244 N.C. App.—No. 1 Pages 1-154

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 2, 2018

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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Leslie Hollowell Davis

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

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Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

COURT OF APPEALS

CASES REPORTED

FILED 17 NOVEMBER 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appeal and Error—impaired driving—suppression of blood alcohol results—no final order from district court—Defendant could not seek appellate review of a ruling on his motion to suppress in an impaired driving prosecution where the district court entered a preliminary determination suppressing blood alcohol results, the State appealed to superior court, where the preliminary determination was reversed and remanded, and nothing in the record indicated that the district court entered a final order denying the motion to suppress. Furthermore, defendant's motion for certiorari was denied. **State v. Hutton, 128.**

of Professional Conduct because the Rule only applied to a business transaction directly adverse to a client. The Rule expressly prohibits entering into a business transaction with a client and knowingly acquiring an ownership, possessory, security or other pecuniary interest that is directly adverse to the client. Both the former and the latter are prohibited unless the attorney complies with all three of the requirements enumerated in the subsequent subsections that follow. **Law Offices of Peter H. Priest, PLLC v. Coch, 53.**

CONSTITUTIONAL LAW

Constitutional Law—effective assistance of counsel—failure to call two witnesses—trial strategy or deficient performance—A methamphetamine defendant was not deprived of effective assistance of counsel failed to call two witnesses. Contrary to defendant's assertion on appeal, trial counsel applied for Writs of Habeas Corpus ad Testificandum. The record shows defense counsel did in fact apply for such writs, which were issued by the trial court, and delivered to the Sheriff for service. The Court of Appeals could not determine whether defense counsel's failure to call the witnesses was trial strategy or deficient performance, or whether any deficiency was so serious as to deprive the defendant of a fair trial. The claim was dismissed without prejudice to defendant's right to reassert it during a subsequent MAR proceeding. **State v. Warren, 134.**

Constitutional Law—effective assistance of counsel—motion for continuance—denied—A defendant in a methamphetamine prosecution received effective assistance of counsel when his motion for a continuance just before trial began was denied. The record shows defendant had sufficient time to investigate, prepare and present his defense. **State v. Warren, 134.**

Constitutional Law—effective assistance of counsel—witness not requested—A methamphetamine defendant did received effective assistance of counsel when his trial counsel failed to request the trial court bring a witness from the jail to make an offer of proof of his testimony. The cold record on appeal was insufficient to rule on the claim and it was dismissed without prejudice to defendant's right to re-assert it. **State v. Warren, 134.**

Constitutional Law—ineffective assistance of counsel—cold record—insufficient to rule—A methamphetamine defendant's claim for ineffective assistance of counsel was dismissed without prejudice where his trial counsel failed to request that the trial court bring a witness from the jail to make an offer of proof. The cold record was insufficient to rule on the claim. **State v. Warren, 134.**

CRIMINAL LAW

Criminal Law—discharging firearm into occupied building—special instruction—hitting wrong apartment—There was no error, much less plain error, in a prosecution for willfully discharging a firearm into an occupied dwelling, where defendant challenged a special jury instruction on whether the State must prove that he hit the building at which he fired. There was sufficient evidence that defendant intentionally discharged a pistol from several witnesses. **State v. Bryant, 102.**

DIVORCE

Divorce—change of venue after remand from Court of Appeals—mandatory pursuant to N.C.G.S. § 50-3—includes all joined claims—After the Court of

SEXUAL OFFENDERS

Sexual Offenders—unlawfully on premises—"knowing" element—"nursery" sign on door—actual presence of children not required—In defendant's prosecution for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the trial court did not err by denying defendant's motion to dismiss based on his argument that the State had failed to produce substantial evidence of the "knowing" element of the crime. The church preschool was advertised throughout the community, and defendant entered a door with a "nursery" sign attached. The actual presence of children is not an element of the crime—the State only had to demonstrate that defendant was knowingly within 300 feet of the preschool. **State v. Fryou, 112.**

Sexual Offenders—unlawfully on premises—challenge based on unconstitutional overbreadth—not based on First Amendment or other constitutional right—On appeal from defendant's conviction for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the Court of Appeals rejected defendant's argument that the statute was unconstitutionally overbroad on its face because it did not require proof of criminal intent and therefore criminalized a substantial amount of constitutionally protected conduct. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), did not confer standing on defendant because his argument was not based on First Amendment rights. Defendant also did not make an overbreadth argument as to any other identifiable constitutional right. **State v. Fryou, 112.**

Sexual Offenders—unlawfully on premises—challenge based on unconstitutional vagueness—statute not vague—On appeal from defendant's conviction for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the Court of Appeals rejected defendant's argument that the statute was unconstitutionally vague as applied to him. As applied to defendant, it was quite clear that North Carolina General Statute § 14-208.18(a)(2) barred sex offenders from being within 300 feet of a church that contained a preschool. Further, the statute addressed the purpose of the location rather than whether children were actually present at the particular time. **State v. Fryou, 112.**

Sexual Offenders—unlawfully on premises—previous conviction—element of victim's age 18 or below—factual question whether victim's was age 16 or below—In defendant's prosecution for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the trial court did not err by ruling that whether defendant was subject to prosecution based on a previous conviction for an offense involving a victim less than 16 years of age was a question of fact. Defendant's previous conviction only required the victim to be under 18 years of age and N.C.G.S. § 14-208(a)(2) required the previous offense to involve a victim under 16 years of age. The age of the victim in the previous conviction was a factual question to which defendant properly could stipulate. **State v. Fryou, 112.**

WATERS AND ADJOINING LANDS

Waters and Adjoining Lands—dry sand beaches—public trust—emergency vehicles—The trial court did not err by granting summary judgment for the Town in an action contesting ordinances governing the use of dry sand beaches in a North Carolina coastal town. Though some states, such as plaintiffs' home state of New Jersey, recognize different rights of access to their ocean beaches, no such restrictions have traditionally been recognized in North Carolina. The contested ordinances here did not result in a "taking" of the property because the town, along with

the public, already had the right to drive on dry sand portions of the property before plaintiffs purchased it. The Town's reservation of an obstruction-free corridor on the property for emergency use constitutes an imposition on plaintiffs' property rights, but does not rise to the level of a taking. **Nies v. Town of Emerald Isle, 81.**

SCHEDULE FOR HEARING APPEALS DURING 2017

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2017:

January 9 and 23

February 6 and 20

March 6 and 20

April 3 and 17

May 1 and 15

June 5

July None

August 7 and 21

September 4 and 18

October 2, 16 and 30

November 13 and 27

December 11

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LEO B. BILODEAU, AND WIFE, LINDA J. BILODEAU, LARRY W. SESSOMS, AND WIFE, WANDA SESSOMS, J. WAYNE WILSON, AND WIFE, ROSE M. WILSON, AND DAVID J. BELL, AND WIFE, HAE SAN BELL, PLAINTIFFS

v.

HICKORY BLUFFS COMMUNITY SERVICES ASSOCIATION, INC., MARK A. POLLMAN, AND WIFE, LYNN PATE, INDIVIDUALLY, AND NICHOLAS F. LAUER, AND WIFE, CELINE M. LAUER, INDIVIDUALLY, AND HICKORY BLUFFS COMMUNITY SERVICES ASSOCIATION INCORPORATED BOARD OF DIRECTORS, DEFENDANTS

No. COA15-501

Filed 17 November 2015

1. Associations—homeowners' association—fine on homeowners—no notice of fine—violation of bylaws

In a lawsuit arising from a dispute between certain homeowners (defendants) and their homeowners' association board, the trial court did not err by concluding on summary judgment that imposition of fines upon defendants was improper under N.C.G.S. § 47F-3-107.1. Even assuming that defendants were given an opportunity to be heard, the board failed to provide defendants with a mailed written notice of the decision to impose fines as required by the bylaws.

2. Associations—homeowners' association—fine on homeowners—rescinded by subsequent board

In a lawsuit arising from a dispute between certain homeowners (defendants) and their homeowners' association board, the trial court did not err by concluding on summary judgment that the board had the authority to rescind and vacate fines previously imposed on defendants. The board possessed this authority under the Planned Community Act and Robert's Rules of Order.

Appeal by plaintiffs from orders entered 9 January 2015 and 28 January 2015 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 22 October 2015.

Harvell and Collins, P.A., by Russell C. Alexander and Wesley A. Collins, for plaintiff-appellants.

Ennis, Baynard & Morton, P.A., by B. Danforth Morton, for defendant-appellee Hickory Bluffs Community Services Association, Inc. and Hickory Bluffs Community Services Association Board of Directors.

TYSON, Judge.

Plaintiffs appeal from the trial court's orders granting summary judgment in favor of Defendants. We affirm.

I. Background

The Hickory Bluffs subdivision encompasses seventy-four lots and is located adjacent to Queens Creek near Swansboro, North Carolina. Hickory Bluffs Community Services Association, Inc. ("the Association"), a non-profit corporation, is the homeowners' association for the subdivision. All lot owners in Hickory Bluffs are members of the Association by virtue of their lot ownerships. The Association is governed by a seven member Board of Directors ("the Board"), pursuant to its bylaws.

Hickory Bluffs was created prior to the enactment of the North Carolina Planned Community Act set forth in North Carolina General Statutes Chapter 47F. The relevant provisions of the Planned Community Act apply to Hickory Bluffs pursuant to N.C. Gen. Stat. § 47F-1-102(c). The provisions of the Act listed in the statute apply to planned communities created in this State before 1 January 1999, unless the articles of incorporation or the declaration expressly provides to the contrary. N.C. Gen. Stat. § 47F-1-102(c) (2013); *see also* Patrick K. Hetrick, Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act, 22 Campbell L. Rev. 1, 51 (1999); James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 30A.09 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2011) (discussing the applicability of the PCA to planned communities created prior to 1 January 1999).

The Hickory Bluffs Declaration of Covenants, Conditions and Restrictions ("the Declaration") was recorded in 1996, and establishes

an Architectural Control Committee ("the Committee"). Construction of any structure or improvement "on any lot" within the subdivision requires the lot owner to submit plans and specifications to the Committee and obtain the its written approval. The Committee is composed of three owners appointed by the Board, and serve at the Board's pleasure.

The developers of the subdivision constructed a common area dock onto Queens Creek, which includes ten boat slips. The dock is frequently submerged underwater at the higher tides. Up to ten lot owners may purchase exclusive use of a boat slip on the dock. A document entitled "Declaration of Assignment Restrictions Hickory Bluffs (Boatslips Only)" was recorded in 1997. The document allows individual boat slips to be assigned for exclusive use, but requires the dock to remain a common area, subject to the Association's maintenance and control. Assignments of the boat slips must be recorded, and boat slips may be assigned by their owner to another lot owner in the subdivision. A conveyance of a lot by the owner shall also convey the lot owner's boat slip.

Defendants, Nicholas and Celine Lauer, and Mark Pollman and wife, Lynn Pate, ("the slip owners"), purchased the rights to exclusive use of boat slips adjoining the community dock. In 2007, the slip owners submitted applications to the Hickory Bluff Architectural Control Committee to install boat lifts in their two slips. Their applications were approved by the Committee.

The slip owners intended to run electricity along the community dock from Pollman's meter base to power the boat lifts. This plan and method was discussed by the Hickory Bluffs Board of Directors on several occasions. The slip owners proposed to the Board that they would pay for half of the costs of running electricity and lighting to the end of the community dock, and the Association would pay the other half. In his proposal to the Board, Pollman estimated the cost to the Association for running electricity to the dock was approximately $4,300.00, plus an additional $20.00 per month for electricity to supply the dock lights.

On 9 February 2008, the Hickory Bluffs Board of Directors voted not to share in the cost of running electricity to the end of the dock. The vote solely concerned the cost sharing of running electricity to the dock and was not a vote on a motion to prevent the slip owners from running electricity to the dock at their own expense. The record shows the Board was aware the slip owners intended to install boat lifts and to run electricity to power them, and that the Committee had approved their plans.

On 19 February 2008, Pollman submitted a building permit application to Onslow County to install a boat lift. The application states

Pollman is the landowner. The county issued permits for the construction of the boat lifts and the slip owners proceeded with the construction. The lifts consist of four wooden pilings placed inside the mooring area. Metal bars run across the tops of the pilings, which hold nylon straps for lifting the boats. The pilings and boat lifts are not attached to the common area dock.

A new Board was elected by the Association's members in 2009. Plaintiff, Leo B. Bilodeau ("Bilodeau"), served as president. The Board learned the slip owners had installed permanent modifications to the community dock without Board approval, and the electrical wiring used to power the boat lifts had failed code inspection.

At the 10 October 2009 meeting of the Board, Bilodeau moved to remove Pollman and his wife, Lynn Pate, from the Board and to discontinue electricity to their boat lift. The Board voted to discontinue electricity to the dock "until [the slip owners] meet the county requirements and the Board agrees to run power to the dock." Following the 10 October 2009 meeting, the wiring remained installed on the dock with the power turned off.

On 5 November 2009, Bilodeau wrote to the county inspections department and stated that "[a]ttempts to electrify the Hickory Bluff CSA Community dock must cease." The county subsequently denied Pollman's permit to replace the wiring to the boat lifts until resolution of the issue between the Board and the slip owners over running wiring along the community dock. On 21 November 2009, the Board voted to refrain from running electricity to the boat lifts until resolution of the issue.

Bilodeau and Defendant David Bell removed the electric wiring from the dock with Pollman's permission. The lifts remained with no electric wiring attached. On 24 August 2010, the Board sent letters to the slip owners stating the construction of the boat lifts and "electrical apparatus" on the community dock was not approved by the Association, and demanding their removal within sixty days. On 6 October 2010, the attorney for the Association sent a letter to the slip owners' attorney demanding removal of the boat lifts and electrical modifications to the community dock. The letter stated the slip owners would accrue fines in the amount of $100.00 per day if the improvements were not removed by 31 October 2010.

A. "Hearing" on Fines

On 9 January 2011, the Board sent Pollman and Pate letters requesting them to attend a hearing on 22 January 2011 at the Bear Creek

Volunteer Fire Station to discuss fines for their failure to remove their boat lifts. On 21 January 2011, Bilodeau sent an email to the members of the Association notifying them that hearings on the slip owners' violations would be held the following day at the Bear Creek Volunteer Fire Station. The email further stated that the hearing was "not a meeting of the members and is not a Board meeting," and the sole purpose of the meeting was to discuss the slip owners' violations. The email informed the Association members that only the slip owners and Board members would be allowed to attend.

On 22 January 2011, Pollman and Pate arrived at the Bear Creek Fire Station for the meeting. The Lauers had requested Pollman and Pate to act on their behalf because they were outside of the country. Other members of the Association attempted to attend the meeting to support Pollman's and Pate's position regarding the fines. One of the Board members stood at the door and denied them access into the meeting. Bilodeau described the members who had gathered at the fire station as an "unruly mob," and stated they were yelling and cursing. He testified the members were allowed to come inside the building one at a time. Pollman and Pate refused to come inside. Bilodeau testified the Board discussed the matter and proceeded with imposing the fine. The record does not contain any minutes or other records whatsoever of Board activities for this date.

The slip owners claim they were not provided written notification of any fines that were purportedly imposed against them as a result of any hearing conducted on 22 January 2011. Bilodeau testified that the slip owners were aware of the imposition of the fines through public knowledge or emails to the Association members. The record does not contain documentation of any written notice being sent to the slip owners regarding fines allegedly imposed.

B. Defendants' Action

On 18 January 2011, the slip owners filed a complaint seeking a judicial declaration that the Association is without authority to require the removal of the boat lifts. They also sought to enjoin the Association from taking any action to prevent the slip owners from completing the rewiring to provide electricity to their boat lifts, or any action to interfere with the slip owners' right to use and enjoy their boat slips. Pursuant to a consent order entered 7 February 2011, the parties agreed the slip owners would not be required to remove their boat lifts and they would not deliver electricity to their boat lifts during the pendency of the suit.

A new Board of Directors was elected in May 2011. On 28 July 2011, the Board voted to cease imposition of the fines as of 28 March 2011. The slip owners requested the Board allow them to provide electricity to their boat lifts. The slip owners provided the Board with a report prepared by licensed professional engineer, which set forth the electrical specifications for wiring the boat lifts. The slip owners agreed to provide all documentation and permits necessary for the improvement. The Board received written approvals from over fifty-one percent of the subdivision's lot owners, and approved the easement.

C. Plaintiffs' Action

On 31 October 2012, Plaintiffs Bilodeau and other members of the Association, filed a complaint against the Association, the Board, and the slip owners. Plaintiffs alleged the slip owners had collectively incurred fines of $36,400.00 from 28 January 2011 until 28 July 2011. Plaintiffs sought an order directing the Board to perfect and foreclose liens against the property of the slip owners for the unpaid fines. In the alternative, Plaintiffs sought an order to declare the Association is under a legal obligation to perfect and foreclose liens for the unpaid fines. Plaintiffs also sought an order directing the slip owners to remove their boat lifts and the electrical wiring, and to recover damages on behalf of the Association for the continuing trespass by the slip owners.

On 5 February 2014, while Plaintiffs' lawsuit was pending, the Board voted and resolved that no fines were properly assessed against the slip owners, and that any fines previously assessed were vacated.

D. Proceedings before the Superior Court

On 25 April 2014, Plaintiffs moved for partial summary judgment seeking judicial determination of several issues prior to trial. On 6 August 2014, Defendants moved for partial summary judgment. The trial court entered a written order, which determined: (1) the Board is empowered by N.C. Gen. Stat. § 47F-3-102(17) to "[e]xercise any . . . powers necessary and proper for the governance and operation of the [A]ssociation;" (2) powers necessary and proper for the governance and operation of the Association include the power to levy assessments and fines; (3) concomitant with the power to levy assessments and fines is the power to alter or rescind assessments and fines, provided that such action is necessary for the Association's governance and operation; (4) because the dock is located within a common area and is not part of a "lot," the Declaration did not give the Architectural Control Committee the power to approve or deny the boat lift applications; (5) the Board has not formally approved the boat lifts; (6) the Board is empowered to

call a special meeting at any time to formally and retroactively approve of the boat lifts or demand their removal if such action is necessary and proper for the governance and operation of the Association; (8) the Board was authorized to impose fines against the slip owners for failure to properly procure Board approval for installation of the boat lifts; (9) the Board did not comply with the provisions of N.C. Gen. Stat. § 47F-3-107.1 in attempting to impose fines because the slip owners were not provided an opportunity to be heard and present evidence; and (10) presuming *arguendo* the Board imposed fines consistent with the law, the fines were subsequently rescinded and vacated on 5 February 2014.

On 14 January 2015, after entry of the order on partial summary judgment, the Board "formally and retroactively approve[d] the boat lifts installed in the slips assigned to Mark Pollman and Lynn Pate and to Nicholas and Celine Lauer and further formally and retroactively approve[d] electrical wiring to said boatlifts."

The case was scheduled for trial on 20 January 2015. Defendants presented the court with the Board's resolution retroactively authorizing the installation of the boat lifts and electrical wiring. Defendants moved for a summary judgment ruling that there are no remaining issues of material fact to be resolved in the dispute based upon the Board's rescission of the fines. The court concluded no genuine issues of material fact existed, granted summary judgment in favor of Defendants, and dismissed all claims. Plaintiffs appeal from the orders on summary judgment.

II. Issues

Plaintiffs argue the trial court erred by granting summary judgment in favor of Defendants where genuine issues of material fact exists to whether: (1) the Board complied with N.C. Gen. Stat. § 47F-3-107.1 in imposing fines on the slip owners; and, (2) the Board was permitted to rescind the fines imposed on the slip owners under the language of the Association's governing documents.

III. Standard of Review

Summary judgment is proper where "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) (2013); *see Draughon v. Harnett Cnty. Bd. Of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). In a motion for summary judgment, the evidence presented to the trial court must be viewed in

a light most favorable to the non-moving party. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.
>
> 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. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted). As our Supreme Court stated, "[t]he purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue." *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

IV. Notice

[1] Defendants argue the trial court erred by concluding the imposition of fines upon the slip owners was improper under N.C. Gen. Stat. § 47F-3-107.1. We disagree.

N.C. Gen. Stat. § 47F-3-107.1 is entitled "Procedures for fines and suspension of planned community privileges or services." The statute provides in pertinent part:

> Unless a specific procedure for the imposition of fines or suspension of planned community privileges or services is provided for in the declaration, a hearing shall be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any lot

> owner should be fined or if planned community privileges or services should be suspended pursuant to the powers granted to the association in G.S. 47F-3-102(11) and (12). Any adjudicatory panel appointed by the executive board shall be composed of members of the association who are not officers of the association or members of the executive board. The lot owner charged shall be given notice of the charge, *opportunity to be heard and to present evidence, and notice of the decision.*

N.C. Gen. Stat. § 47F-3-107.1 (2013) (emphasis supplied).

The Board purportedly scheduled a hearing for 22 January 2011 at the Bear Creek Volunteer Fire Station. The Board was to consider whether to impose fines on the slip owners for failure to properly procure the Board's approval prior to the installation of the boat lifts. The e-mail noticing the hearing stated, "[n]o persons other than Mr. and Mrs. Lauer, Mr. Pollman, Mrs. Pate and the members of the Board will be allowed to attend this hearing." The trial court found this notification, on its face, inconsistent with the due process mandates of N.C. Gen. Stat. § 47F-3-107.1. The court determined the imposition of fines upon the slip owners was not "consistent with the procedures set forth by law."

Plaintiffs claim Pollman and Pate arrived at the fire station with an "unruly mob of supporters" for the hearing on 22 January 2011. The Board allowed witnesses to come inside one at a time to maintain order. The slip owners intended to present at least three witnesses during the hearing. Plaintiffs presented evidence that members, who were not "combative or unruly," were permitted to come inside and speak with the Board members.

Pollman and Pate refused to come inside the fire station. Pollman was told that if he refused to come inside, the Board would impose the fines and the fines would be final. Bilodeau believed the statement to Pollman and Pate that fines would be imposed, if they refused to come into the hearing, was sufficient notice of the imposition of fines under the Planned Community Act. He testified, "[i]n addition to that oral notice, I believe that the Defendants were notified or on notice of the fine in other ways, such as public knowledge, or via e-mails from community members."

Plaintiffs presented evidence the Board voted to impose the fines after Pollman and Pate refused to enter the building for the hearing. The record contains no minutes or written documentation of the meeting. On 11 February 2011, *after* Plaintiffs assert they had voted and

imposed the fines, the Board sent the Association members an e-mail regarding the consent order entered on 7 February 2011. The Board informed the Association members that "nothing in the Court Order prevents the Association from proceeding with a hearing on whether to fine the [slip owners] for their installation of the boat lifts without the Association's approval."

N.C. Gen. Stat. § 47F-3-107.1 requires the Board to provide the member with "notice of the decision" to impose fines. The statute does not require written notice. The Hickory Bluffs bylaws clarify and expand upon the requirements of the statute. The bylaws provide that after the hearing, the Board *shall* determine, *in writing*, to waive the default in whole or in part, to extend the time within which the default may be cured, to proceed immediately with a fine or penalty, or to exercise any remedy. The bylaws further provide, "[t]he Board *shall* mail to the defaulting member a copy of its determination." (Emphasis supplied).

"To the extent not inconsistent with the provisions of [the Planned Community Act], the declaration, bylaws, and articles of incorporation form the basis for the legal authority for the planned community to act as provided in the declaration, bylaws, and articles of incorporation, and . . . are enforceable by their terms." N.C. Gen. Stat. §47F-1-104(a) (2013). The provision in the bylaws requiring written notice to be mailed to the lot owner does not alter or conflict with the notice requirement under N.C. Gen. Stat. § 47F-3-107.1.

The record shows no written notice regarding the Board's imposition of fines was mailed to the slip owners as required by the bylaws. Presuming *arguendo* the slip owners were provided a proper opportunity to be heard and present evidence before the Board on 22 January 2011 and the Board did, in fact, impose fines, the Board failed to provide the slip owners with the required written notice to impose fines under the bylaws. The trial court did not err in determining no genuine issue of material fact exists to whether the Board properly imposed fines upon the slip owners and provided the required written notice. This argument is overruled.

V. Authority to Rescind the Imposition of Fines

[2] Plaintiffs argue the trial court erred by granting partial summary judgment in favor of Defendants and assert genuine issues of material fact exist to whether the Board had authority to rescind and vacate fines previously imposed on the slip owners. We disagree.

Plaintiffs allege the Lauers, Pollman and Pate incurred fines of $100.00 per day from 28 January 2011 until 28 July 2011. According to

Plaintiffs' complaint, filed in 2012, each couple's fine totaled $18,200.00. On 5 February 2014, the Board called a special meeting. A motion was made as follows:

> It is moved that the Board resolve that to the best of its knowledge and understanding no fines were properly imposed against Mark Pollman, Lynn Pate, Nicolaus Lauer or Celine Lauer in January 2011 or at any other time relating to the installation of electrical writing or boat lifts on the community dock or in the slips assigned to Mark Pollman, Lynn Pate, Nicolaus Lauer or Celine Lauer.
>
> It is further moved that the Board resolve that to the extent that any fines were imposed in accordance with the procedural requirements imposed by North Carolina Statutes and the governing documents of the Hickory Bluffs Community Association, Inc. against Mark Pollman, Lynn Pate, Nicolaus Lauer or Celine Lauer, such fines were inappropriate and should be vacated and that the Board does therefore decree that any such fines are now and forever vacated in their entirety.

The six board members present voted unanimously in favor of the motion. Pollman, the seventh Board member, recused himself from the vote.

The trial court determined that "even if any fines properly were imposed," they "have been rescinded by the Board, are no longer enforceable, and no longer shall be deemed a lien upon any property in Hickory Bluffs." In a footnote in the order, the trial court stated, "[a]s a general precept, the power of an entity to take action inherently includes the power to alter or rescind such actions once taken." Otherwise, the trial court explained, a governing board would be precluded from correcting mistakes, settling financial disputes via compromise, and amending decisions when confronted with changed circumstances or newly discovered information. We agree.

The Planned Community Act grants property owners' associations the power to "impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association." N.C. Gen. Stat. § 47F-3-102(12) (2013). Property owners' associations may also "[e]xercise any other powers necessary and proper for the governance and operation of the association." N.C. Gen. Stat. § 47F-3-102(17) (2013).

Under N.C. Gen. Stat. § 47F-3-108(c) (2013), "[e]xcept as otherwise provided in the bylaws, meetings of the association and the executive board shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised." Robert's Rules of Order allow a board of directors to rescind action previously taken:

> *Rescind* – also known as *Repeal* or *Anul* – is the motion by which a previous action or order can be canceled or countermanded. The effect of *Rescind* is to strike out an entire main motion, resolution, order or rule that has been adopted at some previous time.

Henry M. Robert, Robbert's Rules of Order 305 (Sarah Corbin Robert et al., eds., 11th ed. 2011).

The Hickory Bluffs governing documents do not state whether the Board may rescind actions it has previously taken. Plaintiffs cite N.C. Gen. Stat § 47F-3-107.1 and the Hickory Bluffs Declaration and bylaws in asserting the Association had a duty to enforce fines by perfecting and foreclosing liens. The statute provides that if the Board decides to impose fines after a properly noticed hearing, "[s]uch fines shall be assessments secured by liens under G.S. 47F-3-116." N.C. Gen. Stat. § 47F-3-107.1 (2013).

The Hickory Bluffs Declaration states that any assessment not paid when due is delinquent, and the Association "shall file a lien of record against any lot where there remains an assessment unpaid for a period of thirty (30) days or longer." The bylaws state, "[a]ny fine, costs or expenses hereunder shall be enforced as if an assessment lien." Further, "it shall be the duty of the Board of Directors to . . . foreclose the lien, and sell under a power of sale . . . any property for which assessments are not paid within thirty (30) days after due date."

Plaintiffs argue that once fines are imposed, the Board is without authority to rescind them under the Association's governing documents, and must pursue a lien against the fined member's property. Defendants assert the provisions cited by Plaintiffs instruct the Board on the manner in which fines should be collected, rather than providing an intractable mandate preventing the Board from ever rescinding fines imposed upon lot owners.

The provisions of the governing documents cited by Plaintiffs, in conjunction with N.C. Gen. Stat. § 47F-3-102(17) and Robert's Rules of Order cannot be interpreted to prevent the Board from ever revising or rescinding fines previously imposed or re-visiting any Board action

previously taken. To hold otherwise would require the Board to uphold fines which, as here, may have been improperly or illegally imposed, and to foreclose on the impermissibly fined lot owner's property. This interpretation would be unconscionable and forever bind a future Board to some action, rightfully or wrongfully, taken by a previous Board.

In its January 2014 resolution formally and retroactively authorizing the boat lifts, the Board noted: (1) the Board believes that prior to and at the time the boat lifts and electrical wiring were initially installed, it was the intention of the serving Board members to authorize the installation; (2) the slip owners have given valuable consideration for the use of their boat slips and boat lifts are appropriate for the full enjoyment of the slips; (3) the slip owners have incurred significant expense in installing the lifts and wiring; (4) the lifts and wiring have been the subject of considerable litigation at the expense of the Association and it will be "conducive to the peaceful relations of lot owners" to formally and retroactively approve the boat lifts and wiring with expectation that the ongoing litigation would cease; and (5) the electrical wiring was inspected by a licensed electrical engineer who opined it was properly installed and did not present a safety hazard. The Board considered these factors in properly exercising its powers as are "necessary and proper for the governance and operation of the association." N.C. Gen. Stat. § 47F-3-102(17). We do not address any issue of whether the Association would have authority to enforce or foreclose a purported lien filed against a property owner's lot for conduct or actions in common areas which do not "touch and concern" the lot itself.

Presuming the Board properly imposed fines on the slip owners in January of 2011, the Board also possessed the authority to rescind those fines, and exercised that authority. The trial court did not err in determining no genuine issue of material fact existed of whether the Board had the authority to rescind the fines, even if the fines had been properly imposed after sufficient prior notice, opportunity to be heard and written notice of the decision tendered. This argument is overruled.

VI. Conclusion

Where the record is devoid of any evidence the slip owners were provided with written and mailed notice of any fines imposed upon them following the 22 January 2011 hearing, the trial court properly concluded the purported fines were not properly imposed.

Even if fines had been properly imposed upon the slip owners, the Board possessed the authority under the Planned Community Act and

Robert's Rules of Order to later rescind the fines. The trial court properly awarded summary judgment in favor of Defendants. The judgments appealed from are affirmed.

AFFIRMED.

Judges McCULLOUGH and DIETZ concur.

WENBIN CHEN, PLAINTIFF
v.
YALING ZOU, DEFENDANT

No. COA 15-228

Filed 17 November 2015

Process and Service—knowledge that defendant was in New York—failure to exercise due diligence

A divorce judgment was obtained without personal jurisdiction over defendant and was void; therefore, it was proper for the trial court to set aside the divorce judgment based on Rule of Civil Procedure 60(b)(4). Plaintiff attempted service by publication in North Carolina even though he knew defendant was in New York, failing to use the information he had in his possession and not exercising due diligence in attempting to locate defendant as required by Rule 4(j1). Under Rule 60(b)(4), defendant was required to bring her motion within a reasonable time and was not limited to 12 months.

Appeal by Plaintiff from order entered 11 September 2014 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 27 August 2015.

McIlveen Family Law Firm, by Theresa E. Viera and Sean F. McIlveen, for Plaintiff-Appellant.

Bell and Bell Law Firm, P.C., by George C. Bell and Hannah R. Bell, for Defendant-Appellee.

DILLON, Judge.

I. Background

In November 2006, Wenbin Chen ("Plaintiff") and Yaling Zou ("Defendant") were married.

In March 2012, Plaintiff filed his complaint in this action seeking an absolute divorce from Defendant, alleging that the parties had separated in August 2010 when Defendant left the marital home and that Defendant had no subsequent contact with Plaintiff. Plaintiff served Defendant by publication in the Charlotte Observer, published in Mecklenburg County, North Carolina.

In June 2012, the trial court entered a judgment for absolute divorce (the "Divorce Judgment").

In January 2013, Defendant moved back into the marital home with Plaintiff with no knowledge of the Divorce Judgment. Seven months later, the parties had an altercation and Plaintiff called the police to eject Defendant from the home. At this time, Plaintiff produced the Divorce Judgment and showed it to the police.

In November 2013, Defendant filed a Rule 60 motion to set aside the Divorce Judgment. After a hearing on the motion, the trial court entered an order setting aside the Divorce Judgment. In its order, the trial court found as fact that Plaintiff and Defendant's actual date of separation was in September 2011, that after the separation the parties continued to communicate with each other via telephone and text messaging, and that during the separation Defendant had made Plaintiff aware that she was living in New York City. Based on its findings, the trial court concluded that publication in the Charlotte Observer was insufficient under the requirements of Rule 4. Accordingly, the trial court granted Defendant's motion pursuant to Rule 60(b)(4) of our Rules of Civil Procedure, declaring the Divorce Judgment void. Plaintiff appeals.

II. Standard of Review

A motion for relief under Rule 60(b)(4) is within the discretion of the trial court, and our review "is [for] abuse of discretion." *Creasman v. Creasman*, 152 N.C. App. 119, 121-22, 566 S.E.2d 725, 727 (2002). *See also Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

III. Analysis

Plaintiff argues that the trial court erred in concluding that the Divorce Judgment was void based on improper service of process. We disagree.

Rule 60(b)(4) allows the court to relieve a party from a judgment if "the judgment is void." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4). If a judgment is rendered without an "essential element such as jurisdiction or *proper service of process*," it is void. *Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) (emphasis added); *see also Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974). If a judgment is void, it is a "legal nullity" which may be attacked at any time. *Freeman v. Freema*n, 155 N.C. App. 603, 606, 573 S.E.2d 708, 711 (2002).

A. Timeliness of Motion

As a preliminary matter, Plaintiff contends that the trial court's order must be reversed because Defendant failed to file her motion within the time prescribed by Rule 60(b).

Rule 60(b) provides six different reasons for which a trial court may grant relief from a judgment, which are enumerated (1) through (6) in the Rule. The Rule requires that any party seeking relief from a judgment file her motion "within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b) (2014).

Here, Defendant filed her motion some 17 months after the Divorce Judgment, which would be too late if the relief sought was based on subsection (1), (2), or (3) of Rule 60(b). The trial court, however, based its Rule 60(b) order on subsection (4) of the Rule – which allows a trial court to give a party relief from a "void" judgment. Plaintiff contends, though, that subsection (4) of Rule 60 is *not* the proper basis for the trial court's order because the Divorce Judgment was at most *voidable*, and not void. Plaintiff contends that the proper basis for the order was, rather, subsection (3) of Rule 60, which provides relief from judgments based on fraud or other misconduct by a party. Accordingly, Plaintiff contends that the order must be reversed since Defendant did not file her motion within one year of the Divorce Judgment as required by the Rule. We disagree.

It is true that Defendant's Rule 60(b) motion is based on her contention that Plaintiff's affidavit of service was "fraudulent," which might suggest that the proper basis of her motion was under subsection (3). However, we have expressly held that there is a difference between a party misrepresenting to the trial court "of the length of the parties' separation in the divorce complaint and related inaccurate findings in the judgment" and a party misrepresenting that his spouse was properly served with process. *Freeman*, 155 N.C. App. at 606, 573 S.E.2d at

711. The former type of misrepresentation renders the divorce judgment voidable, rather than void. *Id. See also Dunevant v. Dunevant*, 142 N.C. App. 169, 174, 542 S.E.2d 242, 245 (2001) (recognizing that a divorce decree "in all respects regular on [its face]" could not be declared void, "especially [where] the court specifically found that '[d]efendant was properly served' "); *Stokely v. Stokely*, 30 N.C. App. 351, 354, 227 S.E.2d 131, 133 (1976). On the other hand, a misrepresentation involving the actual service of process goes to the trial court's jurisdiction, and it is proper to attack any judgment rendered in such case as a "void" judgment under subsection (4) of Rule 60(b). *Freeman*, 155 N.C. App. at 606, 573 S.E.2d at 711. Our Supreme Court has long recognized this distinction. *See Hatley v. Hatley*, 202 N.C. 577, 163 S.E. 593 (1932); *Fowler v. Fowler*, 190 N.C. 536, 130 S.E. 315 (1925).

Since subsection (4) of Rule 60(b) was the proper ground for Defendant's motion in this case, Defendant was *not* required to bring her motion within 12 months of the entry of the Divorce Judgment. Rather, she merely had to bring her motion within a "reasonable time." Here, Defendant did file her motion within a reasonable time as required by the Rule. Specifically, she filed her Rule 60(b)(4) motion shortly after receiving actual knowledge from Plaintiff that he had obtained the Divorce Judgment. *See Freeman*, 155 N.C. App. 603, 573 S.E.2d 708 (wife's Rule 60(b)(4) motion filed seventeen (17) years after her husband obtained a divorce judgment was timely where she had only recently learned that her husband had forged her name on an acceptance of service of process). Accordingly, this argument is without merit.

B. Service by Publication Was Defective

In this case, Plaintiff attempted service by publication. Service by publication is in derogation of common law, and "statutes authorizing service of process by publication are strictly construed . . . in determining whether service has been made in conformity with the statute." *Dowd v. Johnson*, ___ N.C. App. ___, ___, 760 S.E.2d 79, 83 (2014); *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980).

In evaluating whether service by publication is proper, this Court must first determine "whether the defendant was actually subject to service by publication – meaning that plaintiff exercised due diligence as required by Rule 4(j1)" before resorting to service by publication. *Dowd*, ___ N.C. App. at ___, 760 S.E.2d at 83. *See also* N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2014) (providing that a party may be served by publication *only* if the party "cannot with *due diligence* be served by personal delivery [or] registered or certified mail"). Due diligence requires a plaintiff to

use "all resources reasonably available to [him] in attempting to locate [a] defendant[]." *Jones v. Wallis*, 211 N.C. App. 353, 357, 712 S.E.2d 180, 183 (2011). "[S]ervice of process [of a divorce decree] by publication is void . . . if the information required for personal service is within the plaintiff's actual knowledge or with due diligence could be ascertained." *Thomas v. Thomas*, 43 N.C. App. 638, 646, 260 S.E.2d 163, 169 (1979).

There is no "restrictive mandatory checklist for what constitutes due diligence . . . [r]ather, a case by case analysis is more appropriate." *In re Clark*, 76 N.C. App. 83, 87, 332 S.E.2d 196, 199 (1985). In the present case, the trial court made the following detailed findings relevant to Plaintiff's ability to ascertain the information required for personal service:

> [13.] Following the separation of the plaintiff and the defendant they continued to communicate with each other by telephone and text messages.
>
> . . .
>
> [14.] The defendant told the plaintiff in their communications following their separation that she was in New York City.
>
> . . .
>
> [26.] [N]o effort whatsoever was made to locate the defendant in New York City.
>
> . . .
>
> [40.] The plaintiff . . . stated that he has heard from others that the defendant was in New York City . . . .

These findings are supported by competent evidence in the record, including screenshots of text messages exchanged by the parties and testimony of both Plaintiff and Defendant in the trial court, and are thus conclusive on appeal. *Thomas*, 43 N.C. App. at 646-47, 260 S.E.2d at 169. Although Plaintiff possessed contact information for and remained in contact with Defendant throughout the filing and disposition of the divorce proceedings, he failed to request her address for the purpose of serving her with process.[1]

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1. *See Modan v. Modan*, 327 N.J. Super. 44, 742 A.2d 611 (2000). In *Modan*, the New Jersey court considered the issue of whether a plaintiff satisfied due diligence requirements in serving his wife in divorce proceedings when he knew that she had moved to

Based on the trial court's findings, we agree that the trial court properly concluded that Plaintiff failed to comply with the requirement of Rule 4(j1) to exercise due diligence in attempting to locate Defendant. Specifically, he failed to make "[any] effort whatsoever" to ascertain Defendant's address in New York City. Plaintiff failed to use Defendant's contact information which he had *in his possession*. *See Barclays v. BECA*, 116 N.C. App. 100, 103, 446 S.E.2d 886, 886 (1994) ("[A] reasonable and diligent effort . . . [necessitates] *employment* of 'reasonably ascertainable' information.") (emphasis added). Accordingly, service of process by publication was improper.

Further, even assuming that Plaintiff did exercise due diligence, the findings demonstrate that service by publication in Mecklenburg County was nevertheless inadequate. Specifically, Rule 4(j1) requires that the publication be "circulated in an area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending." N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2014). Here, the findings demonstrate that Plaintiff had reliable information (from Defendant herself) that Defendant was living in New York City. Therefore, the findings suggest that service by publication in Mecklenburg County – where the action was pending – was ineffective. We note that Plaintiff cites *Winter v. Williams*, 108 N.C. App. 739, 425 S.E.2d 458 (1993), in support of his argument that service by publication was proper in Mecklenburg County. However, we find *Winter* distinguishable. Specifically, in *Winter*, we held that service of process was proper in Wake County (where the action was pending) where the plaintiff was only aware of information that the defendant had moved "out west, possibly California." *Id.* at 745, 425 S.E.2d at 461. This Court concluded service was proper because plaintiff had no "reliable information" as to the defendant's whereabouts. *Winter* is distinguishable from the present case because Plaintiff had reliable information from Defendant and several other individuals that Defendant was in New York City, an area significantly smaller and more precise than "out West," or "possibly California."

Pakistan but was not aware of her exact address. The court concluded that "plaintiff was aware of at least an e-mail address . . . where defendant could be reached" and, citing the North Carolina Court of Appeals in *Barclays v. BECA*, held that plaintiff's actions did not satisfy due diligence because he failed to use "all reasonably available resources to accomplish service." *Modan*, 327 N.J. Super. at 49-50, 742 A.2d at 613-14 (citing *Barclays v. BECA*, 116 N.C. App. 100, 446 S.E.2d 886 (1994).

IV. Conclusion

We hold that the Divorce Judgment sought by Plaintiff in this case was obtained without personal jurisdiction over Defendant and is, therefore, void. Accordingly, it was proper for the trial court to set aside the Divorce Judgment based on Rule 60(b)(4).

NO ERROR.

Judges HUNTER, JR. and DIETZ concur.

ASHLEY A. COMSTOCK, PLAINTIFF
v.
CHRISTOPHER M. COMSTOCK, DEFENDANT

No. COA15-126

Filed 17 November 2015

Domestic Violence—Protective Order—renewal—residence in N.C. not required

Residence in North Carolina was not required for the renewal of a Domestic Violence Prevention Order, as opposed to obtaining the initial order.

Appeal by defendant from order entered 14 October 2014 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 12 August 2015.

Krusch & Sellers, P.A., by Rebecca K. Watts, for plaintiff-appellee.

Christopher Comstock, pro se, for defendant-appellant.

North Carolina Coalition Against Domestic Violence, by Amily K. McCool, Averett Law Offices, by D. Melissa Averett, and Horack, Talley, Pharr & Lowndes, P.A., by Elizabeth James, for North Carolina Coalition Against Domestic Violence, amicus curiae.

DAVIS, Judge.

Christopher M. Comstock ("Defendant") appeals from the trial court's 14 October 2014 order granting the motion of Ashley A. Comstock ("Plaintiff") to renew a domestic violence protective order ("DVPO")

previously entered against him. On appeal, Defendant contends that the trial court lacked the authority to renew the DVPO because when Plaintiff filed her motion seeking its renewal, she no longer resided in the State of North Carolina. After careful review, we affirm the trial court's order.

Factual Background

Plaintiff and Defendant were married on 6 May 2001 and separated on 10 June 2010. The parties have two minor children together. On 3 September 2010, Plaintiff sought a DVPO against Defendant, which was issued on 9 September 2010 by the Honorable Ronald L. Chapman in Mecklenburg County District Court.

In the DVPO, the trial court concluded that Defendant had committed acts of domestic violence against Plaintiff and that there was a danger of serious and immediate injury to her. Specifically, the trial court made findings of fact concerning an incident on 10 June 2010 where Defendant struck Plaintiff in the mouth, lacerating the inside of her lip, and then continued assaulting Plaintiff "in the whereabouts of the parties' children." The DVPO (1) granted Plaintiff possession of the parties' residence; (2) ordered Defendant not to "assault, threaten, abuse, follow, harass . . . or interfere" with Plaintiff; (3) required Defendant to stay away from Plaintiff's residence and workplace; and (4) prohibited Defendant from possessing or purchasing a firearm. The DVPO stated that it would remain in effect until 8 September 2011.

Defendant was held in contempt twice for violating the DVPO. First, on 3 May 2011, the trial court held Defendant in civil contempt for several instances of conduct toward Plaintiff that the court found were "intended solely to harass and intimidate her." These incidents included Defendant making statements to Plaintiff to indicate that he was watching her, sitting in his car outside her residence, and almost striking her car with his car during a meeting to exchange their children.

Second, on 15 August 2011, the trial court held Defendant in criminal contempt for violating the DVPO by sending repeated harassing emails to Plaintiff's work email address despite Plaintiff's numerous prior requests that he refrain from doing so. In its 15 August 2011 order, the trial court noted Defendant had "testified that he knows the [DVPO] better than anyone" and "looks at it all the time before he does things." The court determined that this testimony supported its conclusion that Defendant "looks at the Court's orders and tries to find the grey areas to justify his behavior to aggravate and possibly intimidate [Plaintiff]." The trial court sentenced Defendant to 30 days in the custody of the

Mecklenburg County Jail and then suspended the sentence on the condition that Defendant spend 9 nights in jail.

On 2 August 2011, prior to the expiration of the DVPO, Plaintiff filed a motion to renew it. Plaintiff alleged that she was still in fear of Defendant and that he continued to harass and threaten her. On 6 September 2011, the trial court entered a consent order renewing the DVPO until 5 September 2012.

In the spring of 2012, Plaintiff and the minor children moved to Dallas, Texas. On 20 August 2012, prior to the expiration of the 6 September 2011 DVPO renewal order, Plaintiff filed another motion to renew the DVPO. The trial court granted Plaintiff's motion, renewing the DVPO by order entered 22 March 2013 based on its determination that there was good cause for the renewal in light of the fact that Plaintiff continued to be in legitimate fear of Defendant. The 22 March 2013 order renewed the DVPO until 5 September 2014.

On 4 September 2014, Plaintiff sought a third renewal of the DVPO, asserting that she was "still very afraid of the Defendant" and that she and Defendant were "still involved in ongoing domestic litigation and [she] believe[d] that the Defendant [was] very angry with [her]." Plaintiff stated in her motion that Defendant had showed their son a gun he possessed and "made statements indicating that he was going to kill [her]." On 14 October 2014, the Honorable David H. Strickland entered an order ("the 14 October Order") renewing the DVPO against Defendant until 14 October 2016. Defendant filed a timely notice of appeal from the 14 October Order.

Analysis

Defendant's primary argument on appeal is that the trial court's entry of the 14 October Order exceeded the scope of its authority under N.C. Gen. Stat. §§ 50B-2 and 50B-3 because Plaintiff was no longer a North Carolina resident. We disagree.

The issuance and renewal of DVPOs, the means for enforcing them, and the penalties for their violation are governed by North Carolina's Domestic Violence Act, which is codified in Chapter 50B of the North Carolina General Statutes. When a party appeals a DVPO, this Court reviews the order to determine "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." *Thomas v. Williams*, ___ N.C. App. ___, ___, 773 S.E.2d 900, 902 (2015) (citation omitted).

N.C. Gen. Stat. § 50B-2(a) addresses the requirements for initially obtaining a DVPO and provides as follows:

> Any person *residing in this State* may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter. Any action for a domestic violence protective order requires that a summons be issued and served. The summons issued pursuant to this Chapter shall require the defendant to answer within 10 days of the date of service. Attachments to the summons shall include the complaint, notice of hearing, any temporary or ex parte order that has been issued, and other papers through the appropriate law enforcement agency where the defendant is to be served. In compliance with the federal Violence Against Women Act, no court costs or attorneys' fees shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena, except as provided in G.S. 1A-1, Rule 11.

N.C. Gen. Stat. § 50B-2(a) (2013) (emphasis added).

Thus, pursuant to the statute, a party seeking the *initial* entry of a DVPO — either through the filing of a new action under Chapter 50B or the filing of a motion in an existing Chapter 50 case — must reside in North Carolina. *Id.*

The *renewal* of a DVPO, conversely, is governed by a separate statutory provision of the Domestic Violence Act — N.C. Gen. Stat. § 50B-3(b). N.C. Gen. Stat. § 50B-3(b) states, in pertinent part, as follows:

> Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that has been previously renewed, upon a motion by the aggrieved party filed before the expiration of the current

> order . . . . The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed. . . .

N.C. Gen. Stat. § 50B-3(b) (2013).

In the present case, the initial DVPO against Defendant was entered on 9 September 2010 following Plaintiff's filing of a motion in the cause for a DVPO and for emergency child custody in file number 10 CVD 12874, the parties' existing Chapter 50 case involving claims for divorce from bed and board, child custody, child support, and equitable distribution. Plaintiff's motion seeking the DVPO stated that she was living in the parties' former marital residence in Mecklenburg County, North Carolina. Thus, Plaintiff was clearly a "person residing in this State" at the time she initially sought the entry of the DVPO against Defendant, and the trial court therefore had jurisdiction to issue the DVPO. N.C. Gen. Stat. § 50B-2. Since that time, Plaintiff has sought three renewals of the DVPO.

Unlike N.C. Gen. Stat. § 50B-2, N.C. Gen. Stat. § 50B-3(b) contains no residency requirement for the renewal of a DVPO. "It is well established that in order to determine the legislature's intent, statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each." *AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 771 S.E.2d 537, 548 (2015). Where, as here, the General Assembly "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at ___, 771 S.E.2d at 548-49 (citation, quotation marks, and alterations omitted). Thus, the inclusion of a residency requirement in the statutory provision governing the initial issuance of a DVPO coupled with the omission of such a requirement in the statute authorizing the renewal of a DVPO demonstrates a legislative intent to permit such a renewal regardless of whether the moving party remains a North Carolina resident.

We therefore hold that based on the application of well-settled rules of statutory interpretation, the moving party's continued residency within the State of North Carolina is not a jurisdictional prerequisite for obtaining the renewal of an existing DVPO. Indeed, the *only* jurisdictional requirement contained within N.C. Gen. Stat. § 50B-3(b) is that a party seeking the renewal of a DVPO file such a motion before the expiration of the existing order. N.C. Gen. Stat. § 50B-3(b); *see also Rudder v. Rudder*, ___ N.C. App. ___, ___, 759 S.E.2d 321, 329 (2014) (noting that

"the motion for renewal [of a DVPO] must be filed *before the expiration* of the existing order"). Consequently, because Plaintiff filed her motion to renew the DVPO on 4 September 2014 — the day before it was set to expire — the trial court had the authority to renew the order as long as it determined that good cause existed to do so.

In the 14 October Order, the trial court determined that there was, in fact, good cause to renew the DVPO based on its findings regarding Plaintiff's continued fear of Defendant and Defendant's past violations of the DVPO. *See Forehand v. Forehand*, ___ N.C. App. ___, ___, 767 S.E.2d 125, 128-29 (2014) (holding that defendant's prior conduct resulting in issuance of initial DVPO may serve as basis for trial court's finding of good cause for renewal). Defendant has not specifically challenged these findings, and as a result, they are binding on appeal. *Balawejder v. Balawejder*, 216 N.C. App. 301, 312, 721 S.E.2d 679, 686 (2011). Nor has he argued that these findings were insufficient to support the trial court's conclusion that renewal of the DVPO was proper.[1] We therefore hold that the trial court possessed the authority pursuant to N.C. Gen. Stat. § 50B-3(b) to renew the DVPO against Defendant, and we affirm the trial court's 14 October Order.[2]

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

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1. Because of our holding that the North Carolina Domestic Violence Act imposes no residency requirement on an aggrieved party seeking to renew a DVPO, Defendant's final argument — that the trial court erred by failing to make findings of fact on the issue of Plaintiff's residency — is likewise without merit. *See Fortis Corp. v. Ne. Forest Prods.*, 68 N.C. App. 752, 753, 315 S.E.2d 537, 538 (1984) ("The general rule is that in making findings of fact, the trial court is required only to make brief, pertinent and definite findings and conclusions about *the matters in issue*, but need not make a finding on every issue requested." (emphasis added)).

2. Defendant also makes a cursory reference in his brief to his belief that the trial court "seemingly . . . extended [the DVPO] beyond the two (2) year limitation" set forth in N.C. Gen. Stat. § 50B-3(b) by setting the renewed DVPO to expire two years after the date of the hearing on Plaintiff's renewal motion rather than two years after the expiration date of the prior DVPO. In the event that Defendant intended to claim error as to this portion of the 14 October Order, we deem the issue abandoned because he offers no actual substantive argument with regard to this issue. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

ANJELIKA DECHKOVSKAIA, Plaintiff
v.
ALEX DECHKOVSKAIA (Male Name Spelled Deshkovski), Defendant

No. COA15-91

Filed 17 November 2015

1. Divorce—change of venue after remand from Court of Appeals—mandatory pursuant to N.C.G.S. § 50-3—includes all joined claims

After the Court of Appeals remanded an action concerning equitable distribution, alimony, child support, and attorney fees, the trial court erred by denying defendant's N.C.G.S. § 50-3 motion to change venue from Orange County to Durham County. Plaintiff had filed for alimony in her county of residence but moved to Florida thereafter. The mandatory venue provisions of N.C.G.S. § 50-3 required the trial court, upon defendant's properly made motion, to remove all of the joined claims filed in the action to defendant's county of residence. The procedural posture of the case—after trial but before entry of final judgment—did not render the mandatory provisions of the statute inapplicable.

2. Divorce—civil contempt—improperly considered—erroneous denial of venue change motion

After the Court of Appeals remanded an action concerning equitable distribution, alimony, child support, and attorney fees, the trial court erred by holding defendant in civil contempt for failure to pay alimony and attorney fees as required by its 26 July 2012 order. Because the trial court erroneously denied defendant's motion to change venue, the trial court could not proceed on its contempt hearing.

Appeal by defendant from orders entered 22 April and 1 July 2014 by Judge Beverly A. Scarlett in Orange County District Court. Heard in the Court of Appeals 12 August 2015.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for plaintiff-appellee.

Wait Law, P.L.L.C., by John L. Wait, for defendant-appellant.

CALABRIA, Judge.

Defendant appeals from an order denying his motion for change of venue and a contempt order based upon alimony and attorneys' fees arrearages. We reverse the venue order, vacate the contempt order, and remand.

I. Background

While a full recitation of the facts and procedural history of this case may be found at *Dechkovskaia v. Dechkovskaia*, __ N.C. App. __, 754 S.E.2d 831 ("*Dechkovskaia I*"), *disc. review denied*, 367 N.C. 506, 758 S.E.2d 870 (2014), our discussion is limited to the background relevant to this appeal.

On 4 March 2011, Anjelika Dechkovskaia ("plaintiff") filed an action against Alex Deshkovski ("defendant") in Orange County District Court for equitable distribution, spousal support, child support, permanent custody of the parties' child, and attorneys' fees. *Dechkovskaia I*, __ N.C. App. at __, 754 S.E.2d at 833. On 15 February 2012, the trial court awarded sole custody of the parties' minor child to plaintiff and visitation for defendant. *Id.* After a hearing where defendant proceeded *pro se*, the trial court entered an order on 26 July 2012 addressing equitable distribution and alimony. *Id.* For the equitable distribution portion of the order, the trial court distributed two houses to defendant. *Id.* For alimony, the trial court ordered defendant to pay plaintiff $3,500.00 per month for twelve years. *Id.* Defendant was also ordered to pay plaintiff $10,000.00 in attorneys' fees. On 13 August 2012, defendant through counsel filed a motion for new trial and stay of execution, which was denied by order entered 3 December 2012. *Id.* On 2 January 2013, defendant appealed from the order denying his post-trial motions and the 26 July 2012 order, which served as the basis for *Dechkovskaia I*.

On 25 and 28 March 2013, plaintiff filed a motion and an amended motion for contempt against defendant for failure to pay alimony and attorneys' fees as required by the 26 July 2012 order. On 24 October 2013, plaintiff filed a motion to modify defendant's visitation schedule and another motion for contempt. In the same pleading, plaintiff sought approval to move the parties' minor child to Florida to pursue an offer of employment with the Department of Neurosurgery and University of Florida Brain Tumor Immunotherapy Program. The record is silent as to whether a hearing on this motion occurred, but the trial judge signed a handwritten order that states: "Plaintiff is allowed to move to FL with the minor child." This order was entered on 18 November 2013.

On 18 February 2014, in *Dechkovskaia I*, this Court vacated the 26 July 2012 order as to equitable distribution and remanded to Orange

County District Court with instructions to enter a new equitable distribution order and reconsider the amount of alimony based upon that order. As to equitable distribution, this Court concluded that two houses were erroneously included in the valuation of the marital estate and, therefore, were improperly distributed to defendant. *Dechkovskaia I*, __ N.C. App. at __, 754 S.E.2d at 843. As to alimony, this Court concluded that the trial court did not err in finding that defendant had subjected plaintiff to indignities constituting marital misconduct and remanded the alimony action "only for the limited purpose of reconsideration of the amount and term based upon the ultimate equitable distribution award." *Dechkovskaia I*, __ N.C. App. at __, 754 S.E.2d at 843.

This Court explained:

> [D]efendant only argues that the trial court abused its discretion in awarding plaintiff $3,500 per month in alimony for twelve years because its findings on marital misconduct are unsupported by the evidence. Defendant does not otherwise challenge the alimony order or the trial court's consideration of other alimony factors. Therefore, any such arguments have been abandoned. N.C. R. App. P. 28(a). There was sufficient evidence to support the trial court's findings on marital misconduct, and defendant has shown no abuse of discretion in the trial court's consideration of this misconduct in setting the amount and term of the alimony award.
>
> Yet our ruling cannot end here, since we realize that the alimony award was made in conjunction with the equitable distribution award, and the trial court may need to reconsider the alimony amount in light of any changes to the property distribution. *See* N.C. Gen. Stat. § 50–16.3A(a); *Lamb v. Lamb*, 103 N.C. App. 541, 547, 406 S.E.2d 622, 625 (1991). Therefore, we remand the alimony award only so that the trial court may reconsider the amount and term of alimony based upon the new equitable distribution determination.
>
> This opinion does *not* permit the parties to revisit the issue of marital misconduct on remand, as we have found that the trial court did not err as to this issue, and this opinion does not dictate that the trial court should or should not change the alimony award on remand; we merely permit the trial court to exercise its discretion on remand to reconsider the alimony amount and term, as the trial court

> must have the ability to consider the alimony award in light of the new equitable distribution award entered on remand, since they were considered together in the prior trial and order.

Id.

On 6 March 2014, defendant filed a motion for change of venue under N.C. Gen. Stat. § 50-3, seeking to move the equitable distribution hearing on remand and plaintiff's motions for contempt for non-payment of alimony and attorneys' fees from Orange County District Court to Durham County District Court. After a hearing, the trial judge entered an order denying defendant's motion to change venue on 22 April 2014. In its order, the trial judge concluded: "N.C. Gen. Stat. [§] 50-3 does not apply to equitable distribution cases and N.C. Gen. Stat. [§] 5A-23 controls civil contempt." Defendant appealed the venue order on 7 May 2014.

On 11 June 2014, the trial court heard plaintiff's motions for contempt prior to proceeding on the issues remanded from *Dechkovskaia I*. On 1 July 2014, the trial court entered an order finding defendant in civil contempt for failure to pay alimony and attorneys' fees as directed by the 26 July 2012 order. Defendant appealed the contempt order on 30 July 2014. Both the venue and contempt orders are before this Court on appeal.

II. Jurisdiction

Both orders are interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which 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.") (citation omitted). Interlocutory orders are generally not appealable unless certified by the trial court or unless a substantial right of the appellant would be jeopardized absent immediate appellate review. *See, e.g.*, *Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 95 (2015). "[A] right to venue established by statute is a substantial right. Its grant or denial is immediately appealable." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (internal citations omitted). "The appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002) (citing *Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976)). Thus, we have jurisdiction to entertain defendant's appeals.

III. Venue Order

[1] Defendant contends the trial court erred by denying his motion to change venue under N.C. Gen. Stat. § 50-3. We agree.

"Although the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right." *Gardner*, 300 N.C. at 719, 268 S.E.2d at 471. N.C. Gen. Stat. § 50-3 sets forth a mandatory venue removal provision applicable specifically to actions for alimony or divorce. This statute is triggered upon proper motion by the defendant in alimony and divorce actions "filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident[.]" N.C. Gen. Stat. § 50-3 (2015).

In the only case interpreting this venue removal provision, our Supreme Court explained: "[Its language] is clearly mandatory. When the particular situation to which it applies is shown to obtain, the trial court has no choice but to order removal upon proper motion by the defendant." *Gardner*, 300 N.C. at 718, 268 S.E.2d at 470. Stated another way, N.C. Gen. Stat. § 50-3 dictates that if one spouse files an action for alimony or divorce in his or her county of residence and then leaves the state, the other spouse may remove the action to the county of his or her residence; the trial court must order removal if demand is properly made. The statute and case law are silent, however, about its effect on claims properly joined to alimony or divorce actions. The statute is also silent as to its effect upon an action that was remanded after this Court's mandate partially vacated and partially upheld an order adjudicating claims joined to an alimony or divorce action. These appear to be issues of first impression.

A. Claims Joined with Alimony or Divorce

Plaintiff contends the statute operates to remove only independent actions for alimony or divorce; defendant contends it operates to remove the entire cause, including all properly joined claims. At issue, then, is whether the mandatory venue provisions of N.C. Gen. Stat. § 50-3 require removal of all claims filed in the same action. We conclude that it does.

"Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed *de novo*." *In re Ernst & Young, L.L.P.*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998)). "The primary

rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Id.* at 616, 684 S.E.2d at 154 (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)).

> In interpreting a statute, we first look to the plain meaning of the statute. Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.

Frye Reg'l Med. Ctr., Inc. v. Hunt, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citations omitted). North Carolina courts adhere to the well-established principle that a statute of specific application is construed as an exception to statutes of general application. *See, e.g., High Rock Lake Partners, L.L.C. v. N. Carolina Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012). Thus, all civil actions are governed by venue statutes of general application, see N.C. Gen. Stat. §§ 1-82 through 1-84, unless subject to a venue statute of more specific application.

N.C. Gen. Stat. § 50-3 (2015) provides in pertinent part:

> [In] any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides. The judge, upon such motion, shall order the removal of the action, and the procedures of G.S. 1-87 shall be followed.

The cross-referenced statute provides in pertinent part:

> (a) When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court.

N.C. Gen. Stat. § 1-87(a) (2015). N.C. Gen. Stat. § 50-3 uses the phrase "any action . . . for alimony or divorce." Following this phrase is "the action may be removed[.]" "Action" here clearly refers to an "action . . . for alimony or divorce." However, it is well settled that an action may include multiple claims. *See*, *e.g.*, N.C. Gen. Stat. § 50-19.1 (2015) ("Notwithstanding any other *pending claims filed in the same action*, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution[.]") (emphasis added); N.C. Gen. Stat. § 1A-1, Rule 18(a) (2015) ("A party asserting a claim for relief . . . may join . . . as many claims . . . as he has against an opposing party.").

Specifically, N.C. Gen. Stat. § 50-21 provides that a claim for equitable distribution may be joined and adjudicated with an action for alimony. N.C. Gen. Stat. § 50-21 (2015) ("[A] claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes."). Once joined, these claims become one "action" for purposes of N.C. Gen. Stat. § 50-3. *See* Black's Law Dictionary 83 (8th ed. 2004) (defining "action" as "any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree"). If a mandatory venue provision of specific application operates to remove one claim in an action, all joined claims must also be removed to the county of mandatory venue. Thus, if N.C. Gen. Stat. § 50-3 mandates removal of an action comprising claims for alimony and equitable distribution, both claims must be removed. *See* 3 Suzanne Reynolds, Lee's North Carolina Family Law § 12.126 (5th ed. 2002) ("Different statutory provisions on venue apply to equitable distribution depending on the action in which it is asserted. If a spouse raises the claim in an action for alimony or divorce, N.C. Gen. Stat. § 50-3 governs venue. . . . If a spouse asserts the claim in some other action, N.C. Gen. Stat. § 1-82 governs the action[.]").

This interpretation is bolstered by N.C. Gen. Stat. § 50-3's cross-reference to N.C. Gen. Stat. § 1-87, which instructs that "[w]hen a cause is directed to be removed . . . *all* other proceedings shall be had in the county to which the place of trial is changed[.]" N.C. Gen. Stat. § 1-87(a) (2015) (emphasis added). The use of "all" to modify "proceedings" indicates the legislature's intent that the entire cause be removed—not only the cause for alimony or divorce. Moreover, this interpretation is further buttressed by the inextricable nature of equitable distribution and alimony. *See*, *e.g.*, *Capps v. Capps*, 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984) (noting "the obvious relationship that exists between the property that one has and his or her need for support and the ability

to furnish it"); *see also* N.C. Gen. Stat. § 50-16.3A(a) (2015) (permitting review of an award for alimony after the conclusion of an equitable distribution claim); N.C. Gen. Stat. § 50-20(f) (2015) ("The court shall provide for an equitable distribution without regard to alimony. . . . After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony . . . should be modified or vacated[.]"). Although claims for alimony and equitable distribution have the procedural and substantive freedom to be asserted separately and distinctly, when joined and adjudicated together, the claims become inextricably entwined such that each are subject to the mandatory venue provisions of N.C. Gen. Stat. § 50-3.

In the instant case, plaintiff's claims for equitable distribution, alimony, child support, and attorneys' fees were heard and adjudicated together in Orange County District Court and, therefore, all claims are in the same order. Defendant appealed from this order. Plaintiff then moved to Florida. Subsequently, in *Dechkovskaia I*, this Court vacated the 26 July 2012 order as to equitable distribution, upheld the trial court's determination that plaintiff was entitled to alimony, and remanded for the entry of a new equitable distribution order and reconsideration of the alimony amount and term in light of the new equitable distribution order. Defendant then moved under N.C. Gen. Stat. § 50-3 to remove the action to Durham County, his county of residence. Given the mandatory nature of N.C. Gen. Stat. § 50-3, it was error for the trial court to deny defendant's motion to change venue. *See Gardner*, 300 N.C. at 718, 268 S.E.2d at 470. Therefore, we must reverse the order denying defendant's motion to change venue and remand all claims to Durham County District Court.

B. Peculiar Procedural Postures

Plaintiff contends that based on the particular posture of this case, the mandatory provisions of N.C. Gen. Stat. § 50-3 should not apply. Plaintiff asserts the equitable distribution claim should not be removed, as the statute does not mandate removal of an action after trial but before entry of final judgment. Plaintiff further asserts that N.C. Gen. Stat. § 50-3 should not operate to remove an action when an order was appealed, partially upheld and partially vacated, and remanded. We disagree.

The statute unambiguously provides for removal "for trial or for any motion in the cause, either before or after judgment[.]" N.C. Gen. Stat. § 50-3. Removal is required upon proper demand any time after the particular circumstance arises that it describes. Because defendant's

substantial right to venue arose by statute and was asserted prior to the Orange County District Court proceeding on the *Dechkovskaia I* remand, these proceedings ought to have occurred in Durham County District Court. N.C. Gen. Stat. § 1-87 (2015) (requiring "all other proceedings . . . be had in the county" of changed venue).

Therefore, we must vacate the Orange County District Court's equitable distribution order and remand to Durham County District Court for the entry of a new equitable distribution order. "We agree with counsel for plaintiff that a more satisfactory answer should be found, but that answer can come only from the Legislature." *Romulus v. Romulus*, 216 N.C. App. 28, 38, 715 S.E.2d 889, 895 (2011) (quoting *Quick v. Quick*, 305 N.C. 446, 462, 290 S.E.2d 653, 663-64 (1982)). Because this Court vacated the equitable distribution order in *Dechkovskaia I*, on remand to Durham County District Court, the equitable distribution hearing must be conducted *de novo*. *Alford v. Shaw*, 327 N.C. 526, 543 n.6, 398 S.E.2d 445, 455 n.6 (1990) ("Once the judgment was vacated, no part of it could thereafter be the law of the case."). After entering a new equitable distribution order, the Durham County District Court should follow this Court's mandate in *Dechkovskaia I* as to the alimony award.

It is well settled that "alimony is comprised of two separate inquiries. First is a determination of whether a spouse is *entitled* to alimony. . . . [T]he second determination is the *amount* of alimony to be awarded." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) (citations omitted). Because this Court in *Dechkovskaia I* decided the issue of whether plaintiff is *entitled* to alimony, it is the law of the case. *See Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) (explaining that when an appellate court decides issues necessary to determine the case, it becomes "the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal") (citations omitted). Since this Court in *Dechkovskaia I* remanded the alimony award for the limited purpose of reconsidering its *amount* in light of the new equitable distribution order, the Durham County District Court is so limited. When reconsidering the alimony amount and term, the Durham County District Court "should rely on the existing record to make its finding[s] and conclusions on remand[.]" *Robbins v. Robbins*, __ N.C. App. __, __, 770 S.E.2d 723, 735-36, *disc. review denied*, 775 S.E.2d 858 (2015) (permitting trial court on remand to rely on existing record to reconsider distribution scheme in a partially reversed equitable distribution order).

IV. Contempt Order

[2] Defendant contends the Orange County District Court erred by holding him in civil contempt for failure to pay alimony and attorneys' fees as required by its 26 July 2012 order. We agree.

"[T]aking an appeal does not authorize a violation of the order." *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962). "If the order from which an appeal is taken is upheld by the appellate court, wilful failure to comply with the order during pendency of the appeal is punishable by contempt on remand." *Quick*, 305 N.C. at 461, 290 S.E.2d at 663 (citation omitted). Pursuant to N.C. Gen. Stat. § 5A-23(b) (2015), the proper venue for civil contempt proceedings is the county where the order was issued. When a motion for change of venue as a matter of statutory right is made in apt time, "the question of removal then becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon." *Roberts & Hoge, Inc. v. Moore*, 185 N.C. 254, 116 S.E. 728, 729 (1923). In the instant case, the trial court properly considered defendant's motion for change of venue before proceeding on any other issues before it. However, because the trial court failed to remove the cause, we conclude that the trial court could not proceed on its contempt hearing.

A. Validity of Alimony Order Underlying Contempt Order

Plaintiff contends that because the *Dechkovskaia I* Court never vacated the alimony order, the trial court had authority to proceed on the contempt motion before reconsidering the alimony order. We disagree.

It is true that this Court never vacated the alimony order in *Dechkovskaia I*. However, this Court remanded the alimony order for the purpose of reconsidering whether it was equitable in light of the new equitable distribution order.

This Court explained:

> [T]his opinion does not dictate that the trial court should or should not change the alimony award on remand; we merely permit the trial court to exercise its discretion on remand to reconsider the alimony amount and term, as the trial court must have the ability to consider the alimony award in light of the new equitable distribution award entered on remand, since they were considered together in the prior trial and order.

Dechkovskaia I, __ N.C. App. at __, 754 S.E.2d at 843.

The trial court's error requiring the vacation of its equitable distribution order, however, resulted in improperly distributing *two houses* to defendant. *Id.* at ___, 754 S.E.2d at 834-35. Certainly the redistribution of two houses requires, at the very least, a reconsideration of the amount and term of alimony. Until such time as the new equitable distribution order was entered, the trial court was unable to determine whether the specific amount and term of alimony was equitable. Therefore, we conclude the trial court had no authority to enforce its alimony order by contempt proceedings prior to reconsidering alimony in light of the new equitable distribution order. Furthermore, because defendant asserted his statutory right to change venue before the Orange County District Court proceeded on the equitable distribution remand and subsequently reconsider the alimony amount and term, Orange County District Court never issued a valid alimony order giving it the power to enforce its order by contempt proceedings. Therefore, the order finding defendant in contempt must be vacated.

V. Conclusion

For the foregoing reasons, we reverse the trial court's order denying defendant's motion to change venue, vacate its order finding defendant in civil contempt, and remand to Durham County District Court for the entry of a new equitable distribution order and reconsideration of the amount and term of alimony in light of the new equitable distribution order.

REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges ELMORE and DILLON concur.

HENRY FRAZIER, III, PLAINTIFF
v.
NORTH CAROLINA CENTRAL UNIVERSITY, BY AND THROUGH THE UNIVERSITY OF NORTH CAROLINA, DEFENDANTS

No. COA15-23

Filed 17 November 2015

Public Officers and Employees—university system football coach—discharge—complaint dismissed

The trial court did not by err dismissing a complaint arising from the firing of a North Carolina Central University football coach where he failed to exhaust his available administrative remedies pursuant to N.C.G.S. § 150B-43 and failed to adequately allege that the administrative remedies were inadequate.

Appeal by Plaintiff from order entered 25 August 2014 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 11 August 2015.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for Plaintiff.

Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for Defendants.

STEPHENS, Judge.

I. Factual Background and Procedural History

Plaintiff Henry Frazier, III, was employed at North Carolina Central University ("NCCU") as head football coach pursuant to a contract for a five-year period, beginning 1 January 2011 and continuing through 31 December 2015. The terms of Frazier's contract provided that his position was "designated as employment at will and therefore governed by the common law of the State of North Carolina and not by any statutory SPA [State Personnel Act] or EPA [Exempt Personnel Act] policies or procedures." The contract further provided that NCCU could terminate Frazier's employment for just cause, which was defined in pertinent part to include

> [a]ny conduct by [Frazier] which constitutes moral turpitude, which would constitute a criminal offense under

> North Carolina law, or which would tend to bring public disrespect, contempt or ridicule upon [NCCU]. Any discipline under this subsection shall not violate the due process rights of [Frazier] to defend himself against false and/or malicious prosecution or accusations[.]

In the event of any disciplinary action against Frazier, section 3.2 of the contract required NCCU's Director of Athletics to give him notice of and an opportunity to respond to any allegations against him, as well as written notice of any subsequent disciplinary decisions and the right to request a review of such decisions by NCCU's Chancellor.

On 14 May 2012, Frazier was arrested and charged with misdemeanor assault on a female following a domestic incident involving his spouse, and a protective order was entered against him. Frazier was initially placed on administrative leave from NCCU. After entering into a deferred prosecution agreement with the Wake County District Attorney, Frazier was allowed to return to his position at NCCU provided he fully comply with the conditions of his prayer for judgment. At that time, NCCU's Chancellor issued Frazier a formal letter of reprimand and notified him that any additional incidents of this kind would be cause for more severe disciplinary actions, up to and including dismissal.

On 19 August 2013, Frazier was arrested for violating the aforementioned protective order. That same day, NCCU's Director of Athletics, Dr. Ingrid Wicker-McCree notified Frazier by letter that he was suspended with full pay while NCCU collected additional information regarding his arrest. On 22 August 2013, after meeting with Frazier and providing him an opportunity to respond to the allegations against him, Wicker-McCree notified Frazier by letter of her decision to terminate his employment. In her letter, Wicker-McCree explained:

> It is my intent to discharge you for behavior that has brought public disrespect, contempt and ridicule upon [NCCU], the Department of Intercollegiate Athletics and the football program. . . .
>
> . . . .
>
> During our meeting, you provided me with your position regarding your performance as Head Coach and outlined your achievements to date. You also indicated that while you understood [NCCU's] concerns regarding these matters, you did not believe that these issues have had a negative impact on your job performance or your ability to lead

> the program. During our discussion, it became clear to me that you did not have an appreciation of the impact these types of behaviors, your arrest and the resulting negative publicity can and have had on our student athletes, the program and [NCCU]. This was especially disturbing, in light of the fact that you were severely reprimanded for similar behaviors in July 2012. Your recent arrest for violation of a domestic protective order, stemming from your May 2012 arrest, . . . has once again generated local, regional and national media stories and opinions that have harmed the reputation of [NCCU] and our athletics program.

Frazier's contract expressly provided that he had the right to appeal any decision by the Director of Athletics to take disciplinary action against him to NCCU's Chancellor. On 29 August 2013, Frazier's New York-licensed attorney, Linda Kenney Baden, sent a letter to NCCU Chancellor Debra Saunders-White appealing Wicker-McCree's decision. In a letter dated 25 September 2013, Saunders-White informed Frazier that she had considered his request for reinstatement but ultimately concluded—in light of his previous arrest in May 2012, the resulting deferred prosecution and letter of reprimand from NCCU's former Chancellor, and Frazier's "current arrest, and blatant disregard for [NCCU] directives [,which] are inconsistent with the position as Head Coach, a position charged with modeling behaviors for students"—that "there is sufficient basis to support your for cause termination" and therefore upheld Wicker-McCree's decision.

On 30 September 2013, Frazier was acquitted of the charges that led to his most recent arrest. On 1 October 2013, Frazier's attorney, Kenney Baden, sent a letter to NCCU's general counsel, Melissa Jackson Holloway, requesting that NCCU reconsider its decision to terminate her client's employment, and inquiring whether Frazier was required to complete any further internal or more formal appeals process "before legal action ensues." In a letter dated 11 October 2013, Jackson Holloway confirmed that "[i]t is [NCCU's] position that Coach Frazier has exhausted his campus based appeals rights" and also stated that the terms of Frazier's contract precluded him "from pursuing avenues of appeal/review provided for in the State Personnel Act (governing SPA employees) and/or the NCCU EPA non faculty employment policies (governing EPA non faculty employees) including, but not limited to, a review of the termination decision by the NCCU Board of Trustees. . . ." However, Jackson Holloway also cautioned Frazier's attorney that

> given my role as counsel to [NCCU], I am not in the position to identify all of the claims that you believe your client may have against [NCCU] and/or its representatives or to identify every potential statutory or other requirement to pursue such claims. I would respectfully suggest that you obtain NC local counsel to ensure your understanding of state contract law, the North Carolina Tort Claims Act and other relevant statutes, case law and other authority applicable to any claims your client may have.

On 8 April 2014, after hiring a North Carolina-licensed attorney, Frazier filed a complaint in Durham County Superior Court against NCCU and the Board of Governors of the University of North Carolina seeking compensatory and punitive damages for breach of contract, wrongful discharge in violation of public policy, and breach of the covenant of good faith and fair dealing. With NCCU's consent, Frazier subsequently amended his complaint three times in order to attach an accurate copy of his contract and correct certain typographical errors.

On 5 June 2014, NCCU filed a motion to dismiss all of Frazier's claims pursuant to Rule 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure based on sovereign immunity, lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted, given the fact that Frazier failed to exhaust his administrative remedies under our State's Administrative Procedure Act ("APA") and also failed to allege in any of his complaints that the available administrative procedures and remedies were inadequate. The trial court held a hearing on this motion on 12 August 2014, and on 25 August 2014, it entered an order granting NCCU's motion and dismissing Frazier's claims with prejudice. On 22 September 2014, Frazier gave notice of appeal to this Court.

II. Analysis

Frazier argues that by terminating his employment before he had the opportunity to defend himself in court, NCCU violated his contractual right to due process. However, the scope of our review in the present case focuses not on the merits of Frazier's claim but instead on the threshold issue of whether the trial court erred in granting NCCU's motion to dismiss. On that point, Frazier argues that the trial court erred in dismissing his complaint because: (1) his contract did not require him to exhaust administrative remedies available under the APA; (2) NCCU waived its sovereign immunity by entering into the contract with him; and (3) by pleading all the elements of a claim for breach of contract, his

complaint adequately alleged that any available administrative remedies were inadequate. We disagree.

A. Background Law

This Court's standard of review for a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(1) is *de novo*. *See Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002).

> A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction may be raised at any time. Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. An action is properly dismissed for lack of subject matter jurisdiction when the plaintiff has failed to exhaust his administrative remedies. Where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.

Hentz v. Asheville City Bd. of Educ., 189 N.C. App. 520, 522, 658 S.E.2d 520, 521-22 (2008) (citations, internal quotation marks, and brackets omitted). Thus, "[a]n action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Johnson v. Univ. of N.C.*, 202 N.C. App. 355, 357, 688 S.E.2d 546, 548 (2010) (citation omitted).

It is well established that the actions of the University of North Carolina ("the University") and its constituent institutions—which include NCCU, *see* N.C. Gen. Stat. § 116-4 (2013)—are "specifically made subject to the judicial review procedures" provided by N.C. Gen. Stat. § 150B-43. *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992). Section 150B-43 of our General Statutes provides in pertinent part that, "[a]ny party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision[.]" N.C. Gen. Stat. § 150B-43 (2013). To obtain judicial review of a final decision, the person aggrieved by the decision must file a petition in the superior court of the county where that person resides within 30 days after being served with a written copy of the final decision. N.C. Gen. Stat. § 150B-45 (2013). The petition "shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks." N.C. Gen. Stat. § 150B-46 (2013). In reviewing a final decision, the superior court

> may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2013). This Court's prior holdings amply demonstrate that a trial court lacks subject matter jurisdiction to hear an action challenging a final decision by the University unless the plaintiff has exhausted all available administrative remedies, including seeking judicial review pursuant to section 150B-43, or his complaint alleges the administrative remedies available to him are inadequate. *Huang*, 107 N.C. App. at 715-16, 421 S.E.2d at 815-16.

In *Huang*, for example, the plaintiff had been terminated from his position as a tenured professor at N.C. State University ("NCSU") after he was arrested for attempted rape. *Id.* at 711-12, 421 S.E.2d at 813-14. As provided by the administrative remedies made available to him by the Code of the Board of Governors of the University, Huang had sought a hearing from NCSU's Faculty Hearing Committee, which ultimately recommended his discharge. *Id.* at 712, 421 S.E.2d at 813. Thereafter, Huang appealed the termination decision to NCSU's Board of Governors, which agreed to hear certain portions of his petition. *Id.* However, while that appeal was still pending, Huang filed a complaint in superior court seeking compensatory and punitive damages against NCSU and requesting a jury trial for, *inter alia*, breach of contract. *Id.* at 712, 421 S.E.2d at 814. After Huang was granted summary judgment on his breach of contract claim, NCSU appealed to this Court arguing that the trial court lacked jurisdiction to hear the action because Huang had failed to exhaust his administrative remedies before filing his claim. *Id.* For his part, Huang argued that he had exhausted his administrative remedies "because [NCSU's] Board [of Governors] had reached its final

decision [on his appeal] prior to the time summary judgment was actually granted by the trial court." *Id.* Alternatively, Huang argued that he was free to file his breach of contract claim against NCSU directly in the superior court without exhausting administrative remedies "because administrative action could not grant him the relief to which he is allegedly entitled." *Id.*

On appeal, we first explained that "[b]ecause no statutory administrative remedies are made available to employees of the University, those who have grievances with the University have available only those administrative remedies provided by the rules and regulations of the University and must exhaust those remedies before having access to the courts." *Id.* at 713-14, 421 S.E.2d at 814. "Therefore, before a party may ask the courts for relief from a University decision: (1) the person must be aggrieved; (2) there must be a contested case; and (3) the administrative remedies provided by the University must be exhausted." *Id.* at 714, 421 S.E.2d at 814. We ultimately concluded that because Huang filed his action in superior court while his appeal to NCSU's Board of Governors remained pending, "Huang did not exhaust his University remedies prior to filing his claim in superior court and the court therefore did not have jurisdiction." *Id.* at 714, 421 S.E.2d at 815. In so holding, we rejected Huang's argument that his premature filing in superior court was "cured" by the fact that NCSU's Board of Governors rendered a decision on his appeal before the trial court entered summary judgment. We explained: "To adopt Huang's contention would make it impossible for the trial court to perform its function of *reviewing* the administrative proceedings based on the completed administrative record." *Id.* (emphasis added). We then emphasized the various ways that the proceedings on Huang's claim in the trial court had diverged from the review process mandated by section 150B-43:

> The trial court did not have before it the complete administrative record, as required by [section] 150B-47. Indeed[,] the trial court conducted a *de novo* hearing, not a review of the record of the agency proceedings. This is so even though the trial court was made aware of the Board's decision prior to entering summary judgment. Furthermore, Huang filed a complaint in superior court seeking compensatory and punitive damages. The correct procedure for seeking review of an administrative decision is to file a petition in the court explicitly stating what exceptions are taken to the administrative decision. This judicial review is to be conducted without a jury. Huang specifically requested a jury trial.

Id. at 714-15, 421 S.E.2d at 815 (citations, internal quotation marks, and brackets omitted). Moreover, in explaining the rationale behind our holding that Huang's breach of contract claim was barred by his failure to fully exhaust his available administrative remedies and his failure to file a petition for judicial review as required by section 150B-43, we observed that "the policy of requiring the exhaustion of administrative remedies prior to the filing of court actions does not require merely the initiation of prescribed administrative procedures, but that they should be pursued to their appropriate conclusion and their final outcome awaited before seeking judicial intervention[.]" *Id.* at 715, 421 S.E.2d at 815 (citation and internal quotation marks omitted).

We also rejected Huang's alternative argument that he was not required to exhaust his administrative remedies before filing an action in superior court because the only administrative remedies available to him were inadequate. *Id.* at 716, 421 S.E.2d at 816. While acknowledging that "exhaustion of administrative remedies is not required when the only remedies available from the agency are shown to be inadequate," we made clear that "[t]he burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy, and the party making such a claim must include such allegation in the complaint," which we noted "should be carefully scrutinized to ensure that the claim for relief is not inserted for the sole purpose of avoiding the exhaustion rule." *Id.* at 715, 421 S.E.2d at 815-16 (citations, internal quotation marks, and brackets omitted). Thus, although Huang argued on appeal to this Court that his available administrative remedies "[did] not provide him an opportunity for monetary relief to the same degree requested in the complaint," which sought compensatory and punitive damages for breach of contract, we held—based on our examination of his complaint and the record before the trial court, neither of which specifically alleged the inadequacy of his available administrative remedies—that Huang had failed to properly raise the alleged inadequacy issue and that his complaint therefore should have been dismissed for this reason as well. *Id.* at 716, 421 S.E.2d at 816.

In cases since *Huang*, this Court has consistently and repeatedly held that a trial court lacks jurisdiction to hear breach of contract claims brought by University employees who failed to first exhaust their administrative remedies, including petitioning for judicial review pursuant to section 150B-43. *See*, *e.g.*, *Tucker v. Fayetteville State Univ.*, __ N.C. App. __, __,767 S.E.2d 60, 63 (2014) (holding that the trial court lacked subject matter jurisdiction over a former University basketball coach's complaint seeking compensatory damages for breach of contract where

the plaintiff failed to meet his burden of showing that the administrative remedies available were inadequate, and where he also sought to avoid the exhaustion requirement by retiring upon being notified that grounds existed for his termination, thereby skipping the required internal administrative appeals procedures, and then filing suit in superior court instead), *disc. review denied*, __ N.C. __, 768 S.E.2d 854 (2015); *Johnson*, 202 N.C. App. at 359, 688 S.E.2d at 549 (holding that the trial court lacked subject matter jurisdiction to hear a complaint by an assistant University professor who failed to exhaust his available administrative remedies, and rejecting the professor's argument that he was not required to exhaust those remedies because the University's relevant policies provided that a faculty member "may"—rather than "shall"—appeal an adverse decision internally); *Hentz*, 189 N.C. App. at 523-24, 658 S.E.2d at 522-23 (holding based on *Huang* that the trial court lacked subject matter jurisdiction to hear a complaint against the city's board of education and school superintendent for, *inter alia*, breach of contract because the plaintiff filed suit in superior court while her administrative appeal was still pending and her complaint failed to allege that the available remedies were inadequate); *see also Hedgepeth v. Winston-Salem State Univ.*, __ N.C. App. __, 753 S.E.2d 741 (2013) (unpublished), *available* at 2013 WL 6237445.[1]

B. Frazier's Appeal

In the present case, rather than filing a petition for judicial review of NCCU's decision to terminate his employment within 30 days of receiving the 11 October 2013 letter informing him that he had exhausted all on-campus appeal procedures, Frazier waited roughly six months and then filed the present lawsuit. During the hearing on NCCU's motion to dismiss and again in his brief to this Court, Frazier has raised several related arguments as to why his claims should be exempt from

1. Although Rule 30(e)(3) of North Carolina's Rules of Appellate Procedure holds that this Court's unpublished decisions do not constitute controlling legal authority, the facts and procedural posture of *Hedgepeth* are strikingly similar to those of the present case. In *Hedgepeth*, we held—based on *Huang*, *Johnson*, and *Hentz*—that the trial court did not err in dismissing an action for breach of contract by a University employee who, by failing to petition for judicial review pursuant to section 150B-43, had not exhausted her available administrative remedies and also failed to allege in her complaint that such remedies were inadequate. Indeed, during arguments below in the present case, counsel for NCCU specifically cited *Hedgepeth* as support for NCCU's motion to dismiss and, just before granting the motion, the trial court stated, "If the *Hedgepeth* case was published it would be right on point; it's not, so it has no precedential value." Thus, although the trial court was correct that because *Hedgepeth* was unpublished it does not control the result here, we nevertheless find its reasoning persuasive for the reason that, *inter alia*, it followed the well-established precedent on which it relied.

the requirements of the APA and section 150B-43. We find none of them persuasive.

(1) Applicability of the APA to Frazier's employment contract

We turn first to Frazier's argument that the APA does not apply to his claims at all because his contract with NCCU prohibited the use of any statutory administrative procedures for resolving disputes between the parties. In support of this argument, Frazier notes that the dispute-resolution process outlined by section 3.2 of his contract makes no reference to the APA, and he also emphasizes the contract's express provision that his position was "designated as employment at will and therefore governed by the common law of the State of North Carolina and not by any statutory SPA or EPA policies or procedures." In Frazier's view, the fact that the 11 October 2013 letter confirmed that he had exhausted the internal appeal process required by his contract, and that his contract prevented him "from pursuing avenues of appeal/review provided for in the State Personnel Act," proves that there were no administrative procedures for him to utilize before filing a lawsuit.

This argument is unavailing. There is no dispute that NCCU is a member of the University system and therefore, as noted *supra*, the APA makes NCCU's actions subject to judicial review under section 150B-43. Nothing in Frazier's contract expressly purports to exempt him from the APA's procedures, and we do not believe the mere fact that the contract states that the EPA and SPA do not apply has any bearing on this issue. In this Court's recent decision in *Tucker*, we construed a similar contractual provision that exempted the plaintiff University basketball coach from the SPA to mean that his position was subject to the University's internal grievance and dispute-resolution procedures, and not the statutory scheme outlined in chapter 126 of our General Statutes, where the SPA is codified. *See Tucker*, __ N.C. App. at __, 767 S.E.2d at 62. We then concluded that "[o]nce [the] plaintiff completed that process, he would have been entitled to judicial review of the decision [to terminate his contract] pursuant to N.C. Gen. Stat. § 150B-43." *Id.* Similarly here, we construe the language Frazier highlights to mean that the procedure for disputing NCCU's decision to terminate his employment was controlled by section 3.2 of his contract, rather than the SPA or EPA. Our review of the record demonstrates that NCCU followed those procedures and also reveals, contrary to Frazier's characterization of the 11 October 2013 letter, that NCCU's general counsel explicitly warned Frazier's attorney that she was "not in the position to identify all of the claims that you believe your client may have against [NCCU] and/or its representatives *or to identify every potential statutory or other requirement*

to pursue such claims" before advising Frazier to obtain local counsel familiar with our State's laws. Given that neither the express language of Frazier's contract nor the 11 October 2013 letter suggested that the APA was inapplicable, and in light of well-established precedent, we conclude this argument is without merit.

(2) Frazier's failure to exhaust available administrative remedies

Frazier argues next that because NCCU waived its sovereign immunity by entering into a contract with him, he was not required to exhaust administrative remedies, and therefore the trial court erred in dismissing his claims. In support of this argument, Frazier relies on our Supreme Court's holding in *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Id.* at 320, 222 S.E.2d at 423. Frazier concedes that the holding in *Smith* was restricted by our Supreme Court's subsequent holding in *Middlesex Constr. Corp. v. State*, 307 N.C. 569, 299 S.E.2d 640 (1983), *rehearing denied*, 310 N.C. 150, 312 S.E.2d 648 (1984), which confirmed that "under its limited terms, *Smith* permitted suits against the State where none could be brought otherwise," but also clarified that

> [t]he *Smith* Court *abolished* sovereign immunity in only those cases where an administrative or judicial determination was not available. It did so by finding that the State had *implicitly* consented to be sued by entering into a valid contract. Unaffected by the decision were those contractual situations in which the State had *waived* its immunity by statute, thereby *expressly* consenting to suit.

Id. at 574-75, 299 S.E.2d at 643 (emphasis in original). As noted *supra*, our decision in *Huang* demonstrated that section 150B-43 functions as exactly the type of statutory waiver contemplated by *Middlesex*, and our decisions since *Huang* confirm that a University employee who fails to exhaust the administrative remedies that section 150B-43 provides is barred from bringing a subsequent, separate action in superior court for breach of contract. *See, e.g.*, *Tucker*, __ N.C. App. at __,767 S.E.2d at 63; *Johnson*, 202 N.C. App. at 359, 688 S.E.2d at 549; *Hentz*, 189 N.C. App. at 523-24, 658 S.E.2d at 522-23; *Hedgepeth*, 2013 WL 6237445 at *4.

However, Frazier contends that *Huang* is obsolete and that this Court has long since abandoned its exhaustion requirement in circumstances like his, where a party seeks monetary damages for breach of

contract. Specifically, Frazier insists that the fact the APA does not provide for breach of contract damages means that judicial review under section 150B-43 is not an adequate remedy, which in Frazier's view means that he has not failed to exhaust his administrative remedies. In support of his argument, Frazier relies heavily on this Court's decision in *Ware v. Fort*, 124 N.C. App. 613, 478 S.E.2d 218 (1996), which he claims contradicted and abandoned *Huang* by holding that the proper venue for a breach of contract claim is in superior court, rather than an APA proceeding.

There are several reasons why this argument fails. On the one hand, we note that our holding in *Huang* has never been overruled by our Supreme Court, and it is well established 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 re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). On the other hand, we find Frazier's reliance on *Ware* to be entirely misplaced. The plaintiff in *Ware* was a probationary professor at N.C. A&T State University who brought a claim under 42 U.S.C. § 1983 and a *Corum* claim under the North Carolina Constitution after his contract expired and he was not reappointed to the faculty. 124 N.C. App. at 614, 478 S.E.2d at 219. The trial court dismissed these claims, and we affirmed that dismissal because we found no basis for the alleged violation of the plaintiff's due process rights under either the United States Constitution or the North Carolina Constitution, and because "neither a [section] 1983 claim, nor a *Corum* claim, will lie where no appropriate protected interest exists." *Id.* at 619, 478 S.E.2d at 222 (citation omitted). We further observed that

> where adequate state remedies exist, no *Corum* claim will lie. The pleadings indicate that [the] plaintiff had a number of alternative state law remedies whereby he could have pursued the damages he seeks. [The p]laintiff could have sought judicial review of the final BOG decision under Chapter 150B of the [APA]. [The p]laintiff also could have sued the University for breach of contract, since the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.

Id. (citations and internal quotation marks omitted). Despite Frazier's claims to the contrary, our decision in *Ware* did not purport to abandon, or even reference, *Huang*, nor did it posit any sort of general rule that suits for breach of contract damages are somehow exempt from the

APA's exhaustion requirement. Indeed, *Ware* had nothing to with the APA and, when viewed in its full context, it is abundantly clear that the single sentence Frazier's argument revolves around was stated, *in dicta*, as one alternative state law remedy the plaintiff could have pursued instead of filing a *Corum* claim. Moreover, to accept Frazier's contention that *Huang* is obsolete as a result of Ware would also require us to ignore our Supreme Court's holding in *In re Appeal from Civil Penalty*, which we are not at liberty to do. Given that the facts, procedural posture, and arguments raised on appeal in the present case are virtually identical to those at issue in *Huang*, we cannot escape the conclusion that our decision in *Huang* must control the result we reach here. Here, as in *Huang*, a constituent member of the UNC system is being sued by a former employee who seeks compensatory and punitive damages in an action for breach of contract. Like the plaintiff in *Huang*, Frazier failed to file a petition for judicial review as required by section 150B-43 before filing his complaint in superior court. We therefore conclude that here, as in *Huang*, Frazier has failed to exhaust his available administrative remedies.

(3) Frazier's failure to allege inadequacy of available administrative remedies

Frazier argues further that the trial court erred in dismissing his claim because his available administrative remedies were inadequate in light of the compensatory and punitive damages he sought in his complaint for breach of contract. Frazier also contends that by merely alleging an action for breach of contract, he sufficiently alleged that his available administrative remedies were inadequate. In support of this argument, Frazier cites this Court's prior decisions in *S. Furniture Co. of Conover, Inc. v. Dep't of Transp.*, 122 N.C. App. 113, 468 S.E.2d 523 (1996), *disc. review improvidently allowed*, 346 N.C. 169, 484 S.E.2d 552 (1997), and *Sanders v. State Pers. Comm'n*, 183 N.C. App. 15, 644 S.E.2d 10, *appeal dismissed and disc. review denied*, 361 N.C. 696, 652 S.E.2d 654 (2007). However, we find Frazier's reliance on *S. Furniture* and *Sanders* unavailing. While Frazier is correct that in both those cases, we held that the plaintiffs' lawsuits were not barred because the administrative remedies available to them were inadequate to address their underlying claims for breach of contract damages, his argument overlooks critical distinctions between the present facts and the nature of the claims and administrative remedies at issue in *S. Furniture* and *Sanders*.

In *S. Furniture*, the plaintiff property owner contended that when it granted the Department of Transportation ("DOT") a right-of-way over its land for highway access in 1953, DOT agreed to maintain a secondary road and a median crossover on the highway. 122 N.C. App. at 114, 468

S.E.2d at 524. Nearly four decades later, when DOT closed the median and blocked access to the secondary road, the plaintiff sued for breach of contract. *Id.* Citing *Middlesex*, DOT argued that the plaintiff's suit was barred by sovereign immunity because it had an administrative remedy available through section 136-111 of our General Statutes, which provides for special proceedings for inverse condemnation. *Id.* at 115, 468 S.E.2d at 525. However, we rejected this argument because section 136-111 "does not provide a procedure for [the] plaintiff's breach of contract claim and [DOT] has cited no other statutory procedure which would control [the] plaintiff's breach of contract action," which left the plaintiff "completely foreclosed, under the doctrine of sovereign immunity, from obtaining administrative or judicial relief in a contract action against the State." *Id.* at 116, 468 S.E.2d at 525. Such is clearly not the case here.

In *Sanders*, the plaintiffs were a group of State employees who alleged they were wrongfully denied employment benefits after working for more than 12 months as temporary employees and who brought suit for breach of contract as well as claims under the North Carolina Constitution and the North Carolina Administrative Code. 183 N.C. App. at 16-17, 644 S.E.2d at 11. In analyzing whether the trial court had erred in dismissing the plaintiffs' breach of contract action based on sovereign immunity, we focused on "whether [their] complaint contains sufficient allegations to support a finding of waiver of sovereign immunity." *Id.* at 19, 644 S.E.2d at 13. Because the complaint alleged that the defendants were "manipulating State personnel policies and benefit plans, which govern the terms of state employment, to avoid providing [the] plaintiffs benefits that they rightfully earned as a result of the tenure of their employment," we concluded based on *Smith* and a line of cases involving similar allegations against the State by employees claiming they were wrongfully denied benefits—*see Peverall v. Cty. of Alamance*, 154 N.C. App. 426, 573 S.E.2d 517 (2002), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 632 (2003); *Hubbard v. Cty. of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 40 (2001)—that the complaint "sufficiently alleges that [the] defendants accepted [the] plaintiffs' services and, therefore, may not claim sovereign immunity as a defense to their alleged commitment to provide the benefits provided by the personnel policies setting forth the terms of employment." *Id.* at 20, 644 S.E.2d at 13 (citation and internal quotation marks omitted). The State argued that the plaintiffs' breach of contract claim should nevertheless be barred based on *Middlesex*. However, we rejected this argument because the State "pointed to no statute specifically affording [the] plaintiffs relief for their breach of contract claims," but instead relied on "generalized statutory and administrative

provisions allowing for declaratory—but not monetary or injunctive—relief from administrative agencies." *Id.* at 22, 644 S.E.2d at 15 (citation omitted). In light of our determination that "this case does not present a situation in which the State has by statute waived sovereign immunity for a specific type of claim, but set forth procedural requirements as conditions precedent to any lawsuit," we held that the trial court erred in dismissing the plaintiffs' breach of contract claim. *Id.*

In the present case, Frazier contends that *S. Furniture* and *Sanders* demonstrate that the APA is categorically inapplicable to claims seeking monetary damages for breach of contract, and therefore urges us to hold that the trial court erred in dismissing his complaint—which he contends, by seeking compensatory and punitive damages, sufficiently alleged that his available administrative remedies were inadequate. We find this argument unpersuasive. Notably, Frazier's argument ignores the fact that neither *S. Furniture* (in which the State argued the plaintiff failed to exhaust his administrative remedies available under section 136-111 of our General Statutes) nor *Sanders* (in which the State failed to cite any specific statutory procedure the plaintiffs had failed to exhaust) purported to address the adequacy of the administrative remedies provided by section 150B-43. Further, Frazier's argument overlooks fundamental differences between the facts from which his claim for breach of contract damages arose and those at issue in *S. Furniture* and *Sanders*. Moreover, we are unpersuaded by the superficial distinctions he attempts to draw between the present facts and those at issue in our decisions in *Tucker* and *Hedgepeth*, which involved strikingly similar fact patterns as are present here and in which we concluded, in keeping with *Huang*, that the trial court lacked subject matter jurisdiction to hear claims for breach of contract damages filed by University employees who failed to exhaust their available administrative remedies and failed to allege the inadequacy of those remedies in their complaints. *See Tucker*, __ N.C. App. at __, 767 S.E.2d at 63; *Hedgepeth*, 2013 WL 6237445 at *4. Moreover, Frazier's argument on this point also presumes the validity of his earlier, related argument—which we have already rejected for the reasons explained *supra*—that our decision in *Huang* was somehow overruled by our subsequent decision in *Ware*.

In our view, here again, *Huang* is directly on point with the facts and procedural posture of the present case, and consequently controls the outcome. Like the plaintiff in *Huang*, Frazier argues that his claim for compensatory and punitive damages renders the administrative remedies available pursuant to section 150B-43 inadequate. 107 N.C. App. at 715, 421 S.E.2d at 815. However, as we made clear in *Huang*, "[t]he

burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy, and the party making such a claim must include such allegation in the complaint." *Id.* Neither Frazier's original complaint nor any of his three amended complaints makes any such allegation of inadequacy. Although we have held that "[p]recise language alleging that the State has waived the defense of sovereign immunity is not necessary," so long as the complaint "contain[s] sufficient allegations to provide a reasonable forecast of waiver," *Richmond Cty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 587, 739 S.E.2d 566, 569 (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 215, 747 S.E.2d 553 (2013), Frazier's argument that his complaint provides such a forecast fails because it is based entirely on the fact that his complaint pleads a claim for breach of contract damages. Our analysis of the relevant case law demonstrates that merely pleading a claim for breach of contract is not sufficient, standing alone, to adequately allege that judicial review pursuant to section 150B-43 is an inadequate remedy under circumstances like those presented here. *See Huang*, 107 N.C. App. at 716, 421 S.E.2d at 816; *Tucker*, __ N.C. App. at __, 767 S.E.2d at 63; *Hedgepeth*, 2013 WL 6237445 at *4. Therefore, as in *Huang*, we conclude that Frazier failed to properly allege the administrative remedies available to him were inadequate.

Frazier may well be correct in contending that judicial review pursuant to section 150B-43 does not provide for the compensatory or punitive damages he seeks in conjunction with his breach of contract claim, but we are not convinced that this necessarily renders it an inadequate remedy or otherwise obviates the APA's general exhaustion requirement. Indeed, we believe that Frazier's argument misapprehends the purpose of judicial review under the APA in this context, which, as *Huang* implies, is to promote judicial economy by providing a forum for efficiently resolving personnel disputes between the University and its employees based on a review of "the completed administrative record" in a less formalized setting before allowing the plaintiff to seek further judicial intervention. 107 N.C. App. at 714-15, 421 S.E.2d at 815. In the present case, had Frazier timely filed a petition for judicial review as the APA requires, the superior court would have been authorized to review the record and determine whether NCCU's decision to terminate his employment was based on an error of law or procedure, lacked substantial supporting evidence, or was arbitrary or capricious or otherwise constituted an abuse of discretion. *See* N.C. Gen. Stat. § 150B-51. Frazier contends that such judicial review would have been futile and inadequate because even if the superior court agreed with his arguments, the only relief it could afford him would be to remand his case back to

NCCU and the same administrators who, he contends, wrongfully terminated his contract. This Court, however, has previously rejected similar arguments and instead held that "futility cannot be established by [the] plaintiffs' prediction or anticipation that [the University] would again rule adversely to [the] plaintiffs' interests." *See Affordable Care, Inc. v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002).

Because Frazier failed to exhaust his available administrative remedies pursuant to section 150B-43, and also failed to adequately allege that those remedies were inadequate, we hold that the trial court did not err in dismissing his complaint. Accordingly, the trial court's decision is

AFFIRMED.

Judges BRYANT and DIETZ concur.

LAW OFFICES OF PETER H. PRIEST, PLLC, PLAINTIFF
v.
GABRIEL COCH AND INFORMATION PATTERNS, LLC, DEFENDANTS

No. COA15-254

Filed 17 November 2015

1. Attorneys—business transaction with client—Rule 1.8(a) violation—defense use

The trial court did not err in its determination that an attorney's (Priest's) violation of Rule 1.8(a) of the Rules of Professional Conduct could be used defensively against him where the attorney began a relationship with a tech company (defendant) by filing a patent application, eventually entered into an agreement with the plaintiff for work done without pay and for licensing work that called for Priest to receive a percentage of the proceeds from the patented program, and this breach of contract and fraud action arose over the amount due when the company was sold. Priest did not comply with Rule 1.8(a)'s explicit requirements, including advising defendant in writing to seek review by independent counsel and obtaining written informed consent from his clients as to the agreement's essential terms. For the sake of maintaining the public's trust, attorneys should be held to Rule 1.8(a)'s explicit requirements

as a condition of their own recovery when that recovery is based on business transactions with their clients.

2. Attorneys—business transaction with client—Rule 1.8(a)—software patent

The trial court did not err by granting summary judgment in favor of an attorney's clients (Coch and IP) where the attorney (Priest) argued that a business agreement between them was not within the scope of Rule 1.8(a) of the Rules of Professional Conduct because the Rule only applied to a business transaction directly adverse to a client. The Rule expressly prohibits entering into a business transaction with a client and knowingly acquiring an ownership, possessory, security or other pecuniary interest that is directly adverse to the client. Both the former and the latter are prohibited unless the attorney complies with all three of the requirements enumerated in the subsequent subsections that follow.

3. Attorneys—business agreement with client—no recovery

An attorney was not entitled to summary judgment for breach of an oral business contract with a client involving software where he did not properly plead or amend his complaint to include the claim. Even if he had, he did not comply with the requirements of the Rules of Professional Responsibility, Rule 1.8(a).

Appeal by Plaintiff from Order on Defendants' Motion to Dismiss entered 25 January 2013 and from Order and Opinion entered 5 November 2014 by Judge James L. Gale in Durham County Superior Court. Heard in the Court of Appeals 26 August 2015.

Bryant & Ivie, PLLC, by John Walter Bryant and Amber J. Ivie, for Plaintiff.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, for Defendants.

STEPHENS, Judge.

Plaintiff Law Offices of Peter H. Priest, PLLC, argues that the trial court erred in granting summary judgment to Defendants Gabriel Coch and Information Patterns, LLC, on Plaintiff's claims for breach of contract and fraud, and in dismissing Plaintiff's claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices, as well as dismissing Priest as a party in his individual capacity. After

careful consideration, we hold that the trial court did not err and consequently affirm both its Order and its Order and Opinion.

I. Factual Background and Procedural History

This case presents as an issue of first impression the question of whether an attorney who enters into a business transaction with a client as compensation for a legal representation can be barred from enforcing the terms of their agreement based on the attorney's failure to comply with the explicit requirements of Rule 1.8(a) of the North Carolina Rules of Professional Conduct.

A. Factual Background

Plaintiff Law Offices of Peter H. Priest, PLLC, is a North Carolina law firm specializing in patent law, and its principal, Peter H. Priest, is a North Carolina-licensed attorney. Beginning in 2004, Priest and his law firm[1] represented Defendants Gabriel Coch and Information Partners, LLC ("IP"), in the filing and prosecution of a patent for a computer program for geo-collaboration and internet-based mapping ("the Program"). Coch is a member-manager of IP, which is a small information technology start-up that was formed as a North Carolina limited liability company in 2003 for the purpose of developing the Program, which Coch co-invented with his partners Graham Knight and Mark Smith, who are both citizens and residents of the United Kingdom and are also members of IP.

In October 2003, Coch began discussions about filing a patent application for the Program with his neighbor, Joe Agusta, who was working at the time for Priest's law firm as an associate attorney. Agusta outlined the procedure and fees for filing a patent application, as well as his firm's professional fees, and eventually Coch agreed to go forward. After submitting a provisional application on Coch's behalf to the United States Patent and Trademark Office ("USPTO") on 17 December 2004, Agusta filed a formal patent application, titled "Methods and Apparatus for Geo-Collaboration," with the USPTO on 15 December 2005. Around the same time, Coch, Knight, and Smith assigned their interests in the Program to IP, thereby making IP the owner of the patent application and a client of Priest's firm in any further prosecution thereof. According to an engagement letter dated 7 November 2005, which Priest later described as a "per-task" agreement for legal services, the fees due to Priest's firm

1. When the representation at issue in this case began, Priest's firm was known as Priest & Goldstein, PLLC, which dissolved in 2011.

for drafting and filing the patent application were billed at a rate of $250 per hour and capped at $10,000. That amount was exhausted during the early stages of the patent application, and IP paid $10,000 to Priest's law firm in August 2006.

On 24 September 2009, Priest received a "non-final rejection" from USPTO regarding the claims in IP's patent application.[2] After learning that Coch, Knight, and Smith might be financially unable to proceed with the patent registration, Priest filed a response to the "non-final rejection" at his firm's expense. On 18 February 2010, Priest received a Notice of Allowance, which indicated that a patent would be issued for IP's claims upon the filing of certain paperwork and payment of required fees within three months. Priest informed Coch of this development, and Coch agreed with Knight and Smith to split the fees evenly.

On 19 March 2010, shortly after the Notice of Allowance was issued, Priest and Coch met to discuss entering into an agreement ("the Agreement") regarding how to generate revenue through licensing the patent. Given Coch's concerns that he and IP were financially unable to pay the same rate Priest had charged to file the patent application, the two men also discussed how best to compensate Priest for the work his firm had already performed without pay since 2009. Eventually, they agreed in principle that going forward, Priest and his law firm would continue to prosecute and maintain IP's patent and pay 25% of the actual costs of doing so, with the remainder split evenly between Coch, Knight, and Smith, in return for Priest receiving 25% of the proceeds Priest helped to generate from the patent. Coch's contemporaneous emails to Knight and Smith demonstrate that Coch believed the Agreement's terms would make Priest "an equal partner in pushing the Patent forward" based on the rationale that "there is still work to be done, of which I don't know anything and [Priest] is willing to do it for his equity portion." At the end of the meeting, Priest agreed to draft the Agreement and send it to Coch for his input and signature.

Over the next several weeks, after the managing partner of Priest's firm completed a first draft of the Agreement, Priest handled all subsequent edits and revisions and continued to confer via email and in person with Coch, who requested that Knight and Smith be added as parties. Priest would later testify that during a meeting on 23 April

2. Agusta left Priest's law firm in 2006, and the record indicates that the subsequent legal work in this matter was performed by Priest himself and his employee, Dr. Jerry Pechanek.

2010, he orally notified Coch that he and IP should have another attorney review the Agreement, given Priest's role in drafting it, but Coch declined because "he didn't feel like that was necessary." On 5 May 2010, Coch and Priest met to review the final draft of the Agreement. At the end of their meeting, Priest signed the final draft. Priest thereafter contended that he believed Coch signed it as well and then took it with him to obtain signatures from Knight and Smith. On 6 May 2010, Priest emailed a copy of the final draft to Coch so that he could circulate it to Knight and Smith.

In keeping with their earlier discussions, the terms of the Agreement provided that Priest was "willing to work with [Coch, Knight, and Smith] in identifying a licensee or licenses [sic] and negotiating a license or other agreement" on IP's behalf and that Priest would therefore continue to prosecute the patent by filing necessary paperwork and writing letters to potential licensees "at no further cost." Instead, the Agreement provided that the out-of-pocket, actual costs of patent filing, prosecution, and maintenance would be split equally between Priest, Coch, Knight, and Smith. The Agreement also included a section entitled "LICENSING," which provided, *inter alia*, that Priest would have the "exclusive right and responsibility for negotiating and arranging licenses and options" for the patent for three years, and that Coch, Knight, and Smith would "put forth reasonable efforts in instituting a program for licensing the [patent]" and "consult with [Priest] on the licensing strategy, commercialization effort and licensing terms" and would pay 75% of any costs Priest incurred in his licensing efforts. The same section also outlined the scheme by which the parties would divide proceeds generated by the patent as follows:

> a) GROSS REVENUES from licenses negotiated by PRIEST under this AGREEMENT will be distributed on an annual basis on or before December 31 of each year, in the following manner:
>
> b) PATENT EXPENSES and LICENSE EXPENSES shall be reimbursed as outlined above, and then Twenty-Five Percent (25%) of NET REVENUES shall be distributed to each Party.

A separate, earlier section of the Agreement defined "NET REVENUES" as "GROSS REVENUES minus PATENT EXPENSES and LICENSING EXPENSES," and further defined "GROSS REVENUES" as "the total actual amount of all fees, royalties, and/or consideration, of any kind, collected from licensing, optioning or selling the [patent]." The Agreement

did not include any sections specifically addressing the sale of the patent, nor did it expressly convey any interest in the patent or IP's business to Priest or his law firm, but it did grant certain rights to Priest while imposing obligations on Coch, Knight, and Smith that would exist until the patent's expiration in 2025.

On 7 May 2010, Coch forwarded the Agreement to Knight and Smith to review and sign, but never received a signed copy from either of them and later testified that he did not remember ever signing or returning the Agreement to Priest himself. Indeed, during the discovery phase of the ensuing lawsuit, Priest was unable to produce any signed or executed copies of the Agreement. Nevertheless, at the time, both Coch and Priest believed they had entered into the Agreement and proceeded according to its terms, with Priest paying the full costs to complete registration of the patent and then billing Coch, Knight, and Smith for 75% of his expenses, which they paid.

On 15 June 2010, USPTO issued the patent for the Program. In November 2010, Priest sent letters to twelve potential licensees, including representatives of Microsoft, Google, and Facebook, but ultimately generated little interest in the patent. On 9 June 2011, Priest sent follow-up letters to the same twelve potential licensees and received no response. No licenses were ever successfully negotiated, and eventually, Coch grew dissatisfied with Priest's lack of progress.

In September 2011, Coch contacted William J. Plut, a patent broker at Patent Profit International ("PPI") in Silicon Valley, to discuss retaining PPI to sell the patent. Based on his conversation with Plut, Coch emailed Knight and Smith to update them and to request that he receive an additional 10% of any potential sale as a finder's fee. In a subsequent email to Knight and Smith, Coch stated that the sale proceeds "will be split 4 ways as Peter Priest, the attorney who has filed for continuations and has kept this alive from a patent/legal perspective has ¼ of it, as we agreed some time ago."[3] On 4 October 2011, Plut sent Coch a copy of PPI's standard engagement agreement. Given that Priest still had the exclusive right to license the patent under the Agreement, Coch contacted him to request his approval. Priest, who was on vacation in California at the time, held a meeting with Plut and ultimately agreed to hold his exclusive licensing rights in abeyance so that PPI could sell the patent.

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3. Coch later testified that he had not reviewed the Agreement before sending this email, and that his statement that Priest was entitled to 25% of the sales proceeds was a mistake.

By early January 2012, Plut and PPI had placed the patent on the market and mailed a detailed sales package to prospective purchasers. During this time, Priest assisted PPI by making minor edits to the sales package, participating as the prosecuting attorney in a handful of telephone conferences, and sending files to potential purchasers. Within two months, Plut and PPI found a buyer and completed negotiations to sell the patent for $1,000,000. The sale closed on 16 March 2012, and the buyer wired payment to IP's bank account on 19 March 2012. After the close of the sale, Priest claimed that the terms of the Agreement entitled his law firm to $200,000, which amounted to 25% of the sale's net revenue, reduced by PPI's 20% commission and Coch's finder's fee. Coch refused this demand, given that he believed the Agreement only entitled Priest to 25% of any licensing proceeds he personally generated, rather than proceeds from the sale of the patent by a third party broker.

B. Procedural History

On 19 June 2012, acting on behalf of his law firm and in his individual capacity, Priest filed a complaint in Durham County Superior Court alleging claims for breach of contract, breach of fiduciary duty, constructive fraud, fraud, and unfair and deceptive trade practices against Coch and IP based on their refusal to pay Priest 25% of the patent sale proceeds he alleged he was entitled to under the Agreement. On 24 June 2012, the matter was designated a mandatory complex business case and assigned to Chief Special Superior Court Judge for Complex Business Cases James L. Gale. On 10 July 2012, a consent order was entered directing Coch and IP to place $200,000, representing Priest's purported share of the sale proceeds, in escrow.

On 27 August 2012, Coch and IP filed a motion to dismiss Priest's claims under N.C.R. Civ. P. 12(b)(6) and dismiss Priest himself as a party due to a lack of standing under N.C.R. Civ. P. 12(b)(1). On 25 January 2013, the trial court entered an Order on this motion, which it granted in part and denied in part. After concluding that Priest himself was not a proper party to the action because his complaint alleged that he signed the Agreement on behalf of his law firm rather than in any individual capacity, the court granted the motion to dismiss Priest as a party. The court also dismissed Priest's law firm's claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices. In explaining the rationale for this decision, the court noted that, "[f]airly read, the [c]omplaint seeks to enforce a contingent fee agreement," which would certainly trigger a fiduciary duty owed by Priest and his firm as providers of legal services to Coch and IP, but is generally not the type of arrangement that would give rise to a fiduciary duty owed

by Coch and IP as clients. Thus, based on its review of the complaint, the court reasoned that Priest and his firm had failed to state a claim for either breach of fiduciary duty or constructive fraud, which likewise depends upon the violation of a fiduciary duty. Moreover, given that the complaint was based on the Agreement for the payment of attorney fees, the court also dismissed the unfair and deceptive practices claim, reasoning that although Chapter 75 of our General Statutes declares "unfair or deceptive acts or practices in or affecting commerce" to be unlawful, the statutory definition of "commerce" it provides explicitly excludes "professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75.1-1(a), (b) (2013). However, the court denied the motion to dismiss Priest's law firm's claims for breach of contract and fraud.[4]

On 21 January 2014, Coch and IP filed a motion for summary judgment against Priest's law firm's remaining claims for breach of contract and fraud, contending that the Agreement was a business transaction which could not be enforced due to Priest's failure to advise Coch and IP in writing as to the desirability of obtaining independent counsel and Priest's failure to obtain their written informed consent to the Agreement's essential terms as required by Rule 1.8(a) of the Rules of Professional Conduct. Coch and IP argued further that even if the Agreement was enforceable, its express terms limited Priest to 25% of proceeds resulting from licenses he personally negotiated.

In support of this motion, Coch and IP included an affidavit from James G. Passe, a North Carolina attorney who specializes in patent and trademark law. Based on his three decades of experience in the field, Passe concluded the Agreement represents a business transaction. As Passe explained, "It is my experience that a commission on the sale of a patent by a third party is not a standard transaction. I have never heard of such an arrangement during my 30+ years of practice as a patent attorney." Moreover, according to Passe, "[i]t is not common for a patent attorney to enter into an agreement to license or sell

4. On 20 February 2013, Coch and IP filed a motion to stay the action or dismiss these remaining claims for lack of subject matter jurisdiction due to Priest's and his firm's noncompliance with Rule 1.5(f) of North Carolina's Rules of Professional Conduct because they failed to notify Coch and IP of the State Bar's Fee Dispute Resolution Program at least 30 days before filing suit. After the court denied this motion by order entered 19 April 2013, Coch and IP filed an amended answer to Priest's firm's complaint in which they denied that the Agreement entitled Priest to take 25% of proceeds arising from the sale of the patent by a third party and also raised as an affirmative defense Priest's failure to advise Coch and IP of the terms of the parties' Agreement in writing.

a client's patent." Although he acknowledged that it would be ethically permissible for an attorney to enter such an arrangement with a client if he followed Rule 1.8(a)'s explicit requirements, Passe observed that there was no evidence Priest had done so here, which he found particularly problematic given that the Agreement was not the product of an "arm's-length" transaction because Priest "had greater influence and control over the negotiations due to his legal skill and training along with the special trust and confidence that exists in the attorney-client relationship. His law firm also exclusively drafted the provisions in the Agreement." Furthermore, Passe found the Agreement's terms did not clearly inform Coch and IP that Priest's firm would be entitled to 25% of patent sale proceeds because "[t]he Agreement only indicates that Mr. Priest's law firm would receive 25% of the net revenues from licenses negotiated by Priest. The term 'license' is different and not synonymous with a sale of a patent." Passe noted further that, "I have never seen a 25% commission for licensing a patent. In my experience, commissions between 0.5% - 10% are customary for licensing work."

On 25 March 2014, Priest filed a motion for summary judgment in his firm's favor, arguing that the Agreement was validly entered and enforceable; that its terms clearly reached all proceeds from monetizing the patent, whether by licensing or sale given that its definition of "gross revenues" explicitly included both; that our State's Rules of Professional Conduct are not intended to be used as a procedural weapon to void an enforceable contract, based on this Court's prior holding in *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 558 S.E.2d 871, *disc. review denied*, 355 N.C. 490, 563 S.E.2d 563 (2002), as well as Comment [7] to Rule 0.2; and that the Agreement did not fall within the scope of Rule 1.8(a), which Priest characterized as only applying to "a business transaction . . . directly adverse to a client," because Priest and his firm entered into the Agreement in order to help Coch and IP.

On 5 November 2014, the trial court entered an Order and Opinion granting summary judgment in favor of Coch and IP based on Priest's failure to comply with Rule 1.8(a)'s explicit requirements. After first noting that "at the heart of this matter is the determination of whether a valid, enforceable contract exists," the court analyzed and ultimately rejected Priest's reliance on *Baars*, reasoning that although it is well established that violations of the Rules of Professional Conduct do not give rise to an affirmative claim of civil liability, in the present case, Coch and IP were not asserting that Priest or his law firm were liable for any harm, but instead were contesting their own liability. Thus, as the court noted, "The issue is whether the client can use the Rules defensively

even though the client may not seek to impose civil liability based on a violation of the Rules."

Priest insisted, based on Comment [7] to Rule 0.2, that the Rules cannot be used defensively, but the trial court held that this argument was foreclosed by this Court's decision in *Cunningham v. Selman*, 201 N.C. App. 270, 689 S.E.2d 517 (2009), which held that neither Comment [7] nor the principles enunciated in *Baars* prohibited a client from using her attorney's noncompliance with the State Bar Fee Dispute Resolution Program as a jurisdictional defense against his subsequent lawsuit. After noting that Priest's argument in the present case "is identical to the argument rejected in *Cunningham*," the court rejected any suggestion that *Cunningham*'s central holding

> is made inapplicable simply because the *Cunningham* appeal followed a fee-dispute administrative proceeding. Rather, the [c]ourt finds that this case is controlled by *Cunningham*'s holding that the affirmative use of the Rules as a defense to an attorney's claim is proper where the procedural requisites of Rule 1.8 are not satisfied. Rule 1.8 reflects that attorneys have a special obligation when dealing with their clients and are thus fairly held to abide by the Rules as a condition of their own recovery when the recovery is based on contracts with their clients.

Having determined that Coch and IP could raise violations of Rule 1.8 to defend against Priest's lawsuit, the court then focused on whether Priest had complied with the Rule. Despite Priest's claims to the contrary, the trial court declined to interpret the scope of Rule 1.8(a) as applying only to "a business transaction . . . directly adverse to a client," and explained that Priest's narrow reading of the Rule depended on an erroneous attempt "to graft the condition of 'directly adverse' onto any business transaction between attorney and client, essentially ignoring the disjunctive 'or' between business transactions and adverse interests."

Instead, the court interpreted Rule 1.8(a) broadly to apply to "any business transaction" between an attorney and his client, regardless of whether or not their interests are directly adverse. Noting Priest's deposition testimony that the purpose of the Agreement was "to allow my firm to share in the success of the value of the family of patents," the court found that the Agreement represented a business transaction and was therefore subject to Rule 1.8(a)'s requirements. The court assumed without deciding that Priest could satisfy Rule 1.8(a)(1) by proving that the Agreement's terms were fair and reasonable, but nevertheless

concluded that the Agreement did not comply with Rule 1.8(a)(2), given Priest's failure to advise Coch and IP in writing to seek review by independent counsel, nor did it comply with Rule 1.8(a)(3) in light of the fact that Priest never obtained written informed consent from his clients as to the Agreement's essential terms. Finding no genuine issue of material fact that Priest had failed to comply with these requirements, the court ruled that Coch and IP "may elect to void the [Agreement] if it is otherwise valid" and "may defend against [Priest's] claim based on [his] failure to comply with Rule 1.8." The court consequently granted summary judgment in Coch's and IP's favor.[5] Priest gave written notice of appeal to this Court on 4 December 2014.

II. Analysis

Priest and his law firm argue that the trial court erred in granting summary judgment to Coch and IP. We disagree.

"Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citations and internal quotation marks omitted). We review the trial court's order granting summary judgment *de novo*. *Id.*

In the present case, Priest contends that the trial court should have granted summary judgment in his law firm's favor on the breach of contract and fraud claims because, in Priest's view, the express terms of the Agreement clearly entitle his law firm to 25% of proceeds from the sale of the patent. Priest further contends there is ample evidence in the record that Coch understood the promise he was making, but never intended to keep it, and instead concocted an elaborate scheme to induce Priest

5. In addition, while noting that its application of Rule 1.8 was dispositive, for the sake of completeness the court provided alternative conclusions explaining how Priest's claims for fraud and breach of contract would have fared had they survived the Rule 1.8-based defense. On the one hand, the court concluded Priest's fraud claim would have failed as a matter of law given the absence of any evidence indicating that, at the time Coch entered into the Agreement, he did not intend to deliver 25% of the proceeds from the license or sale of the patent, or that Coch made any other knowingly false statement to induce Priest. On the other hand, as to the breach of contract claim, the court noted that both parties pointed to the same section of the Agreement to support their arguments that it did or did not grant Priest 25% of the gross revenues from the sale of the patent, and ultimately concluded that the language of the Agreement was sufficiently ambiguous as to warrant denying summary judgment to either party. Although both parties argue in their appellate briefs that the trial court erred in its alternative holdings, we need not reach those arguments because, as discussed *infra*, we agree with the trial court that the Rule 1.8 issue is dispositive.

to provide free legal services before breaching their bargain. Priest also argues that the trial court erred in dismissing him as an individual party to the action and in dismissing his claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices. Priest argues further that the trial court erred in refusing to allow him to shift his theory of the case after the pleadings were closed and discovery was completed in order to assert claims for breach of an oral contract and *quantum meruit*.

However, before any of these claims can be addressed, we must turn first to the threshold issue of whether the trial court erred in granting summary judgment to Coch and IP based on its determination that they could defend against Priest's claims for his failure to comply with Rule 1.8(a)'s explicit requirements. On this point, Priest argues that the trial court erred by concluding that: (1) his purported violation of the Rules of Professional Conduct could be used defensively as a procedural weapon against his claim; and (2) Rule 1.8(a) applied to the Agreement, which Priest insists was not a business transaction. We address each of these arguments in turn.

A. Defensive use of Rules violation

[1] Priest argues first that the trial court erred in allowing Coch and IP to rely on his purported violation of Rule 1.8(a) as a procedural weapon to defend against his claim. In support of this argument, Priest cites our prior decision in *Baars*, 148 N.C. App. at 421, 558 S.E.2d at 879 (recognizing that "[t]his Court has held that a breach of a provision of the Code of Professional Responsibility is not in and of itself . . . a basis for civil liability") (citation and internal quotation marks omitted), and the plain language of Comment [7] to Rule 0.2. According to Comment [7]:

> Violation of a Rule should not give rise itself to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a

> disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a Rule.

N.C. Rev. R. Prof. Conduct 0.2, cmt. [7]. As the trial court noted in its Order and Opinion, in *Cunningham*, this Court rejected an argument that was virtually identical to the one Priest relies on here. In *Cunningham*, we affirmed the trial court's dismissal for lack of subject matter jurisdiction of an action brought by an attorney against his former client to recover his fee for representing her in an action for equitable distribution based on the attorney's failure to comply with the State Bar's Fee Dispute Resolution Program as required by Rule 1.5(f). 201 N.C. App. at 277, 689 S.E.2d at 523. When the attorney argued on appeal that precedent prohibited his former client from using the Rules as a procedural weapon, we were not persuaded. *Id.* at 287, 689 S.E.2d at 528. As we explained in *Cunningham*,

> [t]he fact that the Rules are not designed to be a basis for civil liability; that the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons; and that nothing in the Rules should be deemed to augment any substantive legal duty of lawyers does not mean that the Rules of Professional Conduct have utterly no bearing on the proper resolution of civil litigation. Instead, we believe Comment [7] and the principle enunciated in *Baars* are directed primarily toward cases in which a former client claims that an attorney is civilly liable, based, in whole or in part, on alleged violations of the Rules of Professional Conduct. The present case does not involve such a scenario. Furthermore, neither Comment [7] nor *Baars* categorically precludes the use of standards set out in the Rules of Professional Conduct in civil litigation; instead, they simply point out that the Rules of Professional Conduct do not have the primary purpose of establishing a standard of care for use in determining civil liability. In this case, however, the principle upon which Plaintiff relies is totally inapplicable because Defendant does not seek to hold Plaintiff liable for an alleged violation of Rule 1.5(f); instead, Defendant found herself on the receiving end of civil litigation after having

> invoked the State Bar's fee dispute resolution process and attempted to use Plaintiff's noncompliance with the State Bar's rules as a jurisdictional defense to Plaintiff's claim.

201 N.C. App. at 287-88, 689 S.E.2d at 529 (internal quotation marks and certain brackets omitted).

Here, Priest argues that the trial court's reliance on *Cunningham* was misplaced due to what he contends is a critical distinction between *Cunningham*'s procedural posture and that of the present facts. Specifically, Priest argues that because this case does not involve the State Bar's Fee Dispute Resolution Program, his claim is not barred by a lack of subject matter jurisdiction, and thus the trial court erred by following *Cunningham* instead of the approach taken by our more recent decision in *Robertson v. Steris Corp.*, __ N.C. App. __, 760 S.E.2d 313 (2014), *disc. review denied*, __ N.C. __, 768 S.E.2d 841 (2015). Priest argues that *Robertson* stands as further confirmation that *Baars* and Comment [7] to Rule 0.2 prohibit the use of an attorney's violation of the Rules as a procedural weapon. We are not persuaded.

In *Robertson*, we upheld the trial court's award of costs and attorney fees in *quantum meruit* to an attorney who brought suit against his former clients after they fired him on the eve of accepting a lucrative settlement offer and refused to pay for his services. *Id.* at __, 760 S.E.2d at 316. The former clients argued that because the contingent fee contract for their representation was never put into writing as Rule 1.5(c) requires, the award of costs and attorney fees should be vacated as contrary to public policy due to the attorney's violation of the Rules and a line of cases in which our State's appellate courts refused to allow recovery in *quantum meruit* where the underlying contracts giving rise to such claims were unenforceable due to violations of public policy. *Id.* at __, 760 S.E.2d at 320. In rejecting this argument, we explained that the cases the former clients relied upon "concern[ed] violations of public policy regarding the *content* of contracts rather than their *form*" and concluded the Rule 1.5(c) violation at issue was one of form rather than content. *Id.* We therefore held that even though the contingent fee contract for the representation was unenforceable due to the violation of Rule 1.5(c), the attorney could still recover in *quantum meruit* because

> the fact that an agreement for legal representation was determined to be in violation of the Rules of Professional Conduct and unenforceable is of no consequence where an attorney's right of recovery arises in *quantum meruit*, because the trial court's award of fees is based upon the

> reasonable value of [the attorney's] services and not upon the failed agreement.

Id. at __, 760 S.E.2d at 321 (citation and internal quotation marks omitted). We found support for our holding in *Baars* and Comment [7] to Rule 0.2 and, more importantly, in "the comments to Rule 1.5 itself [which] explicitly provide that a trial court's determination of the merit of the petition or the claim [for costs and attorney fees] is reached by an application of law to fact and not by the application of this Rule." *Id.* at __, 760 S.E.2d at 319 (citation, internal quotation marks, and emphasis omitted).

Our review of *Robertson* does not support Priest's argument, which ignores the fact that the reason we cited *Baars* and Comment [7] to Rule 0.2 in the context of rejecting the former clients' argument that the attorney should be barred from recovery in *quantum meruit* as a matter of public policy was because we recognized that controlling precedent indicated that the attorney's violation of Rule 1.5(c) rendered the contingent fee contract for the representation unenforceable and would have otherwise barred him from any recovery. *See id.* at __, 760 S.E.2d at 321. Thus, in our view, far from establishing that *Baars* and Comment [7] operate as something akin to a bright-line rule prohibiting the use of Rules violations as procedural weapons, *Robertson* actually lends further support for the proposition that an attorney's failure to comply with the Rules of Professional Conduct can indeed function as a bar to recovery in a subsequent action for attorney fees. *Robertson* did nothing to disturb *Cunningham*'s central holding that although an attorney's violation of the Rules does not give rise to an independent cause of action, neither Comment [7] nor *Baars* prohibits the defensive use of such violations against a lawsuit subsequently initiated by the same attorney. Instead, we conclude that *Robertson* and *Cunningham* demonstrate that the question of whether an attorney's violation of a Rule can be used defensively should be answered by examining what public policy that specific Rule aims to promote, or what harm it seeks to prevent, as evidenced by the Rule's plain language, the Comments to it, and related precedent.

Here, Comment [1] to Rule 1.8 provides that "[a] lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client[.]" N.C. Rev. R. Prof. Conduct 1.8, cmt. 1. This Comment illustrates a strong public policy rationale for allowing violations of Rule 1.8 to be used defensively. Moreover, we agree with the trial court's

observation that the Rule itself reflects the special obligation the attorneys of this State have when dealing with their clients, and we share the trial court's conclusion that, for the sake of maintaining the public's trust, attorneys should be held to abide by Rule 1.8(a)'s explicit requirements as a condition of their own recovery when that recovery is based on business transactions with their clients. While this may be an issue of first impression in our State, we note that courts in other jurisdictions have reached the same conclusion as we reach here. *See*, *e.g.*, *Stillwagon v. Innsbrook Golf & Marina*, No. 2:13-CV-18-D, 2014 WL 4272766 (E.D.N.C. Aug. 29, 2014) (holding that a contract was unenforceable due to the plaintiff attorney's noncompliance with Rule 1.8(a)); *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364 (Mich. Ct. App. 2002) (rejecting plaintiff law firm's argument that violations of Michigan's rules of professional conduct against conflicts of interests may not be used as procedural weapons to defend against lawsuits and observing that "it would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement"), *review denied*, 655 N.W.2d 561 (Mich. 2002). We therefore have no trouble in concluding that the trial court did not err in its determination that an attorney's violation of Rule 1.8(a) can be used defensively against him.

B. Priest's violation of Rule 1.8(a)

Rule 1.8(a) provides that

> [a] lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

N.C. Rev. R. Prof. Conduct 1.8(a).

[2] Priest does not dispute the fact that by failing to advise Coch in writing of the desirability of seeking independent counsel to review the Agreement and by failing to obtain informed consent in writing from Coch, Knight, and Smith as to the Agreement's essential terms, he failed to comply with Rule 1.8(a)(2) and (a)(3). Instead, Priest argues that Rule 1.8(a) does not apply to the Agreement, which he characterizes as both a contingent fee contract and an accommodation to a long-term client, rather than a business transaction. Thus, according to Priest, the trial court should have analyzed the Agreement under Rule 1.5's less-demanding standard for fee agreements in the context of ongoing representations.

Here again, our review of the record does not support Priest's argument. It is clear that Coch and IP hired Priest's law firm to assist them in applying for a patent. While the 7 November 2005 engagement letter only specifically addresses the first phase of filing the patent application, we can infer that both parties contemplated that the representation would continue once USPTO responded to that application. While this process spanned multiple years, the representation had one clearly defined goal—obtaining a patent—with compensation for Priest's firm at a clearly defined rate. We therefore view the Agreement as a fundamental shift in the nature and objective of the representation, a shift that Coch and IP's affidavit from Passe demonstrates is "not a standard transaction" in patent and trademark law and is thus more accurately viewed as a business transaction in which Priest and his firm exercised influence and control from a position of trust when dealing with their legally unsophisticated clients to obtain unusually favorable terms for their own compensation.

Priest also argues that the Agreement is not within the scope of Rule 1.8(a) because the Rule only applies to "a business transaction . . . directly adverse to a client." However, as the trial court correctly noted, this interpretation of the Rule utterly distorts its meaning by ignoring the disjunctive "or" between the Rule's express prohibition against entering into "a business transaction with a client," and its express prohibition against "knowingly acquiring an ownership, possessory, security or other pecuniary interest" that is directly adverse to the client. In our view, Rule 1.8(a)'s plain language prohibits both the former and the latter unless the attorney complies with all three of the requirements enumerated in the subsections that follow. There is no genuine dispute of material fact that Priest failed to comply with Rule 1.8(a)(2) and (a)(3). We therefore hold that the trial court did not err in granting summary judgment in favor of Coch and IP.

C. Quantum Meruit

Priest argues in the alternative that even if the Agreement is unenforceable based on his violation of Rule 1.8(a), he should still be entitled to recovery in *quantum meruit*. We disagree.

It is well established that "an agent or attorney, even in the absence of a special contract, is entitled to recover the amount that is reasonable and customary for work of like kind, performed under like conditions and circumstances." *Robertson*, __ N.C. App. at __, 760 S.E.2d at 321 (citations and brackets omitted). Although we have observed that a party who seeks recovery in *quantum meruit* while also seeking to recover on an express contract should ideally plead these claims in the alternative in her complaint, *see, e.g.*, *James River Equip., Inc. v. Mecklenburg Utils., Inc.*, 179 N.C. App. 414, 419, 634 S.E.2d 557, 560 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 355, 644 S.E.2d 226 (2007), we have also recognized that while "the better practice is to plead both the express and implied contracts, recovery in *quantum meruit* will not be denied where a contract may be implied from the proven facts but the express contract alleged is not proved[,]" *Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 132, 306 S.E.2d 527, 529 (1983) (citation omitted), so long as it "appear[s] from the facts that services are rendered by one party to another, that the services were knowingly and voluntarily accepted and that they were not gratuitously rendered." *Id.* at 133, 306 S.E.2d at 529 (citation omitted).

In the present case, Priest did not plead *quantum meruit* in his complaint, which exclusively addressed his claims based on the Agreement. The only indication in the record before us that Priest ever subsequently attempted to amend his pleadings to include a claim for *quantum meruit* is a footnote in the trial court's Order and Opinion, which states:

> A claim is limited by "admissions and allegations within their pleadings unless withdrawn, amended or otherwise altered." *Webster Enters., Inc. v. Selective Ins. Co. Se.*, 125 N.C. App. 36, 41, 479 S.E.2d 243, 247 (1997). This doctrine precludes [Priest's] efforts to assert claims for breach of oral contract[6] and *quantum meruit*, which were first raised after the pleadings were closed and discovery completed.

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6. **[3]** Priest also argues on appeal that he was entitled to summary judgment for breach of an oral contract formed in March 2010. The gravamen of his argument here is that even though neither party could produce an executed copy of the written Agreement during discovery, the evidence in the record shows that both parties intended to be bound

On appeal, Priest insists that his complaint "gives notice of [his] claim for *quantum meruit* despite not labeling it as such" and that he therefore remains entitled to collect 25% of the proceeds from the sale of the patent, just as he contends the Agreement provided.

This argument fails. While Priest's failure to specifically plead *quantum meruit* is not necessarily fatal, *see Paxton*, 64 N.C. App. at 132, 306 S.E.2d at 529, we again find his reliance on *Robertson* misplaced. As noted *supra*, in *Robertson*, we recognized that a contingent fee contract for representation in litigation was unenforceable because it violated the express requirements of Rule 1.5(c) that such arrangements be in writing, but we nevertheless allowed the attorney to recover on his alternative claim in *quantum meruit* because the Rules violation was one of form, rather than content. __ N.C. App. at __, 760 S.E.2d at 320. Here, by contrast, Priest's claim arises from the Agreement, which, as explained *supra*, is not a contingent fee contract but instead a business transaction. Given that Priest failed to comply with the express requirements of Rule 1.8(a), and in light of the strong public policy considerations that Rule embodies, we decline to hold that Priest's failure to obtain his clients' written consent to the terms of the Agreement or advise them in writing of the desirability of seeking independent counsel were merely formal violations of our Rules of Professional Conduct.

Furthermore, Priest cites no evidence whatsoever to support the proposition that the amount he seeks to recover for the value of his services—$200,000, or 25% of the net proceeds from the sale of the patent—is "reasonable and customary for work of like kind, performed under like conditions and circumstances." *Id.* at __, 720 S.E.2d at 321. Indeed, Passe's affidavit in support of Coch and IP's motion for summary judgment demonstrates that "a commission on the sale of a patent by a third party is not a standard transaction" and that "a 25% commission for licensing a patent" is virtually unprecedented. We therefore hold that the trial court did not err in refusing to allow Priest to assert a late claim for

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by the Agreement's terms and proceeded accordingly. However, Priest's complaint is devoid of any allegation that he is entitled to recover based on this theory, and although Priest argues in his appellate brief that the trial court erred in refusing to allow him to amend his pleadings, here again, the only indication in the record before us that Priest ever sought to amend his complaint to include such a claim comes in the form of a footnote in the trial court's Order and Opinion. In any event, we conclude that even if Priest had properly pled or amended his complaint to include a claim for breach of an oral contract, his argument that such an arrangement entitled him to summary judgment fails for the same reason as his argument based on the written Agreement fails—namely, because it is a business transaction and Priest failed to comply with the express requirements of Rule 1.8(a).

recovery in *quantum meruit*. Accordingly, the trial court's Order and Opinion is

AFFIRMED.

Judges McCULLOUGH and ZACHARY concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF
v.
JEREMIAH JARVIS, MELISSA SHULER, JARRETT LANCE CARLAND, ELANA BARNETT CARLAND, AND NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA15-364

Filed 17 November 2015

1. Insurance—automobile—stacking—limited by policy

In a dispute over insurance coverage arising from a single-vehicle accident, the trial court did not err by granting summary judgment in favor of plaintiff Farm Bureau Mutual Insurance Company where defendants sought to stack the $50,000 liability limit for each vehicle listed on their policy listing the driver as an insured. The language in the policy explicitly limited the maximum liability to $50,000 per person and $100,000 per accident regardless of the number of insureds or vehicles listed in the declarations.

2. Insurance—automobile—additional policies issued to father—son not resident of household

In a dispute over insurance coverage arising from a single-vehicle accident, the trial court did not err by granting summary judgment in favor of plaintiff Farm Bureau Mutual Insurance Company where defendants sought to recover under two policies issued to the minor's father that did not list the driver or the vehicle as insured. There was no evidence that the injured minor was a resident of his father's household such that he would be entitled to liability coverage under his father's policies.

3. Insurance—automobile—additional policy issued to father's business—vehicle not covered by policy

In a dispute over insurance coverage arising from a single-vehicle accident, the trial court did not err by granting summary

judgment in favor of plaintiff Farm Bureau Mutual Insurance Company where defendants sought to recover under a policy issued to a business owned by the injured minor's father. The language of the policy specifically limited what constituted a "covered automobile," and the vehicle driven by the injured minor was not listed as a covered automobile.

Appeal by Defendants from order entered 9 October 2014 by Judge Tommy Davis in Henderson County Superior Court. Heard in the Court of Appeals 23 September 2015.

William F. Lipscomb for Plaintiff-Appellee.

Gary A. Dodd for Defendants-Appellants.

INMAN, Judge.

This case involves a dispute over insurance coverage arising from a single vehicle accident causing serious injuries. At issue are four auto insurance policies, one of which identifies the driver and the vehicle involved in the accident as insured, and three of which do not list the driver or the vehicle, but list members of the driver's extended family. After careful review, we hold that language in the policy listing the driver as an insured provides coverage limited to $100,000 and prohibits the aggregation or "stacking" of individual damage claims for coverage greater than that amount. We further hold that because the driver was not a resident of the household covered by the other three policies, and because the vehicle he was driving was not listed in any of the other three policies, those policies provide no insurance coverage for him or his passenger. For these reasons, we affirm the trial court's order.

Defendants-Appellants Jeremiah Jarvis ("Jeremiah") and Melissa Shuler ("Melissa"), Jeremiah's mother, (collectively, Jeremiah and Melissa are referred to as "Defendants-Appellants") appeal the order granting Plaintiff-Appellee North Carolina Farm Bureau Mutual Insurance Company's ("Plaintiff-Appellee's") motion for summary judgment and denying Defendants-Appellants' motion for summary judgment. On appeal, Defendants-Appellants argue that: (1) policy no. APM 4967687 provides bodily injury liability coverage in the amount of $150,000 because Defendants-Appellants were entitled to aggregate or "stack" the $50,000 coverage for each vehicle listed in the Declarations; (2) policy nos. APM 4869957, BAP 2091039, and APM 4853984 also provide bodily injury liability coverage because Jarrett Lance Carland

("Jarrett"), the driver of the vehicle, was a resident of his father's house and, thus, would be covered under the terms of those policies.

Factual and Procedural Background

On 16 August 2009, Jarrett was driving a 1997 Ford Explorer owned by his mother, Defendant Elana Barnett Carland ("Elana").[1] Jeremiah was a passenger in the vehicle at the time of the accident. Jarrett lost control of the vehicle, and it went off the road, striking a tree. Both Jeremiah and Jarrett sustained serious medical injuries. Jarrett's injuries were especially severe, and his post-accident injuries resulted in a guardian *ad litem* being appointed on his behalf.

As a result of the accident, in December 2010, Defendants-Appellants filed a lawsuit against Jarrett and Elana ("the personal injury action"), which is not the subject of the current appeal, alleging gross negligence and seeking damages based on Jeremiah's physical injuries.[2] Defendants-Appellants had the opportunity in the personal injury action to depose Elana about her divorce from and custody arrangement with Charles Ray Carland ("Charles"), Jarrett's father. They also deposed Jeremiah about Jarrett's relationship with his father. Elana stated that although she shared joint custody with Charles when they separated in 2003 and divorced in 2004 and that the custody arrangement is still "in effect," Jarrett spent no time with Charles nor did he keep any possessions at his father's home. According to Elana, although Jarrett may have spent two nights with his father within a four-month period after the divorce, Jarrett never spent the night again at Charles's house after that. Furthermore, Elana testified that Jarret spent no time at his father's house after Charles remarried in 2004.

At issue in this case are four insurance policies, all underwritten by Plaintiff-Appellee. Policy no. APM 4967687 ("the First Policy") covers three vehicles, including the 1997 Ford Explorer that Jarrett was driving at the time of the accident. On its "Declarations" page, the First Policy listed three covered drivers: Jarrett, Elana, and Jarrett's sister Victoria Carland. The First Policy stated that its limits of liability included $50,000 for bodily injury for each person, with a total limit of $100,000 per accident. The property damage was limited to $50,000 per accident.

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1. Although Elana and Jarrett are Defendants in Plaintiff-Appellee's declaratory judgment action, neither she nor Jarrett is a party to the current appeal.

2. The lawsuit, case no. 10 CVS 2185 filed in Henderson County Superior Court, is not the subject of the current appeal and remains pending in the trial court.

The First Policy also provided uninsured and underinsured liability in the amount of: "BI $50,000 EA PER $100,000 EA ACC." Under the First Policy's "Limit of Liability" provision, the policy explicitly stated that "the limit of liability shown in the Declarations for each accident for Bodily Injury Liability Coverage is our maximum limit of liability for all damages for bodily injury resulting from one auto accident." The policy further provides: "This is the most we will pay as a result of any one auto accident regardless of the number of: 1. Insureds; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the auto accident."

Policy no. APM 4869957 ("the Second Policy") lists the insureds as Charles and Shelia Carland ("Sheila"), Charles's second wife, and Christian and Cassidy Price, Charles's step-children and Sheila's children from an earlier marriage. The policy identifies two covered vehicles, neither of which is the 1997 Ford Explorer. The Declarations page lists the following limits of liability: $50,000 for bodily injury for each person, $100,000 per accident. It notes that an "insured" includes: "[y]ou or any family member." "You" is defined as the "named insured" listed in the Declarations and the "named insured's" spouse if the spouse is a resident of the same household. Most relevant to this case, a "family member" is defined as "a person related to [the "named insured" or the "named insured's" spouse] by blood, marriage or adoption who is a resident of [the "named insured's"] household."

Policy no. APM 4853984 ("the Third Policy") was issued in the name of Cassidy and Christian Price, Charles's step-children. At the time of the accident, Cassidy and Christian lived with Charles and Shelia. The definition of "insured" is the same under the terms of the Third Policy as it is in the Second Policy.

Policy no. BAP 2091039 ("the Fourth Policy") is issued to Carlands Dairy Inc. ("Carlands"),a dairy farm currently owned and operated by Charles. The covered vehicle listed under "Item Three" of the policy is a Ford 150 truck and the named insured is Charles. The Fourth Policy states that it will pay "all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'." Under "Item Two" on the "Declarations" page, the symbol "07" is listed as a "Covered Item." The Fourth Policy explains that the "07" designation means that the "covered automobiles" only includes "those 'autos' described in Item Three of the Declarations for which a premium charge is shown" for liability purposes.

On 28 January 2013, Plaintiff-Appellee filed a complaint for a declaratory judgment regarding its obligation under all four of the insurance policies, which is the subject of the current appeal. Plaintiff-Appellee alleged that it had offered Melissa and Jeremiah the $50,000 per person limit to each of them under the First Policy but that Defendants-Appellants had refused to accept the offer. Defendants-Appellants argued that because there were three vehicles listed on the "Declarations" page of the First Policy, Defendants-Appellants were entitled to aggregate or "stack" the $50,000 per person limit for each of the three listed vehicles and that the First Policy provides bodily injury coverage in the amount of $150,000. With regard to the Second and Fourth policies, Defendants-Appellants claimed, and Plaintiff-Appellee disputes, that Jarrett was a "resident" of Charles's house. Thus, according to Defendants-Appellants, Melissa and Jeremiah were entitled to liability coverage under the Second and Fourth Policy because Jarrett was a "family member" of Charles and, thus, would be covered for liability purposes by the policies. With regard to the Third Policy, and similar to Defendants-Appellants' argument with regard to the Second Policy, they contend that Jarrett was a resident of Cassidy and Christian Price's household. Thus, they contended that they also were entitled to liability coverage for bodily injury under the Third Policy.

On 31 January 2014, Plaintiff-Appellee moved for summary judgment on its declaratory judgment complaint, arguing that the affidavits attached to its motion as well as the depositions of Jeremiah and Melissa, taken in the personal injury action against Jarrett and Elana, show that Plaintiff-Appellee was entitled to a declaratory judgment as a matter of law. On 14 October 2014, the trial court granted summary judgment in favor of Plaintiff-Appellee. Defendants-Appellants timely appeal.

Standard of Review

Our standard of review of an appeal from summary judgment on a declaratory judgment action "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." *Integon Nat. Ins. Co. v. Helping Hands Specialized Transp., Inc.*, __ N.C. App. __, __, 758 S.E.2d 27, 30 (2014) (internal quotation marks omitted).

Analysis

I. Whether the First Policy Allows Aggregation or "Stacking" of the Limits of Liability

[1] As noted above, the First Policy lists three "covered vehicles" and, for each, Elana paid a separate premium. Defendants-Appellants, citing

Woods v. Nationwide, 295 N.C. 500, 246 S.E.2d 773 (1973), claim that "[w]here insurance coverage and premiums relate to separately listed vehicles, the policy holder may reasonably conclude that the premiums he paid for each vehicle should be applied to a specific loss/accident." In general terms, Defendants-Appellants claim that they are entitled to "stack" each $50,000 liability limit for each listed vehicle on the First Policy for a total liability coverage of $150,000. Because of language in the First Policy limiting to $100,000 the total amount of coverage available for any one accident, regardless of the number of vehicles insured, *Woods* is not controlling on the issue and Defendants-Appellants' argument is unavailing.

In *Lanning v. Allstate Ins. Co.*, 332 N.C. 309, 316-17, 420 S.E.2d 180, 185 (1992), our Supreme Court examined language almost identical to that in the present case. The policy language in *Lanning* expressly provided a "maximum limit of liability" of $50,000 "sustained by any one person in any one auto accident" and provided that "the limit of bodily injury liability shown in the Declarations for each accident," $50,000, "is our maximum limit of liability for all damages for bodily injury resulting from any one accident." *Id.* at 317, 420 S.E.2d at 185. The policy further stated, "This is the most we will pay for bodily injury… regardless of the number of: 1. Insureds; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the accident." *Id.* The *Lanning* court distinguished *Woods*, noting that "[u]nlike the Allstate policy here, the *Woods* policy failed to state explicitly that the 'per accident' limitation contained in the policy applied regardless of the number of vehicles listed in the policy." *Id.* Thus, the *Lanning* policy was not ambiguous and it "plainly and unambiguously precludes the aggregation of UM coverages under its policy, plaintiffs' per accident UM coverage under that policy is limited to $50,000." *Id. Lanning* distinguished policies that could be interpreted in such a way to allow stacking with those that explicitly do not, noting that "[w]hen policies written before the 1991 amendments to the Act contain language that may be interpreted to allow stacking of UM coverages on more than one vehicle in a single policy, insureds are contractually entitled to stack." *Id.* at 316, 420 S.E.2d at 185. In contrast, policies that include a "per accident limitation" that applies, regardless of the number of vehicles listed in the Declarations, do not allow for aggregation. *Id.* at 318, 420 S.E.2d at 185.

Thus, *Lanning* compels the same conclusion here. The language in the First Policy specifically and explicitly limits the maximum liability to $50,000 per person and $100,000 per accident regardless of the number of insureds or vehicles listed in the Declarations. Accordingly,

Defendants-Appellants were not entitled to "stack" or aggregate the liability limits based on the number of vehicles listed on the Declarations page. Therefore, summary judgment was appropriate with regard to Plaintiff-Appellee's obligations under the First Policy.

II. Whether Jarrett was a "Resident" of Charles's Household for Purposes of the Second and Third Policies

[2] Next, Defendants-Appellants argue that they are entitled to liability coverage under the Second and Third Policies because Jarrett was a "family member" of Charles's. We disagree.

Resolution of this issue turns on whether there was any evidence that could support a finding that Jarrett was a "resident" of Charles's house. If there was, then Jarrett was an "insured" under the Second and Third Policies as a family member of Charles and Sheila and of Cassidy and Christian Price, and Defendants-Appellants would be entitled to liability coverage of $100,000 under each policy.

As discussed, a "family member" is defined as a person who is related to the "named insured" or the "named insured's" spouse by blood or marriage who is a resident of their household. "A minor may be a resident of more than one household for the purposes of insurance coverage." *N.C. Farm Bureau Mut. Ins. Co. v. Paschal*, __ N.C. App. __, __, 752 S.E.2d 775, 780 (2014). As this Court has noted,

> As observed by our courts, the words "resident," "residence" and "residing" have no precise, technical and fixed meaning applicable to all cases. "Residence" has many shades of meaning, from mere temporary presence to the most permanent abode. It is difficult to give an exact or even satisfactory definition of the term "resident," as the term is flexible, elastic, slippery and somewhat ambiguous. Definitions of "residence" include "a place of abode for more than a temporary period of time" and "a permanent and established home" and the definitions range between these two extremes. This being the case, our courts have held that such terms should be given the broadest construction and that all who may be included, by any reasonable construction of such terms, within the coverage of an insurance policy using such terms, should be given its protection.
>
> Our courts have also found . . . that in determining whether a person in a particular case is a resident of a

> particular household, the intent of that person is material to the question.

Id.

Here, even viewing the evidence in a light most favorable to Defendants-Appellants and looking at the term "resident" in the broadest and most inclusive of terms, *see id.*, there was no evidence, besides a 2003 custody agreement which may still be "in effect" legally but which has not been followed since 2004, that Jarrett maintained any presence at his father's house. Elana testified at her deposition that Jarrett had spent, at the most, two nights at his father's house between 2003 and 2004. However, all overnight visits stopped after 2004 and that Jarrett never spent any significant time at his father's. Charles's and Sheila's affidavits submitted in support of the summary judgment motion were consistent with Elena's testimony. Charles averred that the joint custody arrangement was only practiced for approximately one month after it was entered on 21 December 2004 and that, after that, Jarrett "never lived or even spent one night at my house and he did not keep any clothes or personal belongings at my house." Jeremiah testified during his deposition that, although Jarrett sometimes worked at his father's farm during the summer, he did not recall Jarrett ever spending the night or keeping any belongings at Charles's house.

The facts of this case are distinguishable from those in *Davis v. Maryland Casualty Co.*, 76 N.C. App. 102, 106, 331 S.E.2d 744, 747 (1985), where this Court concluded that "the minor plaintiff was as much a resident of her insured father's household as that of her mother." There, "the evidence disclose[d] that there existed between the father and the minor plaintiff a continuing and substantially integrated family relationship" based on the fact that

> [the minor] has frequently stayed overnight with her father, as many as two or three nights a week. Although a visitation schedule was provided for in the separation agreement, actual visitation has been more liberal. The minor plaintiff has frequently called her father to arrange additional visitation, and [the mother] has permitted the additional visitations whenever the child requested them. The father has made provision for keeping her clothes, personal property, and some of her furniture at his residence.

Id. at 104-106, 331 S.E.2d at 745-47.

In contrast, there was no evidence presented showing that Jarrett stayed with his father or that Charles made any provisions to keep his belongings at his house. Therefore, unlike *Davis*, Defendants-Appellants failed to present any evidence establishing any type of "integrated family relationship," *id.*, or sufficient to raise a genuine issue of disputed fact in that regard, such that Jarrett could be considered a resident of Charles's house. Accordingly, summary judgment was appropriate as to this issue because, since Jarrett was not a resident of Charles's house, he was not a "family member" of Charles and Sheila nor Cassidy and Christian Price as defined by the policy such that Defendants-Appellants would be entitled to liability coverage under the Second and Third policies.

III. Whether Jarrett was Covered Under the Fourth Policy

[3] Finally, Defendants-Appellants allege that they are entitled to liability coverage under the Fourth Policy because, as they contended above, Jarrett was a "family member" of Charles, the named insured. We disagree.

As with the first issue, resolution of this issue turns on the clear and unambiguous language of the Fourth Policy. Unlike the other policies, the Fourth Policy includes language specifically limiting what constitutes a "covered automobile" for purposes of liability coverage. The Declarations page of the Fourth policy has the symbol "07" entered next to "Item Two" of the policy. "Item Two" of the Declarations describes the automobiles that are "covered automobiles" under the policy. The symbol "07" specifically limits the "covered autos" only to those automobiles described in Item Three of the Declarations. The 1997 Ford Explorer was not listed under "Item Three." Therefore, the Fourth Policy does not provide any liability coverage for Jarrett's use of the 1997 Ford Explorer because the 1997 Ford Explorer was not a "covered automobile." Consequently, summary judgment was also appropriate with regard to Plaintiff-Appellee's obligations under the Fourth Policy.

Conclusion

Based on our review of the record and relevant caselaw, we affirm the trial court's order granting Plaintiff-Appellee's motion for summary judgment.

AFFIRMED.

Judges CALABRIA and STROUD concur.

NIES v. TOWN OF EMERALD ISLE

[244 N.C. App. 81 (2015)]

GREGORY P. NIES AND DIANE S. NIES, PLAINTIFFS
v.
TOWN OF EMERALD ISLE, A NORTH CAROLINA MUNICIPALITY, DEFENDANT

No. COA15-169

Filed 17 November 2015

Waters and Adjoining Lands—dry sand beaches—public trust—emergency vehicles

The trial court did not err by granting summary judgment for the Town in an action contesting ordinances governing the use of dry sand beaches in a North Carolina coastal town. Though some states, such as plaintiffs' home state of New Jersey, recognize different rights of access to their ocean beaches, no such restrictions have traditionally been recognized in North Carolina. The contested ordinances here did not result in a "taking" of the property because the town, along with the public, already had the right to drive on dry sand portions of the property before plaintiffs purchased it. The Town's reservation of an obstruction-free corridor on the property for emergency use constitutes an imposition on plaintiffs' property rights, but does not rise to the level of a taking.

Appeal by Plaintiffs from order entered 26 August 2014 by Judge Jack W. Jenkins in Superior Court, Carteret County. Heard in the Court of Appeals 24 August 2015.

Pacific Legal Foundation, by J. David Breemer; and Morningstar Law Group, by Keith P. Anthony, for Plaintiffs-Appellants.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Brian E. Edes and Jarrett W. McGowan, for Defendant-Appellee.

McGEE, Chief Judge.

Gregory P. Nies and Diane S. Nies ("Plaintiffs") purchased an ocean-front property ("the Property") in Defendant Town of Emerald Isle ("the Town") in June of 2001. Plaintiffs had been vacationing in the Town from their home in New Jersey since 1980. Plaintiffs filed this matter alleging the inverse condemnation taking of the Property by the Town.

I.

"Generally speaking, state law defines property interests[.]" *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 707-08, 177 L. Ed. 2d 184, 192 (2010) (citations omitted). North Carolina's ocean beaches are made up of different sections, the delineation of which are important to our decision. *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 33, 621 S.E.2d 19, 22 (2005). The "foreshore," or "wet sand beach," is the portion of the beach covered and uncovered, diurnally, by the regular movement of the tides. *Id.* The landward boundary of the foreshore is the mean high water mark. "Mean high water mark" is not defined by statute in North Carolina, but our Supreme Court has cited to a decision of the United States Supreme Court in discussing the meaning of the "mean" or "average high-tide." *Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970). The United States Supreme Court decision cited by *Fishing Pier* defined "mean high tide" as the average of all high tides over a period of 18.6 years. *Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 26-27, 80 L. Ed. 9, 20 (1935).[1]

The "dry sand beach" is the portion of the beach landward of the mean high water mark and continuing to the high water mark of the storm tide. *Fabrikant*, 174 N.C. App. at 33, 621 S.E.2d at 22. The landward boundary of the dry sand beach will generally be the foot of the most seaward dunes, if dunes are present; the regular natural vegetation line, if natural vegetation is present; or the storm debris line, which indicates the highest regular point on the beach where debris from the ocean is deposited at storm tide. Travelling further away from the ocean past the dry sand beach one generally encounters dunes, vegetation, or some other landscape that is not regularly submerged beneath the salt waters of the ocean.

The seaward boundary of private beach *ownership* in North Carolina is set by statute:

> (a) The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark. Provided, that this section shall not apply where title below the mean high water mark is or has been specifically granted by the State.

---

1. This time period is used because there is "'a periodic variation in the rise of water above sea level having a period of 18.6 years[.]'" *Id.*

> (b) Notwithstanding any other provision of law, no agency shall issue any rule or regulation which adopts as the seaward boundary of privately owned property any line other than the mean high water mark. The mean high water mark also shall be used as the seaward boundary for determining the area of any property when such determination is necessary to the application of any rule or regulation issued by any agency.

N.C. Gen. Stat. § 77-20 (2013).

None of these natural lines of demarcation are static, as the beaches are continually changing due to erosion or accretion of sand, whether through the forces of nature or through human intervention. Furthermore, the State may acquire ownership of public trust *dry sand* ocean beach if public funds are used to raise that land above the mean high water mark:

> Notwithstanding the other provisions of this section, the title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in *the State*. Title to such lands raised through projects that received no public funding vests in the adjacent littoral proprietor. *All such raised lands shall remain open to the free use and enjoyment of the people of the State, consistent with the public trust rights in ocean beaches, which rights are part of the common heritage of the people of this State.*

N.C. Gen. Stat. § 146-6(f) (2013) (emphasis added).

The Town, from time to time, has engaged in beach "nourishment" projects. The purpose of these projects has been to control or remediate erosion of the Town's beaches. The Town embarked on one such project in 2003 ("the Project"). According to Plaintiffs, the result of the Project was an extension of the dry sand beach from Plaintiffs' property line – the pre-Project mean high water mark – to a new mean high water mark located seaward of their property line. Therefore, the State now owns dry sand beach – which it holds for the public trust – between Plaintiffs' property line and the current mean high water mark – which no longer represents Plaintiffs' property line.

The Town was incorporated in 1957. The public has enjoyed access to its beaches, including both the publicly-owned foreshore – or wet

sand beach – and the private property dry sand beaches, since at least that date. This access has included fishing (both commercial and recreational), sunbathing, recreation, horseback riding, and the driving of automobiles upon the beach strand. According to the unchallenged affidavit of Frank Rush ("Rush") who, at the time of the summary judgment hearing, had been the Town's Town Manager since July 2001, "[b]each driving has been allowed within the Town since its incorporation in 1957." Rush averred that, since at least 1980, the Town had been restricting beach driving within its borders to a "permitted driving area," which was defined in the Emerald Isle Code of Ordinances (Oct. 2010) ("the Ordinances" generally, or "the 2010 Ordinances" specifically). According to the minutes of the 9 December 1980 Regular Monthly Meeting of the Emerald Isle Town Board of Commissioners, which meeting was open to the public, beach driving in the Town was regulated by the Carteret County Beach Vehicular Ordinance at that time. In this 9 December 1980 meeting of the Board of Commissioners, the Board voted to rescind use of the Carteret County Beach Vehicular Ordinance and "re-adopt [the Town's] original Beach Vehicular Ordinance[.]" The record does not contain the Carteret County Beach Vehicular Ordinance, or any pre-1980 ordinances related to beach driving.

According to Plaintiffs: "Historically, the [Ordinances] permitted public driving on"

> the foreshore and area within the [T]own consisting primarily of hardpacked sand and lying *between the waters of the Atlantic Ocean . . . and a point ten (10) feet seaward from the foot or toe of the dune closest to the waters of the Atlantic Ocean[.]*

This is the language from Section 5-21 of the 2010 Ordinances, and accurately reflects the defined permitted driving area from the time Plaintiffs purchased the Property in June of 2001 until the filing of this action on 9 December 2011. This statement also constitutes an acknowledgement by Plaintiffs that, "historically," the public has been driving on private property dry sand beach, and that this behavior has been regulated by the Town. However, the ordinances "allowing" driving on the designated driving areas were in fact restrictive, not permissive, in that they restricted previously allowed behavior and did not create any new rights:

> Sec. 5-22. Driving on beach and sand dunes prohibited: exceptions.
>
> It shall be unlawful for any vehicular traffic to travel upon the beach and sand dunes located within the town

> between 9 pm on April 30 and 5 am on September 15. . . . . This does not apply to commercial fisherm[e]n holding valid state licenses while engaged in commercial fishing activities.
>
> Sec. 5-23. Driving on designated areas only.
>
> It shall be unlawful for any vehicular traffic holding and displaying a duly authorized permit issued pursuant to this article to travel on any portion of the beach and sand dune areas other than those areas designated herein as permitted driving areas and the limited access ways as defined in section 5-21.

Emerald Isle Code of Ordinances §§ 5-22, 5-23 (Aug. 2004). The 1980 ordinances contained similar restrictive language related to beach driving. The Ordinances appear to have been adopted to regulate pre-existing behavior, not to permit new behavior.

In 2010, the Town adopted some new sections to the Ordinances, including Section 5-102, which stated:

> (a) No beach equipment, attended or unattended, shall be placed within an area twenty (20) feet seaward of the base of the frontal dunes at any time, so as to maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand.

Emerald Isle Code of Ordinances § 5-102 (Jan. 2010). "Beach strand" was defined by the 2010 Ordinances as "all land between the low water mark of the Atlantic Ocean and the base of the frontal dunes." Emerald Isle Code of Ordinances § 5-100 (Jan. 2010). Section 5-104 stated that any beach equipment found in violation of the Ordinances would be removed and disposed of by the Town, and could result in fines. Emerald Isle Code of Ordinances § 5-104 (Jan. 2010). According to Plaintiffs, Town and other permitted vehicles regularly drive over, and sometimes park on, the dry sand beach portion of the Property.

In 2013, subsequent to the filing of this action, the Town amended the Ordinances, completely reorganizing the contents of Chapter 5. For example, prohibitions previously found in Section 5-102 of the 2010 Ordinances are now found in Section 5-19 of the 2013 Ordinances. Section 5-1 of the 2013 Ordinances states: "Unless otherwise noted, this chapter shall be applicable on the public trust beach area, as defined by NCGS 77-20, and includes all land and water area between the Atlantic Ocean

and the base of the frontal dunes." Emerald Isle Code of Ordinances § 5-1 (Oct. 2013). Sections 5-60 and 5-61 of the 2013 Ordinances limit driving on "the public trust beach area" to certain time periods, and restrict driving on these areas to permitted vehicles. Emerald Isle Code of Ordinances §§ 5-60, 5-61 (Oct. 2013). Permits are issued to qualified applicants by the Town Manager. Emerald Isle Code of Ordinances § 5-61 (Oct. 2013). Though the language used in Section 5-19 of the 2013 Ordinances differs in some respects from the previous language found in Section 5-102 of the 2010 Ordinances, Section 5-19 still reserves an unimpeded twenty-foot-wide strip along the beach measured seaward from the foot of the frontal dunes. Plaintiffs' action is not materially affected by the 2013 amendment to the Ordinances. Relevant to this appeal, Plaintiffs claim that the effect of the contested Ordinances was the taking of the dry sand beach portion of the Property by the Town.

Plaintiffs, along with other property owners not parties to this appeal, filed this action on 9 December 2011. The complaint alleged, *inter alia*, violation of the Takings Clause of the Fifth Amendment of the United States Constitution. The Town moved for summary judgment on 25 July 2014. Summary judgment in favor of the Town was granted by order entered 26 August 2014, and Plaintiffs' action was dismissed. Plaintiffs appeal.

II.

Plaintiffs' sole argument on appeal is that the trial court erred in granting summary judgment in favor of the Town because the contested ordinances effected a taking of the Property in violation of the Takings Clause of the Fifth Amendment. In support of their argument, Plaintiffs contend that the dry sand ocean beach portion of their property is not subject to public trust rights.

> 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.G.S. § 1A–1, Rule 56(c) (2013). We review de novo an order granting summary judgment.

Falk v. Fannie Mae, 367 N.C. 594, 599, 766 S.E.2d 271, 275 (2014) (citation omitted). We affirm the ruling of the trial court.

III.

Plaintiffs first argue that privately owned dry sand beaches in North Carolina are not subject to the public trust doctrine. We disagree.

Our Supreme Court has noted that "the law involving the public trust doctrine has been recognized . . . as having become unnecessarily complex and at times conflicting." *Gwathmey v. State of North Carolina*, 342 N.C. 287, 311, 464 S.E.2d 674, 688 (1995). The public trust doctrine is a creation of common law. *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27. Our General Assembly has codified recognition of the continuing legal relevance of common law in the State:

> N.C.G.S. § 4–1 provides:
>
> > All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

Gwathmey, 342 N.C. at 295-96, 464 S.E.2d at 679.

> [T]he "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete. N.C.G.S. § 4–1. Further, much of the common law that is in force by virtue of N.C.G.S. § 4–1 *may be modified or repealed by the General Assembly*, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment.

Id. at 296, 464 S.E.2d at 679 (emphasis added); *see also Shively v. Bowlby*, 152 U.S. 1, 14, 38 L. Ed. 331, 337 (1894) ("The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the constitution and laws of the United States.").

The General Assembly has the power to make or amend laws so long as those laws do not offend the constitutions of our State or the United States. As our Supreme Court has recognized:

> "(U)nder our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom." Absent such constitutional restraint, questions as to public policy are for legislative determination. When the constitutionality of a statute is challenged, "every presumption is to be indulged in favor of its validity."

Martin v. Housing Corp., 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) (citations omitted).

This Court has recognized both public trust lands and public trust rights as codified by our General Assembly:

> The public trust doctrine is a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public. As this Court has held, "public trust rights are 'those rights held in trust by the State for the use and benefit of the people of the State in common. . . . . They include, but are not limited to, the right to navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.' " *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Pres., Inc. v. Coastal Res. Comm'n*, 117 N.C. App. 556, 574, 452 S.E.2d 337, 348 (1995) (emphasis omitted) (quoting N.C. Gen. Stat. § 1–45.1 (1994)).

Fabrikant, 174 N.C. App. at 41, 621 S.E.2d at 27 (citation omitted). Public trust rights are associated with public trust lands, but are not inextricably tied to ownership of these lands. For example, the General Assembly may convey ownership of public trust land to a private party, but will be considered to have retained public trust rights in that land unless specifically relinquished in the transferring legislation by "the clearest and most express terms." *Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684. Public trust rights are also attached to public trust resources which, according to our General Assembly, may include both public and private lands:

> "public trust resources" means land and water areas, *both public and private*, subject to public trust rights as that term is defined in G.S. 1-45.1.

N.C. Gen. Stat. § 113-131(e) (2013) (emphasis added). As noted above, N.C. Gen. Stat. § 1-45.1 defined public trust rights as including the "right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches." *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27 (citation and quotation marks omitted). This Court has adopted the N.C. Gen. Stat. § 1-45.1 definition of public trust rights. *Id.*

Concerning "ocean beaches," the General Assembly has found:

> The public has traditionally fully enjoyed the State's beaches and coastal waters and public access to and use of the beaches and coastal waters. The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State. The General Assembly finds that the beaches and coastal waters are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State.

N.C. Gen. Stat. § 113A-134.1(b) (2013). The General Assembly considers access to, and use of, ocean beaches to be a public trust right. N.C. Gen. Stat. § 1-45.1; N.C. Gen. Stat. § 113A-134.2 (2013). This Court has indicated its agreement. *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27.

N.C. Gen. Stat. § 77-20(e) defines "ocean beaches" as follows:

> "[O]cean beaches" means the area adjacent to the ocean and ocean inlets that is *subject to public trust rights*. This area is in constant flux due to the action of wind, waves, tides, and storms and *includes the wet sand area of the beach that is subject to regular flooding by tides and the dry sand area of the beach that is subject to occasional flooding by tides*, including wind tides other than those resulting from a hurricane or tropical storm. The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

N.C. Gen. Stat. § 77-20(e) (emphasis added). Having attempted to define "ocean beaches," N.C. Gen. Stat. § 77-20(d) further states the position of the General Assembly that the public trust portions of North Carolina ocean beaches include the dry sand portions of those beaches:

> The public having made frequent, uninterrupted, and unobstructed use of the *full width and breadth of the ocean beaches of this State from time immemorial*, this section shall not be construed to impair the *right of the people to the customary free use and enjoyment of the ocean beaches*, *which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State recognized by Article XIV, Section 5 of the Constitution of North Carolina. These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State.*

N.C. Gen. Stat. § 77-20(d). N.C. Gen. Stat. § 77-20 was last amended in 1998, before Plaintiffs purchased the Property.

The Executive Branch, through a 1996 opinion of the Attorney General, also adopted this assessment.

> Because the public ownership stops at the high water line, the public must either be in the water or on the dry sand beach when the tide is high. The term "dry sand beach" refers to the flat area of sand seaward of the dunes or bulkhead which is flooded on an irregular basis by storm tides or unusually high tides. *It is an area of private property which the State maintains is impressed with public rights of use under the public trust doctrine and the doctrine of custom or prescription.*

Opinion of Attorney General Re: Advisory Opinion Ocean Beach Renourishment Projects, *N.C.G.S. § 146-6(f)*, *1996 WL 925134*, **2* (Oct. 15, 1996) ("Advisory Opinion") (emphasis added) (citation omitted); *See also* 15A N.C.A.C. 7M.0301 (2015) (wherein the Department of Environment and Natural Resources expresses a similar view).

The General Assembly has made clear its understanding that at least some portion of privately-owned dry sand beaches are subject to public trust rights. The General Assembly has the power to make this determination through legislation, and thereby modify any prior common law understanding of the geographic limits of these public trust rights. *Gwathmey*, 342 N.C. at 296, 464 S.E.2d at 679.

There is, however, potential ambiguity in the definition of "ocean beaches" provided in N.C. Gen. Stat. § 77-20(e):

> The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

N.C. Gen. Stat. § 77-20(e). A thorough search of the opinions of this Court and our Supreme Court fails to uncover any holding establishing the landward extent of North Carolina's ocean beaches. Further, it is not clear that any North Carolina appellate court has specifically recognized the dry sand portion of our ocean beaches as subject to public trust rights. In *Concerned Citizens*, this Court, in *dicta*, discussed the public trust doctrine relative to privately owned property in the following manner:

> Finally, we note that in its joint brief plaintiffs and plaintiff-intervenor rely heavily on the "public trust doctrine." They argue that holding our State's beaches in trust for the use and enjoyment of all our citizens would be meaningless without securing public access to the beaches. However, plaintiffs cite no North Carolina case where the public trust doctrine is used to acquire additional rights for the public generally at the expense of private property owners. We are not persuaded that we should extend the public trust doctrine to deprive individual property owners of some portion of their property rights without compensation.

Concerned Citizens v. Holden Beach Enterprises, 95 N.C. App. 38, 46, 381 S.E.2d 810, 815 (1989) (*Concerned Citizens I)*, *rev'd*, *Concerned Citizens v. Holden Beach Enterprises*, 329 N.C. 37, 404 S.E.2d 677 (1991). However, our Supreme Court reversed this Court's opinion in *Concerned Citizens* on different grounds and expressly disavowed the above *dicta*:

> We note dicta in the Court of Appeals opinion to the effect that the public trust doctrine will not secure public access to a public beach across the land of a private property owner. *Concerned Citizens v. Holden Beach Enterprises*, 95 N.C. App. at 46, 381 S.E.2d at 815. As the statement was not necessary to the Court of Appeals opinion, nor is it

> clear that in its unqualified form the statement reflects the law of this state, we expressly disavow this comment.

Concerned Citizens v. Holden Beach Enterprises, 329 N.C. 37, 55, 404 S.E.2d 677, 688 (1991) (*Concerned Citizens II*).

We acknowledge both the long-standing customary right of access of the public to the dry sand beaches of North Carolina[2] as well as current legislation mandating such. *See* N.C. Gen. Stat. § 77-20. It is unclear from prior North Carolina appellate opinions whether the common law doctrine of custom is recognized as an independent doctrine in North Carolina, or whether long-standing "custom" has been used to help determine where and how the public trust doctrine might apply in certain circumstances. The General Assembly apparently considers "custom" as a factor in determining the reach of public trust rights in North Carolina. *See* N.C. Gen. Stat. § 77-20(d). Our Attorney General, at least in 1996, was of the opinion that the doctrine of custom operated to preserve public access to North Carolina's dry sand beaches. *Advisory Opinion*, 1996 WL 925134, *2. In any event, we take notice that public right of access to dry sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become a part of the public consciousness. Native-born North Carolinians do not generally question whether the public has the right to move freely between the wet sand and dry sand portions of our ocean beaches. Though some states, such as Plaintiffs' home state of New Jersey, recognize different rights of access to their ocean beaches, no such restrictions have traditionally been practiced in North Carolina. *See* Kalo, *The Changing Face of the Shoreline*, 78 N.C. L. Rev. at 1876-77 ("[O]ut-of-state buyers came from areas with different customs and legal traditions. Many of these buyers came from states, like New Jersey, where dry sand beaches were regarded as private or largely private. Consequently, many of them brought their expectations of privacy with them to North Carolina. The customs and traditions of North Carolina, however, are not necessarily those of New Jersey, Virginia, or Massachusetts.").

N.C. Gen. Stat. § 77-20 establishes that some portion, at least, of privately- owned dry sand beaches are subject to public trust rights.

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2. Though the issue of historical right of public access to the dry sand beaches was not fully argued below, and is not extensively argued on appeal, it is unchallenged that the Town had allowed public access on privately-owned dry sand beaches since its incorporation. The statement of our General Assembly that the "public ha[s] made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial," N.C. Gen. Stat. § 77-20(d), is also uncontested by Plaintiffs. *See also* N.C. Gen. Stat. § 113A-134.1(b); N.C. Gen. Stat. § 146-6(f).

Lacking further guidance from prior opinions of our appellate courts, we must determine the geographic boundary of public trust rights on privately-owned dry sand beaches. We adopt the test suggested in N.C. Gen. Stat. § 77-20(e): "Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line." *Id.* We adopt this test because it most closely reflects what the majority of North Carolinians understand as a "public" beach. *See*, *e.g.*, Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1877 (2000) ("the custom of the dry sand beaches being open to public trust uses has a long history in North Carolina"). We hold that the "ocean beaches" of North Carolina include both the wet sand beaches – generally, but not exclusively, publically owned – and the dry sand beaches – generally, but not exclusively, privately owned.

For the purposes of N.C. Gen. Stat. § 77-20, the landward boundary of North Carolina ocean beaches is the discernable reach of the "storm" tide. This boundary represents the extent of semi-regular submersion of land by ocean waters sufficient to prevent the seaward expansion of frontal dunes, or stable, natural vegetation, where such dunes or vegetation exist. Where both frontal dunes and natural vegetation exist, the high water mark shall be the seaward of the two lines. Where no frontal dunes nor stable, natural vegetation exists, the high water mark shall be determined by some other reasonable method, which may involve determination of the "storm trash line" or any other reliable indicator of the mean regular extent of the storm tide. The ocean beaches of North Carolina, as defined in N.C. Gen. Stat. § 77-20(e) and this opinion, are subject to public trust rights unless those rights have been expressly abandoned by the State. *See Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684.

The limits of the public's right to use the public trust dry sand beaches are established through appropriate use of the State's police power. As the United States Supreme Court has stated:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the

> understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 120 L. Ed. 2d 798, 820 (1992) (citations omitted).

The right to prevent the public from enjoying the dry sand portion of the Property was never part of the "bundle of rights" purchased by Plaintiffs in 2001. Because Plaintiffs have no right to exclude the public from public trust beaches, those portions of the Ordinances regulating beach driving,[3] even if construed as ordinances "allowing" beach driving, cannot effectuate a Fifth Amendment taking.

IV.

We must next determine whether the Town, pursuant to public trust rights or otherwise, may enforce ordinances reserving unimpeded access over portions of Plaintiffs' dry sand beach without compensating Plaintiffs. We hold, on these facts, that it may.

Public trust rights in Plaintiffs' property are held by the State concurrently with Plaintiffs' rights as property owners. Though the Town may prevent Plaintiffs from denying the public access to the dry sand beach portion of the Property for certain activities, that does not automatically establish that the Town can prevent, regulate, or restrict other specific uses of the Property by Plaintiffs without implicating the Takings Clause of the Fifth Amendment to the United States Constitution:

> The Takings Clause – "nor shall private property be taken for public use, without just compensation," U.S. Const., Amdt. 5 – applies as fully to the taking of a landowner's [littoral] rights as it does to the taking of an estate in land. Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions

3. Sections 5-21 through 5-32 of the 2010 Ordinances, and Sections 5-1 and 5-60 through 5-64 of the 2013 Ordinances.

> that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property. Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking."

Stop the Beach, 560 U.S. at 713, 177 L. Ed. 2d at 195 (citations omitted).

As Plaintiffs acknowledge: "Takings tests vary depending on whether the challenged imposition is a physical invasion of property or a regulatory restriction on the use of property." "In *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798 (1992)], the [United States Supreme] Court established two categories of regulatory action that require a finding of a compensable taking: regulations that compel physical invasions of property and regulations that deny an owner all economically beneficial or productive use of property." *King v. State of North Carolina*, 125 N.C. App. 379, 385, 481 S.E.2d 330, 333 (1997) (citation omitted). Plaintiffs argue on appeal that the contested ordinances violate the "physical invasions" prong of *Lucas* and *King*, and therefore effect a *per se* taking. Plaintiffs do not argue that the contested ordinances constitute a regulatory taking.

A.

Plaintiffs cannot establish that the contested beach driving ordinances[4] constitute physical invasion of the Property for purposes of the Takings Clause. The majority of Plaintiffs' argument is predicated on Plaintiffs' contention that the dry sand portion of the Property is not encumbered by public trust rights. We have held that the dry sand portion of the Property is so encumbered. Because public beach driving across the Property is permissible pursuant to public trust rights, regulation of this behavior by the Town does not constitute a "taking."

Plaintiffs have never, since they purchased the Property in 2001, had the right to exclude public traffic, whether pedestrian or vehicular, from the public trust dry sand beach portions of the Property. The Town has the authority to both ensure public access to its ocean beaches, and to impose appropriate regulations pursuant to its police power. *See Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27; *see also Kirby v. N.C. Dep't of Transp.*, __ N.C. App. __, __, 769 S.E.2d 218, 230 (2015), *disc. rev. allowed*, __ N.C. __, 775 S.E.2d 829 (2015); *Slavin v. Town of Oak*

4. Sections 5-21 through 5-32 of the 2010 Ordinances, and Sections 5-1 and 5-60 through 5-64 of the 2013 Ordinances.

Island, 160 N.C. App. 57, 584 S.E.2d 100 (2003). The contested beach driving portions of the Ordinances do not create a right of the public relative to the Property; they regulate a right that the public already enjoyed. *See also*, *e.g.*, N.C. Gen. Stat. § 160A-308 (2013) ("A municipality may by ordinance regulate, restrict and prohibit the use of dune or beach buggies, jeeps, motorcycles, cars, trucks, or any other form of power-driven vehicle specified by the governing body of the municipality on the foreshore, beach strand and the barrier dune system. . . . . Provided, a municipality shall not prohibit the use of such specified vehicles from the foreshore, beach strand and barrier dune system by commercial fishermen for commercial activities.").

B.

Plaintiffs also contest Section 5-102 of the 2010 Ordinances and Section 5-19 of the 2013 Ordinances. Section 5-102 prohibits any beach equipment "within an area twenty . . . feet seaward of the base of the frontal dunes at any time, so as to maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand." Emerald Isle Code of Ordinances § 5-102 (Jan. 2010). Plaintiffs argue that the beach equipment ordinance prevents them from "station[ing] any beach gear in the strip of land near the dunes during May-September (and many other times) due to the passing of Town vehicles, and for the same reason (and due to the ruts left by the vehicles) they can barely walk on the land."

The 2013 Ordinances include the following provisions related to beach equipment:

> Sec. 5-19. Restricted placement of beach equipment.
>
> a) In order to provide sufficient area for unimpeded vehicle travel by emergency vehicles and town service vehicles on the public trust beach area, no beach equipment, including beach tents, canopies, umbrellas, awnings, chairs, sporting nets, or other similar items shall be placed:
>
> 1. Within an area twenty (20) feet seaward of the base of the frontal dunes on the public trust beach area;
>
> 2. Within the twenty (20) feet travel lane on the public trust beach areas that extends from any vehicle access ramp.
>
> b) The requirements of subsection a) shall apply only between May 1 and September 14 of each year, and

> emergency vehicles and town service vehicles shall only utilize said areas when no safe alternative vehicle travel area is available elsewhere on the public trust beach area.
>
> c) In order to promote the protection of threatened and/or endangered sea turtles, no beach equipment, including beach tents, canopies, umbrellas, awnings, chairs, sporting nets, or other similar items shall be placed within twenty (20) feet of any sea turtle nest.
>
> d) Violations of this section shall subject the offender to a civil penalty of fifty dollars ($50.00).

Emerald Isle Code of Ordinances § 5-19 (Oct. 2013). We have already held that the public, including the Town, has the right to drive on public trust beaches. This right may be regulated, within the Town's limits, through the Town's police power. Therefore, no part of Section 5-19 of the 2013 Ordinances[5] "allowing" or regulating driving on the dry sand portion of the Property can constitute a taking.

As our Supreme Court has noted:

> "The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." "The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of the police power are noncompensable."

Barnes v. Highway Commission, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962) (citations omitted). Further:

> "What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest." "The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from

5. We will analyze Section 5-19 of the 2013 Ordinances, but our analysis applies to Section 5-102 of the 2010 Ordinances as well.

> conducting themselves or using their property to the detriment of the general welfare." "The police power is inherent in the sovereignty of the State. It is as extensive as may be required for the protection of the public health, safety, morals and general welfare." "Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly-populated community, the enjoyment of private and social life, and the beneficial use of property."
>
> > [T]he police power[ ] [is] the power vested in the Legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.
>
> "Laws and regulations of a police nature . . . do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner." " 'Regulation' implies a degree of control according to certain prescribed rules, usually in the form of restrictions imposed on a person's otherwise free use of the property subject to the regulation."

Kirby, __ N.C. App. at __, 769 S.E.2d at 229-30 (citations omitted). The only "physical invasion" of the Property arguably resulting from Section 5-19 is Town vehicular traffic. However, we have held that Town vehicular traffic is allowed pursuant to the public trust doctrine and, therefore, cannot constitute a taking.

Within Plaintiffs' argument that the contested Ordinances constitute a physical invasion of the Property, Plaintiffs contend that if this Court determines that public trust rights apply to the dry sand portion of the Property, we should still find a taking has occurred. Plaintiffs argue that the beach equipment regulation "imposed new and excessive burdens on an existing easement, without compensation." However, Plaintiffs do not argue that the beach equipment restrictions are an invalid use of the Town's police power. Plaintiffs cite to no authority in support of their argument that imposing certain restrictions on the placement of beach equipment, which might result in occasional or even regular diversion of beach traffic on the Property, could constitute an invalid use of the police power. Nor do Plaintiffs argue or demonstrate that the ordinance

"is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, [so that] it comes within the purview of the law of eminent domain." *Kirby*, __ N.C. App. at __, 769 S.E.2d at 230 (citation omitted). Plaintiffs also fail to "show that [the] regulation deprives the owner of all economically beneficial or productive use of the land[.]" *Piedmont Triad Reg'l Water Auth. v. Unger*, 154 N.C. App. 589, 592, 572 S.E.2d 832, 835 (2002), *see also Slavin*, 160 N.C. App. 57, 584 S.E.2d 100. In fact, Plaintiffs make no argument implicating regulatory takings jurisprudence.

Assuming, *arguendo*, Plaintiffs argued that a regulatory taking had occurred, this argument would fail.

> Land-use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good[.]"

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 324-25, 152 L. Ed. 2d 517, 541-42 (2002) (citations omitted). The United States Supreme Court then went on to state:

> [E]ven though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on "the parcel as a whole":
>
> > " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole[.]"

> This requirement that "the aggregate must be viewed in its entirety" . . . clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, . . . were not considered regulatory takings. In each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."

Id. at 327, 152 L. Ed. 2d at 543 (citations omitted). Plaintiffs fail to forecast evidence that the regulation restricting certain uses of a portion of the Property could rise to the level of a taking of the entire Property.

We note that our General Assembly has addressed the specific issue of regulating beach equipment on North Carolina ocean beaches in legislation that became effective on 23 August 2013. N.C. Gen. Stat. § 160A-205, entitled "Cities enforce ordinances within public trust areas," states:

> (a) Notwithstanding the provisions of G.S. 113-131 or any other provision of law, a city may, by ordinance, define, prohibit, regulate, or abate acts, omissions, or conditions upon the State's ocean beaches and prevent or abate any unreasonable restriction of the public's rights to use the State's ocean beaches. In addition, a city may, in the interest of promoting the health, safety, and welfare of the public, regulate, restrict, or prohibit the placement, maintenance, location, or use of equipment, personal property, or debris upon the State's ocean beaches. A city may enforce any ordinance adopted pursuant to this section or any other provision of law upon the State's ocean beaches located within or adjacent to the city's jurisdictional boundaries to the same extent that a city may enforce ordinances within the city's jurisdictional boundaries. A city may enforce an ordinance adopted pursuant to this section by any remedy provided for in G.S. 160A-175. For purposes of this section, the term "ocean beaches" has the same meaning as in G.S. 77-20(e).
>
> (b) Nothing in this section shall be construed to (i) limit the authority of the State or any State agency to regulate the State's ocean beaches as authorized by G.S. 113-131, or common law as interpreted and applied by the courts of this State; (ii) limit any other authority granted to cities by the State to regulate the State's ocean beaches; (iii)

> deny the existence of the authority recognized in this section prior to the date this section becomes effective; (iv) impair the right of the people of this State to the customary free use and enjoyment of the State's ocean beaches, which rights remain reserved to the people of this State as provided in G.S. 77-20(d); (v) change or modify the riparian, littoral, or other ownership rights of owners of property bounded by the Atlantic Ocean; or (vi) apply to the removal of permanent residential or commercial structures and appurtenances thereto from the State's ocean beaches.

N.C. Gen. Stat. § 160A-205 (2013). This provision is found in Chapter 160A, Article 8 – "Delegation and Exercise of the General Police Power." The 2013 Ordinances were adopted subsequent to the effective date of this legislation.

We hold that passage of Section 5-102 of the 2010 Ordinances, and Section 5-19 of the 2013 Ordinances, constituted legitimate uses of the Town's police power. We hold that the regulation of the use of certain beach equipment, on public trust areas of the ocean beaches within the Town's jurisdiction, to facilitate the free movement of emergency and service vehicles, was " 'within the scope of the [police] power[.]' " *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989) (citation omitted). Further, the " 'means chosen to regulate,' " prohibiting large beach equipment within a twenty-foot-wide strip along the landward edge of the ocean beach, were " 'reasonable.' " *Id.* (citation omitted).

C.

The contested provisions in the 2010 Ordinances and the 2013 Ordinances did not result in a "taking" of the Property. First, though Plaintiffs argue that the Ordinances deprived them of "the right to control and deny access to others," as discussed above, it is not the Ordinances that authorize public access to the dry sand portion of the Property; public access is permitted, and in fact guaranteed, pursuant to the associated public trust rights. *See Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27. The Ordinances restrict and regulate certain public and private uses pursuant to the Town's police power. The Town's reservation of an obstruction-free corridor on the Property for emergency use constitutes a greater imposition on Plaintiffs' property rights, but does not rise to the level of a taking.

Though Plaintiffs argue that "the Town has made it impossible for [them] to make any meaningful use of the dry [sand] [P]roperty[,]"

Plaintiffs retain full use of, and rights in, the majority of the Property. *Tahoe-Sierra*, 535 U.S. at 327, 152 L. Ed. 2d at 543. Plaintiffs' rights in the dry sand portion of all but the twenty-foot-wide strip of the Property are the same as when they purchased the Property. *Id.* Concerning the twenty-foot-wide strip, Plaintiffs retain all the rights they had when they purchased the Property other than the right to use large beach equipment on that portion of the Property "between May 1 and September 14 of each year." The Town, along with the public, already had the right to drive on dry sand portions of the Property before Plaintiffs purchased it. We affirm the judgment of the trial court.

AFFIRMED.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JOHNNY BURRIS BRYANT, JR.

No. COA15-134

Filed 17 November 2015

1. Indictment and Information—willfully discharging firearm into occupied property—apartment as dwelling

An indictment alleging that defendant willfully discharged a firearm into an occupied apartment sufficiently charged defendant in the words of the statute. Although the superseding indictment referenced N.C.G.S. § 14-34 instead of N.C.G.S. § 14-34.1(b), it did not constitute a fatal defect as to the validity of the indictment as defendant was put on reasonable notice as to the charge against him.

2. Criminal Law—discharging firearm into occupied building—special instruction—hitting wrong apartment

There was no error, much less plain error, in a prosecution for willfully discharging a firearm into an occupied dwelling, where defendant challenged a special jury instruction on whether the State must prove that he hit the building at which he fired. There was sufficient evidence that defendant intentionally discharged a pistol from several witnesses.

3. Evidence—arrest warrant—admission not plain error—other evidence of guilt

There was no plain error in a prosecution for willfully firing into an occupied dwelling in introducing the arrest warrant into evidence where there was testimony from more than one witness that defendant intentionally discharged his pistol. The trial court's error did not have a probable impact on the jury's finding.

Appeal by defendant from judgments entered 11 September 2014 by Judge Kevin Bridges in Cabarrus County Superior Court. Heard in the Court of Appeals 26 August 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Staci T. Meyer, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant.

McCULLOUGH, Judge.

Defendant appeals from his convictions of possession of a firearm by a felon and discharging a weapon into an occupied dwelling. For the reasons stated herein, we find no plain error.

I. Background

On 19 August 2013, defendant Johnny Burris Bryant, Jr. was indicted in case number 13 CRS 50172 for possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415. This indictment was superseded by an indictment issued 8 September 2014. On 19 August 2013, defendant was also indicted in case number 13 CRS 50173 for discharging a weapon into an occupied dwelling in violation of N.C. Gen. Stat. § 14-34. This indictment was superseded by an indictment issued 14 April 2014.

Defendant's trial commenced at the 8 September 2014 criminal session of Cabarrus County Superior Court, the Honorable Kevin M. Bridges presiding. Jennifer Garmon testified that on 31 December 2013, she was living at 1722 Clemson Court, Kannapolis, North Carolina, in the Royal Oaks Gardens apartment complex. She and her fiancé, Daniel Long, were sleeping when around 3:00 a.m. they were awakened by a commotion outside. Ms. Garmon heard "a lot of screaming, sounded like a lot of people running around outside, people yelling[.]" She saw Delonte Scott run from a crowd of people in front of apartment 1727, the apartment of

Shirley and Jamie Collins, and into his sister's apartment 1713, "which was directly across the street from my house." She could tell that Mr. Scott was bleeding. Mr. Scott's sister came out of the apartment and made "comments about how that was her brother and that wasn't going to happen[.]" An ambulance and police arrived on the scene.

Lieutenant Brian Ritchie of the Kannapolis Police Department testified that around 2:19 a.m. on 1 January 2013, he responded to a call regarding a "fight in progress" at Royal Oaks Gardens Apartments. When he arrived on the scene, Delonte Scott had already been taken by ambulance to the hospital. After unsuccessfully searching for the suspect in the assault, LaShawn Blount, officers left the scene at 3:20 a.m.

Ms. Garmon testified that soon after the ambulance and police had left the scene, a black car drove into the apartment complex and two men stepped out of the vehicle. She heard people say "[w]ell, Blaze is here, it will be handled, and I kind of just sat back and watched." Ms. Garmon and Mr. Long both learned that "Blaze" was defendant and defendant was Scott's brother. Defendant was the driver of the vehicle and Walter Sumlin was the passenger. Ms. Garmon testified that Walter Sumlin was a "little bit smaller" than defendant and that he had a silver gun in his pants. Defendant pulled a black pistol out of the waistband of his pants. Defendant, with the black pistol in his hand, started screaming "I don't care if you're cribs; I don't care if you're blood; you did my family wrong; somebody is going to get it." Ms. Garmon saw defendant walk toward the apartment of Shirley and Jamie Collins and fire his pistol towards the apartment's doorway. The bullet entered the home of Joseph Fezza and Champale Woodard, immediate neighbors of the Collins' apartment. Afterwards, defendant and Sumlin ran into apartment 1713.

Sharita Huntley, a resident of 1745 Clemson Court, testified that she saw "Johnny Blaze," whom she identified as defendant, with a black gun in his hand. She testified that he shot it once in the air in the direction of Shirley Collins' apartment.

Champale Woodard testified that she lived at 1727 Clemson Court in the Royal Oaks Gardens Apartments with her two children, Daya and Michael Fezza. Joseph Fezza, Ms. Woodard's boyfriend, also lived at 1727 Clemson Court. Michael Fezza's bedroom was located upstairs. On the night of 31 December 2012, he slept in his room. On the morning of 1 January 2013, Ms. Woodard found two bullet holes in his room near his crib. Joseph Fezza called the police to report the bullet holes.

Trooper Travis Meadows testified that he responded to Mr. Fezza's call and saw two bullet holes on the wall of Michael Fezza's room. He

believed the two holes were made by one bullet. Officer Samuel Gadd of the Kannapolis Police Department recovered a bullet from the wall of 1727 Clemson Court. Lieutenant Ritchie, who also responded to the scene, testified that he received information that Delonte Scott "had been set up by the occupants of that apartment at 1729, that they had invited him over for the purpose of him being assaulted." Lieutenant Ritchie received information that LaShawn Blount may be located in 1745 Clemson Court. As he was searching this apartment, a man told Lieutenant Ritchie that there was a man at the bottom of the steps with "two guns in his waistband." Lieutenant Ritchie identified the individual suspected to have guns in his waistband as Walter Sumlin. Lieutenant Ritchie and another officer asked Sumlin to go outside. Sumlin appeared "very nervous" and after they all walked outside, he "took off running." As he was running, Sumlin reached into his front waistband, removed a black semi-automatic handgun, and dropped it to the ground. Sumlin then pulled a second gun from his waistband, a silver revolver with a brown grip, and dropped it to the ground as well. Eventually, Sumlin was apprehended.

Deborah Chancey, an analyst of firearms related evidence for the North Carolina State Crime Lab, was tendered as an expert in the field of forensic firearms analysis. She tested the following items: a silver INA 38 special revolver; a blue black Star 9-millimeter semi-automatic pistol; and one fired bullet. The silver revolver was eliminated as a source of the fired bullet. However, Ms. Chancey confirmed that the fired bullet was from the black pistol.

Defendant testified on his own behalf. He testified that about 2:30 a.m. on 1 January 2013, he received a phone call informing him that his brother had been assaulted. He got into a car with his girlfriend and three other girls to head toward the apartment complex. Upon arrival, defendant exited the car, approached his sister, and asked about LaShawn Blount's whereabouts. He was told that Blount was no longer there. Defendant testified that he was "asking everybody like what happened with my brother. They was telling me things. I asked them why didn't nobody stop them; why did they let this happen to my brother, and so on and stuff of that nature." Defendant heard a gunshot but did not witness the shooting itself. Thereafter, he ran into his sister's apartment at 1713 Clemson Court.

Defendant denied taking any weapons to the scene. Defendant admitted to being a felon since 1998. He testified that he did not currently own a weapon. Defendant further testified that his nickname was

"Blaze" based on his "excessive marijuana use." He denied that his nickname had anything to do with "viciousness or violence."

Defendant's girlfriend, Selma Gray, testified that on 31 December 2012, she had gone to a club with defendant and two of her friends. After they left the club and headed toward a local liquor house, defendant received a call "that somebody had jumped on his brother." They decided to check on defendant's brother and headed to the apartment complex. They all exited the vehicle upon arrival and heard a gunshot. Gray did not see who fired the gun.

On 11 September 2014, a jury found defendant guilty of both counts. Defendant was sentenced as a Prior Record Level III. Defendant was sentenced to a term of 17 to 30 months for the possession of a firearm by a felon conviction and a term of 84 to 113 months for the discharging of a weapon into an occupied dwelling conviction.

Defendant entered notice of appeal in open court.

II. Discussion

On appeal, defendant argues that (A) his conviction of discharging a firearm into an occupied dwelling must be vacated because the indictment was insufficient to charge this crime; (B) the trial court erred by granting the State's request for a special jury instruction; and, (C) the trial court erred by allowing the admission into evidence and publication of the arrest warrant in case number 13 CRS 50173. We address each argument in turn.

A. Indictment

[1] Defendant argues that his conviction of discharging a firearm into an occupied dwelling must be vacated because the indictment was insufficient to charge this crime. Specifically, defendant argues that the term "apartment" is not synonymous with the term "dwelling" pursuant to N.C. Gen. Stat. § 14-34.1(b). Defendant also argues that the indictment was insufficient because it charged defendant with being in violation of N.C. Gen. Stat. § 14-34, instead of N.C. Gen. Stat. § 14-34.1(b). We disagree.

On appeal, our Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "[T]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused[.] . . . The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense

is charged in the words of the statute, either literally or substantially, or in equivalent words." *State v. Simpson*, __ N.C. App. __, __, 763 S.E.2d 1, 3 (2014) (citations and quotation marks omitted). The purpose of the indictment is "to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). "Our courts have recognized that while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006).

Here, the 14 April 2014 superseding indictment charged that defendant

> unlawfully, willfully and feloniously did DISCHARGE A FIREARM TO WIT: A PISTOL INTO APARTMENT 1727 CLEMSON COURT, KANNAPOLIS, NC AT THE TIME THE APARTMENT WAS OCCUPIED BY MICHAEL FEZZA.

The indictment alleged that defendant was in violation of N.C. Gen. Stat. § 14-34.

A jury convicted defendant of discharging a weapon into an occupied dwelling in violation of N.C. Gen. Stat. § 14-34.1(b), a Class D felony. "The elements of the offense prohibited by G.S. § 14-34.1 are (1) the willful or wanton discharging (2) of a firearm (3) into any building (4) while it is occupied." *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991). Subsection (b) of N.C. Gen. Stat. § 14-34.1 states that "[a] person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling . . . is guilty of a Class D felony." N.C. Gen. Stat. § 14-34.1(b) (2013).

Defendant argues that the term "apartment" is not synonymous with the term "dwelling" because an apartment is not always a residence or dwelling. Defendant asserts that "while people often rent apartments as dwellings, this is not invariably true." Defendant's argument is not convincing.

We note that "[t]he protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted G.S. 14-34.1." *State v. Canady*, 191 N.C. App. 680, 687, 664 S.E.2d 380, 384 (2008) (citation omitted). Also, the plain meaning of "apartment" includes "dwelling" as it is defined as "a room or set

of rooms fitted especially with housekeeping facilities and usually leased as a dwelling." *Merriam-Webster Online Dictionary* 2015. We refuse to subject defendant's superseding indictment to hyper technical scrutiny with respect to form. If we were to rule that an "apartment" is not a "dwelling" within the meaning of N.C. Gen. Stat. § 14-34.1, we would contravene the purpose of the statute.

Accordingly, we hold that the body of the superseding indictment sufficiently charged defendant in the words of the statute by alleging that defendant willfully discharged a firearm into an occupied apartment. Although the superseding indictment referenced N.C. Gen. Stat. § 14-34 instead of N.C. Gen. Stat. § 14-34.1(b), it did not constitute a fatal defect as to the validity of the indictment as defendant was put on reasonable notice as to the charge against him.

B. Special Jury Instruction

[2] Defendant argues that the trial court erred by granting the State's request for a special jury instruction.

Because defendant did not make a challenge to the jury instruction at trial, we only consider whether the trial court committed 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.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted).

Defendant challenges the following portion of the trial court's jury instructions:

> The defendant has been charged with discharging a firearm into an occupied dwelling. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant willfully or wantonly discharged a firearm into a dwelling. An act is willful or wanton when it is done intentionally, with knowledge or a reasonable ground to believe that the act would endanger the rights or safety of others.
>
> Second, that the dwelling was occupied by one or more persons at the time that the firearm was discharged.

> And, third, that the defendant had reasonable grounds to believe that the dwelling was occupied by one or more persons. **The State is not required to prove that the defendant intentionally discharged a firearm at a victim or at the occupied property. This is a general intent crime, and the intent element applies to the discharging of the firearm, not the eventual destination of the bullet.**
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant willfully or wantonly discharged a firearm into a dwelling while it was occupied by one or more persons, and that the defendant had reasonable grounds to believe that it was occupied by one or more persons, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(emphasis added).

On appeal, defendant argues that the State must prove that defendant "intentionally fired at a building or vehicle, although a specific intent that the bullet actually enter into the property need not be shown."

In *Canady*, the defendant threatened to shoot a man. The defendant pulled out his gun and pointed the gun at the man's head and fired his gun. 191 N.C. App. at 684, 664 S.E.2d at 382. The shot went past the man's head and into the siding of the exterior wall of a neighbor's apartment. *Id.* The defendant argued that the trial court erred by denying his motion to dismiss the charge of discharging a firearm into occupied property because there was insufficient evidence that he intentionally discharged the firearm at either the man or at the neighbor's apartment and that he fired "into" the apartment. Our Court held that his argument was "irrelevant since the construction of the statute clearly shows that the intent element applies merely to the discharging, not to the eventual destination of the bullet." *Id.* at 685, 664 S.E.2d at 383. The *Canady* Court noted that:

> A person violates this statute if he intentionally, without legal excuse or justification, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons. Furthermore, our Supreme

> Court has stated that [d]ischarging a firearm into a vehicle does not require that the State prove any specific intent but only that the defendant perform[ed] the act which is forbidden by statute. It is a general intent crime.

Id. at 686, 664 S.E.2d at 383 (citation and quotation marks omitted). Accordingly, the Court held that evidence clearly supported the conclusion that the defendant intentionally discharged the gun, "although he may not have intended for the bullet to come to rest in the wall of the apartment building." *Id.* at 686, 664 S.E.2d at 384.

Here, as in *Canady*, there was sufficient evidence presented that defendant intentionally discharged a pistol as recounted by several witnesses. Based on the foregoing, defendant cannot establish that the challenged jury instruction was made in error, much less plain error.

C. Arrest Warrant 13 CRS 50173

[3] In his last argument, defendant contends that the trial court erred by admitting into evidence the arrest warrant in case number 13 CRS 50173. Defendant failed to object to the admission of this evidence at trial, so we review for plain error.

The arrest warrant in case number 13 CRS 50173 listed the offense of "discharging a weapon into an occupied dwelling" in which a magistrate attested to the fact that "there is probable cause to believe that . . . the defendant . . . unlawfully, willfully and feloniously did DISCHARGE A FIREARM TO WIT: A SILVER IN COLOR PISTOL INTO APARTMENT 1727 CLEMSON COURT, KANNAPOLIS, N.C. AT THE TIME THE APARTMENT WAS OCCUPPIED BY JOSEPH FEZZA."

Defendant argues that because the State is not allowed to enter into evidence indictments or pleadings against a defendant, the State should also not be allowed to enter into evidence arrest warrants. He maintains that the jury could interpret the magistrate's statement as conclusive evidence that defendant is guilty of the offense. Defendant asserts that admission of the arrest warrant amounted to a violation of N.C. Gen. Stat. § 15A-1221(b) (2013) which provides that "[a]t no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury."

Defendant relies on the holding in *State v. Jones*, 157 N.C. App. 472, 579 S.E.2d 408 (2003). In *Jones*, our Court held that the admission and publication of a misdemeanor citation (resisting a public officer and displaying a fictitious registration plate) was erroneous based on N.C. Gen. Stat. § 15A-1221(b). The *Jones* Court stated that "our Supreme Court's

interpretation of the statute [is] a means of protecting jurors from being influenced by 'the stilted language of indictments and other pleadings[.]' " *Id.* at 476, 579 S.E.2d at 411 (citation omitted).

We agree with defendant that admission of the arrest warrant in case number 13 CRS 50173 amounted to error. However, the circumstances of the case *sub judice* are readily distinguishable from those found in *Jones*. In *Jones*, there was only one witness for the State, the officer who issued the citation to the defendant, and his testimony "presented a very different account of what happened . . . than did defendant and his three witnesses. The jury's verdicts essentially turned on which account the jury believed." *Id.* at 478, 579 S.E.2d at 412. Here, there was testimony from more than one witness indicating that defendant intentionally discharged his pistol. Jennifer Garmon testified that defendant had a black pistol in his hand and fired it towards the Collins' apartment. Sharita Huntley testified that she saw defendant with a gun in his hand and that he shot it in the air towards the Collins' apartment. Furthermore, Daniel Long testified that he saw defendant waving a black gun in the air and thereafter heard a gunshot. Testimony from a firearms analyst confirmed that the bullet found in the wall of the apartment occupied by Michael Fezza was discharged from the black pistol entered into evidence. Accordingly, we hold that the trial court's error did not have a probable impact on the jury's finding that the defendant was guilty.

III. Conclusion

We hold that the indictment was sufficient to charge defendant with discharging a firearm into an occupied dwelling and that the trial court did not err in granting the State's request for a special instruction. Although we hold that it was error for the trial court to admit the arrest warrant in case number 13 CRS 50173 into evidence, it did not amount to plain error.

NO PLAIN ERROR.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
EMILE GEORGE FRYOU, DEFENDANT

No. COA14-1168

Filed 17 November 2015

1. Sexual Offenders—unlawfully on premises—previous conviction—element of victim's age 18 or below—factual question whether victim's was age 16 or below

In defendant's prosecution for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the trial court did not err by ruling that whether defendant was subject to prosecution based on a previous conviction for an offense involving a victim less than 16 years of age was a question of fact. Defendant's previous conviction only required the victim to be under 18 years of age and N.C.G.S. § 14-208(a)(2) required the previous offense to involve a victim under 16 years of age. The age of the victim in the previous conviction was a factual question to which defendant properly could stipulate.

2. Sexual Offenders—unlawfully on premises—"knowing" element—"nursery" sign on door—actual presence of children not required

In defendant's prosecution for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the trial court did not err by denying defendant's motion to dismiss based on his argument that the State had failed to produce substantial evidence of the "knowing" element of the crime. The church preschool was advertised throughout the community, and defendant entered a door with a "nursery" sign attached. The actual presence of children is not an element of the crime—the State only had to demonstrate that defendant was knowingly within 300 feet of the preschool.

3. Sexual Offenders—unlawfully on premises—challenge based on unconstitutional overbreadth—not based on First Amendment or other constitutional right

On appeal from defendant's conviction for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the Court of Appeals rejected defendant's argument that the statute was unconstitutionally overbroad on its face because it did not require proof of criminal intent and therefore criminalized a

substantial amount of constitutionally protected conduct. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), did not confer standing on defendant because his argument was not based on First Amendment rights. Defendant also did not make an overbreadth argument as to any other identifiable constitutional right.

4. Sexual Offenders—unlawfully on premises—challenge based on unconstitutional vagueness—statute not vague

On appeal from defendant's conviction for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the Court of Appeals rejected defendant's argument that the statute was unconstitutionally vague as applied to him. As applied to defendant, it was quite clear that North Carolina General Statute § 14-208.18(a)(2) barred sex offenders from being within 300 feet of a church that contained a preschool. Further, the statute addressed the purpose of the location rather than whether children were actually present at the particular time.

Appeal by defendant from judgment entered on or about 11 June 2014 by Judge Alan Z. Thornburg in Superior Court, Avery County. Heard in the Court of Appeals 8 April 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Mary Carla Babb, for the State.

Richard Croutharmel, for defendant-appellant.

STROUD, Judge.

Defendant, a registered sex offender, went to the Banner Elk Presbyterian Church to meet with the pastor, but because the church has a preschool on its premises, he was charged with violation of North Carolina General Statute § 14-208.18(a) for being a "[s]ex offender unlawfully on premises[.]" Defendant moved to dismiss the charges for several reasons, including as-applied and facial challenges to the constitutionality of North Carolina General Statute § 14-208.18. The trial court denied defendant's motion, he was convicted, and he appeals. Because defendant has not demonstrated error regarding his trial, lacks standing to bring a facial constitutional challenge, and the statute is not unconstitutionally vague as applied to him, we find no error.

I. Background

The State's evidence tended to show that on 12 March 2010, defendant registered as a sex offender with the Avery County Sheriff's Office. Upon registration defendant received an "offender acknowledgment packet" which contained information regarding the rules and responsibilities of the registered sex offender. Included in the packet was a document that stated that sex offenders "are prohibited from being within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on the premises that are not intended primarily for the use, care, or supervision of minors[.]"

On the morning of Tuesday, 13 November 2012, defendant went to the Banner Elk Presbyterian Church to meet with the pastor in the church's office to ask that the church participate in the "Angel Tree program to provide presents to children of inmates." The church's office hours were from 8:30am to 2:30pm, Monday through Thursday. The church operated a preschool from 9:00am to 1:00pm, Monday through Thursday, for children from ages two to five. The preschool children used rooms throughout the church building and also played outside. The church advertised the preschool with flyers throughout the community, on its website, and with signs around the church. The entrance to the church office was also the entrance to the nursery and the door through which defendant entered had a sign on it reading "nursery[.]"

Thereafter, the police contacted defendant, and he acknowledged that he was a registered sex offender, that he had visited the church office, and that "he knew he wasn't supposed to hang around . . . preschools." In 2013, defendant was indicted for being a sex offender unlawfully on premises pursuant to North Carolina General Statute § 14-208.18(a)(2). On 9 June 2014, defendant filed a motion to dismiss arguing "that the statute is unconstitutional as applied to . . . [him], and further that the statute itself is unconstitutional[,]" and his jury trial began.[1] Before his trial began, defendant made various oral arguments to the trial court addressing his contentions that the charges against him should be dismissed. The trial court denied defendant's oral motions but stated it would withhold its ruling on defendant's pre-trial written motion to dismiss challenging the constitutionality of the statute. The jury found defendant guilty, and the trial court entered judgment in

1. While the transcript notes defendant's trial began on 9 July 2014, the record indicates it actually began on 9 June 2014. Further confirming the June date is the fact that the jury verdict, judgment, and defendant's notice of appeal were filed or entered in June of 2014, so the trial could not have occurred in July of 2014.

accordance with the verdict. Thereafter, the trial court entered a written order denying defendant's motion to dismiss on constitutional grounds, on both facial and as-applied challenges. Defendant appealed.

II. Motion to Dismiss

Defendant raises two separate arguments as to why his motions to dismiss should have been allowed.

> This Court reviews the trial court's denial of a motion to dismiss de novo. Upon 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.

State v. Larkin, ___ N.C. App. ___, ___, 764 S.E.2d 681, 689-90 (2014) (citations and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 768 S.E.2d 841 (2015).

A. Age of Victim in Prior Offense

[1] Defendant first contends that "the trial court reversibly erred in ruling that whether Fryou was subject to prosecution under N.C. Gen. Stat. § 14-208(a)(2) based on having previously been convicted of an offense involving a victim less than 16 years of age was a question of fact for the jury." (Original in all caps.) The State indicted defendant pursuant to North Carolina General Statute § 14-208.18(a)(2) which provides:

> It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

> (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

N.C. Gen. Stat. § 14-208.18(a)(1)-(2) (2011). Subsection (c) of North Carolina General Statute § 14-208.18 as referenced in subsection (a) provides:

> Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:
>
> (1) Any offense in Article 7A of this Chapter.
>
> (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

N.C. Gen. Stat. § 14-208.18(c)(1)-(2) (2011).

The indictment stated that defendant had "been previously convicted of an offense where the victim of the offense was under the age of 16 years at the time of the offense." Before the trial court defendant argued that his prior federal conviction did not show that the victim was under 16 years old; essentially defendant was requesting dismissal to the alleged failure in the indictment. Thereafter, the trial court and both attorneys discussed whether determining the age of the victim in the prior conviction was a question of fact for the jury or a question of law for the trial judge. Ultimately, defendant stipulated that he was "required to register as a sex offender, and that the victim was under the age of 16." But a defendant may generally not stipulate to a question of law. *State v. Hanton*, 175 N.C. App. 250, 253, 623 S.E.2d 600, 603 (2006) ("Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate. This rule is more important in criminal cases, where the interests of the public are involved." (citation, quotation marks, and ellipses omitted)). Thus, defendant's argument on appeal is that the issue of the victim's age was a legal question and not a fact which could be established by stipulation or by the jury's determination.

The State contends that defendant did not preserve this issue for appeal both because he switched his stance on whether the question of

the victim's age was a factual or legal question and because of his stipulation. We disagree. Our review of the transcripts indicates that both parties debated how to characterize the issue of the victim's age throughout the proceedings. Defendant does not on appeal take a stand completely different than he did at trial. And although defendant did ultimately stipulate to the victim's age, he did so specifically under objection, only because the trial court had rejected his prior arguments. Defendant's strategic decision to stipulate, under objection, based on an unfavorable decision by the trial court, does not mean defendant did not preserve the issue for appellate review; it simply means defendant played the hand he was dealt after his argument to the trial court was unsuccessful.

As defendant was charged, North Carolina General Statute § 14-208.18(a)(2) required the State to show, *inter alia*, that defendant was (1) a person required to register under North Carolina General Statute Article 27A, Sex Offender Registration Programs; (2) where the offense that required registration involved a victim that was under 16 years old at the time of the offense; and (3) knowingly at one of the proscribed locations. *See* N.C. Gen. Stat. § 14-208.18. Defendant contends that our construction of North Carolina General Statute § 14-208.18(a)(2) should be guided by *State v. Phillips*, 203 N.C. App. 326, 691 S.E.2d 104, *disc. review denied*, 364 N.C. 439, 702 S.E.2d 794 (2010). In *Phillips*, this Court analyzed statutes regarding satellite-based monitoring ("SBM") to "determine whether the trial court could properly conclude that defendant's conviction of the offense of felonious child abuse by the commission of any sexual act under N.C.G.S. § 14–318.4(a2) is an aggravated offense as defined in N.C.G.S. § 14–208.6(1a)." *Id.* at 329, 691 S.E.2d at 107 (quotation marks omitted). This Court determined:

> N.C.G.S. § 14–318.4(a2) provides: Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class E felony. Consequently, the essential elements of felonious child abuse under subsection (a2) are (1) the defendant is a parent or legal guardian of (2) a child less than 16 years of age, (3) who commits or allows the commission of any sexual act upon that child. In comparison, the statutory definition of aggravated offense requires that the offender (1) engage in a sexual act involving vaginal, anal, or oral penetration (2) with a victim of any age through the use of force or the threat of serious violence or with a victim who is less than 12 years old.

Thus, as defendant asserts in his brief and as the State concedes, an offender's conviction of felonious child abuse under N.C.G.S. § 14–318.4(a2) may or may not be a conviction which results from the commission of a sexual act involving penetration, which is required for an offense to be considered an aggravated offense under N.C.G.S. § 14–208.6(1a). In other words, without a review of the underlying factual scenario giving rise to the conviction, which is prohibited under *Davison*, a trial court could not know whether an offender was convicted under N.C.G.S. § 14–318.4(a2) because he committed a sexual act involving penetration. In addition, while an aggravated offense is an offense in which the offender has engaged in a specific type of sexual act, an offender may be convicted of felonious child abuse by the commission of any sexual act as a result of either committing any sexual act upon a child less than 16 years of age, or as a result of allowing the commission of any sexual act upon such a child. Thus, by examining the elements of the offense alone, a trial court could not determine whether a person convicted of felonious child abuse by the commission of any sexual act necessarily engaged in a specific type of sexual act himself. Further, if an offense does not involve engaging in a sexual act through the use of force or threat of serious violence, the offense can only be found to be an aggravated offense if it involves engaging in sexual acts involving penetration with a victim who is less than 12 years old. However, felonious child abuse by the commission of any sexual act provides that the victim must be a child less than 16 years of age. *Since a child less than **16** years is not necessarily also less than **12** years old, without looking at the underlying facts, a trial court could not conclude that a person convicted of felonious child abuse by the commission of any sexual act committed that offense against a child less than 12 years old. Therefore, in light of our review of the plain language of the statutes at issue, we must conclude that the trial court erred when it determined that defendant's conviction offense of felonious child abuse by the commission of any sexual act under N.C.G.S. § 14–318.4(a2) is an aggravated offense as defined under N.C.G.S. § 14–208.6(1a) because, when considering the elements of the offense only and not the*

> *underlying factual scenario giving rise to this defendant's conviction, the elements of felonious child abuse by the commission of any sexual act do not fit within the statutory definition of aggravated offense.* Because we must conclude that defendant was not convicted of an aggravated offense in light of the rule in *Davison*, we must remand this matter to the trial court with instructions that it reverse its determination that defendant is required to enroll in a lifetime SBM program.

Id. at 330-31, 691 S.E.2d at 107-08 (emphasis added) (citations, quotation marks, ellipses, and brackets omitted). Thus, based upon *Phillips*, defendant contends that we may only consider the elements of the particular crime, and not the underlying facts, of his federal conviction for receiving child pornography and because the elements do not require that the victim be under 16, but rather under 18, the State has failed to demonstrate that defendant violated North Carolina General Statute § 14-208.18(a)(2) in that the victim was under 16 years old.

In contrast, in *State v. Arrington*, ___ N.C. App. ___, 741 S.E.2d 453 (2013), this Court distinguished the *Phillips*, elements-based approach in a case regarding child abduction:

> A defendant commits the offense of abduction of children when he without legal justification or defense, abducts or induces any minor child who is at least four years younger than the person to leave any person, agency, or institution lawfully entitled to the child's custody, placement, or care. Thus, the statutory definition of offense against a minor for purposes of SBM requires proof of a fact in addition to the bare fact of conviction—that the defendant is not the minor's parent.
>
> In the context of deciding whether a conviction was an aggravated offense for SBM purposes, we have held that the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction. *Davison* and the cases following it specifically addressed whether a particular conviction could constitute an aggravated offense. They did not address what the trial court may consider in determining whether a conviction qualifies as a reportable offense against a minor.

The plain language in the definition of aggravated offense requires that courts consider the elements of the conviction as it covers

> any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

The definition of offenses against a minor, by contrast, lists certain, particular offenses, and then adds the requirements that the victim be a minor and that the defendant not be a parent of the victim.

Further, in concluding that trial courts are restricted to considering the elements of the offense in determining whether a given conviction was an aggravated offense we noted a concern that defendants would be forced to re-litigate the underlying facts of their case even if they pleaded guilty to a lesser offense. This concern is absent in the context of defining offenses against a minor. Trial courts in this context do not need to inquire into whether defendant's conduct could have constituted a greater offense, despite a plea to the lesser. They only need decide whether the victim was a minor and whether defendant was a parent of the minor child, facts that will normally be readily ascertainable.

Because the statute explicitly requires that the State show that defendant was not the parent of the minor victim in addition to the fact that defendant was convicted of one of the listed offenses, the statute effectively mandates that the trial court must look beyond the offense of conviction. Therefore, we hold that in deciding whether a conviction counts as a reportable conviction under the offense against a minor provision, the trial court is not restricted to simply considering the elements of the offense for which the defendant was convicted to the extent that the trial court may make a determination as to whether or not the defendant was a parent of the abducted child.

Id. at ___, 741 S.E.2d at 455-56 (emphasis added) (citations and quotation marks omitted). Thus, in *Arrington*, this Court clarified that the trial court could look beyond the bare elements and consider the underlying facts because not only did the statute at issue require defendant have the prior conviction, but it also required a further factual determination, separate and apart from that prior conviction. *See id.* We conclude that the case before us is more similar to *Arrington*. *See id.*

In addition, to the extent that there may be any conflict between *Phillips* and *Arrington*, there is a more fundamental reason that we are guided by *Arrington*. *Phillips* involved SBM which is "a civil regulatory scheme[,]" and thus of limited use in determining a criminal matter. *State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) ("SBM is a civil regulatory scheme[.]"), *aff'd per curiam*, 364 N.C. 422, 700 S.E.2d 222 (2010); *see Phillips*, 203 N.C. App. 326, 691 S.E.2d 104. One of the primary reasons that the trial court must rely only on the crime for which the defendant was convicted in considering imposition of SBM is that the court is often conducting a separate hearing regarding this civil regulatory matter, perhaps years after the initial criminal conviction. Allowing evidence beyond the elements of the crime for which the defendant was actually convicted would force him "to re-litigate the underlying facts of [his] case even if [he] pleaded guilty to a lesser offense." *Arrington*, ___ at ___, 741 S.E.2d at 455-56. While SBM cases may provide some guidance for interpreting statutes addressing sexual offenses, this case is a criminal prosecution of a crime defined by a particular statute and does not concern the imposition of a civil regulatory remedy. *See generally Wagoner*, 199 N.C. App. at 332, 683 S.E.2d at 400.

Just as in *Arrington*, here the statute at issue defines a criminal offense and the definition requires not only a separate prior offense but an additional fact coupled with that prior offense. *Compare Arrington* at ___, 741 S.E.2d at 456. In *Arrington*, "the statute explicitly require[d] that the State show that defendant was not the parent of the minor victim *in addition* to the fact that defendant was convicted of one of the listed offenses" and from that this Court concluded that "the statute effectively mandates that the trial court must look beyond the offense of conviction." *Id.* (emphasis added). Similarly, here, the statute requires the State to show that defendant had been convicted of an offense requiring registration and that the victim of that offense was under 16 years old. *See* N.C. Gen. Stat. § 14-208.18(a).

Using a plain language analysis, *see State v. Largent*, 197 N.C. App. 614, 618, 677 S.E.2d 514, 517 (2009) ("Where 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, and the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein.") (citation and quotation marks omitted), North Carolina General Statute § 14-208.18(a)(2) does *not* require that the offense for which defendant registered have an element requiring the victim to be under 16 years old, but only that the victim actually be under 16 years old. *See id.* In other words, there was no dispute here that defendant had been convicted of a registrable offense, but since that offense did not include as an element a requirement that the victim was under the age of 16, the State must also prove that the victim of that crime was *actually* younger than 16 at the time of the offense.[2] *See id.* Accordingly, the age of the victim was a factual question, and defendant could properly stipulate to it. The trial court did not err in denying defendant's request for dismissal regarding this element, so this argument is overruled.

B. Knowing Element

[2] Defendant also contends that "the trial court reversibly erred in denying Fryou's motion to dismiss at the close of evidence because the State failed to produce substantial evidence that Fryou had knowledge of the existence of a preschool on the premises of the Banner Elk Presbyterian Church." (Original in all caps.) The State argues again that defendant has not preserved this issue for appeal, but we have reviewed the transcript, and we find defendant's attorney's argument during the motion to dismiss regarding defendant's "intent to go near a place where he knows he can't go" to be sufficient for review of the knowing element.

Again, when considering the evidence the trial court was to "consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Larkin*, ___ N.C. App. at ___, 764 S.E.2d at 690. The State's evidence tended to show that the church advertised the preschool with flyers throughout the community, on its website, and with signs around the church. The entrance to the church office, where defendant met with the pastor, was also the entrance to the nursery and had a sign explicitly stating the word "nursery[;]" thus, even if defendant had not seen the advertisements of the preschool, he walked through the door which had a sign indicating the presence of the nursery and the jury could infer from this

2. Of course, if one of the elements of the underlying crime is that the victim is younger than 16, proof of the conviction itself would suffice.

that he was thus informed of the nursery, but instead of leaving, entered the church anyway.

Even so, defendant contends that the evidence just noted does not demonstrate that he should have known children were actually on the premises at the same time that he was. Yet the actual presence of children on the premises is not an element of the crime, and the State needed only to demonstrate that defendant was "knowingly" "[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors" whether the minors were or were not actually present at the time. *See* N.C. Gen. Stat. § 14-208.18(a)(2). We conclude there was "substantial evidence" that defendant knew a child care facility was being operated on the premises. *Larkin*, ___ N.C. App. at ___, 764 S.E.2d at 689. This argument is overruled.

II. Overbreadth

[3] Defendant contends that "Section 14-208.18(A)(2) of the North Carolina General Statutes is unconstitutionally overbroad *on its face* because it fails to require proof of criminal intent and therefore criminalizes a substantial amount of constitutionally protected conduct." (Emphasis added). (Original in all caps).

> In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground. When examining the constitutional propriety of legislation, we presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality.
>
> A law is impermissibly overbroad if it deters a substantial amount of constitutionally protected conduct while purporting to criminalize unprotected activities. Legislative enactments that encompass a substantial amount of constitutionally protected activity will be invalidated even if the statute has a legitimate application.

State v. Mello, 200 N.C. App. 561, 564, 684 S.E.2d 477, 479-80 (2009) (citations, quotation marks, brackets, and heading omitted), *aff'd per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010).

Defendant plainly presents his argument as a facial rather than an as-applied challenge arguing that "[w]hen raising an overbreadth

challenge, the challenger has the right to argue the unconstitutionality of the law as to the rights of others, not just as the ordinance is applied to him. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 298, 37 L. Ed. 2d 830, 840 (1973)."

Broadrick states that

> the Court has altered its traditional rules of standing to permit—in the First Amendment area—attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick v. Oklahoma, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 840 (1973) (citation and quotation marks omitted); *see County Court of Ulster v. Allen*, 442 U.S. 140, 155, 60 L. Ed. 2d 777, 790 (1979) ("[I]f there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment.") (citation omitted)). But defendant's contentions regarding North Carolina General Statute § 14-208.18(a) do not relate to speech or expression under the First Amendment in any way. Defendant did not argue either before the trial court or on appeal in his original brief that he was going to the church to worship or assert any other right protected by the First Amendment; in fact, defendant's brief does not identify a specific constitutional amendment or provision, state or federal, upon which his argument as to unconstitutional overbreadth could be based. Since defendant's argument is not based upon First Amendment rights, *Broadrick* cannot confer standing on defendant. *See Broadrick*, 413 U.S. at 612, 37 L. Ed. 2d at 840. And since defendant does not make an overbreadth argument as to any other identifiable constitutional right, even if it may be theoretically possible to do so, his argument fails.

III. Vagueness

[4] Defendant's remaining constitutional argument is that the statute is unconstitutionally vague as applied to him. He argues that

> Section 14-208.18(a)(2) of the North Carolina General Statutes is unconstitutionally vague as applied to Fryou because the statute contemplates two distinct physical locations, one on the premises of the other and both operational at the same times, and in Fryou's case there was only one distinct physical location, a church, that occasionally operated a preschool on its premises.

(Original in all caps.)

> The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act. In passing upon the constitutionality of a statute there is a presumption that it is constitutional, and it must be so held by the courts, unless it is in conflict with some constitutional provision.

State v. Daniels, 224 N.C. App. 608, 621, 741 S.E.2d 354, 363 (2012) (citations, quotation marks, and brackets omitted), *disc. review denied and appeal dismissed*, 366 N.C. 565, 738 S.E.2d 389 (2013).

> [A] statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Id. at 622, 741 S.E.2d at 364 (citations and quotation marks omitted).

Again, North Carolina General Statute § 14-208.18(a) provides in pertinent part:

> It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

> (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

N.C. Gen. Stat. § 14-208.18(a).

Defendant first essentially contends that North Carolina General Statute § 14-208.18(a)(2) is vague in situations where premises serve a dual purpose by arguing "the statute contemplates that one location be dedicated to the use, care, or supervision of minors and that the other location not be so dedicated such that it is lawful for a sex offender to be at the location that is not dedicated to the use, care, or supervision of minors." Yet North Carolina General Statute § 14-208.18(a)(2) directly addresses defendant's argument and plainly prohibits him from being "[w]ithin 300 feet" of any premises, no matter its purpose, if within that premises there is "any location intended primarily for the use, care, or supervision of minors[.]" N.C. Gen. Stat. § 14-208.18(a)(2). While North Carolina General Statute § 14-208(a)(1) plainly prohibits defendant from being within 300 feet of certain locations, like preschools, (a)(2), takes the prohibition a step further, into defendant's situation, and also prohibits defendant from being at premises, like churches, if those premises include areas primarily used for "the use, care, or supervision of minors[.]" *Id.*

Defendant argues that North Carolina General Statute §14-208.18(a)(2) would bar sex offenders from many types of businesses and locations. This is correct, since this subsection specifically includes "malls, shopping centers, or other property open to the general public." N.C. Gen. Stat. § 14-208.18(a). Indeed, it may be unlikely that a sex offender could drive a car through a town in North Carolina and not come within 300 feet of some sort of store, restaurant, park, hospital, or school which would be included under North Carolina General Statute §14-208.18(a)(2), since so many of these locations have within them specific areas "primarily for the use, care, or supervision of minors[.]" *Id.* Other subsections of North Carolina General Statute § 14-208.18 set forth some specific exemptions which, under certain limited conditions, permit a registered sex offender to be present on premises that would otherwise be off limits, including school property to address the needs of his own child, a voting place, or a facility providing medical care. *See* N.C. Gen.

Stat. § 14-208.18. But defendant's vagueness argument is more properly a challenge to the *facial* constitutionality of the statute and is actually an overbreadth argument, but as noted above, defendant failed to argue any violation of First Amendment rights in his original brief, and thus has no grounds for an overbreadth challenge. *See Broadrick*, 413 U.S. at 612, 37 L. Ed. 2d at 840. Defendant's argument here is based on vagueness, and North Carolina General Statute § 14-208.18(a)(2) may be many things, but it is not vague.[3] *See* N.C. Gen. Stat. § 14-208.18(a)(2). As applied to defendant, it is quite clear that North Carolina General Statute § 14-208.18(a)(2) bars sex offenders from being within 300 feet of a church which contains a preschool. *See id.*

Defendant further stresses the dual purposes of the church premises and also argues that "[a] person of ordinary intelligence would have inferred that a sign at a church that simply read, 'Nursery,' meant there was a nursery at the church for parents to drop their children at while they worshipped in the sanctuary on SUNDAYS." But as we noted, nothing in North Carolina General Statute § 14-208.18(a)(2) states that the location "primarily for the use, care, or supervision of minors" must be *in operation* for defendant to be prohibited from being within 300 feet. *See* N.C. Gen. Stat. § 14-208.18(a)(2). In fact, North Carolina General Statute § 14-208.18(a)(2) avoids the vagueness that defendant contemplates by addressing the purpose of the location rather than if the location is open or not or whether there are actually children present at a particular time. In other words, the question is what a "person of ordinary intelligence," *Daniels*, 224 N.C. App. at 622, 741 S.E.2d at 364, would believe the purpose of the location to be; we believe that a reasonable person would say a preschool or nursery's[4] primary purpose is caring for children, even if the preschool happened to be closed to the public at the time. Under the statute as written, a sex offender need not wonder if the preschool is open or not, or if children are present, or if it is open but being used to host some other type of event like a staff holiday party; thus, in

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3. While the language in North Carolina General Statute § 14-208.18(a)(2) may raise other constitutional issues, defendant has only raised vagueness as an as-applied challenge, and thus, it is all we address.

4. While the focus of the State's case was on the preschool the church operated during the week, often in the nursery area, there was actually also a church nursery used in the more traditional fashion, to care for children on Sunday morning while their parents attend services. The terms "preschool" and "nursery" are used interchangeably in the evidence to describe the location, but there is no dispute regarding the existence of a child care facility as described throughout this opinion, regardless of the exact terminology used. Both "preschool" and "nursery" clearly denote locations which provide care and supervision for young children.

this situation, no matter the time of day or day of the week, the location was a preschool or nursery and obviously has a primary purpose of "the use, care or supervision of minors" so defendant violated the statute. *See* N.C. Gen. Stat. § 14-208.18(a)(2). The trial court therefore correctly ruled that North Carolina General Statute § 14-208.18(a)(2) is not unconstitutionally vague, and this argument is overruled.

V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
JOSHUA ALEXANDER HUTTON

No. COA15-276

Filed 17 November 2015

Appeal and Error—impaired driving—suppression of blood alcohol results—no final order from district court

Defendant could not seek appellate review of a ruling on his motion to suppress in an impaired driving prosecution where the district court entered a preliminary determination suppressing blood alcohol results, the State appealed to superior court, where the preliminary determination was reversed and remanded, and nothing in the record indicated that the district court entered a final order denying the motion to suppress. Furthermore, defendant's motion for certiorari was denied.

Appeal by defendant from Judgment entered 7 July 2014 by Judge Joseph N. Crosswhite in Davidson County Superior Court. Heard in the Court of Appeals 21 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

Paul F. Herzog for defendant.

ELMORE, Judge.

Joshua Hutton (defendant) appeals from his no contest plea to impaired driving. The State filed a motion to dismiss the appeal and defendant filed a petition for writ of *certiorari*. After careful consideration, we deny defendant's petition for writ of *certiorari* and we grant the State's motion to dismiss the appeal.

I. Background

Defendant was charged with impaired driving under N.C. Gen. Stat. § 20-138.1 on 11 June 2011. Defendant filed a motion to suppress the results of the blood alcohol content reading in Davidson County District Court on 10 May 2012. The Honorable Jimmy L. Myers entered an order (preliminary determination) on 1 March 2013 concluding that the results of the test would be suppressed. The State gave oral notice of appeal to superior court that same day and filed a written notice of appeal on 7 March 2013 to Davidson County Superior Court. The notice of appeal stated that it was based on the preliminary indication suppressing the intoxilyzer/blood results.

The State's appeal was heard on 16 May 2013 in Davidson County Superior Court. The court heard testimony from Trooper James Jackson, Van Williamson, and defendant. The Honorable Kevin M. Bridges entered an order on 30 July 2013 reversing the preliminary determination and remanding the matter to the district court for further proceedings. Nothing in the record indicates that the district court, on remand, entered a final order denying the motion to suppress. Defendant admits in his petition for writ of *certiorari* that neither he nor the State sought imposition of a final order upon remand to district court.

Defendant subsequently entered a no contest plea to the impaired driving charge on 3 January 2014 in Davidson County District Court, and the Honorable Mary F. Covington sentenced defendant to a term of sixty days' imprisonment. The order of commitment stated, "defendant gives notice of appeal from the judgment of the District Court to the Superior Court."

On appeal, defendant again entered a no contest plea to the impaired driving charge on 7 July 2014 in Davidson County Superior Court, and the Honorable Joseph N. Crosswhite suspended defendant's sentence and placed defendant on unsupervised probation for twelve months. The order of commitment stated, "defendant gives notice of appeal from the judgment of the Superior Court to the appellate division." The State

filed a motion to dismiss the appeal with this Court on 29 June 2015. Defendant filed a petition for writ of *certiorari* on 13 July 2015.

II. Analysis

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002) (citing *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 657 (1977)) (internal citations omitted).

> A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2)(1)–(3) (2013). "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2013). For the reasons discussed below, because the district court did not enter an order "finally denying" the motion to suppress, we are unable to review the issues presented in defendant's appeal.

A. The State's Motion to Dismiss

In the State's motion to dismiss, it argues that defendant has no right to appeal as defendant has not raised an appealable issue allowed by statute for this Court to review. The State contends that N.C. Gen. Stat. § 15A-1444 and N.C. Gen. Stat. § 15A-979(b), cited by defendant as authority for his appeal, do not provide a right of appeal in this case. Defendant argues that we should deny the State's motion to dismiss because he

"took the necessary steps to preserve his right to appellate review of the order when he entered his no contest plea in superior court." Defendant contends that "[t]his case involves a straightforward application of this Court's statutory interpretation in *State v. Palmer*, 197 N.C. App. 201, 204–06, 676 S.E.2d 559, 561–62 (2009)[.]"

The procedures for implied-consent offenses are provided for in Chapter 20 of our General Statutes. Specifically, section 20-38.6(f) provides,

> The judge shall set forth in writing the findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. If the judge preliminarily indicates the motion should be granted, *the judge shall not enter a final judgment on the motion until after the State has appealed to superior court* or has indicated it does not intend to appeal.

N.C. Gen. Stat. § 20-38.6(f) (2013) (emphasis added).

Section 20-38.7 states,

> (a) The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. If there is a dispute about the findings of fact, the superior court shall not be bound by the findings of the district court but shall determine the matter de novo. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.
>
> (b) The defendant may not appeal a denial of a pretrial motion to suppress or to dismiss but may appeal upon conviction as provided by law.

N.C. Gen. Stat. § 20-38.7 (2013).

In *State v. Palmer*, the defendant was charged with willfully operating a motor vehicle while subject to an impairing substance, and he filed a motion to suppress "[a]ny evidence . . . obtained pursuant to the interaction[,]" which the district court granted in a preliminary order. 197 N.C. App. at 202, 676 S.E.2d at 560. The State gave notice of appeal in open court and filed a notice of appeal to superior court, which stated, "[t]he State gave oral notice of appeal in open court after the hearing," and "further gives written notice of appeal [to the superior court] through this document." *Id.* The defendant challenged the sufficiency of the State's appeal at the superior court hearing, contending that the

State did not comply with the statutory requirements authorizing an appeal. *Id.* at 202–03, 676 S.E.2d at 560. The superior court dismissed the State's appeal "because [t]he State ha[d] failed to properly file a motion appealing the indication of the District Court to suppress the evidence in this case as required by [section] 15A-951, [section] 20-38.7 and [section] 15A-1432." *Id.* at 203, 676 S.E.2d at 560. The State attempted to appeal to this Court from the superior court's order. *Id.* at 203, 676 S.E.2d at 561.

We began our analysis by reviewing *State v. Fowler*, 197 N.C. App. 1, 676 S.E.2d 523 (2009), where

> this Court determined that, after the superior court considers an appeal by the State pursuant to N.C.G.S. § 20-38.7(a), "the superior court must then enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant's pretrial motion" made in accordance with N.C.G.S. § 20-38.6(a), because "the plain language of N.C.G.S. § 20-38.6(f) indicates that the General Assembly intended the *district* court should enter the final judgment on [such] a . . . pretrial motion."

Palmer, 197 N.C. App. at 203, 676 S.E.2d at 561 (citing *Fowler*, 197 N.C. App. at 11–12, 676 S.E.2d at 535). We noted that the *Fowler* Court "further concluded that the State [did] not have a present statutory right of appeal to the Appellate Division from a superior court's interlocutory order which may have the same 'effect' of a final order but requires further action for finality." *Id.* (citing *Fowler*, 197 N.C. App. at 6, 676 S.E.2d at 531) (internal quotation marks omitted). The *Palmer* Court, relying on the above authority, concluded that "the State has no statutory right of appeal from a superior court's interlocutory order remanding a matter to a district court for entry of a final order granting a defendant's pretrial motion to suppress[.]" *Id.* at 204, 676 S.E.2d at 561.

In this case, the State argues, and we agree, that if the superior court's ruling is not a final order for purposes of the State's appeal, it is likewise not a final order for purposes of defendant's appeal.[1] Because the district court did not enter a final judgment pursuant to section 20-38.6(f) denying the motion to suppress, and based on this Court's decision in *State v. Palmer*, defendant cannot seek review of the ruling

1. *See also State v. Osterhoudt*, 222 N.C. App. 620, 624, 731 S.E.2d 454, 457 (2012) (noting "that the State is correct in its concession that it has no statutory right of appeal from a superior court order entered pursuant to N.C. Gen. Stat. § 20-38.7"); *State v. Rackley*, 200 N.C. App. 433, 434, 684 S.E.2d 475, 476 (2009) (dismissing the State's appeal from the superior court's order pursuant to N.C. Gen. Stat. § 20-38.7(a) as interlocutory).

on his motion to suppress. See N.C. Gen. Stat. § 15A-979(b) (2013) ("An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.").

B. Defendant's Petition for Writ of *Certiorari*

Defendant alternatively requests that we review the superior court's 30 July 2013 Order, which reversed the district court's 1 March 2013 Order, because all parties intended that defendant obtain full appellate review of the 30 July 2013 Order. "Where a defendant does not have an appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari." *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (citing N.C. Gen. Stat. § 15A-1444(e)). Rule 21 of the North Carolina Rules of Appellate Procedure authorizes this Court to issue a writ of *certiorari* in the following situations: (1) the right to prosecute an appeal has been lost by failure to take timely action; (2) when no right of appeal from an interlocutory order exists; or (3) to review a trial court's ruling on a motion for appropriate relief. N.C.R. App. P. 21(a)(1) (2009).

Here, defendant asks that we vacate his no contest plea, set aside the judgment, and remand the matter to superior court so that it may re-review the district court's preliminary determination on his motion to suppress. Although this Court has authority to grant *certiorari*, we decline to do so in this case.

III. Conclusion

In sum, we cannot review by right and we decline to review by *certiorari* the trial court's order. Therefore, we grant the State's motion to dismiss.

DISMISSED.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
DUSTIN JAMAL WARREN

No. COA15-499

Filed 17 November 2015

1. Constitutional Law—effective assistance of counsel—motion for continuance—denied

A defendant in a methamphetamine prosecution received effective assistance of counsel when his motion for a continuance just before trial began was denied. The record shows defendant had sufficient time to investigate, prepare and present his defense.

2. Constitutional Law—ineffective assistance of counsel—cold record—insufficient to rule

A methamphetamine defendant's claim for ineffective assistance of counsel was dismissed without prejudice where his trial counsel failed to request that the trial court bring a witness from the jail to make an offer of proof. The cold record was insufficient to rule on the claim.

3. Constitutional Law—effective assistance of counsel—witness not requested

A methamphetamine defendant did received effective assistance of counsel when his trial counsel failed to request the trial court bring a witness from the jail to make an offer of proof of his testimony. The cold record on appeal was insufficient to rule on the claim and it was dismissed without prejudice to defendant's right to re-assert it.

4. Constitutional Law—effective assistance of counsel—failure to call two witnesses—trial strategy or deficient performance

A methamphetamine defendant was not deprived of effective assistance of counsel failed to call two witnesses. Contrary to defendant's assertion on appeal, trial counsel applied for Writs of Habeas Corpus ad Testificandum. The record shows defense counsel did in fact apply for such writs, which were issued by the trial court, and delivered to the Sheriff for service. The Court of Appeals could not determine whether defense counsel's failure to call the witnesses was trial strategy or deficient performance, or whether any deficiency was so serious as to deprive the defendant of a fair trial. The

claim was dismissed without prejudice to defendant's right to reassert it during a subsequent MAR proceeding.

5. Appeal and Error—motion to continue—no ruling obtained at trial—appeal dismissed

A methamphetamine defendant's argument on appeal concerning the denial of a motion to continue right before he testified was dismissed where defendant did not obtain a ruling at trial on the issue.

6. Sentencing—conspiracy to manufacture meth—sentencing level—sentenced to same class as manufacturer

The trial court did not err in sentencing defendant as a Class C felon upon his conviction for conspiracy to manufacture methamphetamine in violation of N.C.G.S. § 90-95(b)(1a). Although defendant contended that he should have been sentenced for conspiracy to a felony one class lower than that committed pursuant to N.C.G.S. § 14-2.4(a) (2013), it is expressly stated in N.C.G.S. § 90-98 that a defendant convicted of conspiracy to manufacture methamphetamine is to be sentenced to the same class of felony as a defendant convicted of the manufacture of methamphetamine.

Appeal by defendant from judgment entered 10 September 2014 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 22 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

James R. Parish, for defendant-appellant.

TYSON, Judge.

Dustin Jamal Warren ("Defendant") appeals from a jury's verdict finding him guilty of possessing precursor chemicals with the intent to manufacture methamphetamine, manufacturing methamphetamine, and conspiracy to manufacture methamphetamine. We find no error in part, and dismiss Defendant's remaining arguments without prejudice to pursue them through a motion for appropriate relief.

I. Background

Shortly before 12:00 p.m. on 29 January 2014, Defendant drove his gold Buick to the Seashore Motel in Atlantic Beach, North Carolina.

Accompanying Defendant was Heather Kennon ("Kennon"), an acquaintance Defendant knew through his brother.

Defendant pulled up to the motel office, Kennon alighted the car, and went into the office to register for a room. Scott Way ("Way"), the manager of the Seashore Motel, watched as Kennon alighted from the front passenger seat. Kennon filled out a registration card and paid for a room for the night. On the registration card, Kennon listed her name and the license plate of Defendant's gold Buick. Way accepted the registration and payment and gave her a key to room 9. After checking in, Way testified Kennon and Defendant stayed in the car for a "little while," and then proceeded into the room.

Approximately two hours after checking in, Kennon returned to the motel office and asked for an extra space heater. Snow was on the ground that day, and it was very cold outside. Carla Thomas ("Carla"), an assistant manager at the Seashore Motel, explained to Kennon the motel is old and another space heater would likely blow the circuit breaker.

Way brought extra blankets to room 9 and offered them in lieu of a second space heater. Way testified a man opened the door roughly two or three inches and "announced that they were in, you know, in – not decent," and did not want the extra blankets. Way testified he heard a male voice, and did not observe any males enter or exit room 9 except for Defendant.

The next morning, Way and Carla began the process of checking out guests and cleaning rooms previously rented. Around 9:00 or 9:30 a.m., Carla knocked on the door of room 9 to ascertain whether Kennon and Defendant needed anything or would like to register for another night.

After no answer, Carla announced her identity and that she was about to enter the room. Carla unlocked the door and entered the room. She noticed a black bag which contained, *inter alia*, a mask and a glue gun. Carla also noticed a pickle jar turned upside-down with a dried white reside at the bottom. After viewing the contents of room 9, Carla informed Way of her findings. Together, they determined the police needed to be summoned. Way called 911.

A. Kennon's Testimony

Kennon testified that on 28 January 2014, she met Defendant at the DoubleTree Hotel in Atlantic Beach, North Carolina. Kennon and Defendant shared a room at the hotel, where they injected and inhaled methamphetamine, respectively. Defendant had already obtained the materials to make methamphetamine, with the exception of cold packs.

Kennon and Defendant stopped by Cassie Flowers' ("Flowers") residence to obtain cold packs.

On 29 January 2014, Kennon accompanied Defendant to the Seashore Motel. After registering and paying for the room, Defendant parked the gold Buick in front of room 9. Kennon testified Defendant brought a black suitcase into the room, which contained the precursors to, and various supplies necessary to manufacture, methamphetamine. Defendant began removing the precursors and supplies from the suitcase and arranging them in preparation to make methamphetamine.

While Defendant prepared the supplies, Kennon injected herself with methamphetamine she had received from Defendant the previous day. Kennon attempted to assist Defendant in making methamphetamine. Defendant became dissatisfied with Kennon's assistance and manufactured the methamphetamine alone, as Kennon looked on. Kennon testified the manufacturing process yielded approximately 4.5 grams of methamphetamine.

After Defendant finished, he left the supplies in room 9 at the Seashore Motel and they traveled to Anique Pittman's ("Pittman") residence. Pittman was Defendant's girlfriend. Kennon testified she, Defendant, Pittman, and Mark Thomas ("Thomas") drank beers, ingested methamphetamine, and spent the night. Kennon testified Defendant had the key to room 9 and intended to return to the Seashore Motel to retrieve the black suitcase and supplies prior to check out.

The next morning, Defendant left Kennon at Pittman's house to retrieve the materials left in room 9. Kennon testified while Defendant was gone, Thomas texted Pittman's phone "saying the law got [Defendant]."

B. Law Enforcement Investigation

In the midmorning hours of 30 January 2014, Atlantic Beach Police Lieutenant Brian Prior ("Lieutenant Prior") received a call regarding a potentially hazardous chemicals and HAZMAT situation at the Seashore Motel. Upon arrival, Lieutenant Prior made contact with Carla, who told him about the items she had discovered inside room 9.

Lieutenant Prior entered the room, and observed: (1) a 7-up two liter bottle with an unknown "red slushy residue" at the bottom; (2) plastic tubing; (3) a soda cap that had been "hollowed out" with a tube placed though the cap and secured with glue; (4) a funnel; (5) a face mask; (6) a glass jar with an unknown white powdery substance at the bottom; (7) Coleman fuel; (8) cardboard containers with salt in them; and (9) a used syringe located in the trashcan. Lieutenant Prior determined

these items were consistent with items in a methamphetamine lab, based on his training and experience. Lieutenant Prior secured the room and obtained a search warrant. After the search warrant was issued, room 9 was processed by North Carolina State Bureau of Investigation ("SBI") agents.

SBI Special Agent Kelly Ferrell ("Agent Farrell") was in charge of responding to clandestine laboratories found in the eastern portion of the state as a "Site Safety Officer." Agent Farrell was called to room 9 of the Seashore Motel to process a suspected methamphetamine laboratory on 30 January 2014. Agent Farrell documented the items located in room 9.

Agent Farrell analyzed the red slushy residue found in the bottom of the 7-up bottle, which tested positive for hydrochloric acid, a precursor chemical for methamphetamine. Agent Farrell also observed a bottle of Floweasy drain cleaner, which contains sulfuric acid, and a Walgreens cold pack, which contains ammonium nitrate. Agent Farrell testified both sulfuric acid and ammonium nitrate are precursor chemicals for methamphetamine. Agent Farrell also observed various other trappings of a methamphetamine laboratory in room 9, including: (1) masks; (2) burnt aluminum foil; (3) a hot glue gun; (4) coffee filters; (5) green rubber gloves; (6) a bottle of hydrogen peroxide; and (7) a two pack of Energizer brand batteries of advanced lithium.

Agent Farrell testified the materials found in room 9 were "typical of what [is] see[n]" at a methamphetamine lab using the "one-pot cook" method. Agent Farrell testified: (1) it took her "less than a minute" to determine the materials found in room 9 were a clandestine methamphetamine laboratory; and (2) the precursor chemicals found in room 9 were in fact used to produce methamphetamine.

Atlantic Beach Police Officer David Ennis ("Officer Ennis") arrived at the Seashore Motel and assisted Lieutenant Prior. Officer Ennis briefly looked inside room 9 and sealed off the crime scene to ensure no one entered or exited except those authorized to do so. Officer Ennis reviewed the registration card Kennon had filled out at the time of check in. Officer Ennis ran the vehicle license plate number Kennon listed on the registration card, and found the plate was issued to a Buick vehicle registered to Defendant.

While Officer Ennis remained on the scene, he noticed a gold Buick enter the Seashore Motel parking lot. Officer Ennis made contact with Defendant, the driver of the car, and asked him why he was at the motel. Defendant replied he was "just driving around."

While talking to Defendant, Officer Ennis noticed two blue pills located in "the grip of the driver's side door" handle of Defendant's vehicle. Defendant admitted the pills were Adderall, a controlled substance. Officer Ennis instructed Defendant to exit his vehicle, handcuffed him, and placed him under arrest for possession of a controlled substance. Thomas was inside the car at the time of Defendant's arrest and was also arrested on unrelated charges.

Officer Ennis performed a pat down of Defendant and a key fell "from the lower half of his body." Officer Ennis picked up and examined the key, issued to room 9 at the Seashore Motel. Defendant was transported to the Carteret County Detention Center for processing.

C. Defendant's Indictment and Pre-Trial Motions

Defendant was indicted with (1) possession and distribution of a methamphetamine precursor; (2) manufacturing methamphetamine; and (3) conspiracy to manufacture methamphetamine on 24 February 2014. Defendant retained counsel approximately twenty-seven days after his arrest. Defendant was represented by attorney Rodney Fulcher ("Fulcher"). At some point prior to 3 September 2014, Defendant, though counsel, made a motion to continue his case, which was granted.

On 3 September 2014, Fulcher moved to withdraw as counsel. In support of his motion, Fulcher stated "[a]s we've kind of gone along with it, I don't think [Defendant] and I see eye-to-eye on everything. I don't think I can zealously represent him at a trial based on the evidence, the conversations we've had." Fulcher also mentioned Defendant was unable to "continue finish hiring" him.

Defendant made a statement to the court at the motion hearing. Defendant stated Fulcher had not talked to "none of [his] witnesses" and had not obtained "none of the evidence." Defendant stated he felt as if he was "being railroaded," and "ask[ed] for [Fulcher] to withdraw from [the] case, and we just proceed toward trial." Defendant also stated he would need "enough time to prepare for trial, and a lawyer who's going to do the job I asked him to do." After hearing from Fulcher, Defendant, and the State, the trial court denied both the motion to withdraw and motion to continue.

That same day, Defendant, through counsel, made an "Application and Writ of Habeas Corpus ad Testificandum" to secure the testimony of two defense witnesses, Flowers and Thomas, who were in prison in North Carolina. On 4 September 2014, Judge Benjamin Alford issued the

writ and ordered the Carteret County Sheriff to serve the writ and make Flowers and Thomas available for testimony at trial.

Defendant's case was called for trial on 8 September 2014. Defendant made another motion to continue. In support of his motion, Defendant stated defense witnesses were subpoenaed on 3 September 2014, and many of the subpoenas had not yet been served. Defendant argued Flowers and Thomas were material witnesses, and Defendant would be prejudiced if they were not available to testify. The State replied "the witnesses, some of them, are in custody, and we'll get them here." The trial court denied Defendant's motion to continue. Defendant then made a motion to suppress the evidence found in room 9 as illegally obtained. The trial court denied Defendant's motion to suppress.

D. Defendant's Trial and Sentencing

Defendant's case proceeded to trial on 8 September 2014. At the close of State's evidence, on 9 September 2014, Defendant moved to dismiss the three charges, which was denied. The court asked if Defendant would present any witnesses or evidence, and Defendant indicated he would. Regarding the testimony of Flowers and Thomas, Defendant's counsel stated "I do not know if Mark Thomas had been writted back or Cassie Flowers either. But I plan to call Lisa -- Richard Willis, and Anique Pittman. All the other ones I am certain are here to testify."

Defendant then called three witnesses on his behalf: Lisa Turner, Richard Willis, and Anique Pittman. Before the closing of Defendant's evidence, the following exchange occurred between the Court and Defendant's counsel:

> THE COURT: . . . Anything from the defendant?
>
> [Defendant's Counsel]: Yes, Your Honor. We would bring a couple questions about witnesses.
>
> THE COURT: Yes, sir.
>
> [Defendant's Counsel]: Your Honor, if I may approach on one witness?
>
> THE COURT: Yes.
>
> (Discussion off the record at the bench.)
>
> THE COURT: All right. Mr. Fulcher, you have some motion you want --

[Defendant's Counsel]: I do, Your Honor. We would -- I would like to call one witness, a Brandon Elps, for the purposes of testifying to the truth of Ms. Kennon. He's over in custody in our jail. It would be limited to the fact -- of testimony, that she had, in previous occasions, gotten him in trouble, went to the law on him and all that. So that would be my motion, to have him over here.

And the other two witnesses would be -- and the other two would be for Cassie Flowers in the Department of Corrections, and Mark Thomas. They, too, would be witnesses to show -- testify to the untruthfulness of Ms. Kennon and things that she had said and done in the past.

And I would make a motion to continue, to get those witnesses here.

. . .

THE COURT: It would appear to the Court that any writ . . . that was issued by this Court was done last Thursday, September the 4th, and the trial was scheduled -- was due to start the 8th, and the person, Ms. Flowers, is not currently in the Carteret County jail and neither is Mark Thomas, is my understanding.

As to the other one, testifying about some alleged bad act of Heather Kennon at some earlier time without any connection to this case, would -- this Court does not believe would have relevance to the charges for which the defendant stands trial in this case, and would not grant a continuance for that.

If you want to make an offer of proof as to that -- who is it that's in the Carteret County jail?

[Defendant's Counsel]: Brandon Elps. But I don't think I can do anything other than specific instances --

THE COURT: I understand. If you want to make an offer of proof as to that, I'll be happy to have the Sheriff bring him over.

Following this exchange, Defendant testified on his own behalf. No other evidence or testimony or offer of proof was presented by Defendant. The jury returned verdicts finding Defendant guilty of each of the three charges.

During sentencing, the trial court determined Defendant had 15 prior record level points, and had attained a prior record level 5 for sentencing purposes. The court then consolidated file number 14 CRS 050372, possession and distribution of a methamphetamine precursor, with file number 14 CRS 050376, manufacture of methamphetamine, for judgment. The trial court determined the charges were Class F and Class C felonies, respectively, and sentenced Defendant to an active minimum term of 127 months and a maximum of 165 months in prison on the consolidated judgment.

In file number 14 CRS 050377, conspiracy to manufacture methamphetamine, the trial court determined the offense was a Class C felony, and sentenced Defendant to an active minimum term of 127 months and a maximum of 165 months to run consecutively at the expiration of his sentence in the first judgment.

Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by: (1) denying trial counsel's motion to withdraw from the case and asserts Defendant's trial counsel rendered ineffective assistance in three discreet ways; (2) denying Defendant's motion to continue and excluding negative character testimony against State's witness Kennon by Flowers and Thomas; and (3) determining the conspiracy to manufacture methamphetamine charge was a Class C felony, because the felony is properly classified as a Class D felony.

III. Motion to Withdraw and Ineffective Assistance of Counsel

[1] Defendant argues the trial court erred in denying defense counsel's motion to withdraw from the case. He contends he received ineffective assistance of counsel following the trial court's denial of defense counsel's motion to withdraw.

A. Standard of Review

We review the denial of a motion to withdraw for abuse of discretion. *State v. Thomas*, 350 N.C. 315, 329, 514 S.E.2d 486, 495 (1999).

In order to show ineffective assistance of counsel, a defendant must satisfy the two-prong test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984). This test for ineffective assistance of counsel has also been explicitly adopted by the Supreme Court of North Carolina

for state constitutional purposes. *State v. Braswel*l, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to *Strickland*:

> 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. Unless a defendant makes both showings, it cannot be said that the conviction. . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; accord Braswell, 312 N.C. at 561-62, 324 S.E.2d at 248.

Our Supreme Court has stated, "this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct" when reviewing ineffective assistance of counsel claims. *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted). We "ordinarily do not consider it to be the function of an appellate court to second-guess counsel's tactical decisions[.]" *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

B. Analysis

N.C. Gen. Stat. § 15A-144 provides: "[t]he court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause." N.C. Gen. Stat. § 15A-144 (2013). In this case, Defendant's counsel requested the court allow him to withdraw from representing Defendant in this case. Defendant's counsel stated he did not "see eye-to-eye on everything" with Defendant and that he did not think he could "zealously represent [Defendant] at a trial based on the evidence" and the conversations they had. Defendant's counsel also mentioned Defendant was unable to "continue finish hiring" him.

Our Supreme Court has held in order to "establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel." *State v. Thomas*, 350 N.C. 315, 328, 574 S.E.2d 486, 445 (citation omitted), *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 318 (1999).

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, an ineffective assistance of counsel claim brought on direct review "will be decided on the merits when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). "[O]n direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." *Id.* at 167, 557 S.E.2d at 524-25 (citation omitted). "[S]hould the reviewing court determine that [ineffective assistance of counsel] 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 [motion for appropriate relief ("MAR")] proceeding." *Id.* at 167, 557 S.E.2d at 525.

Here, Defendant asserts he received ineffective assistance from his trial counsel in three ways: (1) when the trial court denied his motion to continue to allow him to secure witnesses on his behalf; (2) when defense counsel failed to request the court to produce a witness, Elps, from the jail to make an offer of proof of his testimony; and (3) when, after Writs were issued, defense counsel did not have Flowers and Thomas brought from the Department of Correction to impeach Kennon's truthfulness. We discuss each in turn.

1. Trial Court's Denial of Defendant's Motion to Continue

[2] Defendant contends he received ineffective assistance of counsel and his due process rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States were violated when the trial court denied his motion to continue immediately prior to the commencement of Defendant's trial. We disagree.

In *State v. Rogers*, 352 N.C. 119, 529 S.E.2d 671 (2000), our Supreme Court discussed the appropriate inquiry where ineffective assistance of counsel is alleged due to a denial of a motion to continue:

> While a defendant ordinarily bears the burden of showing ineffective assistance of counsel [under the *Strickland* standard], prejudice is presumed "without inquiry into the actual conduct of the trial" when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is remote. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation "only when surrounding circumstances justify"

> this presumption of ineffectiveness. "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense."

352 N.C. at 125, 529 S.E.2d at 675 (quoting *United States v. Cronic*, 466 U.S. 648, 659-62, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d. 657, 668-70 (1984); *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 336-37 (1993)).

The record shows Defendant had sufficient time to investigate, prepare and present his defense. Defendant was arrested on 30 January 2014, and indicted on 24 February 2014. Defendant testified he retained trial counsel "twenty-seven days after" being arrested. The trial court previously continued the case for one month, and Defendant's trial began on 8 September 2014, more than seven months after Defendant was arrested and roughly six months after he had retained counsel.

Prior to trial, Defendant's counsel filed two Writs of Habeas Corpus ad Testificandum, and argued a motion to suppress. During trial, Defendant's counsel cross-examined each of the State's witnesses, and presented the testimony of four witnesses on Defendant's behalf, including Defendant's own testimony.

Defendant had ample time to investigate, prepare, and present his defense. *Id.* Defendant has failed to show he received ineffective assistance of counsel by the trial court's denial of his motion to continue. The trial court did not err in denying Defendant's motion to withdraw or to continue on this ground.

2. Failure to Make Offer of Proof Regarding Elps' Testimony

[3] Defendant contends he received ineffective assistance of counsel when his trial counsel failed to request the trial court bring Elps from the jail to make an offer of proof of his testimony. We hold the cold record is insufficient for us to rule on this claim. We dismiss the claim without prejudice to Defendant's right to re-assert the claim.

As noted, a defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient and the deficiency was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *see also State v. Grooms*, 353 N.C. 50, 64, 540 S.E.2d 713, 722 (2000). A defendant must demonstrate a reasonable probability that the trial result would have been different absent counsel's error. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

The trial court stated its belief that Elps' testimony would not be relevant, but nonetheless offered to allow Defendant to make an offer of proof regarding Elps' testimony:

> THE COURT: [T]his Court does not believe [Elps' testimony] would have relevance to the charges for which the defendant stands trial in this case, and would not grant a continuance for that.
>
> . . .
>
> If you want to make an offer of proof as to that, I'll be happy to have the Sheriff bring [Elps] over.

Defendant's counsel did not make an offer of proof as to Elps' testimony. Defendant's counsel stated "he [did not] think [he] would be able to do anything other than specific instances" of prior untruthful statements or conduct by Kennon.

From the record and transcript, we are unable to determine whether failure to make an offer of proof under these facts constitutes ineffective assistance of counsel. No affidavit tends to show what Elps would have testified to. Although Defendant's trial counsel stated he believed Elps could only testify as to specific instances of Kennon's untruthfulness, we are unable to ascertain whether Elps' testimony would have been relevant and admissible. We are also unable to determine whether trial counsel's failure to make an offer of proof of Elps' testimony made his conduct deficient, nor whether the deficiency, if present, was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *Grooms*, 353 N.C. at 64, 540 S.E.2d at 722.

Because we determine Defendant has prematurely asserted an ineffective assistance of counsel claim as to this ground, we "dismiss [the] claim[] without prejudice to [Defendant's] right to reassert [it] during a subsequent MAR proceeding." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525 (citation omitted).

3. Failure to Offer Flowers' and Thomas' Testimony

[4] Defendant argues he received ineffective assistance of counsel when his trial counsel failed to call Flowers and Thomas as witnesses to testify regarding the untruthfulness of Kennon. The record and transcript are again insufficient for us to rule on this claim. We dismiss this ground without prejudice to Defendant's right to reassert the claim in a subsequent MAR proceeding.

The first step to an ineffective assistance of counsel claim is to show the counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Defendant claims his counsel was deficient with regard to the offering of Flowers' and Thomas' testimony in two ways: first, Defendant claims there is "no indication defense counsel even took the effort to apply for Writs of Habeas Corpus ad Testificandum for [Flowers and Thomas]." Second, Defendant claims his counsel's failure to call Flowers and Thomas as witnesses constituted deficient performance, because these witnesses would have provided testimony as to the untruthfulness of Kennon, the State's "most crucial witness."

We find no merit in Defendant's initial assertion. The record contains an Application and Writ of Habeas Corpus ad Testificandum for both Flowers' and Thomas' testimony. Defense counsel was not deficient in failing to apply for Writs of Habeas Corpus ad Testificandum. The record shows defense counsel did in fact apply for such writs, they were issued by the trial court, and delivered to the Sheriff for service.

As to Defendant's second assertion, on the record before us, we are unable to determine whether defense counsel's failure to call Flowers and Thomas to testify constituted trial strategy or ineffective assistance of counsel. No offer of proof regarding Flowers' and Thomas' testimony was presented. The record does not contain affidavits revealing what Flowers and Thomas would have testified to.

We are unable to determine whether defense counsel's failure to call Flowers and Thomas as witnesses was trial strategy or deficient performance, or whether the deficiency, if present, was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *Grooms*, 353 N.C. at 64, 540 S.E.2d at 722.

Because we determine Defendant prematurely asserted an ineffective assistance of counsel claim on this ground, we also "dismiss [this] claim[] without prejudice to [Defendant's] right to reassert [it] during a subsequent MAR proceeding." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525 (citation omitted).

IV. Motion to Continue

[5] Defendant argues the trial court erred by denying two motions to continue: one immediately preceding trial, and the other immediately preceding his own testimony. Defendant based both motions on the premise that two of his witnesses, Flowers and Thomas, were not available to testify despite writs being issued to ensure their attendance

at trial. Defendant asserts Flowers' and Thomas' testimony as to the untruthfulness of a key State's witness, Kennon, would likely have resulted in Defendant's acquittal.

A. Standard of Review

A trial court may allow or deny a motion to continue in its sound discretion. Its decision will not be overturned absent a gross abuse of discretion. *State v. Jones*, 172 N.C. App. 308, 311-12, 616 S.E.2d 15, 18 (2005) (citations omitted). An 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) (citation omitted).

Where the trial court's denial of a motion to continue raises a constitutional issue, it is "fully reviewable [on appeal] by examination of the particular circumstances presented by the record on appeal of each case." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982) (citation omitted). "To establish [the denial of a motion to continue rises to] a constitutional violation, a defendant must show that he did not have ample time to . . . investigate, prepare, and present his defense." *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002) (citation and quotation marks omitted).

B. Analysis

As explained *supra*, the trial court did not err in denying Defendant's motion to continue immediately prior to trial. Defendant had ample time to investigate, prepare and present his defense after receiving a prior continuance. We examine Defendant's argument regarding the trial court's denial of Defendant's motion to continue made immediately prior to Defendant's testimony.

During Defendant's case at trial, Defendant made two consecutive motions to continue. One motion concerned the testimony of Elps, and the other concerned the testimony of Flowers and Thomas:

> THE COURT: All right. [Defendant's counsel], you have some motion you want --
>
> [Defendant's Counsel]: I do, Your Honor. We would -- I would like to call one witness, a Brandon Elps, for the purposes of testifying to the truth of Ms. Kennon. He's over in custody in our jail. It would be limited to the fact -- of testimony, that she had, in previous occasions, gotten him in

> trouble, went to the law on him and all that. So that would be my motion, to have him over here.
>
> And the other two witnesses would be -- and the other two would be for Cassie Flowers in the Department of Corrections, and Mark Thomas. They, too, would be witnesses to show -- testify to the untruthfulness of Ms. Kennon and things that she had said and done in the past.
>
> And I would make a motion to continue, to get those witnesses here.

After the motions were made, the trial court discussed Flowers and Thomas, but only issued a ruling denying Defendant's motion to continue regarding Elps' testimony:

> THE COURT: It would appear to the Court that any writ . . . that was issued by this Court was done last Thursday, September the 4th, and the trial was scheduled -- was due to start the 8th, and the person, Ms. Flowers, is not currently in the Carteret County jail and neither is Mark Thomas, is my understanding.
>
> As to the other one, testifying about some alleged bad act of Heather Kennon at some earlier time without any connection to this case, would -- this Court does not believe would have relevance to the charges for which the defendant stands trial in this case, and would not grant a continuance for that.

The trial court offered to allow Defendant to make an offer of proof regarding Elps' testimony, which Defendant failed to do. The court did not make a ruling on Defendant's motion to continue to allow for Flowers' and Thomas' testimony. Defendant failed to ask the court for a ruling on the issue.

Under the North Carolina Rules of Appellate Procedure, "[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[.] . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1). Because Defendant "did not obtain a ruling by the trial court on this issue, it is not properly preserved for appeal." *Lake Toxaway Cmty. Ass'n v. RYF Enters., LLC*, ___ N.C. App. ___, ___, 742 S.E.2d 555, 562 (2013) (citation omitted); *see also State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), *cert. denied*, 518

U.S. 1024, 135 L. Ed. 2d 1080 (1996). Pursuant to N.C. R. App. P. 10(a)(1), we dismiss Defendant's argument as partially unpreserved.

V. Conspiracy to Manufacture Methamphetamine Sentencing

[6] Defendant contends the trial court erred determining the proper felony class of conspiracy to manufacture methamphetamine charge. He asserts that although conspiracy to manufacture methamphetamine is a Class C felony, he should have been sentenced to a felony one class lower than was committed pursuant to N.C. Gen. Stat. § 14-2.4(a) (2013). We disagree.

A. Standard of Review

"When a defendant assigns error to the sentence imposed by the trial court our standard of review is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006) (citation and brackets omitted), *disc. rev. denied*, 361 N.C. 222, 642 S.E.2d 709 (2007).

B. Analysis

N.C. Gen. Stat. § 14-2.4(a) provides: "*Unless a different classification is expressly stated*, a person who is convicted of a conspiracy to commit a felony is guilty of a felony that is one class lower than the felony he or she conspired to commit[.]" N.C. Gen. Stat. § 14-2.4(a) (emphasis supplied). Here, Defendant was found guilty of conspiracy to manufacture methamphetamine in violation of N.C. Gen. Stat. § 90-95(b)(1a) (2013). N.C. Gen. Stat. § 90-95(b)(1a) "expressly" provides, in relevant part: "The manufacture of methamphetamine shall be punished as a Class C felony[.]" N.C. Gen. Stat. § 90-95(b)(1a).

N.C. Gen. Stat. § 90-95(b)(1a) is a part of Article 5 of Chapter 90 of the General Statues, designated by our General Assembly as the North Carolina Controlled Substances Act ("CSA"). *See* N.C. Gen. Stat. § 90-86 (2013). N.C. Gen. Stat. § 90-98, another section of the CSA, provides:

> Except as otherwise provided in this Article, any person who attempts or conspires to commit any offense defined in this Article is guilty of an offense that is the same class as the offense which was the object of the attempt or conspiracy and is punishable as specified for that class of offense and prior record or conviction level in Article 81B of Chapter 15A of the General Statutes.

N.C. Gen. Stat. § 90-98 (2013). N.C. Gen. Stat. § 90-95(b)(1a) does not provide a lesser sentence for a person convicted of conspiracy to

manufacture methamphetamine. Under N.C. Gen. Stat. § 90-98, it is "expressly stated" that a defendant convicted of conspiracy to manufacture methamphetamine is properly to be sentenced to the same class of felony as a defendant convicted of the manufacture of methamphetamine. The trial court did not err in sentencing Defendant as a Class C felon upon his conviction for conspiracy to manufacture methamphetamine in violation of N.C. Gen. Stat. § 90-95(b)(1a). N.C. Gen. Stat. § 90-98. Defendant's argument is overruled.

VI. Conclusion

Defendant had ample time to investigate, prepare, and present his defense and received a prior continuance. The trial court did not err in declining to grant Defendant's motion to continue immediately prior to trial, and he did not receive ineffective assistance of counsel on this issue.

From the cold record, we are unable to determine whether defense counsel's failure to make an offer of proof regarding Elps' testimony or defense counsel's failure to call Flowers and Thomas to testify regarding Kennon's untruthfulness constituted trial strategy or conduct that may rise to ineffective assistance of counsel. We dismiss these arguments without prejudice to Defendant's right to pursue these claims in a subsequent MAR proceeding.

The trial court did not abuse its discretion in denying Defendant's motion to continue immediately prior to trial. This argument is overruled. Defendant failed to obtain a ruling by the trial court on his motion to continue immediately prior to his testimony. We dismiss this argument as unpreserved.

The trial court did not err in sentencing Defendant as a Class C felon on the charge of conspiracy to manufacture methamphetamine. *Id.*

Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant's claims of ineffective assistance of counsel on Elps' offer of proof and failure to call Flowers and Thomas to testify are dismissed without prejudice.

NO ERROR IN PART; DISMISSED IN PART

Judges McCULLOUGH and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 NOVEMBER 2015)

AFR. METHODIST EPISCOPAL ZION CHURCH v. PARKER No. 15-470	Sampson (13CVS333)	No Error
BOBBER v. BOBBER No. 15-61	Carteret (14CVD202)	Affirmed
DIXON v. DIXON No. 15-355	Rowan (13CVD1883)	Dismissed in part and affirmed in part.
FIPPS v. FISHER No. 14-1352	Orange (11CVD311)	Affirmed in part; reversed and remanded in part
IN RE K.H. No. 15-628	Orange (12JA104) (15CVD113)	Affirmed
IN RE S.K. No. 15-561	Orange (12JT94) (12JT95)	Affirmed
IN RE P.S. No. 15-449	Cabarrus (14JA117)	Affirmed
IN RE S.A.G. No. 15-466	Guilford (12JT577)	Affirmed
McKEE v. McKEE No. 15-381	Cabarrus (11CVD1534)	Reversed and Remanded
MILLIGAN v. WINSTON-SALEM/ FORSYTH CNTY. SCH. No. 15-231	N.C. Industrial Commission (414302)	Affirmed
PAYKERT v. COLEMAN No. 15-165	Guilford (13CVD1506)	Affirmed in Part, Vacated in Part, and Remanded
READY v. READY No. 15-412	Mecklenburg (06CVD1898)	Affirmed
STALLINGS v. STALLINGS No. 15-327	Nash (11CVD1437)	Dismissed

STATE v. ANDERSON No. 15-269	Catawba (13CRS4770) (13CRS51818)	No Error
STATE v. BIGGS No. 15-393	Chowan (05CRS50466) (05CRS50467)	Affirmed
STATE v. BOLTON No. 15-224	Guilford (12CRS95247) (13CRS24208)	Affirmed
STATE v. BRINSON No. 15-602	Edgecombe (14CRS602-608)	Affirmed in Part; Reversed and Remanded in Part
STATE v. BRYANT No. 14-1300	No Error (12CRS220593-94)	Wake
STATE v. CARVER No. 15-303	Haywood (03CRS52874)	Affirmed
STATE v. COMPTON No. 15-567	Wake (13CRS214421)	No Error
STATE v. CRUZ No. 14-1404	Orange (10CRS53388-89) (10CRS53987-93)	No Error
STATE v. HARP No. 15-409	Vance (13CRS52194)	No Error
STATE v. INMAN No. 15-510	Cumberland (09CRS57579) (09CRS57580) (13CRS56522) (14CRS59589)	Affirmed
STATE v. JACOBS No. 15-160	Moore (13CRS1790) (13CRS51955)	No Error
STATE v. JARVIS No. 15-496	Buncombe (13CRS61090-91)	Affirmed
STATE v. JOYNER No. 15-442	Iredell (13CRS53209)	No Error
STATE v. LEDBETTER No. 15-322	Lincoln (12CRS54203-04)	No Error

STATE v. LOWERY No. 15-425	Gaston (13CRS62066)	Vacated
STATE v. MARSH No. 15-631	Cabarrus (13CRS1935) (13CRS52064-65) (13CRS52320-21)	No Error
STATE v. MARSHALL No. 15-149	Wake (13CRS651)	No Error
STATE v. McLAUGHLIN No. 15-528	Hoke (07CRS53404-05) (09CRS50645-48) (10CRS514)	Reversed and Remanded
STATE v. MOTLEY No. 15-452	Nash (12CRS55533)	Remanded for Re-sentencing
STATE v. PATTERSON No. 15-138	Iredell (13CRS50905-11) (13CRS51143-44) (13CRS51151-84) (13CRS51188-91) (13CRS51793-800) (13CRS51809-16) (13CRS51818-41)	No Error
STATE v. REEVES No. 15-210	Lincoln (10CRS51312-16)	No Error
STATE v. ROSS No. 15-73	Wake (13CRS211138-39)	Affirmed
STATE v. SIMPSON No. 14-1265	Bladen (12CRS51850)	No Error
STATE v. WATTS No. 15-15	Mecklenburg (13CRS218075-77) (13CRS25822)	No Error
STATE v. WISE No. 15-317	Mecklenburg (12CRS235434-36)	No Error
WILLARD v. WILLARD No. 15-227	Wake (06CVD18122)	Reversed and Remanded

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