 S.E.2d 236, 241 (2000). In order "to state a claim for wrongful interference with prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference." *Id.* at 393, 529 S.E.2d at 242 (citation and quotation marks omitted).

a. The Association and Dinero

The statute of limitations for TIPEA claims is three years. *See* N.C. Gen. Stat. § 1-52. The allegations in the second amended complaint relevant to these claims concern actions taken sometime prior to 1 July 2005. In the Federal Action, Plaintiff did not assert a TIPEA claim against either the Association or Dinero and, therefore, no tolling of the limitations period occurred as to these claims. *See Renegar*, 145 N.C. App. at 85, 549 S.E.2d at 232-33. Therefore, the trial court correctly dismissed her TIPEA claims against the Association and Dinero as time barred.

b. Hull, Progelhof, Zanzarella, Murray, and Buccafurri

Plaintiff's TIPEA claims against Hull, Progelhof, Zanzarella, Murray, and Buccafurri were brought in the Federal Action. Therefore, unlike her claims against the Association and Dinero, the statute of limitations was tolled as to her TIPEA claims brought against these Defendants.

We address separately each of Plaintiff's two theories supporting her TIPEA claims against these Defendants.

i. Potential Employment with the UMC

[6] Plaintiff's TIPEA claims against Hull, Progelhof, Zanzarella, Murray, and Buccafurri[11] related to her potential employment with the UMC alleged, in pertinent part, the following:

> 42. Defendants Association, Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella knew that [Plaintiff] was a graduate of the Yale Divinity School, that she had achieved official certification as a candidate for ordained ministry in the United Methodist Church, and that she was an active participant in several local Christian ministries.
>
> . . . .
>
> 159. Upon information and belief, the Church officials revoked [Plaintiff's] certification because Defendant Buccafurri collected libelous materials previously written by Hull, Dinero, Progelhof, Zanzarella and Murray *exactly for this purpose* and sent false information about [her] to Church officials.
>
> 160. Upon information and belief, the decision to revoke [Plaintiff's] certification was also based upon the false criminal charges filed against [her] by Defendants Murray, Buccafurri, Hull, Progelhof, and Zanzarella.
>
> . . . .
>
> 162. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella had knowledge of the facts and circumstances associated with [Plaintiff's] prospective entry into a contract with the United Methodist Church.
>
> 163. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella instituted false criminal charges against [Plaintiff], and deliberately caus[ed her] to suffer emotional distress severe enough to preclude her ordination in the United Methodist Church.
>
> 164. Upon information and belief, Defendants Buccafurri, Dinero, Hull, Progelhof, Murray, and Zanzarella compiled

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11. As noted above, the trial court denied Buccafurri's motion to dismiss the TIPEA claim alleging interference with Plaintiff's potential employment with the UMC. Therefore, we must address the validity of Plaintiff's TIPEA claim regarding her employment opportunity with the UMC only as to Hull, Progelhof, Zanzarella, and Murray.

documents containing false and misleading statements that besmirched [Plaintiff's] reputation.

165. This package of documents contained false statements that Defendants Buccafurri, Dinero, Hull, Progelhof, Murray and Zanzarella knew to be false.

166. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella maliciously induced [the] United Methodist Church not to enter into the prospective contract with [Plainitff].

167. But for the tortious interference of Defendants Association, Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella [Plaintiff] and the United Methodist Church would have entered into a valid contract.

168. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella made false statements about [Plaintiff] to the United Methodist Church.

169. Defendants Buccafurri's, Murray's, Dinero's, Hull's, Progelhof's, and Zanzarella's actions were not done in the legitimate exercise of their own rights, but with a malicious design to injure [Plaintiff].

170. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella acted without justification.

171. Defendants Buccafurri's, Murray's, Dinero's, Hull's, Progelhof's, and Zanzarella's actions resulted in actual damages to [Plaintiff].

172. On or about February 2, 2005, United Methodist Church officials revoked [Plaintiff's] ordination candidate certification.

173. An ordination certificate is a prerequisite to becoming an ordained minister in the United Methodist Church.

174. Defendant's [sic] caused [Plaintiff] to lose substantial economic benefits in the form of salary and fringe benefits.

(Emphasis added).

In *Walker*, we elaborated on the pleading requirements applicable to TIPEA claims:

> We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendants' own rights, but with design to injure the plaintiffs, or gaining some advantage at their expense. . . . Maliciously inducing a person not to enter into a contract with another, which he would otherwise have entered into, is actionable if damage results. The word "malicious" used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiffs or gaining some advantage at their expense. Thus, to state a claim for wrongful interference with prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference.

Walker, 137 N.C. App. at 393, 529 S.E.2d at 241-42 (internal citations, quotation marks, brackets, and ellipses omitted). *See Owens v. Pepsi Cola Bottling Co. of Hickory, N.C. Inc.*, 330 N.C. 666, 680, 412 S.E.2d 636, 644 (1992) (a claim for "tortious interference with prospective economic advantage may be based on conduct which prevents the making of contracts").

Here, Plaintiff has alleged sufficient facts tending to show that Hull, Progelhof, Zanzarella, and Murray knowingly wrote false and misleading statements about her for the purpose of preventing her from being hired by the UMC and that but for their actions she would have entered into a valid employment contract with the UMC. Moreover, she alleges these actions were taken by Defendants with full knowledge that she was pursuing a position with the UMC and that their intention was to undermine — without justification — her job prospects with the UMC. Finally, she has alleged that as a result of these actions she suffered actual damages in the form of loss of employment opportunity, salary, and fringe benefits.

We believe these allegations satisfy the pleading requirements for a TIPEA claim. It is well settled that

> [a] pleading adequately sets forth a claim for relief if it contains: (1) A short and plain statement of the claim

> sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. The general standard for civil pleadings in North Carolina is notice pleading. Pleadings should be construed liberally and are sufficient if they give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial.

Haynie v. Cobb, 207 N.C. App. 143, 148-49, 698 S.E.2d 194, 198 (2010) (internal citations and quotation marks omitted); *see also Fournier v. Haywood Cty. Hosp.*, 95 N.C. App. 652, 654, 383 S.E.2d 227, 228 (1989) ("Pleadings must be liberally construed to do substantial justice, and must be fatally defective before they may be rejected as insufficient.").

In applying this liberal standard to Plaintiff's allegations, we conclude the trial court erred in dismissing her TIPEA claims against Hull, Progelhof, Zanzarella, and Murray based on her prospective employment with the UMC, and we therefore reverse this portion of the trial court's 4 February 2015 order.

ii. Potential Employment with Boys and Girls Home

[7] We reach a contrary result with regard to Plaintiff's TIPEA claims relating to her potential employment with the Boys and Girls Home. It is well established that "[w]hile we treat plaintiffs' factual allegations as true, we may ignore plaintiffs' legal conclusions." *Skinner v. Reynolds*, __ N.C. App. __, __, 764 S.E.2d 652, 655 (2014) (citation and quotation marks omitted).

Plaintiff has failed to make specific factual allegations as to acts by Defendants Hull, Progelhof, Zanzarella, and Buccafurri that would give rise to a valid TIPEA claim based on her failure to obtain employment with the Boys and Girls Home. As discussed above, Plaintiff expressly alleged that these Defendants were aware that she had achieved official certification as a candidate for ordained ministry within the UMC and were responsible for a packet containing false information about her being sent to the UMC that resulted in the UMC's decision to revoke her ordination candidate certification.

No comparable allegations exist with regard to her TIPEA theory relating to the Boys and Girls Home. Instead, Plaintiff essentially argues that the Boys and Girls Home declined to hire her because of the fact that

criminal charges had been previously filed against her. While her second amended complaint does contend that these Defendants were responsible for the filing of the false charges, she has failed to adequately allege that the charges were taken out against her for the specific purpose of thwarting her chances of obtaining employment with the Boys and Girls Home.

Moreover, although the section of Plaintiff's second amended complaint addressing this cause of action contains a number of conclusory allegations that track the elements of a TIPEA claim, such conclusions alone are insufficient to state a legally sufficient claim for TIPEA. *See Walker*, 137 N.C. App. at 392, 529 S.E.2d at 241 ("In ruling on a Rule 12(b)(6) motion to dismiss [a TIPEA claim], the trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." (internal citation omitted)). For these reasons, we affirm the trial court's dismissal of Plaintiff's TIPEA claims against Hull, Progelhof, Zanzarella and Buccafurri arising out of her failure to obtain employment with the Boys and Girls Home.

5. NIED Claims

[8] Plaintiff next challenges the trial court's dismissal of her claims for NIED against all Defendants. "In order to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause plaintiff severe emotional distress, and (3) the conduct did in fact cause plaintiff severe emotional distress." *Fields v. Dery*, 131 N.C. App. 525, 526-27, 509 S.E.2d 790, 791 (1998) (citation, quotation marks, and ellipses omitted), *disc. review denied*, 350 N.C. 308, 534 S.E.2d 590 (1999).

The fatal flaw with Plaintiff's NIED claims is that the allegations in her second amended complaint repeatedly reference a pattern of *intentional* conduct by Defendants. Moreover, the NIED section of her pleadings states, in pertinent part, as follows:

> 210. Defendants Association, Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella were negligent in that they failed to use ordinary care not to inflict emotional distress on [Plaintiff].
>
> 211. Defendants Association, Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella breached this duty by participating in a *systematic pattern of harassment*, *threats*, *violence*, *and intimidation* against [Plaintiff].

(Emphasis added).

These allegations demonstrate the invalidity of Plaintiff's NIED claims. It is nonsensical to assert that one or more of the Defendants were *negligent* by engaging in a purposeful scheme to harass, threaten, and intimidate her. Therefore, Plaintiff's NIED claims fail as a matter of law and were properly dismissed by the trial court. *See Horne v. Cumberland Cty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 149, 746 S.E.2d 13, 19 (2013) (affirming dismissal of NIED claim where "plaintiff's NIED claim is premised on allegations of intentional — rather than negligent — conduct").

III. Defendants' Cross-Appeal

[9] The only remaining issue for resolution by this Court concerns Defendants' cross-appeal. In their cross-appeal, Defendants contend that the trial court erred in failing to dismiss Plaintiff's complaint in its entirety under Rule 12(b)(7) because Plaintiff failed to join a necessary party — the V. Duncan Radcliffe Trust (the "Trust"). We disagree.

Pursuant to Rule 12(b)(7), a defendant may move to dismiss an action for "[f]ailure to join a necessary party." N.C.R. Civ. P. 12(b)(7). "When faced with a motion under Rule 12(b)(7), the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action." *Fairfield Mountain Prop. Owners Ass'n, Inc. v. Doolittle*, 149 N.C. App. 486, 487, 560 S.E.2d 604, 605 (2002) (citation and quotation marks omitted).

It is well settled that "[a] 'necessary' party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *Godette v. Godette*, 146 N.C. App. 737, 739, 554 S.E.2d 8, 9 (2001) (citation and quotation marks omitted). Defendants contend that "the V. Duncan Radcliffe Trust [was] the true owner of the residence located at 1421 Avenel Drive, Wilmington, NC 28411 at all relevant times and [Plaintiff], Trustee of the V. Duncan Radcliffe Trust was the acting trustee at all relevant times." They therefore argue that Plaintiff's failure to join the Trust as a party mandates the dismissal of this action under Rule 12(b)(7). This argument is meritless.

This lawsuit involves intentional tort claims asserted by Plaintiff for acts allegedly inflicted upon her that caused her to personally suffer emotional distress, physical injuries, and financial harm. Therefore, because Plaintiff's claims are personal and unique to her, the Trust cannot be characterized as a necessary party. Accordingly, the trial court did not err in denying Defendants' Rule 12(b)(7) motions.

Conclusion

For the reasons stated above, we reverse the portions of the trial court's 4 February 2015 order dismissing Plaintiff's (1) IIED claims against Buccafurri, Dinero, Hull, Progelhof, Zanzarella, and Murray; and (2) TIPEA claims concerning her potential employment with the UMC against Murray, Hull, Progelhof and Zanzarella. We affirm the trial court's 21 August 2014 order.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges CALABRIA and TYSON concur.

RAYMOND JAMES CAPITAL PARTNERS, L.P., PLAINTIFF
v.
HAZEL HAYES, DEFENDANT

No. COA15-746

Filed 2 August 2016

Corporations—shareholder action—wrongdoing by minority shareholder—failure to allege individualized or special duty

The trial court did not err in a shareholder action by granting defendant's (minority shareholder's) motion to dismiss claims regarding defendant recording false transactions in the company's ledger and misappropriating corporate funds for personal gain. Plaintiff majority shareholder failed to allege any duty that was individualized or otherwise special. Thus, plaintiff lacked standing to maintain a direct action seeking individual recovery against defendant.

Appeal by plaintiff from order entered 23 February 2015 by Judge Robert C. Ervin in Caldwell County Superior Court. Heard in the Court of Appeals 2 December 2015.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Amber Reinhardt Mueggenburg, for plaintiff-appellant.

Tin, Fulton, Walker & Owen, PLLC, by Sam McGee, for defendant-appellee.

CALABRIA, Judge.

Raymond James Capital Partners, L.P. ("plaintiff") appeals from an order granting Hazel Hayes' ("defendant") motion to dismiss all claims asserted against her. We affirm.

I. *Background*

Plaintiff was a majority shareholder of Albion Medical Holdings, Inc. ("Albion"), a closely held corporation. Defendant was a minority shareholder of Albion. Greer Laboratories, Inc. ("Greer")—a North Carolina corporation and wholly-owned subsidiary of Albion—employed defendant for approximately forty-five years. In 2005, defendant became Assistant Controller of Greer. Her job responsibilities included "performing monthly bank reconciliations, maintaining the general ledger, reviewing accounting entries and maintaining physical possession over Greer's manual checks."

In 2013, Albion, and by extension, Greer, were sold pursuant to a Stock Purchase Agreement. A business valuation method known as EBIDTA (Earnings Before Interest, Taxes, Depreciation, and Amortization) was used to calculate the purchase price. Albion was sold for 13.5 times the trailing twelve-month EBITDA. In addition, any excess cash of Albion was to be allocated to shareholders in the form of dividends or a pre-closing distribution. After the sale occurred, defendant continued to work as Greer's Assistant Controller until she retired in September 2014.

Soon after defendant's retirement, Greer uncovered evidence that indicated she had issued manual checks to herself and falsely recorded the funds as payments to banks and vendors in the general corporate ledger. After being confronted with this evidence, defendant allegedly admitted to embezzling funds from Greer beginning in May 2013; however, the results of an internal investigation suggested that the fraudulent check scheme dated back to 2004.

Consequently, on 7 November 2014, plaintiff filed a verified complaint[1] against defendant in Caldwell County Superior Court. Plaintiff alleged claims of embezzlement, conversion, fraud, breach of fiduciary duty, constructive fraud, unfair and deceptive trade practices,

1. Greer also filed an action against defendant in Caldwell County but a settlement was eventually reached in that case. For reasons not contained in the record, none of Albion's shareholders were parties to that action.

and a violation of North Carolina's Racketeer Influenced and Corrupt Organizations Act ("RICO"). According to plaintiff's allegations, defendant embezzled approximately $839,878.00 from Greer. The verified complaint also contained a motion for a temporary restraining order and a preliminary injunction. The trial court subsequently entered a preliminary injunction against defendant prohibiting her from, *inter alia*, selling, conveying, or liquidating her assets in order to protect plaintiff's "ability to collect upon any judgment it obtain[ed] in th[e] case." Defendant responded by filing an answer and motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim based, in part, on plaintiff's lack of standing to bring individual claims against defendant. After a hearing on the Rule 12(b)(6) motion, the trial court entered an order on 23 February 2015 granting defendant's motion to dismiss as to all claims. Plaintiff appeals.

II. *Standard of Review*

Plaintiff contends the trial court erred in granting defendant's motion to dismiss under Rule 12(b)(6) for failure to state any claim upon which relief could be granted. We disagree.

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wells Fargo Bank, N.A. v. Corneal, __ N.C. App. __, __, 767 S.E.2d 374, 377 (2014) (citation omitted). Ultimately, this Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation, quotation marks, and brackets omitted).

III. *Shareholder Actions*

Plaintiff, as a shareholder of Albion, seeks to bring individual causes of action against defendant, a former officer of Greer,[2] to recover for losses related to plaintiff's investment and the reduction of certain dividends as well as pre-distribution payments to which it was purportedly entitled.

Under North Carolina law, corporate officers with discretionary authority must discharge their duties in good faith, with due care, and in a manner they believe to be in the corporation's best interests. N.C. Gen. Stat. § 55-8-42(a) (2015); *see also id.* § 55-8-30(a) (2015) (same with respect to corporate directors). When these fiduciary duties are breached, the issue of whether the resulting injuries should be litigated in an individual or a derivative action arises. "A derivative proceeding is a civil action brought . . . in the right of a corporation, . . . while an individual action is . . . [brought] to enforce a right which belongs to [a plaintiff] personally." *Morris v. Thomas*, 161 N.C. App. 680, 684, 589 S.E.2d 419, 422 (2003) (citation and internal quotation marks omitted). "Shareholders . . . of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660, 488 S.E.2d 215, 220-21 (1997) (citations and quotation marks omitted). A similar, "well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Id.* at 658, 488 S.E.2d at 219 (citations omitted). Since the loss of an investment " 'is [typically] identical to the injury suffered by' the corporate entity as a whole[,]" claims arising from injuries to the corporation are properly asserted in derivative suits. *Green v. Freeman*, 367 N.C. 136, 144, 749 S.E.2d 262, 269 (2013) (citation omitted); Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 17.01 *et seq.* (7th ed. 2015) (explaining that corporate shareholders may normally enforce a claim that belongs to the corporation only through a derivative suit brought on behalf of the corporation).

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2. We note that defendant does not concede that she was actually an officer of Greer. The trial court also questioned plaintiff's characterization of defendant as a corporate officer. In any event, since the essence of the verified complaint is that defendant was an officer and that she owed specific fiduciary duties to plaintiff, we assume for purposes of this appeal that defendant was an officer.

A suit against corporate officers or directors for breach of fiduciary duty is "[o]ne of the clearest examples of a derivative action. . . ." *Id.* at § 17.02[1]. As explained by the United States Supreme Court, shareholder derivative suits exist to remedy "those situations where the management through fraud, neglect of duty or other cause declines to take the proper and necessary steps to assert the rights which the corporation has." *Meyer v. Fleming*, 327 U.S. 161, 167, 90 L. Ed. 595, 600 (1946).

The general prohibition against individual shareholder suits is understandable, for "the duties, the breaches of which constitute the ground of action, are duties to the corporation, considered as a legal entity, and not duties to any particular [share]holder." *Coble v. Beall*, 130 N.C. 533, 536, 41 S.E. 793, 794 (1902). Thus, "any damages [recovered from derivative suits] flow back to the corporation, not to the individual shareholders bringing the action." *Green*, 367 N.C. at 142, 749 S.E.2d at 268. Furthermore, the procedural requirements for derivative suits protect shareholders and the corporation itself by avoiding a "multiplicity of lawsuits," by limiting "who should properly speak for the corporation[,]" and by preventing "self-selected advocate[s] pursuing individual gain rather than the interests of the corporation or the shareholders as a group, [from] bringing costly and potentially meritless strike suits." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 396, 537 S.E.2d 248, 253 (2000) (citation and internal quotation marks omitted). Given these principles, a shareholder generally has no standing to bring individual actions against a corporation. Standing, which "is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,]" generally refers "to a party's right to have . . . the merits of [its] dispute" decided by a judicial tribunal. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51-52 (2002) (citations omitted).

Nevertheless, a "shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong," under two circumstances: (1) where "the wrongdoer owed [the shareholder] a special duty[,]" and (2) where the shareholder suffered a personal injury—one that is "separate and distinct from the injury sustained by the other shareholders or the corporation itself." *Barger*, 346 N.C. at 659, 488 S.E.2d at 219 (citation omitted). Accordingly, an evaluation of [plaintiff's] standing in this matter requires an analysis of: (1) [plaintiff's] alleged injury, and (2) the relationship between [plaintiff] and defendant[] with respect to each claim." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 335, 525 S.E.2d 441, 444 (2000).

A. Special Duty

All of plaintiff's claims for relief are based on the same core of operative facts, to wit: that defendant recorded false transactions in Greer's ledger and misappropriated corporate funds for her own personal gain. However, plaintiff insists that Albion existed merely as a holding company for its subsidiaries, which included Greer.[3] Based on this characterization, plaintiff argues that defendant owed it a "special duty" individually. Specifically, plaintiff contends that "[d]ue to [d]efendant's position, authority[,] and familiarity with the financial affairs of Greer, [she] owed a heightened duty to shareholders [of Albion] to act in good faith and with due care with regards to said financial affairs." We disagree.

In *Barger*, our Supreme Court explained and illustrated the special duty exception as follows:

> The special duty may arise from contract or otherwise. To support the right to an individual lawsuit, the duty must be one that the alleged wrongdoer owed directly to the shareholder as an individual. The existence of a special duty thus would be established by facts showing that defendants owed a duty to plaintiffs that was personal to plaintiffs as shareholders and was separate and distinct from the duty defendants owed the corporation. A special duty therefore has been found when the wrongful actions of a party induced an individual to become a shareholder; when a party violated its fiduciary duty to the shareholder; when the party performed individualized services directly for the shareholder; and when a party undertook to advise shareholders independently of the corporation.

Id. at 659, 488 S.E.2d at 220 (citations omitted). The *Barger* Court then explained: "This list is illustrative; it is not an exclusive list of all factual

3. We note that plaintiff asks us to ignore the corporate form relevant to this case. As the trial court pointed out, the duties that defendant allegedly owed would run to the shareholders of Greer, which was Albion itself. According to the trial court, the duties would not run to defendants as shareholders of Albion. Plaintiff has not cited any case law supporting the general proposition that North Carolina courts disregard the separate existence of a parent corporation and its wholly-owned subsidiary. Apart from cases presenting circumstances that would justify veil piercing or a conclusion that a wholly-owned subsidiary was its parent's agent, the trial court's analysis appears to be sound. In any event, for purposes of this appeal, we assume that any duties defendant may have owed to Greer flowed directly to the shareholders of Albion.

situations in which a special duty may be found." *Id.* Despite this qualification, the special duty exception clearly requires an articulation of some duty owed to a plaintiff that is distinct from the general fiduciary duties directors and officers owe to the corporation.

In the instant case, the special, or heightened, duties identified by plaintiff do not support its purported right to seek individual recovery in a direct action against defendant. The verified complaint alleges that (1) shareholders in a closely held corporation owe a fiduciary duty to one another, and (2) officers owe a fiduciary duty to shareholders. Unfortunately for plaintiff, the former is a misstatement of North Carolina corporation law and the latter fails to meet the threshold set out in *Barger*.

"As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation." *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) (citation omitted). However, "[a]n exception to this rule is that a controlling shareholder owes a fiduciary duty to minority shareholders." *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009). To that end, our courts have extended special protections to minority shareholders in closely held corporations. *See, e.g.*, *Norman*, 140 N.C. App. at 407, 537 S.E.2d at 260 (noting that North Carolina's "cases have consistently held that majority shareholders in a close corporation owe a 'special duty' and obligation of good faith to minority shareholders"). However, plaintiff was not a minority shareholder of Greer; it was a *majority* shareholder in Albion.

Furthermore, while corporate officers generally "owe a fiduciary duty to the corporation and [its] shareholders[,]" *T-WOL Acquisition Co. v. ECDG South, LLC*, 220 N.C. App. 189, 208, 725 S.E.2d 605, 617 (2012) (emphasis added), the breach of that duty rarely creates an individual cause of action. *See Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 26, 560 S.E.2d 817, 822 (2002) ("Under North Carolina law, directors of a corporation generally owe a fiduciary duty to the corporation, and where it is alleged that directors have breached this duty, the action is properly maintained by the corporation rather than any individual creditor or stockholder.") (citation omitted). As the commentary to section 55-8-30 explains, the prior version of the law "provided that officers and directors stand in a fiduciary relation 'to the corporation and its shareholders,' " but the amended version does not reference a fiduciary duty to shareholders. Our Supreme Court has recognized that this amendment was intended " 'to avoid an interpretation [of section 55-8-30] . . . that would give shareholders a direct right of action on claims that should be asserted derivatively[.]' " *Green*, 367 N.C. at 141, 749 S.E.2d at

268 (quoting N.C. Gen. Stat. § 55-8-30 (2011)). When the fiduciary duties of due care, loyalty, and good faith are breached, a shareholder may sue the offending director or officer in a derivative action. N.C. Gen. Stat. § 55-7-41 (2015).

Here, all of plaintiff's causes of action are based upon defendant's violation of her core fiduciary duties to the corporation (Greer). As a result, plaintiff has failed to allege any duty that was individualized or otherwise "special." Absent from the verified complaint is any allegation that plaintiff was a party to a contract with defendant that created distinct duties personal to plaintiff, or that defendant induced plaintiff to become a shareholder. There is also no allegation that defendant advised or dealt with plaintiff outside of the officer-shareholder relationship. In fact, there is no indication that plaintiff and defendant had particular dealings with each other in any context. *Green*, 367 N.C. at 143-44, 749 S.E.2d at 269 (holding that the special duty exception did not apply where "the most contact plaintiffs had with [the defendant] was seeing her a handful of times and saying nothing more than " 'hello' "). Although the *Barger* scenarios are not exclusive, this case does not present a situation where the recognition of a special duty would be proper or justified.

In sum, plaintiff has not "set forth any allegations which, even taken as true, support a special duty between it and defendant[]." *Energy Investors*, 351 N.C. at 336, 525 S.E.2d at 444.

B. Separate and Distinct Injury

Plaintiff next argues that its injuries were "separate and distinct" from those suffered by Greer and that, therefore, its individual claims fall under the second *Barger* exception. Once again, we disagree.

To proceed under the second, special injury exception to the general rule against individual actions, a plaintiff must allege an injury "peculiar and personal" to itself as a shareholder. *Barger*, 346 N.C. at 659, 488 S.E.2d at 220. Specifically, a plaintiff must show that its particular injury was "separate and distinct from the injury sustained by the other shareholders or the corporation itself." *Id.* at 659, 488 S.E.2d at 219.

As to plaintiff's claim for embezzlement, the verified complaint contains the following statements of injury and damages:

> 28. [Defendant's] actions as set forth herein resulted in the diminution in value of Albion's stock and the decrease in the purchase price of Albion.

> 29. [Defendant's] actions as set forth herein further resulted in the decrease in the value of excess cash available for distribution either as dividends or a pre-closing distribution to [plaintiff] *and the other shareholders* of Albion.

(Emphasis added). The verified complaint is replete with virtually identical allegations as to each of plaintiff's additional causes of action. Plaintiff's arguments on appeal are also consistently couched in terms of injuries sustained by it and "the shareholders." Thus, by plaintiff's own account, it has not suffered a unique, personal injury. Given the nature of its allegations at the trial level and its arguments on appeal, plaintiff has failed to show that its injury is separate and distinct from that suffered by other shareholders.

Furthermore, the heart of plaintiff's verified complaint is that it and Albion's other shareholders received inadequate—or more precisely, reduced—payments based upon the diminution of the value of their shares. Yet the alleged reduction in distributions or dividends is directly tied to a decrease in Albion's shares: plaintiff ultimately lost the full benefit of its investment only because Albion's shares in Greer lost value. Consequently, any reduced payments received by plaintiff were likewise received by all other shareholders.

Nevertheless, plaintiff contends that its injury is separate and distinct from that suffered by Greer because Greer was never entitled to "(1) the multiplied amount constituting the purchase price pursuant to the Stock Purchase Agreement, (2) the pre-closing distribution amount, or (3) yearly dividends." This argument ignores that the allegedly embezzled funds were taken directly from Greer's corporate coffers. As a result, plaintiff is simply positing a distinction without a difference: plaintiff's claims for reduced payments are based upon its ownership of shares, and these claims derive from the same underlying injury suffered by the corporation itself. Since plaintiff's losses are inextricably linked to the value of its investment, the appropriate reasoning is as follows: (1) defendant's embezzlement of Greer's funds reduced the value of all shares held in Albion and (2) caused Greer and Albion to be purchased for a reduced price, which (3) resulted in plaintiff's and the other shareholders' diminished compensation after the sale. Consequently, plaintiff's injury for reduced payments is the functional equivalent of a claim for diminution of the value of shares held by all of Albion's shareholders. *See*, *e.g.*, *Energy Investors*, 351 N.C. at 336, 525 S.E.2d at 444 (finding no individualized injury where the plaintiff's "injury [was] the loss of its investment, which is identical to

the injury suffered by other limited partners and by the partnership as a whole"); *Barger*, 346 N.C. at 659, 488 S.E.2d at 220 ("The only injury plaintiffs as shareholders allege is the diminution or destruction of the value of their shares as the result of defendants' negligent or fraudulent misrepresentations of TFH's financial status. This is precisely the injury suffered by the corporation itself."). Thus, plaintiff has failed to allege any injury that is separate and distinct from the harm suffered by Greer or all of Albion's shareholders collectively.

IV. *Conclusion*

Plaintiff's individual claims, derivative in nature, do not fall under either one of the *Barger* exceptions to the general rule prohibiting individual shareholder suits. Therefore, plaintiff lacks standing to maintain a direct action seeking individual recovery against defendant. Accordingly, the trial court properly granted defendant's motion to dismiss all claims against her.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

JAMES K. SANDERFORD, Plaintiff
v.
DUPLIN LAND DEVELOPMENT, INC., Defendant

No. COA15-1214

Filed 2 August 2016

Appeal and Error—interlocutory orders—no substantial right—no inconsistent verdicts—separate and distinct injury

Defendant's appeal from an interlocutory order was denied. There was no possibility of inconsistent verdicts, and the interlocutory order did not affect a substantial right. Further, plaintiff was seeking a remedy for a separate and distinct negligent act leading to a separate and distinct injury.

Appeal by defendant from Order entered 29 June 2015 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 11 May 2016.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for plaintiff-appellee.

Bill Faison Attorney, PLLC, by Bill Faison, and Fletcher, Toll & Ray, LLP, by George L. Fletcher, for defendant-appellant.

ELMORE, Judge.

Duplin Land Development, Inc. (defendant) appeals from the trial court's 29 June 2015 order, which denied defendant's motion for summary judgment. Defendant claims that the trial court's order affects a substantial right and is immediately appealable because *res judicata* bars this action. James K. Sanderford (plaintiff) filed a motion to dismiss the appeal. Pursuant to plaintiff's motion, we dismiss the appeal.

I. Background

After closing on a lot in the Bluffs at River Landing in September 2007, plaintiff filed a complaint against defendant in the United States District Court for the Eastern District of North Carolina on 10 November 2010 seeking specific enforcement of Addendum B to his lot purchase agreement, liability under the Interstate Land Sales Full Disclosure Act (ILSFDA) and the Unfair and Deceptive Trade Practices Act (UDTPA), and a claim for fraud. The federal district court entered an order on 15 February 2012 granting summary judgment in favor of defendant, and the United States Court of Appeals for the Fourth Circuit affirmed on 2 July 2013. *Sanderford v. Duplin Land Dev., Inc.*, No. 7:10-CV-230 H(2), 2012 WL 506667 (E.D.N.C. Feb. 15, 2012), *aff'd*, 531 F. App'x 358 (4th Cir. July 2, 2013).

Plaintiff filed the instant action on 21 January 2014 in New Hanover County Superior Court, alleging breach of implied warranty and breach of fiduciary duty, contending that the lot was not suitable for construction of a single-family residence. Plaintiff and defendant both moved for summary judgment. On 3 February 2015, the trial court granted defendant's motion on plaintiff's breach of implied warranty claim, and on 29 June 2015, it denied defendant's motion on plaintiff's breach of fiduciary duty claim. Defendant appeals, claiming that the trial court's order affects a substantial right and is immediately appealable due to the affirmative defense of *res judicata*. Plaintiff filed a motion to dismiss defendant's appeal, arguing defendant has not shown that the order affects a substantial right entitling it to an immediate appeal.

II. Analysis

At the outset, we must address this Court's jurisdiction to hear this appeal. In defendant's statement of the grounds for appellate review, it claims,

> [T]he trial court's summary judgment order affects a substantial right of [defendant] as described in N.C.G.S. 1-277 and N.C.G.S. 7A-27(d)(1) in that [plaintiff] and [defendant] have already litigated the facts surrounding the purchase and sale of Lot 60 to a final judgment in favor of [defendant]. Continuing the current litigation could lead to a verdict inconsistent with summary judgment in the Federal action. Thus, this interlocutory appeal involves a "substantial right". *Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co.*, 135 [N].C. App. 159, 167, 519 S.E.2d 540, 546 (1999).

In plaintiff's motion to dismiss, he argues that "the present action does not involve the same facts or claims as the previous actions, does not affect any substantial right, and no manifest injustice will result from failing to consider the interlocutory appeal of the Order." To support his current claim of breach of fiduciary duty, plaintiff alleges that defendant "knew or should have known there were unsuitable buried materials on the Lot such that a single family residence could not be built thereon, and [defendant] concealed this information from Plaintiff despite its duty as a fiduciary to disclose material facts regarding the Lot." Plaintiff states, however, that in the federal lawsuit, he claimed

> (1) [defendant] misrepresented that the Clark Group would do the sampling and testing provided for in Addendum B when another group actually took the samples and sent them to the Clark Group only for testing; and, (2) [defendant] wrongfully omitted from its notice to Plaintiff concerning its receipt of a confirmatory report indicating acceptable levels of fecal coliform that one monitoring well showed readings above the accepted standards.

"As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a 'substantial right.' " *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993) (citing *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978)). In *Bockweg*, however, our Supreme Court concluded that "the denial of a motion for summary judgment based on the defense of *res judicata may* affect a substantial right,

making the order immediately appealable." *Id.* at 491, 428 S.E.2d at 161 (citing N.C. Gen. Stat. § 1-277 (1983) (emphasis added); N.C. Gen. Stat. § 7A-27(d) (1989); and *Kleibor v. Rogers*, 265 N.C. 304, 306, 144 S.E.2d 27, 29 (1965)). Since that decision, this Court has concluded, "[W]e do not read *Bockweg* as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*." *Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co.*, 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999) (noting that "[t]he opinion pointedly states reliance upon res judicata '*may* affect a substantial right' "). Because the current case presents no possibility of inconsistent verdicts, we dismiss the appeal.

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations omitted). "*Res judicata* not only bars the relitigation of matters determined in the prior proceeding but also 'all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence could and should have brought forward.' " *Holly Farm Foods v. Kuykendall*, 114 N.C. App. 412, 416, 442 S.E.2d 94, 97 (1994) (quoting *Ballance v. Dunn*, 96 N.C. App. 286, 290, 385 S.E.2d 522, 524 (1989)). Furthermore, "[t]he defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]" *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985) (citations omitted).

Our Supreme Court observed that "the common law rule against claim-splitting is based on the principle that all damages incurred as the result of a *single wrong* must be recovered in one lawsuit." *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161 (citing *Smith v. Pate*, 246 N.C. 63, 67, 97 S.E.2d 457, 460 (1957)). However, "[w]here a plaintiff has suffered multiple wrongs at the hands of a defendant, a plaintiff may normally bring successive actions, or, at his option, may join several claims together in one lawsuit." *Id.* (internal citations omitted). Although "there has been a strong movement on the part of some litigants for the courts of this State to adopt the Restatement's 'transactional approach' to res judicata for determining whether two causes of action are part of the same claim[,]" neither appellate court has adopted it. *Nw. Fin. Grp., Inc. v. Cnty. of Gaston*, 110 N.C. App. 531, 537, 430 S.E.2d 689, 693 (1993) ("Under the transactional approach all issues arising out of a transaction or series of transactions must be tried together as one claim.") (citation and quotations omitted); *see also Bockweg*, 333 N.C. at 498, 428 S.E.2d at 165

(Meyer, J., dissenting) ("Under the modern, transactional approach, a claim is defined as 'a single core of operative facts.' ").

Here, it is undisputed that the parties are identical and that they litigated a prior action resulting in a final judgment on the merits. The only issues are whether the current claim was previously litigated in the federal suit and, if not, whether it should have been. As stated above, in plaintiff's federal suit, he sought specific enforcement of Addendum B, relief for violations of ILSFDA and UDTPA, and a claim for fraud. These claims surrounded plaintiff's dissatisfaction with how defendant handled the testing and reporting of the fecal coliform issue.

The federal district court held that defendant provided plaintiff with timely notice of the confirmatory report, foreclosing plaintiff's claim for specific enforcement of the remedies in Addendum B. *Sanderford*, 2012 WL 506667, at *3. Moreover, the court found that although defendant used another company to take samples of the soil, defendant did not breach its contract in light of the Clark Group's oversight of the process. *Id.* at *4. The court also determined that defendant did not misrepresent that it received a confirmatory report. *Id.* Lastly, it concluded that Addendum B to the purchase agreement was an unenforceable contract. *Id.* The Fourth Circuit affirmed. *Sanderford*, 531 F. App'x 358.

In the instant action, the only allegation remaining is breach of fiduciary duty based on defendant's failure, through its agent Mac Rogerson, who plaintiff claimed was also his realtor and "stood in a fiduciary relationship to [p]laintiff," "to disclose all material facts known to [d]efendant regarding the Lot." Plaintiff alleged that "[d]efendant failed to meet its obligations by not disclosing the Buried Unsuitable Materials[.]" Additionally, plaintiff claimed that a "Soil Bearing Test uncovered buried organic material beginning approximately three feet below the surface" indicating that "the Lot is unsuitable for construction." Moreover, "[t]he Unsuitable Buried Material is approximately eighteen (18) to twenty four (24) inches thick across the Lot[,]" and "[u]pon information and belief, . . . [d]efendant[ ] covered the Unsuitable Buried Material with fill dirt, in order to cover and obscure" it, rather than remove it. Based on the breach of fiduciary duty claim, plaintiff is seeking damages in excess of $25,000.

Although defendant argues that "[t]he instant action like the Federal action is dependent upon a soils issue as it relates to the lot sale[,]" there was not a final judgment on the merits in the prior action on the current claim of breach of fiduciary duty based on the alleged unsuitable buried material affecting the suitability of the lot for construction. Moreover,

the current claim is not a "material and relevant matter[ ] within the scope of the pleadings" of the federal suit, which focused solely on Addendum B. *Holly Farm Foods*, 114 N.C. App. at 416, 442 S.E.2d at 97. In *Skinner v. Quintiles Transnational Corporation*, 167 N.C. App. 478, 480–81, 606 S.E.2d 191, 192 (2004), cited by defendant, the plaintiff filed a lawsuit under the Americans with Disabilities Act in 2001, and the plaintiff filed a second lawsuit under North Carolina's Retaliatory Employment Discrimination Act in 2003. In concluding that the claims in plaintiff's second lawsuit were barred by *res judicata*, we explained that "each of plaintiff's two claims [were] based upon her termination by defendant and that the instant action merely present[ed] a new legal theory as to why plaintiff was terminated by defendant." *Id.* at 483–84, 606 S.E.2d at 194. *Contra Tong v. Dunn*, 231 N.C. App. 491, 501, 752 S.E.2d 669, 676 (2013) ("[Although] claims of (1) fraudulent and negligent misrepresentations to an employee, and (2) a breach of fiduciary duty to a common shareholder, arose out of a common set of facts[,]" the plaintiff "is seeking, in this case, a remedy for a 'separate and distinct [tortious] act leading to a separate and distinct injury.' ").

Here, unlike in *Skinner*, plaintiff has not merely presented a new legal theory regarding specific enforcement of Addendum B or misrepresentations regarding the confirmatory report. Rather, plaintiff has asserted a separate cause of action for damages for breach of fiduciary duty regarding defendant's alleged duty, and breach of such duty, to disclose that the lot was unsuitable for a single-family residence.

As was the case in *Bockweg*, here, "[p]laintiff[ ] did not merely change [his] legal theory or seek a different remedy. Rather, plaintiff[ ] [is] seeking a remedy for a separate and distinct negligent act leading to a separate and distinct injury." *Bockweg*, 333 N.C. at 494, 428 S.E.2d at 163. Although "all damages incurred as the result of a *single wrong* must be recovered in one lawsuit," here, where plaintiff "has suffered multiple wrongs[,] . . . plaintiff may normally bring successive actions[.]" *Id.* at 492, 428 S.E.2d at 161.

Defendant also asks us, pursuant to Rule 2 of the Rules of Appellate Procedure, to exercise our plenary power to avoid manifest injustice and consider its argument based on the affirmative defense of the statute of limitations. While Rule 2 "permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to 'prevent manifest injustice to a party' or to 'expedite decision in the public interest[,]' " *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citing N.C. R. App. P. 2), invoking it here is not appropriate.

III. Conclusion

For the foregoing reasons and pursuant to plaintiff's motion, because the current case presents no possibility of inconsistent verdicts, we dismiss defendant's appeal from the trial court's interlocutory order as it does not affect a substantial right.

DISMISSED.

Judges McCULLOUGH and INMAN concur.

ZARMINA SERAJ, Plaintiff
v.
ERIC DUBERMAN, M.D. and WESTERN WAKE SURGICAL, P.C., Defendants

No. COA15-873

Filed 2 August 2016

Medical Malpractice—proximate cause—summary judgment—inappropriate

Summary judgment should not have been granted for defendants in a medical practice action that arose from a surgery to remove a mass in an arm that was deeper and more entangled with nerves than expected. While there were differences in the expert testimony regarding the cause of plaintiff's nerve damage, those differences showed a genuine issue of material fact.

Appeal by Plaintiff from order entered 13 January 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 14 January 2016.

Anglin Law Firm, PLLC, by Christopher J. Anglin, for Plaintiff-Appellant.

Yates, McLamb & Weyher, L.L.P., by John W. Minier and Andrew C. Buckner, for Defendants-Appellees.

HUNTER, JR., Robert N., Judge.

Plaintiff appeals from a trial court order granting summary judgment in favor of Defendants. The trial court stated Plaintiff failed to introduce

evidence showing proximate causation, an element of medical malpractice. We reverse the trial court's grant of summary judgment.

I. Factual and Procedural Background

On 18 March 2013, Plaintiff filed an unverified complaint alleging Dr. Duberman committed medical malpractice during an operation on Plaintiff's arm. Plaintiff alleged the following acts of negligence: failure to perform tests to determine the nature of Plaintiff's benign tumor, failure to perform tests to rule out any nerve or vascular involvement, failure to identify and protect Plaintiff's right median nerve, and negligent injury to Plaintiff's right median nerve. In failing to perform these tests and in these actions, Plaintiff alleges, Dr. Duberman failed to provide medical care in accordance with the training and experience of a physician practicing in the same or a similar community. Plaintiff alleges that her injuries were a "direct and proximate result of [Dr. Duberman's] negligence[.]" The complaint also names Western Wake Surgical as a defendant, asserting Dr. Duberman's negligence occurred within the scope of his duties as an employee. To comply with Rule 9(j) of the North Carolina Rule of Civil Procedure, Plaintiff stated the following:

> [T]he medical care rendered by the defendants and/or their employees and agents and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by persons who are reasonably expected to qualify as expert witnesses under Rule 702 of the Rules of Evidence and who are prepared and willing to testify that the medical care provided to [Plaintiff] did not comply with the applicable standards of care.

On 17 May 2013, Defendants Duberman and Western Wake Surgical filed an unverified answer generally denying Plaintiff's allegations. In addition, Defendants asserted the defenses of contributory negligence and failure to comply with Rule 9(j) as well as a statutory cap on damages.

Defendants filed a motion for summary judgment on 17 October 2014. In their motion, Defendants argued no genuine issue of material fact existed as to "whether any act or omission by defendants was a proximate cause of Plaintiff's alleged injury." In support of their motion, Defendants filed the transcripts of five depositions, which we summarize below.

A. Plaintiff's Deposition

First, Defendants attached the transcript of Plaintiff's deposition taken 27 September 2013. Plaintiff, born in Kabul, Afghanistan, moved to California in 1980. When she moved to North Carolina around the year 2000, she had no ongoing medical problems other than dry eyes. Around 2006, she began to experience a pressure on her head. Following an MRI, doctors found a tumor in her head, and she had to undergo surgery. After the surgery, Plaintiff no longer felt the pressure in her head.

Subsequently, she noticed a swelling on her right arm. Approximately a month after noticing the swelling, she made an appointment with Dr. Newman. He told her the swelling was a "fatty lump" which could be removed by surgery. Dr. Newman referred Plaintiff to a surgeon, Dr. Duberman. Plaintiff made an appointment with Dr. Duberman, and went to his office where he examined her arm. He also diagnosed the swelling on Plaintiff's arm as a fatty tumor or lipoma. Dr. Duberman then discussed surgery options with Plaintiff. He explained she could undergo the procedure while awake, with local anesthesia, or she could be put to sleep for the procedure. He said the procedure would be "simple" so Plaintiff chose local anesthesia.

On the day of the procedure, Dr. Duberman administered a local anesthetic. Plaintiff said the procedure hurt "[a] lot," explaining she started screaming "[a]s soon as he start[ed] cutting [my] arm." She believed the procedure lasted approximately one hour, during which time Dr. Duberman gave her additional local anesthesia. The second dose of local anesthesia was not enough to quell the pain, so Dr. Duberman stopped and decided to schedule a time to conclude the procedure under sedation because she was unable to miss work.

Plaintiff scheduled the second surgery for 13 April 2012, approximately six months after the first attempted procedure. She did not undergo any tests or scans before the second surgery. Before the operation, Dr. Duberman estimated it would take him one-and-a-half hours to remove the mass. The surgery took three hours because the tumor was too deep and there was bleeding.

On 14 April 2012, Plaintiff called Dr. Duberman because she experienced pain and numbness in her fingers. He assured her the pain and numbness was normal. The next day, Plaintiff's pain and numbness increased and she could not hold things. She called Dr. Duberman again, and he said, "I didn't do anything wrong." She told him she thought a nerve may be cut. They discussed scheduling an MRI. The

MRI showed a "very complicated" tumor with nerves surrounding it. Following the MRI, Dr. Duberman referred Plaintiff to a specialist at UNC-Chapel Hill. Plaintiff went to see a doctor at UNC but did not remember any further details.

Plaintiff sought a second opinion at Duke. After seeing multiple doctors from multiple specialties, they told her she had nerve damage resulting from surgery. Due to the complicated nature of the tumor, doctors at Duke refused to perform surgery on Plaintiff to remove the remainder of the tumor.

Plaintiff next went to Houston, Texas to seek treatment from Dr. Jimmy F. Howell, M.D. He successfully removed the remainder of the tumor. Following the surgery in Texas, Dr. Howell told Plaintiff one of her nerves had previously been cut.

At the time of the deposition, Plaintiff took prescription medications foranxiety, depression, and thyroid problems as well as ibuprofen daily for pain relief. Prior to the surgeries, Plaintiff worked five days a week for eight to nine hours per day teaching the Dari language to special forces units deploying to Afghanistan. In June 2012, when her contract ended, she did not actively seek to renew her contract or seek another job because of her hand. She explained teaching requires writing on the blackboard and typing, things she is no longer able to do. Now, Plaintiff collects Social Security disability in the amount of $1,700.00 per month. She explained the pain and loss of use of her hand also caused her to discontinue cooking, gardening, and exercising. It also affected her relationship with her husband, and she began to sleep in a different room because the pain caused her to toss and turn in her sleep. Since the second surgery, Plaintiff's depression worsened.

B. Mahamoud Seraj Deposition

Plaintiff's husband, Mahamoud Seraj ("Mahamoud"), gave a deposition on 9 April 2014. He was born in Afghanistan, and moved to France during high school. As a design engineer, he moved to California and later to Apex, North Carolina. He and Plaintiff married in 1994. Together, they have one daughter and both Plaintiff and her husband have one child each from previous marriages.

Mahamoud estimated Plaintiff went to the doctor approximately two or three weeks after she showed him the lump on her arm. When Plaintiff returned from seeing Dr. Newman for the first time, Plaintiff told him the lump was "fatty tissue." Dr. Newman sent Plaintiff to a

surgeon, Dr. Duberman. Regarding the first surgery using local anesthesia, Mahamoud said, "She just said it was very painful, and Dr. Duberman said, 'We have to do that under general anesthesia because,' from his opinion, [the lump] was deeper than what he was thinking." Following the first surgery, his wife did not experience continuing pain.

Following the second surgery, "Dr. Duberman told her the tumor was very deep. He couldn't extract it. All he could do is stop [the] bleeding." Immediately after the surgery, she complained of "pulsing" in her fingers, with no feeling in two fingers. The weekend after the surgery, she described pain, numbness, pulsing, and burning in her hand. Mahamoud remembers Plaintiff calling Dr. Duberman two times after the surgery. She also had problems holding things.

Mahamoud accompanied Plaintiff to doctors' appointments at UNC and Duke following the second surgery. A doctor at UNC "said that it's very risky to do surgery on this, and they said that, from the symptoms that they are seeing, some nerves are cut." The doctors at Duke were "shocked" Dr. Duberman did not have an MRI taken before the first surgery. The doctors at Duke diagnosed Plaintiff as having a Masson's tumor. It is a rare, benign tumor which would be risky to remove. As Mahamoud understood it, the tumor was "tangled around nerves" and it was touching an artery.

Following the second surgery, Plaintiff had approximately one week remaining on her contract to teach the Dari language to special forces troops and had to administer their final exam. Due to her arm, Plaintiff was unable to drive. Mahamoud drove Plaintiff to class every day that week, and stayed in the classroom with her during class. Plaintiff no longer teaches, in part because she cannot drive and Mahamoud cannot miss work to drive her to work every day. Since Plaintiff lost the full use of her right hand, Mahamoud explained, she's been suffering from anxiety and depression. She takes multiple medications, which have helped, but they make her act "like a zombie."

C. Dr. Duberman Deposition

Dr. Duberman gave a deposition on 11 March 2014. Dr. Duberman attended undergraduate and medical school at Columbia University. He completed his residency at Tufts New England Medical Center. He also completed a fellowship in colon and rectal surgery at the Robert Wood Johnson School of Medicine. Currently, Dr. Duberman is an employee and an owner of Western Wake Surgical. He performs both general and colon and rectal surgeries.

Dr. Duberman operated on approximately 100 upper extremity masses prior to Plaintiff's surgery. About 80 percent of those were lipomas. Generally, he could tell whether a mass was a lipoma or something else based on the texture and feel of the mass. He did not generally perform an MRI before operating on an upper extremity mass.

Discussing Plaintiff, Dr. Duberman recalled "her presenting to the office with this soft tissue mass in her arm. And I remember examining her arm. It was mobile, non-tender, soft – soft tissue mass. And I recall asking her if she wanted it removed and her stating that she would like it removed." Prior to Plaintiff's first surgery, Dr. Duberman did not perform or order an MRI on Plaintiff because he does not believe imaging is needed for "soft tissue masses." Based on his physical examination of Plaintiff, he diagnosed her with a lipoma. During Plaintiff's first visit to Dr. Duberman's office, he identified the lump on her right arm as a lipoma. He was concerned about the rapid enlargement of the mass, but still believed the mass to be a lipoma.

During the first procedure, performed at WakeMed Cary Hospital, he remembered using local anesthesia and Plaintiff being uncomfortable during the procedure. The mass was completely within Plaintiff's muscle. When he made the incision, he could only see muscle, with the tumor bulging from within the muscle. He could not see the tumor itself during the first surgery, only the muscle surrounding the tumor. Following the first surgery on 11 November 2011, Dr. Duberman still believed the mass to be a lipoma.

During the second surgery, Dr. Duberman opened the previous incision. He opened the fascia of the muscle and spread the muscles crosswise. At this time, "copious bleeding ensued." Dr. Duberman applied pressure to the area with a sponge for approximately five minutes. After controlling the bleeding, he continued to dissect into the muscle. He noted seeing a superficial nerve. Below the surface of the muscle belly, he saw a "vascular mass." He identified it as a vascular mass because it was bleeding. Dr. Duberman then conducted a biopsy from the surface of the mass. Then, he closed the incision layer by layer. He then scheduled a follow-up MRI and referred her to a surgical oncologist, Dr. Doug Tyler at Duke.

During the two surgeries on Plaintiff, Dr. Duberman did not see the median nerve, a large nerve in the arm. He also did not notice any neural dysfunction following the second surgery. He did not conduct a neurological examination because it was not his practice to do so on patients with soft tissue tumors. He explained the median nerve is a visible structure, and "had it been encountered it would've been protected."

The biopsy identified Plaintiff's tumor as a Masson's tumor. Before Plaintiff's surgery, Dr. Duberman had never heard of a Masson's tumor.

D. Dr. Williamson Deposition

Dr. Barry Williamson, an expert witness for Plaintiff and a board certified general surgeon, also gave a deposition on 30 May 2014. In Dr. Williamson's professional opinion, Dr. Duberman should have ordered diagnostic tests following the first surgery when he did not find what he expected to find. He should not have conducted the second operation without performing tests first. "The patient should have been worked up fully for what this mass was. Seeing that it encompassed the artery and the nerve, [she] should have been worked up completely for any kind of neurologic dysfunction prior to surgery."

During the second surgery, Dr. Duberman "injured the median nerve." Dr. Williamson found no evidence Dr. Duberman had cut the nerve, only evidence the nerve was damaged.

> Q: [D]o you have an opinion as to the mechanism of that injury? Did he – was it a direct injury? Was it a compression injury?
>
> A: I don't know. I mean, based on his operative note, there's no way to tell. . . .
>
> Q: Do you have an opinion as to whether that tumor could have been removed without damage to the median nerve?
>
> A: I don't know that. That's not my area of expertise.
>
> Q: Do you know whether if the tumor had just been left alone and no further surgery took place at all whether there would have been any injury to the median nerve.
>
> A: Impossible to know. Again, Masson's tumors are fairly rare, so I don't know that anybody has a lot of experience with leaving those behind and seeing what happens. . . .
>
> Q: Tell me about your – you said you had reviewed the deposition of Dr. Duberman. Tell me, was there anything in his testimony that you disagreed with?
>
> A: No. No. Again, you know, like I said, the first surgery that he did, I don't have a problem with. We see people here in the office all the time and take lumps and bumps off, and 95 percent of the time or more you come back with exactly what you think. But occasionally, you find

> something that you're not expecting. And the decision then is do you proceed with that or do you stop and do further workup. And I think that's where the problem came in, is he stopped, but he didn't do any further workup to see why he didn't find what he expected. . . .
>
> Q: Dr. Williamson, more likely than not, to a reasonable degree of medical probability, did Dr. Duberman's negligence cause [Plaintiff's] injury and the sequelae thereof?
>
> A: Yes.
>
> Q: Dr. Williamson, more likely than not, to a reasonable degree of medical probability, had Dr. Duberman treated [Plaintiff] within the standards of care, would she have experienced median nerve damage and the sequelae thereof?
>
> A: No.

He continued by explaining the standard of care of surgeons in Cary would require testing following the first surgery.

E. Dr. Brigman Deposition

Finally, Defendants attached the deposition of Dr. Brian Brigman to their motion for summary judgment. A physician in the field of orthopedic oncology, Dr. Brigman is employed at Duke University Medical Center and is certified in orthopedic surgery. He is also a member of the Vascular Malformation Team at Duke, a multi-disciplinary team. Plaintiff came to see Dr. Brigman because of a mass in her arm. Dr. Tyler, another physician at Duke University Medical Center, referred Plaintiff to Dr. Brigman.

Dr. Brigman examined Plaintiff and noted she had the symptoms of a median nerve injury, including numbness and weakness. Potential causes of the nerve injury included compression from the mass, a traction injury from the surgery, the nerve losing blood supply, or a direct injury from cutting the nerve. At that time, Dr. Brigman recommended scheduling another MRI, and suggested surgery may be an option.

Plaintiff returned approximately six weeks later for a second appointment. At that time, Plaintiff complained she was stressed and losing weight due to the tumor. At the conclusion of the second assessment, Dr. Brigman wrote in his notes: "There is likely injury to her median nerve, however it is unclear whether it's from the previous surgical intervention or if it may be related to compression of the malformation on the

median nerve itself." Dr. Brigman scheduled a surgery during Plaintiff's second visit, but Plaintiff later cancelled the appointment.

On 27 October 2014, Plaintiff filed a cross-motion for summary judgment. Plaintiff argued there was no genuine issue of material fact as to Dr. Duberman's liability for medical negligence, Plaintiff's claim of respondeat superior against Western Wake Surgical, and the affirmative defense of contributory negligence. Attached to the motion, Plaintiff provided affidavits of Plaintiff and Dr. Williamson.

Plaintiff's affidavit stated Dr. Duberman performed a surgery on Plaintiff's arm on 11 November 2011. Before the first surgery, he did not order an MRI or other imaging of her arm. The second surgery occurred 13 April 2012. Before the second surgery, Dr. Duberman did not tell Plaintiff she needed an MRI.

Dr. Williamson's affidavit stated he is a licensed physician in the field of general surgery. Dr. Duberman should have ordered an MRI prior to the second surgery on plaintiff. "Without ordering these, Dr. Duberman could not be certain what type of mass he was operating on." As a general surgeon, Dr. Duberman is not qualified to operate on a Masson's tumor.

On 13 January 2015, the trial court entered an order granting Plaintiff's motion for summary judgment on Plaintiff's respondeat superior claim. The trial court also granted Defendant's motion for summary judgment, noting, "[T]he Plaintiff has failed to offer sufficient evidence establishing the necessary element of proximate causation." The trial court denied Plaintiff's motion for summary judgment as it relates to contributory negligence and determined Plaintiff's constitutional claims related to the economic damages cap were not ripe for consideration. Plaintiff timely filed a notice of appeal.

II. Jurisdiction

As an appeal from a final judgment of a superior court, jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Standard of Review

An order granting summary judgment is reviewed *de novo*. *N.C. State Bar v. Scott*, __ N.C. App. __, __, 773 S.E.2d 520, 522 (2015), *appeal dismissed and disc. review denied*, ___ N.C. ___, 781 S.E.2d 621 (2016). Summary judgment is appropriate only when there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. §1A-1, Rule 56(c) (2015). When reviewing the evidence on a motion for summary judgment, we review evidence presented in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

IV. Analysis

To bring a medical malpractice action, the plaintiff bears the burden of establishing "'(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.' " *Purvis v. Moses H. Cone Memorial Hosp. Service Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (quoting *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998)). An actor's negligence is the proximate cause of harm to another if "(a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." Restatement (Second) of Torts § 431 (2016). The North Carolina Supreme Court defines proximate cause as follows:

> [A] cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (citations omitted). A court should determine whether the evidence presents an issue where a "jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff[.]" Restatement (Second) of Torts § 434 (2016). It is then a question for the jury whether the defendant's conduct was a substantial factor in causing harm to the plaintiff. *Id.*

To forecast evidence of proximate causation in a medical malpractice action, expert testimony is needed. *Cousart v. Charlotte-Mecklenburg Hops. Auth.*, 209 N.C. App. 299, 303, 704 S.E.2d 540, 543 (2011).

> Due to the complexities of medical science, particularly with respect to diagnosis, methodology and determinations of causation, this Court has held that where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. However, when such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. Indeed, this Court has specifically held that an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.

Young v. Hickory Bus. Furniture, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (internal citation and quotations marks omitted).

To survive a motion for summary judgment in a medical malpractice action, the plaintiff must "forecast evidence demonstrating that the treatment administered by [the] defendant was in negligent violation of the accepted standard of medical care in the community[,] and that [the] defendant's treatment proximately caused the injury." *Lord v. Beerman*, 191 N.C. App. 290, 293–294, 664 S.E.2d 331, 334 (2008) (internal citations and quotation marks omitted). "Our Court's prior decisions demonstrate that where a plaintiff alleges that he or she was injured due to a physician's negligent failure to diagnose or treat the plaintiff's medical condition sooner, the plaintiff must present at least some evidence of a causal connection between the defendant's failure to intervene and the plaintiff's inability to achieve a better ultimate medical outcome." *Id.* at 294, 664 S.E.2d at 334.

In *Turner v. Duke Univ.*, 325 N.C. 152, 155–56, 381 S.E.2d 706, 708–09 (1989), for example, Duke University Medical Center admitted decedent to the hospital for constipation, cramping, nausea, and vomiting. *Id.* Defendant, a physician, treated her for constipation, unable to determine the cause of plaintiff's symptoms. *Id.* Decedent's condition worsened, but doctors failed to examine her for a number of hours, during which time she became unresponsive. *Id.* at 156, 381 S.E.2d at 709. Surgery revealed decedent's colon was perforated, and she died of an infection the following day. *Id.* at 156–57, 381 S.E.2d at 709. Plaintiff's expert testified that the defendant should have examined decedent sooner, and his failure to conduct an earlier examination proximately

caused her death. *Id.* at 159–60, 381 S.E.2d at 711. Had the physician discovered decedent's perforated colon sooner, plaintiff's expert testified, decedent's life could have been saved. *Id.* at 160, 381 S.E.2d at 711. "Such evidence is the essence of proximate cause." *Id.* The Court held a question of fact existed as to whether decedent's death was caused by defendant's negligent failure to diagnose decedent's condition. *Id.*

Defendants assert the threshold needed to surmount summary judgment and proceed to a jury on the issue of proximate cause is that plaintiff *probably* would have been better off if not for defendant's negligence. *See Lord*, 191 N.C. App. at 300, 664 S.E.2d at 338. Defendants further contend experts must establish "'[t]he connection or causation between [Defendant's alleged] negligence and [Plaintiff's injury was] *probable*, not merely a remote possibility.' " *Id.* (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)) (emphasis in original).

However, the rule that proximate causation requires a showing plaintiff probably would have been better off is not applicable in this case. The rule applies when there is a negligent delay in treatment or diagnosis. *See id.* at 296–300, 664 S.E.2d at 336–38. As explained in *Katy v. Capriola*, 226 N.C. App. 470, 481, 742 S.E.2d 247, 255 (2013), the rule is part of a special jury instruction when the question for the jury to consider is whether the injury is proximately caused by the delay in treatment or diagnosis. *See Id.*; *see also* N.C.P.I., Civ. 809.00A (gen. civ. vol. 2014).

Defendants argue *Campbell v. Duke Univ. Health Sys., Inc.*, 203 N.C. App. 37, 45, 691 S.E.2d 31, 36 (2010), prevents "mere speculation" to establish proximate cause. In *Campbell*, the plaintiff underwent surgery on his right shoulder. *Id.* at 38, 691 S.E.2d at 33. One hour after the surgery, plaintiff began to experience pain in his left arm. *Id.* at 39, 691 S.E.2d at 33. Plaintiff did not assert the doctrine of *res ipsa loquitur*. *Id.* at 40, 691 S.E.2d at 34. We distinguish *Campbell* from this case on its facts. In *Campbell*, plaintiff's injury was outside the scope of the surgery whereas here the injury occurred within the scope of the surgery.

Here, Plaintiff argues Dr. Duberman's failure to perform testing prior to the second surgery proximately caused her injuries. Had he ordered an MRI or other imaging of the lump, she asserts he would have discovered the mass was not a lipoma and he would not have operated a second time. Not ordering imaging after the first attempted surgery violated the standard of care. The evidence is sufficient to raise a factual issue of whether this violation of the standard of care proximately caused Plaintiff's injuries. Plaintiff emphasizes Dr. Williamson's testimony that it is more likely than not that had Dr. Duberman followed the standard of care, she would

not have experienced nerve damage. Viewing the evidence in the light most favorable to Plaintiff, the non-moving party, Plaintiff contends she presented evidence sufficient to disprove Defendants' claim that no question of material fact exists. We agree.

Plaintiff met her burden to establish Dr. Duberman's failure to perform testing prior to the second surgery was in negligent violation of the accepted standard of medical care in the community. The question before us is whether Dr. Duberman presented sufficient evidence that failure to perform testing prior to the second surgery proximately caused Plaintiff's injury.

Dr. Brigman's expert testimony, which is necessary to forecast evidence of proximate causation in a medical malpractice action, established Dr. Duberman should not have conducted the second surgery on Plaintiff. Dr. Duberman, as a general surgeon, is not qualified to operate on a Masson's tumor. "Without ordering [tests], Dr. Duberman could not be certain what type of mass he was operating on." Had Dr. Duberman ordered the MRI, he would have identified the mass as something other than a lipoma, and would not have conducted the operation. Dr. Williamson agreed Dr. Duberman should not have performed the second surgery without conducting testing first. Dr. Williamson stated: "The patient should have been worked up fully for what this mass was. Seeing that it encompassed the artery and the nerve, [she] should have been worked up completely for any kind of neurologic dysfunction prior to surgery."

Viewed in the light most favorable to Plaintiff, the evidence presents disputed issues of fact so a "jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to [P]laintiff." *See* Restatement (Second) of Torts § 434. Plaintiff experienced numbness and pain in her fingers and hand following the second surgery. There is no evidence she experienced any numbness or pain in her hand prior to the surgery. According to Dr. Williamson, the tumor Dr. Duberman attempted to remove "encompassed the artery and the nerve." In his professional opinion, Dr. Williamson said Dr. Duberman "injured the median nerve." Although Dr. Williamson did not testify conclusively as to whether Dr. Duberman cut the nerve, his testimony sufficiently established Dr. Duberman injured Plaintiff's nerve. We therefore hold the evidence, when viewed in the light most favorable to the non-moving party, shows a genuine issue of material fact exists.

We recognize that Defendants' expert disputes Plaintiff's evidence of proximate causation and posits differing possibilities explaining the results obtained in this medical procedure. These differences are jury

matters going to the weight and credibility of the witnesses or which of several events was more likely than not to be a proximate cause of the injury. Summary judgment is inappropriate where such factual debates are raised by the evidence and experts differ.

V. Conclusion

For the foregoing reasons, we reverse the trial court's summary judgment order.

REVERSED.

Judges STEPHENS and INMAN concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, Appellee

v.

NORTH CAROLINA RATE BUREAU, Appellant

IN THE MATTER OF THE FILING DATED JANUARY 3, 2014 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED HOMEOWNERS' INSURANCE RATES & HOMEOWNERS' INSURANCE TERRITORY DEFINITIONS

No. COA15-402

Filed 2 August 2016

1. Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—underwriting profit

Where the N.C. Commissioner of Insurance rejected the N.C. Rate Bureau's filed rate increases and imposed alternative rate changes, the Court of Appeals held that the Commissioner did not violate any constitutionally mandated standard by refusing to accept the Bureau's cost of equity profit methodology and by adopting an underwriting profit provision that did not return a profit within the range identified by the Bureau's expert witness. The Commissioner's profit methodology was in accord with a methodology upheld by the Court of Appeals in a previous case.

2. Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—net cost of reinsurance

The N.C. Commissioner of Insurance did not err by rejecting the N.C. Rate Bureau's filed net cost of reinsurance of 17.5% of premium and ordering a net cost of reinsurance of 10% of premium.

3. Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—modeled hurricane losses

The N.C. Commissioner of Insurance did not err by reducing the modeled hurricane losses in the N.C. Rate Bureau's filing. The Commissioner performed a careful review of the evidence and did not arbitrarily reduce the modeled hurricane losses to be used in ratemaking.

4. Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—allocation to zones

The N.C. Commissioner of Insurance did not err by rejecting the N.C. Rate Bureau's filed allocation of the net cost of reinsurance and underwriting profit to zones. The Commissioner's decision was supported by the findings, which cast doubt upon the credibility of the model developed by the Bureau's witness.

Appeal by the North Carolina Rate Bureau from order entered 18 December 2014 and amended 22 December 2014 and 13 January 2015 by the North Carolina Commissioner of Insurance. Heard in the Court of Appeals 5 November 2015.

North Carolina Department of Insurance, by Sherri L. Hubbard, for appellee.

Young Moore and Henderson, P.A., by Marvin M. Spivey, Jr., and Glenn C. Raynor, for appellant.

McCULLOUGH, Judge.

The North Carolina Rate Bureau ("Bureau") appeals from order entered by the North Carolina Commissioner of Insurance ("Commissioner") that rejected the Bureau's filed rate increases and imposed alternative rate changes. For the following reasons, we affirm the Commissioner's order.

I. Background

On 3 January 2014, the North Carolina Department of Insurance ("Department") received the Bureau's filing for revised homeowners' insurance rates and revised homeowners' insurance territory definitions (the "filing"). In the filing, the Bureau sought approval of an overall statewide average rate level change of +25.6%, with the filed rates

varying between the newly defined territories.[1] Broken down into categories, the filing included the following statewide rate increases: 24.8% for owners, 54.9% for tenants, and 50.0% for condominiums. The Bureau requested that the filed rates be applied to all new and renewal policies becoming effective on or after 1 August 2014.

The same day the Department received the filing, the Commissioner issued a press release in which he noted that new homeowners' insurance rates went into effect just six months prior in July 2013, expressed his displeasure with the filing, and indicated that the insurance companies should expect a full hearing on the matter because he would not entertain settlement negotiations.

On 19 February 2014, the Commissioner issued a notice of hearing in which he set the matter for hearing to begin 6 August 2014, scheduled a prehearing conference for 24 July 2014, and identified issues with the filing. The Bureau responded to the notice by submitting amendments to the filing. In addition to a slight increase in the overall statewide average rate level change, those amendments included changes to the filed territory definitions in order to address concerns of the Department. On 11 July 2014, the Commissioner granted a continuance pushing the commencement of the hearing back to 20 October 2014. Pursuant to the continuance, the Commissioner also issued amendments to the notice of hearing on 14 July 2014. Those amendments noted the change in the hearing date and rescheduled the prehearing conference for 10 October 2014.

Following the prehearing conference on 10 October 2014, the Commissioner entered a prehearing order with the consent of the Bureau and the Department. The matter came on for public hearing in Raleigh before Commissioner Wayne Goodwin on 20 October 2014. The hearing continued on 21, 27, 28, 29, 30, and 31 October 2014 and 3, 5, 6, 11, and 12 November 2014. During the hearing, over fifty exhibits of prefiled testimony and documentary evidence and over two thousand pages of live testimony were offered for consideration.

The Commissioner issued his order in the matter on 18 December 2014. The Commissioner subsequently amended the order on

1. As indicated in a letter from the Bureau to the Commissioner accompanying the filing on 3 January 2014, the overall statewide average rate level change initially sought in the filing was +25.3%. Yet, as indicated in a letter from the Bureau to the Commissioner accompanying amendments by the Bureau to the filing on 9 June 2014, noted *supra*, the overall statewide average rate level change slightly increased to +25.6% as a result of amendments. To avoid confusion, we refer only to the rate changes identified in the Bureau's amendments to the filing.

22 December 2014 and 13 January 2015 to correct non-substantive typographical errors, miscalculations in exhibits, and an incorrect citation to an exhibit. In the order, the Commissioner accepted the Bureau's amended revisions to the territory definitions, noting the Department had not objected to the amended revisions. The Commissioner, however, determined the Bureau failed to meet its burden of proof regarding its filed rate increases and, therefore, disapproved the filed rates. Instead of the Bureau's filed rates that resulted in an overall statewide average rate level change of +25.6%, the Commissioner ordered rates that resulted in an overall statewide average rate level change of 0%. In reaching the 0% change, the Commissioner ordered rate increases for tenants and condominiums and decreases for owners. The ordered rates were to be effective 1 June 2015.

The Bureau filed notice of appeal from the Commissioner's order on 16 January 2015.

II. Discussion

On appeal, the Bureau seeks to have the Commissioner's order declared null and void so that its filed rates and territory definitions become effective by operation of law. Yet, because the filed territory definitions were approved, the Bureau's arguments on appeal focus on the rates and the allocation of those rates.

Throughout the Bureau's arguments on appeal, the Bureau directs this Court's attention to the press release issued by the Commissioner on the day the Department received the filing. The Bureau contends "[t]he defining theme of the [o]rder is that every decision announced within it was consistent with [the Commissioner's] rejection of the [f]iling the day it was filed." Specifically, the Bureau claims

> [t]he Commissioner rejected overwhelming and sometimes undisputed evidence of the Bureau. He repeatedly accepted as credible testimony of Department witnesses unsupported by competent or material evidence and chose factors based on matters outside the record, all of which in the aggregate led to the result foretold by his press release – that homeowners insurers are not entitled to and should not have requested a rate increase regardless of the evidence of rate inadequacy.

The Bureau further asserts that there are too many issues with the Commissioner's order to address each issue on appeal; therefore, the Bureau asserts the following arguments challenging specific

components of the ordered rates: (1) the Commissioner erred as a matter of law by ordering an underwriting profit provision that fails to meet legal and constitutional standards; (2) the Commissioner erred by rejecting the reinsurance provision filed by the Bureau and by selecting a provision that is unsupported by material and substantial evidence; (3) the Commissioner erred by reducing the filed value for modeled hurricane losses; and (4) the Commissioner erred by rejecting the filed allocation of the net cost of reinsurance and underwriting profit to geographic zones.

Before reaching the merits of the issues, we dispel the Bureau's suggestion that the Commissioner rejected the filing on the day the Department received it. The Commissioner's review of a Bureau filing is governed by statute.

> At any time within 50 days after the date of any filing, the Commissioner may give written notice to the Bureau specifying in what respect and to what extent the Commissioner contends the filing fails to comply with the requirements of this Article and fixing a date for hearing not less than 30 days from the date of mailing of such notice. Once begun, hearings must proceed without undue delay. At the hearing the burden of proving that the proposed rates are not excessive, inadequate, or unfairly discriminatory is on the Bureau. At the hearing the factors specified in [N.C. Gen. Stat. §] 58-36-10 shall be considered. If the Commissioner after hearing finds that the filing does not comply with the provisions of this Article, he may issue his order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, within a reasonable time, after which the filing shall no longer be effective. In the event the Commissioner finds that the proposed rates are excessive, the Commissioner shall specify the overall rates, between the existing rates and the rates proposed by the Bureau filing, that may be used by the members of the Bureau instead of the rates proposed by the Bureau filing. In any such order, the Commissioner shall make findings of fact based on the evidence presented in the filing and at the hearing. Any order issued after a hearing shall be issued within 45 days after the completion of the hearing. If no order is issued within 45 days after the completion of the hearing, the filing shall be deemed to be approved.

N.C. Gen. Stat. § 58-36-20(a) (2015). Although the Commissioner voiced his displeasure with the filing in the press release issued on the day the

Department received the filing, it is clear the Commissioner did not reject the filing outright. The record shows the Commissioner followed the statutory procedure for reviewing the filing, which in the present case included a lengthy hearing and the consideration of extensive evidence. Even more telling, the Commissioner's review resulted in the approval of the filed territory definitions and changes to homeowners' insurance rates, although not the filed rates sought by the Bureau. Consequently, this Court's review is not influenced by the Commissioner's press release.

Standard of Review

Just as the Commissioner's review of the Bureau's filing is governed by statute, so is this Court's review of the Commissioner's order. Concerning judicial review of rates and classifications,

> [a]ny order or decision of the Commissioner . . . may be appealed to the North Carolina Court of Appeals by any party aggrieved thereby. Any such order shall be based on findings of fact, and if applicable, findings as to trends related to the matter under investigation, and conclusions of law based thereon. Any order or decision of the Commissioner, if supported by substantial evidence, shall be presumed to be correct and proper. . . .

N.C. Gen. Stat. § 58-2-80 (2015). After an order or decision of the Commissioner is appealed to this Court,

> [s]o far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any action of the Commissioner. The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commissioner, or
>
> (3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 58-2-90(b) (2015). This Court has further explained that,

> [w]hen reviewing an order by the Commission, this Court must examine the whole record and determine whether the Commissioner's conclusions of law are supported by material and substantial evidence. The whole record test requires the reviewing court to consider the record evidence supporting the Commissioner's order, to also consider the record evidence contradicting the Commissioner's findings, and to determine if the Commissioner's decision had a rational basis in the material and substantial evidence offered. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is more than a scintilla or a permissible inference.
>
> The Commissioner determines the weight and sufficiency of the evidence presented during the hearing, including the credibility of any witnesses. It is not our function to substitute our judgment for that of the Commissioner when the evidence is conflicting. Instead, the Commissioner's order is presumed correct if it is supported by substantial evidence. The order must conform to the guidelines set out in [N.C. Gen. Stat.] § 58-36-10[.]
>
> . . . .
>
> As long as the Commissioner's order meets the criteria of [N.C. Gen. Stat.] § 58-36-10 and is supported by material and substantial evidence, the order should be upheld.

State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 160 N.C. App. 416, 420-21, 586 S.E.2d 470, 472-73 (2003) ("*2001 Auto*") (internal quotation marks, citations, and alterations omitted), *aff'd per curiam on those issues raised in the dissent*, 358 N.C. 539, 597 S.E.2d 128 (2004). Relevant to this appeal, the following standards apply to the making and use of property insurance rates:

(1) Rates or loss costs shall not be excessive, inadequate or unfairly discriminatory.

(2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which that information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.

(3) In the case of property insurance rates under this Article, consideration may be given to the experience of property insurance business during the most recent five-year period for which that experience is available. . . .

(4) Risks may be grouped by classifications and lines of insurance for establishment of rates, loss costs, and base premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans that establish standards for measuring variations in hazards or expense provisions or both. Those standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses. . . .

. . . .

(6) To ensure that policyholders in the beach and coastal areas of the North Carolina Insurance Underwriting Association whose risks are of the same class and essentially the same hazard are charged premiums that are commensurate with the risk of loss and premiums that are actuarially correct, the North Carolina Rate Bureau shall revise, monitor, and review the

existing territorial boundaries used by the Bureau when appropriate to establish geographic territories in the beach and coastal areas of the Association for rating purposes. In revising these territories, the Bureau shall use statistical data sources available to define such territories to represent relative risk factors that are actuarially sound and not unfairly discriminatory. The new territories and any subsequent amendments proposed by the North Carolina Rate Bureau or Association shall be subject to the Commissioner's approval and shall appear on the Bureau's Web site, the Association's Web site, and the Department's Web site once approved.

(7) Property insurance rates established under this Article may include a provision to reflect the cost of reinsurance to protect against catastrophic exposure within this State. Amounts to be paid to reinsurers, ceding commissions paid or to be paid to insurers by reinsurers, expected reinsurance recoveries, North Carolina exposure to catastrophic events relative to other states' exposure, and any other relevant information may be considered when determining the provision to reflect the cost of reinsurance.

N.C. Gen. Stat. § 58-36-10 (2015).

1. Underwriting Profit

[1] In the Bureau's first challenge to the Commissioner's order, the Bureau claims the underwriting profit provision adopted by the Commissioner violates applicable legal and constitutional standards. We disagree.

Our courts have long recognized the requirement that the Commissioner set rates to allow insurers to earn "a fair and reasonable profit" after the payment of losses and operating expenses. *See In re N.C. Fire Ins. Rating Bureau*, 275 N.C. 15, 34, 165 S.E.2d 207, 220 (1969) ("*1967 Fire*") (explaining "that the premium [must] be fixed at a level which will enable the insuring company . . . (1) to pay the losses which will be incurred during the life of the policies to be issued under such rates, (2) to pay other operating expenses, and (3) to retain a 'fair and reasonable profit' and no more"). "An insurance company's total profit is derived from two distinct parts of the insurance business – (1) profit earned by the insurance operations and (2) profits earned by investing

capital and surplus funds." *2001 Auto*, 160 N.C. App. at 421, 586 S.E.2d at 473. Yet, in North Carolina, the total profit is not considered in determining whether rates allow insurers to earn a fair and reasonable profit; only the profit from the insurance operations is considered. *See State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 444, 269 S.E.2d 547, 586 (1980) ("In determining whether an insurer has made a reasonable profit, the amount of business done rather than its capital should be considered, and profits should be determined by subtracting losses and expenses from the total of premiums actually received, *to the exclusion of profit on capital and surplus*, and excess commissions paid to agents *but considering interest on unearned premiums and related elements.*") (emphasis in original) (quotation marks and citation omitted).

> The profit from insurance operations includes both the underwriting profit and investment income from policyholder-supplied funds. The underwriting profit can be defined as the difference between insurance premiums collected and the amount the company pays out for losses and expenses. Policyholder-supplied funds are the amount of premiums paid to the insurance company. Policyholder-supplied funds are usually invested during the insurance coverage period.

2001 Auto, 160 N.C. App. at 421-22, 586 S.E.2d at 473. Although underwriting profit is a component of the profit earned by the insurance operations, which must be sufficient to allow insurers to earn fair and reasonable profit, there are no requirements specific to underwriting profit. "[A] reasonable margin for underwriting profit and to contingencies[]" is, however, among the factors that "shall" be considered in the making and use of rates. N.C. Gen. Stat. § 58-36-10(2).

In this case, the filing included an underwriting profit of 10.5% of premium. Upon review, the Commissioner rejected the Bureau's underwriting profit provision in favor of an underwriting profit of 5.2% of premium. As stated above, the Bureau now claims this was error.

The Bureau's argument that the Commissioner's underwriting profit provision violates legal and constitutional standards is founded on its assertion that a "fair and reasonable profit" must be equal to and determined using the cost of equity (also known as the "cost of capital" or the "cost of equity capital"). The Bureau claims the only evidence of the cost of equity in this case was in the prefiled testimony of James H. Vander Weide, a Bureau witness whom the parties stipulated was an expert in "economics and finance and profit as regards to the property/casualty

insurance industry." Vander Weide testified the cost of equity for the average company writing homeowners' insurance in North Carolina is in the range of +9.1% to +12.8%. Therefore, the Bureau contends the Commissioner erred by rejecting the filed underwriting profit provision and by choosing an underwriting profit provision that did not produce a profit within the cost of equity range identified by Vander Weide.

Upon review of the cases cited by the Bureau, we are not convinced the cost of equity is a constitutionally mandated standard, as the Bureau asserts. Thus, we affirm the Commissioner's rejection of the filed underwriting profit provision.

The Bureau argues North Carolina law has long defined a "fair and reasonable profit" as the level of profit demanded by the investment market on business ventures of comparable risk, which the Bureau equates to the cost of equity. The Bureau then relies on *1967 Fire* and the older *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L. Ed. 333 (1944) ("*Hope Natural Gas*"), and *Bluefield Waterworks and Improvement Co. v. Pub. Serv. Comm'n of W.V.*, 262 U.S. 679, 67 L. Ed. 1176 (1923) ("*Bluefield Waterworks*"), cases to support its assertion that a cost of equity analysis is compelled by the United States Constitution. Upon review of *1967 Fire*, we find no such requirement, nor mention, of the cost of equity. In that case, our Supreme Court explained that whether an amount is "a fair and reasonable profit, an excessive profit[,] or an insufficient profit must be determined by the Commissioner from evidence[, which] involves a projection into the future of past experience and present conditions." *1967 Fire*, 275 N.C. at 39, 165 S.E.2d at 224. The Court then stated, "[i]t involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk." *Id.* The Court never mandated that a fair and reasonable profit be determined solely using a cost of equity analysis. Similarly, there is no mandate in *Hope Natural Gas* or *Bluefield Waterworks*. The Commissioner offered the following explanation for the absence of any references to the cost of equity in those decision:

> 255. These two early U.S. Supreme Court cases indicate that the proper rate of return for regulated industries is a return commensurate with the returns that could be earned by industries of comparable risk.
>
> 256. Both Vander Weide and Appel claim that *Hope Natural Gas* and *Bluefield Waterworks* require a cost of capital analysis. However, this cannot possibly be true because *Hope Natural Gas* was decided in 1944 and

> *Bluefield Waterworks* was decided in 1923. Vander Weide and Appel acknowledge that in the early days of regulation a comparable earning analysis, like the analyses proffered by Department witnesses Schwartz and O'Neil, was an accepted methodology until comparable earnings was abandoned in favor of market-based concepts like the cost of capital. O'Neil notes that from 1921 through approximately the mid-1960's, The 1921 NAIC Profit Formula, which allowed a pre-tax 5% of premium without consideration of investment income, was in use. That 5% of premium has also been mentioned in an older North Carolina case as an amount "generally approved in the industry." 278 N.C. 302[,] 315[,] 180 S.E.2d 155, 164 (1971). A cost of capital analysis, then, was not even utilized in regulatory matters when *Hope Natural Gas and Bluefield Waterworks* were decided.

(Citations to transcripts and exhibits in the present case omitted; emphasis in original). We find the Commissioner's analysis supported by the evidence and case law and hold it persuasive. Furthermore, our Supreme Court has acknowledged that, "[i]n North Carolina, there is no prescribed methodology for calculating the return on profits (profit methodology), and [it] has specifically recognized that creativity is acceptable within the parameters of the applicable statutes." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 350 N.C. 539, 542, 516 S.E.2d 150, 152 (1999) ("*1996 Auto*"). "The Commissioner is considered an expert in the field of insurance and his reliance on various methods of analysis of the profit to which the insurance companies are entitled lies entirely within his discretion." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 124 N.C. App. 674, 687, 478 S.E.2d 794, 803 (1996) ("*1994 Auto*") (internal quotation marks and citation omitted), *disc. rev. denied*, 346 N.C. 184, 486 S.E.2d 217 (1997). Accordingly, we hold the Commissioner did not violate any constitutionally mandated standard in refusing to accept the Bureau's cost of equity profit methodology and in adopting an underwriting profit provision that did not return a profit within the range identified by Vander Weide.

The Bureau also challenges the legality of the profit methodology used by the Commissioner to reach his chosen underwriting profit provision. The Commissioner explained his selection of a comparable earnings profit methodology to determine the appropriate underwriting profit provision in findings 261 to 297. The Bureau claims the profit methodology used in the present case is erroneous as a matter of law because it is identical to the methodology rejected in *1996 Auto*.

In *1996 Auto*, our Supreme Court reviewed this Court's determination that the profit methodology used by the Commissioner in setting rates following the Bureau's 1996 auto filing was identical to the profit methodology previously rejected by this Court in *1994 Auto*. *1996 Auto*, 350 N.C. at 542-43, 516 S.E.2d at 152. For a complete understanding of our precedent, we briefly review those cases.

In *1994 Auto*, this Court remanded the Commissioner's order for recalculation of the underwriting profit provision upon concluding the Commissioner erred as a matter of law in considering investment income from capital and surplus in his ratemaking calculations. 124 N.C. App. at 684-86, 478 S.E.2d at 801-802. In that case, the error was evident because the Commissioner's "formula included a line item and calculation for 'Income from Capital and Surplus.' " *Id.* at 685, 478 S.E.2d at 802.

In *1996 Auto*, the Commissioner attempted to distinguish his profit methodology and ratemaking calculations following the Bureau's 1996 auto filing from those rejected in *1994 Auto*. 350 N.C. at 543, 516 S.E.2d at 152. The Court summarized the Commissioner's calculations in *1994 Auto* in its *1996 Auto* decision as follows:

> he calculated the target total return of the insurance industry based on the total returns of industries of comparable risk. He then subtracted the investment income on capital and surplus from this total return and arrived at a total return on insurance operations.

Id. The Court then explained the Commissioner's calculations being challenged in *1996 Auto* as follows:

> the Commissioner began with a direct estimate and justification of the return on operations, rather than a total return, and derived his profit provisions from this estimated return on operations without explicitly including in his calculations investment income from capital or surplus. The Commissioner reasons that this method keeps the two calculations distinct, whereas the rejected method in the prior case combined the investment income from capital and surplus into the actual ratemaking calculation.

Id. Upon review in *1996 Auto*, this Court agreed with the Bureau's argument that "the Commissioner simply 'repackaged' his calculations by starting with a return on operations as his target in order to avoid the appearance of explicitly considering investment income on capital and surplus, but in essence accomplished exactly what we have previously

disallowed." 129 N.C. App. 662, 666, 501 S.E.2d 681, 685 (1998). This was evident by the Commissioner's admission that the " 'return on operations may be tested to ensure it will result in a "total return" commensurate with the "total return" of businesses of comparable risk by adding the income from capital and surplus to the return on operations.' " *Id.* Thus, this Court, bound by *1994 Auto*, held "the Commissioner improperly considered income from capital and surplus in arriving at his total return[.]" *Id.* On further appeal to our Supreme Court based on a dissent from this Court's majority decision, our Supreme Court affirmed. 350 N.C. at 545, 516 S.E.2d at 153-54.

As stated above, the Bureau now claims the profit methodology in the instant case is identical to the methodology rejected in *1996 Auto*. In support of its argument the Bureau points to the following exchange during the testimony of Allan I. Schwartz, a Department witness whose underwriting profit provision the Commissioner adopted:

> Q. Is it correct that your underwriting profit provision began with a direct estimate of a return on operations, rather than a total return, and you derive your underwriting profit provision from this estimated return on operations without explicitly including in your calculations investment income from capital and surplus?
>
> A. Yes.

Because Schwartz answered affirmatively in response to the question framed in the precise language used to describe the profit methodology rejected by both this Court and our Supreme Court in *1996 Auto*, the Bureau claims we are bound by *1996 Auto*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.")

Upon review of the Commissioner's findings, we do not think the profit methodology used in the instant case was the same as that rejected in *1996 Auto*. First, there is no indication that either Schwartz or the Commissioner tested their underwriting profit provisions by adding the profit earned from investing capital and surplus to the profit earned by the insurance operations to compare total returns, as was held to be error in *1996 Auto*. Second, the Commissioner clearly indicates in the order that his profit methodology is in keeping with the Commissioner's order following the Bureau's 2001 auto filing, which this Court upheld in *2001 Auto*.

In *2001 Auto*, this Court recognized that "[t]he disagreement between the Bureau and the Commissioner regarding the legal significance of the [*1994 Auto* and *1996 Auto*] appeals forms the basis of the current appeal." 160 N.C. App. at 419, 586 S.E.2d at 472. This Court then reviewed those prior cases and addressed whether the Commissioner improperly considered investment income from capital and surplus funds while calculating the ordered insurance rates. 160 N.C. App. at 421, 586 S.E.2d at 473. This Court explained that in *1994 Auto* and *1996 Auto*, "the Commissioner defined 'business ventures of comparable risk' as the total profit of the insurance industry[]" and then, "[i]n order to set a rate equal to comparable businesses . . . , the Commissioner subtracted capital investment income and investment income from policyholder-supplied funds from total returns to reach the underwriting profit[.]" 160 N.C. App. at 422, 586 S.E.2d at 474. This Court distinguished the Commissioner's ratemaking formula in *2001 Auto* in that, "[r]ather than attempting to find a total return, the Commissioner set the return on insurance operations as his target." 160 N.C. App. at 423, 586 S.E.2d at 474. This Court then identified the pertinent findings by the Commissioner, in which the Commissioner rejected the Bureau's cost of equity methodology on the basis that it considered the total return of businesses of comparable risk in violation of North Carolina law prohibiting consideration of investment on capital and surplus, and instead adopted the comparable earnings methodology of Department witness Schwartz, the same witness relied on by the Commissioner in the present case, on the basis that Schwartz's profit methodology only took the profit from insurance operations into account. 160 N.C. App. at 423-26, 586 S.E.2d at 474-76. Upon review, this Court affirmed the Commissioner's order because "the Commissioner focused on the return on insurance operations as the appropriate target for his calculations." 160 N.C. App. at 426, 586 S.E.2d at 476.

In further support of our holding that the cost of equity is not mandated, this Court explained as follows:

> In addition, we find the Bureau's argument that the Commissioner must set his target as the total rate of return to be unpersuasive. No statute or any case has required the Commissioner to focus on the total rate of return for the insurance industry. Instead, previous appellate court opinions have declared that the return on operations is the only portion of income the Commissioner can consider during the ratemaking process. If the Commissioner had compared total returns here, as he did in previous ratemaking

> orders, the Commissioner would have been required to add capital and surplus funds somehow. By using insurance operations as the comparable industry, the Commissioner did not need to consider investment income on capital and surplus funds. Accordingly, the investment income on capital and surplus funds has not been used in the 2001 ratemaking calculation. The Commissioner's underwriting profit provision comports with the requirements of [N.C. Gen. Stat.] § 58-36-10 as well as the holdings of *1994 Auto* and *1996 Auto*.

160 N.C. App. at 426-27, 586 S.E.2d at 476.

The comparable earnings profit methodology employed by the Commissioner in the present case appears the same as that which was upheld in *2001 Auto*. And, in the present case, the Commissioner issued findings and conclusions, all of which are supported by evidence in the record, that are similar to those issued in *2001 Auto*. Those findings and conclusions are to the effect that, first, the Bureau's underwriting profit provision, which sets the target return equal to the cost of equity, violates this State's prohibition on the consideration of investment income from capital and surplus in ratemaking and, second, the comparable earnings profit methodology used by the Department's witnesses to determine an appropriate underwriting profit provision adheres to North Carolina's legal requirements because it only takes into account the profit from the insurance operations.

The Bureau acknowledges the Commissioner's reliance on *2001 Auto*, but dismisses that reliance as error on the basis that *2001 Auto* is directly contrary to this Court's decisions in *1994 Auto* and *1996 Auto*. Therefore, the Bureau contends we are bound by those earlier cases. *See Graham v. Deutsche Bank Nat'l Trust Co.*, __ N.C. App. __, __, 768 S.Ed.2d 614, 617 (2015) ("[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines.") (quotation marks and citation omitted). It is clear, however, from this Court's discussion in *2001 Auto* that the decisions are not contradictory.

Because the Commissioner's profit methodology in the present case is in accord with that upheld by this Court in *2001 Auto*, we overrule the Bureau's argument that the underwriting profit provision adopted by the Commissioner is legally erroneous.

As an aside, we note the filed underwriting profit provision championed by the Bureau fails by their own calculations to meet the cost of equity that the Bureau claims is a minimum standard. The Bureau's calculations

show that the filed 10.5% of premium underwriting profit results in a post-tax total return from underwriting of 6.87% of premium. When the underwriting profit is considered with the net investment gain on insurance transactions, the Bureau's calculations show post-tax total returns of 7.67% of premium and 7.06% of net worth, which the Bureau acknowledges is below the cost of equity. Thus, even if we were to accept the Bureau's assertion that cost of equity is a mandatory requirement, the Bureau's underwriting profit provision fails to meet that mandate.

2. Net Cost of Reinsurance

[2] The Bureau next argues the Commissioner erred in determining the net cost of reinsurance to be included in rates, which the Commissioner addressed in findings 375 through 454.

Reinsurance is insurance purchased by primary insurers from other insurance companies, or reinsurers, to mitigate the risk of large payouts in excess of what a primary insurer could bear in the event of catastrophic losses. It does so by spreading the risk between primary insurers and reinsurers. Reinsurers are willing to accept portions of the risk associated with potential catastrophic losses in exchange for a share of the premiums paid by the insureds. Primary insurers, in turn, pass the expense of reinsurance to the insureds by including the net cost of reinsurance in the rates. A large portion of the exposure to catastrophic losses in North Carolina is due to hurricanes.

In this case, the Bureau's filing included a provision for a net cost of reinsurance of 17.5% of premium. The Bureau based its provision on an analysis performed by David Appel, who was stipulated as an expert in "economics and finance and profit as regards the property/casualty insurance industry." As he explained in his prefiled testimony, Appel "developed a procedure to include the 'net cost of reinsurance' as an expense in the direct homeowners rates in North Carolina." Appel likened his "procedure" to what is used in Florida, "where insurers make rates using direct losses and expenses, but then add in a provision which covers the cost (to the primary insurer) of the reinsurer's profit and expense." Appel then explained his "procedure" in detail and expressed his beliefs that his calculations accurately reflected the net cost of reinsurance in North Carolina and that the net cost of reinsurance was appropriately included in homeowners' insurances rates in North Carolina.

The substance of Appel's prefiled testimony as it relates to determining the net cost of reinsurance can be summarized as follows: Appel adopted the ratemaking assumption "that there is a single aggregate company that is the composite of all carriers in the state." Appel assumed

the hypothetical company maintains a reinsurance program with specific provisions that Appel believed "reflect the types of reinsurance programs that insurers typically purchase to protect against the potentially catastrophic losses that are attendant to the hurricane risk to which the state is exposed." Appel then used statewide aggregate loss distributions produced and provided by AIR Worldwide Corporation ("AIR"), a provider or risk modeling software and consulting services, which were based on AIR's loss estimates from AIR's warm sea surface temperature ("WSST") model, as opposed to AIR's standard ("STD") model, and included the phenomenon of demand surge, to determine the amount of losses that would be subject to reinsurance coverage as a share of the total hurricane losses in the state. Based on the projected reinsured losses, Appel then developed a "competitive market" reinsurance premium. Appel testified that he calculated "the reinsurance premium is 23.9% of statewide direct premium, while the net cost of reinsurance is 17.5% of premium."

To counter Appel's testimony, the Department cross-examined Appel and put on its own evidence tending to show that the Bureau's net cost of reinsurance provision was overstated and not reflective of the reinsurance market in North Carolina. Department witnesses Schwartz and Mary Lou O'Neil, both of whom were stipulated as "expert property/casualty insurance actuaries[,]" and Evan D. Bennett, who the Bureau stipulated was an expert in reinsurance, expressed concern that the Bureau's provision was based on a hypothetical model and no documentation or data was presented to support the assumptions and methodologies underlying the model or Appel's calculations.

Upon review of the evidence concerning net cost of reinsurance in this case, the Commissioner rejected the Bureau's filed net cost of reinsurance of 17.5% of premium and ordered a net cost of reinsurance of 10% of premium. The Bureau now contends the Commissioner erred in doing so.

At the outset, it is apparent from the Commissioner's order that the Commissioner fully considered the evidence on the net cost of reinsurance, as the Commissioner summarized both the Bureau's and the Department's cases and explained his reasons for rejecting the Bureau's filed net cost of reinsurance provision and adopting the 10% provision. Despite the Commissioner's detailed order, the Bureau claims the Commissioner erred.

The Bureau first challenges the Commissioner's rejection of the filed net cost of reinsurance provision. The Bureau contends the filed net cost

of reinsurance provision based on the "procedure" developed by Appel, which the Bureau now refers to as an "economic model," was reasonable and supported by the evidence.

The Commissioner's rejection is concisely explained in the following findings:

> 446. . . . Basically what the Commissioner was presented with in regards to the net cost of reinsurance was a hypothetical model, poorly documented, that was developed by an economist with no discernible background in reinsurance other than vague associations with other professionals who may have some reinsurance experience. Although market information was produced on rebuttal to support model input, the model does not reflect the significant price decreases in the market over the past couple of years because the model is not market-based. Moreover, the reinsurance model utilizes the AIR WSST model to estimate losses; however, the scientific underpinnings of the WSST are debatable and the WSST results in significantly higher losses than the STD model, which produced losses in this filing that the Commissioner has already found excessive.
>
> 447. Given all of the issues . . ., and the fact that the proposed net cost of reinsurance represents 22.1% of the base rate for Owners, the Commissioner can only conclude that the Bureau has not met its burden of proof with regards to the reinsurance component of the indicated rates. . . .
>
> . . . .
>
> 453. Thus, based on the foregoing, the Commissioner finds that the Bureau's proposed net cost of reinsurance is excessive and will result in excessive rates.

Although the Bureau acknowledges that the Commissioner has discretion in weighing the evidence, the Bureau contends the Commissioner abused his discretion in this case by disregarding evidence – both Appel's testimony and "real world" evidence that reinsurance costs actually incurred are consistent with the model results – that the Bureau claims supports its filed net cost of reinsurance provision.

Regarding Appel's testimony, the Bureau points to the Commissioner's finding number 446 and contends the evidence does not support the finding that Appel "had no discernable background in reinsurance."

In support of its challenge, the Bureau highlights portions of Appel's testimony at the hearing which it claims demonstrate that Appel possessed the necessary experience in reinsurance to offer testimony on the subject; namely, that Appel developed the reinsurance model that was first used in a 2002 rate filing and, since that time, has been involved in other rate cases, has given presentations and lectures on the model, has rendered opinions in rate cases in which the net cost of reinsurance was included, has served as an arbitrator in rate cases, and has worked with various insurance companies. Because of these experiences, the Bureau claims "[t]he Commissioner's disregard of Dr. Appel's testimony and the Bureau's reinsurance model is arbitrary and capricious and an abuse of discretion."

Upon review of the Commissioner's findings and the evidence, we hold the Commissioner did not abuse his discretion. First, upon review of finding 446, we disagree with the Bureau's characterization of the Commissioner's finding. When the finding is read in its entirety, it is clear the Commissioner was critiquing Appel's development of the reinsurance model. The evidence in the record supports the finding that Appel had no discernable background in reinsurance when he developed his reinsurance model, as all of the experiences highlighted by the Bureau appear to have occurred since the model was developed and first used in 2002. Appel's prefiled testimony was that he has had the opportunity to become aware of property reinsurance programs over the past several years because a substantial amount of his consulting work over the last dozen to 15 years involved property insurance matters. Appel also indicated it did not appear he gave any presentations or lectures on reinsurance or property-related matters before 2003 and, when he began doing so, they concerned the development of his model.

While it is clear Appel has increasingly gained experienced in reinsurance since the early 2000s, that experience does not refute the Commissioner's finding that the "hypothetical model . . . was developed by an economist with no discernible background in reinsurance . . . ." Nor does Appel's subsequent experience in reinsurance show the Commissioner erred by placing greater weight on the testimony of the Department's witnesses, one of which was an expert in reinsurance; especially where there was evidence that Appel lacked the experience to develop a reinsurance model, the model lacked documentation, and the hypothetical model did not reflect reinsurance in North Carolina.

Regarding the "real world" evidence that the Bureau claims was improperly disregarded, the Bureau points to Exhibit RB-33, which was compiled by Appel and presented during the Bureau's rebuttal case.

Appel explained that RB-33 included the North Carolina Farm Bureau's ("Farm Bureau") insurance expenses for each of the years between 2001 and 2013 and showed the percent of Farm Bureau's direct premium ceded to reinsurance. Appel used Farm Bureau's data to test the reasonableness of his reinsurance model and concluded that the filed net cost of reinsurance was well below that of Farm Bureau.

The Commissioner addressed this "real world" evidence in finding 450 and determined its usefulness for comparison purposes was "nil" because the data included "quota share" reinsurance, or non-catastrophe reinsurance, in all but one of the years. The Bureau now contends the Commissioner's disregard of the Farm Bureau data was in error because, although Appel acknowledged that, "[i]n some years, there's quota share reinsurance in addition to catastrophe excess of loss reinsurance[]" and, therefore, the "percent ceded likely overstates to some extent the amount that is strictly catastrophe excess of loss[,]" Appel's testimony was that in catastrophe prone areas such as North Carolina, "the quota share . . . is going to be priced much closer to catastrophe reinsurance than quota share would be in an environment which was not catastrophe prone because it bears a fair bit of the catastrophe exposure." Thus, the Bureau claims Appel's testimony shows the Farm Bureau data is relevant evidence of the cost of reinsurance in North Carolina.

While the Commissioner may have understated the relevance of the Farm Bureau data by assigning it zero usefulness for comparison purposes, we are hesitant to say that the Commissioner erred in disregarding the data where, on appeal, the Bureau has failed to direct this Court to any concrete evidence indicating what portion of the Farm Bureau data was not reinsurance to guard against the risk of catastrophe losses. Moreover, as found by the Commissioner in finding 451 and argued by the Department on appeal, our Supreme Court has recognized that "the loss experience data of a single carrier in this State does not establish the 'composite' of loss experience of all the carriers, which the establishment of the Bureau was intended to create." *Foremost Ins. Co., Inc. v. Ingram*, 292 N.C. 244, 249, 232 S.E.2d 414, 418 (1977). This seems to hold particularly true where the single carrier, Farm Bureau in the present case, offers homeowners' insurance extensively, but exclusively, in North Carolina. While the Bureau claims this makes Farm Bureau "uniquely reflective" of a single hypothetical company operating in North Carolina, both Bureau and Department witnesses acknowledged that many insurers in North Carolina are multi-state and multi-line carriers. Department witness Schwartz explained that he did not believe the Bureau's calculation took into account that "the aggregate company

in North Carolina . . . writes other lines of insurance in North Carolina, and writes business in other states, and has a substantial premium base and surplus amount which would allow for a higher retention." Based on this evidence, we cannot hold the Commissioner abused his discretion in disregarding the Farm Bureau data as illustrative of reinsurance for the entire state.

In addition to arguing the Commissioner erred in rejecting its filed net cost of reinsurance provision, the Bureau also argues the Commissioner erred in selecting a 10% net cost of reinsurance provision. The Bureau claims the selected provision is unsupported by material and substantial evidence.

The Commissioner's adoption of the 10% net cost of reinsurance is best explained in the following findings:

> 447. . . . Schwartz recommended that, in light of the Bureau's failure to support its net cost of reinsurance provision, it would be appropriate to use a net cost of reinsurance of $0 (zero). The Commissioner does agree that $0 might be appropriate, *however*, *North Carolina is exposed to hurricanes* and, without a doubt, insurers have sought to protect themselves from hurricane claims in North Carolina by purchasing reinsurance, a fiscally prudent decision and sound business practice. Thus the Commissioner considers it reasonable to include some factor above $0 in the rate for the net cost of reinsurance.
>
> . . . .
>
> 448. Schwartz has proposed a factor of 10% of premium, based upon an analysis of historical countrywide data of the entire homeowners insurance industry over the last 28 years. . . .
>
> 449. Schwartz . . . testified that pursuant to [N.C. Gen. Stat.] § 58-36-10(2) countrywide data may be used where North Carolina experience is unavailable. . . .
>
> . . . .
>
> 452. Schwartz provides a reasonable measure to set the net cost of reinsurance at 10% of premium given that we do not have actual composite North Carolina data available, and that the countrywide data . . . provides a reasonable benchmark to North Carolina because of similar measures of risk. . . .

. . . .

> 454. The Commissioner, taking into account the above and the undisputed fact that North Carolina is a coastal state prone (like its sister states in the southeastern United States) to hurricanes and tropical storms, finds that a net cost of reinsurance of 10% of premium is reasonable and will result in rates that are not excessive or inadequate.

The Bureau now contends the Commissioner erred in the above findings because Schwartz was not an expert on reinsurance and, therefore, not competent to provide testimony on the subject. The Bureau also contends the Commissioner erred in relying on countrywide reinsurance data.

Regarding the testimony by Schwartz, the Bureau claims that Schwartz did not meet the requirements of Rule 702(a) of the North Carolina Rules of Evidence and *Daubert* for admissibility of expert testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993). Specifically, the Bureau contends that because Schwartz testified that he has never been engaged on a professional basis by a reinsurer, reinsurance broker, or primary insurer to price a reinsurance policy, has not individually been involved in a transaction for the purchase of reinsurance, and has never in a professional capacity recommended or calculated hurricane average annual losses for use by a reinsurer or reinsurance broker, Schwartz "lacks the 'knowledge, skill, experience, training or education' in the field of reinsurance to be competent to testify on the cost of reinsurance . . . ." We disagree.

The Bureau ignores that Schwartz, an actuarial consultant, received the professional designation of Associate in Reinsurance from the Insurance Institute of America in 1998 (received the Reinsurance Association of America Award for Academic Excellence) after completing qualifying examinations and has been involved in numerous insurance rate cases in various states in recent years. Although Schwartz may not have been qualified to develop a reinsurance model, there is a significant difference between developing a model to project reinsurance costs and comparing modeled results to actual reinsurance data. Based on Schwartz's reinsurance designation and experience as an actuary having participated in numerous rate cases, we hold Schwartz was competent to testify on the subject of reinsurance and the Commissioner did not abuse his discretion in considering or giving weight to Schwartz's testimony.

Regarding the Commissioner's consideration of the countrywide reinsurance data presented by Schwartz and included in Schwartz's prefiled testimony, the Bureau asserts the Commissioner's reliance on the data was error because the data does not reflect the hurricane risks in North Carolina and the costs that insurers will incur to purchase reinsurance in North Carolina. The Bureau specifically points to Schwartz's testimony and claims Schwartz acknowledged the data did not reflect catastrophe risks in North Carolina.

A review of the portion of Schwartz's testimony identified by the Bureau shows that Schwartz never acknowledged that the data was not reflective of North Carolina, but that the data is not that of North Carolina. To be exact, in response to the question, "Now, is it correct, Mr. Schwartz, that you cannot tell from the data . . . what the net cost of reinsurance is for catastrophe reinsurance in a state like North Carolina?" Schwartz responded, "Yeah[, the data] doesn't give catastrophe reinsurance data for North Carolina." We think testimony that data is not for North Carolina and testimony that data is not reflective of North Carolina are very different responses. Moreover, Schwartz went on to testify that he was "not aware of where to obtain [catastrophe reinsurance data for North Carolina]." Schwartz stated that he believed the Department requested such information from the Bureau for use in analyzing the filing, but the Bureau indicated they did not have such information. In setting forth the standards and factors in the making and use of rates, N.C. Gen. Stat. § 58-36-10(2) provides that "countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available." N.C. Gen. Stat. § 58-36-10(2). As found by the Commissioner in finding 449, Schwartz acknowledged N.C. Gen. Stat. § 58-36-10(2). Finding 449, together with the Commissioner's finding that "it is not appropriate to set a provision for net cost of reinsurance . . . based upon data presented for only one company[]" in finding 451, supports the Commissioner's consideration of countrywide data. Thus, the Commissioner did not err.

Even if the countrywide data was properly considered, the Bureau contends the Commissioner acted arbitrarily in selecting the 10% net cost of reinsurance provision from the data. Again, we disagree. While 10% may not be an exact calculation, Schwartz's recommendation and the Commissioner's selection of 10% for the net cost of reinsurance was based on a reasoned analysis with a rational basis in the evidence. Specifically, the data relied on by Schwartz shows that, for the years included, the net cost of reinsurance as a percent of direct earned premium ranges from an average of 4.6% on a calendar year basis to a

maximum of 10.1% on a calendar year basis, and from an average of 7.8% on an accident year basis and to a maximum of 15.9% on an accident year basis. Schwartz used that data to recommend a range of 5% to 16%, considering both the accident year and calendar year bases. Schwartz then selected a 10% net cost of reinsurance from the middle of the range. Upon review, it is clear that Schwartz's analysis was well reasoned and constitutes material and substantial evidence. Furthermore, it supports the Commissioner's findings and conclusions. Thus, the Commissioner's selection of the 10% net cost of reinsurance was not arbitrary.

The Bureau looks to the same countrywide data and references numbers from the column providing the percent of "ceded/direct earned premium" and points out that the average and maximum on an accident year basis are higher than the percentages used by Schwartz – respectively 9.7% and 22.5%. The Bureau then asserts that Schwartz and the Bureau arbitrarily picked the lower percentages for net cost of reinsurance. To support its assertion, the Bureau contends that when Schwartz was asked on cross-examination which was the appropriate number for the Commissioner to use, Schwartz testified that "both provide information[]" and did not explain why he choose 10%. Upon review of both the countrywide data used by Schwartz and the testimony of Schwartz cited by the Bureau, it is clear the Bureau misconstrues the data and Schwartz's testimony. First, the percentages referenced by the Bureau are the result of a different calculation, "ceded/direct earned premium," than the net cost of reinsurance as a percent of direct earned premium relied on in Schwartz's analysis. Second, the portion of Schwartz's testimony cited by the Bureau was not in reference to the difference between the figures identified by the Bureau and the figures relied on by Schwartz. Schwartz's testimony was in reference to the inclusion of net cost of reinsurance analysis on both an accident year basis and a calendar year basis. Schwartz explained the difference between the two bases and stated they provide different information. In determining the range for net cost of reinsurance, Schwartz considered both bases.

3. Modeled Hurricane Losses

[3] In the third issue raised on appeal, the Bureau argues the Commissioner erred in reducing the modeled hurricane losses in the filing. The Commissioner addressed the modeled hurricane losses in findings 153 through 225.

The Bureaus' filed rates were based, in part, on long-term average annual hurricane losses of $316.1 million. These hurricane losses included in the Bureau's filing were based on a report that was provided to the

Bureau by AIR and entered into evidence as Exhibit RB-6A. The report includes an analysis of prospective hurricane losses based on AIR's STD model, which incorporates AIR's standard view of hurricane risk. In prefiled testimony, Bureau witness Robert Newbold, an expert in catastrophe modeling and Senior Vice President of AIR, explained that for the analysis requested by the Bureau, AIR ran 100,000 simulations or iterations of what could happen in the following year in order to derive average loss costs. Although Newbold admitted that, "[a]s with all models, [the] representation are not exact," Newbold opined that "simulation methodology is the best available technique for estimating potential hurricane losses . . . ." Bureau witness Robert J. Curry, an expert property/casualty actuary who is responsible for managing and overseeing the operations of the Personal Property Actuarial Division of Insurance Services Office ("ISO"), echoed Newbold's opinion and explained that using a simulated model to determine long-term average losses is a more accurate way of including the exposure than using actual hurricane losses.

In the order, the Commissioner accepted the use of simulation modeling, explaining in finding 153 that "[t]he purpose in utilizing . . . the hurricane loss model is to avoid inordinate shifts, both upward and downward, in indicated rate levels which would result from reflecting large hurricane and other wind loss events only in the year in which they occur." The Commissioner, however, refused to blindly accept the modeled hurricane losses included in the Bureau's filing and considered the testimony of Bureau and Department witnesses to determine the credibility of the model. Based on the evidence presented, the Commissioner found it necessary to reduce the modeled hurricane losses, finding as follows:

> 223. . . . The model provides useful information and certainly should be considered. However, models aren't perfect; the problems and uncertainties of the model should be considered as well. The Commissioner finds herein that it is both necessary and appropriate to reduce the Bureau's value for the modeled hurricane loss costs to a level that recognizes the bias and inherent uncertainty in modeling in general and catastrophe modeling, specifically.
>
> 224. . . . The Commissioner finds that the average annual modeled hurricane losses of $316.1 million used in support of the filed rates is excessive based on the evidence. He finds that a reduction in the modeled hurricane losses of 13.9% to 272.3 million is supported in the evidence.

> 225. Thus, the Commissioner finds herein that the modeled hurricane losses utilized in the Bureau's indicated rate calculation are excessive and will result in excessive rates. The +13.9% reduction in hurricane losses . . . will result in rates that are neither excessive nor inadequate.

The Bureau now claims the Commissioner's reduction of the modeled hurricane losses was arbitrary and capricious for several reasons.

First, the Bureau contends the Commissioner erred in reducing the modeled hurricane losses because there is no evidence that uncertainty in the model results in an overstatement of the losses. The Bureau claims the Commissioner "effectively assumed that 'uncertainty' in modeling equates to 'excessive losses[]' " without material and substantial evidence and contrary to the Commissioner's findings regarding the validity of the model. We disagree that the Commissioner made such an unfounded assumption.

While the Bureau is accurate in stating the Commissioner issued findings on the general acceptance of simulation modeling within the insurance industry to predict hurricane losses and noted verification procedures used to ensure that AIR's models are as up-to-date and accurate as possible, it is clear from the evidence of both the Bureau and the Department that modeling is not infallible. In fact, the Commissioner issued findings identifying specific testimony that modeling was not precise, had limitations, and that "glitches" had been discovered in the past. The Commissioner also devoted entire subsections of findings to the credibility of AIR's models and both the Bureau's and the Department's cases, in which the Commissioner identified biases on all sides. The Bureau does not attack any particular finding and, upon review of the record, the findings appear to be supported by the record evidence. Because of the admitted uncertainty in modeling, it was not inconsistent for the Commissioner to scrutinize the modeled losses despite his recognition that AIR's models are widely used and accepted.

Moreover, the Commissioner's reduction of the modeled hurricane losses was not based on an unfounded assumption, it was based on the evidence, or the lack thereof, in the record. While the Bureau is correct in asserting that any uncertainty in the STD model may result in the understatement of losses as opposed to an overstatement of losses, the Bureau has not directed this Court to any evidence in the record that the modeled hurricane losses were understated; nor have we been able to find such evidence. Based on the evidence of record, it was well within the Commissioner's discretion to weigh the competent evidence in the record and make adjustments as he deemed necessary.

The Bureau, however, also takes issue with the evidence considered by the Commissioner in reducing the modeled hurricane losses. Specifically, the Bureau contends the Commissioner erred in relying on the testimony of O'Neil and Schwartz. The Bureau also contends the Commissioner erred in using benchmarks that are not based on material and substantial evidence. We are not convinced that the Commissioner erred in either respect. Nevertheless, it is important to note that, while the Commissioner did rely on the testimony of O'Neil and Schwartz and the benchmarks as evidence that the modeled hurricane losses included in the filing were overstated, "the Commissioner [did] not rely[] upon the specific numerical values of their calculations to set a rate[,]" as the Commissioner explained in finding 215.

The Bureau first contends the Commissioner erred in relying on testimony by O'Neil and Schwartz because they were neither offered nor qualified by knowledge, skill, experience, training, or education as experts in hurricane modeling. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a); *Daubert*, 509 U.S. at 588, 125 L. Ed. 2d at 480. In support of its argument, the Bureau directs this Court's attention to finding 218a, in which the Commissioner found that "neither he nor any of the consultants hired by the Department nor anyone on his staff has the expertise to evaluate the inner workings of the model." While we acknowledge the Commissioner's finding, we are not convinced the finding supports the Bureau's argument. A review of finding 218a and the subsequent findings indicate the Commissioner was not commenting on the qualifications of O'Neil and Schwartz to provide testimony regarding the results of AIR's STD model, but regarding the "inner workings of the model[,]" to which neither O'Neil nor Schwartz offered testimony. The Commissioner's subsequent finding describing the type of review he was required to undertake because he lacked the expertise to analyze the inner-workings of the model adds perspective to finding 218a. The Commissioner explained that review as follows:

> 218b. The Commissioner instead must rely on benchmarks that are offered in sworn evidentiary testimony. These benchmarks can be against results from other models, or against actual history. Each of the various benchmarks in the record has different evidentiary force that must be weighed.

O'Neil and Schwartz, both of whom were stipulated as expert property/casualty insurance actuaries, were certainly qualified by knowledge, skill, and experience to review the results of the STD model and compare those results to the results of other models or historical losses. Thus, the Commissioner did not err in relying on their testimony.

The Bureau next takes issue with the Commissioner's use of "benchmarks" to validate the STD model. The Commissioner recognized four benchmarks which he used to estimate that modeled hurricane losses should be 13.1% to 21.5% lower than filed. The Bureau contends three of those benchmarks are not supported by material and substantial evidence in the record and, therefore, the Commissioner's reliance thereon was arbitrary and capricious.

At the outset, we re-emphasize that the Commissioner specifically noted the actual reduction of the modeled hurricane losses was not based on the benchmarks.

In the first challenged benchmark, which the Commissioner explained in finding 218c, the Commissioner compared actual hurricane losses to modeled hurricane losses. That comparison was based off of AIR's own validation in Exhibit RB-6C, which used bar graphs to compare observed and modeled losses for seventeen hurricanes dating back to 1989. Because AIR was comparing observed losses from past years to current model losses, AIR adjusted the actual losses by a 7% annual trend factor to account for inflation and exposure growth. The Commissioner noted in finding 218c that the adjusted actual losses for hurricanes Hugo, Fran, and Isabel, three hurricanes that caused significant losses in North Carolina, are 7.9% higher that the modeled hurricane losses. The Commissioner, however, also tested a 5% annual trend factor and found the adjusted actual losses are 21% lower than the modeled hurricane losses when the 5% factor is used. The Commissioner then found in finding 218c that an annual trend factor of below 5% is shown from inflation and home price indices, which the Commissioner acknowledged were not discussed at the hearing.

The Bureau now contends the Commissioner's analysis using the 5% annual trend factor was in error because the 5% factor was not based on evidence in the record and because the 5% factor does not include the exposure growth component to AIR's validation. The Bureau claims the Commissioner picked the 5% factor because AIR's validation did not support his desired reduction of the modeled hurricane losses and, therefore, the Commissioner "rewrote the evidence to generate another 'benchmark' in his result-oriented effort to reduce modeled losses and ensure that there would be no rate increase." The Bureau is correct that the Commissioner's use of the 5% annual trend factor and the Commissioner's assertion that the annual trend factor is less than 5% are not based on evidence in the record. Thus, the portion of finding 218c indicating an annual trend factor between 3.5% and 4% is proper is error. We hold it was not error, however, for the Commissioner to test the 5% factor.

In response to the Bureau, the Commissioner contends the 5% annual trend factor was just a number selected by the Commissioner to test the sensitivity of AIR's 7% factor. Assuming that was the purpose of the Commissioner's calculations, it was useful and relevant for determining the sensitivity of the STD model. But even if that was not the intended purpose of testing the 5% factor, the Commissioner's analysis and the portion of finding 218c that the annual trend factor was below 5% were harmless because the Commissioner's ultimate reduction of the modeled hurricane losses was not based on the 5% factor.

The second challenged benchmark, described by the Commissioner in finding 218e, was based on the testimony of Department witness O'Neil. For the "O'Neil benchmark," O'Neil conducted a comparison of modeled hurricane losses of AIR and Risk Management Solutions (RMS), a competitor of AIR. O'Neil's comparison was of the WSST modeled hurricane losses of "Beach Plan"[2] properties that had been projected for reinsurance purposes. O'Neil found that AIR projected losses of $247.4 million and RMS projected losses of $141.0 million. O'Neil then determined that AIR's modeled losses were roughly 27.4% higher than the average of the two models. Based on O'Neil's testimony, the Commissioner found modeled hurricane losses could be 21.5% lower than filed. In rebuttal, Bureau witness Newbold took exception to usefulness of O'Neil's comparison, but offered the results if the STD versions of AIR's and RMS's models were considered. Newbold testified that using STD versions of their respective models, AIR projected losses of $226.8 million and RMS projected losses of $167.5 million; thus, AIR's modeled losses were roughly 14% higher than the average of the two models. Based on Newbold's testimony, the Commissioner found modeled hurricane losses could be 13.1% lower than filed.

The Bureau now contends O'Neil's analysis was not material and substantial evidence because the models she compared were different from the model used in the filing and because the comparison was based only on the Beach Plan's exposure, which makes up only a small portion of the entire state. Although the modeled hurricane losses compared by O'Neil were projected using WSST versions of AIR's and RMS's models and, therefore, different from the models used to project modeled hurricane losses in the filing, Newbold's testimony regarding the results of the STD versions of the models adds credence to O'Neil's testimony

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2. The Beach Plan is a residual market created by the legislature to provide insurance to homeowners in beach and coastal counties at a surcharge because insurers are not willing to write insurance policies.

that AIR's estimates were significantly higher than the estimates of RMS. Although such comparison may not be relevant to the actual reduction of the modeled hurricane losses, it is relevant to show that other models produce more modest loss projections. Additionally, although the Beach Plan only includes those territories nearest the coast and is not representative of the entire state, the evidence from AIR was that those coastal territories in the Beach Plan are most vulnerable to hurricane losses and account for much higher shares of the loss than exposure. Thus, we do not entirely dismiss the consideration of the Beach Plan modeled losses. Lastly, and most importantly, while the Commissioner may have used the benchmark to set the outer bounds for a reduction of the modeled hurricane losses, the benchmark was not used by the Commissioner to calculate his reduction of the modeled hurricane losses.

The third benchmark challenged by the Bureau was based on the testimony of Department witness Schwartz. The Commissioner described his review of the "Schwartz benchmark" in finding 218f. The Schwartz benchmark was based on a comparison of modeled hurricane losses and actual hurricane losses from filings dating back to 1998. Schwartz's analysis showed that from 1992 to 2011 the ratio of actual to modeled hurricane losses was 53%. In finding 211, the Commissioner found that "Schwartz corrected for his perceived problems with the AIR model by judgmentally reducing the value of the projected losses in the filing by +10%."

The Bureau contends the Schwartz benchmark is not material and substantial evidence. While we agree that Schwartz's 10% reduction in the modeled losses is not material and substantial evidence, the Schwartz analysis is relevant, material, and substantial evidence to show the comparison between observed losses and modeled losses for purposes of demonstrating AIR's STD model overstated modeled hurricane losses in the recent past.

The Bureau's arguments against each of these benchmarks is that they are not material and substantial evidence. We disagree and hold the benchmarks were material and substantial evidence of the purpose for which they were recognized – to show that AIR's modeled hurricane losses were not exact and were overestimated.

While the Commissioner may have considered the benchmarks for determining the modeled losses were not entirely reliable, the Commissioner indicated his eventual reduction of the modeled hurricane losses was not based on the benchmarks. In fact, the Commissioner noted deficiencies in the benchmarks by stating in finding 218g that

"none of [the four benchmarks] on its own is completely reliable." The Commissioner also recognized in finding 215 that O'Neil's and Schwartz's testimony may have contained some documentation issues and unsupported assumptions, but as we recognized above, the Commissioner overlooked those deficiencies because he was "not relying upon the specific numerical values of their calculations to set a rate." The Commissioner correctly recognized in finding 215 that his duty was to determine "whether the Bureau met its burden of proof for this filing." The Commissioner ultimately determined the Bureau failed to meet its burden of proof regarding three components of the modeled hurricane losses and determined it was proper to exclude those components from consideration, thereby reducing the modeled hurricane losses to be used in ratemaking. The Commissioner described his reduction as follows:

> 218i. The Commissioner finds it helpful to tabulate the STD model output in the following format. From here, it can be seen that eliminating three sources of losses that were disputed by the Department witnesses: 1) the demand surge component ($17.0 million), 2) the losses arising from modeled CAT 5 events in North Carolina ($14.0 million), and 3) the losses ($12.8 million) arising from modeled hurricanes that make landfall somewhere other than the Carolinas, but which are presumed by the AIR model to continue into North Carolina with wind speeds below hurricane force, one would end up with an indicated average annual loss due to hurricanes of $272.3 million, which is 13.9% below the filed amount, and within the range cited above. . . .

The Bureau's last argument regarding the Commissioner's review of the modeled hurricane losses is that the Commissioner's 13.9% reduction removes losses that insurers are required to pay. The Bureau contends the removal of the three components was arbitrary and suggests that the only reason for their removal is because the combined effect caused the modeled hurricane losses to fall within the range of the benchmarks. We disagree with the Bureau's assertion that the Commissioner's decisions to exclude CAT 5 hurricanes, demand surge, and losses incurred from winds below 74 miles per hour were arbitrary and capricious.

Concerning CAT 5 hurricanes, the Bureau asserts that the decision to remove the CAT 5 hurricanes from the modeled losses was arbitrary because the evidence was undisputed that it was statistically and meteorologically possible that a CAT 5 hurricane could impact North Carolina. Although the Bureau recognizes that there has never been a CAT 5 hurricane impact in North Carolina in the period of time for which consistent

historical data has been collected, the Bureau's model hurricane losses include the admittedly extremely low probability events. In response, the Commissioner points to testimony from Newbold that there is less than a .1% probability a CAT 5 hurricane will strike North Carolina and indicating it is a very unlikely event. The Commissioner further points to prefiled testimony of Schwartz explaining that "[p]rojected hurricane events from the AIR model that have a probability of 0.1% or less . . . comprise about 7.7% of the overall projected modeled hurricane losses[,]" "projected hurricane events from the AIR model that have a probability of 0.5% or less . . . comprise about 22.7% of the overall projected modeled hurricane losses[,]" and "[m]ore than ½ of all the projected hurricane losses from the AIR model come from hurricane events that have a probability of 2.5% or less . . . ." After noting Schwartz's testimony, the Commissioner found in finding 209 that "[w]hile the very low probability events have a large impact on projected losses, these very low probability events have the most uncertainty about whether the results are accurate." In finding 193, the Commissioner also recalled O'Neil's testimony that "[al]though . . . Newbold may be correct from a technical modeling viewpoint that a Category 5 storm is possible, it does not follow that it is appropriate to generate losses from such an event for inclusion in North Carolina Homeowners' rates. Homeowners should not be required to pay for losses from a hypothetical event which has no basis in actual historical observation." We hold the Commissioner's findings concerning CAT 5 hurricanes are supported by the evidence and demonstrate a reasoned decision to exclude the losses from those storms due to the very low probability and high comparative costs included in the modeled hurricane losses.

Concerning demand surge, the Commissioner recognized in finding 185 that "[d]emand surge accounts for the sudden and usually temporary increase in the cost of material, services, and labor due to increased demand following a catastrophe." The Commissioner further noted in a footnote to that finding that, "[d]emand surge, *at best*, is a function of supply and demand . . . [and] *at worst*, is a function of price gouging." The Commissioner then found in finding 187 that "[t]he analysis showed that there is an increase of 5.7% in gross losses when demand surge is applied." In summarizing the testimony of O'Neil, the Commissioner indicated that O'Neil took issue with the inclusion of demand surge because the validation for demand surge was based on other states and there had not been an analysis for North Carolina events. O'Neil also contemplated that the North Carolina price gouging statute could limit demand surge. We find it significant that the Commissioner did not completely reject the possibility of demand surge, but instead disagreed with the Bureau's analysis as follows:

> 198a. The Commissioner agrees with O'Neil that the Demand Surge surcharge averaging 5.7% is not adequately supported by the Rate Bureau. He was able to review the demand surge impact on each of the 57,754 modeled losses. The Commissioner was surprised to find that nearly 40% of the modeled losses included additional losses due to demand surge. He finds that modeled events with loss amounts as low as $6 statewide loss included demand surge.
>
> 198b. The Commissioner finds that nearly half of the total demand surge dollars . . . arise from modeled events that make landfall in states other than North Carolina. Presumably the North Carolina portion of losses excluding demand surge from events that make landfall elsewhere are only a fraction of the total, and yet, the formula provides the same percentage load in each state's losses. It is not clear to the Commissioner why a major event in Florida that tracks into North Carolina doing relatively minor damage there should entail supply and demand problems in North Carolina.
>
> 198c. Whatever study was done to develop the model, no details other than a table of factors were presented into evidence by the Rate Bureau.
>
> 198d. AIR testified that it commonly runs the model either with or without demand surge, implying that it is not regarded by its end users as a necessary component of the model.

It is clear from these findings that the Commissioner's exclusion of demand surge was a result of the Bureau's failure to meet its burden of proof. We hold these findings are supported by the evidence and demonstrate a coherent analysis by the Commissioner.

Concerning losses from winds below 74 miles per hour, the Bureau contends the exclusion of those losses from modeled hurricane losses is arbitrary because "[t]he actual hurricane losses removed from the ratemaking data to prevent any duplication include all losses caused by winds of 40 mph or higher." We are not convinced. It is undisputed that hurricanes are classified as storms with sustained winds at least 74 miles per hour. As a result, O'Neil testified that "[she] didn't think it appropriate to consider [losses caused by winds below 74 miles per hour] as hurricane losses in the model." The Commissioner reflected

O'Neil's opinion in his findings and adopted it, resulting in the exclusion of losses incurred from non-hurricane force winds from modeled hurricane losses. While there may be reasons for the inclusion of such winds, the Commissioner's determination is rationally based on the evidence presented and, therefore, was not arbitrary.

Upon full review of the Commissioner's analysis of the modeled hurricane losses, the Order shows the Commissioner performed a careful review of the evidence and did not arbitrarily reduce the modeled hurricane losses to be used in ratemaking. The Commissioner removed those sources of the modeled hurricane losses that he determined were questionable and not fully supported by the Bureau.

4. Allocation to Zones

[4] Lastly, the Bureau argues the Commissioner erred in rejecting its filed allocation of the net cost of reinsurance and underwriting profit to zones. The Commissioner addressed the Bureau's allocation in findings 455 to 469.

The Bureau's filed allocation was based on a simulation model developed by Bureau witness Appel. Appel explained that he used his model to calculate the risks faced by different regions in North Carolina and, instead of using the revised territories in the filing, allocated the net cost of reinsurance and underwriting profit between four zones: beach, coast, central, and mountains. The Bureau now claims the filed allocation "did not change the overall filed rate level; it simply accomplished the fundamental goal of allocating the reinsurance costs across the state proportional to the risk and thereby collecting a greater portion of the premium from the exposures which present a correspondingly greater risk."

The Commissioner took exception to the Bureau's allocation; particularly regarding the inclusion of certain counties that are not afforded coverage under the Beach Plan in the "coast" zone, which is burdened by a greater share of the net cost of reinsurance and underwriting profit. The Commissioner also considered testimony of Department witness O'Neil, who took exception to Appel's allocation. O'Neil testified that she disagreed with the allocation of the net cost of reinsurance and underwriting profit to zones on the conceptual level because, "[f]rom an overall level, the Rate Bureau relates the amount of profit to the willingness of investors to supply capital. In that regard investors are only concerned with overall company profit, not the specific areas from which it may arise." O'Neil also took exception to the inclusion of another level of simulation modeling to the Bureau's filing and challenged the

documentation and results of Appel's model, noting that "the allocation of more than 40% of the nearly $1 billion of underwriting profit, contingencies and Net Cost of Reinsurance to Zone 1a [was] unreasonable on its face." In place of Appel's model, O'Neil calculated the indicated rate level changes by territory.

It is clear from the Commissioner's findings that the Commissioner did not find Appel's model and the resulting allocation of the net cost of reinsurance and underwriting profit reliable. The Commissioner then rejected the Bureau's allocation, finding as follows:

> 468a. The Commissioner finds that the filed distribution of the net cost is discriminatory in that it is based on a Monte Carlo simulation of losses that appears to understate significantly the loss variance in the less hurricane prone areas by means of significantly understating the assumed annual variance in non-hurricane losses. According to the simulation file that was provided to the Department by the Rate Bureau (*DOI-5*, *D.R 1.181-192*), the arbitrarily assumed ratio of the standard deviation to the mean (known in statistics as the coefficient of variation (C.V.)) is approximately 1% for non-hurricane losses. Data provided on *DOI-9*, *Schwartz prefiled testimony*, *AIS-18*, shows that the state with the smallest annual coefficient of variation in its loss ratio among the 50 states has a C.V. of approximately 12%. The Commissioner finds that a Monte Carlo simulation that assumes a standard deviation relative to the mean for non-hurricane losses of 1% produces results that cannot be relied upon in determining overall risk by zone.
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> 469. Given Appel's lack of credibility on this particular issue and the Bureau's failure to recognize or address the fairness issue, the Commissioner herein orders that the net cost of reinsurance and underwriting profit will <u>not</u> be allocated to zones. Allocating the net cost and profit to zones as Appel recommends will result in rates that are unfairly discriminatory.

The Bureau now challenges the Commissioner's rejection of its allocation of the net cost of reinsurance and underwriting profit to zones because the Commissioner's analysis went outside the record. Specifically, the Bureau contends the Commissioner's comparison of the coefficients of variation in finding 468a was not based on evidence

in the record. Upon review of Exhibit DOI-9, AIS-18, to which the Commissioner specifically referred in finding 468a, we agree with the Bureau that the finding is not supported by evidence in the record. In response, the Commissioner does not direct this Court to any evidence supporting finding 468a, but instead contends that the Commissioner "used his expertise to analyze the data provided through discovery to determine that Appel's simulation of losses cannot be relied upon." While that may be the case, without further findings regarding the Commissioner's analysis and where the data relied upon may be found, this Court cannot determine whether finding 468a is supported by evidence in the record and must hold that it is not.

We do, however, agree with the Commissioner's further assertion that even if finding 468a is not supported by the record evidence, the Commissioner's rejection of the Bureau's allocation of the net cost of reinsurance and underwriting profit to zones is supported by the Commissioner's other findings, which cast doubt upon the credibility of Appel's model. The concerns raised in those findings concerning Appel's credibility are supported by material and substantial evidence in the record. Thus, we affirm the Commissioner's rejection of the Bureau's filed allocation of the net cost of reinsurance and underwriting profit to zones.

III. Conclusion

Upon a full review of the Commissioner's order, we hold the order reflects a careful, thoughtful, and thorough consideration of the evidence. The evidence in the record supports the Commissioner's critical findings and ultimate conclusions. This Court will not second guess the Commissioner's determinations as to the credibility of the witnesses or the weight to be given their testimony. Therefore, the order of the Commissioner is affirmed.

AFFIRMED.

Judges DIETZ and TYSON concur.

STATE v. ABRAMS

[248 N.C. App. 639 (2016)]

STATE OF NORTH CAROLINA
v.
LARRY WILLIAM ABRAMS

No. COA15-1144

Filed 2 August 2016

Evidence—marijuana—expert testimony—reliability analysis

The trial court did not abuse its discretion in a drug case by admitting expert testimony identifying the substance recovered from defendant's home as marijuana. The agent's testimony was the product of reliable principles and methods applied reliably to the facts of the case, which satisfied the two challenged prongs of the reliability analysis under Rule 702(a).

Judge HUNTER, JR. concurring.

Appeal by defendant from judgments entered 27 May 2015 by Judge Robert C. Ervin in Caldwell County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Deborah M. Greene, for the State.

Leslie Rawls for defendant-appellant.

CALABRIA, Judge.

Larry William Abrams ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of possession with intent to sell or deliver marijuana, intentionally maintaining a building to keep controlled substances, and possession of drug paraphernalia. We conclude defendant received a fair trial, free from error.

I. Background

During a traffic stop on 13 February 2012, Willie Cloninger ("Cloninger") consented to deputies of the Caldwell County Sheriff's Department ("CCSD") searching his vehicle. He told CCSD that he had four ounces of marijuana under his seat and agreed to make undercover buys for them. Cloninger made three buys at defendant's home. After each buy, Cloninger met with the officers and returned the purchased substances to them.

James Ferguson also cooperated with the CCSD. When his home was raided, he admitted to purchasing marijuana from defendant for the past nine months. Subsequently, CCSD executed a search warrant on defendant's home and recovered, *inter alia*, "[f]ive Ziploc bags of green vegetable plant matter" and various other containers of plant material. Georgiana Baxter ("Agent Baxter"), a special agent with the North Carolina State Bureau of Investigation ("SBI") and a forensic scientist with the North Carolina State Crime Lab ("NC Lab") in the Western Regional Laboratory ("WRL") in Asheville, tested the plant matter recovered from defendant's home and concluded that it was marijuana. Defendant was charged with, *inter alia*, possession with intent to sell or deliver marijuana, intentionally maintaining a building to keep controlled substances, and possession of drug paraphernalia.

At trial, the State tendered Agent Baxter as an expert witness. Agent Baxter currently serves as a forensic scientist supervisor in the chemistry section of the NC Lab in WRL, where she has worked for nearly fourteen years. She has completed the specialized "in-house training program through the [NC Lab] dealing with all aspects of forensic drug analysis" and was certified by the American Board of Criminalistics in the area of forensic drug analysis. As of the date she testified, Agent Baxter had been previously tendered and admitted as an expert approximately eighty-seven times to give her opinion as to whether a substance was a controlled substance.

Agent Baxter testified that she examined the plant material recovered from defendant's residence pursuant to the procedures set forth by NC Lab for analyzing and identifying marijuana. Those procedures called for an analyst to separate the vegetable material from its packaging and record its weight; conduct a visual inspection of the material with the naked eye; conduct an inspection of the material under a microscope; and then conduct a chemical test to determine the presence of tetrahydrocannabinol ("THC"), the active component of marijuana. After conducting this analysis on the vegetable material recovered from defendant's home, Agent Baxter concluded that it was marijuana.

On 27 May 2015, a Caldwell County jury returned verdicts finding defendant guilty of possession with intent to sell or deliver marijuana, intentionally maintaining a building to keep controlled substances, and possession of drug paraphernalia. The trial court sentenced defendant to a 60-day active sentence to be served in the custody of the Sherriff of Caldwell County, as well as a minimum of 6 months and a maximum of 17 months to be served in the North Carolina Division of Adult

Correction, where he was placed on supervised probation for 30 months with monetary and special conditions of probation. Defendant appeals.

II. Identification of Marijuana

Defendant argues the trial court abused its discretion by admitting expert testimony identifying the substance recovered from his home as marijuana, in violation of the new reliability inquiry imposed by amended Rule 702(a) of the North Carolina Rules of Evidence. We disagree.

A. Expert Testimony, the *Daubert* Standard

As an initial matter, "North Carolina is now a *Daubert* state." *State v. McGrady*, __ N.C. __, __, __ S.E.2d __, __, 2016 N.C. LEXIS 442, at *13 (2016). Rule 702(a) governs the admission of expert witness testimony. In 2011, our General Assembly amended Rule 702(a) to reflect its federal counterpart, which itself was amended in 2000 in response to the standard articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993) and later clarified in *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L.Ed.2d 508, 118 S.Ct. 512 (1997) and *Kumho Tire. Co. v. Carmichael*, 526 U.S. 137, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999). *McGrady*, __ N.C. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *7.

Our Supreme Court recently interpreted the 2011 amendment to Rule 702(a) to "adopt[] the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases[,]" and held that "the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule." *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *6.

B. Standard of Review

We review a trial court's ruling on the admissibility of expert testimony pursuant to Rule 702(a) for an abuse of discretion. *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *22. " '[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *22 (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

In reviewing a trial court's application of Rule 702(a), our Supreme Court instructed:

> To determine the proper application of North Carolina's Rule 702(a) . . . [the reviewing court] must look to the text

> of the rule, to [*Daubert*, *Joiner*, and *Kumho*], and also to our existing precedents, as long as those precedents do not conflict with the rule's amended text or with *Daubert*, *Joiner*, and *Kumho*.

Id. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *14.

C. Discussion

Rule 702(a) provides in pertinent part:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). Inquiry under the amended Rule 702(a) still involves a "three-step framework—namely, evaluating qualifications, relevance, and reliability[,]" *McGrady*, __ N.C. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *20, and "expert testimony must satisfy each to be admissible." *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *14. In the instant case, defendant does not dispute Agent Baxter's credentials nor the relevance of her testimony, but challenges its reliability.

1. Reliable Principles and Methods

Defendant contends Agent Baxter's testimony was not "the product of reliable principles and methods[,]" in violation of Rule 702(a)(2), on the basis that "the State did not present any testimony relating to [*Daubert*'s] five factors. Nor did it present any other support for the reliability of the test Baxter used to determine the nature of the vegetable matter." We disagree.

Regarding *Daubert*'s and other particular factors a trial court may consider when determining reliability, our Supreme Court explained:

In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147-49. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 152. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, so they do not form "a definitive checklist or test," *id.* at 593. And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150.

The federal courts have articulated additional reliability factors that may be helpful in certain cases, including:

> (1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations.
>
> (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.
>
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

> Fed. R. Evid. 702 advisory committee's note to 2000 amendment (citations and quotation marks omitted). In some cases, one or more of the factors that we listed in *Howerton* may be useful as well. *See Howerton* [*v. Arai Helmet, Ltd.*], 358 N.C. [440,] 460, 597 S.E.2d [674,] 687 [(2004)] (listing four factors: use of established techniques, expert's professional background in the field, use of visual aids to help the jury evaluate the expert's opinions, and independent research conducted by the expert).
>
> Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3). The court has discretion to consider any of the particular factors articulated in previous cases, or other factors it may identify, that are reasonable measures of whether the expert's testimony is based on sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the expert has reliably applied those principles and methods in that case. *See Kumho*, 526 U.S. at 150-53.

McGrady, __ N.C. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *18-20 (footnotes omitted). In addition, our Supreme Court emphasized that "Rule 702(a), as amended in 2011, does not mandate particular 'procedural requirements for exercising the trial court's gatekeeping function over expert testimony.' " *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *22 (quoting Fed. R. Evid. 702).

In the instant case, Agent Baxter's testimony established that she analyzed the vegetable matter recovered from defendant's home in accordance with the procedures for identifying marijuana employed by NC Lab at the time. Regarding Rule 702(a)(2), the reliability of the "principles and methods" employed, Agent Baxter explained that when identifying a substance as marijuana:

> The first thing that I'm going to do . . . is . . . separate any weighable material from its packaging that I receive it in. So I want the weight of just the material itself. I'm going to record that weight. At that point, I'm going to proceed with my analysis, conducting some type of preliminary analysis, whether that be a color test. In this particular case, with plant material, it's going to include a microscopic examination as well. After that, I'm going to do some type of chemical analysis to confirm the identification.

Regarding the microscopic exam, Agent Baxter explained in greater detail:

> There's basically four characteristics that we're looking for with marijuana. They have unique characteristics about their leaves. They have particular types of hairs that grow on those leaves. The stems of marijuana plants aren't rounded like a lot of tree, or you know, other types of plant material. They're fluted so . . . they're almost square, with concave edges. The seeds of the marijuana plant are very unique in that they are mottled, which means they look like little turtles' backs. So those are the kinds of things that we're looking for when we look under the microscope.

Regarding the chemical analysis, Agent Baxter explained that she conducted

> what is referred to as a Duquenois-Levine color test [, which is] a chemical test that reacts with certain compounds. In this case, it reacts with certain cannabinoids, such as THC, which is the active component in marijuana.

Based on her detailed explanation of the systematic procedure she employed to identify the substance recovered from defendant's home, a procedure adopted by the NC Lab specifically to analyze and identify marijuana, her testimony was clearly the "product of reliable principles and methods" sufficient to satisfy the second prong of Rule 702(a), and the trial court did not abuse its discretion in admitting this testimony. We overrule defendant's challenge.

2. Application of Reliable Principles and Methods

Defendant next contends Agent Baxter's testimony did not establish that she "applied the principles and methods reliably to the facts of the case[,]" in violation of Rule 702(a)(3). We disagree.

Agent Baxter testified that "we handle every case the same. We only work one item of evidence at a time, so as to prevent any type of cross-contamination during analysis." Agent Baxter received five bags of vegetable matter for testing, and explained:

> Based on our sampling procedures at that time, . . . I was required to randomly select three of those plastic bags and do a complete chemical analysis.

After selecting the first bag, Agent Baxter "separated it from the packaging material, [and measured the] weight o[f] that material[,]" which

was "379.21 grams." Next, she performed "a macroscopic [examination] . . . for particular characteristics. [She] then did a microscopic examination of the material[.]" Subsequently, she performed "a Duquenois-Levine color test" and "receive[d] a positive indication[.]" Based on her analysis, Agent Baxter concluded that the substance was marijuana.

Regarding analyzing the two other samples, Agent Baxter testified that she applied the same procedures she used to analyze the first sample:

> Once again, I separated it from its packaging material to obtain that net weight. I visually observed the material, did a microscopic examination as well as the chemical test that I performed[.]

Agent Baxter concluded that, based on her analysis, the substance tested in each of the bags was marijuana.

Agent Baxter's testimony established that the principles and methods she employed were "applied . . . reliably to the facts of the case[,]" per Rule 702(a)(3). Therefore, the trial court did not abuse its discretion by admitting her testimony.

III. Conclusion

Agent Baxter's testimony was "the product of reliable principles and methods" "applied . . . reliably to the facts of the case[,]" which satisfied the two challenged prongs of the reliability analysis under Rule 702(a). Defendant has failed to show the trial court abused its discretion in admitting Agent Baxter's expert testimony identifying the substance as marijuana. *McGrady*, __ N.C. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *22. Therefore, we conclude defendant received a fair trial, free from error.

NO ERROR.

Judge TYSON concurs.

Judge HUNTER, JR. concurs in a separate opinion.

HUNTER, JR., Robert N., Judge, concurs in a separate opinion.

I concur in holding the trial court did not commit error, but write separately to briefly discuss difficulties this Court faces in reviewing *Daubert* challenges on appeal.

Our Supreme Court and legislature have held North Carolina is a *Daubert* state. *See State v. McGrady*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (72PA14 2016). Our trial courts are bound to follow *Daubert* and its related guidance. At the present, trial courts are not required to make findings of fact or conclusions of law when they accept or reject an expert witness. With the advent of *Daubert*, this is problematic to appellant review. *See State v. Walston*, __ N.C. App. __, __, 780 S.E.2d 846, 862 (2015).

To utilize an expert witness in North Carolina, the moving party must show the witness's expertise puts the expert in a better position to have an opinion on a given subject than the trier of fact. *See State v. Goode*, 341 N.C. 513, 529, 461 S.E.2d 631, 640 (1995). The movant must show the witness is "qualified as an expert by knowledge, skill, experience, training, or education . . . ." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). Then, the movant must follow the three-part framework of Rule 702 and show the testimony is based up sufficient facts or data, is the product of reliable principles and methods, and the expert witness applied the principle and methods reliably to the facts of the case. *Id.* At issue in the case *sub judice*, the reliability prong poses procedural challenges for this Court's appellate review.

Because the substantive rule has an extensive history in federal law, our courts would adopt the federal procedure found in federal courts. However, the United States Circuit Courts of Appeal do not agree on the issue of whether a trial court must conduct a formal *Daubert* hearing when it applies the sufficiency and reliability factors in Rule 702. Circuits that allow a trial court to forego a *Daubert* hearing suggest a trial court can conduct a voir dire examination of the witness or allow the movant to establish a foundation on direct examination or through affidavits and expert reports. *See In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1138–39, (9th Cir. 2002); *United States v. Glover*, 479 F.3d 511, 517 (7th Cir. 2007); *Hoult v. Hoult*, 57 F.3d 1, 5 (1st Cir. 1995) ("[W]e assume that the [trial] court performs [the *Daubert*] analysis *sub silentio* throughout the trial with respect to all expert testimony."); *United States v. Lacascio*, 6 F.3d 924 (2d Cir. 1993); *United States v. Johnson*, 488 F.3d 690, 697 (6th Cir. 2007). The other circuits that require a formal *Daubert* hearing face a nuanced procedural challenge—whether an *in limine* hearing is required when there is a material dispute as to the expert's reliability. *See Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002); *see also Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999). Of the two lines of cases, the United States Supreme Court generally supports a trial

court's procedural discretion in conducting a *Daubert* inquiry. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony. The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable.").

However, parties may wish to build a record to contest specific findings when an expert is accepted or rejected. In civil trials parties may move to amend a trial court's findings of fact pursuant to N.C. R. Civ. P. 52(b), request specific findings on a witness's qualifications through an objection pursuant to N.C. R. Civ. P. 46(a)(1), or provide an offer of proof outside of the presence of the jury when their witness is excluded as an expert, pursuant to N.C. R. Evid. 103(a)(2). However, this leaves parties in criminal trials with no procedural mechanism to compel the trial court to make findings of fact or conclusions of law regarding its acceptance or rejection of an expert witness. This also creates the possibility of a silent record when parties stipulate to an expert's qualifications and/or reliability, and the movant fails to provide an offer of proof for the record to show its witness meets the *Daubert* requirements.

Given these federal distinctions, one model for procedure is to import the Rule 404(b) procedure in Rule 702. Under Rule 404(b), if a party fails to challenge the admissibility of evidence through a motion *in limine*, but does raise the issue at trial, the trial court holds a *voir dire* hearing. *See*, *e.g.*, *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 160–61 (2012). At this hearing, the trial court conducts a five part analysis: (1) whether there is sufficient evidence the party committed the act; (2) whether the evidence serves a proper purpose; (3) whether the evidence is sufficiently similar to the act in question; (4) whether the evidence and act in question are temporally proximate; and (5) whether the evidence survives the Rule 403 balancing test. *See Id.*; *see also State v. Oliver*, 210 N.C. App. 609, 613, 709 S.E.2d 503, 506 (2011). Then the trial court must make formal findings and note its findings for the record. *See State v. Smith*, 152 N.C. App. 514, 528, 568 S.E.2d 289, 298 (2002) (presumed error when the trial court does not note Rule 403 analysis on the record); *State v. Washington*, 141 N.C. App. 354, 540 S.E.2d 388 (2000) (no error when the trial court demonstrates a Rule 403 analysis in

its ruling); *State v. Rowland*, 89 N.C. App. 372, 383, 366 S.E.2d 550, 556 (1988) (holding 404(b) evidence is inadmissible when a trial court fails to make findings of admissibility under Rule 404(b)).

Accordingly, best practice dictates parties should challenge an expert's admissibility through a motion *in limine*. In the event a trial court delays its ruling on the matter, or in the event a party fails to raise the challenge until the expert is called upon at trial, our trial courts should afford parties a *voir dire* hearing to examine the witness and submit evidence into the record, which this Court can review on appeal. Lastly, in ruling on the expert's admissibility, the trial court should identify the *Daubert* factors and make findings of fact and conclusions of law, either orally or in writing, as to the expert's admissibility.

Here, the State provided sufficient evidence to show Agent Baxter met all the *Daubert* requirements. I concur in holding the trial court did not commit error.

STATE OF NORTH CAROLINA
v.
ROBERT WILLIAM ASHWORTH

No. COA15-1279

Filed 2 August 2016

1. Motor Vehicles—impaired driving—checkpoint—trial court findings—not supported by evidence

In an impaired driving prosecution arising from operation of a checkpoint, the evidence did not support a portion of a finding that a trooper was operating a marked patrol car with a light bar or that the trooper had communicated to his sergeant details of the checkpoint such as the start and end time.

2. Motor Vehicles—impaired driving—finding—not sufficient

In a prosecution for impaired driving arising from a operation of a checkpoint, the trial court's findings did not permit the judge to meaningfully weigh whether the seizure was appropriately tailored and advanced the public interest, and the severity of the checkpoint's interference with individual liberty.

Appeal by Defendant from judgment entered 25 March 2015 by Judge Reuben F. Young in Superior Court, Orange County. Heard in the Court of Appeals 25 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Coleman, Gledhill, Hargrave, Merritt & Rainsford, P.C., by James Rainsford, for Defendant.

McGEE, Chief Judge.

Robert William Ashworth ("Defendant") appeals from judgment after a jury found him guilty of driving while impaired. We vacate the judgment and the trial court's denial of Defendant's motion to suppress, and remand for further proceedings.

I. Background

In the evening hours of 31 July 2013, North Carolina State Troopers Matthew Morrison ("Trooper Morrison") and Ray Fort ("Trooper Fort") were on duty in Orange County, North Carolina. They decided to operate a checking station, or checkpoint, at the intersection of Smith Level Road and Damascus Church Road in Chapel Hill, that was to begin at 8:00 p.m. and continue for approximately two hours. Prior to initiating the checking station, Trooper Morrison contacted his superior, Sergeant Michael Stuart ("Sergeant Stuart"), to request authorization. Sergeant Stuart gave his authorization, and later completed a "checking station authorization" form ("the form"). At the hearing, Sergeant Stuart testified he was unsure of when he filled out the form, but that it was likely the next day, 1 August 2013. The form noted that the primary purpose of the checking station was to ask for driver's licenses, and that the station would operate from 8:00 p.m. to 10:00 p.m.

At approximately 9:45 p.m., a vehicle driven by Defendant approached on Damascus Church Road and stopped at the checking station. Trooper Morrison did not notice any violation of the law as Defendant approached. Trooper Morrison requested Defendant's driver's license, which Defendant produced. Detecting the odor of alcohol coming from the vehicle, Trooper Morrison asked Defendant whether he had been drinking. Defendant responded: "You got me. I had about five beers back to back, drank them real quick." Trooper Morrison conducted field sobriety tests on Defendant and, after determining that Defendant was impaired, arrested him for driving while impaired. A chemical analysis

later revealed that Defendant's blood-alcohol concentration at the time of his arrest was 0.08.

Prior to trial, Defendant filed a motion to suppress all evidence obtained as a result of the stop. Defendant argued that the checking station violated his rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 19, 20 and 23 of the North Carolina Constitution. Defendant's motion was heard on 17 November 2014. The State presented the testimony of Trooper Morrison and Sergeant Stuart. Following witness testimony and arguments of counsel, the trial court took the matter under advisement. The trial court entered a written order on 19 November 2014 denying Defendant's motion to suppress. The case proceeded to trial. At trial, Defendant failed to timely object to the admission of evidence obtained as a result of the checkpoint stop. Defendant was convicted by a jury on 25 March 2015 of driving while impaired. Defendant appeals.

II. Analysis

[1] In his sole argument, Defendant contends the trial court plainly erred in denying his motion to suppress. The scope of review of a suppression order is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Findings of fact that are not challenged on appeal are binding and deemed to be supported by competent evidence. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). For findings that are challenged, this Court's review is "limited to determining whether competent evidence supports the trial court's findings of fact[.]" *State v. Granger*, ___ N.C. App. ___, ___, 761 S.E.2d 923, 926 (2014) (citation omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013) (citation omitted). If there is competent evidence to support the trial court's finding, then it is binding on appeal, "even if the evidence is conflicting." *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (citation omitted).

As Defendant concedes, he failed to lodge a timely objection at trial to the introduction of the evidence recovered as a result of Defendant being stopped at the checking station. Our Supreme Court has held that a pretrial motion to suppress is a type of motion *in limine*, *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), and a "motion

in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (citations omitted). Therefore, we consider whether the trial court plainly erred in denying Defendant's motion to suppress.[1]

The plain error rule

> is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Cummings, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (alterations in original) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)); *see also State v. Waring*, 364 N.C. 443, 468, 701 S.E.2d 615, 631 (2010) (holding that when a defendant "fail[s] to preserve issues relating to [a] motion to suppress, we review for plain error"). To prevail, a defendant must show "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (2003) (internal quotation marks and citation omitted).

A. Sufficiency of the Findings of Fact

In its order denying Defendant's motion to suppress, the trial court entered the following findings of fact:

> 1. Trooper Matthew Morrison has been working as a Trooper for the State of North Carolina, Department of Public Safety for the N.C. State Highway Patrol for

1. To be entitled to plain error review, a defendant must "specifically and distinctly contend that the alleged error constituted plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). Here, Defendant has done so; therefore, we proceed to a plain error analysis.

two years. Prior to working for the N.C. State Highway Patrol, Trooper Morrison worked for the Chatham County Sheriffs' Office for the previous seven years.

2. Sergeant Michael Stewart [sic] is employed and working as a Trooper for the State of North Carolina in the N.C. Department of Public Safety for the N.C. State Highway Patrol for over seven years. He has been a Sergeant for two years.

3. On 31 July 2013 at or about 9:45 p.m., Trooper Morrison was working a checking station (hereafter referred to as "checkpoint") on Smith Level Road (1919) at the intersection with Damascus Church Road (1939) in Orange County with Trooper Fort. He was wearing his duty uniform, a safety vest, carrying a flash light and operating a marked patrol car with a light bar. The purpose of the checkpoint was to check driver's licenses and look for traffic violations. Trooper Morrison's vehicle was parked to the side of the road next to a private driveway with his lights operating.

4. Two officers are required by Highway Patrol Policy for a checkpoint, so if one of them got tied up with a driver, they had to stop the checkpoint until they were both available to work the checkpoint.

5. Prior to setting up the checkpoint, Trooper Morrison called Sergeant Stewart, one of his supervising officers, indicated that he and Trooper Fort wanted to set a checkpoint on 31 July 2013 to check for drivers/operator's license and other traffic violations of the traffic law at the intersection of Smith Level Road (1919) and Damascus Church Road (1939) from 8:00 p.m. until 10:00 p.m. by stopping every vehicle in every direction. Because Highway Patrol Policy for a checkpoint required two officers present at the checkpoint, if one of the two officer[s] got tied up with a driver, they had to stop the checkpoint until they were both available to work the checkpoint.

6. Sergeant Stewart does not know when he filled out and signed the Checking Station Authorization Form (Form HP-14), but it was not that night, probably the next morning. He could have made a mistake in filling out the Checking Station Authorization Form. The Checking

> Station Authorization Form (HP-14) prepared and signed by Sergeant Stewart was marked and entered into evidence as State's Exhibit Number Two.
>
> 7. The Checking Station Authorization Form later completed after the checkpoint had been conducted indicates the checking station was located on the western end of Damascus Church Road (1940) (near the intersection of Jones Ferry Road) and Smith Level Road (1919) checking only southbound traffic.
>
> 8. The defendant was stopped on Damascus Church Road near Smith Level Road. Trooper Morrison saw a truck driven by the defendant pulled up to the checkpoint.

Defendant only challenges findings of fact three and five. Thus, all other findings of fact are deemed to be supported by competent evidence and are binding on this Court. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878.

Defendant asserts the portion of finding of fact three that states Trooper Morrison was "operating a marked patrol car with a light bar" is unsupported by competent evidence. We agree. At the hearing on Defendant's motion to suppress, the following colloquy occurred between the State and Trooper Morrison:

> [State:] Were you using any other lights other than what was on the patrol vehicles?
>
> [Trooper Morrison:] We had our flashlights.

In addition, Trooper Morrison testified that both his vehicle and Trooper Fort's vehicle "had their lights on." However, Trooper Morrison himself never testified he was operating a patrol vehicle, and did not mention whether his vehicle, even if it was a patrol vehicle, was marked. Further, Trooper Morrison did not testify regarding whether his vehicle was equipped with a light bar. We hold that the evidence and testimony presented at the hearing on Defendant's motion to suppress does not support the challenged portion of finding of fact three, which is therefore not binding on appeal. *See State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (holding that when the "evidence does not support the trial court's finding," the finding "is not binding on this Court.").

Defendant also challenges a portion of finding of fact five as unsupported by competence evidence. The challenged portion of finding of fact five states:

> Prior to setting up the checkpoint, Trooper Morrison called Sergeant Stewart, one of his supervising officers, [and] indicated that he and Trooper Fort wanted to set a checkpoint on 31 July 2013 to check for drivers/operator's license and other traffic violations of the traffic law at the intersection of Smith Level Road (1919) and Damascus Church Road (1939) from 8:00 p.m. until 10:00 p.m. by stopping every vehicle in every direction.

Defendant contends that no competent evidence established that Trooper Morrison communicated to Sergeant Stuart: (1) a dedicated start and end time for the checking station; (2) which directions of traffic would be stopped; or (3) whether every vehicle would be stopped. We agree.

At the hearing on Defendant's motion to suppress, Trooper Morrison testified about his conversation with Sergeant Stuart regarding authorization for the checking station:

> [State:] So tell us as best as you recall: What did you talk to Sergeant Stuart about or what did you say to him to get authorization.
>
> [Trooper Morrison:] I believe when we contacted him we just told him we wanted to do a checking station at Damascus -- excuse me at Smith Level and Damascus, right there at that intersection. I think we told him we were going to start -- I don't recall exactly if we told him what time we were going to start it or not, but we just told him we had two troopers there and wanted to do a checking station. And he just gave us his authorization. And he said, "Okay. Just let me know –" I think he said, "Let me know what time you start it, and let me know what time you end it."
>
> [State:] Did you discuss what directions of traffic you would be stopping at this intersection?
>
> [Trooper Morrison:] We were going to stop all three, coming off -- going down Smith Level north and south, and coming off of Damascus.
>
> [State:] Do you recall whether or not you told Sergeant Stuart that specific information?

> [Trooper Morrison:] I don't. I don't think I told him that. I just told him – I am pretty sure we just told him we were going to do it right there at Damascus and Smith Level.

Trooper Morrison admitted there was "no exact ending time" set for the checking station.

Sergeant Stuart testified he did not recall whether he asked Trooper Morrison what time the checking station was to begin, but said as a general rule he asked for that information because he "need[ed] that information . . . to fill out the authorization form."

Sergeant Stuart further testified that as a general rule troopers checked cars in every direction, but he did not recall whether Trooper Morrison stated which directions would be checked at that particular checking station.

After reviewing the record and transcript, we agree with Defendant that the challenged portion of finding of fact five is unsupported by competent evidence. No evidence or testimony presented at the hearing on Defendant's motion to suppress established that Trooper Morrison informed Sergeant Stuart of a dedicated start or end time for the checking station, which directions of traffic would be stopped, or whether every car would be stopped. The challenged portion of finding of fact five, being unsupported by competent evidence, is not binding on appeal. *See Otto*, 366 N.C. at 136, 726 S.E.2d at 827.

B. Constitutionality of the Checking Station

[2] In the present case, all findings of fact, except for the challenged portions of findings of fact three and five, are binding on appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. We next determine whether, as Defendant argues, the trial court's conclusion of law that the checking station was operated within federal constitutional limitations,[2] was plain error. In its order denying Defendant's motion to suppress, the trial court reached the following pertinent conclusions of law based on its findings of fact:

> 3. Checkpoints for driver's licenses and other traffic violations advance an "important purpose" and the public has a "vital interest" in "ensuring compliance with these and other types of motor vehicle laws that promote public

2. While Defendant's motion to suppress argued the checking station violated his state and federal constitutional rights, Defendant's brief to this Court only argues the checking station was unconstitutional on Fourth Amendment grounds. Any argument on state constitutional grounds is deemed abandoned. N.C.R. App. P. Rule 28(b)(6).

safety on the roads." Clearly, ensuring that drivers are properly licensed as required by law is of "vital interest" to the public and "the gravity of the public concerns are much greater than and were well-served by the minimal seizure" by temporarily stopping vehicles at this checkpoint.

4. Although the officers in this case decided somewhat whimsically to set up this checkpoint, the officers did request approval and a Checking Station Authorization Form (HP-14) completed and signed by Sergeant Stewart, their Sergeant, as required for a checkpoint prior to conducting the checkpoint. The checkpoint had a "predetermined starting and ending time." In accordance with the Highway Patrol Policy, a minimum of two officers were assigned to the checkpoint, two vehicles were located at the checkpoint with their blue lights and emergency flashers operating, the officers were wearing uniforms and reflective safety vests, the officers were carrying flashlights, the checkpoint was visible for a distance in either direction, officers were to stop every vehicle that approached the checkpoint from every direction and officers were to ask for the same information—driver's license from every driver. However, no reason was stated for the selection of this particular location on this particular highway for this checkpoint, nor was any reason stated for the selection of this particular time span.

5. Although, according to the Checking Station Authorization Form, the road number on which the checkpoint was to be conducted was "Road Number" 1940, which is west Damascus Church Road; the "Nearest Road Number" on the form was "1919", which is Smith Level Road. Since only 1939, which is east Damascus Church Road is near and intersects 1919; which is Smith Level Road, the reference to 1940 as the location for the checkpoint was clearly a typographical error.

6. Although conducting a checkpoint at an intersection, rather than a designated stretch of a street or highway, is less supportive of an identified, particular problem on either road, and more supportive of a "fishing expedition"; the fact that east Damascus Church ends at its intersection with Smith Level Road, rather than continuing on through the intersection, makes the "designated purpose"

> of the checkpoint appear more logical to drivers traveling on Smith Level Road that all of the drivers in the vicinity are being treated equally. If drivers on Smith Level Road were being stopped and those on Damascus Church Road were not being stopped, it might appear that the former were being unfairly singled out for detention while the latter were receiving unwarranted favor.
>
> 7. A applying [sic] the three-prong inquiry set out in *Brown* [*v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979)], the primary programmatic purpose of this checkpoint was lawful, the officers "appropriately tailored their checkpoint stops" to fit their primary programmatic purpose, and "the public interest in the checkpoint was NOT outweighed by the intrusion on the Defendant's protected liberty interest."
>
> 8. For the foregoing reasons, the stop of the Defendant was constitutional and did not violate N.C.G.S. §15A-16.3A.

As noted, we review a motion to suppress to determine whether the trial court's "factual findings . . . support the judge's ultimate conclusions of law." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. A trial court's conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *See Biber*, 365 N.C. at 168, 712 S.E.2d at 878. The conclusions of law "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (citation omitted). In the present case, we hold that the binding findings of fact are insufficient to support the trial court's conclusions of law regarding the constitutionality of the checking station.

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (quotation omitted). As the United States Supreme Court has held, "[t]he principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-567, 49 L. Ed. 2d 1116 (1976) (citation omitted). Checkpoint seizures are consistent with the Fourth Amendment if they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357 (1979) (citation omitted).

When considering a constitutional challenge to a checkpoint, a reviewing court "must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements." *State v. Veazey*, 191 N.C. App. 181, 185, 662 S.E.2d 683, 686 (2008). First, the court must determine the primary programmatic purpose of the checkpoint. *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42, 148 L. Ed. 2d 333, 343 (2000)). Second, if a legitimate primary programmatic purpose is found, "'[t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.' " *Id.* (quoting *Illinois v. Lidster*, 540 U.S. 419, 426, 157 L. Ed. 2d 843, 852 (2004)).

In the present case, the trial court concluded that the checking station had a proper programmatic purpose of checking for driver's licenses and other traffic violations. Defendant does not challenge the primary programmatic purpose of the checking station; therefore, we consider whether the trial court plainly erred in concluding that the checkpoint was "reasonable," given the findings of fact in this case.

To determine whether a checkpoint was "reasonable" under the Fourth Amendment, a court must weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest. *See*, *e.g.*, *Martinez-Fuerte*, 428 U.S. at 555, 49 L. Ed. 2d at 1126. In *Brown v. Texas*, the United States Supreme Court developed a three-part test when conducting this balancing inquiry, and held a reviewing court must consider: "[(1)] the gravity of the public concerns served by the seizure, [(2)] the degree to which the seizure advances the public interest, and [(3)] the severity of the interference with individual liberty." 443 U.S. at 51, 61 L. Ed. 2d at 362 (citation omitted). If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional. *Veazey*, 191 N.C. App. at 186, 662 S.E.2d at 687 (citing *Lidster*, 540 U.S. at 427-28, 157 L. Ed. 2d at 852-53).

Under *Brown*'s first prong, the trial court was to consider "the gravity of the public concerns served by the seizure." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362. Both this Court and the United States Supreme Court have held that "license and registration checkpoints advance an important purpose[.]" *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (citation omitted); *see also Delaware v. Prouse*, 440 U.S. 648, 658, 59 L. Ed. 2d 660, 670-71 (1979) ("States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.").

In the present case, the trial court found as fact that the purpose of the checking station was to "check driver's licenses and look for traffic violations," and concluded as a matter of law that "ensuring that drivers are properly licensed . . . [was] of 'vital interest' " and that interest outweighed the "minimal seizure" of this checkpoint stop. This finding of fact and conclusion of law reflect a sufficient consideration of Brown's first prong. *See State v. McDonald*, ___ N.C. App. ___, ___, 768 S.E.2d 913, 921 (2015) ("While . . . checking for driver's license and vehicle registration violations is a permissible purpose for the operation of a checkpoint, the identification of such a purpose does not exempt the trial court from determining the gravity of the public concern actually furthered under the circumstances surrounding the specific checkpoint being challenged."). Accordingly, the trial court did not err, nor plainly err, in concluding that the first prong of *Brown* was satisfied.

Under *Brown*'s second prong, the trial court was required to consider "the degree to which the seizure advance[d] the public interest." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362. This Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including:

> whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690 (citation omitted). In its order denying Defendant's motion to suppress, the trial court made no findings of fact regarding whether the checkpoint was spontaneously set up on a whim,[3] whether the police offered a reason why the intersection of Damascus Church and Smith Level Road was chosen, why the time span for the checking station was chosen, or any other reason why the checking station advanced the public interest. Although the trial court did find as fact that Trooper Morrison informed Sergeant Stuart that the checking station had a predetermined start and end time – 8:00 p.m. and 10:00 p.m., respectively – as we have held, that finding of fact is unsupported by competent evidence. *See supra*, at 8-9. We hold that the trial court's findings of fact do not support its conclusion of law

3. The trial court did conclude as a matter of law, however, that "the officers in this case decided somewhat whimsically to set up this checkpoint[.]"

that the seizure was appropriately tailored and advanced the public interest and, given the lack of findings to support such a conclusion, the trial court plainly erred in holding that the second *Brown* prong was satisfied. *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362.

Finally, *Brown*'s third prong required the trial court to consider "the severity of the [checking station's] interference with individual liberty." *Id.* In general, "[t]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop." *Martinez-Fuerte*, 428 U.S. at 558, 49 L. Ed. 2d at 1128 (quotation omitted). However, "courts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives." *Veazey*, 191 N.C. App. at 192, 662 S.E.2d at 690-91. As this Court noted in *Veazey*,

> [c]ourts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers' authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint. Our Court has held that these and other factors are not "lynchpins," but instead are circumstances to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint.

Id. at 193, 662 S.E.2d at 691 (internal citations and quotation marks omitted).

In the present case, the trial court did make several findings of fact regarding *Brown*'s third prong, including: (1) Sergeant Stuart, a supervising officer, authorized the checking station; (2) the lights on Trooper Morrison's vehicle were operating; and (3) the troopers were wearing duty uniforms and safety vests, and were carrying flashlights. While

these findings demonstrate that the trial court did consider some of the relevant factors under *Brown*'s third prong, the lack of any findings to support the trial court's conclusion that the checking station "advanced the public interest" under *Brown*'s second prong provided no basis upon which the court could "weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest." *Veazey*, 191 N.C. App. at 186, 662 S.E.2d at 687. As our Court held in *McDonald*,

> [w]e do not mean to imply that the factors discussed above are exclusive or that trial courts must mechanically engage in a rote application of them in every order ruling upon a motion to suppress in the checkpoint context. Rather, our holding today simply reiterates our rulings in *Veazey* and its progeny that in order to pass constitutional muster, such orders must contain findings and conclusions sufficient to demonstrate that the trial court has meaningfully applied the three prongs of the test articulated in *Brown*.

McDonald, ___ N.C. App. at ___, 768 S.E.2d at 921.

III. Conclusion

The findings of fact in the trial court's order denying Defendant's motion to suppress do not support the trial court's conclusions of law that the checking station was conducted consistent with the Fourth Amendment. The trial court's findings of fact did not permit the judge to meaningfully weigh the considerations required under the second and third prongs of *Brown*. We hold the error amounted to plain error, as it likely affected the jury's verdict – the evidence obtained at the checking station was the only evidence presented by the State at trial. The trial court's judgment and the order denying Defendant's motion to suppress are vacated, and this case is remanded for further findings of fact and conclusions of law regarding the reasonableness of the checkpoint stop.

JUDGMENT VACATED; VACATED AND REMANDED.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANDREW BURROW, DEFENDANT

No. COA16-68

Filed 2 August 2016

1. Criminal Law—defenses—duress—evidence insufficient

The trial court did not err in a prosecution for attempted felonious breaking or entering by refusing to instruct the jury on duress. Defendant did not present substantial evidence of each element of the defense, in that he failed to show that his actions were caused by a reasonable fear of death or serious bodily harm and he had at least two opportunities to seek help and escape.

2. Constitutional Law—inadequate representation of counsel—evidence insufficient

Defendant received adequate representation of counsel where his trial counsel did not attempt to introduce into evidence items that would have corroborated his version of events. Defense counsel made a tactical decision not to attempt to introduce the evidence, and defendant could neither show that trial counsel's performance was deficient or that there was prejudice that deprived him of a fair trial. Defendant entered a stipulation of the underlying offense and was able to present testimony about duress.

3. Contempt—criminal—not a misdemeanor—consecutive sentences

A finding of criminal contempt is not a Class 3 misdemeanor (for which consecutive sentences may not be imposed), and the trial court's orders sentencing defendant to six consecutive thirty-day terms of imprisonment based on six findings of direct criminal contempt was affirmed.

Appeal by defendant from Judgments entered 13 May 2015 by Judge R. Stuart Albright in Surry County Superior Court. Heard in the Court of Appeals 8 June 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Gilda C. Rodriguez for defendant.

ELMORE, Judge.

Michael Andrew Burrow (defendant) appeals from judgments entered after he was found guilty of attempted felonious breaking or entering and attaining habitual felon status. He argues that the trial court erred in denying his request to instruct the jury on duress and that he received ineffective assistance of counsel (IAC). Defendant also appeals from orders entered finding him in direct criminal contempt and sentencing him to six consecutive thirty-day terms of imprisonment. After careful review, we find no error in the jury instructions, we conclude that defendant did not receive IAC, and we affirm the contempt orders.

I. Background

Defendant's evidence tended to show that around 21 April 2014, after he and his wife had an argument, defendant left their home and went to stay with his father in Lexington for around three days. Defendant testified that he later met with old friends in Winston-Salem where he rented a motel room, bought and used cocaine, and found a woman to smoke it with and talk to. Around 25 April 2014, defendant's wife reported defendant missing and posted flyers in "the bad areas of Winston-Salem," which she called "crack town." Defendant and the other woman met with two of her acquaintances, Detroit and Gabriel. The next couple of days were spent between staying at a "crack house," going to buy more drugs, going to dumpsters to retrieve discarded items and trade them for crack, and going to motels to use the drugs.

The State's evidence tended to show that on 28 April 2014, Mitsy Johnson was home alone around 2 p.m. when she saw two men trying to pry open the back door. Ms. Johnson later identified defendant as one of the men, and she testified that he had a tool that looked like a screwdriver. She also stated that defendant told the other man (Gabriel) to get another tool. Ms. Johnson called her husband and asked him to call the police. In the meantime, she took pictures of defendant and Gabriel while they were trying to pry open the door. After one or two minutes, defendant looked up and saw Ms. Johnson taking pictures. Gabriel immediately fled toward the driveway while defendant stood there for a moment before following. The frame and edge of the door were bent and left with pry marks.

Defendant testified that when he, Gabriel, and Detroit arrived at Ms. Johnson's house on 28 April 2014, Gabriel told defendant, "Get out, you're going to help do this." Afterward, when they left her house, Detroit drove defendant's vehicle, which ran out of gas on two occasions. They

received assistance from a man outside in his yard, and later defendant walked to a diner where a patron gave him five dollars. Within thirty minutes to one hour after leaving Ms. Johnson's house, defendant contacted his wife, and he returned to their home later that night. The following day, defendant surrendered to the Surry County Sheriff's Office.

On 8 December 2014, defendant was indicted for attempted felonious breaking or entering under N.C. Gen. Stat. § 14-54. The matter came on for trial during the 11 May 2015 Criminal Session of Superior Court in Surry County, the Honorable R. Stuart Albright presiding. At trial, defendant entered a stipulation in which he admitted that he contacted the Surry County Sheriff's Office on 29 April 2014 and stated that he had seen his photograph on the news, that he was the one who had attempted to break into the home, and that he was on his way to the Sheriff's Office to turn himself in.

After he turned himself in, defendant informed Detective Sergeant J.D. Bryles that over the course of the last several days, he had been held against his will. Detective Bryles testified that defendant "just stated that they were forcing him to go out and do these break-ins so that they could generate more money and they could all purchase more crack cocaine." When Detective Bryles asked about weapons or threats, defendant did not indicate that any threats were made against him. Later in the conversation after Detective Bryles questioned why he did not request help when he came into contact with two different law enforcement agencies, defendant "acknowledged that he was not being held against his will."

On 12 May 2015, the jury found defendant guilty as charged, and the following day, the jury found defendant guilty of attaining habitual felon status. The trial court sentenced defendant to a term of sixty-three to eighty-eight months imprisonment. Also on 12 May 2015, the trial court convened a contempt proceeding and found defendant guilty of six counts of direct criminal contempt for conduct prohibited by N.C. Gen. Stat. § 5A-11(a)(1) and (2). The trial court sentenced defendant to six consecutive terms of thirty-days imprisonment for the six findings of contempt. Defendant appeals.

II. Analysis

A. Jury Instruction

[1] Defendant argues that the trial court erred in denying his request to instruct the jury on duress because he presented substantial evidence of the defense.

"[T]he question of whether a defendant is entitled to an instruction on the defense of duress or necessity presents a question of law, and is reviewed *de novo*." *State v. Edwards*, ___ N.C. App. ___, ___, 768 S.E.2d 619, 621 (Feb. 17, 2015) (COA14-710). "A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) (citation omitted). "For a particular defense to result in a required instruction, there must be substantial evidence of each element of the defense when viewing the evidence in a light most favorable to the defendant." *State v. Brown*, 182 N.C. App. 115, 118, 646 S.E.2d 775, 777 (2007) (citing *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *Ferguson*, 140 N.C. App. at 706, 538 S.E.2d at 222).

"In order to be entitled to an instruction on duress, a defendant must present evidence that he feared he would 'suffer immediate death or serious bodily injury if he did not so act.' " *Haywood*, 144 N.C. App. at 234, 550 S.E.2d at 45 (quoting *State v. Cheek*, 351 N.C. 48, 73, 520 S.E.2d 545, 560 (1999)). Moreover, "a defense of duress 'cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm.' " *State v. Smarr*, 146 N.C. App. 44, 55, 551 S.E.2d 881, 888 (2001) (quoting *State v. Kearns*, 27 N.C. App. 354, 357, 219 S.E.2d 228, 231 (1975)) (quotations omitted).

Here, the evidence showed that Gabriel drove defendant's vehicle to Ms. Johnson's house while defendant was in the passenger seat drinking and smoking crack cocaine and marijuana. Gabriel, carrying a knife, and defendant, carrying a lug wrench, eventually walked to the back door. After realizing Ms. Johnson was taking their pictures, Gabriel fled first, and after a few moments, defendant followed Gabriel. When asked if he attempted to get away from Detroit or Gabriel at any point in time, defendant testified, "Yes. But they pretty much had control of my car. . . . Either Gabriel would drive or Detroit would drive. I was sitting in the passenger seat smoking crack." After testifying that both Gabriel and Detroit had knives, he stated, "At a point I did get scared of them . . . [b]ecause they talked about stealing my truck." He admitted that they never "pull[ed] a knife" on him.

Viewing the evidence in the light most favorable to defendant, defendant did not present substantial evidence of each element of the defense, requiring a jury instruction. Defendant failed to show that his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not act. Although defendant

argues that over the course of several days Detroit and Gabriel were holding him against his will, defendant had at least two opportunities to seek help and escape. Officer William Widener stopped to assist defendant and Gabriel when they ran out of gas, and moments later, Officer Widener followed them to the gas station after he realized a missing person report was filed for defendant. Even though defendant was alone with Officer Widener at the gas station and Gabriel was with at least four other officers around twenty-five feet away, defendant never stated he was being held against his will. Rather, he stated that he was in good health, that he was going through a separation with his wife, that he did not want to be around her, that he took the battery out of his phone so that she could not call him, and that he did not need to be listed as a missing person.

In declining to instruct the jury on duress, the trial court noted that "defendant testified himself that these other participants in the crimes never pulled a knife on [defendant] specifically. And he said that he was scared of the other two individuals because they talked about stealing his truck." Moreover, the trial court stated, "By the defendant's own admission, when he was at the gas station where Officer Widener was located, the Court finds that there's nothing in the record to suggest that the defendant would have exposed himself to harm of any kind if he had surrendered to or asked Officer Widener for help at the gas station."

Because the trial court found, *inter alia*, that defendant had the opportunity to avoid doing the act in question, it concluded that defendant was not entitled to an instruction on duress. Based on the evidence discussed above and the record in this case, the trial court properly denied defendant's request for an instruction on duress.

B. Ineffective Assistance of Counsel

[2] Next, defendant claims that he received IAC because his trial counsel did not attempt to introduce into evidence the missing person report or photo, a money transfer receipt, a motel receipt, and his wife's cell phone which contained text messages that he sent her in April 2014. Defendant argues that he was prejudiced by his trial counsel's decision not to attempt to introduce any of the listed evidence because the items would have corroborated his version of the events.

"IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). However,

"should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Fletcher*, 354 N.C. 455, 481, 555 S.E.2d 534, 550 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). Under the two-part test, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (quoting *Strickland*, 466 U.S. at 687). "Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* (quoting *Strickland*, 466 U.S. at 687). Our Supreme Court has previously stated that "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *Id.* at 482, 555 S.E.2d at 551.

Here, the trial court engaged in a colloquy with defendant about his decision to testify and present evidence. When the trial court asked what his other evidence would be, generally, defendant replied, stating the missing person report and photo, a money wire receipt, and a motel receipt. Later in the trial, the trial court asked defendant off the record about whether a cell phone on the desk in front of him was turned on, and defendant stated, "No, sir. This is just evidence, sir. I'm sorry." Again, the trial court told defendant that the cell phone must be turned off, and defendant stated, "I was trying to present text messages to you, Your Honor, so you could see. But it ain't coming into evidence[.]"

Although defendant's trial counsel decided not to introduce any of the physical evidence above, defendant's wife was permitted to testify about the money order, which she sent on 29 April 2014 *after* defendant returned to their home, as well as the content of the missing person report. Moreover, defendant's wife testified about the text messages that she received from defendant while he was with Detroit and Gabriel as follows:

> Q: How many would you say he was sending you?
>
> A: In those, in the three days from the time he was—I found him to the time—over a thousand, or close to it.

Q: Did he ever tell you that he felt threatened?

A: He—not, not during the text messages.

On appeal, defendant argues that because "trial counsel made no attempt to introduce any of the text messages or the other evidence [defendant] listed to the trial court, and, thereby, waived any appellate review of the evidence, trial counsel's performance fell below an objective standard of professional reasonableness." We disagree.

Under these facts, defendant's trial counsel made a tactical decision not to attempt to introduce allegedly corroborative evidence. Although defendant now argues that he wanted his trial counsel to admit his wife's physical cell phone so that the jury could use the phone to read text messages between the two, defendant cannot show that his trial counsel's performance was deficient. Second, even if defendant could show deficient performance, he cannot establish prejudice such that he was deprived of a fair trial. Defendant entered a stipulation as to the underlying offense, and he was able to present testimony on his theory of duress. Defendant cannot establish that his trial counsel's decision not to attempt to admit the physical evidence prejudiced his defense.

C. Contempt

[3] Lastly, defendant claims that the trial court erred in sentencing him to six consecutive thirty-day terms of imprisonment based on six findings of direct criminal contempt. Defendant argues that criminal contempt should be classified as a Class 3 misdemeanor, and consecutive sentences may not be imposed for Class 3 misdemeanors.

While trial courts in this State have sentenced contemnors to consecutive sentences, this Court has never been asked to decide if such practice is permissible. Subject to the listed statutory exceptions, N.C. Gen. Stat. § 5A-12(a) (2015) provides that a "person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three[.]" Under N.C. Gen. Stat. § 5A-12(c) (2015), "[t]he judicial official who finds a person in contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment for contempt if warranted by the conduct of the contemnor and the ends of justice."

Defendant argues that a finding of criminal contempt must be a misdemeanor because N.C. Gen. Stat. § 14-1 (2015) defines a felony and then provides, "Any other crime is a misdemeanor." Further, N.C. Gen. Stat. § 14-3(a)(2) (2015) states that unclassified misdemeanors with a

maximum punishment of thirty days or less or only a fine are Class 3 misdemeanors. Thus, because consecutive sentences may not be imposed if all convictions are for Class 3 misdemeanors, *see* N.C. Gen. Stat. § 15A-1340.22(a) (2015), defendant claims that consecutive sentences may not be imposed for multiple findings of contempt.

Defendant's argument fails to take into account the entirety of N.C. Gen. Stat. § 14-3, which dictates that the offense actually be a misdemeanor before labeling it a Class 3 misdemeanor. Our Supreme Court, however, has described criminal contempt as "*sui generis*," meaning "[o]f its own kind or class," Black's Law Dictionary 1475 (8th ed. 2004), and as "a petty offense with no constitutional right to a jury trial." *Blue Jeans Corp. v. Clothing Workers*, 275 N.C. 503, 508, 511, 169 S.E.2d 867, 870, 872 (1969). Moreover, in *State v. Reaves*, this Court held that a criminal contempt adjudication does not constitute a "prior conviction" for purposes of the North Carolina Structured Sentencing Act. 142 N.C. App. 629, 633, 544 S.E.2d 253, 256 (2001). We stated, "Had the General Assembly intended that criminal contempt adjudications as well as misdemeanors be considered 'crimes,' so as to qualify as 'prior conviction' under G.S. § 15A-1340.11(7), it would have been a simple matter [for it] to [have] include[d] th[at] explicit phrase within the statutory amendment." *Id.* at 636, 544 S.E.2d at 257–58 (internal citations and quotations omitted). More recently, in *State v. Luke*, 2010 WL 4292027, at *4 (Nov. 2, 2010) (COA10-169),[1] this Court stated, "[A] criminal contempt adjudication is not a misdemeanor in North Carolina."

In N.C. Gen. Stat. § 5A-12, the General Assembly provided the possible punishments for contempt, including imprisonment up to thirty days. Nothing in that statute or in Chapter 5A prohibits consecutive sentences for multiple findings of contempt. *Compare* N.C. Gen. Stat. § 15A-1354(a) (2015) ("When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, . . . the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently."), *with* N.C. Gen. Stat. § 15A-1340.22(a) ("Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.").

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1. While "[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority[,]" N.C. R. App. P. 30(e)(3), we find the Court's analysis persuasive and adopt it here.

Defendant does not challenge the underlying findings in the contempt orders and presents no other argument as to why the trial court erred. Because a finding of contempt is not a Class 3 misdemeanor, the trial court did not err in sentencing defendant to six consecutive thirty-day terms of imprisonment.

III. Conclusion

The trial court did not err in denying defendant's request to instruct the jury on duress, and defendant did not receive IAC. Additionally, we affirm the trial court's orders sentencing defendant to six consecutive thirty-day terms of imprisonment based on six findings of direct criminal contempt.

NO ERROR and AFFIRMED.

Judges DAVIS and DIETZ concur.

STATE OF NORTH CAROLINA
v.
DREW THOMAS CHARLESTON

No. COA15-1306

Filed 2 August 2016

1. Appeal and Error—preservation of issue—erroneous instruction

There was no error in a prosecution for discharging a firearm into occupied property where defendant contended that the State did not present substantial evidence that met the trial court's instruction (which raised a higher evidentiary bar for the State than ordinarily used). Defendant did not present the trial court with specific reasoning, and it was not clear that defendant had preserved the issue for appeal.

2. Firearms and Other Weapons—discharging a weapon into an occupied building—sufficiency of evidence

In a prosecution for discharging a firearm into an occupied building, there was no merit to Defendant's contention that the trial court erred by denying his motion to dismiss where defendant argued that the State should have had to prove the crime as the

jury was instructed at trial (the instruction erroneously raised the evidentiary bar for the State). Although the logical inference that Defendant had reasonable grounds to believe that the home *was* occupied was less strong than the inference than that it *might* have been occupied, the State nonetheless presented sufficient evidence for a jury to find accordingly.

3 Firearms and Other Weapons—discharging a weapon into occupied property—instructions—not disjunctive

The trial court did not give a disjunctive instruction on discharging a firearm into occupied property, expressly or functionally, where defendant fired at one house but hit another.

4. Firearms and Other Weapons—discharging firearm into occupied dwelling—no variance between indictment and evidence

There was no plain error in a prosecution for discharging a firearm into occupied property where defendant contended that the trial court's instruction created the risk of a variance between the evidence and the proof. Defendant apparently fired at one house and hit another. Defendant was indicted only for firing into the neighboring house, the trial court informed the jury pool that defendant was charged only with firing into that house, and the evidence supported that charge.

5. Evidence—victim impact—no plain error

The trial court erroneously permitted victim impact evidence in a prosecution for discharging a firearm into an occupied dwelling, but there was no plain error because the State presented extensive evidence of Defendant's guilt.

6. Sentencing—two felonies—appointed counsel

When sentencing defendant for discharging a firearm into an occupied dwelling and possession of a firearm by a felon, the trial court did not err by making payment of all of the costs of appointed counsel a condition of defendant's probation for possession of a firearm by a felon. Although defendant argued that the costs would have been a civil lien had the attorney's fees been assigned to the judgment for discharging a firearm into an occupied building, the lien judgment was already ordered to be entered by statute. The only change resulting from defendant's being given probation for possession of a firearm by a felon was that payment became a condition of probation. There was only one fee which covered both charges because defendant was convicted of both felonies on the same day before the same judge.

7. Sentencing—right to be present—appointed counsel costs

Defendant's right to be present during his sentencing was not violated where the trial court assigned attorney fees to a Class G felony judgment in open court and in defendant's presence. When the written judgments were entered, the trial court merely made sure the fines were properly calculated at Class D rates.

Appeal by Defendant from judgments entered 30 April 2015 by Judge W. David Lee in Superior Court, Rowan County. Heard in the Court of Appeals 28 April 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas D. Henry, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for Defendant.

McGEE, Chief Judge.

Drew Thomas Charleston ("Defendant") appeals from his convictions of discharging a firearm into occupied property and possession of a firearm by a felon. We find no error in part and no plain error in part.

I. Background

The evidence presented at trial tended to show that, on the evening of 11 January 2014, Trevacyia Scales ("Ms. Scales") and her five-year-old daughter were at home. Sandra Knox ("Ms. Knox") lived next door to Ms. Scales and also was at home. Ms. Scales testified that Defendant, Ms. Scales's ex-boyfriend, came by her home that evening, unannounced. Defendant's cousin had driven Defendant to Ms. Scales's home in a gray Jeep Cherokee. Defendant told Ms. Scales that he wanted to collect his clothes, and Ms. Scales gave him a bag with some clothes inside. Defendant also said he wanted to retrieve a shotgun that he believed was under the mattress in Ms. Scales's bedroom. Ms. Scales refused to let Defendant go into her bedroom. When Defendant went out to signal his cousin to get out of the Jeep, Ms. Scales closed her front door and locked it. Defendant and his cousin then left in the Jeep. Ms. Scales testified she went to her bedroom and checked under the mattress and the bed for a shotgun that she did not find.

Shortly thereafter, Defendant called Ms. Scales and they argued about the shotgun. Ms. Scales testified Defendant told her: "Well, I'm going to show you. I'm going to show you. I'm going to let it ride for

now, but I'm going to show you better than I can tell you." After the phone call, Ms. Scales sat on her couch, located at the front of her home and under a window. She noticed a Jeep driving down her street that "looked like the same Jeep Cherokee" Defendant had arrived in earlier. Ms. Scales testified the Jeep came to a brief stop in front of a neighbor's home and then started rolling again towards her home. As the Jeep approached, the rear driver's side window rolled down, and Ms. Scales saw Defendant sitting in the back seat. Ms. Scales heard gun shots and crawled to her daughter's room that was also at the front of her home. Ms. Scales immediately called law enforcement.

While the police were searching Ms. Scales's home, Defendant called Ms. Scales again. The police asked Ms. Scales to put the call on speakerphone so they could hear the conversation. Ms. Scales testified she called Defendant by name and he responded. Defendant again demanded the shotgun. A female voice said to Ms. Scales: "Just give him the gun, and it will all go away." Ms. Scales testified that another man then got on the phone and said the gun belonged to him and he wanted it back. Defendant then returned to the line and allegedly stated: "Next time, they'll come through the window."

Ms. Scales and Officer Frederick D. West ("Officer West"), with the Salisbury Police Department, testified that none of the bullets fired that evening actually entered into Ms. Scales's home. Ms. Knox and Sergeant Adam Bouk ("Sergeant Bouk") testified that all the bullets entered into the home of Ms. Knox. When the shots were fired, Ms. Knox was lying on her couch watching television. Ms. Knox estimated there were at least six or seven bullet holes in her home. Officer Joe Wilson ("Officer Wilson") testified there were seven shell casings in the street near where the Jeep had been located.

Defendant was indicted on 10 March 2014 for one count of discharging a firearm into occupied property and one count of possession of a firearm by a convicted felon. The jury found Defendant guilty of one count of discharging a firearm into occupied property and one count of possession of a firearm by a convicted felon. He was sentenced to 84–113 months of imprisonment for discharging a firearm into occupied property and 36 months of supervised probation for possession of a firearm by a convicted felon. Defendant appeals.

II. Motion to Dismiss

[1] Defendant contends the trial court erred by denying his motion to dismiss the charge of discharging a firearm into occupied property. Specifically, after Defendant's motion to dismiss was denied, the trial

court instructed the jury, in part, that it could convict Defendant of the charge of discharging a firearm into occupied property if it believed beyond a reasonable doubt that Defendant "knew or had reasonable grounds to believe that the dwelling *was* occupied[.]" (emphasis added). Defendant argues, and the State agrees, the instruction raised a higher evidentiary bar for the State —ordinarily the State would need to prove only that a defendant had "reasonable grounds to believe that the building *might be* occupied[.]" *See State v. James*, 342 N.C. 589, 596, 466 S.E.2d 710, 715 (1996) (emphasis added). Defendant contends that the trial court should have granted his motion to dismiss on the ground that the State did not present substantial evidence that Defendant "knew or had reasonable grounds to believe that the dwelling *was* occupied[.]" (emphasis added).

As a preliminary matter, it is not clear whether Defendant has preserved this argument for appeal. Generally, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1); *see State v. Person*, 187 N.C. App. 512, 519, 653 S.E.2d 560, 565 (2007) ("Although defendant provided no specific reasoning to support the motion to dismiss, he was not required to do so, since it was apparent from the context that he was moving to dismiss all the charges based on the insufficiency of the evidence."), *rev'd in part on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008). At trial, Defendant did not present the trial court with "specific reasoning" to support his motion to dismiss. *See Person*, 187 N.C. App. at 519, 653 S.E.2d at 565. We also do not see how it could be "apparent from the context" of Defendant's motion to dismiss that he was arguing the State did not meet an evidentiary burden higher than would have been necessary to convict him, based on an erroneous jury instruction that had not yet been given. Similarly, we do not see how the trial court could have erred in denying Defendant's motion to dismiss, *solely* based on a jury instruction that had not yet been given.[1]

[2] Defendant also attempts to re-frame this issue in his reply brief. Rather than arguing the trial court erred at the time it denied his motion to dismiss, Defendant instead "merely contends that the State

1. Defendant does not contend on appeal that the State failed to present substantial evidence that Defendant had reasonable grounds to believe that the building "might be" occupied.

[should have had to] prove the crime as the jury was instructed at trial." Notwithstanding the fact that "[a] reply brief does not serve as a way to correct deficiencies in the principal brief[,]" *Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 96 (2015) (quotation marks omitted), Defendant's argument is without merit.

"When reviewing a sufficiency of the evidence claim, this Court considers whether the evidence, taken in the light most favorable to the [S]tate and allowing every reasonable inference to be drawn therefrom, constitutes substantial evidence of each element of the crime charged." *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008) (quotation marks omitted). At trial, the State established that the shooting occurred in a residential neighborhood in the evening. Ms. Knox also testified that her car was parked outside her home. Although the logical inference that Defendant had reasonable grounds to believe Ms. Knox's home "was" occupied is less strong than the inference that it "might" have been occupied, the State nonetheless presented sufficient evidence for a jury to find accordingly. *See id.*; *see also State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) ("Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt[.]" (citation omitted)).

III. Disjunctive Jury Instruction

[3] Defendant contends the trial court erred in instructing the jury on discharging a firearm into occupied property. Before trial, Defendant was indicted for firing only into the home of Ms. Knox, but the jury instruction on that charge was stated in terms of Defendant's allegedly "discharg[ing] a firearm into *a* dwelling[.]" (emphasis added). Because the jury instruction did not expressly name the home of Ms. Knox as the dwelling that was fired into, Defendant contends the instruction was "disjunctive" and "violated his right to a unanimous verdict" because the instruction "permitted jurors to convict [Defendant] of either of two possible offenses: shooting into Ms. Scales's house or shooting into Ms. Knox's house."[2] We are unpersuaded.

Generally, the North Carolina Constitution requires that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury

2. Defendant did not object to any of the jury instructions given at trial. However, "[a] defendant's failure to object at trial to a possible violation of his right to a unanimous jury verdict does not waive his right to appeal on the issue, and it may be raised for the first time on appeal." *State v. Davis*, 188 N.C. App. 735, 739, 656 S.E.2d 632, 635 (2008) (quotation marks omitted).

in open court[.]" N.C. Const. art. I, § 24. As explained by our Supreme Court in *State v. Lyons*, 330 N.C. 298, 302–03, 412 S.E.2d 308, 311–12 (1991), "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, either of which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." (emphasis omitted).

Defendant concedes in his brief that the jury instruction at issue was "not explicitly phrased in the disjunctive[.]" *Cf. id.* (holding that a jury instruction was disjunctive where it allowed the jury to convict the defendant if it believed he "committed [an] assault and battery upon Douglas Jones *and/or* Preston Jones"). Instead, Defendant contends the instruction "had the practical effect of a disjunctive instruction[.]" *Cf. Davis*, 188 N.C. App. at 737–42, 656 S.E.2d at 634–37 (holding that a jury instruction was not expressly disjunctive but conducting a *Lyons* analysis, *assuming arguendo* "the instruction could be viewed as being disjunctive"). However, in the present case, we do not believe the jury was presented with either an expressly or functionally disjunctive instruction on the charge of discharging a firearm into occupied property.

Defendant was indicted for firing only into the home of Ms. Knox. During jury selection, the trial court informed the prospective jurors that "[t]he discharge of a firearm into occupied property is alleged to have occurred on the property being then occupied by one Sandra Knox." At trial, the State presented evidence only suggesting that the home that was fired into was Ms. Knox's home. Specifically, when the State asked Ms. Scales whether any of the bullets "actually went into [Ms. Scales's] home[,]" she responded: "No." By contrast, Ms. Knox testified at length about the bullet holes and damage done to her home. Sergeant Bouk testified in great detail about bullet holes in Ms. Knox's home. Officer West expressly testified that there were no bullet holes in Ms. Scales's home. While it may have been a better practice for the trial court to specifically state that Ms. Knox's home was the property involved in its instruction to the jury, based on the record, the trial court did not give a disjunctive instruction on the charge of discharging a firearm into occupied property.

IV. Variance

[4] Defendant also argues that the trial court's instruction on the charge of discharging a firearm into occupied property "created an impermissible risk of variance between the indictment and the proof supporting

conviction." Because Defendant did not object to the jury instructions at trial, we review this argument for plain error. *See State v. Turner*, 98 N.C. App. 442, 446–48, 391 S.E.2d 524, 526–27 (1990) (reviewing for plain error an unpreserved argument that there was an impermissible variance between an indictment and jury instruction).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity[,] or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

Generally, an impermissible variance has occurred when, although "the State's evidence [might] support the trial court's instruction[,] . . . the indictment does not." *Turner*, 98 N.C. App. at 448, 391 S.E.2d at 527. For instance, in *State v. Tucker*, 317 N.C. 532, 537, 346 S.E.2d 417, 420 (1986), the defendant was indicted for kidnapping. "The kidnapping indictment charge[d] that [the] defendant committed kidnapping only by unlawfully *removing* the victim 'from one place to another.' " *Id.* at 538, 346 S.E.2d at 421. However, the trial court "repeatedly instructed the jury that [the] defendant could be convicted if he simply unlawfully *restrained* the victim, 'that is, restricted [her] freedom of movement by force and threat of force.' " *Id.* Although the State's evidence supported the judge's instructions to the jury, the indictment did not. *Id.* at 537, 346 S.E.2d at 420. Accordingly, the Court held that the trial court committed plain error "[i]nsofar as the instructions given allowed the jury to convict on grounds other than those charged in the indictment[.]" *Id.* at 536, 346 S.E.2d at 420.

In the present case, and similar to Defendant's argument above, Defendant contends the trial court's instruction on the charge of discharging a firearm into occupied property was too broad because it did not specifically state that Ms. Knox's home was the property involved. However, as discussed above, Defendant was indicted for firing only into Ms. Knox's home; the trial court informed the jury pool that Defendant was charged with firing only into Ms. Knox's home; and the evidence

at trial supported only this theory of the charge. Therefore, it was clear the trial court's instruction on this charge applied only to Defendant allegedly firing into Ms. Knox's home. Defendant's argument is without merit.

V. Victim Impact Evidence

[5] Defendant also contends the trial court erred by allowing the introduction of victim impact evidence during the guilt-innocence phase of trial. Generally, "the effect of a crime on a victim's family often has no tendency to prove whether a particular defendant committed a particular criminal act against a particular victim; therefore victim impact evidence is usually irrelevant during the guilt-innocence phase of a trial and must be excluded." *State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639, 645 (2007). Defendant also concedes that he did not object at trial to the victim impact evidence he challenges on appeal. Accordingly, "we must limit our review to whether admission of [the] victim[ ]impact evidence constitutes plain error." *State v. Bowman*, 349 N.C. 459, 477, 509 S.E.2d 428, 439 (1998).

Defendant challenges the following testimony the State elicited from Ms. Scales during the guilt-innocence phase of trial:

> Q. How has this impacted your daughter?
>
> A. She is -- is very shaken still. If she hears a loud noise or anything that sounds like a shot, it could even be like a car backfiring, she gets shaky. She runs to me and she clings to me.
>
> And, you know, she -- she has talked about it. She'll just talk about it or whatever, but we have considered counseling for her because this has affected her. Even though she was five then, she's seven now it's still with her, and I have to get her through that each time something happens. And she relives it all over again.
>
> . . .
>
> Q. How has this impacted you?
>
> A. Well, it -- definitely emotionally. I've been afraid. When they text[ed] me and told me that he had been released, someone had posted his bond, I immediately called the police because I was in fear of my life for him -- retaliation for him having to be in jail all of that time.

> So it's, like, I would dream about him. I moved to a bigger house so I would -- every time I would go around a dark corner, I would think I would see him. Or he would be in the back of the house.
>
> He could possibly be hiding, so it's, like, now to the point where because he was out, I would have to go home, turn on all my lights, inspect my entire house before I can even take a shower or lay down. I have to stick butter knives in my windows because at this point, I just didn't know what he was capable of doing.

The State further elicited testimony from Ms. Scales that she was evicted as a result of the incident because her "neighbors did not feel safe[.]" Ms. Knox also testified:

> Q. Did you remain at your home that evening?
>
> A. No, I left.
>
> Q. Did you return the next day?
>
> A. Yes, to get some items of clothing.
>
> Q. Did you -- did you stay at your house the next night?
>
> A. No, I left and went to my daughter's house.
>
> Q. When was the next time that you actually were able to stay at your own home?
>
> A. About three weeks -- I -- let's see. I left for three weeks.
>
> Q. And why did you leave for three weeks?
>
> A. Because I was just frightened. I was -- I was -- I was -- every time I would hear a door or somebody knock on the door or somebody would call me, I would just jump. I was just -- I was just scared.

In *Graham*, 186 N.C. App. at 187–92, 650 S.E.2d at 644–47, this Court held that a trial court erred when it allowed similar victim impact evidence at trial. However, after "[e]xamining the entire record," the *Graham* Court also found there was "considerable evidence of [the] defendant's guilt[.]" *Id.* at 192, 650 S.E.2d at 647. Specifically, "the State presented extensive evidence from two eyewitness who were well-acquainted with [the] defendant and who positively identified him at trial, and [it presented] evidence that [the] defendant fled to Alabama shortly after hearing that the crime had been publicized." *Id.* Based on

that evidence, the *Graham* court concluded there was not "a reasonable possibility that the jury's verdict would have been different" absent the erroneous evidence, and this Court held that there was no prejudicial error in that case. *Id.*

In the present case, it also appears that the trial court impermissibly admitted victim impact evidence at trial. However, the State presented extensive evidence from Ms. Scales of Defendant's guilt, including (1) her confrontations with Defendant shortly before the shooting over a shotgun Defendant believed was in her home; (2) her positive identification of Defendant in the Jeep just before shots were fired; and (3) the incriminating phone conversation between Ms. Scales and Defendant shortly after the shooting. That phone conversation was overheard by the police, who also found seven shell casings in the street near where the Jeep had been when shots were fired. Moreover, unlike *Graham*, in which this Court conducted a prejudicial error analysis, we review Defendant's argument on appeal for plain error because he did not object to the challenged testimony at trial. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. This imposes a higher burden for Defendant to overcome. *See id.* After examining the entire record, we do not find plain error in the present case.

VI. Attorney's Fees

[6] In Defendant's final argument, he contends that the trial court "violated N.C. Gen. Stat. § 15A-1343(b)(10), committed clerical error, or violated [Defendant's] right to be present at sentencing by assigning attorney's fees to the judgment for possession of a firearm by a felon rather than the judgment for discharging a weapon into an occupied dwelling." We disagree.

Specifically, Defendant argues that had the attorney's fees been assigned to the judgment for discharging a weapon into an occupied dwelling, for which Defendant received a jail sentence, those fees would have been docketed as a civil lien against Defendant. *See* N.C. Gen. Stat. § 7A-455(b) (2015) ("[T]he court shall direct that a judgment be entered . . . for the money value of services rendered by assigned counsel, the public defender, or the appellate defender, . . . which shall constitute a lien as prescribed by the general law of the State applicable to judgments."). Instead, the trial court assigned the attorney's fees to the judgment for possession of a firearm by a felon, the payment of which was a condition of Defendant's probation for that conviction. N.C. Gen. Stat. § 15A-1343(b)(10) states: "As [a] regular condition[ ] of probation, a defendant must: . . . [p]ay the State of North Carolina for the costs of

appointed counsel . . . to represent him in the case(s) for which he was placed on probation." N.C. Gen. Stat. § 15A-1343(b)(10) (2015).

Initially, N.C. Gen. Stat. § 15A-1343(b)(10) refers to the "case(s) for which [a defendant] was placed on probation." N.C. Gen. Stat. § 15A-1343(b)(10) does not state that this monetary condition is limited to the judgment(s) in "which [a defendant] was placed on probation," nor does it state that this condition is limited to the charge(s) "for which [a defendant] was placed on probation."[3]

Assuming *arguendo* "case" effectively means "charge" for the purposes of N.C. Gen. Stat. § 15A-1343(b)(10), Defendant's argument still fails. At trial, after the trial court had rendered a sentence for Defendant's conviction of discharging a weapon into an occupied dwelling, a Class D felony, the trial court rendered a sentence for Defendant's conviction of possession of a firearm by a felon, a Class G felony. While the trial court was making this determination, the following exchange occurred between the trial court and Defendant's counsel:

> THE COURT: . . . . With respect to the jury verdict of guilty with respect to possession of a firearm by a felon, upon that verdict being recorded, it's the judgment according to that case that this defendant be imprisoned for a minimum of 17 months and a maximum of 30 months. That sentence to run at the expiration of the sentence imposed in the first case [discharging a firearm into an occupied dwelling]. That sentence[,] however, is suspended and the defendant upon his release from incarceration in the first matter is to report to his probation officer within 72 hours of that release.
>
> At which time he is to be on supervised probation for a term of 36 months under the following terms and [conditions]: First, that he provide a DNA sample, if he has not previously done so at that time; that he pay the Court costs; that he reimburse the state for the cost of his attorney.
>
> [Counsel], do you know your hours in these matters?
>
> [COUNSEL]: Exactly, it is 51.73. And Your Honor, I have -- the spread sheet has calculated that amount to be $3,621.10.

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3. Black's Law Dictionary defines case in relevant part as "[a] . . . criminal proceeding[.]" Black's Law Dictionary 243 (9th ed. 2009). Black's defines charge in relevant part as "[a] formal accusation of an offense[.]" *Id.* at 265.

> THE COURT: And you're calculating that on the Class D?
>
> [COUNSEL]: I am, Your Honor.
>
> THE COURT: All right. I am going to award an attorney's fee in the amount of $3,621.10; that to be paid under -- as a monetary condition of that judgment.

Defendant argues that, because the trial court asked Defendant's attorney if he was calculating his fees based upon the Class D felony, which in this case was the conviction for discharging a weapon into an occupied dwelling, the trial court meant to attach the attorney's fees to that charge. However, in context, it is clear that the trial court was discussing the attorney's fees in relation to the conviction for possession of a firearm, which sentence was suspended. It is also clear that the trial court *did* intend for the amount of the attorney's fees to be based upon the Class D felony instead of the Class G felony. This is because the relevant statutes and rules of the Office of Indigent Defense Services ("IDS") required the attorney's fees to be based upon the Class D felony charge in this case.

N.C. Gen. Stat. § 7A-458 states in relevant part:

> The fee to which an attorney who represents an indigent person is entitled shall be fixed in accordance with rules adopted by the Office of Indigent Defense Services. Fees shall be based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, and the time, effort and responsibility involved.

N.C. Gen. Stat. § 7A-458 (2015). N.C. Gen. Stat. § 15A-1343(e) states in relevant part:

> Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and all fees and costs for appointed counsel . . . in the case in which the person was convicted. The fees and costs for appointed counsel . . . shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The court shall determine the amount of those costs and fees to be repaid and the method of payment.

N.C. Gen. Stat. § 15A-1343(e). Pursuant to the mandates of N.C. Gen. Stat. §§ 7A-458 and 15A-1343(e), IDS has established rules and procedures for compensating appointed counsel. When an attorney represents a defendant on multiple charges heard before the same judge and decided on the same day, that attorney submits a single fee application. *See* Office of Indigent Defense Services, *Memorandum*, p. 4, December 3, 2015, at http://www.ncids.org/Rules%20&%20Procedures/Fee%20and%20Expense%20Policies/Atty%20Fee%20policies,%20non-capital.pdf. The rates for appointed counsel in superior court depend on the class of the charged offenses. "For all cases finally disposed in Superior Court where the most serious original charge was a Class A through D felony, the . . . rate will be $70 per hour. For all other cases finally disposed in Superior Court, including misdemeanor appeals, the . . . rate will be $60 per hour." *Id.* at 7. As noted above, when counsel defends a defendant on multiple charges, the rate is based upon the most serious offense charged. *Id.* The Administrative Office of the Courts has produced official fee application forms corresponding with the rules and procedures of IDS, including AOC-CR-225, which is the fee application form for non-capital criminal trials. AOC-CR-225 directs the attorney to indicate only the "most serious original charge" on the form to serve as the basis for calculating the appropriate attorney fee. AOC-CR-225.

In this case, Defendant was charged and convicted of two crimes: (1) discharging a weapon into an occupied dwelling, which is a Class D felony, and (2) possession of a firearm by a felon, which is a Class G felony. Pursuant to IDS rules and procedures, the appropriate attorney's fee, to be assessed as a single fee for representation services for both the charges, was properly based upon the most serious charge – the Class D felony. Defendant was given an active sentence for the Class D felony, and given a suspended sentence with probation for the Class G felony, to start at the expiration of Defendant's active sentence. N.C. Gen. Stat. § 7A-455 directs in part:

> (b) *In all cases* the court shall direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, . . . which shall constitute a lien as prescribed by the general law of the State applicable to judgments. [A]ny funds collected by reason of such judgment shall be deposited in the State treasury and credited against the judgment. The value of services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services.
>
> . . . .

> (c) No . . . judgment under subsection (b) of this section shall be entered unless the indigent person is convicted. If the indigent person is convicted, the . . . judgment shall become effective and the judgment shall be docketed and indexed pursuant to G.S. 1-233 et seq., in the amount then owing, upon the later of (i) the date upon which the conviction becomes final *if the indigent person is not ordered, as a condition of probation*, to pay the State of North Carolina for the costs of his representation in the case or (ii) the *date upon which the indigent person's probation is terminated, is revoked, or expires* if the indigent person is so ordered.

N.C. Gen. Stat. § 7A-455 (2015) (emphasis added).

Because Defendant was convicted, the trial court was required to "direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, . . . constitut[ing] a lien[.]" N.C. Gen. Stat. § 7A-455(b). In the present case, the appropriate attorney's fee for this judgment was required to have been calculated pursuant to the $70.00 per hour rate applicable for the Class D felony, even though some of the time spent on the case was dedicated to defense of the Class G felony. *Memorandum*, pp. 4, 7. It seems clear that this requirement is why the trial court, when discussing the applicable attorney's fee in connection with the Class G felony of possession of a firearm by a felon, asked if Defendant's attorney was calculating the rate based on the Class D felony of discharging a weapon into an occupied dwelling.

Defendant argues that the language of N.C. Gen. Stat. § 15A-1343(b)(10): "As [a] regular condition[ ] of probation, a defendant must: . . . [p]ay the State of North Carolina for the costs of appointed counsel . . . to represent him in the case(s) for which he was placed on probation[,]" prohibited the trial court from requiring Defendant to pay the costs of his appointed counsel at the Class D rate, because "the case[ ] for which he was placed on probation" was only a Class G felony. However, even assuming *arguendo* that "case" in this instance is equivalent to "charge," Defendant ignores the fact that pursuant to IDS rules and regulations, because he was convicted of both the Class G and Class D felonies on the same day and before the same judge, there was only one fee which covered both charges; the costs of his appointed counsel for both the Class G felony and the Class D felony are the same, and are calculated at the same rate – the $70.00 per hour rate for Class D felonies. IDS rules and regulations do not allow for separating the hours spent by appointed

counsel for individual charges – all work done for each individual charge is considered work done for every charge, as part of the same case. Therefore, for the purposes of N.C. Gen. Stat. § 15A-1343(b)(10), the appropriate cost of appointed counsel for the Class G charge was 51.73 hours at the $70.00 Class D felony rate.

The lien judgment for this full amount was already ordered to be entered pursuant to N.C. Gen. Stat. § 7A-455. The only change resulting from Defendant's being given probation on the Class G felony was that payment of the attorney's fee became a condition of his probation pursuant to N.C. Gen. Stat. § 15A-1343(b)(10). This is contemplated in N.C. Gen. Stat. § 7A-455:

> [The] judgment [creating the lien] shall become effective . . . in the amount then owing, upon the later of (i) the date upon which the conviction becomes final *if the indigent person is not ordered, as a condition of probation, to pay the State of North Carolina for the costs of his representation in the case or (ii) the date upon which the indigent person's probation is terminated, is revoked, or expires*[.]

N.C. Gen. Stat. § 7A-455(c) (emphasis added). The trial court did not err in making payment of all the costs of appointed counsel, based upon the rate for Class D felonies, a condition of Defendant's probation for the charge of possession of a firearm by a felon.

[7] Defendant further argues that his right to be present during his sentencing was violated because "[t]he trial court orally assigned the fees to the Class D judgment, but assigned the fees to the Class G judgment when the written judgments were entered." As we have discussed above, the trial court assigned the fees to the Class G felony judgment in open court and in Defendant's presence. The trial court merely made sure the fees were properly calculated at the Class D rate. This argument is without merit.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges DILLON and ZACHARY concur.

STATE v. COBB

[248 N.C. App. 687 (2016)]

STATE OF NORTH CAROLINA
v.
TIMOTHY LAMONT COBB

No. COA15-1337

Filed 2 August 2016

1. Appeal and Error—untimely pretrial motion—trial court's discretion—not revisited

Although defendant's pretrial motion to suppress was untimely, the trial court's discretionary decision to consider the motion was not revisited on appeal.

2. Judgments—findings and conclusions—mislabeled—nearly identical

The trial court did not err when ruling on a pretrial motion to suppress where defendant contended that findings were mislabeled as conclusions and vice versa. The findings and conclusions were nearly identical.

3. Search and Seizure—consent to search—defendant not in custody

Defendant was not in custody and his consent to search his house was voluntary, considering the totality of the circumstances, where officers came to defendant's rooming house to investigate another crime, defendant was sitting on the porch and went inside for his identification and motioned an officer to come with him, the officer smelled marijuana and asked permission to search defendant and then the room, and defendant consented. Defendant's movements were not restricted and defendant chose to stay while officers searched the room. The officers' guns were holstered, and they did not make physical contact with defendant until after cocaine was found, and they did not make threats, use harsh language, or raise their voices at any time.

4. Sentencing—habitual felon—not cruel and unusual punishment

Defendant's sentence under the Habitual Felon Act did not deny defendant his right to be free of cruel and unusual punishment.

Appeal by defendant from judgment entered 18 March 2015 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 9 June 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Anne Bleyman for defendant-appellant.

McCULLOUGH, Judge.

Timothy Lamont Cobb ("defendant") appeals from his convictions of possession of marijuana, possession of drug paraphernalia, possession with intent to sell and deliver cocaine, and attaining habitual felon status. For the reasons stated herein, we hold no error.

I. Background

On 8 May 2014, defendant was arrested for one count of possession of marijuana in violation of N.C. Gen. Stat. § 90-95(d)(4), one count of possession of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22(a), and one of count possession with intent to sell and deliver cocaine in violation of N.C. Gen. Stat. § 90-95(a). On 8 September 2014, defendant was indicted by the Forsyth County Grand Jury on all counts. On the same date, a separate indictment was issued charging defendant with attaining habitual felon status based on three prior felony convictions.

On 10 September 2014, the State notified defendant of its intention to introduce evidence obtained by virtue of a search without a search warrant. On 4 March 2015, defendant filed a motion to suppress this evidence. A *voir dire* hearing on defendant's motion to suppress was held during the 16 March 2015 criminal session of Forsyth County Superior Court.

In regards to defendant's motion to suppress, the State offered the testimony of Officer F. J. Resendes, Officer B. K. Ayers, and Sergeant Edward David Branshaw of the Winston-Salem Police Department. The State's evidence indicated that on 8 May 2014, Officers Resendes and Ayers were stationed outside of defendant's residence, located at 518 Fifteenth Street. Officer Resendes described the residence as a "rooming house," consisting of multiple people living inside and renting out different rooms. The officers were conducting surveillance based on information that there was narcotics activity occurring at this residence. While the officers were stationed outside 518 Fifteenth Street, an unknown black male exited the residence and got into a black Cadillac that had been parked on the curb in front of the home. Officers Resendes and Ayers followed the Cadillac and observed the car fail to properly use a turn signal and illegally park in front of another residence. The

officers parked their car in front of the Cadillac and exited their vehicle. As the officers began to approach the Cadillac, the unknown driver accelerated, struck Officer Ayers in the leg, and quickly sped away from the scene.

Officer Ayers notified his superior, Sergeant Branshaw, of the incident and returned to the 518 Fifteenth Street residence in an effort to obtain information regarding the identity of the driver of the Cadillac. When the officers arrived at the residence, defendant and another tenant, Mr. Rice, were sitting on the front porch. The officers asked defendant and Mr. Rice if they knew the identity of the driver of the black Cadillac, to which both men responded that they did not know his name. Officer Ayers then asked Mr. Rice for his name. Officer Ayers testified that Mr. Rice stated his work identification was inside, stood up from the porch, and motioned for Officer Ayers to come inside with him.

Upon following Mr. Rice into the hallway of the residence, Officer Ayers detected a strong odor of marijuana. Officer Ayers then returned to the porch and asked defendant for consent to search his person. Officer Ayers testified that defendant verbally consented to a search of his person, but that he ultimately did not locate anything illegal on defendant. Officer Ayers testified that he then asked defendant for consent to search his room inside the house, to which defendant again provided verbal consent.

Officer Resendes testified that upon entering defendant's room, he smelled the odor of burnt marijuana. Officer Resendes asked defendant for a second time for consent to search his room, and defendant "stated it was fine." As Officer Resendes began searching the room, defendant handed him remnants of marijuana cigarettes and stated, "All I got is this." Defendant was not in handcuffs or placed under arrest at this time.

Officer Ayers testified that while he was searching defendant's room, he noticed a ceiling panel that was darker in color and not tightly seated against the other tiles, "like it had been removed several times." After removing this tile, Officer Ayers located a bag of what appeared to contain a large amount of crack cocaine. The officers then placed defendant in handcuffs. As the officers continued searching the room, they located a bag of marijuana and approximately $2,000.00 in a coat pocket.

Officer Ayers notified Sergeant Branshaw of what he had located during the search of defendant's room. Sergeant Branshaw testified that upon receipt of this information, he entered defendant's room and asked once again if he was still consenting to the search, to which defendant

replied, "[y]ou already found everything you are going to find. Go ahead and do whatever."

Defendant did not present any evidence on his own behalf.

Following this hearing, the trial court denied defendant's motion to suppress. On 18 March 2015, the trial court orally entered an order denying defendant's motion to suppress, making the following pertinent findings of fact:

> 17. Officer Ayers did not threaten or coerce Defendant into giving consent to search his bedroom at 518 Fifteenth Street.
>
> 18. Defendant freely, intelligently and voluntarily gave consent to search his bedroom at 518 Fifteenth Street without any coercion, duress or fraud.
>
> . . . .
>
> 20. Defendant gave valid consent to search his bedroom at 518 Fifteenth Street.
>
> . . . .
>
> 23. Officer Resendes did not threaten or coerce Defendant into giving consent to search his bedroom at 518 Fifteenth Street.
>
> 24. Defendant again freely, intelligently and voluntarily gave consent to search his bedroom at 518 Fifteenth Street without any coercion, duress or fraud.
>
> 25. Defendant never revoked or limited his consent to search his bedroom at 518 Fifteenth Street.
>
> 26. Defendant gave valid consent to search his bedroom at 518 Fifteenth Street for a second time.
>
> . . . .
>
> 29. Defendant said, "All I got is this" . . . freely, spontaneously, and voluntarily without any compelling influences.
>
> . . . .
>
> 34. Up until the moment he was handcuffed and detained . . . Defendant was free to leave, not in custody, not under arrest and his freedom of movement had not been restrained or restricted in any significant way.

35. Up until the moment he was handcuffed and detained as set forth above, a reasonable person in Defendant's position would not have believed he was under arrest or restrained in any significant way.

. . . .

37. Sergeant Branshaw did not threaten or coerce Defendant into giving consent to search his bedroom at 518 Fifteenth Street.

38. Defendant, for the third time, freely intelligently and voluntarily gave consent to search his bedroom at 518 Fifteenth Street without any coercion, duress or fraud.

39. Defendant never revoked or limited his consent to search his bedroom at 518 Fifteenth Street.

40. Defendant gave valid consent to search his bedroom at 518 Fifteenth Street for a third time.

Based on these findings of fact, the trial court concluded that:

1. Based on the totality of the circumstances . . . Officers F. J. Resendes and B. K. Ayers and Sergeant Edward David Branshaw requested and received knowing and voluntary consent from Defendant without any coercion, duress or fraud to search his bedroom . . . and that anything seized from Defendant's bedroom as a result of the search was obtained lawfully.

2. Based on the totality of the circumstances . . . Defendant had not been taken into custody or otherwise deprived of his freedom of movement in any significant way when he said, "All I got is this," as set forth above.

3. Based on the totality of the circumstances . . . there had been no formal arrest or restraint on the freedom of Defendant's movement of the degree associated with a formal arrest when he said, "All I got is this," as set forth above.

4. Based on the totality of the circumstances . . . Defendant was not in custody when he said, "All I got is this," as set forth above.

5. Based on the totality of the circumstances . . . a reasonable person in Defendant's position would not believe that

> he had been taken into custody or otherwise deprived of his freedom of movement in any significant way when he said, "All I got is this," as set forth above.
>
> 6. Based on the totality of the circumstances . . . Defendant freely made a knowing and voluntary statement when he said, "All I got is this," as set forth above.

On 18 March 2015, a jury returned verdicts of guilty on all substantive counts. On that same date, defendant pled guilty to attaining habitual felon status. In accordance with this plea, defendant was sentenced to prison for a term of 52 to 75 months. On that same date, defendant entered notice of appeal in open court.

II. Standard of Review

When reviewing a trial judge's ruling on a motion to suppress, the appellate court "determine[s] only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000). The trial court's findings of fact are binding if such findings are supported by competent evidence in the record, but the trial court's conclusions of law are fully reviewable on appeal. *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997).

III. Discussion

Defendant presents two issues on appeal. Defendant asserts that the trial court erred by: (A) denying defendant's motion to suppress evidence obtained from the search of defendant's room because the defendant's consent to search was not given voluntarily and (B) sentencing defendant as a habitual felon in violation of defendant's right to be free of cruel and unusual punishment.

However, we must first address a preliminary issue.

Timeliness of Motion to Suppress

[1] For the first time on appeal, the State asserts that defendant violated N.C. Gen. Stat. § 15A-976 by failing to file its motion to suppress within the allotted statutory time period.

According to N.C. Gen. Stat § 15A-976(b):

> If the State gives notice not later than 20 working days before trial of its intention to use [evidence obtained by virtue of a search without a search warrant], the defendant may move to suppress the evidence only if its motion

> is made not later than 10 working days following receipt of the notice from the State.

N.C. Gen. Stat. § 15A-976(b) (2015).

In the present instance, the State put defendant on notice that it intended to offer evidence seized without a warrant on 10 September 2014, but defendant did not file his motion to suppress until 4 March 2014. The State now asserts that because this far exceeds the 10 days within which a motion to suppress must be filed in order to comply with N.C. Gen. Stat. § 15A-976, this issue has not been preserved for appellate review. The State argues that although this issue was not raised at trial, our Court has held that the requirements of Chapter 15A, Article 53 must be met or the motion is a nullity.

In the unpublished opinion *State v. Harrison*, __ N.C. App. __, __,772 S.E.2d 873, __, 2015 WL 1800443 (April 2015) (unpub.), our Court addressed this exact issue. In *Harrison*, we held:

> Although defendant's motions to suppress were untimely and could have been summarily dismissed, the trial court exercised its discretion to consider the motions and denied the motions on the merits. We will not now second[-]guess the trial court's discretion to consider the motion after it has ruled on the merits.

Id. at __, 772 S.E.2d at __.

Although unpublished decisions do not constitute controlling legal authority upon this Court, *see Lifestore Bank v. Mingo Tribal Pres. Tr.*, 235 N.C. App. 573, 583 n.2, 763 S.E.2d 6, 13 n.2 (2014) (citing N.C. R. App. P. 30(e)(3) (2014)), we find the reasoning in *Harrison* persuasive.

Our decision in *Harrison* is further supported by *United States v. Johnson*, in which the Fourth Circuit was asked to review the trial court's dismissal of an untimely motion to suppress. *See United States v. Johnson*, 953 F.2d 110, 115-16 (4th Cir. 1991), *superseded by statute on other grounds as stated in United States v. Riggs*, 370 F.3d 382, 385 n.2 (4th Cir. 2004). Although the trial court in *Johnson* chose to dismiss the motion rather than ruling on the merits, the Fourth Circuit opinion noted, "Motions filed out of time are accepted at the discretion of the trial court, and this court will not entertain challenges to the proper use of this discretion." *Id.* at 116.

Accordingly, although defendant's motion to suppress was untimely, we hold that the decision of the trial court to nonetheless consider the

motion should not be revisited. Thus, we review the merits of defendant's arguments on appeal.

A. Motion to Suppress

In his first issue on appeal, defendant claims that the trial court erred by denying his motion to suppress because defendant did not give voluntary consent to search his room.

Labeling Conclusions of Law as Findings of Fact

[2] On this issue, defendant first contends that the trial court erroneously labeled certain conclusions of law as findings of fact. Defendant specifically challenges findings of fact numbers 17, 18, 20, 23, 24, 25, 26, 34, 35, 37, 38, 39, and 40.

"As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations omitted). However, this Court has also held, "What is designated by the trial court as a finding of fact [] will be treated on review as a conclusion of law if essentially of that character. The label of fact put upon a conclusion of law will not defeat appellate review." *Wachacha v. Wachacha*, 38 N.C. App. 504, 507, 248 S.E.2d 375, 377 (1978) (citations omitted). When a trial court erroneously designates certain conclusions of law as findings of fact, no prejudicial error is committed when the trial court later makes conclusions of law almost identical to the findings of fact. *See State v. Rogers*, 52 N.C. App. 676, 682, 279 S.E.2d 881, 885-86 (1981). Such errors are, at most, technical errors and are clearly not prejudicial. *Id.*

On this issue, defendant first argues that findings of fact numbers 17, 18, 20, 23, 24, 26, 37, 38, and 40, concerning the question of whether defendant voluntarily gave consent to search his room, were improperly labeled as findings of fact because the question of voluntariness or coercion is one of law not fact. While defendant correctly asserts that the general issue of "voluntariness" is considered to be one of law, *see State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) ("The conclusion of voluntariness [of a defendant's statement] is a legal question which is fully reviewable"); *State v. Barlow*, 330 N.C. 133, 139, 409 S.E.2d 906, 910 (1991) ("[T]he question of the voluntariness of a confession is one of law, not of fact."), defendant's objection to the labeling of these findings is without merit. The trial court's factual findings numbered 17, 18, 20, 23, 24, 26, 37, and 40 are nearly identical to its conclusions of law numbered 1 and 6, which conclude that defendant's consent was voluntary, without

any coercion, duress, or fraud. Therefore, we find that the errors cited by defendant are not prejudicial, and we treat the question of voluntariness as a conclusion of law.

Next, defendant asserts that findings of fact numbers 34 and 35, concerning the question of whether defendant was "in custody" at the time his room was searched, were improperly labeled as findings of fact because the question of custody is one of law not fact. For the same reason stated above, we find that defendant's objection to these findings is without merit. Findings of fact numbers 34 and 35 are reiterated, nearly verbatim, in the trial court's conclusions of law numbers 2, 3, 4, and 5. Thus, we again find that the alleged errors cited by defendant are not prejudicial, and we treat the question of custody as a conclusion of law.

Finally, defendant asserts that findings of fact numbers 25 and 39 were improperly labeled as findings of fact because they concern the scope or limit of consent, which defendant contends is a question of law not fact. However, these technical errors appear to be defendant's sole grievance with findings 25 and 39; nowhere on appeal does defendant claim that these findings are not supported by competent evidence. Thus, we reject defendant's challenges to the trial court's designation of findings of fact numbers 25 and 39.

Sufficiency of the Trial Court's Conclusions of Law

[3] Next, defendant contends that the trial court's findings of fact are insufficient to support its legal conclusion that defendant gave voluntary consent to search. Specifically, defendant claims that since he had been informed that there was a narcotics investigation in progress at the time it was contended he gave consent and was kept under "constant police supervision by at least one and often more of the officers" at all times after he was told there was a narcotics investigation, his consent was not voluntary because he was "in custody" at the time it was given. Defendant argues that a reasonable person in the place of defendant would not have felt at liberty to ignore the police presence and go about his business, and thus defendant was seized for purposes of the Fourth Amendment of the United States Constitution. We disagree.

> An individual is seized by a police officer and is thus within the protection of the Fourth Amendment when the officer's conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. A reviewing court determines whether a reasonable person would feel free

> to decline the officer's request or otherwise terminate the encounter by examining the totality of circumstances.

State v. Icard, 363 N.C. 303, 308-309, 677 S.E.2d 822, 826 (2009) (internal citations and quotation marks omitted). Relevant considerations under the totality of the circumstances test include, but are not limited to: the number of officers present, whether the officers displayed a weapon, the words and tone of voice used by the officers, any physical contact between the officer and the defendant, the location of the encounter, and whether the officer blocked the individual's path. *Id.* at 309, 677 S.E.2d at 827.

Defendant relies on *State v. Dukes*, 110 N.C. App. 695, 431 S.E.2d 209 (1993), as support for his argument that a person who is kept under constant police supervision in the persons own home and is aware that the police are there investigating a specific crime can be considered "in custody." In *Dukes*, this Court held:

> We believe that a reasonable person, knowing that his wife had just been killed, kept under constant police supervision [including trips to the restroom], told not to wash or change his clothing and never informed that he was free to leave albeit his own home, would not feel free to get up and go. On the contrary, a reasonable person in defendant's position would feel compelled to stay. We hold therefore that the defendant was "in custody" when he made the statement at issue . . . .

Id. at 702-703, 431 S.E.2d at 213.

The facts of the present case are distinguishable from those in *Dukes*. Unlike the defendant in *Dukes*, there is no evidence that defendant's movements were limited by any of the officers at any point in time during the encounter. The officers did not "supervise" defendant while they were in his home. They simply followed defendant to his room after he gave them consent and defendant chose to stay in the room while the officers searched it. Absent any other indication that "the officers restricted defendant's movements in any way, the only evidence that supports defendant's claim that he was "in custody" is the mere presence of four uniformed police officers at defendant's house. This, alone, does not equate to "constant police supervision." Therefore, we find that the trial court was correct to conclude that defendant was not "in custody" at the time he gave consent to search his room.

Considering the totality of the circumstances, we conclude that a reasonable person in the place of defendant would not have felt compelled to consent to the officer's request to search. According to the uncontradicted evidence presented by the State, the officers' guns were holstered throughout the entire encounter, and never drawn. Until the officers found the cocaine and placed defendant under arrest, the officers did not restrain defendant in any way. There is no evidence indicating that any of the officers ever made physical contact with defendant, aside from placing him in handcuffs. There is also no showing that the officers ever made threats, used harsh language, or raised their voices at any time during the encounter. Although there were four officers present at defendant's residence, only two, Officers Ayers and Resendes, were speaking with defendant when he initially gave consent to search his room. At that time, the other two officers at the residence were in the street investigating the hit and run incident, which defendant knew to be the primary reason for the police presence at his home. Additionally, Sergeant Branshaw only entered defendant's room *after* the crack cocaine had been located and defendant had been handcuffed. Accordingly, we hold that defendant's consent was given voluntarily and conclude that the trial court did not err in denying defendant's motion to suppress.

B. Habitual Felon Status

[4] In his second argument, defendant contends that his sentencing under the Habitual Felon Act violates his constitutional right under the 8th and 14th amendments of the United States Constitution and Article I Sections 19 and 21 of the North Carolina Constitution to be free of cruel and unusual punishment. Defendant urges this Court to re-examine its prior holdings and find that his sentencing under the Habitual Felon Act are excessive and grossly disproportionate to those under Structured Sentencing alone.

This exact issue has already been addressed by this Court in *State v. Mason*, 126 N.C. App. 318, 484 S.E.2d 818 (1997), *cert. denied*, 354 N.C. 72, 553 S.E.2d 208 (2001). In *Mason*, the defendant argued that the violent habitual felon laws were unconstitutional because they denied the defendant freedom from cruel and unusual punishment. Our Court held that:

> [O]ur Supreme Court has addressed these same issues in regard to the habitual felon statute and determined that the General Assembly acted within constitutionally permissible bounds in enacting legislation designed to identify

> habitual criminals and to authorize enhanced punishment as provided. Therefore, the violent habitual felon statute is not unconstitutional on its face.

Id. at 321, 484 S.E.2d at 820 (internal citations and quotation marks omitted). "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we reject defendant's argument that his sentence under the Habitual Felon Act denied his right to be free of cruel and unusual punishment.

IV. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying defendant's motion to suppress. We further hold that defendant was not denied his constitutional right to be free of cruel and unusual punishment.

NO ERROR.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
RISA COVINGTON

No. COA15-1240

Filed 2 August 2016

1. Burglary and Unlawful Breaking or Entering—motor vehicle—instruction on lesser-included offense—no supporting evidence

There was no error in a prosecution for breaking or entering into a motor vehicle where defendant contended that the trial court should have instructed the jury on the lesser-included offense of first-degree trespass because he lacked the felonious intent necessary for breaking or entering into a motor vehicle. Defendant conceded that there was sufficient evidence to submit breaking or entering into a motor vehicle to the jury and unambiguously testified at trial that he had no memory of the events surrounding his entry into the vehicle because he was drunk. There were no witnesses,

and defendant was unable to offer an alternative explanation for entering the vehicle beyond conjecture.

2. Constitutional Law—ineffective assistance of counsel—failure to request instruction

Defendant did not receive ineffective assistance of counsel in a prosecution for breaking or entering into a motor vehicle where his counsel did not request an instruction on the lesser-included offense of first-degree trespass. Defendant was not entitled to such an instruction, and it would have been futile for his counsel to request it.

Appeal by defendant from judgment entered 5 March 2014 by Judge Reuben F. Young in Alamance County Superior Court. Heard in the Court of Appeals 11 April 2016.

Roy Cooper, *Attorney General*, *by Anne Goco Kirby*, *Assistant Attorney General*, *for the State.*

Cheshire Parker Schneider & Bryan, *PLLC*, *by John Keating Wiles*, *for defendant-appellant.*

DAVIS, Judge.

Risa Covington ("Defendant") appeals from his convictions for breaking or entering into a motor vehicle, misdemeanor larceny, injury to personal property, and attaining the status of an habitual felon. On appeal, he contends that (1) the trial court plainly erred by failing to instruct the jury on the lesser-included offense of first-degree trespass; and (2) he received ineffective assistance of counsel. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On the morning of 27 September 2012, Samuel King ("King"), the owner of King's Wheels and Tires ("King's Tires") located at 1625 North Church Street in Burlington, North Carolina, arrived at his business and noticed trash strewn on the ground near three cars parked in the parking lot behind the building. King walked toward the vehicles in order to investigate further.

As he approached, he saw Defendant sitting in the driver's seat of a blue Honda Civic (the "Civic"), which was later established as the property of Catherine Woods ("Woods"). He observed Defendant "prying on

the dash" with what appeared to be a screwdriver. King asked Defendant if the Civic belonged to him, and Defendant responded by inaudibly mumbling under his breath. King told Defendant he was calling the police at which point Defendant got out of the Civic and began walking away from King down North Church Street.

King called 911 and informed the dispatcher of the events that had just transpired. He also reported that Defendant was walking down North Church Street. Officer Johnathan Khan ("Officer Khan") with the Burlington Police Department ("BPD") was dispatched to North Church Street. Shortly thereafter, Officer Khan located Defendant walking along Cobb Avenue one block away from North Church Street.

Officer Khan honked his patrol vehicle's horn twice at which point Defendant stopped, looked back in the direction of Officer Khan, and began walking towards him. Upon seeing Defendant, Officer Khan recognized him from past encounters between them. When Defendant reached the patrol vehicle, Officer Khan asked Defendant if he had been "messing around [with] any cars over here by King's Tire." Defendant denied having done so. Officer Khan detected an odor of alcohol on Defendant's breath and noticed that he was unsteady on his feet.

Officer Khan exited his vehicle and frisked Defendant for weapons. He felt a large object in Defendant's left sleeve as well as metal objects in his left front pockets that he believed could be knives. He searched Defendant's pockets and discovered a pair of vice grip pliers, a ratchet socket, a vehicle oxygen sensor, an electronic device with an attached USB cord, a library card issued in the name of Tiffany Neal, a lighter, three boxes of cologne, lottery tickets, three silver earrings, and other miscellaneous items.

While Officer Khan was in the process of searching Defendant, Officer Justin Jolly ("Officer Jolly") of the BPD went to King's Tires. After speaking with King and checking King's Tires' records, he determined that the owner of the Civic was Woods. He then called her and informed her about the break-in, asking her to come to King's Tires. While Woods was en route, Officer Jolly drove to Officer Khan's location and collected the items Officer Khan had recovered from Defendant. Officer Jolly then returned to King's Tires.

Woods subsequently arrived at King's Tires, and upon speaking with Officer Jolly she identified several of the items recovered from Defendant as her personal property that she had left in her Civic when she dropped it off at King's Tires overnight for maintenance work. Officer Jolly radioed Officer Khan and instructed him to arrest Defendant.

On 28 January 2013, Defendant was indicted on charges of breaking and entering into a motor vehicle, misdemeanor larceny, injury to personal property, and attaining the status of an habitual felon. Beginning on 3 March 2014, a jury trial was held before the Honorable Reuben F. Young in Alamance County Superior Court.

The jury found Defendant guilty of breaking or entering into a motor vehicle, misdemeanor larceny, and injury to personal property. He subsequently pled guilty to attaining the status of an habitual felon. The trial court consolidated Defendant's convictions and sentenced him to 50-72 months imprisonment.

On 3 March 2015, Defendant filed a petition for writ of *certiorari* with this Court seeking review of his convictions despite the fact that he failed to properly enter notice of appeal. On 20 March 2015, we granted Defendant's petition.

Analysis

I. Instruction on Lesser-Included Offense

[1] Defendant's first argument on appeal is that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of first-degree trespass. Specifically, Defendant contends that he presented evidence at trial showing that he lacked the felonious intent necessary to commit the offense of breaking or entering into a motor vehicle, thereby entitling him to a jury instruction on the lesser-included offense. We disagree.

Defendant failed to object at trial to the absence of an instruction on first-degree trespass. Therefore, our review is limited to plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

> It is well settled that a defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it. The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Chaves, __ N.C. App. __, __, 782 S.E.2d 540, 542-43 (2016) (citation and brackets omitted).

"The trial court is not obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention." *State v. Lucas*, 234 N.C. App. 247, 256, 758 S.E.2d 672, 679 (2014) (citation, quotation marks, and ellipses omitted). "Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citation and quotation marks omitted).

The elements of breaking or entering into a motor vehicle are "(1) there was a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein." *State v. Jackson*, 162 N.C. App. 695, 698, 592 S.E.2d 575, 577 (2004) (citation and emphasis omitted). "First-degree trespass is a lesser-included offense of felonious breaking or entering. Unlike felonious breaking or entering, first-degree trespass does not include the element of felonious intent but rather merely requires evidence that the defendant entered or remained on the premises or in a building of another without authorization." *Lucas*, 234 N.C. App. at 256, 758 S.E.2d at 678-79 (internal citation omitted).

Defendant concedes that there was sufficient evidence to submit the offense of breaking or entering into a motor vehicle to the jury. He argues, however, that conflicting evidence existed as to his intentions for entering the Civic. In support of this argument, Defendant speculates that he *may* have entered the Civic for the purpose of sleeping because he was drunk, had been kicked out of his sister's house the previous night, and had occasionally broken into other vehicles and buildings in the past when similarly intoxicated in order to find a place to sleep.

The fatal flaw with Defendant's argument is that he unambiguously testified at trial that he had no memory at all of the events surrounding his forced entry into the Civic. Defendant testified as follows on direct examination:

> Q. Okay. Risa, do you remember this night in question?
>
> A. I don't.
>
> Q. Do you remember any of it at all?
>
> A. None of it.
>
> Q. Okay. Why don't you remember, if you know?
>
> A. I was drunk.
>
> . . . .
>
> Q. Do you remember speaking to Officer Kahn [sic]?
>
> A. No. No, sir.
>
> Q. Okay. Do you remember walking down Church Street?
>
> A. No.
>
> Q. Do you remember where you were coming from before 8:30 that morning?
>
> A. No, sir.
>
> Q. What's the first thing that you remember?
>
> A. Nothing really. When I got down here, I got in the holding cell, went to sleep. When I woke up I realized I was in jail.
>
> Q. Didn't know how you got there?
>
> A. No.
>
> . . . .
>
> Q. . . . So you don't remember going to King's that day?
>
> A. No, sir.

Because (1) Defendant was unable to remember how or why he entered the Civic; and (2) no witnesses observed him actually sleeping in the vehicle, no evidence was presented at trial tending to support Defendant's hypothesis that he may have broken into the Civic in order to sleep. Indeed, the *only* evidence relating to Defendant's actions while

in the vehicle came from King, who testified that when he first noticed Defendant inside the Civic, Defendant was attempting to pry open the vehicle's front dashboard with a screwdriver.

Thus, the only support for Defendant's argument on this issue is his own pure conjecture, which is insufficient to entitle him to a lesser-included instruction on first-degree trespass. *See Leazer*, 353 N.C. at 240, 539 S.E.2d at 926 ("A defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the state's evidence but not all of it. Further, mere speculation as to the rationales for defendant's behavior is not sufficient to negate evidence of premeditation and deliberation." (internal citations, quotation marks, and brackets omitted)).

While Defendant attempts to rely on *State v. Worthey*, 270 N.C. 444, 154 S.E.2d 515 (1967), and *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985), on this issue, his reliance on these cases is misplaced. In *Worthey*, the defendant was charged with felonious breaking and entering into a building, and on appeal he argued that the trial court erred by failing to give a jury instruction on the lesser-included offense of non-felonious breaking or entering. He testified that upon being discovered by police officers exiting a manufacturing plant he was not authorized to enter, he had told the officers that he went "inside to meet an employee of [the plant] named 'Robert' who was going to give him a ride, and that he used the toilet facilities while inside." *Worthey*, 270 N.C. at 445-46, 154 S.E.2d at 515-16. Our Supreme Court awarded the defendant a new trial based on the above-referenced testimony, holding that "[t]he evidence as to defendant's intent was circumstantial and did not point unerringly to an intent to commit a felony; the jury might have found defendant guilty of a misdemeanor upon the evidence." *Id.* at 446, 154 S.E.2d at 516.

Similarly, in *Peacock*, the defendant was charged with, among other offenses, first-degree burglary and requested an instruction on the lesser-included offense of breaking and entering. His request was denied by the trial court. *Peacock*, 313 N.C. at 557, 330 S.E.2d at 192-93. The defendant had told officers that he broke into his landlady's apartment at his boarding house while he was "trip[ping] on . . . acid" so that he could talk to her about his rent. He further related that only after breaking into the apartment did he consider robbing her. He then killed the landlady, stole a "money pouch" from her, and left the premises. *Id.* at 556, 330 S.E.2d at 192.

Our Supreme Court held that

> Defendant's statement that he "was standing there [in the living room] thinking about robbing Mrs. Frye" is at

> best ambiguous with regard to the question of when he formed an intent to commit larceny. We note, however, that Detective Hill, who transcribed defendant's oral statement, testified on cross-examination that defendant told him that it was *after* he was inside that he decided to rob Mrs. Frye. Detective Hill's interpretation of what defendant said lends credence to defendant's argument that a juror might also infer that he broke and entered without an intent to commit larceny.

Id. at 559-60, 330 S.E.2d at 194. The Court then held that the defendant was entitled to a new trial based on the trial court's failure to instruct the jury on the lesser-included offense of breaking and entering. *Id.* at 561-62, 330 S.E.2d at 195.

Because here, conversely, Defendant's total lack of memory rendered him unable to offer *any* alternative explanation beyond utter conjecture as to why he entered the Civic, *Worthey* and *Peacock* are inapposite. Thus, in light of his inability at trial to present evidence indicating that he lacked the intent to commit larceny at the time he broke into the Civic, we hold that the trial court did not err at all — much less commit plain error — by failing to instruct the jury on the lesser-included offense of first-degree trespass. *See Lucas*, 234 N.C. App. at 257, 758 S.E.2d at 679 ("Thus, in the absence of any evidence disputing the State's theory that Defendants 'cased' the neighborhood and shattered the Merediths' window in the hope of stealing from the home, Defendants have not demonstrated that the trial court's failure to instruct the jury regarding first-degree trespass was error much less plain error.").[1]

II. Ineffective Assistance of Counsel

[2] Defendant's final argument on appeal is that he received ineffective assistance of counsel. Specifically, he contends that his trial counsel's failure to request an instruction on the lesser-included offense of first-degree trespass constituted ineffective assistance of counsel. We disagree.

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1. The versions of *Lucas* available online through Westlaw and LexisNexis contain the full sentence quoted above. The South Eastern Reporter, 2d Series also contains this full sentence. The slip opinion available online likewise contains the full sentence. However, a portion of the sentence is missing from the North Carolina Court of Appeals Reports. The North Carolina Court of Appeals Reports contains only the following incomplete sentence: "Thus, in the absence of any evidence disputing the State's theory that Defendants 'cased' the neighborhood and shattered the Merediths' window in the hope of stealing from the home." *Lucas*, 234 N.C. App. at 257.

"In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Edgar*, __ N.C. App. __, __, 777 S.E.2d 766, 770-71 (2015) (internal citations and quotation marks omitted).

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendants to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Turner, __ N.C. App. __, __, 765 S.E.2d 77, 83 (2014) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, __ N.C. __, 768 S.E.2d 563 (2015). However, "[i]n considering ineffective assistance of counsel claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at __, 765 S.E.2d at 84 (citation and brackets omitted).

Here, as discussed above, Defendant was not entitled to a jury instruction on first-degree trespass. Therefore, it would have been futile for his trial counsel to request one. Accordingly, we hold that Defendant has failed to establish an ineffective assistance of counsel claim. *See Lucas*, 234 N.C. App. at 258-59, 758 S.E.2d at 680 ("A successful ineffective assistance of counsel claim based on a failure to request a jury instruction

requires the defendant to prove that without the requested jury instruction there was plain error in the charge. Here, we have already determined that the trial court did not commit plain error in its instructions to the jury . . . . Accordingly, we cannot conclude that their trial counsel's failure to request these instructions constituted ineffective assistance of counsel." (internal citation and quotation marks omitted)).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Chief Judge McGEE and Judge STEPHENS concur.

STATE OF NORTH CAROLINA
v.
TRAVIS LAMONT DAUGHTRIDGE

No. COA15-1160

Filed 2 August 2016

1. Appeal and Error—notice of appeal—sufficient

Defendant's oral notice of appeal was sufficient to confer jurisdiction on the Court of Appeals where defendant's exchange with the trial court manifested his intention to enter a notice of appeal. The State did not contend that it was misled or prejudiced in any way.

2. Evidence—officer's perception of defendant's demeanor—investigative process

The trial court did not err in a prosecution for first-degree murder and possession of a firearm by a felon by allowing an investigator to testify about his perception of defendant's demeanor during questioning. The testimony served to assist the jury in understanding the investigative process and why the officer continued the investigation instead of accepting defendant's explanation of events. It did not speak to the ultimate issue of guilt or innocence.

3. Evidence—text messages from victim's cell phone—context for decisionmaking

There was no plain error in a prosecution for first-degree murder and possession of a firearm by a felon where the trial court admitted an investigator's testimony concerning text messages from the victim's cellphone. The text messages were examined for the purpose of determining whether the death was a suicide and provided context for the investigator's decisionmaking.

4. Evidence—invited error—cross-examination—investigator's opinion of defendant

In a prosecution for first-degree murder and possession of a firearm by a felon, testimony by an investigator on cross-examination that defendant was deceptive was admissible as invited error and did not constitute plain error.

5. Evidence—expert testimony—forensic pathologist—opinion based on non-medical information

There was error in a first-degree murder prosecution, but not plain error, where a forensic pathologist testified to his opinion that the victim's death was a homicide rather than a suicide based on non-medical information provided by law enforcement officers. However, given the entire record, the error did not have a probable impact on the jury's verdict.

Appeal by defendant from judgments entered 31 October 2014 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 24 February 2016.

Roy Cooper, *Attorney General*, *by Sonya Calloway-Durham*, *Special Deputy Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Kathryn L. VandenBerg*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Travis Lamont Daughtridge ("Defendant") appeals from his convictions for first-degree murder and possession of a firearm by a felon. On appeal, he contends that the trial court plainly erred by allowing the admission of (1) an investigator's testimony concerning Defendant's demeanor; and (2) opinion testimony from a medical examiner that the victim's death was a homicide rather than a suicide. After careful

review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: In 2011, Simeka Daughtridge ("Simeka") lived with her three children at her mother's house on Spruce Street in Durham, North Carolina. Her mother, Linda Sanders ("Linda"), and her brother, Kevin Surratt ("Kevin"), also lived at the Spruce Street address along with Kevin's girlfriend and their infant son.

On 26 August 2011, Simeka married Defendant, who periodically stayed with Simeka at Linda's residence. However, their relationship began to deteriorate soon after their marriage.

On 30 October 2011, while Defendant was at Linda's house, Defendant and Simeka began arguing in Simeka's bedroom. The door was shut, and they were alone together in the room. Linda was at church and Kevin, his girlfriend, and their son were in Kevin's bedroom. Simeka's children were watching television in the living room.

Approximately 10-15 minutes after Defendant and Simeka began arguing, Simeka's eldest daughter heard a gunshot from the direction of Simeka's room and observed Defendant run out of the room a few seconds later. Simeka's son also heard a "loud noise" and the sound of shattering glass coming from Simeka's bedroom. He too saw Defendant run out of the room several seconds later.

Defendant, upon seeing the children, yelled: "[Y]our mom shot herself." He then shouted in the direction of Kevin's room: "Your sister shot herself." Kevin immediately ran into Simeka's room while his girlfriend called 911. Kevin discovered Simeka laying on her bed on her left side with an apparent bullet wound to her chest. He attempted to perform first aid by rolling Simeka onto her back and applying pressure to the wound with a towel. Defendant stood in the doorway for several seconds and then fled from the house.

Officers with the Durham Police Department ("DPD") responded to the scene at approximately 2:00 p.m., and emergency medical personnel arrived shortly thereafter. Simeka was transported via ambulance to Duke University Medical Center. Upon arrival, she was pronounced dead.

Upon examining Simeka's bedroom, law enforcement officers discovered a .9 millimeter Kel-Tec semi-automatic handgun laying on the floor roughly three feet from Simeka's body. They also discovered a

bullet inside a washing machine in the bedroom that had passed through the glass door of the machine and shattered it.

Approximately one hour after the shooting had occurred, Defendant returned to Linda's house. He then told one of the officers that Simeka had shot herself.

Detective David Anthony ("Detective Anthony") with the DPD spoke with Defendant in his patrol car parked outside of the residence. Detective Anthony told Defendant that he was not under arrest but asked him if he would be willing to come to the police station to be interviewed. Defendant agreed, and while at the police station he voluntarily surrendered his clothing for gunshot residue ("GSR") analysis.

Defendant provided a written statement in which he stated that he and Simeka had been talking in her bedroom and that he had then left the bedroom and gone to the living room when he heard a gunshot. He shouted to Kevin that Simeka had shot herself and did not thereafter reenter Simeka's room because "[he] just couldn't do it." Instead, he ran to a neighbor's house.

Investigator Charles Sole ("Investigator Sole") was assigned as the lead investigator of the case. Upon reviewing the written statement Defendant had given to Detective Anthony, Investigator Sole decided to schedule a follow-up interview with Defendant because based on his training and experience certain parts of Defendant's account of the incident "were just not adding up."

Prior to the follow-up interview with Defendant, Investigator Sole received the results of the GSR analysis that had been performed on Defendant and his clothing. The analysis revealed that particles of GSR were present on Defendant's t-shirt, jeans, and hooded jacket. Investigator Sole interviewed Defendant once more on 9 November 2011. He ultimately arrested Defendant on 7 December 2011 for the murder of Simeka.

On 12 December 2011, Defendant was indicted on charges of first-degree murder and possession of a firearm by a felon. Beginning on 27 September 2014, a jury trial was held before the Honorable Henry W. Hight, Jr. in Durham County Superior Court.

At trial, the State introduced the testimony of Dr. Eric Duval ("Dr. Duval"), a forensic pathologist and medical examiner. Dr. Duval testified as an expert in the field of forensic pathology. He opined that the cause of death was a bullet wound to Simeka's chest. He further stated his opinion that "the manner of death [was] homicide."

The State also offered the testimony of David Freehling ("Freehling"), an expert in the field of GSR testing, who testified that while Simeka's hands and clothing had tested negative for GSR, Defendant's t-shirt, hooded jacket, and jeans all tested positive for GSR with one particle of GSR found on each of these three articles of clothing.

While Defendant did not testify, he attempted to establish during his case-in-chief that Simeka's death was a suicide. In support of this theory, defense counsel re-called Detective Anthony as a witness and examined him on the subject of why law enforcement officers had not investigated more extensively the theory that Simeka killed herself.

Defendant also called Kevin as a witness, who testified that Simeka had exhibited suicidal tendencies prior to her death and had threatened to kill herself on at least one prior occasion. Kevin further stated that Simeka was depressed and unhappy as a result of her deteriorating relationship with Defendant.

In addition, Defendant introduced testimony from his own GSR expert, Robert White, who testified that he would typically expect more than three particles of GSR to be present on the clothing of an individual who had fired a gun. Finally, Defendant presented the testimony of Dr. Christina Roberts, an expert in forensic pathology, who stated that she was unable to determine whether Simeka's manner of death was homicide or suicide.

The jury found Defendant guilty of both charges. The trial court sentenced Defendant to consecutive sentences of life imprisonment without parole for his first-degree murder conviction and 19-23 months imprisonment for his conviction of possession of a firearm by a felon.

Analysis

I. Appellate Jurisdiction

[1] Initially, we must determine whether we have jurisdiction over Defendant's appeal. *See Hous. Auth. of City of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) ("As an initial matter, we must address the extent, if any, to which Defendant's appeal is properly before us. An appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." (citation, quotation marks, and brackets omitted)). The State challenges the sufficiency of Defendant's notice of appeal and argues that his appeal should be dismissed. Defendant contends that notice of appeal was properly given, but, out of an abundance of caution, he also filed a

petition for writ of *certiorari* with this Court in the event we determine that his purported notice was, in fact, defective.

At the conclusion of trial, the following colloquy took place between Defendant's trial counsel and the trial court:

> MR. MEIER: Yeah, Your Honor, just motion to dismiss JNOV [sic] as well as request and [sic] an appellate public defender to be appointed.
>
> THE COURT: Motion [to] set aside the verdict is denied.
>
> MR. MEIER: Yes, sir.
>
> THE COURT: Motion of appeal is noted to the -- I guess to the Supreme Court of North Carolina to the Appellate Division, State of North Carolina. I will appoint[ ] the appellate defender to represent the Defendant. He's in your custody, Mr. Sheriff.

While this exchange is admittedly not a model of clarity, we nevertheless interpret it as manifesting Defendant's intention to enter a notice of appeal to this Court. In response to Defendant's trial counsel's request, the trial court ordered that the Office of the Appellate Defender be appointed to represent Defendant before this Court. Moreover, the State does not contend that it was misled or prejudiced in any way by any defect in Defendant's notice of appeal.

We therefore hold that Defendant's oral notice of appeal was sufficient to confer jurisdiction upon this Court. *See State v. Williams*, __ N.C. App. __, __, 761 S.E.2d 662, 664 (2014) ("Accordingly, as defendant's intent to appeal can be fairly inferred and the State provides no indication it was misled by the defendant's mistake, we do not dismiss defendant's appeal on the basis of a defect in the notice of appeal."), *appeal dismissed and disc. review denied*, __ N.C. __, 768 S.E.2d 857 (2015). Consequently, we deny the State's motion to dismiss the appeal, dismiss Defendant's petition for writ of *certiorari* as moot, and proceed to address the merits of Defendant's arguments.

II. Testimony of Investigator Sole Regarding Defendant's Demeanor

[2] Defendant's first argument on appeal is that the trial court committed plain error by allowing Investigator Sole to testify as to his perception of Defendant's demeanor. We disagree.

Defendant failed to object at trial to the testimony he now challenges on appeal. Therefore, our review is limited to plain error. *See* N.C.R.

App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Defendant's argument on this issue is based primarily on the following portions of Investigator Sole's testimony on direct examination:

> Q. Please explain the circumstances under which you scheduled that interview?
>
> A. Like I said in an investigation like this we're objective. And I had contacted Mr. Daughtridge to followup [sic] on his initial statement with Detective Anthony and also I had some questions myself that we had developed since his conversation with Anthony.
>
> Q. Now, you had reviewed his statement. Were there things that concerned you that you wanted to followup [sic] on?
>
> A. Yes.
>
> Q. What were the things that concerned you?
>
> A. I mean, initially the day of the incident, having responded to other death investigations and now an allegation of being a suicide, things were just not adding up.
>
> Q. So you had investigated other death investigations where it was determined it had been a suicide?

A. I've been on numerous [sic] throughout my career. But as the lead investigator, yes, I had been involved in several of them as an assisting [sic] to the lead investigator.

Q. Specifically, when you said things didn't add up, what drew your concerns?

A. I mean, the initial thing was is [sic] that his demeanor and his -- the statements that he had left the scene. I mean, that's just not consistent with a suicide particularly of your wife. I mean, generally, we have to remove the persons from the scene and try to keep them out. I mean, he was very disengaged. That was really odd to me.

Q. Was there anything else that concerned you at that time since taking his statement?

A. Again, a lot of it was based on just his demeanor. There was no, you know, emotion that he was upset. It appeared there was -- it was more of supporting his theory of what had happened and him not being in a room than what had happened to his wife.

Q. Now, at that time were you aware of -- had the children spoken to you at that time?

A. There was comments brought back to me from the victim's mother that [sic] what the children were saying. I mean, technically in our unit we usually defer child interviews to folks that have that expertise. So I contacted a couple of the juvenile investigators to try to make that process happen. But there were comments from coming [sic] from the family and the victim's mother about the children regarding what they had seen.

. . . .

Q. Prior to this recorded statement, did he provide that information to any other law enforcement during any questioning about this physical altercation between himself and Ms. Daughtridge?

A. Not to my knowledge. I mean, looking at the interview [sic] Detective Anthony and again with me, I had to pull it out of him. I didn't understand why he would -- he wouldn't

be just forthright with it. Everything that had occurred were [sic], you know, concerning his wife.

. . . .

Q. And although he did not state it during the beginning portion, was there -- at the end did he indicate in fact there had been other contact with his body with a gun that was being handled by Ms. Daughtridge?

A. Yes. I mean, on several occasions he was contradicting what he was confronted with.

. . . .

Q. Once you had talked to David Freehling at the State Crime Lab, what was the next step in the investigation?

A. Obviously, we waited to get all of his reports back and any information regarding the gunshot residue. You know, by that time we had conducted some other interviews that, again, it just didn't add up to -- it wasn't adding up that she had shot herself, when those -- with the totality of those things.

Defendant specifically challenges the following statements from the above-quoted testimony: (1) "things were just not adding up"; (2) "the initial thing was is [sic] that his demeanor and his -- the statements that he had left the scene. I mean, that's just not consistent with a suicide particularly of your wife. I mean, generally, we have to remove the persons from the scene and try to keep them out. I mean, he was very disengaged. That was really odd to me"; (3) "a lot of it was based on just his demeanor. There was no, you know, emotion that he was upset. It appeared there was -- it was more of supporting his theory of what had happened and him not being in a room than what had happened to his wife"; (4) "I mean, on several occasions he was contradicting what he was confronted with"; (5) "I mean, looking at the interview [sic] Detective Anthony and again with me, I had to pull it out of him. I didn't understand why he would -- he wouldn't be just forthright with it. Everything that had occurred were, you know, concerning his wife"; and (6) "[b]y that time we had conducted some other interviews that, again, it just didn't add up to -- it wasn't adding up that she had shot herself, when those -- with the totality of those things." Defendant asserts that these statements constituted impermissible lay opinions in violation of Rule 701 of the North Carolina Rules of Evidence.

Defendant is correct as a general proposition that "when one witness vouches for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded by Rule 701 [of the North Carolina Rules of Evidence]." *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007) (citation, quotation marks, and brackets omitted), *aff'd per curriam*, 362 N.C. 342, 661 S.E.2d 732 (2008); *see also State v. White*, 154 N.C. App. 598, 605, 572 S.E.2d 825, 831 (2002) ("The jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of [a law enforcement officer].").

However, it is apparent from the context of Investigator Sole's testimony on direct examination that he was simply explaining the steps he took in furtherance of his ongoing investigation. His statements expressing skepticism over Defendant's account of these events served merely to provide context and explain his rationale for continuing to subject Defendant to additional scrutiny.

Such testimony does not run afoul of Rule 701. Indeed, we have expressly held that "[t]estimony elicited to assist the jury in understanding a law enforcement officer's investigative process is admissible under Rule 701." *State v. Bishop*, __ N.C. App. __, __, 774 S.E.2d 337, 347, *rev'd on other grounds*, __ N.C. __, __ S.E.2d __ (filed Jun. 10, 2016) (No. 223PA15).

We find instructive our opinion in *State v. Lawson*, 159 N.C. App. 534, 583 S.E.2d 354 (2003), in which the defendant was charged with robbery with a firearm and possession of a firearm by a felon. The defendant robbed a convenience store at gunpoint and then fled. The store clerk called the police, and descriptions of the defendant and his accomplice were provided by the clerk and another witness. *Id.* at 535-36, 583 S.E.2d at 355-56.

Approximately two hours later, an officer pulled over a car driven by the defendant for running a stoplight. When the officer asked the defendant for his driver's license, he was unable to produce any identification but told the officer his name was Antonio Lawson. The officer ran a DMV identification check for the name "Antonio Lawson," but the search returned no record of any such individual. *Id.* at 536, 583 S.E.2d at 356.

At trial, the officer testified that "'[a]t that point I knew that he was lying to me because if you've ever had a North Carolina ID whether it be three days ago, three years ago, thirty years ago, your information is in DMV files. With that name and that DOB there was no information. He

had already stated to me that he had a North Carolina ID so I knew at that point he was lying.' " *Id.* at 541, 583 S.E.2d at 359.

On appeal, the defendant argued that the trial court committed plain error in admitting this portion of the officer's testimony because it "intimated defendant was a liar." *Id.* at 540, 583 S.E.2d at 359. We rejected this argument, noting that

> in contrast to defendant's contentions on appeal, Officer Wilson did not characterize defendant as "a liar." In reviewing the testimony, it appears instead that Officer Wilson's testimony as to defendant's lying dealt with: (1) the special circumstances of asking for defendant's identification during a traffic stop, (2) *why defendant's responses aroused Officer Wilson's suspicion*, and (3) explaining why Officer Wilson initially arrested defendant for providing fictitious information.

Id. at 542, 583 S.E.2d at 359 (emphasis added).

We held that "[i]n the present case, Officer Wilson's testimony was not that of an expert as to credibility; further, he was not invading the province of the jury as he was not commenting on the credibility of a witness. As noted above, Officer Wilson was testifying to the circumstances of the traffic stop and the reason for defendant's detention. The above testimony by Officer Wilson does not rise to the level of plain error." *Id.* at 542, 583 S.E.2d at 360.

As in *Lawson*, we believe the testimony offered by Investigator Sole during direct examination served to assist the jury in understanding his investigative process and why he chose to continue investigating Defendant instead of accepting Defendant's explanation of the events of 30 October 2011 at face value. Such testimony does not speak to the ultimate issue of Defendant's guilt or innocence and was therefore admissible under Rule 701. *See State v. Houser*, __ N.C. App. __, __, 768 S.E.2d 626, 631-32 ("[The officer] was not invading the province of the jury by commenting on the truthfulness of defendant's statements and subsequent testimony. Rather, he was explaining the investigative process. . . . [S]tatements were rationally based on [the officer's] experience as a detective and were helpful to the jury in understanding the investigative process in this case. . . . [W]e hold that the trial court's admission of this testimony was not error, let alone plain error."), *disc. review denied*, __ N.C. __, 775 S.E.2d 869 (2015).

[3] Defendant contends that Investigator Sole's testimony concerning certain text messages sent from Simeka's cellphone also constituted improper lay opinion testimony in violation of Rule 701. The text messages at issue were examined by Investigator Sole for the purpose of determining whether Simeka's death was a suicide. Specifically, Defendant points to the following exchange during his direct examination:

> Q. Now, the text messaging was that of any importance to you?
>
> A. I mean, it's again a standard procedure during a death investigation to look at those type of records. When I looked at them in this case predominantly what I was looking at it is as we said you're trying to be objective it being a death investigation. And there being this allegation of suicide that if there was any type of messaging that would be consistent with her being upset, you know, making -- maybe telling someone else in a text message, this type of stuff.
>
> And it wasn't present so it didn't appear to have anything in that direction. The text messaging seemed to be fairly normal and not what I would consider -- she was holding a conversation with someone about I think things getting better or there were other options for her based on her -- what things were with her current relationship.

We believe these statements likewise provided context for Investigator Sole's decision-making with regard to his investigation. This portion of Investigator Sole's testimony further explains why he conducted a homicide investigation rather than concluding that Simeka's death was a suicide. Defendant has failed to offer any persuasive argument that the admission of this evidence constituted plain error.

[4] Finally, Defendant challenges the following testimony offered by Investigator Sole on cross-examination as violative of Rule 701:

> Q. Okay. But as an investigator you're ascribing motives and thoughts to everybody. You assumed my client was deceptive, correct?
>
> A. He was deceptive.
>
> . . . .
>
> Q. But so when [Linda] makes mistaken statements of fairly significant facts, maybe she was mistaken, maybe

> she was wrong. [Defendant] is deceitful, correct, that's your opinion?
>
> A. The things that [Defendant] was not truthful about were significant to a death investigation. That's why I define it as deception.

However, while Defendant argues that Investigator Sole's characterization of him as "deceptive" was improper, the above-quoted exchange falls squarely within the invited error doctrine. "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *Gobal*, 186 N.C. App. at 319, 651 S.E.2d at 287; *State v. Steen*, 226 N.C. App. 568, 575, 739 S.E.2d 869, 875 (2013) ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law, and a defendant who invites error has waived his right to all appellate review concerning the invited error, *including plain error review*." (internal citations, quotation marks, and alterations omitted and emphasis added)).

Investigator Sole's statements on cross-examination were direct responses to the questions of Defendant's trial counsel. Consequently, based on the invited error doctrine, the challenged testimony cannot constitute plain error.

III. Dr. Duval's Testimony

[5] Defendant's final argument on appeal is that the trial court erred in allowing Dr. Duval to testify as to his opinion that Simeka's death was a homicide. Specifically, Defendant contends that because Dr. Duval's opinion on this issue was based not on medical findings within his area of expertise but rather on non-medical information relayed to him by law enforcement officers, the trial court erred by allowing its admission. While acknowledging that prior cases from North Carolina courts have allowed analogous expert testimony from medical examiners, *see State v. Annadale*, 329 N.C. 557, 406 S.E.2d 837 (1991); *State v. Borders*, 236 N.C. App. 149, 762 S.E.2d 490 (2014), *disc. review denied*, __ N.C. __, 772 S.E.2d 726 (2015), he argues that the General Assembly's 2011 amendment to Rule 702 of the North Carolina Rules of Evidence now requires trial courts to serve in a stricter "gatekeeper" capacity when considering the admissibility of expert testimony. Because Defendant failed to object to this portion of Dr. Duval's testimony at trial, our review is — once again — limited to plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Our Supreme Court has very recently confirmed that the General Assembly's amendment to Rule 702 adopted the federal standard for the admission of expert witness testimony set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993), and its progeny. *See State v. McGrady*, __ N.C. __, __, __ S.E.2d __, __, slip op. at 5 (filed Jun. 10, 2016) (No. 72PA14) ("We hold that the 2011 amendment adopts the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases. The General Assembly amended North Carolina's rule in 2011 in virtually the same way that the corresponding federal rule was amended in 2000. It follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule.").

Rule 702 now provides, in pertinent part, as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.R. Evid. 702(a).

In *McGrady*, the Supreme Court discussed in detail the implications stemming from the amendment to Rule 702.

> Rule 702(a) has three main parts, and expert testimony *must satisfy each to be admissible*. First, the area of proposed testimony must be based on scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. This is the relevance inquiry discussed in both *Daubert* and *Howerton*. As with any evidence, the testimony must meet the minimum standard for logical relevance that Rule 401 establishes. In other words, the testimony must relate to an issue in the case. But relevance means something more for expert testimony. *In*

order to assist the trier of fact, expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience. An area of inquiry need not be completely incomprehensible to lay jurors without expert assistance before expert testimony becomes admissible. To be helpful, though, that testimony must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case for its own.

Second, the witness must be qualified as an expert by knowledge, skill, experience, training, or education. This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony. Expertise can come from practical experience as much as from academic training. Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise. As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

Third, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data. (2) The testimony must be the product of reliable principles and methods. (3) The witness must have applied the principles and methods reliably to the facts of the case. These three prongs together constitute the reliability inquiry discussed in *Daubert*, *Joiner*, and *Kumho*. The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate. However, conclusions and methodology are not entirely distinct from one another, and when a trial court

> concludes that there is simply too great an analytical gap between the data and the opinion proffered, the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.

McGrady, __ N.C. at __, __ S.E.2d at __, slip op. at 12-15. (internal citations, quotation marks, and brackets omitted and emphasis added).

The Supreme Court's analysis in *McGrady* — which the trial court did not have the benefit of at the time of Defendant's trial — makes clear that trial courts must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702. Here, Dr. Duval's opinion that Simeka's death was a homicide as opposed to a suicide appears to have been largely —if not entirely — based on his interpretation of *non-medical* information conveyed to him by law enforcement officers who were involved in the investigation of Simeka's death.

> Q. Did you take into consideration statements made by witnesses at the scene as far as the circumstances related to the moments before and after Simeka Daughtridge was shot?
>
> A. Yes.
>
> Q. And could you please tell the jury the information that you considered as far as the circumstances of the moments before and after she was shot?
>
> A. It was relayed to me by law enforcement that eyewitnesses stated that there was some sort of verbal altercation occurring in the bedroom in which the decedent was in. A loud sound or a pop or something analogous to a gunshot was heard and then a person was seen to emerge from the room.
>
> Q. And the person that was seen to emerge from the room, do you know who that was?
>
> A. I believe it was described as the decedent's boyfriend.
>
> Q. And were you informed as to what he had told the police as far as whether or not that was consistent [sic] what other witnesses observed?
>
> A. I believe that again, according to information provided to me from law enforcement, was [sic] that the decedent's

boyfriend claimed that he was not in the room with the decedent at the time that the gunshot was heard.

Q. As a result of all of the information that you took into consideration, did you form an opinion as to whether or not Simeka Daughtridge was the victim of homicide?

A. Yes.

Q. And based on all the information that you were provided as well as the testing that you performed yourself, what was your expert opinion as to whether or not she was the victim of homicide?

A. In my opinion the manner of death is homicide.

Dr. Duval further testified during cross-examination as follows:

Q. Okay. A few other questions. The information you had received was from law enforcement only, correct, as far as what the --

A. To my recollection.

Q. -- as to the cause and manner of death?

A. Yes.

. . . .

Q. Okay. Outside of what law enforcement told you, is there anything about the wound itself that would indicate that it could not have been self-inflicted?

A. No.

We believe Defendant has raised legitimate concerns about the admissibility of Dr. Duval's opinion testimony on the issue of whether Simeka's death was a homicide. Clearly, Dr. Duval would have been qualified to provide an opinion that Simeka's death was a homicide — rather than a suicide — if that opinion was based on the type of evidence that was within his area of expertise as an expert witness in the field of forensic pathology. However, based on our review of the trial transcript, it is difficult to escape the conclusion that his opinion on this specific issue was based not on such medical evidence but instead on statements from law enforcement officers about the results of their investigation — information that bore little, if any, connection to his own observations stemming from his autopsy of Simeka.

The State has failed to adequately explain how Dr. Duval was in a better position than the jurors to evaluate whether the results of the officers' investigation were more suggestive of a homicide than a suicide. Therefore, based on the principles set out in *McGrady*, his opinion failed to pass muster under the new test governing the admissibility of expert witness opinion testimony that is now required in light of the 2011 amendment to Rule 702.

However, we are not convinced that the trial court's error in allowing Dr. Duval to give this opinion rose to the level of plain error. This is so for several reasons.

First, the results of the GSR testing are inconsistent with the theory that Simeka committed suicide. The State's evidence established that had Simeka, in fact, shot herself, GSR would have been present on her hands. However, no GSR was discovered on her hands during forensic testing. During direct examination, Freehling offered the following testimony:

> Q. And if somebody was to have shot themselves and died as a result of that gunshot wound shortly after shooting themselves, would you expect there to be gunshot residue on their hands?
>
> A. It's depending on the caliber of the weapon and if the body was touched or the hands were touched or anything that could lead to the lost [sic] of particles. You would expect to find particles on the hands of someone that shot themselves if it was as is. But then there's factors that lead to particle loss which could be the caliber of the weapon, if EMTs touched the body or while transferring to the hospital, anything [sic] of those factors could lead to particle loss.
>
> Q. Now, you talked about caliber. A .9 millimeter would you consider that a small caliber?
>
> A. That's higher caliber. The smaller calibers were [sic] little to no gunshot residue submitted are typically .22 caliber and .25 caliber.
>
> Q. And as far as you had talked about medical personnel, if there's no medical intervention as far as cleaning of the hands or medical procedures on the hands, that would not then affect a loss of gunshot residue; is that correct?

A. That's correct.

Freehling also testified that "[GSR] expands up to a few feet from the weapon. So the further away you get from the weapon, the less likely you are to have gunshot residue on you." He further testified as follows:

> Q. And as far as if there's gunshot residue mixed in with, say, blood can you still detect that gunshot residue?
>
> A. Yes.

Significantly, Simeka's blood-stained hands were not disturbed following the shooting as reflected by a Duke University Medical Center report prepared by Dr. Catherine Lynch, who stated therein that "[Simeka] was prepped for autopsy/police investigation with bags placed on her hands and was not wiped clean per my request." Moreover, when Simeka's body was delivered to Dr. Duval for autopsy, he observed that "I saw what appeared to be dried blood stains on [her] hands."

Consequently, the preservation of Simeka's hands in an undisturbed state for forensic testing and the total lack of *any* GSR on them forecloses the possibility that she shot herself. Furthermore, Simeka was shot with a .9 millimeter high caliber handgun as opposed to a smaller caliber handgun that — as Freehling noted — might not leave appreciable traces of GSR.

Defendant's clothing, conversely, tested positive for the presence of GSR despite his assertion during his interview with Investigator Sole that he had not been in Simeka's room at the time of the shooting. Given Freehling's testimony that GSR only travels "three to four feet . . .maximum" from a fired .9 millimeter gun and that the "cloud is only in the air for a matter of seconds" before the particles fall to the ground, the fact that three separate pieces of Defendant's clothing — his t-shirt, jeans, and hooded jacket — all tested positive for GSR clearly indicates that he was, in fact, present in Simeka's bedroom within several feet of the Kel-Tec .9 millimeter weapon at the time she was shot.[1]

Second, both of Simeka's children who testified at trial stated that Defendant exited Simeka's room *after* they heard the gunshot. No witness at trial who was present in the house at the time of the shooting testified to the contrary.

---

1. While no GSR was found on Defendant's hands, his absence from the residence for approximately one hour after the shooting would have afforded him the opportunity to take steps to remove the residue from his skin.

Third, the fact that Defendant made no effort to tend to Simeka and actually left the residence prior to the arrival of law enforcement officers or emergency medical personnel serves as circumstantial evidence of Defendant's guilt. *See State v. Bagley*, 183 N.C. App. 514, 521, 644 S.E.2d 615, 620 (2007) ("[E]vidence of flight is admissible if offered for the purpose of showing defendant's guilty conscience as circumstantial evidence of guilt of the crime for which he is being tried[.]"); *State v. Page*, 169 N.C. App. 127, 137, 609 S.E.2d 432, 438 (2005) ("The State presented evidence that defendant did not render assistance in reviving [the victim] or contact emergency personnel regarding the shooting. Defendant's hands were shown to contain gunshot residue. . . . Additionally, defendant's inconsistent statements regarding his location during the shooting is circumstantial evidence of defendant's guilt.").

Finally, any prejudicial effect from the erroneous admission of Dr. Duval's opinion on the manner of Simeka's death was mitigated during cross-examination by Defendant's trial counsel:

> Q. If you had been told that a victim, that a deceased person was suicidal, had attempted suicide, and in fact had the day before told her children, mom, was not going to be with you much longer, would you have considered that in determining whether something was a homicide or suicide?
>
> A. Sure.
>
> Q. But if you're not told that, you can't consider it in making your determination?
>
> A. Yes.
>
> Q. Were you told any of that in this case?
>
> A. Not to my recollection.
>
> . . . .
>
> Q. Do you know if the victim in this case ever expressed thoughts of killing herself?
>
> A. I have no idea.
>
> Q. Did you talk to the family and ask them about that?
>
> A. No.
>
> Q. Did you ask the police if she had any of that?

A. I don't know.

. . . .

Q. But at the time, you never even considered the self inflicted angle because it was never communicated to you?

A. No.

Q. And there's nothing about the autopsy itself per her wound that would tell you there's no way she could have done this herself?

A. That is the shortcoming of an autopsy.

Q. But that wound, and that type, where it was, and everything else, you've seen wounds like that that are self-inflicted?

A. Yes.

Furthermore, as noted earlier, the jury heard Dr. Duval explicitly admit during cross-examination that his opinion that Simeka did not commit suicide was based entirely on non-medical information he received from law enforcement officers.

Q. Okay. A few other questions. The information you had received was from law enforcement only, correct, as far as what the --

A. To my recollection.

Q. -- as to the cause and manner of death?

A. Yes.

. . . .

Q. Okay. Outside of what law enforcement told you, is there anything about the wound itself that would indicate that it could not have been self-inflicted?

A. No.

Thus, as a result of defense counsel's cross-examination of Dr. Duval, the jury was expressly told that in forming his opinion as to Simeka's manner of death (1) he had not been made aware of any of Defendant's evidence suggesting Simeka had a motive to commit suicide; (2) he instead relied exclusively on the information the officers had

related to him about their investigation; and (3) nothing from his analysis of Simeka's body during the autopsy shed light on whether the death was a homicide rather than a suicide. These admissions would have led a reasonable juror to place Dr. Duval's stated opinion on the manner of death in its proper context.

For these reasons, we conclude that the admission of Dr. Duval's opinion testimony did not amount to plain error. *See*, *e.g.*, *State v. Turbyfill*, __ N.C. App. __, __, 776 S.E.2d 249, 259 ("[The expert witness'] testimony appears to have violated Rule 702(a1) on the issue of defendant's specific alcohol concentration level as it related to the results of the Horizontal Gaze Nystagmus (HGN) Test defendant performed. However, we do not believe that, given an examination of the entire record, the error had a probable impact on the jury's [verdict]."), *disc. review denied*, __ N.C. __ 780 S.E.2d 560 (2015); *State v. Blizzard*, 169 N.C. App. 285, 294-95, 610 S.E.2d 245, 252 (2005) (medical expert's testimony that when he saw victim shortly after rape allegedly occurred, victim "truly was believable" to him was error but did not rise to level of plain error in light of overwhelming evidence of defendant's guilt).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and HUNTER, JR. concur.

STATE v. GARRISON

[248 N.C. App. 729 (2016)]

STATE OF NORTH CAROLINA
v.
DAMON J. GARRISON, DEFENDANT

No. COA15-1293

Filed 2 August 2016

Constitutional Law—right to counsel—defendant pro se—inquiry insufficient—comprehension of range of punishments

A defendant who proceeded pro se was entitled to a new trial where the trial court did not make an inquiry sufficient to satisfy itself that defendant comprehended the range of permissible punishments.

Appeal by defendant from Judgment entered 8 May 2015 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 June 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant.

ELMORE, Judge.

Damon Garrison (defendant) appeals from his convictions, arguing that the trial court did not engage in the proper inquiry under N.C. Gen. Stat. § 15A-1242 (2015) before permitting him to proceed *pro se*. After careful review, we agree and conclude that defendant is entitled to a new trial.

I. Background

On 3 February 2014, defendant was indicted for possession of drug paraphernalia, felony possession of a schedule VI controlled substance,[1] maintaining a place to keep controlled substances, and manufacturing a controlled substance. Defendant was initially provided with court-appointed counsel. On 17 July 2014, however, defendant's counsel filed a motion to withdraw, stating that defendant "would like to present the strategy." After a hearing, the Honorable Lisa C. Bell allowed the motion.

1. Prior to trial, the trial court granted the State's motion to amend this charge to misdemeanor possession.

The case came on for trial at the 6 May 2015 Criminal Session of the Superior Court of Mecklenburg County, the Honorable Linwood O. Foust presiding. Defendant was not represented by counsel. On 8 May 2015, the jury returned verdicts finding defendant guilty of all charges. The trial court suspended defendant's sentence of four to fourteen months' imprisonment and placed him on twelve months' supervised probation. Defendant timely appeals.

II. Analysis

Defendant argues that the trial court did not comply with the requirements of N.C. Gen. Stat. § 15A-1242 before permitting him to proceed *pro se*.

We review a trial court's decision to permit a defendant to represent himself *de novo*. *State v. Watlington*, 216 N.C. App. 388, 393–94, 716 S.E.2d 671, 675 (2011). "A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution." *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). A criminal defendant also " 'has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.' " *Id.* (quoting *State v. Mems*, 281 N.C. 658, 670–71, 190 S.E.2d 164, 172 (1972)). "The trial court, however, must insure that constitutional and statutory standards are satisfied before allowing a criminal defendant to waive in-court representation." *Id.* (citing *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992)).

Relevant here, N.C. Gen. Stat. § 15A-1242 (2015) states,

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

This Court has previously held that "[t]he inquiry is a mandatory one, and failure to conduct it is prejudicial error." *State v. Godwin*, 95 N.C. App. 565, 572, 383 S.E.2d 234, 238 (1989) (citing *State v. Bullock*, 316 N.C. 180, 185–86, 340 S.E.2d 106, 108–09 (1986)); *see also State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 231 (2000) (holding that "because it is prejudicial error to allow a criminal defendant to proceed *pro se* without making the inquiry required by section 15A-1242, Defendant must be granted a new trial").

Defendant argues that the trial court did not conduct any of the three required inquiries under N.C. Gen. Stat. § 15A-1242(1)–(3). The State concedes error under N.C. Gen. Stat. § 15A-1242(3), noting that defendant was not advised of the range of permissible punishments and admitting that a new trial is warranted. After a thorough review of the transcripts, we agree and conclude that the trial court failed to make an inquiry sufficient to satisfy itself that defendant comprehended the range of permissible punishments under N.C. Gen. Stat. § 15A-1242(3). Accordingly, as the inquiry is a mandatory one, the trial court's failure to satisfy the statutory requirements before permitting defendant to proceed pro se constitutes prejudicial error. *See Godwin*, 95 N.C. App. at 572, 383 S.E.2d at 238. Because we conclude that defendant is entitled to a new trial, we do not reach his second argument on a challenged jury instruction.

III. Conclusion

The trial court failed to comply with N.C. Gen. Stat. § 15A-1242 before permitting defendant to proceed *pro se*. As a result, defendant is entitled to a new trial.

NEW TRIAL.

Judges DAVIS and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CURTIS RAY GATES, JR., DEFENDANT

No. COA15-626

Filed 2 August 2016

1. Sexual Offenses—second-degree—indictment—only attempt charged—only verdict for attempted offense supported

The trial court erred by accepting the jury's verdict of guilty of second-degree sexual offense when the indictment charged attempted second-degree sexual offense. The indictment failed to allege that defendant actually committed a sex offense, so it was ineffective to confer jurisdiction upon the trial court to convict defendant of second-degree sexual offense; however, the indictment sufficiently alleged attempted second-degree sexual offense and the verdict supported a conviction for that offense.

2. Appeal and Error—constitutional law—effective assistance of counsel—claim based on record evidence—appellate review available

Appellate review of a claim of ineffective assistance of counsel was available where the merits of the claim could be reviewed based on the appellate review.

3. Evidence—other crimes—inadmissible to prove defendant's propensity—admissible for other purposes—identifying defendant—natural development of facts

Defendant's claim of ineffective assistance of counsel was overruled where counsel did not object to evidence of another crime that was used to show the process of identifying defendant and to present the narrative of the facts.

Appeal by Defendant from judgment and commitment entered 18 December 2014 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 16 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Torrey D. Dixon, for the State.

Paul F. Herzog, for Defendant-appellant.

INMAN, Judge.

Curtis Ray Gates, Jr. ("Defendant") appeals his convictions for second-degree sex offense and breaking or entering. We vacate and remand for entry of judgment convicting him of attempted sexual offense and breaking or entering because the indictment charging Defendant alleged only an attempted and not a completed sex offense. We also overrule Defendant's claim that he received ineffective assistance of counsel.

I. Background

The State's evidence at trial was as follows:

Around 7:30 a.m. on 10 May 2013, KL[1] was sexually assaulted by a man in her home. She had first met her attacker about two months earlier, when he knocked on the door of her residence and asked if a "Corporal So-and-so" lived there. KL told the man "no," and he left. KL did not see the man again until the attack on 10 May 2013.

The morning she was attacked, KL's husband had left their home for work before 5:00 a.m. and did not lock the exterior doors. KL had not heard her husband leave, and thought it was her husband's footsteps she heard when her attacker entered the house. When she awoke more fully, she saw a man standing in the doorway of her bedroom wearing a green T-shirt, dark pants, and gray shoes. The man asked KL where her husband was and she responded "at work." KL then asked the man, "why are you here?" The man responded that he wanted to have sex with her. When she tried to get up from her bed, the man pushed her back down. He told her to be quiet and that he did not want to hurt her.

KL testified that she was afraid for herself and for her children, who were elsewhere in the house, so she did not attempt to resist. KL told the man she was sick, attempting to dissuade him, but the man did not stop. He removed her bra and put on a condom. He tried to penetrate her vaginally but was not successful. He then removed the condom and began to put a blanket over KL's face but stopped when she begged him not to. He forced KL to perform fellatio on him. After about two minutes, the man ejaculated and demanded that KL rinse out her mouth. KL spit some of the semen out, but tried to retain some behind in the back of her throat. The man then told KL he was sorry, asked for a hug, hugged KL, and walked out the back door of the home.

KL then called her husband, told him what had happened, and locked all the doors. She swabbed the inside of her mouth with a Q-tip and cotton balls and placed those items in a Ziploc bag. Officer Bryan Stitz

1. We use initials for the victim KL to protect her privacy.

("Officer Stitz") of the Jacksonville Police Department arrived about five or ten minutes later. KL told Officer Stitz what had happened. A second police officer swabbed KL's mouth to collect evidence.

Officer William Woolfolk ("Officer Woolfolk") of the Jacksonville Police Department testified that he arrived at the victim's residence around 8:44 a.m. on 10 May 2013. He spoke with Officer Stitz and a detective on the scene who advised him that a sexual assault had occurred and there was "some biological evidence in a sandwich bag inside the foyer." While wearing latex gloves, Officer Woolfolk collected a sandwich bag containing two cotton balls and one Q-tip. He then placed the evidence in his car. He changed gloves and collected more Q-tip samples from the sink. Once he had gathered the evidence, he transported the samples to the police department. The samples were later sent to the United States Army Criminal Investigation Laboratory ("USACIL") for analysis. A forensic biologist employed by USACIL, found three separate DNA profiles in the samples: KL, her husband, and Defendant.

KL saw the man who attacked her two weeks later when she was walking home from a shopping trip to Walmart around 9:00 p.m. He was wearing a khaki-green trainer shirt, dark colored knee-length pants, and black shoes with red lines. The man asked her if she remembered him, and KL answered "yes." He asked KL if she had told her husband about the incident and asked about meeting again. KL walked home immediately and told her husband. Her husband quickly got dressed and chased after the man, but was unable to find him.

On 3 June 2013, KL met with a special agent trained as a sketch artist at the police department. KL provided a rough sketch of her attacker she had drawn herself. After the sketch artist met and spoke with her at length about the incident, he drew a composite of KL's attacker.

The warrant for Defendant's arrest alleged that he "unlawfully, willfully, and feloniously did engage in a sex offense with [KL] by force and against that victim's will." It also alleged that he committed a crime against nature with KL and alleged that Defendant entered KL's residence with the intent to commit a felony.

Defendant was charged in a three-count bill of indictment. The second and third counts were for "Crime Against Nature" and "Breaking and Entering," respectively, stating charges consistent with the arrest warrant. But count one in the indictment, labeled "Second Degree Sexual Offense," did not match the arrest warrant. It stated that Defendant "willfully and feloniously did *attempt* to engage in a sex offense with [KL] by force and against that victim's will." (Emphasis added.)

The word "attempt" in the indictment apparently escaped the notice of the trial court, who instructed jurors that "[t]he defendant has been charged with second-degree sexual offense." The trial judge provided no instruction regarding attempt. The jury returned a guilty verdict for Defendant for second-degree sex offense and felonious breaking or entering.[2] The trial court consolidated the offenses into one judgment. Defendant was sentenced in the presumptive range to 96 to 176 months in prison. Defendant gave oral notice of appeal.

II. Analysis

A. Validity of the Indictment

[1] Defendant first argues that the trial court erred in accepting the jury's verdict of guilty of second-degree sex offense, when count one of the indictment charged *attempted* second-degree sex offense. We agree.

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). "This Court reviews the sufficiency of an indictment *de novo*. An indictment must set forth each of the essential elements of the offense . . . . To require dismissal any variance must be material and substantial and involve an essential element." *State v. Hooks*, __ N.C. App. __, __, 777 S.E.2d 133, 138 (2015) (internal quotation marks and citation omitted).

North Carolina permits "short-form" indictments in murder, sex offense, and rape cases. *Wallace*, 351 N.C. at 508, 528 S.E.2d at 343. N.C. Gen. Stat. § 15-144.2(a) (2015) provides, in pertinent part:

> In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law.

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2. Before the case was submitted to the jury, the State dismissed the charge of crime against nature.

"[T]he trial court lacks subject matter jurisdiction to try, or enter judgment on, an offense based on an indictment that only charges a lesser-included offense." *State v. Scott*, 150 N.C. App. 442, 453–54, 564 S.E.2d 285, 294 (2002). "While it is permissible to convict a defendant of a lesser degree of the crime charged in the indictment, . . . an indictment will not support a conviction for an offense more serious than that charged." *Id.* at 454, 564 S.E.2d at 294.

In this case, count one of the indictment does not set forth each element of second-degree sex offense, as required to confer jurisdiction upon the trial court to convict for that offense. *See Hooks*, __ N.C. App. at __, 777 S.E.2d at 138. Because an attempted sex offense, as described in this indictment, is not a completed sex offense, the statutory essential element that Defendant "engage in a sexual act" is absent.

The State argues that the indictment is valid because the word "attempt" is simply "used in its common meaning, to describe the defendant's unsuccessful attempt to engage in vaginal intercourse with the victim." This argument is without merit because the North Carolina statute provides a definition of "sexual act" which does not include vaginal intercourse. N.C. Gen. Stat. § 14-27.20(4); 14-27.5 (2013). Further, "[w]ords [(in a statutorily prescribed form of criminal pleading)] having technical meanings must be construed according to such meanings." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984). The word "attempt" in the indictment must be construed according to its technical meaning—an attempted second-degree sex offense.

The State further argues that count one and count two (crime against nature), when considered together, satisfy all the elements of a valid short-form indictment for completed second-degree sexual offense. This argument is without merit. Although count one contains the phrase "by force and against the victim's will," count two does not. The indictment does not allege that the crime against nature was by force and against the victim's will. Even if we assume the words "crime against nature" in count two of the indictment refer to a sexual act, the indictment does not show that the crime against nature it alleges is the sexual act referenced in count one. Without the specific allegation that the crime against nature was committed by force and against the person's will, the indictment is devoid of an essential element of second-degree sex offense. Also, because the State dismissed the crime against nature charge, the jury had no opportunity to determine Defendant's guilt to that count of the indictment.

The facts of this case are similar to those in *State v. Pettis*, COA11-1438, 2012 N.C. App. LEXIS 734, *1, 221 N.C. App. 435, 727 S.E.2d

25 (2012) (unpublished). In *Pettis*, both the heading and the body of the indictment at issue contained language pertaining to attempted sex offense by a person assuming a parental role. During trial, the prosecutor misspoke and stated that the body of the indictment did not contain the word "attempt" and that the State was proceeding on the principle charge. *Id.* at *3–5. The trial court, relying on the prosecutor's misstatement, instructed the jury on completed sexual offense by a person assuming a parental role. *Id.* at *5–6. Because the trial court did not have " 'subject matter jurisdiction to try, or enter judgment on, an offense based on an indictment that only charges a lesser-included offense[,]' " this Court vacated the defendant's conviction. *Id.* at *7 (quoting Scott, 150 N.C. App. at 453–54, 564 S.E.2d at 294).

The indictment charging Defendant with second-degree sexual offense failed to allege that Defendant actually committed a sex offense, so it was ineffective to confer jurisdiction upon the trial court to convict Defendant of second-degree sexual offense. However, the indictment sufficiently alleged attempted second-degree sexual offense and the jury's verdict supports a conviction for that offense. *See* N.C. Gen. Stat. § 15-144.2 (2015) ("Any bill of indictment containing [the short-form] averments and allegations . . . will support a verdict of guilty of . . . an attempt to commit a sex offense or an assault."); N.C. Gen. Stat. § 15-170 (2015) ("Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."); *State v. Stokes*, 367 N.C. 474, 482, 756 S.E.2d 32, 38 (2014) ("By finding defendant guilty of second-degree kidnapping, the jury necessarily found beyond a reasonable doubt all the elements of the lesser included offense of attempted second-degree kidnapping."). We vacate the judgment and remand this case to the trial court for entry of judgment of conviction for attempted second-degree sexual offense and breaking or entering and for resentencing. *See Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 18, 657 S.E.2d 673, 684 (2008) ("Under a consolidated sentence, if one of the counts upon which the conviction is based is set aside, the entire judgment must be remanded for resentencing even if the remaining counts would have been sufficient, standing alone, to justify the consolidated sentence.").

The trial court must determine Defendant's sentences for attempted second-degree sexual offense and breaking or entering. *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) ("[W]e think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated."); *see Scott*,

150 N.C. App. at 453–54, 564 S.E.2d at 294 (vacating the defendant's conviction for first-degree arson and remanding to the trial court for entry of judgment and resentencing for second-degree arson because the indictment failed to allege all the essential elements of first-degree arson).

On remand, the trial court is not bound by its earlier decision to consolidate Defendant's convictions for sentencing. N.C. Gen. Stat. § 15A-1335 (2015) provides, in pertinent part:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335 "does not prohibit the trial court's replacement of concurrent sentences with consecutive sentences upon resentencing, provided neither the individual sentences, nor the aggregate sentence, exceeds that imposed at the original sentencing hearing." *State v. Oliver*, 155 N.C. App. 209, 211, 573 S.E.2d 257, 258 (2002).

B. Ineffective Assistance of Counsel

Defendant next argues that he received ineffective assistance of counsel because his counsel at trial failed to object to evidence of Defendant's involvement in another sexual assault of a different female victim. After careful review of the record, we disagree.

1. Standard of Review

[2] "In order to obtain relief on the basis of an ineffective assistance of counsel claim, Defendant is required to demonstrate that his trial counsel's performance was deficient and that this deficient performance prejudiced the defense." *State v. Pemberton*, 228 N.C. App. 234, 240, 743 S.E.2d 719, 724 (2013) (internal citations omitted). The United States Supreme Court has provided a two-part test to use in deciding whether a defendant has a valid claim for ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as

> to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The North Carolina Supreme Court adopted this test in *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). To establish that counsel was ineffective, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. "[E]ven if counsel made an unreasonable error, [a defendant must show that] there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Banks*, 210 N.C. App. 30, 49, 706 S.E.2d 807, 821 (2011) (internal quotation marks omitted).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, when the appellate court can adequately review the merits of an ineffective assistance of counsel claim based on the appellate record, we will do so in the interest of judicial economy.

> It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.

State v. Thompson, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004) (internal quotation marks and citation omitted).

Defendant's ineffective assistance of counsel claim is based upon evidence introduced at trial and does not rely upon information outside the record. Accordingly, we address it.

2. Evidence of Another Crime

[3] During a criminal trial, evidence of other crimes committed by the defendant—crimes for which he is not on trial—is not admissible to prove the defendant's propensity to commit the crime charged. N.C. Gen. Stat. §8C-1, N.C. R. Evid. 404(b) (2015). But evidence of other crimes is admissible for other purposes, including to identify the defendant as the perpetrator of the crime for which he is on trial. *Id.* In this case, the State introduced evidence of Defendant's involvement in another sexual assault because a sample of Defendant's DNA collected in the

investigation of that assault matched DNA found at the scene of the assault on KL.

Defendant argues his counsel should have objected to testimony by two Jacksonville Police Department officers who investigated a sexual assault on 14 July 2013 ("the July assault"), two months after the assault on KL.

In a *voir dire* hearing outside the jury's presence, the State offered transcribed testimony by Officer Chris Funcke ("Officer Funcke") given in Defendant's trial following the July assault.[3] The State argued that the evidence was probative to show Defendant's identity as KL's attacker and to tell jurors the complete story of how law enforcement officers had matched Defendant's DNA with DNA found at the crime scene in the present case. The prosecutor explained that Defendant was not a suspect in the present case until officers investigated him in the July assault case. The prosecutor noted similarities between the two incidents in that each: (1) involved an alleged assault on a stranger, (2) involved the demand of oral sex in a "forced situation," (3) happened in the early morning hours, and (4) occurred within three miles of one another. Defense counsel objected to testimony relaying a hearsay statement by the victim in the July assault and asked the trial court to tell the jury that evidence about the July assault "is being offered for these particular purposes and these purposes only." Defense counsel acknowledged that the State was offering the evidence "to link up how they ended up with Mr. Gates and his DNA and brought it into here." The trial court allowed the testimony, including the July assault victim's hearsay statement, for the purposes of proving Defendant's identity as KL's attacker, "enhanc[ing] the natural development of the facts," and "describ[ing] a chain of circumstances which the [S]tate needs to show, in order to introduce testimony as to a subsequent search warrant of [D]efendant's home, as well as the acquisition of the DNA sample." Following the *voir dire* hearing, and prior to Officer Funcke's testimony, the trial court gave the jury a limiting instruction:

> Ladies and gentlemen, this testimony is not being admitted to show or prove the character of the defendant, or

3. Defendant was convicted on charges of first-degree sexual offense, first-degree kidnapping, and crime against nature in the other case, which this Court reviewed and held was free from error. *State v. Gates*, __ N.C. App. __, __, 781 S.E.2d 883, 886 (2016). Jurors in the present case were not told about Defendant's conviction in that case.

> any propensity of the defendant to commit any offense. Mr. Funcke's testimony is being received solely for the purpose of showing the identity of the person who committed the alleged offense on May 10, 2013. It is also being admitted to explain the development of the facts of the case and the chain of circumstances that led to further law enforcement actions, which will be described by additional witnesses offered by the state. If you believe this testimony or evidence, you may consider it, but only for the limited purposes for which it was received.

The trial court reiterated this limiting instruction during the jury instructions at the end of the trial.

Officer Funcke testified at trial for the present case as follows:

While patrolling the parking lot of Hooligans nightclub in the early morning of 14 July 2013, Officer Funcke noticed a car parked behind an adjacent building. When he pulled his vehicle next to the parked car, he saw Defendant, whom he identified in court, lying on the ground and a woman performing fellatio on him. When the woman saw Officer Funcke, she stood up and ran toward him, "crying hysterically," thanking him and saying "he [(Defendant)] was going to rape me." She told Officer Funcke that she had been trying to get into her car when Defendant punched her and forced her to the location where Officer Funcke had found them. Officer Funcke then examined Defendant's car at the scene and saw a green, military-style shirt, like that identified by KL in the present case. Another officer who arrived on the scene mentioned the sketch of KL's attacker and Officer Funcke recognized that Defendant resembled that sketch.

The trial court also allowed testimony by Detective Karen Scott ("Detective Scott") as follows: Detective Scott was the lead investigator of the July assault and was also assigned to KL's case, which remained open as officers had not identified a suspect. While searching Defendant's house in connection with the July assault, Detective Scott found shoes consistent with those KL had described were worn by her attacker. Detective Scott collected a sample of Defendant's DNA and discovered that it matched the DNA on the swab samples taken from KL's residence.

The trial court did not give jurors a limiting instruction regarding Detective Scott's testimony. Defense counsel did not object before the jury to testimony by either Officer Funcke or Detective Scott.

N.C. Gen. Stat. §8C-1, N.C. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Rule 404(b) is "a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990) (emphasis removed).

> [A]dmission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, has been approved in many other jurisdictions following adoption of the Rules of Evidence. This exception is known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct" exception. Such evidence is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts.

State v. Agee, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990) (internal quotation marks and citations omitted). "Our Supreme Court has ruled that the list of exceptions contained in Rule 404(b) is not exclusive and that extrinsic evidence of conduct is admissible if relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Pruitt*, 94 N.C. App. 261, 266, 380 S.E.2d 383, 385 (1989) (internal quotation marks omitted). "Moreover, in cases involving prior sex offenses, including rape, our courts have been markedly liberal in the admission of 404(b) evidence." *State v. Harris*, 140 N.C. App. 208, 211, 535 S.E.2d 614, 617 (2000). "The burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted." *State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994).

Our review of the record, summarized above, reveals that Defendant could not have met his burden to show there was no proper purpose for the testimony by Officer Funcke and Detective Scott. It was relevant to prove Defendant's identity as KL's attacker, as the trial court stated. The

testimony explained why law enforcement officers identified Defendant as a suspect in the assault on KL and how they obtained his DNA, which matched DNA samples collected following KL's assault. It "serve[d] to enhance the natural development of the facts." *Agee*, 326 N.C. at 547, 391 S.E.2d at 174. Because of these legitimate purposes, the testimony was admissible. Defense counsel's failure to object to the introduction of the evidence was not deficient. Defendant's ineffective assistance of counsel claim is therefore overruled.[4]

III. Conclusion

For the foregoing reasons, we vacate the conviction for second-degree sexual offense and remand for entry of judgment and resentencing for attempted second-degree sexual offense and breaking or entering. We overrule Defendant's claim for ineffective assistance of counsel.

VACATED AND REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

4. We also deny Defendant's Motion Requesting This Court to Take Judicial Notice That the Sun Rose at 6:10 A.M. on Friday, May 10, 2013, at Jacksonville, Onslow County, North Carolina Based on the Records of the US Naval Observatory. Knowledge of the time the sun rose on that particular day may pertain to whether the evidence of the other crime showed Defendant had a common plan or scheme, but it is not necessary with regard to identity or showing the complete story.

STATE OF NORTH CAROLINA
v.
BRIAN HANCOCK, DEFENDANT

No. COA15-1311

Filed 2 August 2016

Probation and Parole—revocation—grounds—independent determination by trial court

Defendant did not show that the trial court's decision to revoke his probation was legally erroneous, unsupported by the evidence, or manifestly unreasonable. Even though the State conceded error, the Court of Appeals was not bound by that concession. Due to the timing of the underlying offense, defendant was not subject to the Justice Reinvestment Act of 2011 (JRA) and its absconding condition, and his probation could only be revoked upon a finding that he committed a new criminal offense. Although defendant argued that the mere fact of being charged was insufficient to support a finding of commission of an offense, a defendant need not be convicted for the trial court to find that defendant violated N.C.G.S. § 15A-1343(b)(1) by committing an offense.

Appeal by defendant from judgment entered 7 August 2015 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 11 May 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly S. Murrell, for the State.

Joseph P. Lattimore for defendant-appellant.

ELMORE, Judge.

Brian Hancock (defendant) appeals from the judgment and commitment entered upon revocation of his probation. Because the evidence and the trial court's findings support revocation based on defendant's violation of the regular condition of probation in N.C. Gen. Stat. § 15A-1343(b)(1), we affirm.

I. Background

On 12 September 2012, defendant pleaded guilty to possession with intent to sell or deliver (PWISD) cocaine, an offense he committed on

18 January 2011, prior to the 1 December 2011 effective date of the Justice Reinvestment Act of 2011 (JRA). *See* N.C. Sess. Laws 2011-192, §§ 1, 4 (June 23, 2011); *see also* N.C. Sess. Laws 2011-412, § 2.5 (Oct. 15, 2011) (amending effective date in N.C. Sess. Laws 2011-192, § 4(d)). The trial court suspended defendant's sentence of fifteen to eighteen months' imprisonment and placed defendant on supervised probation for sixty months.

On 8 February 2013, a probation officer filed a violation report, alleging that defendant had willfully violated the conditions of his probation as follows:

> 1. Condition of Probation "Not use, possess or control any illegal drug or controlled substance . . ." in that
>
> ON 02/07/2013, DURING A WARRANTLESS SEARCH OF [DEFENDANT'S] RESIDENCE, THREE ROCKS OF COCAINE, A SMALL AMOUNT OF MARIJUANA AND DRUG PARAPHERNALIA WERE FOUND.

A subsequent violation report, filed 27 March 2013,[1] charged defendant with eleven willful violations, including the following:

> 10. Condition of Probation "Commit no criminal offense in any jurisdiction" in that
>
> THE DEFENDANT WAS CHARGED ON 02/07/2013 IN UNION COUNTY ON CASE 13CR 050542 FOR THE MISDEMEANOR POSSESSION OF DRUG PARAPHERNALIA AND OF POSSESSION OF MARIJUANA OF UP TO 1/2 OZ. . . .
>
> 11. Condition of Probation "Commit no criminal offense in any jurisdiction" in that
>
> ON 02/07/2013 IN UNION COUNTY THE DEFENDANT WAS CHARGED ON 13CR 050542 WITH PWISD COCAINE. . . .

1. It appears that a third violation report was filed 27 May 2015, alleging that defendant had "failed to notify probation officer of his location, therefore making himself unavailable and has absconded." The record on appeal does not contain this document. Defendant represents to this Court that the 27 May 2015 violation "report could not be located in the trial court's file" and notes that the trial court "did not find a violation based on that allegation." The hearing transcript reflects that the trial court expressly declined to find the violation alleged in the 27 May 2015 report.

The trial court held a violation hearing on 7 August 2015. The probation officer who filed the 8 February 2013 and 27 March 2013 violation reports retired prior to the hearing and did not attend. Defendant's then-current probation officer read each report's allegations into the record. The officer further testified that defendant had failed to report to him or contact the probation office at any time since defendant had been assigned to the officer's caseload. Counsel for defendant cross-examined the officer but offered no evidence. After hearing from the parties, the trial court revoked defendant's probation and activated his suspended sentence. Defendant appeals.

II. Analysis

On appeal, defendant claims the trial court abused its discretion by revoking his probation without a legal basis. The State concedes the error and asks this Court to remand to the trial court for entry of an appropriate sanction short of revocation pursuant to our holding in *State v. Nolen*, 228 N.C. App. 203, 206, 743 S.E.2d 729, 731 (2013). "This Court, however, is not bound by the State's concession. The general rule is that stipulations as to the law are of no validity." *State v. Phifer*, 297 N.C. 216, 226, 254 S.E.2d 586, 591 (1979) (citations omitted). Rather, it is the role of the reviewing court to determine whether "a particular legal conclusion follows from a given state of facts[.]" *Id.* (citations omitted). Therefore, notwithstanding the State's concession, we must review the record to determine whether the parties correctly ascribe error to the trial court.

The following principles govern our review of a judgment revoking probation:

> [A] proceeding to revoke probation is not a criminal prosecution and is often regarded as informal or summary. Thus, the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. Instead, all that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation. Accordingly, the decision of the trial court is reviewed for abuse of discretion.

State v. Murchison, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (citations, quotation marks, and alterations omitted). A trial court abuses its discretion if its decision is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision."

State v. Maness, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009). Moreover, erroneous findings may be disregarded as harmless if the trial court's decision to revoke probation is supported by at least one properly-found violation. *See State v. Belcher*, 173 N.C. App. 620, 625, 619 S.E.2d 567, 570 (2005).

As the parties observe, this case is governed by the JRA, to wit:

> [F]or probation violations occurring on or after 1 December 2011, the JRA limited trial courts' authority to revoke probation to those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of [confinement in response to violation (CRV)] under N.C. Gen. Stat. § 15A-1344(d2).

Nolen, 228 N.C. App. at 205, 743 S.E.2d at 730 (citing N.C. Gen. Stat. § 15A-1344(a)).

Here, because defendant committed his underlying offense prior to 1 December 2011, he was not subject to the JRA's "absconding" condition of probation enacted in N.C. Gen. Stat. § 15A-1343(b)(3a). *Id.* at 206, 743 S.E.2d at 731; *see also State v. Hunnicutt*, 226 N.C. App. 348, 354–55, 740 S.E.2d 906, 911 (2013) (noting that the JRA initially made this provision "effective for probation *violations* occurring on or after 1 December 2011[,]" but the "effective date clause was later amended, however, to make the new absconding condition applicable only to *offenses* committed on or after 1 December 2011") (emphasis added). The record on appeal further shows that defendant has served no prior CRVs under N.C. Gen. Stat. § 15A-1344(d2). Therefore, the trial court was authorized to revoke defendant's probation only upon a finding that he committed a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1).

In announcing its ruling in open court, the trial court stated that "the revocation is based on absconding," and it explicitly found certain violations alleged in the report filed 27 March 2013 as follows:

> I am reasonably satisfied in my discretion that this probationer has willfully and without lawful excuse violated the terms and conditions of his probationary sentence by testing positive for cocaine and marijuana, by failing to complete any of his community service, by failing to report to his probation officers as directed. That as of March 11,

> 2013, the defendant had willfully avoided supervision and was therefore an absconder; that again as of March 26th, 2013, the defendant had willfully avoided supervision as of that date and was an absconder. That he has failed to obtain his substance abuse assessment, that he has otherwise failed to report as directed. . . .

These findings correspond to paragraphs one, two, three, eight, and nine in the 27 March 2013 report.

In its written judgment, however, the trial court found additional violations not included in its oral findings. Specifically, the court found that defendant willfully violated his probation as alleged in the report filed 8 February 2013 and as alleged in paragraphs ten and eleven of the report filed 27 March 2013.[2] The written judgment includes an additional finding that each violation found by the court was, "in and of itself, a sufficient basis upon which [the court] should revoke probation and activate the suspended sentence." Moreover, it includes a finding that the court was authorized to "revoke defendant's probation . . . for the willful violation of the condition(s) that he[ ] not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above."

As previously stated, because defendant was a pre-JRA probationer he was not subject to the "absconding" condition in N.C. Gen. Stat. § 15A-1343(b)(3a). Insofar as the trial court purported to revoke defendant's probation on this basis, its ruling was in error. However, "a trial court's ruling must be upheld if it is correct upon any theory of law[,] and thus it should not be set aside merely because the court gives a wrong or insufficient reason for [it]." *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 63, 344 S.E.2d 68, 73 (1986) (citation and internal quotation marks omitted).

Here, the court made findings in its written judgment that support its decision to revoke defendant's probation. In this circumstance, the written judgment is controlling. *See State v. Kerrin*, 209 N.C. App. 72, 75, 703 S.E.2d 816, 818 (2011) (concluding that "the trial court was not required to announce all of the findings and details of its judgment in open court"); *State v. Williamson*, 61 N.C. App. 531, 533–34, 301 S.E.2d 423, 425 (1983) ("The minimum requirements of due process in a final probation revocation hearing" require "a written judgment by the judge

2. The court also found that defendant committed the violations alleged in paragraphs one through five and seven through eleven of the 27 March 2013 report.

which shall contain (a) findings of fact as to the evidence relied on, [and] (b) reasons for revoking probation.").

Of the several violations found by the trial court, defendant was subject to revocation only for committing a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1). The court found that defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) as alleged in paragraphs ten and eleven of the 27 March 2013 report. Defendant contests this finding, arguing that the State failed to present any evidence that he committed the criminal offenses alleged in paragraphs ten and eleven. Yet, the 27 March 2013 violation report alleged the following probation violations:

> 10. Condition of Probation "Commit no criminal offense in any jurisdiction" in that
>
> THE DEFENDANT WAS CHARGED ON 02/07/2013 IN UNION COUNTY ON CASE 13CR 050542 FOR THE MISDEMEANOR POSSESSION OF DRUG PARAPHERNALIA AND OF POSSESSION OF MARIJUANA OF UP TO 1/2 OZ. . . .
>
> 11. Condition of Probation "Commit no criminal offense in any jurisdiction" in that
>
> ON 02/07/2013 IN UNION COUNTY THE DEFENDANT WAS CHARGED ON 13CR 050542 WITH PWISD COCAINE. . . .

See N.C. Gen. Stat. § 15A-1343(b)(1) (2015); *see also* N.C. Gen. Stat. §§ 90-95(a)(1), (3), (b)(1), (d)(4), 90-113.22 (2015).

As defendant observes, the mere fact that he was charged with certain criminal offenses is insufficient to support a finding that he committed them. *State v. Lee*, 232 N.C. App. 256, 260, 753 S.E.2d 721, 723 (2014). However, a defendant need not be convicted of a criminal offense in order for the trial court to find that a defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) by committing a criminal offense. We have previously stated,

> Under the Justice Reinvestment Act, a defendant's probation is subject to revocation if he violates the normal condition of probation that he "[c]ommit no criminal offense in any jurisdiction." N.C. Gen. Stat. § 15A-1343(b)(1) (2011). A conviction by jury trial or guilty plea is one way for the State to prove that a defendant committed a new criminal offense. The State may also introduce evidence

> from which the trial court can independently find that the defendant committed a new offense.

Lee, 232 N.C. App. at 259, 753 S.E.2d at 723 (internal citations omitted). Moreover, by alleging a violation of the condition requiring him to "[c]ommit no criminal offense in any jurisdiction[,]" paragraphs ten and eleven of the 27 March 2013 report "put defendant on notice that the State was alleging a revocation-eligible violation[.]" *Id.* at 260, 753 S.E.2d at 723.

We conclude that the trial court made an independent determination that defendant committed the three offenses he was charged with on 7 February 2013 in 13 CR 050542, as alleged in paragraphs ten and eleven of the 27 March 2013 violation report. The court made this determination by finding that defendant committed the violation alleged in the 8 February 2013 report. The 8 February 2013 report alleged that defendant willfully violated the condition of probation in N.C. Gen. Stat. § 15A-1343(b)(15) based on the following facts:

> ON 02/07/2013, DURING A WARRANTLESS SEARCH OF [DEFENDANT'S] RESIDENCE, THREE ROCKS OF COCAINE, A SMALL AMOUNT OF MARIJUANA AND DRUG PARAPHERNALIA WERE FOUND.

The sworn violation report constitutes competent evidence sufficient to support the trial court's finding that defendant committed this violation. *See State v. High*, 183 N.C. App. 443, 449, 645 S.E.2d 394, 397–98 (2007)).

Given the informal nature of a probation revocation proceeding, *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358, the trial court was entitled to infer that the discovery of the "three rocks of cocaine, a small amount of marijuana and drug paraphernalia" during the warrantless search of defendant's residence on 7 February 2013 gave rise to the criminal charges "for the misdemeanor possession of drug paraphernalia and of [sic] possession of marijuana up to 1/2 oz"[3] and "PWISD cocaine" filed against defendant the same day. (All caps omitted.)

III. Conclusion

Accordingly, the trial court's finding that defendant committed the violation alleged in the 8 February 2013 report supports its finding that he committed three of the criminal offenses alleged in paragraphs ten

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3. Because possession of one-half ounce or less of marijuana is a Class 3 misdemeanor, see N.C. Gen. Stat. § 90-95(a)(3), (d)(4) (2015), defendant's probation could not be revoked "solely" for committing this offense. N.C. Gen. Stat. § 15A-1344(d) (2015).

and eleven of the 27 March 2013 report. As defendant does not contest the finding that he willfully violated his probation as alleged in the 8 February 2013 report, he cannot show that the trial court's decision to revoke his probation was legally erroneous, unsupported by the evidence, or manifestly unreasonable.

AFFIRMED.

Judges McCULLOUGH and INMAN concur.

STATE OF NORTH CAROLINA
v.
CLAYTON JAMES, DEFENDANT

No. COA15-853

Filed 2 August 2016

1. Kidnapping—restraint—separate from assault

There was sufficient separate evidence of restraint to support kidnapping in a prosecution for assault and kidnapping where defendant restrained the victim and strangled her until she was unconscious and then dragged her across the street. Defendant restrained her at two separate times; the assault by strangulation was complete prior to the additional restraint and movement.

2. Kidnapping—purpose—terrorizing victim—evidence sufficient

There was sufficient evidence to support the State's theory that defendant's motive in kidnapping the victim was to terrorize her where multiple witnesses heard defendant telling the victim that he was going to kill her and he demonstrated that his threat was real by assaulting, placing her in a headlock, and choking her. The evidence showed that the victim was in a state of intense fright and apprehension.

3. Kidnapping—first-degree—victim not released in safe place—victim seriously injured

The evidence in a first-degree kidnapping prosecution was sufficient to support the element that the victim was not left in a safe place or was seriously injured where she was strangled until she was unconscious and dragged down the road by her hair to a gravel driveway. An unconscious person lying on the side of a road or in a

driveway where a car may hit her is not safe; moreover, the victim suffered serious injuries.

4. False Imprisonment—lesser offense of kidnapping—evidence of defendant's purpose

There was no plain error in not instructing the jury on the lesser-included offense of false imprisonment in a kidnapping and assault prosecution where the evidence showed that defendant had the purpose of seriously harming or terrorizing the victim. Whatever purpose defendant may have had in his own mind, his words and actions spoke quite clearly. Moreover, the jury had ample evidence of defendant's guilt, and the jury probably would not have reached the same result absent any error.

Appeal by defendant from judgments entered on 22 January 2015 by Judge Stanley L. Allen in Superior Court, Guilford County. Heard in the Court of Appeals on 17 December 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

James W. Carter for defendant-appellant.

STROUD, Judge.

Defendant Clayton James appeals his conviction of first degree kidnapping, injury to personal property, and assault by strangulation. On appeal, defendant argues primarily that the trial court erred by denying his motion to dismiss the first degree kidnapping charge because the evidence was insufficient to submit the charge to the jury. Because there was sufficient evidence to establish each essential element of the charge, the trial court did not err in denying defendant's motion.

I. Background

The State's evidence at trial tended to show the following facts. On 12 July 2014, Susan[1] was staying at her mother's house because defendant had been harassing her. Susan previously had a romantic relationship with defendant for about five and one-half years, until they broke up in February 2013 because defendant "started getting very aggressive." Susan was on her way to Food Lion on 12 July 2014 when she

1. We have used a pseudonym to protect the privacy of the victim.

encountered defendant while walking at the intersection of Grove Street and Aycock Street. As Susan proceeded to walk across the street, defendant cut her off and confronted her, asking why she had not been answering his text messages or talking to him. Susan told him: " 'Well, you know I got a lot going on' ". . . and " 'Plus, we not together anyway.' "

Unsatisfied with her response, defendant became aggravated and told Susan " 'You gonna talk to me.' " Since they were out in public, it was daytime, and she had seen some kids nearby on a porch, Susan felt safe enough to tell defendant that if they were going to talk, it would be right there. Defendant told her she was going to go with him and grabbed Susan by the collar. As she struggled to get away, he punched her in the face. Defendant continued to grab Susan while in the middle of the street and eventually grabbed her by the throat and she "could feel the life leaving out of [her]." During the struggle with defendant, Susan suffered a mark on her face, bruises, abrasions on her arms and knees, a tear in her clothes, and broken glasses.

Susan could feel herself blacking out. Defendant threatened to kill her "in broad daylight." Susan believed defendant meant it when he said he would kill her. She was afraid at the time and still afraid when testifying at his trial. Susan then lost consciousness, and when she woke up, she was no longer in the street, but rather was lying in a driveway on the side of the road, and she saw defendant running away. Susan also saw "the babies" (referring to the three young individuals who witnessed the incident and testified at defendant's trial) and a police officer. She had no idea how long she lost consciousness. Susan did not know how she got from the street to the driveway, but she woke up in a different place than she remembered being before losing consciousness.

Jeremy was at his friend Destiny's house near the intersection where the incident occurred with Destiny and their friend Karlee when they heard Susan, a stranger, yell " 'Help' " and saw defendant use his fist to punch her in the face. He then watched defendant, also a stranger, choke Susan, and she fell to the ground. Destiny noted that defendant "had her in a headlock. He had his arm -- one of his hands on her neck and also one of his arms wrapped around her neck, choking her." Jeremy heard defendant say to Susan, " 'I will kill you in the broad daylight, bitch.' " He then observed defendant punch and drag Susan "to the gravel." Destiny noted that defendant dragged Susan "by her hair, also with his arm around her neck" onto the gravel "about one house down, so about ten feet." She noted further that Susan appeared to be unconscious "because she wasn't at that point really moving." After seeing all this, Jeremy called 911 and spoke with dispatch. As the three witnesses got

closer, defendant ran up the hill and left. Jeremy, Destiny, and Karlee spoke with Susan and asked if she was okay. Karlee noted that Susan "was very shaken up, she was bleeding on her face, her pants were ripped, she was bleeding from her elbow and her knees and crying[.]"

Shortly after, Greensboro Police Officer Peter Abraham Witmer arrived on the scene. He saw Susan standing in a gravel driveway with Jeremy, Destiny, and Karlee. Susan "was crying, concerned about her safety. She kept asking where is the gentleman that assaulted her, very emotionally distraught." Susan told Officer Witmer what had happened, and he observed various items in the roadway including one of Susan's earrings and her glasses. He estimated that those items were about "100, 120 feet" from where he observed Susan on the gravel driveway when he arrived.

Susan had two cell phones, but she lost one during the assault. About 10 minutes after the incident, Susan received a call from the missing phone. She told one of the paramedics she thought it was defendant calling from her other phone, and she told her not to answer. Susan was taken to the hospital, where she had a CAT scan. The hospital personnel asked if she wanted to stay overnight, but she declined and was released. The following Monday, July 14, Susan went to the District Attorney's office to have pictures taken of her injuries. She also visited Family Services of the Piedmont and saw a counselor for trauma and was still in a counseling program at the time of defendant's trial.

On 8 September 2014, defendant was indicted for kidnapping, injury to personal property, assault by strangulation, and common law robbery. Defendant was tried by a jury beginning on 12 January 2015. At the close of the State's evidence on 15 January 2015, defense counsel moved to dismiss all of the charges "on the grounds that the evidence is insufficient as a matter of law to support a conviction." Defendant's trial counsel then stated: "With respect to the kidnapping, I do not wish to be heard further. With respect to the assault by strangulation, I do not wish to be heard further." Defendant then proceeded to raise arguments regarding common law robbery and injury to personal property.

The State then had an opportunity to respond, and noted first that it was "not going to address the assault by strangulation, kidnapping, since [defense counsel] didn't raise any issues." After hearing the State's response to defendant's arguments regarding the other two charges, the trial court denied the motion. Defendant's motion to dismiss was renewed at the close of all the evidence, and again denied.

On 15 January 2015, at the close of all the evidence, the jury returned verdicts finding defendant not guilty on the common law robbery charge but guilty on the remaining charges of first degree kidnapping, injury to personal property, and assault by strangulation. The trial court arrested judgment on the assault by strangulation and consolidated defendant's convictions for first degree kidnapping and injury to personal property. Defendant was sentenced in the presumptive range to a minimum term of 90 months and a maximum term of 120 months imprisonment in the North Carolina Department of Adult Corrections. Defendant timely appealed to this Court.

II. Motion to Dismiss

A. Standard of Review

Defendant's first argument on appeal is that the trial court erred by denying his motion to dismiss. Specifically, defendant argues that the trial court erred by denying his motion to dismiss the first degree kidnapping charge because the evidence was insufficient as a matter of law to submit the charge to the jury.

> A defendant may move to dismiss a criminal charge when the evidence is not sufficient to sustain a conviction. Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.
>
> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*.

State v. Robledo, 193 N.C. App. 521, 524-25, 668 S.E.2d 91, 94 (2008) (citations, quotation marks, brackets, and ellipses omitted). "In deciding

whether the trial court's denial of [a] defendant's motion to dismiss violated [the] defendant's due process rights, this Court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Penland*, 343 N.C. 634, 648, 472 S.E.2d 734, 741 (1996) (quotation marks omitted).

B. Analysis

Defendant argues that there was insufficient evidence presented at trial to show that (1) the restraint of the victim, Susan, was not inherent to the assault by strangulation; (2) defendant removed Susan for the purpose of terrorizing her; and (3) defendant did not leave her in a safe place or seriously injured her.

N.C. Gen. Stat. § 14-39(a) (2015) defines the offense of kidnapping and provides in pertinent part:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

Subsection (b) of the same statute provides that the offense is first-degree kidnapping "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]" N.C. Gen. Stat. § 14-39(b).

i. Restraint

[1] First, defendant contends that the State presented insufficient evidence to show that the restraint of the victim was separate and distinct from the removal required for assault by strangulation. Defendant argues that any restraint "was inherent to the assault by strangulation." Our Supreme Court has previously explained:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the legislature to make a restraint, which is an inherent, inevitable

> feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.
>
> On the other hand, it is well established that two or more criminal offenses may grow out of the same course of action, as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other (*e.g.*, a breaking and entering, with intent to commit larceny, which is followed by the actual commission of such larceny). In such a case, the perpetrator may be convicted of and punished for both crimes. Thus, there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony. Such independent and separate restraint need not be, itself, substantial in time, under G.S. 14-39 as now written.

State v. Fulcher, 294 N.C. 503, 523-24, 243 S.E.2d 338, 351-52 (1978).

While defendant argues that the restraint in this case did not end until Susan was on the driveway, we agree with the State that the evidence presented at trial shows two separate, distinct restraints sufficient to support convictions for both kidnapping and assault by strangulation. After the initial restraint when defendant choked Susan into unconsciousness, leaving her unresponsive on the ground, defendant then continued to restrain her by holding her hair, wrapping one of his arms around her neck, and dragging her to a new location -- a gravel driveway -- 100 to 120 feet away. The assault by strangulation was complete prior to the additional restraint and movement. Indeed, defendant would have been guilty of that crime even if he had left Susan at the spot where the initial assault took place. Dragging her an additional distance to the driveway added an additional restraint sufficient to support the crime of kidnapping.

Defendant cites to *State v. Simmons*, 191 N.C. App. 224, 662 S.E.2d 559 (2008) in support of his argument that there was no evidence of

restraint other than that which is inherent to the crime of assault by strangulation. In *Simmons*, the defendant was charged with first degree sex offense, first degree kidnapping, and burglary. *Id.* at 227, 662 S.E.2d at 561. This Court vacated the kidnapping conviction because the defendant raped the victim in one room, the guest bedroom, and "[t]here was no evidence of confinement, restraint, or removal, other than that which is inherent to the offense of rape itself." *Id.* at 232, 662 S.E.2d at 564. Here, by contrast, defendant was charged not with a sex offense but rather with assault by strangulation, followed by kidnapping. Defendant first strangled Susan, and then dragged her to another location, which is evidence of additional "confinement, restraint, or removal," unlike the *Simmons* case. *Id.*

Defendant also cites to *State v. Braxton*, 183 N.C. App. 36, 643 S.E.2d 637 (2007) and contends that the evidence in the present case, unlike *Braxton*, supported only the offense of assault by strangulation. We disagree. This Court concluded in *Braxton* that the evidence supported a conviction for both kidnapping and assault by strangulation where "there was sufficient evidence of defendant's restraint of [the victim] to satisfy the elements of first degree kidnapping[]" and the defendant's "act of pinning [the victim] on the bed by pushing his knee into her chest, his grabbing of her hair, and his preventing her from leaving the motel room were separate and independent acts from his assaulting her by means of strangulation." *Id.* at 41, 643 S.E.2d at 641.

We conclude that the same result from *Braxton* stands here. The State presented substantial evidence indicating that after restraining Susan while strangling her, defendant took the additional step after she was unconscious to restrain her further by dragging her across the street. Accordingly, we conclude that the State's evidence at trial showed that defendant restrained Susan at two separate and distinct points in time, sufficient to support a conviction for both assault by strangulation and kidnapping.

ii. Purpose

[2] Next, defendant contends that the evidence presented at trial was insufficient to support the State's theory that defendant's purpose was to terrorize Susan by restraining or removing her. Defendant points out that "the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize her." *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986). Thus, defendant claims the State's chosen theory was that defendant's purpose was to terrorize the victim, but the evidence was

insufficient to support such theory. Specifically, defendant claims that "there was no statement by [defendant] which would tend to support an argument that he had the specific intent to terrorize [Ms.] Goolsby." Yet the State's evidence showed that defendant did have such specific intent. Multiple witnesses heard defendant saying to Susan something along the lines of: "I'm gonna kill you, bitch. I'm gonna kill you in broad daylight, bitch. I'm gonna kill you."

Defendant cites to multiple cases where this Court has found that the restraint, confinement, or movement of a person has been done for the sole purpose of terrorizing a victim, and argues that this case does not rise to the level of those cases. *See, e.g.*, *State v. Bonilla*, 209 N.C. App. 576, 580, 706 S.E.2d 288, 292 (2011) (defendant beat and kicked victim, "bound [his] hands and feet and placed a rag in his mouth[,]" threatened to kill him, and "forced a bottle into his rectum."); *State v. Rodriguez*, 192 N.C. App. 178, 188, 664 S.E.2d 654, 660 (2008) (defendant physically abused victims by dunking under water, burning, and dripping candle wax, and emotionally abused others by making them listen to the screams and smells of other victims); *State v. Jacobs*, 172 N.C. App. 220, 226, 616 S.E.2d 306, 311 (2005) (defendant, among other things, approached victim with rifle, grabbed by her hair, forced into vehicle, placed in headlock and choked her, then hit her with his fists).

But even if defendant's actions were arguably less horrific than some of the acts of defendants in the cases noted above, defendant's argument ignores the evidence of his clear, direct intent in this case to terrorize Susan. Defendant unequivocally threatened her life and his actions demonstrated that his threat was very real and immediate. Like the defendant in Jacobs, defendant assaulted Susan, placed her in a headlock, and choked her. Defendant claims that "[t]errorizing is defined as 'more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." The evidence shows that Susan was in a state of intense fright and apprehension. Several witnesses heard her yelling for help and saw defendant punching and choking her, rendering her unconscious, and then dragging her across the street. Accordingly, we find that the State presented sufficient evidence supporting its theory that defendant's purpose was to terrorize his victim.

iii. Safe Place or Serious Injury

[3] Finally, defendant claims that the evidence at trial was insufficient to support the element that elevated this kidnapping to first degree: that the victim was not left in a safe place or was not seriously injured.

Defendant points out that "safe place" is not defined by N.C. Gen. Stat. § 14-39(b) and that "our case law in North Carolina has not set out any test or rule for determining whether a release was in a 'safe place.' " *State v. Sakobie*, 157 N.C. App. 275, 282, 579 S.E.2d 125, 130 (2003). Instead, "the cases that have focused on whether or not the release of a victim was in a safe place have been decided by our Courts on a case-by-case approach, relying on the particular facts of each case." *Id.* at 280, 579 S.E.2d at 129.

Defendant argues that leaving a victim in a safe place requires a "conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." *State v. Jerrett*, 309 N.C. 239, 262, 362 S.E.2d 339, 351 (1983). According to defendant, "[t]he cases indicate that a place will be considered safe if it is familiar to the victim, or protects the victim, or affords the victim ready access to rescue." Defendant's argument is based upon drawing rather far-fetched inferences favorable to his position from the evidence. He claims that he left Susan "on the side of Grove Street, out of the roadway, a little after 5 p.m."; "there were three witnesses in close proximity";' "Susan was familiar with the street"; and "Susan also had a cell phone[,]" so she was left in a safe place. We disagree. The reasonable inferences from the evidence are contrary to those urged by defendant. Whether she was familiar with the street or not, an unconscious person lying on the side of a roadway or in the middle of a driveway where a car may hit her is not safe. Defendant dragged Susan to the middle of a gravel driveway, where he left her, unconscious and injured. He was not leaving her there for the purpose of consigning her to the care of the three witnesses who happened to be nearby; he was running away because they saw him. If they had not, he may have finished carrying out his threat. Even if defendant left her with one cell phone, she had started with two, and defendant took one, perhaps not realizing that she had another he missed. He did not leave her in a place of safety or protection.

Furthermore, even if we were to accept defendant's interpretation of a safe place, defendant's argument would still fail since the statute requires finding *either* that the victim was not left in a safe place *or* that the victim suffered serious bodily injuries (or was sexually assaulted, which is not at issue here). N.C. Gen. Stat. § 14-39(b). Although defendant attempts on appeal to classify Susan's injuries as not serious, the evidence shows otherwise. The State presented photographs and testimony showing that the victim suffered serious injuries, including cuts and bruises to her face, abrasions to her elbows and knees, thumbprints, fingerprints, and scratches to her throat, which required treatment and

evaluation in the emergency room. She also suffered from serious emotional trauma which required therapy for many months, even continuing through the time of the trial.

We conclude, therefore, that the State presented more than sufficient evidence to support all of the essential elements of the first degree kidnapping charge. Accordingly, the trial court did not err when it denied defendant's motion to dismiss.

III. Jury Instruction

A. Plain Error

iv. Standard of Review

[4] Next, defendant argues that the trial court erred by failing to instruct the jury on false imprisonment. Since defendant did not raise an objection to the instructions with the court below, the issue was not preserved for appeal. Accordingly, defendant asks that we review for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

v. Analysis

Defendant claims that the trial court should have instructed the jury on the lesser-included offense of false imprisonment. As defendant points out, while false imprisonment is a lesser-included offense of kidnapping, the difference between the offenses is whether the act was committed with the intent to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39(a). Here, that purpose was "[d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed . . . ." N.C. Gen. Stat. § 14-39(a)(3).

In support of this argument, defendant claims that he did not restrain and/or remove the victim "for the purpose of terrorizing her." In addition, defendant argues that even if this Court found that

he did so restrain Susan, defendant's purpose was "unclear" and "the jury could have found that the restraint and/or removal was for a purpose *other than to terrorize* [Susan.]" (Emphasis added). Whatever purpose defendant may have had in his own mind at that moment, his words and actions spoke quite clearly. Several witnesses heard defendant threaten to kill Susan. Specifically, defendant was heard saying: "I'm gonna kill you in broad daylight, bitch." His actions showed this was not an idle threat. The evidence clearly supported a conclusion that defendant had the purpose as described in N.C. Gen. Stat. § 14-39(a)(3) to seriously harm or terrorize Susan.

Moreover, defendant has failed to show that the trial court's instructions amounted to plain error. We are not convinced that this is such "exceptional case" where absent the lack of instruction on false imprisonment, the jury probably would have reached a different result. The jury had ample evidence of defendant's guilt, through the victim and multiple unbiased eyewitnesses. We conclude, therefore, that defendant has failed to show the lack of instruction on false imprisonment amounted to plain error.

B. Ineffective Assistance of Counsel

Finally, defendant argues that he received ineffective assistance of counsel ("IAC") because his trial counsel failed to request a jury instruction on false imprisonment.

> To prevail in a claim for IAC, a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. As to the first prong of the IAC test, a strong presumption exists that a counsel's conduct falls within the range of reasonable professional assistance. Further, if there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Smith, 230 N.C. App. 387, 390, 749 S.E.2d 507, 509 (2013) (citations, quotation marks, and brackets omitted), *cert. denied*, 367 N.C. 532, 762 S.E.2d 221 (2014).

Since we have found that the trial court did not err in failing to instruct on false imprisonment, we need not address this final argument

in more detail, as defendant cannot show either that his counsel's performance was deficient or that he was prejudiced. Accordingly, we find defendant was not denied effective assistance of counsel.

IV. Conclusion

In sum, we conclude that the trial court did not err when it denied defendant's motion to dismiss for insufficient evidence, as the State's evidence at trial presented ample evidence to establish each element of first degree kidnapping. We also find that the trial court did not commit plain error by not *sua sponte* instructing the jury on false imprisonment where substantial evidence showed that defendant threatened and terrorized her. Since the trial court did not err by not instructing the jury on false imprisonment, we further find that defendant was not denied effective assistance of counsel for failing to raise such grounds below. Accordingly, we hold that the trial court committed no error.

NO ERROR.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
GYRELL SHAVONTA LEE

No. COA 15-1352

Filed 2 August 2016

1. Homicide—second-degree murder—jury instructions—no duty to retreat—shooting in public street

On appeal from defendant's conviction for second-degree murder, the Court of Appeals found no plain error in the trial court's omission of a no duty to retreat jury instruction because the shooting occurred in a public street several houses from defendant's residence, and the evidence was such that a jury could reasonably find a defender was justified in the use of self-defense in any other setting.

2. Homicide—second-degree murder—jury instructions—self-defense

On appeal from defendant's conviction for second-degree murder, the Court of Appeals found no plain error in the trial court's instruction to the jury that defendant was not entitled to self-defense

if he was the aggressor because there was conflicting evidence as to which party was the aggressor.

3. Homicide—second-degree murder—jury instructions—lawful defense of another—omitted—threat of harm concluded

On appeal from defendant's conviction for second-degree murder, the Court of Appeals found no plain error in the trial court's omission of a jury instruction on lawful defense of another because when defendant shot the victim, he was aware that the threat of harm to his companion had concluded.

4. Homicide—second-degree murder—exclusion of testimony—independent evidence of aggression

On appeal from defendant's conviction for second-degree murder, the Court of Appeals found no plain error where the trial court excluded a statement made on the witness stand by defendant's uncle that he overheard defendant saying, "[W]ell, why can't you-all just get along?" There was independent evidence upon which the jury could have based a finding that defendant acted as an aggressor in the moments before he shot the victim.

5. Appeal and Error—length of jury deliberations—plain error review not applicable

On appeal from defendant's conviction for second-degree murder, the Court of Appeals rejected defendant's argument that there was plain error when trial court required the jury to deliberate for an unreasonable length of time. There was no plain error because that standard of review is limited to jury instructions and evidentiary matters, neither of which applied to the trial court's decision to order further deliberation.

6. Homicide—second-degree murder—mitigating factors—sentence in presumptive range

On appeal from defendant's conviction for second-degree murder, the Court of Appeals rejected defendant's argument that the trial court erroneously failed to consider mitigating factors at his sentencing. The trial court sentenced defendant within the presumptive range and was not required to make any findings regarding mitigation.

Appeal by Defendant from judgment dated 12 July 2015 by Judge J. Carlton Cole in Superior Court, Pasquotank County. Heard in the Court of Appeals 6 June 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Paul M. Green, for Defendant.

McGEE, Chief Judge.

Gyrell Shavonta Lee ("Defendant") appeals his conviction for second-degree murder. Defendant contends that the trial court erred by: (1) omitting a no duty to retreat instruction from its jury instructions; (2) instructing the jury it could find Defendant was the initial aggressor despite a lack of evidence to support that theory; (3) not instructing the jury on the lawful defense of a third person; (4) excluding a non-hearsay statement made by Defendant; (5) violating a statutory mandate by requiring the jury to deliberate for an unreasonable length of time; and (6) not considering evidence of aggravating or mitigating factors in sentencing Defendant as mandated by statute. We find no error.

I. Background

Defendant celebrated New Year's Eve on 31 December 2012 in Elizabeth City, where Defendant lived with his brother. Shortly after midnight, Defendant exited a home across the street from his residence and encountered several individuals, including Quinton Epps ("Epps") and Defendant's cousin, Jamieal Walker ("Walker"), congregated around a blue 1993 Grand Marquis automobile. Epps and Walker were engaged in a heated verbal dispute. Walker seemed "very agitated" and told Defendant that Epps "felt verbally disrespected." Epps left in the Grand Marquis, and Defendant went inside his residence.

About twenty minutes later, a black Cadillac STS vehicle ("the Cadillac") approached Defendant's residence. Defendant and Walker were standing "beside the house . . . in the front yard." Defendant saw Epps get out of the Cadillac's back passenger side. Walker and Epps began arguing, and Defendant observed that Epps was "verbally disrespectful [and] verbally aggressive." Epps got back into the Cadillac and it sped away.

Approximately twenty minutes later, a burgundy Mitsubishi Galant ("the Mitsubishi") drove up alongside Defendant's backyard, stopping briefly. Defendant retrieved a .45 caliber handgun from his car and concealed it on his person, "[out of] instinct," although Defendant believed "Epps . . . wasn't a threat at th[at] time." The Mitsubishi pulled off, circled

the block, and parked two or three houses down from Defendant's residence in front of a cemetery across the street, at the intersection of Shepard Street and Herrington Road. Epps and several other individuals exited the Mitsubishi.

Defendant and Walker walked down the street to talk to Epps. Epps and Walker began arguing. Defendant saw Epps had a gun behind his back. The argument escalated, and Walker punched Epps in the face. After being punched, Epps leaned back, grabbed the hood of Walker's jacket, and shot Walker in the stomach. When Epps shot Walker a second time, Defendant withdrew his handgun. Walker was able to get up, and Epps continued shooting at Walker as he attempted to flee. After Epps fired a final shot at Walker, Epps turned and pointed his gun at Defendant. Before Epps could fire, Defendant shot Epps several times. Epps died as a result of a gunshot wound to his torso inflicted by Defendant.

Police Chief Eddie Buffaloe ("Chief Buffaloe") and other officers from the Elizabeth City Police Department ("ECPD") arrived at the scene of the shooting at approximately 2:30 a.m., after noticing a crowd gathered at the intersection of Shepard Street and Herrington Road. Chief Buffaloe observed an individual, later identified as Epps, lying in the road with apparent gunshot wounds. After Epps was transported from the scene, ECPD K-9 Officer David Sutton performed a search of the area and discovered Defendant's .45 caliber handgun, its magazine empty, beneath a trash can located behind Defendant's residence.

ECPD Crime Scene Investigator Leroy Owen ("Investigator Owen") was also called to the scene. Investigator Owen did a walk-through, marking potential evidence and taking photographs. Among other things, Investigator Owen collected a spent, bloodied bullet from the spot where Epps had been lying on the ground; five 9 millimeter shell casings; and eight .45 caliber shell casings. Investigator Owen noticed a "divot" in the ground where he found the spent bullet. Subsequent ballistics testing matched the spent bullet, the .45 caliber bullet casings, and the bullets removed from Epps's body during an autopsy, with Defendant's handgun. Walker's body was discovered several hours later approximately 120 yards from where Epps's body was found. Defendant was indicted for first-degree murder on 7 January 2013.

At trial, the State's sole eyewitness, Quentin Jackson ("Jackson"), testified that, shortly after leaving work at 2:00 a.m. on 1 January 2013, he drove up to a stoplight on Shepard Street and saw Epps and Walker running nearby and then simultaneously fall to the ground. Jackson

testified he saw "one guy reach over on the guy that was falling and shoot [him], and then . . . one get up and run and one continuously get shot." According to Jackson, Walker was able to run away and Epps remained on the ground, at which point Defendant "came out of nowhere," stood over Epps, and began repeatedly shooting Epps at close range. Jackson also testified that another unidentified individual was shooting at Defendant, but that Epps never aimed at, or shot, Defendant.

ECPD Officer Joseph Felton ("Officer Felton") interviewed Jackson at the scene on the night of the shooting, and Jackson described seeing "five black guys run up to the victim and shoot[] him point blank." When asked by Officer Felton to describe the shooter, Jackson said it was "a big dude with long dreads wearing an orange sweater" who had taken off running after the shooting. Defendant did not have dreadlocks at the time of the shooting. Jackson later denied ever having given this account. Defendant maintained that he shot Epps only after Epps pointed a gun at Defendant, and Defendant denied continuing to shoot after seeing Epps fall to the ground. Defendant was found guilty of second-degree murder and sentenced to a term of 192 to 243 months' imprisonment. Defendant appeals.

II. Omission of No Duty to Retreat Jury Instruction

A. Standard of Review

[1] Defendant first argues the trial court erroneously omitted a no duty to retreat instruction from its jury instructions. The "[d]efendant did not object to the . . . instruction given by the trial court, and our review is therefore limited to plain error." *State v. Withers*, 179 N.C. App. 249, 257, 633 S.E.2d 863, 868 (2006). To show plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)) (internal quotation marks omitted). We apply plain error "cautiously and only in the exceptional case." *Id.*

Defendant cites *Withers* for the proposition that "[a]lthough there was no objection, the omission of part of [the pattern instruction] is preserved for *de novo* review because the trial court stated it would instruct according to the pattern." Defendant misapplies *Withers*. The portion of that opinion Defendant relies upon addressed the trial court's failure to

"instruct [the jury] on not guilty by reason of self-defense *as a possible verdict* in its final mandate to the jury." 179 N.C. App. at 255, 633 S.E.2d at 867 (emphasis added). In the present case, the trial court properly instructed the jury that "if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, . . . it will be your duty to return a verdict of not guilty." The *Withers* defendant also alleged the trial court erred by failing to instruct the jury, as part of its self-defense instruction, that the defendant did not have a duty to retreat. *Id.*, 179 N.C. App. at 256, 633 S.E.2d at 868. On that issue, this Court concluded that because the defendant did not object to the self-defense instruction, review was limited to plain error. *See also State v. Davis*, 177 N.C. App. 98, 102, 627 S.E.2d 474, 477 (2006) (holding that "[s]ince defendant neither requested the [no duty to retreat] instruction nor objected to the court's failure to give the instruction, we review the assignment of error under the plain error standard.").

More recently, in *State v. Eaton*, ___ N.C. App. ___, 781 S.E.2d 532, 2016 WL 47973 (2016) (unpublished), this Court rejected a similar argument, *i.e.*, that an instructional issue was preserved despite the defendant's lack of objection because the trial court indicated it would give a specific pattern instruction and then omitted a portion of the pattern instruction from its instructions to the jury. In the present case, as in *Eaton*,

> the trial court did not merely indicate that it would instruct pursuant to [the pattern instruction] and then fail to instruct as indicated, as [D]efendant insinuates. . . . The trial court . . . repeated the instructions it intended to offer. The trial court never indicated it would give the portion of [the pattern instruction] which [D]efendant now contends was erroneously omitted and [D]efendant did not take issue with the proposed instruction. . . . [T]he trial court instructed the jury precisely as proposed, [and] . . . the trial court's reference to the pattern instruction did not preserve the issue for appeal absent an objection by defendant.

Id., 2016 WL 47973 at *11.

B. Analysis

Defendant contends the omission of a no duty to retreat instruction amounted to plain error because, if the jury had been instructed on the right to stand one's ground in a place where one has a lawful right to be,

Defendant "probably would not have been convicted of second-degree murder." We disagree.

"[W]here supported by the evidence in a claim of self-defense, an instruction negating [a] defendant's *duty to retreat* in his home or premises must be given even in the absence of a request by [the] defendant." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (emphasis in original); *see also Davis*, 177 N.C. App. at 102, 627 S.E.2d at 477 (finding that "[a] comprehensive self-defense instruction requires instructions that a defendant is under no duty to retreat *if the facts warrant it*[.]" (emphasis added)). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant." *Withers*, 179 N.C. App. at 257, 633 S.E.2d at 868 (quoting *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (alteration in original)).

The trial court in this case instructed the jury, pursuant to N.C.P.I.—Crim. 206.10[1] and as agreed upon by the parties, that Defendant "would be not guilty of any murder or manslaughter if [he] acted in self-defense and . . . was not the aggressor in provoking the fight and did not use excessive force under the circumstances." The court omitted the following sentence found in N.C.P.I.—Crim. 206.10: "Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be." That sentence in the pattern instructions includes the following footnote: "See N.C.P.I.—Crim. 308.10."[2] In turn, N.C.P.I.—Crim. 308.10, the pattern instruction for self-defense where retreat is at issue, "is to be used if the evidence shows that the defendant was at a place where the defendant had a lawful right to be . . . when the assault on the defendant occurred" and that the defendant was not the aggressor. Defendant argues that, having undertaken to instruct the jury according to N.C.P.I.—Crim. 206.10, the trial court erroneously omitted the disputed sentence of the pattern instruction, and was further required to read N.C.P.I.—Crim. 308.10 in its entirety. These arguments are without merit.

Both the omitted sentence from N.C.P.I.—Crim. 206.10, and N.C.P.I.—Crim. 308.10 generally, refer specifically to "a place where the

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1. N.C.P.I.—Crim. 206.10 (2014) is the pattern instruction for "First degree murder where a deadly weapon is used, covering all lesser included homicide offenses and self-defense."

2. We note that a previous version of the footnote read, "*Where the evidence raises the issue of retreat*, see alternative paragraph set forth in N.C.P.I.—Crim. 308.10." (emphasis added). *See Morgan*, 315 N.C. at 643, 340 S.E.2d at 94-95.

defendant has a lawful right to be." *See also* N.C. Gen. Stat. § 14-51.2(f) (2015) ("A *lawful occupant within his or her home*, *motor vehicle*, *or workplace* does not have a duty to retreat from an intruder in the circumstances described in this section." (emphasis added)); N.C. Gen. Stat. § 14-51.3(a) (2015) ("[A] person is justified in the use of deadly force and does not have a duty to retreat *in any place he or she has the lawful right to be* if either of the following applies . . . ." (emphasis added)). Thus, Defendant's argument, that a different verdict probably would have been reached but for the omission of a no duty to retreat jury instruction, presumes Defendant was in a place where he had a lawful right to be, for purposes of a no duty to retreat defense, when he shot Epps.

Defendant contends he "was where he had a right to be—the street by his home—when he was confronted by Epps, who had a pistol in his hand and had just fatally wounded [Walker]." However, the right to stand one's ground is more limited than Defendant suggests. Our Supreme Court has stressed that "where the person attacked is not in *his own dwelling*, *home*, *place of business*, *or on his own premises*, then the degree of force he may employ in self-defense is conditioned by the type of force used by his assailant." *State v. Pearson*, 288 N.C. 34, 43, 215 S.E.2d 598, 605 (1975) (emphasis added). *Compare with State v. Johnson*, 261 N.C. 727, 729–30, 136 S.E.2d 84, 86 (1964) (holding that "when a person . . . is attacked *in his own home or on his own premises*, the law imposes on him no duty to retreat before he can justify his fighting in self defense [sic], regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm." (emphasis added)); *Withers*, 179 N.C. App. at 259, 633 S.E.2d at 870 (finding trial court erred by failing to instruct the jury on duty to retreat where, in light of the facts in evidence, "the jury could have found that defendant . . . *was attacked in his home or on his premises*." (emphasis added)); *State v. Everett*, 163 N.C. App. 95, 102, 592 S.E.2d 582, 587 (2004) (concluding defendant was entitled to a no duty to retreat instruction where "[t]he evidence . . . [was] legally sufficient to support a conclusion that defendant was attacked by her husband in her own home[.]").

The unqualified no duty to retreat defense is also limited by statute to "[a] lawful occupant *within his or her home*, *motor vehicle*, *or workplace*[.]" N.C.G.S. § 14-51.2(f) (emphasis added). "Home" is defined as

> [a] building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or

> permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence.

N.C. Gen. Stat. § 14-51.2(a)(1) (2015). *See also State v. Rhodes*, 151 N.C. App. 208, 214, 565 S.E.2d 266, 270 (2002) (quoting *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955)) (noting that "[i]n North Carolina, 'curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.' "); *and see State v. Williams*, ___ N.C. App. ___, ___, 784 S.E.2d 232, 234 (2016) (concluding that "the term 'property' [as used in statute addressing violations of domestic violence protective orders] is not limited to buildings or other structures affixed to land but also encompasses the land itself.").

We recognize that N.C. Gen. Stat. § 14-51.3(a)(1) provides in part that

> a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . . [h]e or she reasonably believes that [deadly] force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

N.C. Gen. Stat. § 14-51.3(a)(1) (2015). However, to the extent this language can be characterized as extending the no duty to retreat defense to *any* public place, it is conditioned upon the reasonableness of a person's belief that the use of deadly force was necessary under the circumstances. In other words, the right to stand one's ground in "any public place" is conditioned as an initial matter upon whether the defender was justified in the use of self-defense without regard to the physical setting in which the confrontation occurred. This is consistent with case law predating N.C.G.S. § 14-51.3(a)(1), which the General Assembly enacted in 2011. *See, e.g.*, *State v. Beal*, 181 N.C. App. 100, 102, 638 S.E.2d 541, 543 (2007) (observing that in order to "determine whether the evidence presented supported defendant's proposed instruction that he had no duty to retreat[,] . . . [we must] first define the law of self-defense . . . [.]"). he statutory presumption of reasonableness remains limited to the use of defensive (including deadly) force in defending one's home, motor vehicle, or workplace. *See* N.C. Gen. Stat. § 14-51.3(a)(2) (2015); N.C. Gen. Stat. § 14-51.2 (2015).

In the present case, Defendant received a self-defense instruction consistent with the language in N.C.G.S. § 14-51.3(a)(1). The jury was instructed that Defendant

> would be excused of first degree murder and second degree murder on the ground of self-defense if, first, [Defendant] believed it was necessary to kill the victim in order to save [Defendant] from death or great bodily harm. Second, [if] the circumstances as they appeared to [Defendant] at the time were sufficient to create such a belief in the mind [of] a person of ordinary firmness.

The statutory reference to "any place [one] has a lawful right to be" does not change our essential analysis regarding Defendant's duty to retreat, since the right to use self-defense is not limited spatially, and the statutory presumption favoring a no duty to retreat instruction remains limited to one's home, motor vehicle, or workplace. Because Defendant was not within his home or premises, motor vehicle, or workplace, any right to "stand his ground" stemmed from the two above-described elements of self-defense, and Defendant received instructions to that effect.

Defendant was not entitled to a presumption that his use of deadly force was reasonable under the circumstances. There was no evidence that Epps ever entered Defendant's home or yard. It is undisputed that when Defendant shot Epps, Defendant was standing in the intersection of a public street several houses down from his residence, not within his home, motor vehicle, or workplace. Where the evidence is such that a jury could reasonably find a defender was justified in the use of self-defense in any other setting, a no duty to retreat instruction does not change the analysis. Accordingly, even considering the evidence in the light most favorable to Defendant, we are unable to conclude that, if the trial court's instruction on self-defense had included a no duty to retreat instruction, Defendant "probably would not have been convicted of second-degree murder." This argument is overruled.

III. "Aggressor" Jury Instruction

A. Standard of Review

[2] Defendant next challenges the trial court's instruction to the jury that "[D]efendant [was] not entitled to the benefit of self-defense if . . . [D]efendant was the aggressor with the intent to kill or inflict serious bodily injury upon the deceased." Because Defendant failed to raise this objection below, we review for plain error.

B. Analysis

Defendant contends the trial court erroneously instructed the jury that it could find Defendant was the aggressor because, Defendant argues, there was no evidence to support such a finding. Specifically,

Defendant challenges the following portion of the trial court's aggressor instructions:

> One enters a fight voluntarily if one uses towards one's opponent abusive language which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered a fight the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so.
>
> In other words, a person who uses defensive force is justified if the person withdraws in good faith from physical contact with the person who was provoked and indicates clearly that he intends to withdraw and terminate the use of force but the person who was provoked continues or resumes the use of force. A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using the defensive force reasonably believes that he was in imminent danger of death or serious bodily harm. The person using defensive force had no reasonable means to retreat and the use of force likely caused the -- [sic] and the use of force likely to cause death or serious bodily harm was the only way to escape danger.
>
> The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor with the intent to kill or inflict serious bodily injury upon the deceased.

According to Defendant, his actions of "arming [himself] in anticipation of a possible conflict then declining to withdraw from a place [he had] a right to be" (1) were the only possible bases for a finding that he was the aggressor in his confrontation with Epps, and (2) did not constitute "*any* evidence that [Defendant] was the aggressor within the law of self-defense." (emphasis in original)). We disagree, based on our conclusion that there was other evidence from which a reasonable jury could find Defendant acted as the aggressor. *See State v. Effler*, 207 N.C. App. 91, 97-98, 698 S.E.2d 547, 551-52 (2010) (concluding aggressor instruction was not plain error where sufficient evidence was presented for a reasonable jury to conclude defendant was the aggressor).

"Broadly speaking, [a] defendant can be considered the aggressor when [the defendant] 'aggressively and willingly enters into a fight

without legal excuse or provocation.' " *State v. Vaughn*, 227 N.C. App. 198, 202, 742 S.E.2d 276, 279 (2013) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)). Here, there was no evidence that, prior to the fatal shootings, Defendant was directly provoked by Epps. At most, Defendant testified, Epps was generally "verbally . . . disrespectful." *See State v. Mize*, 316 N.C. 48, 54, 340 S.E.2d 439, 443 (1986) (holding defendant was not entitled to a jury instruction on self-defense in part because, "although defendant heard indirectly of threats from the victim, the latter had neither assaulted nor threatened [defendant] directly.").

Defendant conceded that when Defendant armed himself with a gun, Epps "wasn't a threat at the time." Defendant voluntarily accompanied Walker down the street to confront Epps. Defendant did not retreat[3] despite immediately noticing that Epps had a gun, observing an escalating confrontation between Epps and Walker, and witnessing Epps shoot Walker. Defendant testified he "withdrew" his gun while Epps was still shooting Walker. Defendant also testified that "right after [Epps] shot [Walker], [Epps] looked at me and pointed [his] gun and [then] I shot him." Thus, it was unclear from Defendant's testimony whether Defendant was already aiming his gun at Epps when Epps pointed a gun at Defendant. Further, the State's witness, Quentin Jackson, testified that he observed Defendant "[come] out of nowhere" and shoot Epps while Epps was on the ground and before Epps ever had an opportunity to aim a gun at Defendant. *See State v. Locklear*, 165 N.C. App. 905, 602 S.E.2d 728, 2004 WL 1824322 at *3 (2004) (unpublished) (noting that "[i]t is a well established [sic] rule in this State that a jury is the sole judge of a witness' credibility, and it may believe some, all, or none of what a witness says.").

"When there is conflicting evidence as to which party was the aggressor, the jury, as the finders of fact, are [sic] entitled to determine which of the parties, if either, is the aggressor." *State v. Norris*, ___ N.C. App. ___, 768 S.E.2d 650, 2015 WL 67197 at *3 (2015) (unpublished) (citing *State v. Cannon*, 341 N.C. 79, 82-83, 459 S.E.2d 238, 241 (1995)); *see also State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991) (noting that "[c]ontradictions in the evidence are for the jury to decide.").

In cases cited by Defendant, "'[t]here [was] no conflict in evidence as to which of the parties was the aggressor. [The d]efendant did not

3. As discussed in Part II of this opinion, Defendant was not entitled to a no duty to retreat instruction, because he was not within his home or curtilage when he fatally shot Epps.

start the fight.' " *Vaughn*, 227 N.C. App. at 202, 742 S.E.2d at 279 (quoting *State v. Tann*, 57 N.C. App. 527, 530, 291 S.E.2d 824, 827 (1982) (alterations in original)). *See also State v. Temples*, 74 N.C. App. 106, 109, 327 S.E.2d 266, 268 (1985); *State v. Ward*, 26 N.C. App. 159, 163, 215 S.E.2d 394, 396-97 (1975). In the present case, by contrast, there was conflicting evidence about the sequence of events culminating in Epps's death, and the extent of Defendant's role in precipitating the shooting. Accordingly, the trial court's aggressor instructions were not plain error.

IV. Jury Instruction on Lawful Defense of a Third Person

A. Standard of Review

[3] Defendant next contends the trial court erred by omitting a jury instruction on lawful defense of another. Because Defendant failed to request such a jury instruction, we review for plain error.

B. Analysis

> In general one may kill in defense of another if one [reasonably] believes it to be necessary to prevent death or great bodily harm to the other . . . to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing.

State v. Perry, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (quoting *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994)). However,

> [i]f there is no evidence from which a jury reasonably could find that the defendant in fact believed that it was necessary to kill to protect another from death or great bodily harm, the defendant is not entitled to have the jury instructed on either perfect or imperfect defense of another.

Id., 338 N.C. at 467, 450 S.E.2d at 477; *see also State v. McKoy*, 332 N.C. 639, 644, 422 S.E.2d 713, 716 (1992) (stating that "[i]n order to have either perfect or imperfect self-defense, the evidence must show that it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself or another from death or great bodily harm. It must also appear that the defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.").

Defendant's testimony and other custodial statements established that Epps was no longer shooting at Walker when Defendant shot Epps, and Walker was already fatally wounded. Defendant testified that

"[a]s soon as [Epps] got done shooting Walker[,] [Epps] looked at me and he drew his gun and I shot him." Defendant later told police he "was scared, and [Epps] pointed that gun [at me]. He had already shot my cousin, and then he was trying to shoot me." Defendant also said he "didn't have a clear shot" until Epps "fired at [Walker] one last time" and Walker "snatched away." In telephone conversations from jail, Defendant indicated he shot Epps in his own defense, not to protect Walker from death or great bodily harm, and "to make sure [Epps] couldn't shoot [any]body else." Notwithstanding Defendant's contention that he "drew" his gun while Epps was still shooting Walker, Defendant's claim that he shot Epps in Walker's defense fails as a matter of law because when Defendant actually shot Epps, Defendant was aware that the threat of harm to Walker had concluded.

The cases Defendant cites, in which defendants were entitled to defense of another instructions, are unavailing. In each of those cases, the defendant committed the defensive act(s) when the perceived harm to another was either imminent or in progress. *See*, *e.g.*, *State v. Moore*, 363 N.C. 793, 797-98, 688 S.E.2d 447, 450 (2010); *State v. Jones*, 299 N.C. 103, 105-06, 261 S.E.2d 1, 4 (1980); *State v. Hornbuckle*, 265 N.C. 312, 313-14, 144 S.E.2d 12, 13 (1965); *State v. Clark*, 134 N.C. 698, 47 S.E. 36, 37 (1904), *overruled on other grounds by State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337 (1965); *State v. Patterson*, 50 N.C. App. 280, 282-83, 272 S.E.2d 924, 925-26 (1981); *State v. Graves*, 18 N.C. App. 177, 178-80, 196 S.E.2d 582, 583-85 (1973). *See also State v. Norman*, 324 N.C. 253, 261, 378 S.E.2d 8, 13 (1989) (observing that our Supreme Court "ha[s] sometimes used the phrase 'about to suffer' interchangeably with 'imminent' to describe the immediacy of the threat that is required to justify killing in self-defense." (citing *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927))).

Further, evidence that "[e]verybody [was] running, ducking and screaming and scared" did not entitle Defendant to an instruction on defense of another (or others). *See State v. Ramseur*, 226 N.C. App. 363, 376, 739 S.E.2d 599, 607-08 (2013) (concluding evidence that a group of individuals had been "afraid" and subjected to verbal threats by the deceased was insufficient to "support a reasonable belief by [the] [d]efendant that . . . the people . . . were in *imminent* danger of death or great bodily harm unless [the] [d]efendant fired on [the deceased]." (emphasis in original)).

In sum, the evidence failed to demonstrate that Defendant shot Epps "to prevent death or great bodily harm" to Walker, and did not support a reasonable belief by Defendant that it was necessary to shoot Epps to

prevent imminent death or harm to others. Accordingly, Defendant was not prejudiced by the omission of a jury instruction on defense of others.

V. Exclusion of Witness Testimony

[4] Defendant next argues the trial court erroneously excluded a statement made on the witness stand by Defendant's uncle, Charles Bowser ("Bowser").

A. Standard of Review

Our Supreme Court has held that

> [i]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. . . . [Additionally,] the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Jacobs, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010) (quoting *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007)).

When Bowser was asked to recount Epps's and Walker's second confrontation on the night they were killed, Bowser testified he overheard Defendant say to Epps and Walker, "[W]ell, why can't you-all just get along?" The State's objection to this statement was sustained. Defense counsel made no attempt to establish the significance or admissibility of the excluded statement, "or request that the witness be allowed to answer outside the presence of the jury."[4] *Id.*, 363 N.C. at 819, 689 S.E.2d at 862. Thus, Defendant failed to preserve this argument for appellate review. *See, e.g.*, *Raines*, 362 N.C. at 20, 653 S.E.2d at 138 (concluding exclusion of evidence was not preserved for appellate review where "the trial court sustained the prosecution's objection [and] [d]efense counsel then proceeded to other questions without making an offer of proof or requesting that the witness be allowed to answer outside the presence of the jury."); N.C. R. App. P. 10(a)(1) (2015) (providing that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if . . . not

4. By contrast, when the State objected to a similar line of questioning during the direct examination of defense witness Michael Gregory, defense counsel did request a voir dire hearing outside the presence of the jury.

apparent from the context."). Further, even if reviewable, "'the failure of a trial court to admit or exclude . . . evidence will not result in the granting of a new trial absent a showing by defendant that a reasonable possibility exists that a different result would have been reached absent the error.' " *State v. Hernandez*, 202 N.C. App. 359, 363, 688 S.E.2d 522, 525 (2010) (quoting *State v. Weeks*, 322 N.C. 152, 170, 367 S.E.2d 895, 906 (1988)).

B. Analysis

Defendant contends the excluded testimony was "the only evidence of the actual words spoken by [Defendant] that night [of the shootings]" and showed Defendant was "trying to calm the hostilities, not [acting as] an aggressor." Excluding Bowser's statement, Defendant argues, was prejudicial because it permitted the jury "to convict [him] on the theory that he was the aggressor[.]" We disagree.

As discussed in Section III, there was independent evidence upon which the jury could have based a finding that Defendant acted as an aggressor in the moments before shooting Epps. *See*, *e.g.*, *State v. Cook*, ___ N.C. App. ___, ___, 782 S.E.2d 569, 579 (2016) (citing N.C. Gen. Stat. §15A-1443(a) (2013)) (finding defendant failed to show prejudicial error from admission of alleged hearsay, where "the State proffered overwhelming evidence supporting defendant's conviction[.]"); *State v. Bass*, 190 N.C. App. 339, 348, 660 S.E.2d 123, 129 (2008) (concluding admission of alleged hearsay did not prejudice defendant where other witness testimony established the fact for which it was offered). Additionally, Defendant testified on his own behalf and was permitted to describe to the jury his efforts to "calm the hostilities" between Walker and Epps, including that Defendant "tried to eradicate the verbal disagreement . . . [between them]." Defendant has not demonstrated he was prejudiced by the exclusion of Bowser's testimony.

VI. Length of Jury Deliberations

A. Standard of Review

[5] Defendant next argues the trial court committed plain error by requiring the jury to deliberate for an unreasonable length of time in violation of N.C. Gen. Stat. § 15A-1235(c), which sets forth procedures a trial court may follow at its discretion in the event of jury deadlock. Our Supreme Court has explicitly characterized N.C.G.S. § 15A-1235(c) as "permissive" rather than mandatory, *see State v. May*, 368 N.C. 112, 119, 772 S.E.2d 458, 463 (2015), and held that "when a trial court is alleged to have violated a permissive statute, we review for plain error if the issue

has not been preserved." *Id.* (citing *State v. Aikens*, 342 N.C. 567, 577-78, 467 S.E.2d 99, 106 (1996)). Defendant did not object to the trial court's jury instructions, comments to the jury, or the length of jury deliberations. This argument was therefore not properly preserved. *See* N.C.R. App. P. 10(b)(1) (2015). Accordingly, our review is limited to plain error.

We further note that "plain error analysis applies only to jury instructions and evidentiary matters[.]" *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L.Ed.2d 795 (2003). Thus, we consider whether Defendant's argument in fact challenges "jury instructions" given by the trial court. We conclude it does not.

B. Analysis

Jury deliberations in this case began at approximately 2:15 p.m. on 11 July 2015. At 4:00 p.m., the jury sent a note requesting printed copies of the instructions on the possible verdicts and asking to view an exhibit. Deliberations resumed at 4:08 p.m. Shortly before 7:00 p.m., the trial court returned the jury to the courtroom, expressing concern that the jurors "ha[d] been working very, very hard and ha[d] not taken a break." The jury, with defense counsel's consent, was told it could either "take a dinner recess," or "continue deliberating . . . [and] have dinner brought in." The jurors chose the latter.

At 7:33 p.m., the jury sent a note requesting to see another exhibit. At 8:43 p.m., the jury sent a note indicating it was deadlocked. At 8:50 p.m., again with defense counsel's consent, the trial court exercised its discretion to give the jury instruction set forth in N.C. Gen. Stat. § 15A-1235(b)[5] (often referred to as an *Allen* instruction, *see Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528 (1896)). *See State v. Streeter*, 191 N.C. App. 496, 505, 663 S.E.2d 879, 885 (2008) (citing *State v. Adams*,

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5. N.C. Gen. Stat. § 15A-1235(b) (2015) provides that "[b]efore the jury retires for deliberation, the judge may give an instruction which informs the jury that:

> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

85 N.C. App. 200, 210, 354 S.E.2d 338, 344 (1987)) (noting that "[t]he decision to give an *Allen* instruction is within the sound discretion of the trial court."). Defendant does not challenge the trial court's *Allen* instruction.

At the conclusion of the *Allen* instruction, the trial court directed the jury to "resume [its] deliberations and continue [its] efforts to reach a verdict." At 10:50 p.m., the trial court returned the jury to the courtroom and requested an update on the deliberations. The following exchange ensued:

> COURT: Have you-all gotten any closer to reaching a unanimous verdict? Without saying what the numbers are?
>
> FOREMAN: We're getting there, Your Honor, a lot closer than the first time.
>
> COURT: At this time do you believe there is a reasonable possibility that you all will reach a unanimous verdict?
>
> FOREMAN: It will take a little time but I think it's possible.
>
> COURT: Thank you. . . . Again I gave you those [*Allen*] instructions earlier, keep working at it.
>
> [. . .]
>
> COURT: What says the State after hearing the response of the jury foreperson?
>
> STATE: Let them continue to deliberate, Your Honor.
>
> COURT: What says the defendant?
>
> DEFENSE: Same, thank you, Your Honor.

The jury resumed its deliberations and returned to the courtroom with a verdict at 11:34 p.m.

Defendant now contends that by "requiring the jury to deliberate until almost midnight on a Saturday with no end in sight and no prospect of an evening recess[,]" the trial court violated N.C. Gen. Stat. § 15A-1235(c), which provides,

> [i]f it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

N.C. Gen. Stat. § 15A-1235(c) (2015).[6] According to Defendant, this subsection (which Defendant mischaracterizes as a "statutory mandate," *see May*, 368 N.C. at 119, 772 S.E.2d at 463), "required . . . [the trial court] to declare a recess well before midnight . . . and have the jurors continue their deliberations Monday morning during regular business hours." Beyond this general contention, Defendant does not identify specific comments by the trial court that he interprets as "requir[ing] or threaten[ing] to require the jury to deliberate for an unreasonable length of time."

As noted above, plain error analysis applies only to unpreserved arguments involving jury instructions or evidentiary issues. In the present case, the trial court gave *no* further instructions after the *Allen* instruction, read to the jury with defense counsel's express consent at 8:50 p.m. That instruction, which was given virtually verbatim in accordance with N.C.G.S. § 15A-1235(b), is not challenged on appeal. The trial court concluded its *Allen* instruction by directing the jury to "resume [its] deliberations and continue [its] efforts to reach a verdict."

A trial court's decision to order further jury deliberations is not a "jury instruction;" rather, it is a discretionary ruling permitted by N.C.G.S. § 15A-1235(c). *See State v. Ross*, 207 N.C. App. 379, 387-88, 700 S.E.2d 412, 418 (2010). In the present case, when the trial court requested an update from the jury at 10:50 p.m., the court gave no new instructions and did not repeat the *Allen* instruction. It merely asked whether there appeared to be "a reasonable possibility" that the jury would reach a verdict. *See, e.g.*, *Streeter*, 191 N.C. App. at 504, 663 S.E.2d at 885 (finding trial court's inquiry into status of jury deliberations did not "coerce or intimidate the jury into reaching a verdict[,]" where court "did not ask whether the split [vote] was for conviction or acquittal . . . [and] was not impatient towards the jury nor did it indicate that it would hold the jury until a verdict was reached."). The trial judge then acted within his statutory discretion to "require the jury to continue its deliberations," based on the foreman's assurances that the jury was making progress toward a unanimous verdict. Arguably, N.C.G.S. § 15A-1235(c) was not even implicated at this point in the proceedings, because it no longer

6. "N.C.G.S. § 15A-1235(c) does not require an affirmative indication from the jury that it is having difficulty reaching a verdict, nor does it require that the jury deliberate for a lengthy period of time before the trial court may give the *Allen* instruction." *State v. Boston*, 191 N.C. App. 637, 643, 663 S.E.2d 886, 891 (2008). Additionally, the trial court is not required to repeat the instruction every time a jury indicates it is deadlocked. *See State v. Summey*, 228 N.C. App. 730, 740-41, 746 S.E.2d 403, 410-11 (2013).

"appear[ed] . . . that the jury [was] unable to agree." *See State v. Smith*, 188 N.C. App. 207, 217, 654 S.E.2d 730, 738 (2008) (concluding N.C.G.S. § 15A-1235(c) was inapplicable because jury was not deadlocked when, "[o]n more than one occasion, the [trial] court asked the jury foreman whether the jury was making progress towards a verdict [and] [e]ach time he was asked, the foreman indicated that the jury was making progress."). Defendant has failed to identify an "instruction" by the trial court that "require[d] or threaten[ed] to require the jury to deliberate for an unreasonable length of time," a prerequisite for plain error review of this argument. *See Ross*, 207 N.C. App. at 387-88, 700 S.E.2d at 418.

Even assuming *arguendo* that plain error review is appropriate, Defendant has not shown he was prejudiced by the trial court's instructions or comments to the jury regarding its deliberations. This Court has suggested that a trial court "require[s] or threaten[s] to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals" if, "[under the totality of] the circumstances surrounding jury deliberations[,] [the trial court's actions] might reasonably be construed by . . . the jury . . . as coercive." *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496 (2002) (citation and internal quotation marks omitted). A trial court's decisions regarding the length of jury deliberations are coercive if they

> suggest[] to [a member of the jury] that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict.

State v. Roberts, 270 N.C. 449, 451, 154 S.E.2d 536, 538 (1967). *See also May*, 368 N.C. at 119, 772 S.E.2d at 463 (quoting *State v. Patterson*, 332 N.C. 409, 416, 420 S.E.2d 98, 101 (1992)) (holding that "as part of our plain error analysis, in determining whether a trial court's instructions led to a coerced jury verdict . . . 'we must analyze the trial court's actions in light of the totality of the circumstances facing the trial court at the time it acted.' "); *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985) (holding that "in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury.").

Considering the record as a whole, we find no suggestion that permitting the jury to continue deliberations, without editorialization by the trial court, when a unanimous verdict appeared imminent, "tilted

the scales and [coerced] the jury to reach its verdict convicting [Defendant]." *See State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (internal quotation marks and citation omitted). The trial court gave a proper and complete *Allen* instruction after being informed the jury was deadlocked and, without further comment, asked the jury to resume deliberations. In its final colloquy with the jury, the trial court explicitly avoided inquiring into the jury's numerical split. Moreover, "the trial court did not communicate with less than all of the jurors . . . [or] rush[] the jury to reach a verdict[.]" *Summey*, 228 N.C. App. at 742, 746 S.E.2d at 411-12. It did not "convey[] the impression that it was irritated with the jury for not reaching a verdict, . . . [or] intimate[] that it would hold the jury until it reached a verdict[.]" *State v. Nobles*, 350 N.C. 483, 510, 515 S.E.2d 885, 901-02 (1999). *See also Smith*, 188 N.C. App. at 218, 654 S.E.2d at 738 (holding trial court's instructions were not coercive where "[a]t no time did the trial court inform the jurors that they would not be able to go home until they reached a unanimous verdict or that they would remain together until they reconciled their differences."); *State v. Rasmussen*, 158 N.C. App. 544, 560-61, 582 S.E.2d 44, 56 (2003) (finding no coercion notwithstanding "(1) the trial court's statement to the jury that it wanted 'to get the case done if we can do it today[]'; [and] (2) the fact that the jury was asked to deliberate after normal hours on a Friday evening."). Contrary to Defendant's contention that the trial court required the jury to deliberate "with no end in sight and no prospect of an evening recess," the trial court's comments to the jury at 10:50 p.m. reflected an attempt to ascertain whether continuing deliberations would be futile.

In *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986), our Supreme Court found a trial court did not coerce a verdict, despite inquiring into the jury's numerical division and giving an incomplete *Allen* instruction, where

> [t]he jury was not required to deliberate for an inordinate amount of time, and at no point did the jurors indicate that they were hopelessly deadlocked. The trial judge also granted the jury's requests to review exhibits introduced at trial. The record also reveals that the trial judge was polite, considerate, and accommodating toward the jury.

Id., 315 N.C. at 329, 338 S.E.2d at 86. In the present case, as in *Williams*, Defendant "has failed to point to any statement, act, or omission by the [trial] court which could remotely be interpreted as coercive." *Id.*, 315 N.C. at 329, 338 S.E.2d at 86-87. This argument is overruled.

VII. Consideration of Mitigating Factors at Sentencing

A. Standard of Review

[6] Defendant lastly contends the trial court erroneously failed to consider "mitigating factors present in the offense" at Defendant's sentencing. "The standard of review for application of mitigating factors is an abuse of discretion." *State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 785 (2006) (citing *State v. Butler*, 341 N.C. 686, 694–95, 462 S.E.2d 485, 489–90 (1995)). *See also State v. Garnett*, 209 N.C. App. 537, 549, 706 S.E.2d 280, 288 (2011) (quoting *State v. Rogers*, 157 N.C. App. 127, 129, 577 S.E.2d 666, 668 (2003)) (stating that "'[a] trial court's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion.' "). "Abuse of discretion results where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Thomsen*, ___ N.C. ___, ___, 776 S.E.2d 41, 48 (2015) (quoting *State v. Rollins*, 224 N.C. App. 197, 199, 734 S.E.2d 634, 635 (2012)).

In North Carolina, "'[a] trial judge is given wide latitude in determining the existence of mitigating factors, and the trial court's failure to find a mitigating factor is error only when no other reasonable inferences can be drawn from the evidence.' " *State v. Bacon*, 228 N.C. App. 432, 436, 745 S.E.2d 905, 908-09 (2013) (quoting *State v. Mabry*, 217 N.C. App. 465, 471, 720 S.E.2d 697, 702 (2011)). On appeal, a trial court may be reversed for failure to find a mitigating factor "only when the evidence offered in support of that factor 'is both uncontradicted and manifestly credible.' " *Mabry*, 217 N.C. App. at 471, 720 S.E.2d at 702 (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983)).

B. Analysis

The trial court sentenced Defendant within the presumptive range for a Class B1 felony, prior record level I. *See* N.C. Gen. Stat. §§ 15A-1340.17(c)(2), (e) (2015). It is well-established that a trial court is not required to make findings of mitigation or aggravation if, in its discretion, it does not depart from the presumptive sentencing range, "even if evidence of mitigating factors is presented at sentencing." *State v. Kelly*, 221 N.C. App. 643, 648, 727 S.E.2d 912, 915 (2012) (citing *Hagans*, 177 N.C. App. at 31, 628 S.E.2d at 785–86 (2006)); *see also State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 918 (2006) (holding that "the trial court is free to choose a sentence from anywhere in the presumptive range without findings other than those in the jury's verdict."); N.C. Gen. Stat. § 15A-1340.16(a) (2015) (providing in part that "[t]he court

shall consider evidence of aggravating or mitigating factors present in the offense that make aggravated or mitigated sentences appropriate, but the decision to depart from the presumptive range is in the discretion of the court."); N.C. Gen. Stat. § 15A-1340.16(c) (2015) (providing in part that "[t]he court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)."). Accordingly, because the trial court did not depart from the presumptive range in sentencing Defendant, it was not required to make any findings regarding mitigation. *See State v. Caldwell*, 125 N.C. App. 161, 162-63, 479 S.E.2d 282, 283 (1997) (concluding that "[our] Legislature [clearly] intended to provide the trial court with a window of discretion to be exercised when sentencing a criminal defendant within the presumptive range. It is not the province of this Court to impose the additional requirement that the trial court justify its decision by making findings of aggravation and mitigation subject to appellate review.").

Defendant argues that, even if not required to make findings, the trial court erroneously failed to "consider" evidence of mitigating factors that were "proved by the State's own evidence." This argument is without merit. A sentence that falls within the presumptive range but is imposed "without comment . . . does not mean the trial court failed to consider the mitigating factors presented." *Hagans*, 177 N.C. App. at 31, 628 S.E.2d at 786. *See also State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) (concluding that, "[a]s the trial court imposed the presumptive sentence . . ., it was not required to take into account any evidence offered in mitigation.").

We note that, at sentencing, Defendant did not assert the specific statutory factors he now argues the trial court erroneously failed to consider.[7] Where a defendant

> fails to request that a trial court find a factor in mitigation, the trial court has a duty to find the factor only when the evidence offered at the sentencing hearing supports the existence of a [statutory] mitigating factor . . . [and] defendant [proves] by a preponderance of the evidence that the evidence so clearly establishes the fact in issue

7. Specifically, Defendant cites N.C. Gen. Stat. § 15A-1340.16(e)(1) (2015) ("The defendant committed the offense under . . . threat . . . [that] significantly reduced the defendant's culpability.") and N.C. Gen. Stat. § 15A-1340.16(e)(8) (2015) ("The defendant acted under strong provocation . . . .").

> that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law.

See State v. Davis, 206 N.C. App. 545, 549, 696 S.E.2d 917, 920 (2010) (internal quotation marks and citations omitted). During Defendant's sentencing hearing, in requesting a sentence at the lowest end of the mitigated range, defense counsel told the trial court only that Defendant had committed "an unintentional act." Our Supreme Court has held that, absent a stipulation by the State, "statements made by defense counsel during argument at the sentencing hearing do not constitute evidence which would support a finding of [either] nonstatutory [or statutory] mitigating factors." *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 71 (1986).

Defendant addressed the trial court prior to sentencing, reasserting his claim of self-defense and expressing remorse for the "tragic situation." Even if this could be characterized as evidence of mitigating factors, the trial court acted "squarely [with]in its discretion . . . by sentencing Defendant in the presumptive range after considering Defendant's evidence of mitigating factors." *Garnett*, 209 N.C. App. at 550, 706 S.E.2d at 288.

VIII. Conclusion

For the reasons stated in this opinion, we find Defendant's trial was free from error.

NO ERROR.

Judges HUNTER, JR., and DILLON concur.

STATE OF NORTH CAROLINA
v.
ROLANDO MARRERO, DEFENDANT

No. COA15-908

Filed 2 August 2016

1. Search and Seizure—knock and talk—totality of circumstances—defendant not seized

Based on the totality of the circumstances, the trial court correctly concluded that officers did not act in a physically or verbally abusive manner during a knock and talk approach to defendant in his house and that no seizure of defendant occurred.

2. Search and Seizure—protective sweep of house—exigent circumstances

Exigent circumstances existed for a protective sweep of defendant's residence and to ensure that evidence was not destroyed where, under the totality of the circumstances, a dangerous and emergent situation existed.

Appeal by defendant from judgment entered 12 January 2015 by Judge Beecher R. Gray in Superior Court, Mecklenburg County. Heard in the Court of Appeals on 27 January 2016.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Allegra Collins Law, by Allegra Collins, for defendant-appellant.

STROUD, Judge.

Defendant Rolando Marrero appeals from the trial court's denial of his motion to suppress. On appeal, defendant argues that the trial court erred and should have granted his motion because officers violated his Fourth Amendment rights when they entered his home. After review, we affirm the decision of the lower court, because defendant was not illegally seized and exigent circumstances justified the officers' warrantless entry into defendant's home.

I. Background

The trial court's findings of fact are not challenged on appeal. On 2 March 2014, at 7:52 p.m., Sergeant Robert Wise of the Charlotte

Mecklenburg Police Department ("CMPD") received a message from a confidential informant of a "home invasion" robbery to take place at 9:00 p.m. that night "at a residence near Milton Road." The informant claimed that he had turned down an offer to join the robbery and that there was a red pickup truck in the driveway of the targeted residence. The informant also alleged that the two suspects had attempted to obtain an AK-47 assault rifle and would be in a small red Hyundai vehicle.

Sergeant Wise was able to confirm that the informant's information was reliable and dispatched officers to monitor the location. Officers identified a particular house on Bell Plaine Drive as the location of the targeted residence. While monitoring, the officers observed a small red Hyundai drive past the house twice. Thereafter, the officers were informed that detectives and other patrol officers were en route to the house to conduct a "knock and talk" to investigate drug activity. The officers on scene were instructed to watch the back of the house and positioned themselves near the intersection of the end of the driveway, the backyard, and back right corner of the residence to ensure no one attempted to enter from the back. At least two officers were in the front of the residence with shotguns pointed downward in "low ready position."

At 9:15 p.m., CMPD detectives Brett Riggs and Messer[1] arrived wearing tactical vests with "POLICE" written across them. The other six officers were in full uniform at various locations surrounding the residence, facing away from the house in anticipation of robbery suspects armed with an AK-47. Detective Riggs did not know whether a robbery had already occurred, was in progress, or had not yet occurred. With Detective Messer at his side, Detective Riggs approached defendant's front porch, shined his flashlight into the windows on either side of the front door, and then knocked. In response to a muffled voice, Detective Riggs loudly stated, "Charlotte-Mecklenburg Police Department." After receiving no response, Detective Riggs knocked on the door once more and, after a few moments, defendant opened the door. Only two or three minutes elapsed from the initial knock to the moment defendant opened the door. During the encounter, Detective Riggs did not see any blue lights emitting from any of the patrol vehicles.

When the door was opened, Detective Riggs immediately smelled unburned, or "green," marijuana from inside the house. Detective

1. Detective Messer is never identified by his first name in the record on appeal.

Riggs attempted to explain to defendant that the officers were there to investigate potential drug activity and protect against a potential home invasion, but quickly realized defendant did not speak or understand English. Based on the odor of marijuana, Detective Riggs decided to detain defendant, perform a protective sweep of the residence, and apply for a search warrant.

Two officers conducted a protective sweep of the house to ensure there was no one else inside who could harm them. Soon after, Detectives Riggs and Messer obtained a search warrant and a Spanish-speaking CMPD officer read the warrant to defendant. During the execution of the search warrant, 149 living marijuana plants and 20 pounds of vacuum-sealed marijuana were found in defendant's basement. About 30 pounds of marijuana were seized as a result of the search.

Defendant was indicted on 10 March 2014 for (1) Trafficking in Drugs; (2) Manufacture of a Controlled Substance; (3) Maintaining a Place to Keep Controlled Substances; and (4) Possession of Drug Paraphernalia. Defendant filed a motion to suppress evidence seized at his residence on 24 July 2014, arguing that the evidence was obtained as a result of a non-consensual knock and talk, which amounted to a seizure of defendant in violation of the Fourth Amendment.

Defendant's motion came on for hearing on 12 January 2015. Three of the CMPD officers who were involved in the encounter testified, including Detective Brett Riggs, who was in charge of the operation. After a three-hour evidentiary hearing, the trial court denied defendant's motion. The court's written order included findings that the CMPD were onsite in response to information from a reliable informant that an armed robbery of 30 or more pounds of marijuana was to take place at defendant's residence; Detective Riggs and Detective Messer approached defendant's front door to conduct a "knock and talk"; before knocking Detective Riggs used a flashlight to locate the house number and to determine if anyone inside the house was peering out; "[i]t took the Defendant two to three minutes to answer the door" after Detective Riggs first knocked; as soon as defendant opened the door Detective Riggs smelled a strong odor of marijuana; and "[b]ased upon the odor of marijuana, and the Defendant's inability to understand English," Detective Riggs made the decision to enter and secure the residence. Based on these and other findings, the trial court concluded that no illegal seizure of the defendant occurred during the course of the knock and talk and that exigent circumstances justified CMPD's warrantless entry into defendant's home.

Following the trial court's ruling, defendant pled guilty to the charges against him. Defendant timely reserved his right to appeal and now appeals the denial of his motion to suppress.

II. Motion to Suppress

Defendant's lone issue on appeal is whether the trial court erred in denying his motion to suppress. Defendant claims his Fourth Amendment rights were violated (1) because he was illegally seized inside his home as a result of police coercing him to open his front door, (2) because he did not consent to the police entering his home, and (3) because no exigent circumstances existed to justify a warrantless entry. Therefore, defendant asks this Court to reverse the lower court's order and suppress all evidence obtained as a result of his interaction with CMPD officers.

The standard of review for determining whether a defendant's motion to suppress was properly denied is " 'whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.' " *State v. Isenhour*, 194 N.C. App. 539, 541, 670 S.E.2d 264, 266-67 (2008) (quoting *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (2003)). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Blackstock*, 165 N.C. App. 50, 55, 598 S.E.2d 412, 416 (2004). Conclusions of law, on the other hand, are fully reviewable on appeal. *Isenhour*, 194 N.C. App. at 541, 670 S.E.2d at 267. In carrying out this analysis deference is given to the trial judge as he is in the best position to weigh the evidence. *Blackstock*, 165 N.C. App. at 56, 598 S.E.2d at 416.

1. Seizure

[1] Defendant first contends that he was illegally seized as a result of being coerced into opening the front door of his house during a knock and talk carried out by the CMPD. Whether defendant was coerced to open the door for a knock and talk encounter is a novel question for this Court. While there is no case law directly on point, there are many cases involving illegal seizures which guide this decision.

A "knock and talk" is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant. *State v. Smith*, 346 N.C. 794, 800, 488 S.E.2d 210, 214 (1997). This Court and the North Carolina Supreme Court have recognized the right of police officers to conduct knock and talk investigations,

so long as they do not rise to the level of Fourth Amendment searches. *State v. Wallace*, 111 N.C. App. 581, 585, 433 S.E.2d 238, 241 (1993) ("Law enforcement officers have the right to approach a person's residence to inquire whether the person is willing to answer questions."); *State v. Grice*, 367 N.C. 753, 762, 767 S.E.2d 312, 319 (discussing the limiting principle of knock and talk investigations), *cert. denied*, __ U.S. __, 192 L. Ed. 2d 882 (2015). The Fourth Amendment ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. " 'The touchstone of the Fourth Amendment is reasonableness.' " *Grice*, 367 N.C. at 756, 767 S.E.2d at 315 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250, 114 L. Ed. 2d 297, 302 (1991).

The seizure of an individual can take place through the application of physical force or without the officer ever laying his hands on the person seized. *Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267. An individual is seized by an officer and falls within the protection of the Fourth Amendment when officer conduct " 'would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (quoting *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991)) (quotation marks omitted). In determining whether a reasonable person would feel free to decline an officer's request to communicate, a reviewing court must examine the totality of the circumstances. *Id.* at 308-09, 677 S.E.2d at 826. This test focuses on the coercive effect of police conduct, taken as a whole. *Id.* at 309, 677 S.E.2d at 826. Circumstances which might indicate a seizure include, but are not limited to, "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980).

Defendant's argument relies on a 7th Circuit case, *United States v. Jerez*, 108 F.3d 684 (7th Cir. 1997), and a comparison between the police conduct in *Jerez* and the conduct of the officers in this case. In *Jerez*, the 7th Circuit held that a Fourth Amendment seizure occurred based upon a knock and talk carried out by police officers at a Wisconsin motel. *Id.* at 692-93. The officers in *Jerez* performed a knock and talk after 11:00 p.m. at night and persistently knocked on the defendants' motel door for 3 minutes straight. *Id.* at 687. The officers made verbal demands encouraging the occupants to open the door, knocked on the window of the motel room, and even shined a flashlight through

the window illuminating one of the defendants as he lay in his bed. *Id.* Based on the totality of the circumstances, the 7th Circuit concluded the police conduct during the knock and talk compelled the defendants to open the door and amounted to a Fourth Amendment seizure. *Id.* at 692-93.

Defendant's reliance on *Jerez* is misplaced. Not only are 7th Circuit opinions not binding on this Court, but the facts of *Jerez* are distinguishable from the facts of the present case. Unlike *Jerez*, neither officer banged on windows, demanded the door be opened, or looked for alternative methods of ensuring defendant was aware of their presence. Here, the officers simply knocked on defendant's front door a few times and stated they were with the CMPD once over the course of the two to three minutes it took defendant to answer the door. Detective Riggs did use a flashlight before knocking, but only to identify the house number and for officer safety, not in an attempt to rouse defendant as the officers in *Jerez*.

North Carolina case law regarding "illegal seizures" offers the best instruction for the present case. In *Isenhour*, the defendant appealed the denial of his motion to suppress, claiming he was illegally seized and that the consent he gave officers to search his vehicle was given involuntarily, due to the coercive conduct of those officers. 194 N.C. App. at 541, 670 S.E.2d at 266. The police officers in *Isenhour* parked eight feet behind the defendant's car, approached the defendant while armed and in full uniform, and stood on either side of his car as they spoke with him. *Id.* at 540, 670 S.E.2d at 266. The defendant eventually consented to a search of his car and was subsequently arrested. *Id.* at 541, 670 S.E.2d at 266. After conducting a totality of the circumstances review, this Court affirmed the lower court's denial of the defendant's motion to suppress, noting that the defendant's consent was voluntary and that the officers did not create any psychological or physical barriers which would have led a reasonable person to believe that they were not free to leave or terminate the encounter. *Id.* at 544, 670 S.E.2d at 268.

In contrast, in *Icard*, a police officer pulled behind a parked vehicle, in which the defendant was a passenger, and activated his blue lights. 363 N.C. at 304, 677 S.E.2d at 824. The officer called for back-up and a fellow officer arrived in his patrol car and activated his takedown lights, illuminating the passenger side of the truck. *Id.* at 305, 677 S.E.2d at 824. During the encounter, one officer rapped on the passenger door of the vehicle. *Id.* After receiving no response the officer opened the door himself and proceeded to ask for the defendant's license and to search her purse. *Id.* The North Carolina Supreme Court concluded the interaction

between the defendant and the officers was non-consensual. *Id.* at 310-11, 677 S.E.2d at 827-28. The Court noted that the actions of the officers amounted to a show of authority and that a reasonable person in the defendant's position would not have felt free to leave or terminate the encounter. *Id.*

Defendant's argument here mirrors the argument made by the defendant in *Isenhour*. Although defendant seemingly consented to the knock and talk by opening his door, he claims his response was involuntary and compelled by coercive police conduct. Here, however, while other officers were on the scene outside the house, there was no evidence that defendant was aware of their presence while he was in the house and before he opened the door. During the knock and talk, Detective Riggs could not see any blue lights from the police cars nearby. Detective Riggs and Detective Messer were the only officers on the defendant's porch during the knock and talk. Unlike in *Icard*, Detective Riggs and Detective Messer did not perform the knock and talk with takedown lights shining into defendant's home. Detective Riggs did use a flashlight, but only to identify the house number and ensure that no one was looking out from inside defendant's house. As in *Icard*, Detective Riggs' first few knocks were ignored, but neither Detective Riggs nor Detective Messer reacted like the officer in *Icard*. They did not attempt to open the front door themselves or demand that the door be opened in an effort to engage with defendant. Instead, they knocked once more and defendant eventually opened the door himself. Similar to *Isenhour*, the officers here did not mount a show of authority or engage in intrusive conduct.

Based on the totality of the circumstances, the trial court correctly concluded that the officers in this case did not act in a physically or verbally threatening manner and that no seizure of defendant occurred during the course of the knock and talk. This conclusion is supported by the findings of fact in the record. Therefore, the trial court did not err in concluding that the defendant was not illegally seized during the knock and talk procedure carried out by CMPD officers.

2. Exigent Circumstances

[2] Defendant next contends he did not consent to the search of his home by CMPD officers and that no exigent circumstances existed to justify a warrantless entry of his home after he opened the door. The trial court made no findings or conclusions of law regarding a consent theory, as it concluded that probable cause and exigent circumstances were present. When probable cause and exigent circumstances exist, consent is not necessary. Therefore, this Court's review focuses only on

whether exigent circumstances existed to justify the CMPD's warrantless entry of defendant's home.

We note that defendant's only specific argument to any of the trial court's findings of fact is that "the evidence does not support the findings of fact" as to exigent circumstances, but there is no such finding of fact. Defendant argues that the "finding" of exigent circumstances is in error based only upon testimony by Detective Riggs that on the paperwork he completed after the search, he had answered "no" to a question about "whether this raid and search was for exigent circumstances." The trial court made only conclusions of law regarding exigent circumstances. Although Detective Riggs did testify as defendant notes, a witness's statement about a question of law is not binding upon the trial court. In addition, Detective Riggs and the other officers did testify about their safety concerns, particularly in light of the report of a potential armed robbery, and the need to secure any evidence which may be readily disposed during any delay while they obtained a warrant. Defendant does not raise any objection to any of the findings of fact as unsupported by the evidence. We therefore review this argument only to determine if the unchallenged findings of fact support the trial court's conclusion of law.

The Fourth Amendment dictates that "a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement . . . ." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). The existence of probable cause and exigent circumstances is one such exception. *See State v. Harper*, 158 N.C. App. 595, 602, 582 S.E.2d 62, 67 (2003) ("Generally, warrantless searches are not allowed absent probable cause and exigent circumstances[.]"). Here, defendant does not challenge the existence of probable cause, so our review focuses solely on whether exigent circumstances were present.

" '[A]n exigent circumstance is found to exist in the presence of an emergency or dangerous situation.' " *State v. Stover*, 200 N.C. App. 506, 511, 685 S.E.2d 127, 131 (2009) (quoting *State v. Frazier*, 142 N.C. App. 361, 368-69, 542 S.E.2d 682, 688 (2001)) (quotation marks omitted). The State has the burden of proving that exigent circumstances necessitated the warrantless entry. *Cooke*, 306 N.C. at 135, 291 S.E.2d at 620. Determining whether exigent circumstances exist depends on the totality of the circumstances. *State v. Nowell*, 144 N.C. App. 636, 643, 550 S.E.2d 807, 812 (2001), *aff'd per curiam*, 355 N.C. 273, 559 S.E.2d 787 (2002). Factors considered in determining whether exigent circumstances exist include, but are not limited to:

> (1) the degree of urgency involved and the time necessary to obtain a warrant; (2) the officer's reasonably objective belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.

State v. Wallace, 111 N.C. App. at 586, 433 S.E.2d at 241-42 (1993). In conducting this analysis, the United States Supreme Court has instructed courts to look to objective factors, rather than subjective intent. *Kentucky v. King*, 563 U.S. 452, 464, 131 S. Ct. 1849, 1859 (2011) (quotations, citations, and italics omitted).

When there is a possibility of danger to police, officers "may conduct a protective sweep of a residence in order to ensure that their safety is not in jeopardy." *Stover*, 200 N.C. App. at 511, 685 S.E.2d at 132. A protective sweep is reasonable if based on " 'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.' " *State v. Dial*, 228 N.C. App. 83, 87, 744 S.E.2d 144, 148 (2013) (quoting *State v. Bullin*, 150 N.C. App. 631, 640, 564 S.E.2d 576, 583 (2002)). Furthermore, the North Carolina Supreme Court has acknowledged, "[t]he immediate need to ensure that no one remains in the dwelling preparing to fire a yet unfound weapon . . . constitutes an exigent circumstance which makes it reasonable for the officer to conduct a limited, warrantless, protective sweep of the dwelling." *State v. Taylor*, 298 N.C. 405, 417, 259 S.E.2d 502, 509 (1979).

Here, the trial court found that officers arrived at defendant's residence because of a tip from a reliable informant that "suspects were going to rob a marijuana plantation that was inside a residence house off of Milton Road[.]" The informant explained that "at least one of the suspects would be armed with an AK-47 rifle." The court also found that during the knock and talk Detective Riggs was "unaware as to whether a robbery had occurred, was in progress, or was imminent". In addition, as soon as defendant opened his door Detective Riggs smelled a strong odor of marijuana. Based on the detection of a strong odor of marijuana, and defendant's inability to understand English, Detective Riggs made the decision to enter defendant's home and secure it in preparation for obtaining a search warrant. Given these findings, and the rational inferences which can be drawn from them, an officer in Detective Riggs' position could have reasonably believed that there was an undiscovered dangerous individual within defendant's home with an AK-47. The

CMPD's need to ensure that no one remained in the residence carrying an AK-47 constituted an exigent circumstance. *See Taylor*, 298 N.C. at 417, 259 S.E.2d at 509 ("The immediate need to ensure that no one remains in the dwelling preparing to fire a yet unfound weapon . . . constitutes an exigent circumstance"). Therefore, Detective Riggs' decision to initiate a protective sweep for officer safety was reasonable.

Furthermore, the ready destructibility of contraband and the belief that contraband might be destroyed have long been recognized as exigencies which justify warrantless seizures/entries. *Grice*, 367 N.C. at 763, 767 S.E.2d at 320. In the present case, the trial court found that officers were advised that defendant's residence contained "a marijuana plantation" with "at least 30 pounds of marijuana inside[.]" Additionally, the trial court found that when defendant opened the door the officers immediately smelled a strong odor of marijuana. Given these findings, it is objectively reasonable to conclude that an officer in Detective Riggs' position would have worried that defendant would destroy evidence when he and Detective Messer left the scene to obtain a search warrant, especially given the ready destructibility of marijuana.

Based on the totality of the circumstances, a dangerous and emergent situation existed at the time Detective Riggs initiated a protective sweep of defendant's residence. Therefore, the trial court did not err in concluding that exigent circumstances warranted a protective sweep for officer safety and to ensure defendant or others would not destroy evidence.

III. Conclusion

The lower court did not err in concluding that the knock and talk carried out by CMPD officers did not rise to the level of a Fourth Amendment seizure and that exigent circumstances justified the CMPD's warrantless entry into defendant's home. Its conclusions on these matters were supported by findings of fact in the record and those findings were based on competent evidence, namely the testimony of CMPD officers at the hearing on defendant's motion to suppress. Therefore, we affirm the trial court's denial of defendant's motion to suppress.

AFFIRMED.

Judges ELMORE and DIETZ concur.

STATE v. PIGFORD

[248 N.C. App. 797 (2016)]

STATE OF NORTH CAROLINA
v.
MICHAEL RAY PIGFORD, DEFENDANT

No. COA15-1047

Filed 2 August 2016

Search and Seizure—vehicle checkpoint—odor of marijuana inside car—no link to defendant

The trial court erred by denying defendant's motion to suppress evidence of cocaine found during a search of his person at a vehicle checkpoint where the deputy had probable cause to search the vehicle but not defendant's person. There was nothing linking the odor of marijuana in the vehicle to defendant. The inevitable discovery doctrine was not raised below.

Judge McCULLOUGH concurring.

Appeal by defendant from judgments entered 18 March 2015 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

W. Michael Spivey for defendant.

ELMORE, Judge.

Defendant moved to suppress the evidence of cocaine found during a search of his person at a vehicle checkpoint. The trial court denied the motion, and the jury found defendant guilty of possession of cocaine and possession of a firearm by a felon. The issue on appeal is whether an odor of marijuana emanating from "inside a vehicle" provides an officer with probable cause to conduct an immediate warrantless search of the driver. On these facts, we hold that it does not. We reverse the trial court's order and grant defendant a new trial for possession of cocaine in 14 CRS 050859.

I. Background

On 5 April 2014, Michael Ray Pigford (defendant) was stopped at a driver's license checkpoint. Defendant was driving the vehicle and Annie

Dudley was riding in the front passenger seat. At the checkpoint, Deputy Sherriff Dwight Curington approached the vehicle and noticed an odor of marijuana emanating from the open driver-side window. Based on his training and experience, Deputy Curington was familiar with the smell of marijuana. He was "unable to establish the exact location" of the odor but "was able to determine it was coming from inside the vehicle."

Upon smelling the odor, Deputy Curington ordered defendant out of the vehicle and searched him. He found cocaine residue on a dollar bill and straw located in defendant's back pocket. Deputy Curington arrested defendant, placed him in a patrol car, and proceeded to search the vehicle where he found a bag of marijuana under the driver seat and a handgun in the pouch on the back of the passenger seat. The handgun was stolen.

Prior to trial, defendant moved to suppress the evidence of cocaine found on his person. The court denied the motion, concluding that "the odor of marijuana emitting from the front driver side window of the vehicle that defendant was driving established probable cause for Deputy Curington to remove the defendant from the vehicle and conduct a search of defendant's person."

The jury acquitted defendant of possession of a stolen firearm, but found him guilty of possession of cocaine and possession of a firearm by a felon. He also pleaded guilty to attaining habitual felon status. The trial court sentenced defendant to 36 to 56 months of imprisonment for possession of cocaine, and imposed a consecutive sentence of 100 to 132 months for possession of a firearm by a felon. Defendant appeals.

II. Discussion

Defendant argues that the trial court erred in denying his motion to suppress the cocaine found on the dollar bill and straw. He maintains that Deputy Curington lacked probable cause to conduct a warrantless search of defendant's person because there was no individualized suspicion. More specifically, although the deputy smelled marijuana emanating from the vehicle, there was no evidence that the odor was attributable to defendant personally. The State responds by arguing that the odor of marijuana establishes exigent circumstances justifying an immediate search of not only the vehicle, but of the person, as well. Whether the smell of marijuana emanating from the driver-side window of a vehicle constitutes probable cause to search the driver appears to be an issue of first impression in North Carolina.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of

fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. Contemporaneously, "[t]he Fourth Amendment 'protects people from unreasonable government intrusions into their legitimate expectations of privacy.' " *United States v. Place*, 462 U.S. 696, 706–07 (1983) (citing *United States v. Chadwick*, 433 U.S. 1, 7 (1977)).

The Supreme Court has stressed its preference for warrant-based searches: "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted).

One such exception, the "automobile exception," allows an officer to conduct a warrantless search of a lawfully stopped vehicle if probable cause exists to believe it contains contraband or evidence of a crime. *Maryland v. Dyson*, 527 U.S. 465, 466–67 (1999); *Carroll v. United States*, 267 U.S. 132, 153 (1925). Where such probable cause exists, an officer may also search "any containers found inside [the vehicle] that may conceal the object of the search." *United States v. Johns*, 469 U.S. 478, 479–80 (1985) (describing the holding from *United States v. Ross*, 456 U.S. 798, 825 (1982)). The exception is based on the "ready mobility" of a vehicle and the reduced expectation of privacy derived "from the pervasive regulation of vehicles capable of traveling on the public highways." *California v. Carney*, 471 U.S. 386, 390–92 (1985).

"Exigent circumstances" form the basis of another recognized exception to the warrant requirement. The exception applies where " 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (citations omitted). Exigent circumstances include the need to "prevent

the imminent destruction of evidence," *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citation omitted), whereby officers may "conduct an otherwise permissible search without first obtaining a warrant," *Kentucky v. King*, 563 U.S. 452, 455 (2011).

To be sure, "the scope of the warrantless search . . . is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Ross*, 456 U.S. at 825. It must be supported by probable cause. *Id.*; *King*, 563 U.S. at 455.

> "Probable cause exists where 'the facts and circumstances within [an officer's] knowledge, and of which [he] had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief' that an offense has been or is being committed," and that evidence bearing on that offense will be found in the place to be searched.

Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370 (2009) (alterations in original) (citations omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 175–176 (1949)); *see also Illinois v. Gates*, 462 U.S. 213, 238 (1983) (describing "probable cause" as "a fair probability that contraband or evidence of a crime will be found in a particular place" (citation omitted)). "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *see also Chandler v. Miller*, 520 U.S. 305, 313 (1997) ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." (citation omitted)).

It is not contested that Deputy Curington had probable cause to search defendant's vehicle. In *United States v. Di Re*, 332 U.S. 581 (1948), however, the Supreme Court of the United States rejected the government's claim that "officers have the right, without a warrant, to search any car which they have reasonable cause to believe carries contraband, and incidentally may search any occupant of such car when the contraband sought is of a character that might be concealed on the person." *Id.* at 584. The Court held instead that probable cause to search a vehicle does not justify a search of a passenger: "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587.

The Court later clarified that *Di Re* "turned on the unique, significantly heightened protection afforded against searches of one's person."

Wyoming v. Houghton, 526 U.S. 295, 303 (1999). Its holding was not based on a "distinction between drivers and passengers," *id.* at 303 n.1, because probable cause to search a car also justifies a search of "passengers' *belongings* found in the car that are capable of concealing the object of the search," *id.* at 307 (emphasis added). Rather, it was based on the distinction "between search of the person and search of property." *Id.* at 303 n.1.

We relied on *Di Re* to reach a similar conclusion in *State v. Malunda*, 230 N.C. App. 355, 749 S.E.2d 280, *writ denied*, *review denied*, 367 N.C. 283, 752 S.E.2d 476 (2013). In *Malunda*, after conducting a lawful traffic stop, officers ordered the defendant-passenger out of the car and detained him on the curb. *Id.* at 356–57, 749 S.E.2d at 282. The officers proceeded toward the driver side of the vehicle and "noticed a strong odor of marijuana" which they had not smelled on the passenger side. *Id.* at 357, 749 S.E.2d at 282. They removed the driver and searched the vehicle, finding marijuana in the driver-side door. *Id.* Officers then searched the defendant and found crack cocaine on his person. *Id.* We held that the odor of marijuana gave the officers probable cause to search the vehicle but not the defendant: "Probable cause to search a vehicle does not . . . amount to probable cause to search a passenger in the vehicle." *Id.* at 359, 749 S.E.2d at 283 (citing Di Re, 332 U.S. at 587). Because "there was nothing linking the marijuana to defendant besides his presence in the vehicle," the search of the defendant's person was not supported by probable cause particularized to the defendant. *Id.* at 360, 749 S.E.2d at 284.

Nevertheless, the State attempts to justify the search, as did the trial court, based on our holding in *State v. Yates*, 162 N.C. App. 118, 589 S.E.2d 902 (2004), where the odor of marijuana on the defendant gave rise to a warrantless search of his person. *Id.* at 120–21, 589 S.E.2d at 903. In that case, an officer formed probable cause that the defendant possessed marijuana after the "defendant walked by him twice, once going in, the other time out" of a restaurant, "emanating a strong odor of marijuana, and each time defendant was alone." *Id.* at 123, 589 S.E.2d at 905. Because "narcotics can be easily and quickly hidden or destroyed," especially after a suspect learns of an officer's suspicions, we concluded that the warrantless search was reasonable based on the exigency of the situation. *Id.*

We fail to see how *Yates* could justify the challenged search *sub judice* because the State offered no evidence—and the trial court did not find—that the marijuana odor was attributable to defendant. Deputy

Curington testified that as he stood next to the driver-side window, he smelled marijuana "inside the car," though his description of the source of the odor was no more precise. He could not recall whether the other windows of the vehicle were rolled down, nor did he approach the passenger-side window where the odor could have been just as potent. He offered no testimony as to whether he smelled marijuana on defendant after ordering him out of the car. To the extent the odor could have been attributed to defendant, it could have been equally attributable to Ms. Dudley or somewhere else inside the car. Deputy Curington may have had probable cause to search the vehicle, but he did not have probable cause to search defendant.

The State did not argue that the discovery of the cocaine was inevitable. Our North Carolina Supreme Court adopted the "inevitable discovery" doctrine established in *Nix v. Williams*, 467 U.S. 431 (1984), as an exception to the exclusionary rule, whereby unlawfully obtained evidence may nevertheless be admitted at trial if the State proves by a preponderance that the evidence ultimately would have been discovered through lawful means. *State v. Garner*, 331 N.C. 491, 500, 417 S.E.2d 502, 507 (1992); *State v. Pope* (*Pope I*), 333 N.C. 106, 114, 423 S.E.2d 740, 744 (1992). Given that Deputy Curington had probable cause to search the vehicle, which contained marijuana and a stolen gun, we might wonder whether the cocaine inevitably would have been discovered through a search incident to a lawful arrest. Whether this doctrine applies in a particular case, however, "is initially a question to be addressed by the trial court." *State v. Pope* (*Pope II*), 333 N.C. 116, 117, 423 S.E.2d 746, 746 (1992). And since it was neither raised nor considered at defendant's motion hearing, we express no opinion on its applicability *sub judice*. *State v. Phelps*, 156 N.C. App. 119, 128, 575 S.E.2d 818, 824–25 (2003) (Hunter, J., dissenting in part), *rev'd for the reasons stated in the dissent*, 358 N.C. 142, 592 S.E.2d 687 (2004).

We are mindful that law enforcement, to be effective, must have "the ability to find and seize contraband and evidence of a crime." *Houghton*, 526 U.S. at 305. We also acknowledge, however, that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Where "[e]ven a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security," *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968), it is certainly not too onerous to require an officer to take some additional step to establish

individualized suspicion before intruding upon a reasonable expectation of privacy.[1]

III. Conclusion

The deputy lacked probable cause to remove defendant from the vehicle and search his person. The search violated defendant's Fourth Amendment rights, and the trial court erred in denying his motion to suppress. N.C. Gen. Stat. § 15A-974(a)(1) (2015); *Pope I*, 333 N.C. at 113–14, 423 S.E.2d at 744 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). We reverse the trial court's order and grant defendant a new trial for possession of cocaine.

REVERSED; NEW TRIAL.

Judge INMAN concurs.

Judge McCULLOUGH concurs with a separate opinion.

McCULLOUGH, Judge, concurrence.

I write separately in concurring with the majority opinion that the search of the defendant's person was improper under the record we have before us. I also write separately to make it clear that at the new trial the State is not precluded from relying on the doctrine of inevitable discovery. In so doing the State must make a record that demonstrates that the cocaine at issue would have been inevitably discovered. As the majority opinion notes, *State v. Phelps* 156 N.C. App 119, 128, 575 S.E.2d 818, 824-25 (2003), *rev'd in part for reasons stated in the dissent*, 358 N.C. 142, 592 S.E.2d 687 (2004), seems to stand for the proposition that this doctrine cannot be relied upon without a factual record establishing its applicability, thus this court cannot make a finding of inevitable discovery without a proper record. An order of new trial does not bar either party from making a new argument or introducing evidence that it never needed to resort to, given the trial court's initial erroneous ruling.

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1. Our appellate case law suggests that officers are capable of determining the source of a marijuana odor. In *State v. Johnson*, 225 N.C. App. 440, 442, 737 S.E.2d 442, 444 (2013), for example, an officer noticed a "strong odor of marijuana coming from [the] defendant's vehicle," prompting the officer to ask the defendant to sit in the patrol car while he checked the defendant's license information. In the patrol car, the officer "still smelled a strong odor of marijuana coming from [the] defendant." *Id.*

STATE OF NORTH CAROLINA
v.
ROBERT MORGAN SMITH

No. COA 15-1364

Filed 2 August 2016

1. Evidence—pretrial motion to suppress—not timely—merits not addressed—right to object at trial preserved

The trial court did not err by summarily dismissing defendant's pretrial motion to suppress hospital medical records in an impaired driving prosecution where defendant's motion was not timely. Moreover, any error was not prejudicial because the trial court stressed that it was not addressing the merits of the motion and was preserving defendant's right to raise any objections during the trial.

2. Evidence—medical records—release—statutory authority

N.C.G.S. § 8-53 (physician-patient privilege) is not the only statute under which patient medical records may be requested and released. N.C.G.S. § 90-21.20B allows law enforcement to obtain medical records through a search warrant for criminal investigative purposes.

3. Evidence—medical records—federal regulations—search warrant

Defendant did not demonstrate that his medical records were obtained in violation of 45 C.F.R. § 164.512(f) (and thus N.C.G.S. § 90-21.20B(a)). By its plain language, 45 C.F.R. 164.512(f) permits disclosure of health information to law enforcement as required by a search warrant if certain conditions are met.

4. Evidence—medical information—disclosure—vehicle crash

The information listed in N.C.G.S. § 90-21.20B(a1) may be disclosed, at the request of law enforcement officials investigating a vehicle crash, while disclosure of additional identifiable health information in the same context is possible with a warrant or judicial order that specifies the information sought. Under N.C.G.S. § 90-21.20B(1a)(3), identifiable health information obtainable by warrant is not strictly limited to name, current location, and perceived state of impairment.

Appeal by Defendant from order and judgment dated 27 August 2014 by Judge Joseph N. Crosswhite in Superior Court, Wayne County. Heard in the Court of Appeals 25 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Whitney Hendrix Belich, for the State.

Strickland, Agner & Associates, by Dustin B. Pittman, for Defendant.

McGEE, Chief Judge.

Robert Morgan Smith ("Defendant") appeals from order of the trial court summarily denying his motion to suppress his medical records pursuant to a search warrant after he was charged with driving while impaired. Defendant contends the trial court erred in denying his motion to suppress as untimely under N.C. Gen. Stat. § 15A-971 *et seq*. Defendant further argues the trial court erroneously admitted the medical records in violation of the physician-patient privilege, N.C. Gen. Stat. § 8-53, and certain health information disclosure provisions in N.C. Gen. Stat. § 90-21.20B. We find no error.

I. Background

Sergeant Karl Rabun ("Sgt. Rabun") of the Goldsboro Police Department responded to an early morning call on 5 September 2013 reporting a motorcycle crash at a traffic circle in downtown Goldsboro, North Carolina. Upon arriving at the scene, Sgt. Rabun found Defendant lying on the ground on the east side of the intersection, with one arm pinned beneath a "badly damaged" motorcycle. Sgt. Rabun recognized Defendant as a local attorney who had previously worked in Wayne County law enforcement. As Sgt. Rabun approached Defendant, he noticed "the strong odor of alcoholic beverage . . . emanating from [Defendant's] breath as he was trying to speak and breathe." Defendant was "complaining of pain . . . from obviously being involved in [an] impact." Sgt. Rabun directed Defendant to lie still until emergency medical responders arrived. Rescue personnel and additional law enforcement officers arrived and helped lift the motorcycle off Defendant.

Officer Matthew Marino ("Officer Marino") of the Goldsboro Police Department assumed responsibility as lead investigator of the crash. Officer Marino immediately noticed the "very strong" odor of alcohol on Defendant's breath. He observed that the engine of Defendant's motorcycle was still hot. Defendant was transported by medical responders

to the Emergency Room at Wayne Memorial Hospital ("the hospital"), where he was treated for injuries.

Approximately forty-five minutes after Defendant arrived at the hospital, Officer Marino spoke with Defendant again. Officer Marino continued to detect a strong odor of alcohol on Defendant's breath and observed that Defendant had bloodshot eyes and slurred speech. Officer Marino formed the opinion that Defendant's faculties were "appreciably impaired" and that "it was more probable rather than not that [Defendant] [had been] driving under the influence of alcohol." After advising Defendant of his implied-consent rights, Officer Marino asked Defendant to submit to a blood test. Defendant refused a blood test, telling Officer Marino to "go get a warrant." Later that morning, Officer Marino charged Defendant with driving while impaired.

Officer Marino applied for a search warrant on 9 September 2013 to obtain Defendant's medical records from Wayne Memorial Hospital related to the motorcycle crash, which was granted. Officer Marino received a total of twenty pages of medical records. Defendant's medical records noted that Defendant had an elevated blood alcohol level at the time of treatment on 5 September 2013. The State filed a notice of intent to use evidence on 6 March 2014, pursuant to N.C. Gen. Stat. § 15A-975(b), including "any . . . oral, written, recorded, and otherwise memorialized statements of the defendant" and "[a]ny and all laboratory analyses provided to the Defendant."

Defendant filed a motion to suppress his medical records on 22 August 2014, alleging that the search warrant had "illegally authorized the seizure of [Defendant's] hospital records pertaining to [his] . . . medical treatment beginning 5 September 2013." In a memorandum of law filed with Defendant's motion to suppress, Defendant alleged that the search warrant violated North Carolina's physician-patient privilege, certain health information disclosure provisions in N.C. Gen. Stat. § 90-21.20B, and the federal Health Insurance Portability and Accountability Act (HIPAA). Defendant also alleged that the warrant was not supported by probable cause as required by N.C. Gen. Stat. § 15A-244.

The State moved to summarily dismiss Defendant's motion to suppress, alleging that Defendant's motion was untimely and accompanied by an insufficient affidavit. Prior to trial, the trial court heard and summarily denied Defendant's motion to suppress, finding that Defendant's motion was untimely under N.C. Gen. Stat. § 15A-976, and that Defendant had not offered any newly discovered facts or extraordinary circumstances that would justify a late filing. In denying Defendant's

motion to suppress, the trial court noted it "[did] not address the merits of [Defendant's] motion, and . . . intentionally preserve[d] the right of the Defendant to raise any objections during the course of th[e] trial at the appropriate time."

The trial court then heard pre-trial arguments regarding the admissibility of Defendant's medical records. After considering the text of N.C.G.S. § 90-21.20B, relevant HIPAA provisions, and case law cited by the State, the trial court held it would

> allow [Defendant's] records to be introduced for the limited purposes indicated; specifically to establish [Defendant's] blood alcohol level, and any statements made by . . . Defendant concerning the motor vehicle accident. Again, this is all subject to the proper identifications and authentications of these [medical] records at the appropriate time [during trial].

The State was instructed to redact "all remaining information" based on the trial court's conclusion that it would have no probative value and that such redaction was necessary to protect Defendant's privacy. Defendant's medical records were subsequently admitted into evidence and published to the jury. The jury found Defendant guilty on 27 August 2014 of driving while impaired. Defendant was sentenced to a level two impaired driving sentence of twelve months, suspended for a probationary term of twenty-four months. Defendant gave notice of appeal in open court.

The State filed a motion to dismiss the appeal on 21 July 2015, based on Defendant's failure to timely serve the record on appeal. The motion was heard and allowed by Judge Arnold O. Jones, II on 10 September 2015. Defendant petitioned this Court on 15 September 2015 to issue a writ of certiorari to review the decision of the trial court. The petition for writ of certiorari was allowed on 1 October 2015. Defendant appeals the trial court order summarily denying his motion to suppress and the admission of his medical records into evidence.

II. Standard of Review

A trial court's conclusions of law in ruling on a motion to suppress evidence are reviewable *de novo*. *See State v. Barnhill*, 166 N.C. App. 228, 230, 601 S.E.2d 215, 217 (2004). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of the trial court. *State v. Williams*, 362 N.C. 628,632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd.*

P'ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). We review *de novo* the trial court's conclusion that Defendant's motion to suppress was untimely filed under N.C. Gen. Stat. § 15A-976.

Defendant also argues that his medical records were improperly admitted because they were obtained in violation of the physician-patient privilege, N.C. Gen. Stat. § 8-53, as well as certain health information disclosure provisions in N.C. Gen. Stat. § 90-21.20B. "Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*[.]" *In re Hamilton*, 220 N.C. App. 350, 352, 725 S.E.2d 393, 395 (2012) (citation omitted).

III. Analysis

A. *Timeliness of Defendant's Motion to Suppress*

[1] Defendant first argues the trial court erred by summarily dismissing his motion to suppress as untimely, pursuant to N.C. Gen. Stat. § 15A-976. Defendant contends that, because the motion to suppress was not based on any of the grounds specified in N.C. Gen. Stat. § 15A-974, it was not subject to the time constraints set forth in N.C.G.S. § 15A-976. Under § 15A-974, evidence must be suppressed if "(1) [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or (2) [i]t [was] obtained as a result of a substantial violation of the provisions of this Chapter." N.C. Gen. Stat. §§ 15A-974(a)(1)-(2) (2015). *See State v. Simpson*, 320 N.C. 313, 322, 357 S.E.2d 332, 337 (1987) ("In determining whether [N.C.G.S. § 15A-974(a)(2)] requires suppression, the reviewing court must consider the importance of the interest violated, the extent of the deviation from lawful conduct and whether the violation was willful, as well as the extent to which suppression will deter future violations."); *State v. Wilson*, 293 N.C. 47, 50, 235 S.E.2d 219, 221 (1977) ("G.S. 15A-974[(a)](1) . . . mandates the suppression of evidence *only* when the evidence sought to be suppressed is obtained in violation of defendant's constitutional rights." (emphasis in original)). Defendant explicitly cited the North Carolina and United States constitutions, as well as N.C.G.S. § 15A-971 *et seq.*, in support of his motion to suppress. As our Supreme Court has noted,

> [a] defendant who seeks to suppress evidence upon a ground specified in G.S. 15A-974 must comply with the procedural requirements outlined in G.S. 15A-971, *et seq.* Moreover, such defendant has the burden of establishing that his motion to suppress is timely and proper in form.

State v. Satterfield, 300 N.C. 621, 624-25, 268 S.E.2d 510, 513-14 (1980) (internal citation omitted)).

N.C. Gen. Stat. § 15A-976(b) provides that

> [i]f the State gives notice not later than 20 working days before trial of its intention to use evidence and if the evidence is of a type listed in G.S. 15A-975(b), the defendant may move to suppress the evidence only if [the] motion is made not later than 10 working days following receipt of the notice from the State.

N.C. Gen. Stat. § 15A-976(b) (2015). In turn, the "type[s] of evidence listed in G.S. § 975(b)" are

> (1) [e]vidence of a statement made by a defendant;
>
> (2) [e]vidence obtained by virtue of a search without a search warrant; or
>
> (3) [e]vidence obtained as a result of [a] search with a search warrant when the defendant was not present at the time of the execution of the search warrant.

N.C. Gen. Stat. §§ 15A-975(b)(1)-(3) (2015). Defendant concedes that his medical records were obtained "with a search warrant when [he] was not present at the time of the execution of the search warrant." N.C.G.S. § 15A-976(b)(3). Accordingly, Defendant's motion to suppress fell squarely within the language of N.C.G.S. § 15A-975(b)(3), and thus was subject to N.C.G.S. § 15A-976(b).

The State filed its notice of intent to use certain evidence[1] on 6 March 2014. Defendant filed his motion to suppress all evidence obtained by search warrant on 22 August 2014, a few business hours before his trial was scheduled to begin. As Defendant sought to suppress evidence obtained as a result of a search warrant executed outside his presence, and because Defendant failed to file the motion to suppress "not later than 10 working days following receipt of the notice from the State," N.C.G.S. § 15A-976(b) applies and his motion to suppress was

1. The State's notice of intent identified two specific types of evidence potentially obtainable from Defendant's medical records: statements made by Defendant, and "[a]ny and all laboratory analyses provided to [] Defendant." Additional evidence listed in the notice of intent—"[a]ny and all photographs, physical evidence, and video tapes collected from the Defendant, the Defendant's home or vehicle, the crime scene, and any other location"—was unrelated to Defendant's medical records and is not at issue in this appeal.

untimely filed. The trial court acted within its "statutorily vested [authority] . . . to deny summarily [a] motion to suppress when the defendant fails to comply with the procedural requirements of Article 53." *State v. Holloway*, 311 N.C. 573, 578, 319 S.E.2d 261, 264 (1984).[2]

We note that even if a trial court erroneously summarily denies a motion to suppress, the defendant must show the error was prejudicial. *See*, *e.g.*, *State v. Speight*, 166 N.C. App. 106, 115, 602 S.E.2d 4, 11 (2004) (concluding that although the trial court erroneously denied defendant's motion to suppress for untimeliness, the error was not prejudicial); *State v. Chance*, 130 N.C. App. 107, 112, 502 S.E.2d 22, 25 (1998) (upholding trial court's erroneous denial of motion to suppress where defendant "failed to show a reasonable possibility that a different result would have been reached at trial had such error[] not been committed."). In this case, despite denying Defendant's motion to suppress on procedural grounds, the trial court stressed that it "[did] not address the merits of [the] motion" and "intentionally preserve[d] the right of the Defendant to raise any objections during the course of th[e] trial at the appropriate time." The trial court did, in fact, permit defense counsel to argue at length regarding the admissibility of Defendant's medical records, including discussion of the substantive statutory arguments raised in Defendant's motion to suppress. Even assuming *arguendo* that the trial court erroneously concluded Defendant's motion to suppress was untimely, Defendant has not shown "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *See also* N.C. Gen. Stat. § 15A-1443(a) (2015).

B. *Admissibility of Defendant's Medical Records*

Defendant also contends the trial court erred in admitting his medical records into evidence "without regard for" the physician-patient privilege set forth in N.C. Gen. Stat. § 8-53, and contrary to several health information disclosure provisions in N.C. Gen. Stat. § 90-21.20B. We disagree and address each in turn.

(1) *Physician-Patient Privilege*

[2] Defendant maintains that, by the plain language of the physician-patient privilege statute, N.C. Gen. Stat. § 8-53, disclosure of a patient's medical records may be compelled only by judicial order after determination that such disclosure is "necessary to a proper administration of

2. The General Assembly has indicated that procedural requirements found in Article 53 are intended "to produce in as many cases as possible a summary granting or denial of the motion to suppress." *See* N.C. Gen. Stat. § 15A-977 official cmt. (2015).

justice." *See* N.C. Gen. Stat. § 8-53 (2015). Defendant cites no authority, other than N.C.G.S. § 8-53 itself, to support his argument that this statute provides the exclusive means of obtaining patient medical records. The State asserts that another statute, N.C. Gen. Stat. § 90-21.20B, allows law enforcement to obtain medical records through a search warrant for criminal investigative purposes. It notes that the latter explicitly permits the disclosure of certain protected patient health information to law enforcement "[n]otwithstanding G.S. 8-53 or any other provision of law . . . ." *See* N.C. Gen. Stat. §§ 90-21.20B(a), (a1) (2015). According to the State, this demonstrates that N.C.G.S. § 8-53 is not the only statute under which patient medical records may be requested and released. We agree.

(2) *Disclosure pursuant to search warrant*

[3] We next consider Defendant's argument that N.C.G.S. § 90-21.20B "[did not] permit[] the disclosure to law enforcement and use at trial of the medical records in this case." We disagree.

N.C. Gen. Stat. § 90-21.20B provides in pertinent part:

> (a) Notwithstanding G.S. 8-53 or any other provision of law, a health care provider may disclose to a law enforcement officer protected health information only to the extent that the information may be disclosed under the federal Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. § 164.512(f) and is not specifically prohibited from disclosure by other state or federal law.
>
> (a1) Notwithstanding any other provision of law, if a person is involved in a vehicle crash:
>
> > (1) Any health care provider who is providing medical treatment to the person shall, upon request, disclose to any law enforcement officer investigating the crash the following information about the person: name, current location, and whether the person appears to be impaired by alcohol, drugs, or another substance.
> >
> > (2) Law enforcement officers shall be provided access to visit and interview the person upon request, except when the health care provider requests temporary privacy for medical reasons.

> (3) A health care provider shall disclose a certified copy of all identifiable health information related to that person as specified in a search warrant or an order issued by a judicial official.

In interpreting N.C.G.S. § 90-21.20B, we look to the federal regulations referenced in N.C.G.S. §90-21.20B(a), which govern disclosure of "protected health information for a law enforcement purpose[.]" *See* 45 C.F.R. § 164.512(f) (2016). Those regulations define "protected health information" as "individually identifiable health information," which in turn is defined as:

> [I]nformation that is a subset of health information, including demographic information collected from an individual, and:
>
> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) That identifies the individual; or
>
> (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. § 160.103 (2016).[3] The regulations further provide that a health care provider may disclose protected health information (*i.e.*, "individually identifiable health information") for a law enforcement purpose to a law enforcement official "[i]n compliance with . . . [a] court order or court-ordered warrant" as long as "(1) [t]he information sought is relevant and material to a legitimate law enforcement inquiry; (2) [t]he request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

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3. "Protected health information" explicitly excludes four specific types of "individually identifiable health information," none of which are at issue in this case: (1) education records covered by the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; (2) FERPA records described in 20 U.S.C. § 1232g(a)(4)(B)(iv); (3) employment records held by a covered entity in its role as employer; and (4) records "[r]egarding a person who has been deceased for more than 50 years." *See* 45 C.F.R. § 160.103.

(3) [d]e-identified information[4] could not reasonably be used." 45 C.F.R. § 164.512(f)(1)(ii) (2016).

Defendant argues that "protected health information" obtainable by law enforcement under 45 C.F.R. § 164.512(f) (and thus N.C.G.S. § 90-21.20B(a)) is limited to "demographic information which identifies an individual or upon which there is a reasonable basis to believe that an individual may be identified," and that N.C.G.S. § 90-21.20B(a) does not permit law enforcement to obtain any further information. As an initial matter, we note that Defendant did not contend at trial that certain "demographic information" in his medical records was obtainable by search warrant; he contended that the records were improperly released because the information in the records was "not obtained for a law enforcement purpose or a law enforcement use."[5]

Defendant overlooks the fact that "protected health information" (used synonymously with "individually identifiable health information"), as defined in 45 C.F.R. § 160.103, "includ[es]," rather than is limited to, demographic information about an individual patient. Defendant also reads the phrase out of context: the regulations refer specifically to "demographic information *collected from an individual*" (emphasis added). In our view, this merely recognizes that "health information" encompasses information received directly from the patient, in addition to information created by the provider or received from some other source.

By its plain language, 45 C.F.R. § 164.512(f) permits disclosure of health information to law enforcement as required by search warrant, if certain conditions are met. Defendant has not alleged that the search warrant in this case sought information that was not "relevant and material to a legitimate law enforcement inquiry" or was insufficiently "specific and limited in scope," or that de-identified information could

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4. "De-identified information" is "[h]ealth information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual . . . ." 45 C.F.R. § 164.514(a) (2016). HIPAA permits covered entities (*i.e.*, health care providers) to disclose limited de-identified health information "for the purposes of research, public health, or health care operations." 45 C.F.R. § 164.514(e)(3)(i) (2016).

5. Defendant argued instead that a different standard altogether, 45 C.F.R. § 164.512(e), applied in this case. That provision governs disclosures of protected health information for judicial and administrative proceedings (as opposed to disclosures for law enforcement purposes, *see* 45 C.F.R. § 164.512(f)), and contains notice and hearing requirements. In his brief before this Court, Defendant does not refer to 45 C.F.R. § 164.512(e).

have reasonably been used instead. *See* 45 C.F.R. § 164.512(f)(1)(ii) (2016). Accordingly, Defendant has not demonstrated that his medical records were obtained in violation of 45 C.F.R. § 164.512(f) or N.C.G.S. § 90-21.20B(a).

(3) *Disclosures Related to a Vehicle Crash*

[4] Finally, N.C. Gen. Stat. § 90-21.20B(a1)(1) specifically addresses disclosure of medical information about a person involved in a vehicle crash. It provides that

> [n]otwithstanding any other provision of law, . . . [a]ny health care provider who is providing medical treatment to the person [involved in a vehicle crash] shall, upon request, disclose to any law enforcement officer investigating the crash the following information about the person: name, current location, and whether the person appears to be impaired by alcohol, drugs, or another substance.

N.C. Gen. Stat. § 90-21.20B(a1)(1) (2015). Defendant argues that this "more narrow provision" permits law enforcement officers investigating a vehicle crash, with or without a search warrant, "to be provided information which informs them of the identity of an individual and whether that person appears to be impaired—nothing more." We disagree.

In N.C.G.S. § 90-21.20B(a1)(1), the General Assembly authorized disclosure "upon request" to law enforcement of the three types of information listed, in the context of a vehicular accident. By contrast, N.C. Gen. Stat. § 90-21.20B(a1)(3) permits disclosure of "*identifiable health information* related to th[e] person [involved in the vehicle crash] *as specified in a search warrant* or other judicial order." N.C. Gen. Stat. § 90-21.20B(a1)(3) (2015) (emphases added). "The rules of statutory construction require presumptions that the legislature inserted every part of a provision for a purpose and that no part is redundant." *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) (citing *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975)). This principle leads us to conclude that the information listed in N.C.G.S. § 90-21.20B(a1)(1) may be disclosed, without a warrant, at the request of law enforcement officials investigating a vehicle crash, while disclosure of additional "identifiable health information" in the same context is possible, but requires a search warrant or judicial order that "specifie[s]" the information sought. As discussed above, under federal law, "identifiable health information" includes information created by a health provider that "[r]elates to the past, present, or future physical or mental health or condition of an individual." 45 C.F.R. § 160.103. Thus,

we conclude that under N.C.G.S. § 90-21.20B(a1)(3), "identifiable health information" obtainable by search warrant is not strictly limited to an individual's name, current location, and perceived state of impairment.

On appeal, Defendant argues his medical records were inadmissible based upon N.C.G.S. § 8-53 and N.C.G.S. § 90-21.20B only. He does not reassert the additional argument raised before the trial court in his motion to suppress, that the search warrant was not supported by sufficient probable cause in violation of N.C. Gen. Stat. § 15A-244, and we do not reach that issue. Defendant also does not allege the records were otherwise inadmissible due to some defect in evidentiary procedure. *See*, *e.g.*, *State v. Drdak*, 330 N.C. 587, 592-93, 411 S.E.2d 604, 607-08 (1992) (holding that the State was required to lay a proper foundation for the admission of blood alcohol test results not controlled by implied-consent statutory procedures). Because Defendant has not shown that his medical records were obtained in violation of either statute he cites, we find no error.

NO ERROR.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
DIEGO LEANDER YOUNG, DEFENDANT

No. COA15-761

Filed 2 August 2016

1. Conspiracy—sufficiency of evidence—two armed robberies—conviction only for second—actions taken in first

There was sufficient evidence of conspiracy to commit armed robbery where there were two robberies and two charges of conspiracy but convictions on only the second robbery, with actions in the first robbery supporting the conspiracy in the second. Keys for a white car were stolen during the first robbery, in which defendant and others participated, and a white car circled the second victim before defendant emerged from the back seat to commit the robbery.

2. Evidence—photographs—identified as perpetrator—not identified as defendant—defendant present in courtroom—jury able to draw conclusions

There was no plain error in the admission of photo line-up evidence where no one testified that defendant was the person depicted in any photo identified. The jurors were able to look at the photographs identified by the victims as the person who robbed them and then look at defendant in the courtroom and draw their own conclusions.

Appeal by defendant from judgments entered 13 June 2014 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 17 December 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Neal T. McHenry, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

STROUD, Judge.

Defendant Diego Leander Young appeals from judgments entered upon the jury verdicts finding him guilty of armed robbery and conspiracy to commit armed robbery. Because the State presented sufficient evidence of the existence of a conspiracy to commit armed robbery, and because defendant has failed to demonstrate any error, much less plain error, in the authentication and relevancy of photographs identified by the witnesses as depicting the person who robbed them, we find no error.

Facts

The State's evidence tended to show the following. On 15 March 2011, Patrick Keen got off work and drove a white Hyundai Azera to Nedham Boric's apartment to sell him marijuana. He had visited this same apartment, on Shady Oaks Trail, about five or six times before for the same reason. When he arrived, he saw Mr. Boric walking his dogs out front, and they both went upstairs to Mr. Boric's second floor apartment. When Mr. Keen entered the apartment, he saw three African American men, two of whom he recognized and knew by nicknames. One of the men was defendant, whom Mr. Keen knew as "D." Mr. Keen identified defendant in the courtroom as the man he knew as "D." Mr. Keen had

seen defendant at Mr. Boric's apartment "[o]nce or twice" before. Mr. Keen greeted the men, but they did not respond, which he thought was "a little awkward and strange." He sat down on the couch. Defendant then walked into the hallway and returned with a "white and blue" bandana covering his face under his eyes and holding a shotgun. Defendant pointed the shotgun at Mr. Keen's head while the other two men just stood there and watched.

Mr. Keen asked "why I was getting robbed," and defendant said " 'I'm being serious.' " The other two men then took the keys to Mr. Keen's Hyundai, as well as his wallet, phone, and book bag, which contained the marijuana. Defendant then hit him in the back of the head with the butt of the shotgun and the men walked him to a bedroom in the back of the apartment and told him that if he moved or said anything, they would kill him. They made him lie down on the bed and tied his hands behind his back with duct tape, tied his ankles with duct tape, and put a sheet over him. Mr. Keen estimated that he stayed there for about two hours, although he had no way of telling the time.

Hearing no noises from the apartment, eventually he broke the tape off and checked to make sure no one was in the apartment. He tried to get out the front door of the apartment but it was locked from the outside. He then climbed out the back balcony to the apartment next door, but no one answered when he knocked on the door. He forced the door open and entered the apartment, where he found a couple who then called 911. According to the police records, the call came in at about 9:47 p.m. Mr. Keen tried to explain to them than he was not there to harm them but was trying to escape from the apartment next door. He still had some duct tape on his leg. The police arrived in a few minutes. After the police came, they went out to the parking lot to find the white Hyundai Azera, but it was missing and was never recovered.

Ms. Konnie Krueger estimated that at about 6:00 p.m. that same day, 15 March 2011, she went out to walk her dog. She lived in a condominium on Meadowlark Lane in Charlotte, N.C. Her condominium was very close to Shady Oaks Trail, in a complex which "back[ed] up" to the apartments where Mr. Keen was robbed. While she was walking the dog in the parking lot, two men passed her; she said hello to them and they said hello to her. She then saw a white car with four doors circle around the parking lot twice. While she was getting her dog and holding an umbrella, she saw a man get out of the back seat of the white car. He began to walk toward her and she saw that he was holding something "long and shiny" which she initially thought was an umbrella since it was raining, but then she realized it was a shotgun. The man was African

American, a "big man," and was wearing a hoody and a dark blue or black bandanna covering his lower face. He then put the gun to her head and said " 'Give me all your money, bitch.' " She initially laughed, thinking "this couldn't be happening to me. I was in ducky pajamas and a hoody." But the man then pointed the gun at her knee and said, " 'Bitch, I'll blow your head off. This ain't a joke.' "

From that moment on, she testified that she "stared directly in his eyes." He told her to give him her money, and she at first said she did not have any, but then felt that she had $3.00 in her pocket. He grabbed the $3.00, a pack of cigarettes, and her medication. He then told her to "get in the place" and she said that she did not live there. He turned to walk away, but then turned back and grabbed her cell phone, saying, " 'You effin' bitch, you ain't going to call the cops -- po-pos on me.' " Defendant then got into the back seat on the left-hand side of the white car and it sped off. Police were called to the scene of Ms. Krueger's robbery at about 9:20 p.m.

Later on the same evening, both Mr. Keen and Ms. Krueger were separately shown photo lineups and both ultimately identified the same photo as the man who had held a gun to their heads and robbed them. At trial, Ms. Krueger testified that she was "[a]bsolutely" certain that the man shown in photograph 2 of State's exhibit 8 was the man who robbed her, "[b]ecause I never took my -- once I knew it was for real, I looked into his eyes the whole time, and I would know those eyes today. They haunt me." Mr. Keen identified the man in the photograph with 95% certainty as "the guy that held a shotgun in my face and hit me on the back of the head" and robbed him.

On 13 June 2014, a jury found defendant guilty of one count of armed robbery and one count of conspiracy to commit armed robbery, both regarding victim Konnie Krueger, but was unable to reach a verdict on the three other charges. The trial court declared a mistrial as to the charges of robbery with a firearm, conspiracy to commit robbery with a firearm, and first degree kidnapping, all regarding victim Patrick Keen. The trial court entered judgment upon the one count of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon, both as to the charges involving Ms. Krueger, and defendant properly gave notice of appeal in open court.

Discussion

Defendant raises two issues on appeal, arguing (1) that the trial court erred by denying his motion to dismiss one of the conspiracy charges and (2) that the court plainly erred when it admitted photographic

lineup evidence identifying defendant as the perpetrator of the robberies at issue.

I. Sufficiency of evidence of conspiracy

[1] Defendant first contends that the "trial court erred by denying [defendant's] motion to dismiss conspiracy in 11 CRS 212908 because evidence that a man exited a car wearing a bandana over his face failed to establish [defendant] and another person entered an express agreement or mutually implied understanding to commit robbery with a firearm." Defendant argues that the trial court should have granted his motion to dismiss because the State failed to present sufficient evidence of the existence of a conspiracy between defendant and another person to rob Ms. Krueger.

Our Supreme Court has previously explained that when reviewing a defendant's motion to dismiss:

> the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether

> the facts, *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty.
>
> Both competent and incompetent evidence must be considered. In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict may be used to explain or clarify the evidence offered by the State. When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455-56 (2000) (citations, quotation marks, and brackets omitted).

Defendant argues that since he was charged with two separate counts of conspiracy -- one to commit armed robbery of Mr. Keen and one to commit armed robbery of Ms. Krueger -- the State must present sufficient evidence to establish that defendant entered into two separate agreements to commit the unlawful acts. Defendant claims that "at most, [the] evidence showed [that] one man exited the backseat of a car, robbed Krueger, and returned to the backseat of a car. Nothing suggested [defendant] conspired with [Nedham] Boric as alleged in the indictment. Nothing suggested [defendant] conspired with any other person to commit robbery with a firearm" of Ms. Krueger.

The State responds that "there was circumstantial evidence that tended to show that defendant had agreed with the other individuals at Nedham Boric's apartment to rob Ms. Krueger." The evidence showed that defendant pointed a gun at Mr. Keen while the other two men took his property, including his car keys, taped him up, and then took his white Azera. Just after this robbery, at an adjoining complex parking lot, Ms. Krueger saw a white car circling the lot just before the car stopped and defendant got out of the back seat and robbed her. The State contends that "[t]aken together, this evidence is sufficient to show that defendant knew in advance that a robbery was going to occur, that he participated with at least one other individual, namely the person driving the car, in the robbery with each having preassigned roles and that defendant and at least one other individual conspired to commit the robbery." Defendant's argument on appeal focuses only on the facts of the occurrences in the parking lot, when a man got out of a car and robbed Ms. Krueger. But the evidence presented at trial also encompassed the

incidents which occurred just before, in Mr. Boric's apartment, and all of the evidence taken together supports the State's theory.

We first note that although defendant was charged with two counts of conspiracy, one as to Mr. Keen and one as to Ms. Krueger, he was convicted only of one count, so we need not determine if the State's evidence can support more than one agreement to commit unlawful acts against more than one victim. Even where multiple crimes are committed, there may be only one conspiracy, or agreement to commit a series of acts.

> It is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime. It is also clear that where a series of agreements or acts constitutes a *single* conspiracy, a defendant cannot be subjected to multiple indictments consistently with the constitutional guarantee against double jeopardy. Defining the scope of a conspiracy or conspiracies remains a thorny problem for the courts. This Court has affirmed multiple conspiracy convictions arising from multiple substantive narcotics offenses involving a single amount of drugs found on a single occasion, apparently on the theory that each conspiracy involved separate elements of proof, and represented a separate agreement. However, under North Carolina law multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies. There is no simple test for determining whether single or multiple conspiracies are involved: the essential question is the nature of the agreement or agreements, but factors such as time intervals, participants, objectives, and number of meetings all must be considered.
>
> It is only proper that the State, having elected to charge separate conspiracies, must prove not only the existence of at least two agreements but also that they were separate.

State v. Rozier, 69 N.C. App. 38, 52-53, 316 S.E.2d 893, 902 (1984) (citations omitted).

If defendant had been convicted of both counts of conspiracy, as to the crimes alleged against both Mr. Keen and Ms. Krueger, we would face the "thorny problem" of the scope of the conspiracy. *Id.* at 52, 316 S.E.2d at 902. Did defendant and the other men agree to take Mr. Keen's

car and go out to commit other robberies, which would be one conspiracy to commit multiple crimes, or did they agree to rob Mr. Keen and then separately agree to take his car and go out to rob someone else, thus making two separate agreements? But we need not make that determination, since defendant was convicted of only one count of conspiracy and the evidence supports the existence of at least one agreement to commit unlawful acts.

Defendant draws comparisons from *State v. Wellborn*, 229 N.C. 617, 621, 50 S.E.2d 720, 723 (1948), where our Supreme Court found insufficient evidence of conspiracy and reversed the defendant's conviction. In *Wellborn*, the defendant was charged with conspiring with another individual, Guy Cain, to feloniously assault another man, Hubert Wells, with a deadly weapon with intent to kill. *Id.* at 617, 50 S.E.2d at 720. The State's evidence, however, was "confined to the circumstance of [the defendant] being seen with Cain a few times that night and that he accompanied Cain in the pickup truck when following the Wells car to the place of the fight." *Id.* at 618, 50 S.E.2d at 721. In reversing the conspiracy conviction, the Supreme Court concluded that "there [was] no evidence that Cain had ever communicated to [defendant] his purpose or that prior to the actual fatal encounter [defendant] had any knowledge of the intent." *Id.* But here, the State presented evidence at trial tending to show that defendant acted in concert with other individuals, first to rob Mr. Keen and then, after stealing his car, Ms. Krueger.

Although the evidence is circumstantial, it does support the inference that defendant and the other men in Boric's apartment agreed to take Mr. Keen's car and to go on to commit other unlawful acts, with defendant wielding the shotgun and another person driving the car. The acts against Ms. Krueger occurred within minutes after defendant and the other men tied up Mr. Keen and took his car. Ms. Krueger was in a parking lot very near Mr. Boric's apartment, and the jury could easily infer that defendant pointed the same shotgun at Ms. Krueger and was wearing the same blue bandana over his face, as described by Mr. Keen. Accordingly, we find that the trial court did not err by denying defendant's motion to dismiss.

2. Plain error in admission of photo lineup evidence

[2] Defendant next argues that the "admission of irrelevant photo lineup evidence constituted plain error because without the erroneously admitted evidence, it is probable the jury would have reached a different result on the offenses involving Kruger." Defendant acknowledges that he did not object at trial to the admission of the photographs identified

in the photo lineups by both Mr. Keen and Ms. Krueger as the man who robbed them and that they were admitted as substantive evidence and published to the jury without objection. Defendant argues that the admission is plain error because the photos were "irrelevant and inadmissible as substantive evidence" where "no witness with knowledge testified that [defendant] was in fact the person depicted in photo 2 or 5." Defendant contends that without these photographs, the jury would likely have reached a different decision.

Because defendant did not object to the admission of the photos at trial, we review this issue for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

We agree that without the admission of Photographs 2 and 5, it is probable that the jury would have reached a different result, since these photographs were a key piece of evidence identifying defendant as the person who both stole Mr. Keen's car and then robbed Ms. Krueger. Thus, we must consider whether the photos were properly authenticated and relevant.

> We generally review the trial court's decision to admit evidence for abuse of discretion, looking to whether the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. However, with regard to a determination on the relevancy of evidence, a trial court's rulings technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403; nonetheless, such rulings are given great deference on appeal.

State v. Murray, 229 N.C. App. 285, 287-88, 746 S.E.2d 452, 454 (2013) (citations, quotation marks, ellipses, and brackets omitted).

Defendant argues that since no one testified that defendant was "the person depicted in any photo identified by [Mr.] Keen or [Ms.] Krueger, the photos were irrelevant and inadmissible." For a photo to be admissible as substantive evidence, "it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be." *State v. Lee*, 335 N.C. 244, 270, 439 S.E.2d 547, 560 (1994). In addition, it must be "properly authenticated as a correct portrayal of the person depicted." *Id.*

> N.C. Gen. Stat. § 8-97 provides that any party may introduce a photograph as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. Rule 901 of our Rules of Evidence requires authentication or identification by evidence sufficient to support a finding that the matter in question is what its proponent claims. In order for a photograph to be introduced, it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be.

Murray, 229 N.C. App. at 288, 746 S.E.2d at 454-55 (citations and quotation marks omitted).

In *Murray*, an informant who purchased drugs from the defendant as part of a controlled buy and the detective conducting the buy testified to authenticate the photographs of the defendant challenged in that case. *Id.*, 746 S.E.2d at 455. Three photos, Exhibits 7, 8, and 9, were admitted, and each depicted a different person. *Id.* The informant testified that he knew the individuals in the photos as "people from whom he had bought drugs in the past" and that he had "picked each of them out of a photo lineup the night before." *Id.* He also testified that one of the photos, Exhibit 9, "was the person from whom he bought drugs on 18 January 2011 [the date of the alleged crime] and that the person was Defendant." *Id.* This Court held that this testimony was sufficient to authenticate all of the photos, and as relevant for our purposes here, to authenticate Exhibit 9 as a photograph of defendant, stating:

> We believe this testimony was sufficient to authenticate Exhibits 7 and 8 as photographs of people from whom Mr. West purchased drugs in the past. We further believe this testimony was sufficient to authenticate Exhibit 9 as Defendant, such that it was properly admitted.

Id. (citation omitted).

In the present case, Mr. Keen testified that he had previously met defendant at Mr. Boric's apartment and knew him as "D." He identified Photograph 5 as the man who held a gun to his head and robbed him when he viewed the photo lineup and he identified defendant in the courtroom at trial as well. Mr. Keen's testimony, like that of the informant in *Murray*, is sufficient to authenticate Photograph 5 as a photograph of defendant.

Photograph 2 was admitted during Ms. Krueger's testimony, and unlike Mr. Keen, she did not know defendant and she did not identify him in court as the person who robbed her. She did testify that Photograph 2 depicted the person who robbed her. Defendant argues that "the State did not call any witness who compiled, administered, or had any knowledge about the source of any photo or the identity of the person depicted in any photo included in any photo lineup. The State wholly failed to elicit testimony from any witness with knowledge that the purported photos of [defendant] actually depicted [defendant.]"

Since our review of this issue is for plain error, we first note that if defendant had objected at trial, the State would have had the opportunity to provide further foundation for the admission of Photographs 5 and 2. In *State v. Howard*, 215 N.C. App. 318, 327, 715 S.E.2d 573, 579 (2011), the defendant claimed that the trial court committed plain error in admitting "Wal-Mart receipts and photos captured from the Wal-Mart surveillance video" because they were not properly authenticated. This Court found no plain error because the State would have been able to provide additional foundation, had defendant made a timely objection at trial. *Id.* at 327-28, 715 S.E.2d at 580.

> North Carolina Rule of Evidence 901(a) states the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. North Carolina Rule of Evidence 1002, known as the best evidence rule states, to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. Rule 1003, Admissibility of Duplicates, provides [that] a duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

> Based upon our review of the record, it appears that if defendant had made a timely objection, the State could have supplied the necessary foundation. Had defendant objected to the evidence now challenged the State could have properly authenticated it and either provided the originals of the social security card and receipts to comply with the best evidence rule or explained why admission of duplicates was appropriate. Since defendant has made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that the evidence in question is inaccurate or otherwise flawed, we decline to conclude the omissions discussed above amount to plain error.

Id. at 327, 715 S.E.2d at 579-80 (citations, quotation marks, ellipses, and brackets omitted).

In addition, we note that Photograph 5 identified by Mr. Keen and Photograph 2 identified by Ms. Krueger are the *same* photograph of the same person. They were given different numbers in the photographic lineups and were identified as separate exhibits for trial, but they are identical photographs. Thus, for purposes of plain error review, the authentication of Photograph 5 is also sufficient to authenticate Photograph 2.

Defendant also argues that the photographs were irrelevant because no witness testified that the person in the photographs was defendant. Defendant notes that "the State did not call any witness who compiled, administered, or had any knowledge about the source of any photo or the identity of the person depicted in any photo included in any photo lineup."[1] Defendant's argument seem to suggest that we should *require* lay opinion testimony to identify the person depicted in the photographs as defendant. This argument is the flip-side of the argument we typically see, which is an objection to lay opinion testimony, often from a law enforcement officer, that the person shown in a photograph or video is

1. N.C. Gen. Stat. § 15A-284.52 (2015) requires that photographic lineups be conducted by an "independent administrator" who is "not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect." Defendant did not raise any argument regarding how the lineup was conducted, and to the extent that we can tell from our record, it appears to have been done generally in accord with the procedure which is now required. In any event, it would seem to be entirely appropriate that the person who compiled or administered the lineups would *not* be able to identify defendant.

the defendant. In those cases, the defendants argue that the jury should be able to determine if the defendant was the person depicted in the photograph. For example, in *State v. Hill*, __ N.C. App. __, __, 785 S.E.2d 178, 181 (2016), the defendant argued on appeal that the law enforcement officers should not have been permitted to "give their lay opinions that the person in the surveillance videos was Hill. Specifically, Hill alleges the officers were no better qualified than the jury to identify the suspect in the videos and, therefore, he was prejudiced by the admission of their testimony."

This Court rejected the defendant's argument in *Hill*, based upon the fact that the officers were familiar with defendant before the incident in question and that his appearance had changed between the time of his arrest and trial. *Id.* at __, 785 S.E.2d at 182. We noted that "[a]dmissible lay opinion testimony is limited to those opinions or 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." *Id.* at __, 785 S.E.2d at 181 (quotation marks omitted). Here, defendant argues that the officers or some other witness should have been required to identify the person depicted in the photographs as defendant. We can find no support for any such requirement. The jury was well able to look at the photographs identified by Mr. Keen and Ms. Krueger as the person who robbed them and to look at the defendant sitting in the courtroom and draw their own conclusions about whether he was the person depicted in the photographs. In fact, we do not have this advantage on appeal, since our record does not show us what the defendant looked like in the courtroom at trial. In any event, defendant has not demonstrated any error in the admission of Photographs 2 and 5, much less any plain error.

For the reasons above, we find no error in the defendant's trial.

NO ERROR.

Judges DIETZ and TYSON concur.

TANNER v. TANNER

[248 N.C. App. 828 (2016)]

JEREMY KYLE TANNER, PLAINTIFF
v.
MARY MARGARET TANNER AND SARA N. TANNER, DEFENDANT

No. COA15-792

Filed 2 August 2016

1. Appeal and Error—appealability—constructive trust—final determination of rights

An appeal in a divorce action was interlocutory but affected a substantial right where a constructive trust on certain funds was imposed in the same order in which the person holding the funds (the husband's mother) was joined as a necessary party. The imposition of the constructive trust and the determination that the monies belonged to the marital estate made a final determination of the final rights of the mother.

2. Parties—necessary—constructive trust—person holding funds—no opportunity to be heard

An order imposing a constructive trust upon funds held by the mother of a party in an equitable distribution system was vacated in the same order in which the mother was joined as a necessary party.

Appeal by defendant from order entered 12 January 2015 by Judge Addie H. Rawls in District Court, Johnston County. Heard in the Court of Appeals 3 December 2015.

No brief filed on behalf of plaintiff-appellee.

The Williams Law Group, PC, by Teresa Y. Davis, for defendant-appellee.

Mary McCullers Reece, for defendant-appellant.

STROUD, Judge.

Appellant Sara Tanner appeals from an order, entered 12 January 2015, imposing a constructive trust upon her funds for the benefit of the marital estate of plaintiff and defendant Mary Margaret Tanner. All parties to the appeal agree that Appellant was properly joined as a necessary party, but because Appellant had not been joined as a party prior to the hearing and order which determined her substantive rights, the trial

court did not have personal jurisdiction over her and we must vacate the order to the extent that it addresses any issue other than joinder of Appellant as a necessary party.

I. Facts

Plaintiff ("Husband") and defendant Mary Tanner ("Wife") were married in 2004 and separated on 15 February 2013. On 15 February 2013, Husband filed a complaint for custody and equitable distribution, including "interim distribution" and "unequal division injunctive relief[.]" (Original in all caps.) On 22 March 2013, Wife filed her answer and counterclaimed for child custody, child support, equitable distribution, post-separation support and alimony, and attorney fees.

On 14 April 2014, Wife filed a "MOTION IN THE CAUSE" in which she requested joinder of Appellant Sara Tanner as a party, imposition of a constructive trust, and a restraining order because she had learned during discovery "that between October and December of 2012 [Husband] removed funds from his business in the approximate amount of $335,569.60 and gave them to his mother Sara N. Tanner." Wife further alleged that Husband had "clearly anticipated his separation" and was attempting to avoid having funds "distributed as marital property." Wife contended that "Sara N. Tanner is a necessary party and should be joined to the equitable distribution action pursuant to Rule 21 of the N.C. Rules of Civil Procedure for further determination of the ownership interest in the funds transferred to her by Plaintiff." Wife also requested imposition of "a restraining order to prohibit the use, movement, depletion, waste, conversion or disappearance of the funds that are the subject of the constructive trust pending further hearings[.]"

On 4 and 6 November 2014, the trial court held a hearing regarding the Wife's motion for joinder, imposition of a constructive trust, and issuance of a restraining order. Husband and Wife each appeared at this hearing with their respective counsel. Appellant was present because she was subpoenaed by Wife to appear and testify, but she was not yet a party to the action and was not represented by counsel. From our record, no summons was ever issued to Appellant nor was she ever served with any other pleadings, motions, or notices. After the hearing, on 6 January 2015, counsel for Appellant filed a notice of appearance.

On 7 January 2015, the case "came on for hearing regarding entry of the order" from the November 2014 hearing. Counsel for Husband had accepted the draft of the order as proposed by Wife's counsel, but Appellant's counsel, who had just made her first appearance in the case

the prior day, objected to entry of the order. Over the objection, the trial court entered the order.

On 12 January 2015, the trial court entered the order for "JOINDER & CONSTRUCTIVE TRUST[.]" The order contained detailed findings of fact and conclusions of law regarding Husband's transfer of funds to Appellant and ultimately determined that a constructive trust should be imposed. The order decreed:

> 1. Sara N. Tanner is hereby joined as a party to the pending claims for equitable distribution in this case.
>
> 2. Sara N. Tanner shall serve as trustee of the remainder of the funds distributed to her by the Plaintiff for the benefit of the Plaintiff and Defendant's marital estate. Those funds are currently in an account managed by UBS. She shall abide by and distribute those funds in accordance with any subsequent Order of this Court equitably distributing the parties' marital estate.
>
> 3. Sara N. Tanner is hereby restrained from taking any action depleting, wasting, moving or otherwise causing the disappearance of the remainder of the funds distributed to her by the Plaintiff. If Sara N. Tanner is advised by the manager of the UBS account in which the funds are located that some action needs to be taken, then she shall immediately advise counsel for both Plaintiff and Defendant. She shall authorize the funds manager to speak with counsel for both Plaintiff and Defendant. No action shall be taken regarding the funds without prior notice, input and agreement of all parties to the equitable distribution claim.

The 12 January 2015 order was the first and only order to join Appellant as a party to the case as a defendant. On 11 February 2015, Appellant gave notice of appeal from the order.

II. Interlocutory Appeal

[1] Appellant acknowledges that her appeal is interlocutory, but argues that we should hear her appeal because "an order determining ownership and control of a substantial amount of money affects a substantial right." Appellant contends that "[t]he order at issue here went well beyond preserving the status quo: the imposition of the constructive trust and the determination that the monies in Sara's account belonged

to the marital estate made a final determination as to Sara's rights." We agree.

In *Estate of Redden v. Redden*, "the trial court entered partial summary judgment in favor of plaintiff[, decedent's estate,] and ordered defendant[, decedent's wife,] to pay plaintiff the sum of $150,000.00 plus costs." 179 N.C. App. 113, 115, 632 S.E.2d 794, 797 (2006), *disc. review allowed in part and remanded on other issues*, 361 N.C. 352, 649 S.E.2d 638 (2007). This Court stated:

> In determining whether a substantial right is affected a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to appellant if not corrected before appeal from final judgment. A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.
>
> Here, defendant asserts in her statement of grounds for appellate review that:
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> > This appeal is taken from the Order, entered June 27, 2005, granting the Plaintiff partial summary judgment and ordering Defendant Barbara Redden to pay to the Estate of MONROE M. REDDEN, JR., deceased, the sum of one hundred fifty thousand dollars ($150,000.00) and costs. The Order appealed affects a substantial right of Defendant Barbara Redden by ordering her to make immediate payment of a significant amount of money; therefore, this Court has jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. § 1–277 and N.C. Gen. Stat. § 7A–27(d).

Id. at 116-17, 632 S.E.2d at 797-98 (citations, quotation marks, and brackets omitted). In accord with the reasoning in *Estate of Redden*, we consider Appellant's appeal. *See id.*

III. Necessary Party

[2] Appellant argues that the trial court's order imposing a constructive trust over funds in her possession must be vacated because she was a necessary party to the hearing. This case stands in a unique procedural posture since the trial court has already agreed with Appellant's

contention that she is a necessary party. Conclusion of law six of the order states, "Sara N. Tanner is a necessary party as contemplated by Rule 19 of the N.C. Rules of Civil Procedure and the court cannot make a final determination of equitable distribution without her being made a party to that action." Thus, Appellant is not arguing that she is a necessary party and should be joined, since the trial court already determined that and ordered her joinder, but rather she contends that the trial court had no authority to hear the merits of the motion to impose a constructive trust on the funds in her possession as she was not a party at the time that issue was being considered by the trial court.

We note that the only parties who filed briefs on appeal are Appellant and Wife. The trial court determined Appellant was a necessary party, but it did so in the same order which also imposed a constructive trust on funds in her possession. Thus, at the time Appellant became a party, the issue of funds in her possession had already been determined without her having any opportunity to be heard on the matter as a party in the case. Wife essentially concedes that Appellant is a necessary party, as she is the party who moved to join her in the first place.

The trial court made many findings of fact, which we need not recite in detail, since they are unnecessary for the issue on appeal. There is no dispute that Appellant has "funds . . . in an account in her sole name managed by UBS" which the trial court ordered she must hold as constructive trustee for the marital estate, although she was never made a party until the order on appeal joining her and imposing the trust. We have reviewed the entire transcript for some indication that Appellant appeared before the trial court in any capacity other than a witness or that she consented to proceed with hearing the substantive issue of the constructive trust, but she simply did neither.

It is true that counsel for Husband and Wife seemed to implicitly agree to try the entire issue of whether a constructive trust should be imposed along with the issue of joinder, but they did not obtain *Appellant's* consent to try all of the substantive issues. Perhaps a conversation occurred off of the record and all present, including Appellant, understood and agreed to the intended scope of the hearing, but the record before us does not in any way indicate this sort of agreement. The record shows that Husband's counsel appeared only as counsel for Husband, not as counsel for Appellant. Appellant had never been identified as a party in any pleading, but only as a potential party in Wife's motion for joinder. Appellant had not been issued a summons, had not been served with a summons, was not served with any pleadings or motions including the motion for joinder, and was not served with

notice of any proceedings before the trial court. Appellant did not on the record consent to be added as a party or to proceed to hearing on an issue which would determine rights to funds held in her bank account without service or representation; she appeared only as a witness, under subpoena to appear and testify, and she was not represented by counsel.

Wife argues that the "facts and evidence regarding joinder, imposition of constructive trust and ownership are closely intertwined [so] the requirement to have separate hearings on those matters defeats judicial economy and underestimates the ability of the trial court to understand the scope and purpose of evidence presented." Wife also contends that Appellant has failed to cite case law supporting "the proposition that the lower court is required to hold a separate hearing determining whether she is a necessary party and imposing a construct[ive] trust and a second hearing determining ownership of the property in dispute." But whether a separate hearing is required is not the issue. Nor do we doubt in the least the trial court's ability "to understand the scope and purpose of the evidence presented" at a joint hearing upon both the motion for joinder and the substantive issue of the constructive trust, but the trial court was also relying upon counsel for both parties -- Husband and Wife -- to bring the case to the trial court with all of the necessary parties in place, if they wished to proceed on both the issue of joinder as well as the substantive issue raised by the motion to impose a constructive trust upon the funds Husband transferred to Appellant.

Our case law plainly states that "[a] judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void." *Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 297 (1989). Wife seeks to rely upon *Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61 (1996) to support her argument, stating, "[t]his case is slightly different from *Upchurch* in that the third party in that case, the son of the spouses, was named as a defendant in Wife's original action for equitable distribution." This distinction is no "slight[] differen[ce:]" it is the crucial difference. Had Appellant been named as a party when the complaint was filed and she was served with process, this would be an entirely different case. Appellant would have had notice of all proceedings in the trial court as well as the opportunity to be represented by counsel and to present evidence regarding the issue of the ownership of property in her possession. Here, unlike in *Upchurch*, *contrast id.*, the third party holding the funds in dispute was not an original party to the action nor had she been added as a party when the trial court determined the ownership of the funds. Thus, the order "is null and void" as to imposition of the constructive trust.

Rice, 96 N.C. App. at 113, 384 S.E.2d at 297. As we are vacating the portion of the order imposing a constructive trust, we need not consider Appellant's other issue on appeal.

The trial court's order is void to the extent that it imposes a constructive trust over the UBS account because Appellant is a necessary party, but she was not party to the action at the time of the hearing. Yet the trial court was also hearing Wife's motion for joinder of Appellant as a party, and it was not necessary for Appellant to be a party or to have notice or to participate in the determination of that motion. In fact, where it appears to a trial court that a necessary party is absent, the trial court may refuse to "deal with the merits of the action until the necessary party is brought into the action" and may correct this *ex mero motu*:

> The absence of parties who are necessary parties under Rule 19 of the Rules of Civil Procedure does not merit a dismissal. When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action. Any such defect should be corrected by the trial court *ex mero motu* in the absence of a proper motion by a competent person.

White v. Pate, 308 N.C. 759, 764, 304 S.E.2d 199, 202-03 (1983) (citations and footnote omitted).

The trial court had both the power and the duty to enter an order for Appellant to be joined as a necessary party, but it could not determine the substantive issues raised by the motion for constructive trust until after she was joined as a party. *See generally id.* Appellant does not challenge the trial court's determination that she is a necessary party. Thus, the trial court had authority to enter its ruling upon the Wife's motion for joinder of Sara as a necessary party, which is expressed in paragraph 1 of the decree: "Sara N. Tanner is hereby joined as a party to the pending claims for equitable distribution in this case." Beyond this, the order is void and must be vacated.

On remand, a summons should be issued to Appellant, to be served upon her along with the pleadings and trial court's order granting the motion for joinder.[1] At any future hearing in this matter, the trial court

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1. A summons need not be issued if Appellant consents to jurisdiction on remand without issuance of a summons and formal service. *See Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) ("Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent.")

shall not rely upon the findings of fact or conclusions of law in the order on appeal, which are vacated, as to the substantive issue of imposition of a constructive trust, since this order is void as to the determination of the substantive issue of imposition of a constructive trust over the funds at issue.

IV. Conclusion

For the foregoing reasons, we affirm the order to the extent that it orders the joinder of Appellant as a necessary party and vacate the remainder of the trial court order addressing the substantive issues and imposing a constructive trust. We remand for a further hearing to address the substantive issues, at which all parties will have proper notice and opportunity to be heard.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

Judges DIETZ and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 AUGUST 2016)

BROWN v. BROWN No. 15-726	Mecklenburg (14CVS2461)	Affirmed
HALE v. BARNES DISTRIB. No. 16-26	N.C. Industrial Commission (X64352)	Affirmed
IN RE A.R. No. 16-183	Union (15JA119)	Vacated and Remanded
IN RE A.R.P. No. 16-50	McDowell (15JA38) (15JA39) (15JA40)	Affirmed
IN RE I.H. No. 15-1373	Surry (14JA92-93)	Affirmed
IN RE J.S.F. No. 16-40	Davidson (11JT90-92)	Affirmed
JOHNSON v. GOODEN No. 15-1259	Bladen (14CVS438)	Affirmed
KHASHMAN v. KHASHMAN No. 15-361	Mecklenburg (14CVS21154)	Affirmed; Remanded with instructions
NESBIT v. NESBIT No. 16-56	Gaston (10CVD658)	Affirmed
PARKER v. ARCARO DRIVE HOMEOWNERS ASS'N No. 15-928	Guilford (14CVS5148)	Reversed and Remanded.
PERQUIMANS CNTY. v. VANHORN No. 15-562	Perquimans (14CVD154)	Vacated and Remanded
SMITH v. TAYLOR No. 15-1226	Mecklenburg (11CVS6383)	Dismissed
STATE v. CARDENAS No. 15-1012	Wake (13CRS223180)	NO PLAIN ERROR
STATE v. COLE No. 15-1291	Alamance (14CRS2565) (14CRS53366)	No Error

STATE v. COXTON No. 15-575-2	Mecklenburg (12CRS248690-99) (12CRS248701)	No Error
STATE v. PAIGE No. 15-1326	Pitt (12CRS53795) (13CRS3949)	AFFIRMED IN PART, REVERSED AND REMANDED IN PART.
STATE v. PHONGSAVANH No. 16-58	Guilford (14CRS70328-29) (14CRS70331)	Dismissed
STATE v. PRITCHARD No. 16-8	Yancey (11CRS304) (11CRS305)	NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART
STATE v. SCOTLAND No. 15-421	Wake (13CRS214119) (14CRS525)	No Error
STATE v. WILLIAMS No. 15-1038	Johnston (09CRS3693) (09CRS6443)	Affirmed
WILLOUGHBY v. JOHNSTON MEM'L HOSP. No. 15-832	Johnston (11CVS3008)	Affirmed
WILLOUGHBY v. JOHNSTON MEM'L HOSP. No. 15-833	Johnston (11CVS3008)	Affirmed
WILLOUGHBY v. JOHNSTON MEM'L HOSP. No. 15-834	Johnston (11CVS3008)	Affirmed

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