244 N.C. App.—No. 4 Pages 546-778

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 9, 2018

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OF
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ADMINISTRATIVE LAW

Administrative Law—majority of board—required presence—If the issue was preserved for appeal, the trial court erred by finding that the administrative hearing in this matter was not conducted by a "majority of the agency," as required by N.C.G.S. § 150B-40(b) (2013). The trial court interpreted this provision to mean that the required majority of Respondent's Board must be present for and conduct the administrative hearing *in its entirety*, including the adoption of the Board's Final Agency Decision." However, N.C.G.S. § 150B-40(b) does not require the *same* required majority of the Board to be present for and conduct the administrative hearing *in its entirety.* **Wilson Funeral Dirs., Inc. v. N.C. Bd. of Funeral Serv., 768.**

APPEAL AND ERROR

Appeal and Error—denial of summary judgment—no appeal after trial—The denial of a summary judgment was not addressed on appeal where the case was tried on the merits after the denial of the motion. **Cushman v. Cushman, 555.**

Appeal and Error—issue abandoned at order argument—Where plaintiffs' counsel announced during oral argument that plaintiffs were abandoning an issue they had raised on appeal, the Court of Appeals affirmed that portion of the trial court's order. **Sain v. Adams Auto Grp., Inc., 657.**

Appeal and Error—jurisdiction—lower court dismissal of appeal—There was no appeal to the Court of Appeals from a lower court's dismissal of an appeal. The Court of Appeals did not have jurisdiction; when prior decisions of the Court of Appeals conflict, the earlier of those decisions is controlling precedent. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

Appeal and Error—notice of appeal—not timely—Plaintiff's appeal from discovery sanctions orders was dismissed where the untimely nature of plaintiff's notice of appeal deprived the Court of Appeals of jurisdiction even though plaintiff contended that defects in the service did not trigger the deadline. While plaintiff contended that the certificates of service did not specify the date or the means of service, each certificate sufficiently showed the date of service and plaintiff had actual notice. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

Appeal and Error—preservation of issues—argument at trial and on appeal—different—In a prosecution for robbery with a dangerous weapon, the merits of defendant's argument on appeal were not considered where defendant's motion to dismiss at trial was on a different ground from the argument she sought to make on appeal. **State v. Chapman, 699.**

Appeal and Error—preservation of issues—In a prosecution for robbery with a dangerous weapon, the merits of defendant's argument about a detective reading a warning statement in the manual of the air pistol used in the robbery were not considered on appeal. Defendant did not make the same arguments at trial and on appeal. **State v. Chapman, 699.**

Appeal and Error—preservation of issues—no objection below—In a case involving the revocation of a funeral establishment permit, petitioners waived the right to object to the procedures used in the administrative proceeding where they had the opportunity to object to the alleged errors but did not do so. Petitioners should have been aware that only four of seven of the original Board members would

be participating in the second hearing and Final Agency Decision. **Wilson Funeral Dirs., Inc. v. N.C. Bd. of Funeral Serv., 768.**

Appeal and Error—satellite based monitoring—civil in nature—Appellate Rule 3—Defendant's petition for writ of certiorari was granted in a satellite based monitoring (SBM) case. SBM orders are civil in nature and are governed by Rule 3 of the North Carolina Rules of Appellate Procedure. Failure to comply with Rule 3 is a jurisdictional default, however a defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake. **State v. Springle, 760.**

Appeal and Error—writ of certiorari—denied—A petition for a writ of certiorari for review of discovery sanctions was denied in the Court of Appeals' discretion. A petition for the writ must show merit or that error was probably committed below; the trial court here properly sanctioned plaintiff for failure to comply with discovery, having considered lesser sanctions and found them inappropriate. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed., 567.**

ASSOCIATIONS

Associations—homeowners—special assessment—action not derivative—injury to plaintiffs—Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the trial court's denial of defendants' motion to dismiss under Rules 12(b)(6) and 12(b)(7). Plaintiffs were not required to bring the declaratory action by or on behalf of the homeowners association. Property owners are permitted to sue their homeowners associations for declaratory relief, and a derivative action would not have been appropriate here because plaintiffs were not alleging injury to the association or seeking to recover on its behalf. **Johnson v. Starboard Ass'n, Inc., 619.**

Associations—homeowners—special assessment—affirmative defense of implied contract—proposed renovations not voluntarily accepted—Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the trial court's denial of defendants' motion for a directed verdict on their affirmative defense of implied contract arising from improvements to Building 33. Even assuming the affirmative defense could be sustained where the homeowners association unlawfully assessed costs against condominium unit owners, viewing the evidence in the light most favorable to the plaintiffs there existed sufficient evidence that plaintiffs did not voluntarily accept the proposed renovations to Building 33. **Johnson v. Starboard Ass'n, Inc., 619.**

ATTORNEYS

Attorneys—fees—discovery violations—no abuse of discretion—There was no abuse of discretion in an award of attorney fees for discovery violations. Even though plaintiff contended the trial court erred in its "blanket award" of all fees requested from alleged discovery violations without providing any analysis of the basis of the award, the record evidence and the trial court's filings indicated that the court acted well within its discretion. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

AUTOMOBILES

Automobiles—impaired driving—breath alcohol testing—information about rights—Spanish speaker—admissibility not conditioned on understanding— The trial court did not err by admitting blood alcohol test results in a prosecution for impaired driving where defendant spoke Spanish and did not fully understand English. The oral notification of rights was in English but the written notification was in Spanish and there was no evidence to suggest that defendant was illiterate in Spanish. Neither the plain language nor the statutory purpose of N.C.G.S. § 20-16.2 disclose a legislative intent by the General Assembly to condition *the admissibility* of chemical analysis test results on a defendant's subjective understanding of the information officers and chemical analysts are required to disclose. **State v. Martinez,7 39.**

CONSTITUTIONAL LAW

Constitutional Law—effective assistance of counsel—no objection at trial—testimony not hearsay—Defendant's trial counsel in a prosecution for robbery with a dangerous weapon was not deficient in not objecting to a recitation by a detective of a statement in the owner's manual of the pistol. The statement was admitted for nonhearsay purposes and the Confrontation Clause was not violated. As a result, an objection in the trial court on hearsay grounds or Confrontation grounds would have been meritless. **State v. Chapman, 699.**

CONTRACTS

Contracts—web page statements—magazine advertisements—not part of contract—In a breach of contract action brought by Montessori Children's House of Durham ("MCHD") to collect unpaid tuition from parents who withdrew their child before the school year began due to a change in class size, the Lower Elementary Tuition Agreement did not contain language requiring MCHD to maintain a maximum class size or a certain student/teacher ratio. Moreover, language on class size on MCHD's official webpage and in two of its magazine advertisements was not incorporated by reference. **Montessori Children's House of Durham v. Blizzard, 633.**

CRIMINAL LAW

Criminal Law—Motion for Appropriate Relief—ineffective assistance of counsel—evidentiary hearing—Defendant was entitled to an evidentiary hearing on a Motion for Appropriate Relief claiming ineffective assistance of counsel where the factual circumstances, in conjunction with Mr. Clarke's own admissions that he made nonstrategic decisions that probably had an impact on the jury's finding of guilt, were such that a hearing should have been held to fully develop the validity of Defendant's ineffective assistance of counsel claim. **State v. Martin, 727.**

Criminal Law—Motion for Appropriate Relief—postconviction discovery—evidentiary hearing—The trial court erred by denying defendant's Motion for Appropriate Relief without an evidentiary hearing on whether defendant had received the postconviction relief requested in a motion. **State v. Martin, 727.**

DEEDS

Deeds—foreclosure—mortgage-backed securities—note and deed of trust not separated—Although the plaintiff in an action arising from a foreclosure

argued that the deed of trust was not valid, his argument was based solely on the securitization process used to created marketable mortgage-backed securities, in which the note and deed of trust are separated. However, the note and deed of trust were not separated; transfer of the note constituted an effective assignment of the deed of trust; and the holder of the note can enforce both. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

Deeds—foreclosure—mortgage-backed securities—note and deed of trust not separated—Although the plaintiff in an action arising from a foreclosure argued that the deed of trust was not valid, his argument was based solely on the securitization process used to created marketable mortgage-backed securities, in which the note and deed of trust are separated. However, the note and deed of trust were not separated; transfer of the note constituted an effective assignment of the deed of trust; and the holder of the note can enforce both. **In re Kenley, 583.**

DIVORCE

Divorce—equitable distribution—distributive factors—defendant's assertions at trial—findings not necessary—The trial court was not required to consider or to make written findings addressing the distributive factors set out in N.C.G.S. § 50-20(c) where the parties had agreed to an equal division of the marital estate. Given defendant's repeated assertions at the trial level that an equal division would be equitable, there was no need to decide whether the parties' agreement met the technical requirements for a legally binding stipulation. The trial court was not required to make findings demonstrating its consideration of the distributional factors set out in N.C.G.S. § 50-20(c) because defendant agreed that an equal division of the marital estate would be equitable. **Cushman v. Cushman, 555.**

Divorce—equitable distribution—post-separation payments—The trial court did not err in an equitable distribution action by failing to classify and distribute defendant's post-separation payments as divisible where those payments were for payments on the mortgage on the former marital residence, maintenance and repair of the former marital residence, and payments on a debt incurred by the parties' adult daughter. Defendant was living in the former marital residence and was not entitled to payment for utilities and routine maintenance; the denial of credit for the daughter's loan payment was supported by plaintiff's testimony that she did not consider the loan a marital responsibility; and plaintiff did not document the amount of the mortgage payment made from his separate property. **Cushman v. Cushman, 555.**

DOMESTIC VIOLENCE

Domestic Violence—protective order—dueling motions—dismissed without a hearing—Where plaintiff and defendant both filed motions for domestic violence protective orders (DVPO), the trial court erred by dismissing plaintiff's motion on the grounds that it was a "Dueling 50B" to defendant's motion. Plaintiff was entitled to a hearing on her motion, and the fact that both plaintiff and defendant had filed motions for DVPOs was not an adequate basis for dismissing plaintiff's motion without a hearing. **Holder v. Kunath, 605.**

ESTOPPEL

Estoppel—collateral—special assessment by homeowners association—issue litigated in prior lawsuit—Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the judgment of the trial court concluding that the special assessment was invalid and directing a verdict for plaintiffs. While defendants argued on appeal that the homeowners association was not required to separate windows and doors from common property in its 2010 Special Assessment, the Court of Appeals held that this argument was barred by collateral estoppel. The dismissal of a prior foreclosure proceeding pursuant to Rule 41(b) operated as a final adjudication on the merits, and the issue here was identical to the issue litigated and necessary to the judgment at issue in a previous case appealed to the Court of Appeals and Supreme Court. **Johnson v. Starboard Ass'n, Inc., 619.**

Estoppel—judicial—location of property boundary—not an issue in prior case—The trial court erred by granting summary judgment for defendant based on judicial estoppel in an action to declare the boundary of two adjoining properties. The location of the true boundary lines of the respective properties was not at issue in the prior federal action. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., 597.**

EVIDENCE

Evidence—experiment—test firing of air pistol—admissible—In a prosecution for robbery with a dangerous weapon, a video of a detective test firing the air pistol used in the robbery was properly admitted. In his experiment, Detective Sergeant Cranford utilized the same weapon brandished during the robbery and fired it at a target from several close-range positions that were comparable to the various distances from which the air pistol had been pointed. Detective Sergeant Cranford noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect that greater air pressure would have on the force of the projectile and its impact on a target. **State v. Chapman, 699.**

Evidence—hearsay—air pistol—statement from an owner's manual—not hearsay—used to explain test fire—There was no error, plain or otherwise, in a prosecution for robbery with a dangerous weapon involving an air pistol where a State's witness read a statement from the owner's manual for the purpose of explaining his conduct when performing a test fire rather for the truth of the dangerousness of the weapon. **State v. Chapman, 699.**

FALSE PRETENSES

False Pretenses—indictment—description of property—sufficient—There was no fatal defect in an indictment for obtaining property by false pretenses where defendant challenged the indictment for obtaining property by false pretenses based on the use of "U.S. Currency" instead of a more specific description of the property. "Money" is a sufficient description; "U.S.Currency" goes beyond that requirement. **State v. Ricks, 742.**

JUDGMENTS

Judgments—foreign—full faith and credit—presumption not overcome— Where the trial court granted enforcement of a foreign judgment against defendant, the trial court did not err by concluding that the Pennsylvania judgment was entitled to full faith and credit. Defendant failed to present any evidence—either through a properly and timely filed sworn affidavit or through evidence or testimony under oath at the hearing—to overcome the presumption that the Pennsylvania judgment was entitled to full faith and credit. The arguments of defendant's counsel regarding Pennsylvania's lack of personal jurisdiction over defendant were not evidence. **Rossi v. Spoloric, 648.**

Judgments—foreign—motion for continuance—denied—Where defendant had more than two months' notice of a hearing on his motion for relief from a foreign judgment and he filed a motion for continuance the day of the hearing, the trial court did not abuse its discretion by denying defendant's motion for continuance. **Rossi v. Spoloric, 648.**

Judgments—foreign—motion to introduce affidavit—denied—On appeal from an order granting enforcement of a foreign judgment against defendant, the Court of Appeals held that the trial court did not abuse its discretion by denying defendant's motion to introduce into evidence an affidavit in support of his motion for relief, notice of defenses, and motion for stay. Defendant made no request for enlargement of time within which to file and serve the affidavit prior to or along with his motions. Even assuming defendant showed excusable neglect when he asserted that an "unanticipated sequence of events" required the affidavit in lieu of live testimony, defendant failed to show that the trial court's denial of his motion was "so arbitrary that it could not be the result of a reasoned decision." **Rossi v. Spoloric, 648.**

JURISDICTION

Jurisdiction—standing—fraud claims—separate and distinct from corporation's injury—lawsuit not precluded by bankruptcy proceeding—Where the president (Junior) of a company (AmerLink) attempted to purchase the chairman and majority shareholder's (plaintiff) interest in the company and allegedly engaged in fraud to do so, the trial court erred by granting summary judgment in favor of defendants Junior and Barth (Senior) on the grounds that plaintiff lacked standing. The Court of Appeals agreed with plaintiff that the adversary proceeding filed by the AmerLink bankruptcy trustee did not preclude plaintiff, Junior, or Senior from bringing claims against each other in their individual capacities. Plaintiff relied upon his agreement with Senior and Junior when he, in his individual capacity, invested his majority interest AmerLink shares into JRI, a corporation owned 50% by plaintiff and 50% by Junior. Plaintiff's alleged injury was separate and distinct from that of AmerLink shareholders or AmerLink itself. **Spoor v. Barth, 648.**

Jurisdiction—subject matter—trusts—claims in trustee's individual capacity and as trustee—Where one sister (plaintiff) filed a complaint for breach of contract in District Court against her sister (defendant), who served as trustee of their mother's revocable trust, the Court of Appeals affirmed in part and reversed in part the District Court's order dismissing plaintiff's claims for lack of subject matter jurisdiction. The Court of Appeals affirmed the order as to the claims against defendant in her capacity as trustee, but the Court reversed the order as to the claims against defendant in her individual capacity for breach of the Resignation

JURISDICTION—Continued

Agreement. Pursuant to N.C.G.S. § 36C-2-203, the Clerk of Superior Court has original jurisdiction over all proceedings concerning the internal affirms of trusts. **Morgan-McCoart v. Matchette, 643.**

JURY

Jury—request to view evidence—judge's failure to exercise discretion—In a prosecution for robbery with a dangerous weapon, the trial court did not exercise its discretion by responding to the jury's request to review testimony by saying that the transcript was not available. However, there was no prejudice, there was other evidence to the same purpose. **State v. Chapman, 699.**

LARCENY

Larceny—erroneous bank deposit—no actual or constructive trespass—The trial court erred by failing to grant defendant's motion to dismiss defendant's three larceny charges where an erroneous amount was deposited directly into defendant's account and the deposit could not be recovered because defendant had removed the money. The State failed to present any substantial evidence tending to show defendant actually or constructively trespassed to take possession of the property of another, an essential element of the charge of larceny. **State v. Jones, 719.**

MORTGAGES AND DEEDS OF TRUST

Mortgages and Deeds of Trust—foreclosure—notice—In an appeal from an order in a special foreclosure hearing, the notice requirement was met with respect to the original purchasers and holders of the note (the Kenleys) where plaintiff argued that the current holder of the note (U.S. Bank) did not properly serve the Kenleys with notice of the calendaring of the appeal from a clerk of court decision, but the Kenleys did not appeal the clerk's decision. Plaintiff did not show how he had been prejudiced or how he had standing to contest the adequacy of the notice to the Kenleys. Moreover, the trial court properly ordered that the bond in the special foreclosure hearing be paid to U.S. Bank. **In re Kenley, 583.**

Mortgages and Deeds of Trust—foreclosure—notice—In an appeal from an order in a special foreclosure hearing, the notice requirement was met with respect to the original purchasers and holders of the note (the Kenleys) where plaintiff argued that the current holder of the note (U.S. Bank) did not properly serve the Kenleys with notice of the calendaring of the appeal from a clerk of court decision, but the Kenleys did not appeal the clerk's decision. Plaintiff did not show how he had been prejudiced or how he had standing to contest the adequacy of the notice to the Kenleys. Moreover, the trial court properly ordered that the bond in the special foreclosure hearing be paid to U.S. Bank. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

Mortgages and Deeds of Trust—quiet title action—trustee improperly joined—attorney fee—The trial court did not err by concluding that the trustee was improperly joined to a quiet title action arising from a foreclosure and by awarding attorney fees. N.C.G.S. § 45-45.3 unambiguously states that the trustee is not a proper party to actions to quiet title. The exceptions to the general rule argued by plaintiff did not apply. Moreover, there are not statutory duties for the trustee to fulfill, and his participation in the proceeding serves no purpose. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

Mortgages and Deeds of Trust—quiet title action—trustee improperly joined—attorney fee—The trial court did not err by concluding that the trustee was improperly joined to a quiet title action arising from a foreclosure and by awarding attorney fees. N.C.G.S. § 45-45.3 unambiguously states that the trustee is not a proper party to actions to quiet title. The exceptions to the general rule argued by plaintiff did not apply. Moreover, there are not statutory duties for the trustee to fulfill, and his participation in the proceeding serves no purpose. **In re Kenley, 583.**

MOTOR VEHICLES

Motor Vehicles—car with frame damage—"As Is—No Warranty" agreement—expressly incorporated into pleadings by reference—Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the Court of Appeals rejected plaintiffs' argument that the trial court improperly considered a document outside the pleadings when it took into account the Buyer's Guide "As Is—No Warranty" agreement as a part of the sales contract. The document was expressly incorporated by reference in plaintiffs' complaint. The existence of the document was first introduced by counsel for plaintiffs, so any error was invited by plaintiffs. **Sain v. Adams Auto Grp., Inc., 657.**

Motor Vehicles—car with frame damage—claims for fraud, tortious breach of contract, civil conspiracy, and negligence—"As Is—No Warranty" agreement—Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court did not err by dismissing plaintiffs' claims against Adams for fraud, tortious breach of contract, civil conspiracy, and negligence. The "As Is—No Warranty" agreement was part of the Buyer's Guide and sales contract and was incorporated by reference in the pleadings. **Sain v. Adams Auto Grp., Inc., 657.**

Motor Vehicles—claims against previous seller—sold car to dealership that sold car to plaintiffs—fraud, unfair and deceptive trade practices, and negligence—dismissed—Where plaintiffs purchased a used car from Adams Auto Group, which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court did not err by dismissing the claims for fraud, unfair and deceptive trade practices, and negligence against defendant Capital One. Plaintiffs' amended complaint contained no allegations tending to show that Capital One made any direct statements to plaintiffs, that plaintiffs' decision to purchase the vehicle was based on any actual misrepresentations or omissions by Capital One, or that Capital One owed any duty to plaintiffs. **Sain v. Adams Auto Grp., Inc., 657.**

Motor Vehicles—unfair and deceptive trade practices claim—seller knew or should have known of frame damage—Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court erred by dismissing their claim against Adams for unfair and deceptive trade practices. Plaintiffs' claim for unfair and deceptive practices was based on Adams' alleged misrepresentation of the condition of the vehicle after purchasing it at auction, where it was announced prior to Adams' purchase that the vehicle had sustained frame damage. Plaintiffs also alleged that Adams should have known their claims were valid and nevertheless refused to repair the car or rectify the situation. **Sain v. Adams Auto Grp., Inc., 657.**

NEGOTIABLE INSTRUMENTS

Negotiable Instruments—note—indorsed in blank—transfer—In an appeal from an order in a special foreclosure hearing, plaintiff conceded that a valid debt existed, and U.S. Bank was the current holder of the note where the note was indorsed in blank and in the possession of U.S. Bank. There was no provision of the Uniform Commercial Code requiring a party possessing a note indorsed in blank to show transfer of the note to enforce it. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

Negotiable Instruments—note—indorsed in blank—transfer—In an appeal from an order in a special foreclosure hearing, plaintiff conceded that a valid debt existed, and U.S. Bank was the current holder of the note where the note was indorsed in blank and in the possession of U.S. Bank. There was no provision of the Uniform Commercial Code requiring a party possessing a note indorsed in blank to show transfer of the note to enforce it **In re Kenley, 583.**

PROCESS AND SERVICE

Process and Service—service—court's inherent authority to serve—The trial court did not err by dismissing plaintiff's appeal from discovery sanction orders where plaintiff contended that the trial court's office did not properly serve the discovery sanction orders. While the word "party" is used in several of the North Carolina Rules of Civil Procedure to refer to litigants, the General Assembly did not intend to deprive trial courts of the inherent authority to serve their own orders. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

REAL PROPERTY

Real Property—quiet title action—distinguished from foreclosure—prior pending action doctrine—not enforceable—In an action arising from a foreclosure, with a transferred note and transferred property, the trial court did not err by granting defendants' Rule 12(b)(6) motion to claims to quiet title and for injunctive relief. The claim for injunctive relief was identical to the relief sought in the foreclosure proceeding, but plaintiff argued that the quiet title claim also sought relief that could not be granted in the foreclosure special proceeding, so that the prior pending action doctrine did not apply. However, the complaint failed to sufficiently allege a claim to quiet title. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

Real Property—quiet title action—distinguished from foreclosure—prior pending action doctrine—not enforceable—In an action arising from a foreclosure, with a transferred note and transferred property, the trial court did not err by granting defendants' Rule 12(b)(6) motion to claims to quiet title and for injunctive relief. The claim for injunctive relief was identical to the relief sought in the foreclosure proceeding, but plaintiff argued that the quiet title claim also sought relief that could not be granted in the foreclosure special proceeding, so that the prior pending action doctrine did not apply. However, the complaint failed to sufficiently allege a claim to quiet title. **In re Kenley, 583.**

ROBBERY

Robbery—instructions—lesser included offense—The trial court did not abuse its discretion in a prosecution for robbery with a dangerous weapon by instructing on the lesser included offense of common law robbery. The contradictory evidence as to one of the elements of armed robbery (the presence of a dangerous weapon) was enough to permit the jury to rationally find defendant guilty of the lesser included offense of common law robbery. **State v. Ricks, 742.**

SATELLITE BASED MONITORING

Satellite Based Monitoring—civil proceeding—ineffective assistance of counsel—not applicable—The argument that an ineffective assistance of counsel claim can be asserted in satellite based monitoring (SBM) appeals because an SBM proceeding is not criminal in nature has been rejected. **State v. Springle, 760.**

SEARCH AND SEIZURE

Search and Seizure—motion to suppress—search warrant—nexus between drug-related activity and residence—Where two men who lived in defendant's residence were engaged in dealing drugs and lied to officers about where they lived, the Court of Appeals affirmed the trial court's order granting defendant's motion to suppress evidence of drug-related activity seized following execution of a search warrant at her residence. The allegations in the affidavit indicating that the two men were involved in drug dealing and engaged in behaviors common to drug dealers were not sufficient to implicate any particular place where the men might have been engaged in drug-related activity. **State v. Allman, 685.**

SENTENCING

Sentencing—recidivist—findings insufficient—out of state convictions—The trial court's conclusion that defendant was a recidivist was not supported by competent evidence and, therefore, cannot support the conclusion that he must submit to lifetime sex-offender registration and satellite-based monitoring. The conclusion that defendant was a recidivist was not supported by findings made by the trial court as to which prior conviction qualified defendant as a recidivist and, further, a stipulation to a prior record level worksheet reflecting out-of-state convictions cannot constitute a legal conclusion that a particular out-of-state conviction is "substantially similar" to a particular North Carolina felony or misdemeanor. **State v. Springle, 760.**

STATUTES OF LIMITATION AND REPOSE

Statutes of Limitation and Repose—fraud—breach of contract—unfair trade practices—issue of material fact on accrual of action—Where the president (Junior) of a company (AmerLink) attempted to purchase the chairman and majority shareholder's (plaintiff) interest in the company and allegedly engaged in fraud to do so, the trial court erred by granting summary judgment in favor of defendant Barth (Senior) on the grounds that plaintiff did not commence the action for fraud, breach of contract as a third-party beneficiary, and unfair and deceptive trade practices against him within the relevant statutes of limitations. The Court of Appeals rejected Senior's argument that the clock began to tick when plaintiff learned of co-defendant Junior's alleged fraudulent actions. There was a genuine issue of material fact as to when Senior's alleged fraud was or should have been discovered by plaintiff. A jury could have determined that plaintiff's causes of action did not accrue until 18 August 2009, when Senior notified AmerLink's bankruptcy attorneys that Senior had no intention of financing AmerLink's Chapter 11 bankruptcy, contrary to the assurances made by Junior. **Spoor v. Barth, 670.**

TAXATION

Taxation—property—industrial solar system—method of appraisal—A decision by the North Carolina Property Tax Commission about the assessment

of an industrial solar system was remanded where the taxpayer met its burden of production with evidence that the County used an arbitrary or illegal method of appraising the value of the solar heating system and that appraisal substantially exceeded the true value in money of the property. The County used a press release from the Governor's website to determine the system's value, failed to follow statutory guidelines for appraisal, and did not consider the obsolescence of the equipment. **In re FLS Owner II, LLC, 611.**

UNFAIR TRADE PRACTICES

Unfair Trade Practices—attorney fees—award and denial distinguished—The trial court satisfied its duty when awarding attorney fees under N.C.G.S. § 75-16.1(2) by recognizing that it had to exercise its discretion and then by stating that in its discretion it would decline to award the requested fees. The findings that followed suggest that the trial court had no need to engage in the analysis required to award fees. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

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

ANTONISHA ALSTON, ADMINISTRATOR, ESTATE OF ANTONIO BELLAMY, PLAINTIFF
v.
AMY HUESKE, DEFENDANT

No. COA 15-207

Filed 5 January 2016

1. Medical Malpractice—expert review—extension of statute of limitations

N.C.G.S. § 1A-1, Rule 9(j) should be complied with at the time of filing, with expert review taking place before the filing of the complaint. An expert in a medical malpractice action must be a licensed health care provider, and if the party is a specialist, the expert must specialize in the same or a similar specialty as the party against whom the testimony is given, with either an active clinical practice or instructing students in a professional school. Rule 9(j) provides an avenue to extend the statute of limitations in order to provide additional time, if needed, to meet the expert review requirement, but the extension may not be used to amend a previously filed complaint in order for it to comply with the Rule 9(j) requirement.

2. Medical Malpractice—Rule 9(j)—allegation—insufficient

There was not enough information in a medical malpractice action to evaluate whether a witness could reasonably be expected to qualify as an expert where the complaint alleged only that the medical records were reviewed by a "Board Certified."

3. Medical Malpractice—Rule 9(j)—statute of limitations—amendment—refiling

While a deficient N.C.G.S. § 1A-1, Rule 9(j) complaint can be dismissed and refiled within one year in some situations, the original complaint must have been filed within the statute of limitations. In this case, the action could not be deemed to have been commenced within the limitations period, and amending or refiling the complaint were not options.

4. Rules of Civil Procedure—Rule 15 motion—not viewed as equivalent of Rule 60 motion—Rule 60 motion not in the record

The trial court had no jurisdiction to review a Rule 15 motion as the functional equivalent of a Rule 60 motion to correct a technical or clerical error where there was no Rule 60 motion in the record.

Appeal by Plaintiff from Order entered 30 September 2014 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 27 August 2015.

Law Offices of Alvin L. Pittman, by Alvin L. Pittman, for Plaintiff-Appellant.

Yates, McLamb, and Weyher, LLP, by Samuel G. Thompson, Jr., for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Antonisha Alston, the administrator for the Estate of Antonio R. Bellamy ("the Administrator") appeals from the trial court's order dismissing Plaintiff's complaint under Rules 9(j) and 12(b)(6) as well as the court's denial of his motion to amend the pleadings. After review, we affirm the trial court's dismissal.

I. Factual and Procedural Background

On 23 December 2013, one week before the statute of limitations ran, the Administrator filed an unverified complaint against Dr. Herendra Arora ("Dr. Arora") and Amy Hueske ("Hueske"), a nurse, seeking damages for medical negligence. The complaint alleges the following narrative.

On 27 December 2011, Antonio Bellamy ("Bellamy"), suffered a burn on his right foot and was subsequently hospitalized at University of North Carolina Hospitals in Chapel Hill, North Carolina. On 30 December 2011, Bellamy underwent a skin graft to address the burn. This procedure employed the use of a Laryngeal Mask Airway to facilitate his breathing. During the operation, the attending anesthesiologist, Dr. Arora, left the room for reasons not described in the complaint. Medical staff, namely Dr. Arora and nurse Hueske failed to monitor or document his breathing, oxygenation, and ventilation for three minutes.

During this time, Bellamy's blood pressure and heart rate fell, requiring medical staff to administer medication to increase Bellamy's blood pressure. When this proved insufficient, medical staff administered CPR. Finally, medical staff inserted an endotracheal tube into Bellamy's airway. The tube first inserted was not properly inspected and had a leak which required the tube to be exchanged for another. During the events described above, Bellamy suffered a period of decreased oxygen for approximately fifteen minutes which led to cardiac arrest. Medical staff placed Bellamy on a ventilator. Through hospital representatives,

Dr. Arora and Hueske relayed to Bellamy's family that there was a "small complication involving an equipment malfunction, but it was detected in time before any harm was done . . . [Bellamy] would be fine." The day after the surgery, Bellamy's family was pressured to make a decision, and ultimately decided to remove Bellamy from the ventilator. Bellamy passed away in the hospital on 1 January 2012.

In order to comply with Rule 9(j), the complaint alleged the following:

> 29. Prior to commencing this action, the medical records were reviewed and evaluated by a duly Board Certified who opined that the care rendered to Decedent was below the applicable standard of care.
>
> 30. . . . The medical care referred to in this complaint has been reviewed by person(s) who are reasonably expected to qualify as expert witnesses, or whom the plaintiff will seek to have qualified as expert witnesses under Rule 702 of the Rules of Evidence, and who is willing to testify that the medical care rendered plaintiff by the defendant(s) did not comply with the applicable standard of care.

On 24 February 2014, Dr. Arora and Hueske filed an unverified answer generally denying the allegations of the Administrator's complaint. Dr. Arora and Hueske asserted defenses under Rule 12(b)(6) and Rule 9(j) within their answer. Following the pleading, the Administrator agreed to voluntarily dismiss Dr. Arora pursuant to Rule 41. This left only the nurse, Hueske, as a Defendant.

The Administrator requested leave to amend the pleadings in order to clearly comply with Rule 9(j), but the trial court denied the Administrator's request under Rule 15(a). The court reasoned the legislature intended 9(j) be satisfied from the beginning, at the time the complaint was filed. The trial court dismissed the case without prejudice pursuant to Rule 12(b)(6) and Rule 9(j) in an order dated 25 September 2014. The Administrator timely filed a notice of appeal with this Court.

II. Jurisdiction

Jurisdiction lies in this court by right pursuant to N.C. Gen. Stat. § 7A-27(b)(1) from a final judgment of a superior court.

III. Standard of Review

We review the trial court's dismissal *de novo*. The standard of review of a Rule 12(b)(6) motion to dismiss is *de novo*. *Leary v. N.C. Forest*

Prods., Inc., 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). Likewise, a trial court's order dismissing a complaint pursuant to Rule 9(j) is reviewed *de novo* on appeal because it is a question of law. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 256, 677 S.E.2d 465, 477 (2009).

IV. Analysis

[1] Rule 9 was amended in 1995 by adding a new subsection, subsection (j). N.C. Sess. Law 1995-309. At that time, the newly enacted Rule 9(j) required any medical malpractice complaint to be dismissed unless:

> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

Id.

In *Thigpen v. Ngo*, the Supreme Court of North Carolina interpreted Rule 9(j) where the plaintiff failed to specify that the medical records had been reviewed by an expert before the plaintiff filed the complaint. *Thigpen v. Ngo*, 355 N.C. 198, 199, 558 S.E.2d 162, 163–164 (2002). In *Thigpen*, before the expiration of the statute of limitations, plaintiff filed an amended complaint certifying the " 'medical care has been reviewed' by someone who would qualify as an expert." *Id.*, 558 S.E.2d at 163–164.

The Supreme Court reasoned that the statute's language was clear and unambiguous in requiring dismissal if the requirements of Rule 9(j) were not met. *Id.* at 202, 558 S.E.2d at 165. "[M]edical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification leads to dismissal." *Id.*, 558 S.E.2d at 165.

In 2011, the General Assembly further amended Rule 9(j) effective 1 October 2011. N.C. Sess. Law 2011-400. As it reads today, Rule 9(j) requires any complaint alleging medical malpractice be dismissed unless:

> (1) The pleading specifically asserts *that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry* have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.
>
> (2) The pleading specifically asserts that *the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry* have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013) (emphasis added to reflect amendment). The Supreme Court of North Carolina decided a case under Rule 9(j) again in 2012, noting that although Rule 9(j) was amended, the requirements remain "substantially unchanged." *Moore v. Proper*, 366 N.C. 25, 29 n.1, 726 S.E.2d 812, 816 n.1 (2012).

It is important for persons filing a complaint under Rule 9(j) to ensure compliance with the rule at the time of filing. Expert review "must take place before the filing of the complaint." *Thigpen*, 355 N.C. at 205, 558 S.E.2d at 167. Our courts have strictly enforced this requirement because of the legislature's purpose in enacting Rule 9(j).

> The legislature specifically drafted Rule 9(j) to govern the initiation of medical malpractice actions and *to require physician review as a condition for filing the action.* The legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert

> certification prior to the filing of a complaint. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.

Thigpen, 355 N.C. at 203–204, 558 S.E.2d at 166 (emphasis added).

In addition, Rule 9(j) requires the medical records and medical care be "reviewed by a person who is reasonably expected to qualify as an expert witness." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2013). To comply, the record and care reviewer must be reasonably expected to qualify under Rule 702 of the North Carolina Rules of Evidence. *Moore*, 366 N.C. at 26, 726 S.E.2d at 814. Rule 702(b) governs expert testimony in medical malpractice actions. An expert in a medical malpractice action must be a licensed health care provider, and if the party is a specialist, the expert must specialize in the same or a similar specialty as the party against whom the testimony is given. N.C. Gen. Stat. § 8C-1, Rule 702(b)(1) (2013). The Rule also requires either an active clinical practice or instructing students in a professional school. N.C. Gen. Stat. § 8C-1, Rule 702(b)(2) (2013).

In fact, since Rule 9(j) requires a high standard for pleadings, Rule 9(j) also provides an avenue to extend the statute of limitations in order to provide additional time, if needed, to meet the expert review requirement. *See Brown v. Kindred Nursing Ctrs. East, LLC*, 364 N.C. 76, 80, 692 S.E.2d 87, 89–90 (2010). In its discretion, the trial court may allow a motion to extend the statute of limitations for up to 120 days. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013). The intent was to allow additional time to find an expert to review the medical records so that they may be reviewed *prior to filing the complaint* to meet the standard of Rule 9(j). *Brown* at 80, 692 S.E.2d at 90. The extension may not be used to amend a previously filed complaint in order for it to comply with the 9(j) requirement. *Id.* "Permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature." *Id.* (quoting *Thigpen*, 355 N.C. at 204, 558 S.E.2d at 166).

A. Motion to Dismiss

[2] We review an appeal from a motion to dismiss *de novo*. On a motion to dismiss, all material facts are taken as true and the motion is viewed in the light most favorable to the plaintiff. *Robinson v. Smith*, 219 N.C. App. 518, 521, 724 S.E.2d 629, 631 (2012). In medical malpractice actions, complaints must meet a higher standard than generally required to

survive a motion to dismiss. As the statute requires, the requirements of Rule 9(j) must be met in the complaint in order to survive a motion to dismiss. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013).

Rule 9(j) must be satisfied at the time of the complaint's filing. Here, the complaint states:

> 29. Prior to commencing this action, the medical records were reviewed and evaluated by a duly Board Certified who opined that the care rendered to Decedent was below the applicable standard of care.
>
> 30. . . . The medical care referred to in this complaint has been reviewed by person(s) who are reasonably expected to qualify as expert witnesses, or whom the plaintiff will seek to have qualified as expert witnesses under Rule 702 of the Rules of Evidence, and who is willing to testify that the medical care rendered plaintiff by the defendant(s) did not comply with the applicable standard of care.

The Administrator argues the trial court erred by granting the dismissal because the complaint met the requirements of Rule 9(j), thus stating a claim for which relief could be granted. Specifically, the Administrator points out there is no requirement for the requirements of Rule 9(j) to be set out within the same paragraph. Such a "hyper-technical" reading of the rule conflicts with the purpose of Rule 9(j), to prevent frivolous malpractice claims. A reading of the whole record shows that this claim is not frivolous. The Administrator also contends that in practice, dismissal under Rule 9(j) usually only happens after early discovery determines whether the board certified reviewers of medical records were qualified to testify as expert witnesses. We are not persuaded.

The wording of the complaint renders compliance with 9(j) problematic. A plaintiff can avoid this result by using the statutory language. Rule 9(j) requires "the medical care and all medical records" be reviewed by a person reasonably expected to qualify as an expert witness and who is willing to testify the applicable standard of care was not met. According to the complaint, the medical care was reviewed by someone reasonably expected to qualify as an expert witness who is willing to testify that defendants did not comply with the applicable standard of care. However, the complaint alleges medical records were reviewed by a "Board Certified" that said the care was below the applicable standard of care. Thus, the complaint does not properly allege the medical records were reviewed by a person *reasonably* expected to qualify as an expert witness.

This omission in the complaint unnecessarily raises questions about whether the witness being "reasonably expected" to qualify as an expert under Rule 702. The only information we have is that the witness is "Board Certified." We do not know whether the witness is a certified doctor or nurse, or even another health care professional. We also cannot say whether the "Board Certified" person is of the same or similar specialty as would be required to testify Hueske violated a standard of care. Simply put, we do not have enough information to evaluate whether this witness could reasonably be expected to qualify as an expert in this case.

The legislature passed Rule 9(j) to require a more stringent procedure to file a medical malpractice claim. Although pleadings are generally construed liberally, legislative intent as well as the strict interpretation given to Rule 9(j) by the North Carolina Supreme Court require us to find the wording of this complaint insufficient to meet the high standard of Rule 9(j).

B. Motion to Amend

[3] In medical malpractice cases, Rule 9(j) requires that the plaintiff obtain relevant medical records and have those medical records examined by a person who is reasonably expected to qualify as an expert witness prior to the filing of the initial complaint or within 120 days of the filing of the complaint should the plaintiff ask for an extension of time pursuant to Rule 9(j). N.C. Gen. Stat. §1A-1, Rule 9(j) (2013). Because the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a). N.C. Gen. Stat. §1A-1, Rule 15(a) (2013); *Keith v. Northern Hosp. Dist. Of Surry County*, 129 N.C. App. 402, 405, 499 S.E.2d 200, 202 (1998). "To read Rule 15 in this manner would defeat the objective of Rule 9(j) which . . . seeks to avoid the *filing* of frivolous medical malpractice claims." *Id.*, 499 S.E.2d at 202 (emphasis in original).

Another possibility is to voluntarily dismiss the action pursuant to Rule 41. A voluntary dismissal by judicial order under Rule 41(a)(2) results in a dismissal without prejudice and generally allows a new action based on the same claim to be commenced within one year of the dismissal so long as the original claim was brought within the applicable statute of limitations. N.C. Gen. Stat. §1A-1, Rule 41(a)(2) (2013). Provided the original complaint was filed within the statutory period, Rule 41 allows, in some situations, a 9(j) deficient complaint to be

dismissed and then re-filed with a sufficient 9(j) statement within one year of dismissal. *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000). However, to re-file after a voluntary dismissal, the action must still be "commenced within the time prescribed therefor." *Bass v. Durham County Hosp. Corp.*, 158 N.C. App. 217, 224, 580 S.E.2d 738, 742 (2003) (Tyson, J., dissenting), *rev'd*, 358 N.C. 144, 592 S.E.2d (2004) (adopting reasoning in dissenting opinion). An action is only "commenced" under rule 9(j) if it has been properly reviewed by an expert at the time of filing. *Id.*

Because this plaintiff did not file the complaint with the proper Rule 9(j) certification before the running of the statute of limitation, the complaint cannot have been deemed to have commenced within the statute.

[4] The appellant asks that we review his Rule 15 motion as the functional equivalent of a Rule 60 motion to correct a technical or clerical error. Because such motion was not pled before the trial court and ruled on we have no jurisdiction to determine this issue.

Although the Administrator presents an interesting procedural argument on appeal, the transcript of the dismissal does not show she made a Rule 60 motion at trial. Instead, the Administrator moved "to amend the complaint" without citing a specific rule. The trial court denied the Administrator's motion to amend her complaint pursuant to Rule 15(a). At that time, the Administrator did not explain to the court she intended to amend the complaint under Rule 60 nor did she make a separate Rule 60 motion. We find no Rule 60 motion in the record or transcript and thus have no jurisdiction to rule on a motion not made at the trial court.

V. Conclusion

For the foregoing reasons, we affirm the final judgment of the trial court.

AFFIRMED.

Judges Dillon and Dietz concur.

CUSHMAN v. CUSHMAN

[244 N.C. App. 555 (2016)]

SHEILA A. CUSHMAN, PLAINTIFF
v.
LARRY J. CUSHMAN, DEFENDANT

No. COA15-233

Filed 5 January 2016

1. Appeal and Error—denial of summary judgment—no appeal after trial

The denial of a summary judgment was not addressed on appeal where the case was tried on the merits after the denial of the motion.

2. Divorce—equitable distribution—distributive factors—defendant's assertions at trial—findings not necessary

The trial court was not required to consider or to make written findings addressing the distributive factors set out in N.C.G.S. § 50-20(c) where the parties had agreed to an equal division of the marital estate. Given defendant's repeated assertions at the trial level that an equal division would be equitable, there was no need to decide whether the parties' agreement met the technical requirements for a legally binding stipulation. The trial court was not required to make findings demonstrating its consideration of the distributional factors set out in N.C.G.S. § 50-20(c) because defendant agreed that an equal division of the marital estate would be equitable.

3. Divorce—equitable distribution—post-separation payments

The trial court did not err in an equitable distribution action by failing to classify and distribute defendant's post-separation payments as divisible where those payments were for payments on the mortgage on the former marital residence, maintenance and repair of the former marital residence, and payments on a debt incurred by the parties' adult daughter. Defendant was living in the former marital residence and was not entitled to payment for utilities and routine maintenance; the denial of credit for the daughter's loan payment was supported by plaintiff's testimony that she did not consider the loan a marital responsibility; and plaintiff did not document the amount of the mortgage payment made from his separate property.

Appeal by defendant from order entered 9 September 2014 by Judge L. Walter Mills in Pamlico County District Court. Heard in the Court of Appeals 20 October 2015.

J. Randal Hunter for plaintiff-appellee.

White & Allen, P.A., by David J. Fillippeli, Jr., and Ashley F. Stucker, for defendant-appellant.

ZACHARY, Judge.

Larry Cushman (defendant) appeals from an order for equitable distribution of the marital and divisible property acquired by defendant and Sheila Cushman (plaintiff) during their marriage. On appeal, defendant argues that the trial court erred by denying his pretrial motion for partial summary judgment, neglecting to consider certain distributional factors, and failing to credit him for post-separation payments. We conclude that the trial court's denial of defendant's pretrial motion for partial summary judgment is not subject to appellate review following a hearing on the merits, and that the trial court did not err in its equitable distribution order.

I. Background

The parties were married on 14 February 1970, separated on 31 May 2010, and divorced on 24 June 2013. One child was born of the marriage, a daughter who was thirty-three years old at the time of the parties' equitable distribution hearing. On 21 April 2012, plaintiff filed a complaint for post-separation support, alimony, and equitable distribution of the marital estate. On 6 August 2012 defendant filed an answer and a motion for sanctions against plaintiff and the attorney who represented plaintiff at that time, pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. Defendant's Rule 11 motion, which was based on plaintiff's inclusion of claims for post-separation support and alimony in her complaint, alleged that prior to the filing of the plaintiff's complaint, the parties had executed a separation agreement releasing all claims other than one for equitable distribution. On 29 August 2012, plaintiff filed a voluntary dismissal of the challenged claims.

At the time that the parties separated, defendant was a retired officer in the United States Marine Corps. After the date of separation, defendant's retirement benefits continued to be deposited into a bank account held jointly by the parties until September 2011, when defendant opened a separate bank account. On 27 September 2012, plaintiff filed a motion seeking an interim distribution of $45,848.00 for her past due share of defendant's military retirement pay. On 2 October 2012, defendant filed a response to plaintiff's motion for interim distribution, in which

defendant agreed that plaintiff had an interest in his retirement benefits but argued that the amount of her entitlement should be reduced. Defendant asserted that (1) because the retirement checks were deposited into a joint account for the first nineteen months of the parties' separation, plaintiff had therefore "received and controlled all of defendant's retirement income" during this time, and that (2) plaintiff's entitlement should be reduced because defendant had "used the net income of his retirement benefits" to make payments towards the mortgage owed on the former marital residence and on a loan obligation of the parties' adult daughter. Defendant's motion did not allege that his payments towards the mortgage or loan were made with his separate funds.

On 21 April 2014, defendant filed a motion for partial summary judgment regarding the identification, valuation, and distribution of marital assets. On 20 May 2014, defendant filed a sworn equitable distribution affidavit in which defendant averred in relevant part that:

> The parties entered into a Separation Agreement dated 16 May 2011 in which the parties settled all their claims except for their claim for Equitable Distribution. <u>Both parties contemplated that they would equally divide their marital property and debts</u> as provided by North Carolina General Statute 50-20(c). . . . [I]n order to establish an Equitable Distribution of the marital assets and debts, plaintiff will have to pay a distributive award to defendant of $2,109.05. That being the case, each party will have assets valued at $175,551.76. It is respectfully submitted that the <u>division in this case should be an equal division by using the net value of marital property and net value of divisible property. It is respectfully contended that there are no factors which would support a finding that an equal division is not equitable</u>.

(Emphasis added.) On 19 May 2014, the trial court conducted a hearing on equitable distribution and defendant's summary judgment motion. The trial court entered an order on 9 September 2014 denying defendant's motion for partial summary judgment and distributing the marital estate.[1] The trial court found that the parties had "testified and stipulated to the Court that an equal division was equitable," and directed defendant to pay plaintiff a distributive award of $52,595.05. Details of

1. The equitable distribution order stated that defendant's Rule 11 motion was "continued to a date uncertain for later hearing."

the trial court's order for equitable distribution are discussed below, as relevant to the issues raised on appeal. On 17 September 2014, defendant filed a "motion to vacate order, for [a] new trial pursuant to Rule 59 . . . [and] to disqualify Judge Walter Mills[.]" On 9 October 2014, defendant appealed to this Court before obtaining a ruling on his Rule 59 motion.

II. Standard of Review

It is undisputed that

> [t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.

Pegg v. Jones, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007) (internal quotation omitted), *aff'd per curiam*, 362 N.C. 343, 661 S.E.2d 732 (2008). "The trial court's findings need only be supported by substantial evidence to be binding on appeal." *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (citations omitted). In addition, "[i]t is well established by this Court that where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *Juhnn v. Juhnn*, __ N.C. App. __, __, 775 S.E.2d 310, 313 (2015) (citing *In re K.D.L.*, 207 N.C. App. 453, 456, 700 S.E.2d 766, 769 (2010), *disc. review denied*, 365 N.C. 90, 706 S.E.2d 478 (2011)).

Furthermore, it is axiomatic that:

> "The division of property in an equitable distribution is a matter within the sound discretion of the trial court." When reviewing an equitable distribution order, the standard of review "is limited to a determination of whether there was a clear abuse of discretion." "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason."

Petty v. Petty, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009) (quoting *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005), and *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *disc. review denied and appeal dismissed*, 363 N.C. 806, 691 S.E.2d 16 (2010).

III. Denial of Motion for Partial Summary Judgment

[1] Defendant argues first that the trial court erred by denying his "motion for partial summary judgment as to the identification, classification, valuation, and distribution of the marital assets and debts of the parties." After the trial court denied defendant's pretrial motion, the court conducted a trial on the parties' claims for equitable distribution. Our Supreme Court has held:

> The denial of a motion for summary judgment is an interlocutory order and is not appealable. . . . To grant a review of the denial of the summary judgment motion after a final judgment on the merits, however, would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (citing *MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E. 2d 271 (1983) (other citations omitted). *Harris* is controlling on the issue of the appealability of the trial court's pretrial ruling on defendant's summary judgment motion. "Because this case was tried on the merits after denial of defendants' motion for summary judgment, under *Harris*, defendants' arguments regarding the summary judgment order cannot amount to reversible error, and we, therefore, do not address them." *Houston v. Tillman*, __ N.C. App. __, __, 760 S.E.2d 18, 20-21 (2014).

IV. Distributional Factors in N.C. Gen. Stat. § 50-20(c)

[2] Defendant contends that the trial court erred by failing to consider the distributional factors set out in N.C. Gen. Stat. § 50-20(c). This statute identifies factors for the trial court to consider in its determination of whether an equal division would be equitable and provides that:

> There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and

> divisible property equitably. The court shall consider all of the following factors under this subsection[.]

On appeal, defendant specifically maintains that the trial court erred by failing to consider N.C. Gen. Stat. § 50-20(c)(11a), which directs the trial court to consider, if it determines that an equal division would not be equitable, the "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution." Defendant asserts that the trial court was required to award him a credit under this subsection for defendant's post-separation expenditures for the mortgage and maintenance on the former marital residence, and also for his post-separation payments towards a loan obligation of the parties' adult daughter. In addition, defendant claims that the trial court should have considered plaintiff's "waste and conversion" of marital assets. We hold that on the facts of this case, the court was not required to consider or to make written findings addressing the distributive factors set out in N.C. Gen. Stat. § 50-20(c).

This Court has held that when the parties in an equitable distribution case agree to an equal division of the marital estate, the trial court should not consider the distributional factors in N.C. Gen. Stat. § 50-20(c):

> [W]here the parties, as here, stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution, any of the distributional factors set forth in § 50-20(c). The trial court therefore correctly refused to credit the husband with any mortgage payments he made after the separation of the parties.

Miller v. Miller, 97 N.C. App. 77, 81, 387 S.E.2d 181, 184 (1990).

In this case, the trial court found in Finding No. 18(A) that:

> Neither party contended that they were entitled to an unequal distribution of marital assets and liabilities. In fact, both of them testified and stipulated to the Court that an equal division was equitable. Because distribution factors are used only to determine whether an equal division of assets would not be equitable, a trial court should not consider, or make findings as to the distributional factors in N.C.G.S. § 50-20(c), when the parties have stipulated to an equal division of all marital and divisible assets and

> liabilities. Therefore, neither party is entitled to any credits for post separation payments.

This finding is supported by evidence that clearly establishes that defendant had agreed to an equal division of the marital estate. As discussed above, defendant executed a sworn affidavit averring in relevant part that:

> The parties entered into a Separation Agreement dated 16 May 2011 in which the parties settled all their claims except for their claim for Equitable Distribution. Both parties contemplated that they would equally divide their marital property and debts as provided by North Carolina General Statute 50-20(c). . . . It is respectfully submitted that the division in this case should be an equal division by using the net value of marital property and net value of divisible property. It is respectfully contended that there are no factors which would support a finding that an equal division is not equitable.

(emphasis added). During the hearing, defendant was asked if he agreed to an equal division and responded as follows:

> PLAINTIFF'S COUNSEL: Mr. Cushman, . . . do you agree than an equal division of assets and liabilities is the fair thing for the judge to do between you and Ms. Cushman?
>
> DEFENDANT: What asset are we talking about now?
>
> PLAINTIFF'S COUNSEL: All of --
>
> DEFENDANT: All assets?
>
> PLAINTIFF'S COUNSEL: Anything you accumulated during the marriage, would you agree that an equal division is fair between the two of you?
>
> DEFENDANT: I do, state law demands it I think.
>
> PLAINTIFF'S COUNSEL: All right. So you agree and stipulate that an equal division is what Judge Mills should do?
>
> DEFENDANT: Correct, sir.

Moreover, defendant's counsel began his argument to the trial court by explicitly asserting that an equal division of the parties' assets would be equitable:

> TRIAL COURT: Any argument, Mr. Hooten?

> DEFENSE COUNSEL: We agree that it ought to be an equitable distribution case with equal division and I think if Your Honor will look at the Equitable Distribution Affidavit we prepared . . . an equal division would give each party about $175,000 in assets[.]

(emphasis added). We conclude that the record evidence clearly supports the trial court's finding that the parties had agreed to an equal division of the marital estate.

Defendant argues on appeal that the evidence fails to establish that the parties had entered into a formal stipulation. Defendant makes various arguments challenging the validity of their agreement on this issue, including the failure of the trial court to conduct an inquiry into the parties' understanding of the legal consequences of their agreement, and the fact that the record does not contain a sworn written stipulation in which both parties signed a document agreeing to an equal division. We determine that, given defendant's repeated assertions at the trial level that an equal division would be equitable, we need not decide whether the parties' agreement met the technical requirements for a legally binding "stipulation."

It is undisputed that at the trial level - in defendant's equitable distribution affidavit, in defendant's testimony, and in defense counsel's argument - defendant pursued the theory that an equal division of the marital estate would be equitable.

> Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. . . . The defendant may not change his position from that taken at trial to obtain a steadier mount on appeal."

Balawejder v. Balawejder, 216 N.C. App. 301, 307, 721 S.E.2d 679, 683 (2011) (quoting *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal citations and quotation marks omitted). In this case, defendant expressly sought an equal division of the marital estate at the hearing on this matter, and may not take the opposite position on appeal. Given that defendant agreed at the trial level that an equal division of the marital estate would be equitable, the trial court was not required to make findings demonstrating its consideration of the distributional factors set out in N.C. Gen. Stat. § 50-20(c). *Miller*, 97 N.C. App. at 81, 387 S.E.2d at 184.

V. Defendant's Post-Separation Payments Toward Marital Debt

[3] Defendant argues next that the trial court erred by failing to "classify [defendant's] post-separation payments on the marital debt as divisible property and distribute the same." Defendant contends that his post-separation expenditures on "the mortgage, Sallie Mae loan, and maintenance, upkeep and repairs to the marital home," constitute divisible property that the trial court was required to distribute. We disagree.

On appeal, defendant argues that the trial court was required to classify, value, and distribute three categories of post-separation payments: (1) payments towards the mortgage on the former marital residence; (2) money spent on maintenance and repair of the former marital residence, and; (3) payments towards a debt incurred by the parties' adult daughter. We have held that " '[a] spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) for the benefit of the marital estate.' " *Bodie v. Bodie*, 221 N.C. App. 29, 34, 727 S.E.2d 11, 15-16 (2012) (quoting *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002)). The crucial requirement for our purposes is that defendant is only entitled to credit for payments made "from non-marital or separate" funds. As we observed in *Bodie*, "[defendant] has not cited any cases, and we know of none, holding that a spouse is entitled to a 'credit' for post-separation payments made using marital funds." *Id.*

The trial court made the following findings of fact addressing defendant's contention that he was entitled to credit for these post-separation payments:

> 18. The Defendant contends that he is entitled to various other credits for debts and expenses that he has paid since the parties' separation. He is not entitled to these credits. In further support hereof, the Court finds as follows:
>
> A. Neither party contended that they were entitled to an unequal distribution of marital assets and liabilities. In fact, both of them testified and stipulated to the Court that an equal division was equitable. Because distribution factors are used only to determine whether an equal division of assets would not be equitable, a trial court should not consider, or make findings as to the distributional factors in N.C.G. S. § 50-20(c), when the parties have stipulated to an equal division of all marital and divisible assets and

> liabilities. Therefore, neither party is entitled to any credits for post separation payments.
>
> B. The Defendant contends that he is entitled to various credits relating to mortgage payments and expenses to maintain the Pamlico County property. As set forth above, he has stipulated that an equal division is equitable. Furthermore, he continued to occupy the former marital residence and be in complete control of it after the parties separated. Also, this property has been sold, and both parties, as to this marital asset, made the decision to divide this money equally. Certainly, the repairs and improvements done to the residence created equity in the home, which was present as cash in the proceeds of the sale, and again, subsequently divided equally by the parties. The reduction in the principal amount of the mortgage represents divisible property; however, there is insufficient evidence to determine value. Therefore, this property is not subject to distribution in this matter.
>
> C. The Defendant contends that a certain student loan incurred for the benefit of [Hailey] S. Cushman is a marital debt for which he is entitled to credit because of payments that he made on the debt following the separation. Neither the Plaintiff nor the Defendant are obligated on the loan. The debt was not incurred for the benefit of the Plaintiff or the Defendant. It is a student loan incurred solely by the parties' daughter, [Hailey] S. Cushman, and is not subject to this action.

We will consider separately the types of post-separation payments at issue in this case. Regarding defendant's payments for utilities and routine maintenance of the marital residence, defendant does not dispute the trial court's finding that defendant "continued to occupy the former marital residence and be in complete control of it after the parties separated." Defendant has neither advanced any argument that it would be fair for plaintiff to bear responsibility for defendant's living expenses such as water and electricity after their separation, nor cited any authority classifying such payments as divisible property. We conclude that the trial court did not err by ruling that defendant was not entitled to credit for these expenses.

Regarding payments towards the loan obligation of the parties' adult daughter, we conclude that the trial court's finding on this issue

was supported by the evidence. Defendant argues that the parties had agreed to assume responsibility for their daughter's loan as part of paying for her education and that, on the basis of their personal agreement, this debt should be classified as marital property, and his post-separation payments as divisible property. Plaintiff, however, testified that she did not regard the loan as a marital responsibility. "The trial court is the sole judge of the weight and credibility of the evidence." *Montague v. Montague*, __ N.C. App. __, 767 S.E.2d 71, 74 (2014) (citing *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994)). The trial court's finding on this issue is supported by competent evidence and should be upheld.

Defendant also asserts that his post-separation payments towards the mortgage on the former marital residence and for repairs to the residence are divisible property. Defendant has failed, however, to produce evidence of the dollar amount, if any, of such payments that were made with his separate funds. Defendant concedes that the post-separation payments were made using his retirement benefits and, to an unspecified extent, from his Social Security benefits. Defendant testified that the repairs to the former marital property were made "exclusively" using his retirement funds, and that defendant had spent approximately $4,400 from his "retirement fund" on home repair. Defendant does not, however, challenge the trial court's Finding No. 11:

> 11. The Defendant is retired from the United States Marine Corps. The Plaintiff is entitled to 50 percent of the Defendant's gross disposable retirement pay. Her entitlement to 50 percent of this gross disposable retired pay vested at the time the parties separated on May 31, 2010. As set forth above, the parties have entered an order distributing to the Plaintiff her share of the Defendant's gross disposable retired pay. She received her share of that retired pay by way of a check from DFAS for the first time on December 31, 2013. . . .

Because it is undisputed that plaintiff was entitled to half of defendant's retirement benefits, defendant's "retirement fund" consisted of a commingled account that included funds belonging to plaintiff. Defendant did not introduce any documentation of the amount of his post-separation payments from his "retirement fund" that could properly be considered defendant's separate property. Similarly, although defendant contends that his Social Security benefits are separate property which defendant used to make some post-separation payments, defendant never produced any documentation of the amount he spent

from his separate funds. Defendant also admitted at trial that he did not know the extent to which these payments resulted in a reduction in the principal debt.

" 'The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate.' " *Johnson v. Johnson*, __ N.C. App. __, __, 750 S.E.2d 25, 29 (2013) (quoting *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991)). The statutory mandates that "the trial court (1) classify and value all property of the parties . . . (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property, necessarily exist only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution." *Miller*, 97 N.C. App. at 80, 387 S.E.2d at 184. Defendant neglected to introduce evidence establishing the amount of the post-separation payments made from his separate funds. Because defendant failed to meet his burden to introduce evidence on this issue, the trial court did not err by making no findings specifically valuing or distributing defendant's post-separation payments. *See Albritton v. Albritton*, 109 N.C. App. 36, 41, 426 S.E.2d 80, 83-84 (1993) ("We see no reason to remand this case on the basis that the trial court failed to make a specific finding . . . when it was plaintiff who failed to provide the trial court with the necessary information. . . . [T]he trial court's failure to put a specific value on defendant's pension plan was not error.").

Moreover, given that it was defendant's burden to produce evidence on this issue, we will not remand for the taking of additional evidence. This Court has long held that where

> the party claiming the property, here a debt, to be marital has failed in his burden to present evidence from which the trial court can classify, value and distribute the property, that party cannot on appeal claim error when the trial court fails to classify the property as marital and distribute it. . . . Furthermore, remanding the matter for the taking of new evidence, in essence granting the party a second opportunity to present evidence, 'would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing.'

Miller, 97 N.C. App. at 80, 387 S.E.2d at 184 (quoting *In re Marriage of Smith*, 448 N.E.2d 545, 550 (Ill. App. Ct. 1983)).

For the reasons discussed above, we conclude that the trial court did not err and that its equitable distribution order should be

AFFIRMED.

Judges BRYANT and CALABRIA concur.

E. BROOKS WILKINS FAMILY MEDICINE, P.A., PLAINTIFF
v.
WAKEMED; WAKEMED D/B/A FALLS POINTE MEDICAL GROUP; INAM RASHID, MD; MICHELE CASEY, MD; MONICA OEI, MD; AND LESLIE ROBINSON, MD, DEFENDANTS

No. COA15-217

Filed 5 January 2016

1. Process and Service—service—court's inherent authority to serve

The trial court did not err by dismissing plaintiff's appeal from discovery sanction orders where plaintiff contended that the trial court's office did not properly serve the discovery sanction orders. While the word "party" is used in several of the North Carolina Rules of Civil Procedure to refer to litigants, the General Assembly did not intend to deprive trial courts of the inherent authority to serve their own orders.

2. Appeal and Error—notice of appeal—not timely

Plaintiff's appeal from discovery sanctions orders was dismissed where the untimely nature of plaintiff's notice of appeal deprived the Court of Appeals of jurisdiction even though plaintiff contended that defects in the service did not trigger the deadline. While plaintiff contended that the certificates of service did not specify the date or the means of service, each certificate sufficiently showed the date of service and plaintiff had actual notice.

3. Appeal and Error—writ of certiorari—denied

A petition for a writ of certiorari for review of discovery sanctions was denied in the Court of Appeals' discretion. A petition for the writ must show merit or that error was probably committed below; the trial court here properly sanctioned plaintiff for failure to comply with discovery, having considered lesser sanctions and found them inappropriate.

4. Appeal and Error—jurisdiction—lower court dismissal of appeal

There was no appeal to the Court of Appeals from a lower court's dismissal of an appeal. The Court of Appeals did not have jurisdiction; when prior decisions of the Court of Appeals conflict, the earlier of those decisions is controlling precedent.

5. Attorneys—fees—discovery violations—no abuse of discretion

There was no abuse of discretion in an award of attorney fees for discovery violations. Even though plaintiff contended the trial court erred in its "blanket award" of all fees requested from alleged discovery violations without providing any analysis of the basis of the award, the record evidence and the trial court's filings indicated that the court acted well within its discretion.

6. Unfair Trade Practices—attorney fees—award and denial distinguished

The trial court satisfied its duty when awarding attorney fees under N.C.G.S. § 75-16.1(2) by recognizing that it had to exercise its discretion and then by stating that in its discretion it would decline to award the requested fees. The findings that followed suggest that the trial court had no need to engage in the analysis required to award fees.

Appeal by Plaintiff and cross-appeal by Defendants from orders entered 5 August 2014 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 9 September 2015.

John M. Kirby, for Plaintiff-Appellant.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and William R. Forstner, for Defendants-Appellees/Cross-Appellants WakeMed and WakeMed d/b/a/ Falls Pointe Medical Group; Robinson Bradshaw & Hinson, P.A., by Julian H. Wright, Jr. and Andrew A. Kasper, for Defendants-Appellees/Cross-Appellants Inam Rashid, MD; Michele Casey, MD; Monica Oei, MD; and Leslie Robinson, MD.

INMAN, Judge.

E. Brooks Wilkins Family Medicine, P.A. ("Plaintiff") appeals from an order awarding attorneys' fees to Inam Rashid, MD, Michele Casey,

MD, Monica Oei, MD, and Leslie Robinson, MD (collectively "Doctor Defendants") and an order awarding attorneys' fees to WakeMed and WakeMed d/b/a Falls Pointe Medical Group (collectively "WakeMed Defendants"). WakeMed Defendants and Doctor Defendants (collectively "Defendants") cross-appeal from both orders awarding Defendants attorneys' fees. Plaintiff also appeals from the order affirming the dismissal of Plaintiff's appeal. After careful review, we dismiss Plaintiff's appeal as to all orders except the attorneys' fees orders and affirm the attorneys' fee orders.

Factual & Procedural Background

Plaintiff is a family medical practice in Raleigh. In January 2010, Doctor Defendants resigned from their employment with Plaintiff and formed their own practice affiliated with WakeMed Defendants. In March 2012, Plaintiff brought an action against Defendants. In August 2012, the claim was subsequently dismissed without prejudice.[1]

On 7 December 2012, Plaintiff filed a second complaint, alleging all Defendants misappropriated trade secrets under N.C. Gen. Stat. § 66-152 *et seq.* and committed unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1. Plaintiff also alleged that Doctor Defendants breached certain contracts. On 4 June 2013, pursuant to Defendants' motions to dismiss, the trial court dismissed Plaintiff's unfair and deceptive trade practice ("UDTP") claims with prejudice based upon the "learned profession" exception provided in the UDTP statute.

On 30 August 2013 and 4 September 2013, Defendants moved to compel discovery from Plaintiff, alleged discovery abuses by Plaintiff, and sought an order awarding costs and fees. On 4 November 2013, the trial court entered orders compelling Plaintiff to provide full and complete responses to Defendants' discovery requests and to provide requested documents before 27 December 2013. The orders warned Plaintiff that the court "reserve[d] the right to impose any sanctions allowed by Rule 37."

Plaintiff did not comply with the court orders to provide discovery. Two weeks after the court-ordered deadline, on 13 and 17 January 2014, Defendants again moved to compel discovery from Plaintiff, sought an order awarding costs and fees from Plaintiff, and moved for dismissal of the action as a sanction under Rule 37 of the North Carolina Rules of Civil Procedure. After the motions were filed, Plaintiff produced more

1. The first complaint, which also included a named defendant who is not a party to the action from which this appeal arises, is not included in the record.

than 6,000 pages of additional documents and admitted that most of the documents had been in Plaintiff's possession prior to the initial discovery response deadline in the spring of the previous year.

On 31 March 2014, during a hearing on Defendants' motions for sanctions, the trial court announced from the bench that, in the exercise of the court's discretion, the action would be dismissed as a sanction for Plaintiff's violation of the court's prior discovery orders. The trial court noted "example after example" of Plaintiff's violations of the prior discovery orders and found that Plaintiff's responses were "evasive and incomplete and designed to obfuscate the defense of this lawsuit." The trial court instructed counsel for Defendants to prepare a detailed written order and to submit it to counsel for Plaintiff for his review before providing it to the trial court in electronic form.

On 25 April 2014, the trial court filed orders (one regarding claims against Doctor Defendants, the other regarding claims against WakeMed Defendants) (collectively, "the discovery sanction orders") containing extensive findings of fact, including that "Plaintiff's repeated failures to comply with this Court's discovery orders were intentional and intended to obstruct the defense of this case." The orders also noted that the trial court considered sanctions short of dismissing the action with prejudice "and determine[d] the sanctions imposed are reasonable, necessary, and justified in light of the particular facts and circumstances of this case." The trial court arranged for the discovery sanction orders to be served on the parties by the trial court coordinator in the Wake County Superior Court Judges' Office. Appended to the last page of each order was a certificate of service stating the following:

> I HEREBY CERTIFY that the foregoing document was served on the parties listed below by mailing and/or hand-delivering a copy thereof to each of said parties, addressed, postage prepaid as follows:
>
> H. Wood Vann [counsel for Plaintiff]
> 120 E. Parrish St., Ste. 200
> Durham, NC 27701
>
> . . . .
>
> This, the 25th day of April, 2014.
>
> _____
> Terri Stewart
> Trial Court Coordinator
> Wake County Superior Court Judges' Office

Thirty-three (33) days after entry and service of the discovery sanction orders, on 28 May 2014, Plaintiff filed and served a notice of appeal from various orders, including the discovery sanction orders.

On 16 June 2014, Defendants jointly moved to dismiss Plaintiff's appeal from the discovery sanction orders as untimely. Defendants also moved for attorneys' fees, expenses, and costs related to Plaintiff's discovery abuses and related to the defense against Plaintiff's UDTP claims. On 5 August 2014, the trial court entered orders ("the attorneys' fees orders") awarding Doctor Defendants $141,637.50 in attorneys' fees and WakeMed Defendants $63,784.00 in attorneys' fees from Plaintiff. The orders denied Defendants' requests for fees incurred in dismissing the UDTP claims. On that same day, the trial court also entered an order dismissing Plaintiff's appeal from the discovery sanction orders ("appeal dismissal order") on the ground that Plaintiff failed to timely file and serve notice of appeal from those orders, missing the deadline provided by Rule 3(c)(1) of the North Carolina Rules of Appellate Procedure.

On 21 August 2014, Plaintiff filed notice of appeal from the attorneys' fees orders and the appeal dismissal order. On 3 and 4 September 2014, Defendants filed notices of cross-appeal from the attorneys' fees orders. On 26 February 2015, Defendants filed a joint motion to dismiss Plaintiff's appeal from all orders other than the attorneys' fees orders. On 9 March 2015, Plaintiff filed a petition for writ of certiorari to permit this Court to review various orders, including the discovery sanction orders and the appeal dismissal order.

I. Joint Motion to Dismiss Appeals

Plaintiff appears to appeal from three categories of orders: (1) the discovery sanction orders, (2) the appeal dismissal order, and (3) the attorneys' fees orders. Defendants contend the parties' appeals from the attorneys' fees orders are the only matters properly before this Court. We agree, for reasons explained below.

A. Appeal from the Discovery Sanction Orders

[1] Plaintiff contends the trial court erred in dismissing its appeal from the discovery sanction orders. Plaintiff argues its 28 May 2014 notice of appeal was properly filed pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure after the trial court failed to comply with Rules 58 and 5 of the North Carolina Rules of Civil Procedure. Because Plaintiff's interpretation of these rules is flawed, and because Plaintiff had timely actual notice of the discovery sanction orders, we affirm the trial court's dismissal of Plaintiff's appeal from these orders.

Rule 3(c) of the North Carolina Rules of Appellate Procedure provides that a party in a civil action must file and serve a notice of appeal:

> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period[.]

N.C. R. App. P. 3(c)(1) & (2) (2013). Rule 58 of the North Carolina Rules of Civil Procedure, entitled "Entry of Judgment," provides in pertinent part:

> [A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. *Service and proof of service shall be in accordance with Rule 5.*

N.C. Gen. Stat. § 1A-1, Rule 58 (2013) (emphasis added).

Rule 5 of the North Carolina Rules of Civil Procedure, entitled "Service and filing of pleadings and other papers[,]" consistently refers to the service of papers, including orders, in the passive voice—"service shall be made," "may be made in a manner," "shall be served" are the verb forms in this Rule—and does not specify who is authorized or required to serve an order. N.C. Gen. Stat. § 1A-1, Rule 5 (2013).

Plaintiff contends 25 April 2014, the date the discovery sanction orders were entered, did not commence the thirty-day appeal period as required by Rule 3 because (1) the orders were not properly served pursuant to Rule 58 and (2) the orders did not contain proper certificates of service pursuant to Rule 5. As explained below, we hold that the trial court has the inherent authority to serve its own orders and that any errors in the certificates of service were obviated by timely actual notice to Plaintiff of the discovery sanction orders.

Plaintiff contends that the trial court's office did not properly serve the discovery sanction orders as required by the language of Rule 58, so that service on 25 April 2014 did not trigger the Rule 3(c)(1) deadline for Plaintiff to appeal. Plaintiff argues that because the trial court

coordinator is not a "party" to the action, was not the "party" designated by the judge, and was not the "party" who prepared the judgment, the trial court coordinator's service of the discovery sanctions orders was ineffective to trigger the thirty-day deadline provided in Rule 3(c)(1), which refers to Rule 58, and instead required Plaintiff to meet the later deadline provided in Rule 3(c)(2).

We reject Plaintiff's argument that service of an order by the court does not comply with Rule 58 because the trial court is not a "party," *i.e.*, not one of the named parties to the action. While we acknowledge that the word "party" is used in several of the North Carolina Rules of Civil Procedure to refer to litigants, we do not believe that the General Assembly intended to deprive trial courts of the inherent authority to serve their own orders. Such an interpretation would make no common sense and would violate our state constitution.

"[T]he order is the responsibility of the trial court, no matter who physically prepares the draft of the order." *In re A.B.*, ___ N.C. App. ___, ___, 768 S.E.2d 573, 579 (2015). The fair administration of justice requires that trial courts have the authority to take responsibility not only for signing orders, but also for filing and serving orders. While counsel, on behalf of parties, often serve orders that have been signed and filed by the trial court, trial courts routinely sign, file, and serve orders directly upon all parties. Service by the trial court, usually through a trial court coordinator or other court staff, bypasses the need to coordinate with counsel, expedites service, and usually avoids doubt and dispute regarding entry of orders and service upon all parties.

The North Carolina Constitution provides in pertinent part: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government[.]" N.C. Const. art. IV, § 1. Our Supreme Court has explained:

> The inherent power of the Court has not been limited by our constitution. To the contrary, the constitution protects such power. . . . Our courts have repeatedly made reference to and affirmed the existence and exercise of inherent judicial power. . . . Inherent power is that which the court necessarily possesses irrespective of constitutional provisions. Such power may not be abridged by the legislature. Inherent power is essential to the existence of the court and the orderly and efficient exercise of the administration of justice. Through its inherent power the court

> has authority to do all things that are reasonably necessary for the proper administration of justice.

Beard v. N.C. State Bar, 320 N.C. 126, 129, 357 S.E.2d 694, 695-96 (1987) (citations omitted). Therefore, because Plaintiff's interpretation of the word "party" in Rule 58 would violate the separation of powers required by our state constitution, "[w]e cannot attribute to the language used the force and effect urged by [Plaintiff]. Instead, we must construe it in such a manner as to bring it within the legislative authority of the General Assembly and make it consistent with the validity of the statute in which it is used." *Rhodes v. Asheville*, 230 N.C. 759, 759, 53 S.E.2d 313, 313 (1949).

[2] Plaintiff also contends service of the discovery sanction orders was invalid pursuant to Rule 5 of the Rules of Civil Procedure because the certificates of service did not specify the date on which the documents were served and did not specify the means of service. Plaintiff argues that defects in the certificates of service tolled the time for filing an appeal such that its appeal was timely.

Each certificate of service is dated 25 April 2014, and thus sufficiently shows the date of service.[2] The certificates state that the document was served "by mailing and/or hand delivering" a copy to counsel for Plaintiff. The use of "and/or" in judicial proceedings is disfavored. *See Gordon v. State Farm Mut. Auto. Ins. Co.*, 6 N.C. App. 185, 188, 169 S.E.2d 514, 516 (1969) ("We do not look with favor upon the ambiguous and uncertain term 'and/or.'"(citation and internal quotation marks omitted)). We need not address this issue, however, because Plaintiff had actual notice of the discovery sanction orders within the time period required by Rule 3(c)(1).

This Court has held a litigant's actual notice of a final order within three days of its entry triggers Rule 3(c) and notice of appeal must be filed within thirty days of the date of entry. *See Magazian v. Creagh*, __ N.C. App. __, __, 759 S.E.2d 130, 131 (2014) ("[W]hen a party receives actual notice that a judgment has been entered, the service requirements of Rule 3(c) are not applicable, and actual notice substitutes for proper service."); *see also Manone v. Coffee*, 217 N.C. App. 619, 623, 720 S.E.2d

2. The trial court found that the discovery sanction orders were served on 25 April, the same day they were entered. The trial court is in the best position to weigh all the evidence and its findings "'are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary.'" *In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)).

781, 784 (2011) (explaining that when a party receives actual notice "the party has been given fair notice . . . that judgment has been entered"), *see also Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 425, 667 S.E.2d 309, 312 (2008) (holding that this Court "do[es] not believe the purposes of Rule 58 are served by allowing a party with actual notice to file a notice of appeal and allege timeliness based on lack of proper service"). So, even if service of the discovery sanction orders was improper for any of the reasons asserted by Plaintiff, if Plaintiff had actual notice of the orders within three days of their entry, but waited more than thirty days (from the date the orders were entered) before filing the notice of appeal, its notice would be untimely.

Here, Plaintiff' presented no evidence that might have supported a finding that it did not receive actual notice within the time period designated by Rule 3(c)(1). Rule 6(a) of the Rules of Civil Procedure provides in pertinent part: "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." N.C. Gen. Stat. § 1A–1, Rule 6(a) (2013); *see Magazian*, __ N.C. App. at __, 759 S.E.2d at 131 (As with formal notice, "[t]he three day period [for receiving actual notice of an order] excludes weekends and court holidays."). Because the discovery sanction orders were entered on 25 April 2014, a Friday, the three day deadline under Rule 3(c) and Rule 58 for service of the orders was Wednesday, 30 April 2014. Although Plaintiff's counsel submitted an affidavit to the trial court stating that he did not receive delivery of the orders "until after April 27," a Sunday, he did not deny receiving delivery on 28 April, 29 April, or 30 April—all days within the deadline for service as calculated by Rule 6(a) and within the scope of Rule 3(c)(1). As long as Plaintiff received actual notice of the discovery sanction orders on 28 April, 29 April, or 30 April—a fact not disputed by any evidence—it had thirty days from 25 April to file notice of appeal. Since April has thirty days, Plaintiff's deadline to file an appeal initially fell on 25 May. However, 25 May was a Sunday, and Monday, 26 May was a federal holiday on which the court was closed. Thus, Plaintiff's deadline to file the notice of appeal was extended to the next business day, 27 May. *See* N.C. R. App. P. 27(a) (in computing a period of time allowed by the Rules of Appellate Procedure, when the last day of the period is a Saturday, Sunday, or legal holiday, "the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.").

The untimely nature of Plaintiff's notice of appeal from the discovery sanction orders deprives this Court of jurisdiction over the appeal. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation

omitted) ("The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal."); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) ("[I]n the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of [N.C. R. App. P.] 2."). Therefore, we dismiss Plaintiff's appeal from the discovery sanctions orders.

[3] Plaintiff asks this Court to issue a writ of certiorari in the event it concludes the 28 May 2014 notice of appeal was untimely, in order to address the issues raised in the notice of appeal. "A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citations omitted). It appears the trial court properly sanctioned Plaintiff for failure to comply with discovery, having considered lesser sanctions and finding them to be inappropriate in this case. In our discretion, we deny Plaintiff's petition.

B. Appeal from Appeal Dismissal Order

[4] Plaintiff appeals from the 5 August appeal dismissal order. Defendants contend Plaintiff's purported appeal from the dismissal order is procedurally barred. Plaintiff argues a party can appeal as of right a lower court's dismissal of an appeal, as demonstrated by decisions of this Court reversing trial court orders dismissing appeals.

There is a split in this Court's decisions regarding the method of seeking appellate review of a trial court's dismissal of an appeal. Defendants rely on *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980) (holding that "[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari[]") and *High Point Bank and Trust Co. v. Fowler*, __ N.C. App. __, __, 770 S.E.2d 384, 386-87 (2015) (dismissing an appeal from a trial court's order of dismissal entered on the ground that the appellants failed to give timely notice of appeal).

Plaintiff relies upon *Lawrence v. Sullivan*, 192 N.C. App. 608, 614-20, 666 S.E.2d 175, 178-81 (2008), a case in which this Court reversed a trial court's order dismissing an appeal for alleged violations of Rules 7 and 11 of the North Carolina Rules of Appellate Procedure. This Court noted that "[a] motion to dismiss an appeal is a matter within the discretion of the trial court," thus limiting the review to whether "there was

a clear abuse of discretion," but the Court ultimately held that the trial court had abused its discretion in dismissing the appeal, and it reached the substantive merits of the case. *Id.* at 614-15, 620, 666 S.E.2d at 179, 181. Plaintiff also relies upon *Cobb v. Rocky Mount Bd. of Educ.*, 102 N.C. App. 681, 403 S.E.2d 538 (1991), in which this Court reversed an order entered by the trial court dismissing an appeal, concluding that the trial court's order was erroneous. Rather than reaching the merits, this Court remanded the matter to the trial court to settle the record properly and to certify the appeal as taken on the date of the mandate of this Court's decision. *Id.* at 685, 403 S.E.2d at 541.

When prior decisions of this Court conflict, the earlier of those decisions is controlling precedent. *See, e.g.*, *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005). The line of cases supporting Defendants' argument predate the decisions relied on by Plaintiff. Thus, we conclude that no appeal lies in this Court from the appeal dismissal order. As we do not have jurisdiction, we dismiss Plaintiff's appeal as to the appeal dismissal order.

Plaintiff petitions this Court, if it finds it necessary, to issue a writ of certiorari to review the appeal dismissal order. Even assuming *arguendo* that a writ of certiorari would confer jurisdiction on this Court and we were to grant it, as we already discussed, the trial court properly dismissed Plaintiff's appeal from the discovery sanction orders as being untimely. Therefore, we deny the petition for writ of certiorari as to this issue.

II. Appeals from Attorneys' Fees Orders

A. Plaintiff's Appeal

[5] Plaintiff contends the trial court erred in the amount of attorneys' fees awarded to Defendants as sanctions under Rule 37 of the North Carolina Rules of Civil Procedure.[3] Specifically, Plaintiff argues a portion of the costs and expenses awarded to Doctor Defendants is not attributable to Plaintiff's discovery violations. Plaintiff also claims because counsel for WakeMed Defendants did not submit billing records, it was not possible for the trial court to determine the fees attributable to discovery violations.

3. Plaintiff also argues the discovery sanction orders contained erroneous findings and thus, the trial court erred in using these orders to support an award of attorneys' fees. However, as we lack jurisdiction to review the discovery sanction orders, we dismiss that portion of the appeal, and accordingly, will not address this argument.

"A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996). "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. " *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667-68, 554 S.E.2d 356, 363 (2001) (citation and internal quotation marks omitted).

Rule 37(a)(4) of the Rules of Civil Procedure provides that, upon a successful motion for an order compelling discovery, the trial court shall award the moving party "the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." N.C. Gen. Stat. § 1A-1, Rule 37(a)(4) (2013). Moreover, Rule 37(b)(2) provides that if a party fails to obey a discovery order, "the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2013).

In each of the attorneys' fees orders, the trial court found that the fees awarded were "attributable to the [Defendants'] efforts related to Plaintiff's deficient discovery and not for other aspects of the defense of this action[.]" The respective orders specified that the trial court considered the affidavit of Julian H. Wright, Jr. in its award to Doctor Defendants and the affidavits of William R. Forstner and Jeanne M. Foley in its award to WakeMed Defendants.

Julian Wright, attorney for Doctor Defendants, submitted billing records to the trial court showing attorney and staff time expended on the disputed discovery issues. In his affidavit, Wright explained the "entries . . . are only for time devoted to work that dealt with getting, understanding, reviewing, analyzing, and eventually filing motions under Rule 37 about Plaintiff's deficient discovery responses and document productions." Although WakeMed Defendants' counsel did not submit billing records, William R. Forstner, attorney for WakeMed Defendants, stated in his affidavit that "the fees attributable to issues surrounding Plaintiff's evasive, incomplete, and duplicative discovery responses represent at least 328 billable hours," and that in calculating the hours "our firm excluded entries unrelated to Plaintiff's discovery deficiencies, including any ambiguous entries." Finally, Jeanne M. Foley, a paralegal for the law firm representing Defendant WakeMed, submitted an affidavit stating:

> I have never worked on a litigation case in which the document production and overall discovery responses were so fractured and complicated. I encountered numerous and repeated deficiencies with Plaintiff's production too numerous to recount in this Affidavit. . . . The time and expense were significantly increased by Plaintiff's approach to discovery and document production.

These three affidavits support the trial court's factual findings that the fees awarded to Defendants were attributable to Plaintiff's discovery violations. *See Long v. Joyner*, 155 N.C. App. 129, 137, 574 S.E.2d 171, 177 (2002) (affirming the award of attorneys' fees when the amount of fees corresponded with the charges identified by attorney in an affidavit).

Plaintiff contends the trial court erred in its "blanket award" of all fees requested from alleged discovery violations, without providing any analysis of the basis of the award. "Rule 37(a)(4) requires the award of expenses to be reasonable, [and] the record must contain findings of fact to support the award of any expenses, including attorney's fees." *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988).

In the attorneys' fees orders, the trial court made findings of fact, supported by record evidence, regarding the reasonableness of the fees. The trial court found the following:

> [T]he time and labor expended, and expenses incurred, addressing Plaintiff's deficient discovery and the necessary interventions of this [c]ourt were reasonable and necessary for the defense of the case. . . . This conclusion is based, in part, upon the many hours of time spent by the [c]ourt attempting to review and evaluate Plaintiff's discovery responses during the [c]ourt's consideration of the [Doctor Defendants' Motion to Compel and the Defendants' Motions for Sanctions].

Based on the record evidence and the trial court's findings, the trial court acted well within its discretion in determining reasonable attorneys' fees to be awarded against Plaintiff and in favor of Defendants. We therefore affirm the attorneys' fees orders as related to the discovery sanctions.

B. Defendants' Cross-Appeal

[6] Defendants assert that the trial court committed reversible error by failing to review Defendants' motions for attorneys' fees incurred in obtaining dismissal of the UDTP claim according to the legal standard

provided in the UDTP statute. We hold that when the trial court in its discretion denies a motion for attorneys' fees, it need not make statutory findings required to support a fee award.

"Questions regarding statutory interpretation are reviewed *de novo* under an error of law standard." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008). However, once the trial court applies the proper legal standard, "[t]he decision whether or not to award attorney fees . . . rests within the sole discretion of the trial judge." *Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc.*, 180 N.C. App. 70, 81, 637 S.E.2d 230, 236 (2006), *aff'd*, 361 N.C. 347, 643 S.E.2d 586, 586-87 (2007) (citations omitted). "The judge's decision to deny attorney fees under the [judge's discretion] is limited only by the abuse of discretion rule[,]" *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 457, 337 S.E.2d 616, 620 (1985) (citations omitted), and a trial court may be reversed "only upon a showing that its actions are manifestly unsupported by reason." *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 422 (citation omitted), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005).

N.C. Gen. Stat. § 75-16.1 provides in pertinent part:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> . . .
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2013). In the attorneys' fees orders, with respect to the UDTP claim, the trial court found:

> The [c]ourt exercises its discretion and declines to award the [Defendants] their attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1. The [c]ourt finds that a claim dismissed pursuant to Rule 12(b)(6) is not necessarily frivolous or malicious under § 75-16.1. The [c]ourt further finds that Plaintiff's pleading of the UDTP claim did not inhibit the [c]ourt's consideration of the merits of this action.

Defendants assert that neither conclusion of the trial court addresses the legal standard required by N.C. Gen. Stat. § 75-16.1(2) to support either an award or a denial of attorneys' fees regarding the UDTP claims.

We are aware of no prior appellate decision in this state expressly addressing the issue of whether a trial court that denies a motion to award attorneys' fees is required to apply the factual analysis specified in N.C. Gen. Stat. § 75-16.1. Based on the language of the statute, we hold that the trial court is not required to make such findings in any order declining to award attorneys' fees.

The provision that the trial court may award attorneys' fees "upon a finding by the presiding judge that . . . [t]he party instituting the action knew, or should have known, the action was frivolous and malicious[,]" reflects an intent by the legislature that any award of attorneys' fees must be justified by certain factual criteria. However, the structure of the provision suggests that the legislature requires no such findings by the trial court in denying fees. The distinction between orders awarding and denying fees makes sense, because if the trial court in its discretion is disinclined to award fees, the analysis of factors necessary to support a fee award is obviated. Requiring a trial court to engage in such an exercise to support an order denying attorneys' fees would be like requiring a civil jury which found no negligence to include in its verdict the amount of damage proximately caused by negligence.

This Court's decision in *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 337 S.E.2d 616, while not directly on point, is instructive. Reviewing an appeal from a trial court order denying a motion for attorneys' fees which included no findings, this Court in *Varnell* held that the trial judge's decision to deny attorneys' fees "is limited only by the abuse of discretion rule," and in quoting the statute, deemed it unnecessary to include findings required to support an award of fees. 78 N.C. App. at 457, 337 S.E.2d at 620.

This case is different from *Varnell* only because the trial court, in denying the motion for attorneys' fees, entered findings that do not track statutory language providing for awarding fees. The findings may shed light on how the trial court made its decision, but they were neither required nor prohibited by the statute. Only if the findings reflected that the decision was manifestly unsupported by reason would the trial court's order be reversed. The trial court's findings (1) that a claim subject to dismissal on the face of the complaint is not necessarily frivolous and (2) that the claim did not impede the trial court's handling of the action are, in our view, reasonable. In effect, the trial court explained

why it declined to award fees because the claim was *not* necessarily frivolous or malicious.

All of the case authorities relied upon by Defendants involved appeals from orders allowing fees and set forth an analysis which makes the award of fees – not an order denying fees – contingent upon statutory findings. *See Birmingham v. H & H Home Consultants & Designs, Inc.*, 189 N.C. App. 435, 442-44, 658 S.E.2d 513, 518-19 (2008) (reversing and remanding order granting motion for attorneys' fees under N.C. Gen. Stat. § 75-16.1 because trial court misapplied the standard for assessing whether action was "frivolous and malicious"); *see also McKinnon v. CV Indus., Inc.*, __ N.C. App. __, __, 745 S.E.2d 343, 351 (2013) (remanding award of attorneys' fees to the trial court to "make an ultimate finding as to whether plaintiff knew or should have known that the assertion . . . of his Chapter 75 claim was frivolous and malicious.").

We hold that the trial court here satisfied its duty under the statute by first, recognizing that it had to exercise its discretion, and second, by tating that in its discretion it would decline to award the requested fees. The findings that followed suggest that the trial court had no need to engage in the analysis required to award fees and that the litigation was not, in the view of the trial court, inhibited by the UDTP claims. Even assuming *arguendo* that the findings have any legal significance, they do not apply the wrong legal standard, because the statute does not articulate a standard for *denying* attorneys' fees.

Conclusion

We dismiss Plaintiff's appeal as to all orders except the attorneys' fees orders. We deny Plaintiff's petition for writ of certiorari. We affirm the attorneys' fee orders.

DISMISSED IN PART; AFFIRMED IN PART.

Judges CALABRIA and STROUD concur.

SHAKA GREENE, PLAINTIFF
v.
TRUSTEE SERVICES OF CAROLINA, LLC AND U.S. BANK, NATIONAL ASSOCIATION, DEFENDANTS

IN RE IN THE MATTER OF THE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM JEFFREY S. KENLEY AND LAURA L. KENLEY, IN THE ORIGINAL AMOUNT OF $296,700.00, AND DATED SEPTEMBER 29, 2005 AND RECORDED ON SEPTEMBER 30, 2005, IN BOOK 3935 AT PAGE 425, UNION COUNTY REGISTRY

TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA15-90

No. COA15-97

Filed 5 January 2016

1. Negotiable Instruments—note—indorsed in blank—transfer

In an appeal from an order in a special foreclosure hearing, plaintiff conceded that a valid debt existed, and U.S. Bank was the current holder of the note where the note was indorsed in blank and in the possession of U.S. Bank. There was no provision of the Uniform Commercial Code requiring a party possessing a note indorsed in blank to show transfer of the note to enforce it.

2. Mortgages and Deeds of Trust—foreclosure—notice

In an appeal from an order in a special foreclosure hearing, the notice requirement was met with respect to the original purchasers and holders of the note (the Kenleys) where plaintiff argued that the current holder of the note (U.S. Bank) did not properly serve the Kenleys with notice of the calendaring of the appeal from a clerk of court decision, but the Kenleys did not appeal the clerk's decision. Plaintiff did not show how he had been prejudiced or how he had standing to contest the adequacy of the notice to the Kenleys. Moreover, the trial court properly ordered that the bond in the special foreclosure hearing be paid to U.S. Bank.

3. Real Property—quiet title action—distinguished from foreclosure—prior pending action doctrine—not enforceable

In an action arising from a foreclosure, with a transferred note and transferred property, the trial court did not err by granting defendants' Rule 12(b)(6) motion to claims to quiet title and for injunctive relief. The claim for injunctive relief was identical to the relief sought in the foreclosure proceeding, but plaintiff argued that

the quiet title claim also sought relief that could not be granted in the foreclosure special proceeding, so that the prior pending action doctrine did not apply. However, the complaint failed to sufficiently allege a claim to quiet title.

4. Deeds—foreclosure—mortgage-backed securities—note and deed of trust not separated

Although the plaintiff in an action arising from a foreclosure argued that the deed of trust was not valid, his argument was based solely on the securitization process used to created marketable mortgage-backed securities, in which the note and deed of trust are separated. However, the note and deed of trust were not separated; transfer of the note constituted an effective assignment of the deed of trust; and the holder of the note can enforce both.

5. Mortgages and Deeds of Trust—quiet title action—trustee improperly joined—attorney fee

The trial court did not err by concluding that the trustee was improperly joined to a quiet title action arising from a foreclosure and by awarding attorney fees. N.C.G.S. § 45-45.3 unambiguously states that the trustee is not a proper party to actions to quiet title. The exceptions to the general rule argued by plaintiff did not apply. Moreover, there are not statutory duties for the trustee to fulfill, and his participation in the proceeding serves no purpose.

Appeal by plaintiff Shaka Greene from orders entered 27 August 2014, and by respondent Shaka Greene from an order entered 3 September 2014 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 1 June 2015.

The Law Office of Erin E. Rozzelle, PLLC, by Erin Rozzelle, for plaintiff/respondent-appellant.

Brock & Scott, PLLC, by Jolee M. Wortham, for defendant/petitioner-appellee Trustee Services of Carolina, LLC.

Bell, Davis & Pitt, P.A., by Adam T. Duke and D. Anderson Carmen, for defendant/petitioner-appellee U.S. Bank, National Association.

GEER, Judge.

Shaka Greene has brought two separate appeals arising out of his challenge to a foreclosure sale based on a Deed of Trust on property

he purchased at a sale resulting from foreclosure on a claim of lien for nonpayment of homeowners' association dues by the property owners, Jeffrey and Laura Kenley. As the issues presented in the two appeals involve common questions of law, we have consolidated the appeals for purposes of decision.

In COA15-97, Mr. Greene, as respondent, appeals from an order allowing petitioner, U.S. Bank, N.A., through substitute trustee Trustee Services of Carolina, LLC, to proceed with foreclosure on the property. On appeal, Mr. Greene argues that U.S. Bank has not satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16(d) (2013) in that U.S. Bank failed to establish that it was the holder of the note at issue and failed to show proper service on the Kenleys. However, the exhibits admitted into evidence in the special foreclosure proceeding show that U.S. Bank was in possession of a promissory note indorsed in blank and secured by a Deed of Trust encumbering Mr. Greene's property. These facts are sufficient to show that U.S. Bank is holder of the note and the beneficiary of the Deed of Trust. Additionally, Mr. Greene, who does not dispute that he received proper notice and challenges only the notice to the Kenleys of the hearing on his appeal, has not shown that U.S. Bank failed to give the statutorily-required notice. We, therefore, affirm the order.

In COA15-90, plaintiff Shaka Greene appeals from an order dismissing, pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, his claim to quiet title asserted against defendant U.S. Bank and substitute trustee Trustee Services, brought to prevent any action to foreclose on the property previously owned by the Kenleys and bought and occupied by Mr. Greene. Mr. Greene argues in support of his quiet title claim that U.S. Bank is not the holder of a valid debt secured by a Deed of Trust encumbering Mr. Green's property. Because the complaint showed that U.S. Bank was the holder of the promissory note secured by the Deed of Trust and, therefore, had a valid interest in the property, we hold that Mr. Greene failed to allege sufficient facts to support the quiet title claim. Consequently, we affirm the trial court's order granting the motion to dismiss. Moreover, we agree with defendant Trustee Services that the trial court properly awarded it attorney's fees pursuant to N.C. Gen. Stat. § 45-45.3 (2013) because Trustee Services was an improper party to the quiet title action.

Facts

On 29 September 2005, Jeffrey and Laura Kenley executed a promissory note (the "Note") in the original amount of $296,700.00 in favor of Homebanc Mortgage Corporation. The Note was secured by a Deed

of Trust encumbering certain specified property ("the property") and was recorded in Union County, North Carolina. The Kenleys defaulted under the terms of the Note by failing to make monthly payments beginning on 1 July 2009. On 11 March 2010, the Kenleys filed for Chapter 7 bankruptcy, and in their bankruptcy petition, the Kenleys stated that they intended to surrender the property.

On 12 March 2010, U.S. Bank, N.A., through David Simpson as substitute trustee, initiated foreclosure proceedings against the Kenleys in Union County special proceeding 10 SP 449. The foreclosure proceeding was stayed due to the Kenleys having filed for bankruptcy. On 16 May 2010, the bankruptcy court granted U.S. Bank's motion for relief from the bankruptcy stay to allow U.S. Bank to proceed with the foreclosure. On or about 30 June 2010, the Kenleys obtained a discharge from bankruptcy that included the debt based on the Note.

The Kenleys also defaulted on their obligations to pay homeowners association dues on the property, and, on 6 October 2011, the Emerald Lake at Country Woods Homeowners Association, Inc. filed a claim of lien on the property. The Homeowners Association foreclosed on the claim of lien and the property was sold at a public sale on 2 May 2012 to the highest bidder, Shaka Greene, for $4,706.41. The Association Lien Foreclosure Deed was a non-warranty deed and was recorded in Union County on 27 July 2012. Mr. Greene did not conduct a title search prior to purchasing the property and understood a possibility existed that the property was encumbered by a superior lien. Mr. Greene occupied the property as his primary residence beginning on 1 August 2012.

On 8 February 2013, U.S. Bank, through substitute trustee Trustee Services, initiated foreclosure proceedings against the Kenleys in 13 SP 183. Mr. Greene, as the record owner of the property, received notice of the foreclosure and appeared at the hearing before the clerk of court on 2 April 2014. After the hearing, the clerk entered an order authorizing the foreclosure sale. On 10 April 2014, Mr. Greene appealed the clerk's order to superior court for de novo review.

On 3 July 2014, while Mr. Greene's appeal of the clerk's order was pending, Mr. Greene filed a complaint in 14 CVS 1717 against Trustee Services and U.S. Bank, and filed an amended complaint on 5 August 2014. In the amended complaint, Mr. Greene asserted a claim to quiet title to the property and a claim seeking injunctive relief to prevent defendants from taking any action to foreclose on the property until the quiet title claim could be heard. The complaint included allegations suggesting

that any assignments of the Note to U.S. Bank were invalid, unauthorized, or otherwise defective and that there were also discrepancies in the notices of substitution of trustee. Based upon these allegations, the complaint asserted that there was not a valid debt owed on the property, that the Deed of Trust was invalid, that U.S. Bank was not the holder of any note, and that Trustee Services had no authority to initiate the foreclosure proceeding.

On 14 August 2014, U.S. Bank filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(6) on the ground that the facts alleged were insufficient to state any viable claim and that the issues raised in the amended complaint should be heard and determined in the foreclosure special proceeding pursuant to N.C. Gen. Stat. § 45-21.16(d) and (d1). Defendant Trustee Services also moved to dismiss and for attorney's fees pursuant to N.C. Gen. Stat. § 45-45.3 on the grounds that it was improperly joined as a party to the action.

Defendants' motions were heard by Judge W. David Lee on 25 August 2014. Judge Lee granted U.S. Bank's motion to dismiss the civil action filed by Mr. Greene concluding that "the issues raised by the allegations in the complaint, as amended, are issues to be determined in the foreclosure special proceeding pending in Union County, North Carolina, File No. 13 SP 183[.]" The trial court further concluded that Trustee Services was improperly joined as a defendant pursuant to N.C. Gen. Stat. § 45-45.3. In a separate order entered on the same date, the trial court granted Trustee Services' motion for attorneys' fees in the amount of $1,350.00.

Immediately following the hearing on the motions to dismiss the amended complaint in 14 CVS 1717, Judge Lee conducted the de novo hearing in the special foreclosure proceeding, 13 SP 183, pursuant to N.C. Gen. Stat. § 45-21.16(d1). On 3 September 2014, Judge Lee entered an order authorizing foreclosure of the Deed of Trust on the property, finding that all six elements of N.C. Gen. Stat. § 45-21.16(d) were satisfied. Mr. Greene timely appealed all three orders to this Court.

I

[1] We first address Mr. Greene's appeal from the order in the special foreclosure proceeding. Upon filing and service of a notice of hearing on a trustee's request to foreclose pursuant to a power of sale, N.C. Gen. Stat. § 45-21.16(d) provides that the clerk of court shall conduct a hearing and may not authorize a foreclosure sale if he or she finds that there does not exist any one of the following:

> (i) [a] valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) [a] right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b) . . . and (vi) that the sale is not barred by G.S. 45-21.12A[.]

The clerk's decision may be appealed to the superior court for a hearing de novo. N.C. Gen. Stat. § 45-21.16(d1). Both the clerk's and the superior court's authority in the special foreclosure proceeding is limited to determining whether the six criteria listed in N.C. Gen. Stat. § 45.21.16 are satisfied. *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013). Correspondingly, interested parties who seek to prevent the foreclosure sale from going forward are limited in the special proceeding to challenging the existence of one or more of these six enumerated findings. *Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 295-96, 681 S.E.2d 456, 458 (2009). The applicable standard of review on appeal to this Court is " 'whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.' " *In re Foreclosure of Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010) (quoting *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50, 535 S.E.2d 388, 392 (2000)).

In his appeal from the superior court's order in the special foreclosure proceeding, Mr. Greene first argues that the superior court erred in finding the existence of a valid debt of which U.S. Bank is the holder. For the superior court to find that U.S. Bank is the holder of a valid debt in accordance with N.C. Gen. Stat. § 45-21.16(d)(i), "this Court has determined that the following two questions must be answered in the affirmative: (1) is there sufficient competent evidence of a valid debt[;] and (2) is there sufficient competent evidence that [the party seeking to foreclose is] the holder[] of the notes [that evidences that debt?]" *Adams*, 204 N.C. App. at 322, 693 S.E.2d at 709 (internal quotation marks omitted). Mr. Greene concedes that a valid debt exists, and the issue on appeal is whether or not competent evidence exists to support the superior court's finding that U.S. Bank is the current holder of the Note.

The definition of "holder" under the Uniform Commercial Code ("UCC"), as adopted by North Carolina, controls the meaning of the term as used in N.C. Gen. Stat. § 45-21.16(d)(i). *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 490, 711 S.E.2d 165, 171 (2011). The UCC defines "holder" as including "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is

the person in possession[.]" N.C. Gen. Stat. § 25-1-201(b)(21)(a) (2013). When a negotiable instrument is indorsed in blank, the "instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specifically indorsed." N.C. Gen. Stat. § 25-3-205(b) (2013). Here, the Note presented to the superior court by U.S. Bank was (1) indorsed in blank and (2) in the possession of U.S. Bank.

Mr. Greene argues that the record does not contain sufficient evidence that U.S. Bank is the holder of the Note because U.S. Bank did not present evidence regarding the transfer of the Note to U.S. Bank or how it otherwise came into possession of the Note. In support of this argument, Mr. Greene relies solely on *Gilbert*, 211 N.C. App. at 492, 711 S.E.2d at 172, contending that production by a party of an original note at trial does not, in itself, establish that the note was transferred to that party with the purpose of giving them the right to enforce the instrument. In *Gilbert*, however, in contrast to this case, the note presented to the trial court was not indorsed in blank, but rather was specially indorsed, and the party in possession of the note was not the entity to whom the note was payable. *Id.* (noting that "the Note was not indorsed to Petitioner or to bearer, a prerequisite to confer upon Petitioner the status of holder under the UCC").

Contrary to Mr. Greene's contention, there is no provision of the UCC requiring a party in possession of a note indorsed in blank to show transfer of the note in order to enforce it. Instead, "[i]t is the fact of possession which is significant in determining whether a person is a holder" of a note indorsed in blank. *In re Foreclosure of Connolly*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983). Whenever this Court has held that mere possession of the original note was insufficient to satisfy the definition of a holder, the "original notes were either (1) not drawn, issued, or indorsed to the party, to bearer, *or in blank*, or (2) the trial court neglected to make a finding in its order as to which party had possession of the note at the hearing." *In re Foreclosure of Manning*, 228 N.C. App. 591, 598, 747 S.E.2d 286, 292 (2013) (emphasis added).

Here, because the Note was indorsed in blank and U.S. Bank had possession of the Note, the superior court properly determined that U.S. Bank was the holder of the Note, satisfying N.C. Gen. Stat. § 45-21.16(d)(i). *See In re Foreclosure of Cornish*, ___ N.C. App. ___, 757 S.E.2d 526, 2014 WL 636969, at *2, 2014 N.C. App. LEXIS 216, at *4 (2014) (unpublished) (holding that the note indorsed in blank "became payable to its bearer" and " '[i]n this instance, the production of the note [was] sufficient to prove the lender's status as the holder of the note' ").

[2] Mr. Greene also argues that the superior court erred in finding that the notice requirement was met with respect to the Kenleys. Mr. Greene, the record owner of the property, does not dispute that he received proper notice or that the Kenleys received proper notice of the initial hearing before the clerk of court. Mr. Greene argues only that U.S. Bank did not properly serve the Kenleys with notice of the calendaring of the hearing on Mr. Greene's appeal of the clerk of court's decision. The Kenleys, however, did not appeal the clerk of court's decision. Mr. Greene has made no showing on appeal regarding how he has been prejudiced by or how he has standing to contest the adequacy of the notice to the Kenleys of the hearing on his appeal. The superior court, therefore, properly found that U.S. Bank met the notice criteria of N.C. Gen. Stat. § 45-21.16(d).

Lastly, with respect to the special foreclosure proceeding, Mr. Greene argues that the superior court erred in directing that the bond posted by Mr. Greene, pursuant to N.C. Gen. Stat. § 45-21.16, be paid to U.S. Bank. Because the superior court correctly found that all six elements of N.C. Gen. Stat. § 45-21.16 were satisfied, the court properly ordered the bond paid to U.S. Bank. *See In re Simon*, 36 N.C. App. 51, 57, 243 S.E.2d 163, 166 (1978) (explaining that bond " 'protect[s] the prevailing party from any probable loss by reason of the delay in the foreclosure' " (quoting N.C. Gen. Stat. § 45-21.16(d) (1977))). Accordingly, we affirm the 3 September 2014 order authorizing foreclosure on the property.

II

[3] With respect to the civil action, 14 CVS 1717, Mr. Greene argues that the trial court erred by granting defendants' Rule 12(b)(6) motions to dismiss his claims to quiet title and for injunctive relief.

> When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. A complaint may be dismissed pursuant to Rule 12(b)(6) where (1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim. An appellate court reviews *de novo* a trial court's dismissal of an action under Rule 12(b)(6).

Horne v. Cumberland Cnty. Hosp. Sys., Inc., 228 N.C. App. 142, 144, 746 S.E.2d 13, 16 (2013) (internal citations and quotation marks omitted).

Defendants argue that the trial court properly dismissed Mr. Greene's claims based on the prior pending action doctrine. Pursuant to that doctrine, "where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action." *Eways v. Governor's Island*, 326 N.C. 552, 558, 391 S.E.2d 182, 185 (1990). The doctrine applies where " 'the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded[.]' " *Jessee v. Jessee*, 212 N.C. App. 426, 438, 713 S.E.2d 28, 37 (2011) (quoting *Cameron v. Cameron*, 235 N.C. 82, 85, 68 S.E.2d 796, 798 (1952)).

In the civil action, Mr. Greene seeks to enjoin defendants, the same parties as in the foreclosure proceeding, from taking any action to foreclose on the property on the grounds that: (1) there is no valid debt on the property, (2) the Deed of Trust is invalid, and (3) U.S. Bank is not the holder of the note and Deed of Trust to the property. Each of these grounds were issues that were to be decided in the foreclosure special proceeding pursuant to N.C. Gen. Stat. § 45-21.16(d). Thus, the parties, the subject matter, and the issues involved are the same in the prior pending foreclosure proceeding as in the civil action.

With respect to the relief sought, while Mr. Greene's claim for injunctive relief in the civil action is identical to the relief sought in the foreclosure proceeding, Mr. Greene's quiet title claim also sought to "recover judgment that the cloud of Defendant U.S. Bank's adverse claim be removed from his title to the property and that Plaintiff be declared the owner in fee simple of the property, free and clear of any claim of the Defendant U.S. Bank." Mr. Greene argues that the relief sought in the quiet title claim cannot be granted in the foreclosure special proceeding and, therefore, the prior action pending doctrine does not apply. Assuming, without deciding, that the doctrine does not apply to the quiet title claim, we hold that the superior court properly granted the motion to dismiss because the amended complaint fails to sufficiently allege a claim to quiet title.

Actions to quiet title are controlled by N.C. Gen. Stat. § 41-10 (2013), which provides that such an action "may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]" The purpose of the statute creating a cause of action to quiet title is to " 'free the land of the cloud resting upon it and make its title clear and indisputable, so

that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion. . . .' " *Resort Dev. Co. v. Phillips*, 278 N.C. 69, 77, 178 S.E.2d 813, 818 (1971) (quoting *Christman v. Hilliard*, 167 N.C. 4, 8, 82 S.E. 949, 951 (1914)). " 'A cloud upon title is in itself a title or encumbrance, apparently valid, but in fact invalid.' " *York v. Newman*, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285 (1968) (quoting *McArthur v. Griffith*, 147 N.C. 545, 549, 61 S.E. 519, 521 (1908)).

"To establish a *prima facie* case for removing a cloud upon title, two requirements must be met: (1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim in the land adverse to plaintiff's title, estate or interest." *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004). This Court has held that "[a]n invalid deed of trust would constitute an interest in real property adverse to the interest of the property owner." *Kelley v. CitiFinancial Servs., Inc.*, 205 N.C. App. 426, 430, 696 S.E.2d 775, 779 (2010).

In this case, Mr. Greene's complaint alleges that he is the owner of the property, and defendant U.S. Bank claims an interest in the property as the holder and beneficiary of a Deed of Trust and promissory note secured by the property. The complaint alleges that U.S. Bank's claim is not valid because "Defendant U.S. Bank is not and cannot illustrate that it is in fact the holder and legal beneficiary of a valid Deed of Trust and promissory note secured thereby of the land [and] Defendant U.S. Bank is not the original beneficiary to the Deed of Trust and promissory note, and cannot establish proper chain of title from Homebanc Mortgage Corporation to illustrate a valid legal interest in the land."

However, Mr. Greene's allegation regarding the validity of U.S. Bank's claim is a legal conclusion that is not entitled to a presumption of validity. *See Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009). Rather, the question on appeal is whether the factual allegations of the complaint, taken as true, show that U.S. Bank's claim is invalid.

[4] With respect to Mr. Greene's claim that the Deed of Trust itself is invalid, we first emphasize that Mr. Greene does not challenge the validity of the Note and Deed of Trust when executed or recorded. By its terms, the Deed of Trust is to be cancelled when payment of all sums secured by it has been paid, and the complaint does not allege payment of the Note in full.

Mr. Greene's argument that the Deed of Trust is invalid is based solely on factual allegations involving MERS, Inc., which was assigned the

Deed of Trust and Note after Homebanc Mortgage filed for bankruptcy. Mr. Greene argues that through the securitization process employed by MERS, Inc. to create marketable mortgage-backed securities, the Note and the Deed of Trust are separated, thereby rendering the Deed of Trust void and unenforceable. This theory is foreclosed by N.C. Gen. Stat. § 47-17.2 (2013) which specifies that:

> A transfer of the promissory note or other instrument secured by the deed of trust, mortgage, or other security interest that constitutes an effective assignment under the law of this State shall be an effective assignment of the deed of trust, mortgage, or other security instrument. The assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust, mortgage, or other security instrument, including the right to substitute the trustee named in any deed of trust, and to exercise any power of sale contained in the instrument without restriction.

In other words, the Note and the Deed of Trust are not separated through the securitization process: transfer of the Note constitutes "an effective assignment of the deed of trust," and the holder of a note can enforce both the note and the Deed of Trust. *Id.*; s*ee also Horvath v. Bank of New York, N.A.*, 641 F.3d 617, 623 (4th Cir. 2011) (rejecting argument that securitization of promissory note caused Deed of Trust to split from note and become unenforceable, and holding that transfer of note necessarily involves transfer of underlying security). Accordingly, we hold that plaintiff's complaint fails to show that the Deed of Trust is invalid.

Nor are the allegations in Mr. Greene's complaint sufficient to show that U.S. Bank is not the holder of the Note or Deed of Trust. Mr. Greene attached as exhibits to the amended complaint both the Note that U.S. Bank presented to the clerk of court in the foreclosure hearing and the Deed of Trust. The Note indorsed in blank states that "the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.' " The Deed of Trust states, in turn, that the "Lender is the beneficiary under this Security Instrument." The Fourth Circuit has interpreted the "Lender" in a Deed of Trust containing identical language to that in this case to encompass not only the original Lender specifically named in the Deed of Trust (in this case, Homebanc Mortgage Corp.), but also any subsequent purchasers of the Deed of Trust. *See id.* at 625. This interpretation is consistent with the provision in the Deed of

Trust that "[t]he covenants and agreements of this Security Instrument shall bind . . . and benefit the successors and assigns of Lender."

Because the Note was indorsed in blank, the discrepancies in the Assignments of Deed of Trust alleged in the complaint are irrelevant. All that was required to show that U.S. Bank is the holder of the Note and beneficiary of the Deed of Trust was that U.S. Bank has possession of the Note. The amended complaint alleges that U.S. Bank submitted the Note, indorsed in blank, to the clerk of court at the foreclosure special proceeding. That allegation is sufficient to show that U.S. Bank had possession and was the holder of the Note and, therefore, has a valid interest in the property.

Because the amended complaint's allegations establish that U.S. Bank had a valid interest in the property, the amended complaint does not state a valid claim to quiet title. Accordingly, the trial court properly dismissed plaintiff's amended complaint. *See Joy v. MERSCORP, Inc.*, 935 F. Supp. 2d 848, 867 (E.D.N.C. 2013) (dismissing quiet title claim when it was undisputed that borrower had defaulted on mortgage loan, and complaint's allegations that bank engaged in practice of "rubber-stamping" assignments, therefore invalidating assignments did not provide any factual basis for removing Deed of Trust as an encumbrance on property).

[5] We next address whether the trial court erred in concluding that Mr. Greene improperly joined Trustee Services as a party to this action and in awarding attorneys' fees pursuant to N.C. Gen. Stat. § 45-45.3. N.C. Gen. Stat. § 45-45.3 provides, in pertinent part:

> (c) Except in matters relating to the foreclosure of the deed of trust or the exercise of a power of sale under the terms of the deed of trust, the trustee is neither a necessary nor a proper party to any civil action or proceeding involving (i) title to the real property encumbered by the lien of the deed of trust or (ii) the priority of the lien of the deed of trust. *Examples of civil actions or proceedings in which the trustee is neither a necessary nor a proper party include, but are not limited to*, civil actions or proceedings relating to:
>
> . . . .
>
> (3) The establishment or correction of title to real property, including, but not limited

> to, *actions to quiet title*, reform land records, or resolve boundary line disputes.

(Emphasis added.)

This statute unambiguously states that the trustee is not a proper party to "civil actions or proceedings relating to . . . actions to quiet title." *Id.* Mr. Greene argues, however, that the clause " '[e]xcept in matters relating to the foreclosure of the deed of trust or the exercise of a power of sale under the terms of the deed of trust' " creates an exception to the specific types of proceedings to which a trustee is not a proper party. (Emphasis omitted; quoting N.C. Gen. Stat. § 45-45.3(c).) We disagree.

This clause modifies and creates an exception to the general rule stated in the latter part of the first sentence: that the trustee is not a proper party to any civil action or proceeding involving title to real property encumbered by the lien on the Deed of Trust or the priority of the lien on the Deed of Trust. The second sentence, however, provides examples of the types of cases where the exception to the general rule would not apply. In other words, the "examples" listed in the statute are cases that do not relate to the foreclosure of the Deed of Trust or the exercise of a power of sale under the terms of the Deed of Trust.

Additionally, we believe that "matters relating to the foreclosure of the deed of trust or the exercise of a power of sale under the terms of the deed of trust," *id.*, refers to foreclosure special proceedings pursuant to N.C. Gen. Stat. § 45-21.16(d), and to actions to enjoin a foreclosure sale pursuant to N.C. Gen. Stat. § 45-21.34 (2013). N.C. Gen. Stat. § 45-21.34 provides:

> Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient[.]

These are the two avenues pursuant to which a party may contest the foreclosure of the Deed of Trust or the exercise of a power of sale under the terms of the Deed of Trust. Further, both of these statutory proceedings expressly contemplate the participation of the trustee. The

trustee is the person holding legal title to the property and the person who is tasked with exercising the power of sale. See N.C. Gen. Stat. § 45-21.16(a), (d) (providing that trustee initiates foreclosure special proceeding by filing notice of hearing and serving notice on all interested parties; "the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article"). When relief is granted pursuant to N.C. Gen. Stat. § 45-21.34, the trustee is enjoined from carrying out the foreclosure sale. Trustees are necessary parties to proceedings pursuant to N.C. Gen. Stat. §§ 45-21.16 and 45-21.34 because the trustee is the party tasked with facilitating the process.

In contrast, in other civil proceedings regarding title to real property encumbered by the lien of the Deed of Trust or the priority of the lien of the Deed of Trust, including the specific examples listed in N.C. Gen. Stat. § 45-45.3, there are no statutory duties for the trustee to fulfill and his participation in the proceeding serves no purpose. Accordingly, we agree with the trial court's interpretation of N.C. Gen. Stat. § 45-45.3 and with its conclusion that Trustee Services was an improper party to join as a defendant in the action to quiet title.

N.C. Gen. Stat. § 45-45.3(d)(3) provides that if a trustee is improperly joined as a party and makes an appearance in the action, the party who improperly joined the trustee is "liable to the trustee for all the expenses and costs incurred by the trustee in the defense of the action or proceeding or in obtaining the trustee's dismissal from the action or proceeding, including the reasonable attorneys' fees actually incurred by the trustee." Therefore, the trial court did not err in awarding attorneys' fees. Because Mr. Greene does not argue that the amount of fees awarded was unreasonable, we affirm the order.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

ALLEN TOBY HEDGEPETH, as Trustee under the Allen Toby Hedgepeth Declaration of Trust, Dated May 30, 2001, Plaintiff

v.

PARKER'S LANDING PROPERTY OWNERS ASSOCIATION, INC., Defendant

No. COA15-683

Filed 5 January 2016

Estoppel—judicial—location of property boundary—not an issue in prior case

The trial court erred by granting summary judgment for defendant based on judicial estoppel in an action to declare the boundary of two adjoining properties. The location of the true boundary lines of the respective properties was not at issue in the prior federal action.

Appeal by plaintiff from order entered 12 January 2015 by Judge Marvin K. Blount in Currituck County Superior Court. Heard in the Court of Appeals 17 December 2015.

Vandeventer Black LLP, by Norman W. Shearin and Ashley P. Holmes, for plaintiff-appellant.

Thompson & Pureza, P.A., by C. Everett Thompson, II and David R. Pureza, for defendant-appellee.

TYSON, Judge.

Allen Toby Hedgepeth ("Plaintiff") appeals from order granting summary judgment in favor of Parker's Landing Property Owners Association, Inc. ("Defendant"). We reverse and remand.

I. Factual and Procedural Background

Parker's Landing is a subdivision located in Currituck County, North Carolina. This property is bordered by U.S. Highway 158 to the west and by a tract of raw land ("the Hedgepeth Tract") to the south. The last survey plat of Parker's Landing was recorded in 1989 and provides all streets in the subdivision are private and owned by the Property Owners Association ("the POA"). The POA also owns the common areas within the subdivision.

In 1993, Plaintiff purchased the Hedgepeth Tract at a foreclosure sale without conducting a title search. The prior owners of the Hedgepeth

Tract had purchased the property in 1987 with the intent of developing the property into a residential subdivision. The prior owners allegedly allowed the property to be foreclosed upon, because it failed to include a reasonable means of ingress or egress. Plaintiff sought to develop the Hedgepeth Tract into a residential subdivision, but under the development ordinances, could not do so without a 50-foot right-of-way leading from his property to U.S. Highway 158 or any other street.

Plaintiff, a resident of Virginia, filed a complaint against the POA in the United States District Court for the Eastern District of North Carolina in 2007 ("the federal complaint" or "the federal action"), to seek a declaration that he had an easement directly across Parker's Landing Drive. Plaintiff alleged "Parker's Landing Drive now affords the only physical access from the [Hedgepeth] Tract to U.S. Highway 158."

Plaintiff asserted that "[p]rior to the recording of the Final Plat [of Parker's Landing], the predecessors in title to the developer of Parker's Landing recognized the existence of two (2) easements burdening Parker's Landing for the benefit of the [Hedgepeth] Tract[.]" Plaintiff contended the easements were created when the Parker's Landing Tract and the Hedgepeth Tract were severed from common ownership, which created an easement-by-necessity for access for an otherwise landlocked tract across the Parker's Landing Tract to the public highway. Plaintiff averred the developer of Parker's Landing relocated the easements from several platted lots to a street in the subdivision, Parker's Landing Drive, with the mutual assent of Plaintiff's predecessor-in-title.

In his federal court complaint, Plaintiff admitted the POA owned "the Common Areas in Parker's Landing Subdivision[,]" including Parker's Landing Drive. Plaintiff also conceded the south line of the Hedgepeth Tract adjoined Parker's Landing Drive. Plaintiff claimed he had either an express easement, an implied easement, or an easement by estoppel across Parker's Landing Drive.

At a pre-trial conference held on 29 May 2009, the parties entered into a pre-trial order, in which the parties stipulated to the following relevant facts:

> 4. POA is the owner of the "Common Areas" in Parker's Landing Subdivision described in that certain deed dated December 9, 2005 . . . .
>
> 5. Among the Common Areas owned by POA is a street named Parker's Landing Drive shown on the amended plat of Parker's Landing Subdivision recorded in Plat

> Cabinet E, Slide 116 & 117, Currituck County Registry (the "Amended Plat"). . . .
>
> . . . .
>
> 8. POA is the owner of Parker's Landing Drive as shown on the Plats.

Plaintiff moved for summary judgment, and the federal district court denied Plaintiff's motion by order entered on 5 June 2009. The federal district court concluded, in part:

> Regardless of the angle from which this case is viewed, or with which party a shifting-burdens inquiry begins, Hedgepeth, who ultimately must prove he is entitled to judgment as a matter of law, unequivocally has demonstrated that he cannot do so insofar as he seeks declaration of an easement for use of Parker's Landing Drive to subdivide and develop the Hedgepeth tract.
>
> However, the court finds that no genuine issue of material fact exists, the resolution of which could result in Parker's Landing Drive being subject to an easement benefitting the Hedgepeth Tract . . . . Therefore, Hedgepeth's Motion for Summary Judgment . . . is DENIED.
>
> However, the court concludes that the record demonstrates . . . that an implied easement exists such that he has reasonable access to his property over the 25-foot right-of-way (Doris Lane) as shown on the plat of the heirs of Capitolla Smith . . . . Therefore, it hereby is DECLARED that the Parker's Landing tract, as shown on the August 30, 1993, Amended Final Plat . . . is subject to a 10-foot easement and a 25-foot right-of-way (Doris Lane) as shown on the plat of the heirs of Capitolla Smith . . . , the scope of which may not exceed that necessary to the farming or cultivation of the Hedgepeth tract, consistent with the use to which those paths were put when the common title to the two tracts was severed in 1894.

On 2 February 2011, Plaintiff filed a complaint against the POA and alleged the portion of Parker's Landing Drive, as depicted on the Amended Plat as running along the south line of the Hedgepeth Tract, actually *overlaps* with the south boundary of the Hedgepeth Tract. Plaintiff contended "[t]he true and correct boundary line dividing the [Hedgepeth] Tract and the lands of the POA is the common boundary

described in that certain deed from W.W. Jarvis et ux to Nancy Virginia Parker dated October 12, 1940, and recorded in Book 71, Page 449, Currituck County Registry."

Plaintiff requested the trial court "declare the rights of the parties under the Amended Plat, Declaration, and the deeds, to quiet title to the [Hedgepeth] Tract, determine the true boundary between the [Hedgepeth] Tract and the lands of the POA, and enjoin the POA from interfering with those said rights[.]"

The POA filed a motion for summary judgment, and the trial court granted summary judgment in favor of the POA on 12 January 2015. Plaintiff gave timely notice of appeal to this Court.

II. Issue

Plaintiff argues the trial court erred by granting summary judgment in favor of defendant the POA on any proper grounds, and particularly under the doctrine of judicial estoppel.

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) (citation and internal quotation marks omitted), *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." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citations 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). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

IV. Analysis

Plaintiff argues the trial court erred by granting summary judgment in favor of the POA. Plaintiff contends the trial court improperly based its ruling for Defendant on the doctrine of judicial estoppel. We agree.

Judicial estoppel precludes a party to a legal proceeding from making "clearly inconsistent" factual assertions, by subsequently asserting a contrary factual position. *Whitacre P'ship v. Biosignia*, 358 N.C. 1, 22, 591 S.E.2d 870, 884 (2004). Judicial estoppel seeks to protect the integrity of judicial proceedings by "prevent[ing] a party from acting in a way that is inconsistent with its earlier position before the court." *Powell v. City of Newton*, 364 N.C. 562, 569, 703 S.E.2d 723, 728 (2010) (citation omitted); *see also Whitacre*, 358 N.C. at 26, 591 S.E.2d at 887 ("[J]udicial estoppel seeks to protect courts, not litigants, from individuals who would play 'fast and loose' with the judicial system." (citation omitted)).

Judicial estoppel is an "equitable doctrine, which may be invoked in a court's discretion, is inherently flexible and requires weighing of relevant factors." *Powell*, 364 N.C. at 568, 703 S.E.2d at 728; *see also Whitacre*, 358 N.C. at 28, 591 S.E.2d at 888 (noting judicial estoppel should not be subjected to "rote application of inflexible prerequisites or an exhaustive formula" (internal quotation marks omitted)). "[T]he circumstances under which judicial estoppel may appropriately be invoked are . . . not reducible to any general formulation of principle." *Whitacre*, 358 N.C. at 28, 591 S.E.2d at 888 (citation and quotation marks omitted). Judicial estoppel is "limited to the context of inconsistent factual assertions" and "*should not be applied to prevent the assertion of inconsistent legal theories.*" *Id.* at 32, 591 S.E.2d at 890 (emphasis supplied).

Our Supreme Court set forth three factors, which serve as guideposts for a court's decision of whether to apply the doctrine.

> First, a party's subsequent position must be *clearly inconsistent* with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 29, 591 S.E.2d at 888-89 (emphasis supplied) (citations and internal quotation marks omitted).

Here, Plaintiff sought a declaration of the true ownership and location of the south boundary of his property, which shares a common boundary with the subdivision. This Court previously addressed the effect of the federal court action on subsequent claims Hedgepeth brought against the POA and individual lot owners in the subdivision in *Hedgepeth v. Parker's Landing Ass'n, Inc., et al. (Hedgepeth I)*, __ N.C. App. __, 762 S.E.2d 865 (2014).

In *Hedgepeth I*, this Court held *res judicata* applied to Hedgepeth's claim to enforce his right of access over the 25-foot easement because "the extent of the federal court order was to declare that Hedgepeth had limited rights of access over the 25-foot easement and the 10-foot easement." *Id.* at __, 762 S.E.2d at 873.

This Court also held *res judicata* did *not* apply to Hedgepeth's boundary claims against the POA:

> As a preliminary matter, we hold that only those portions of Hedgepeth's complaint concerning the two easements found by the federal court could possibly be the subject of *res judicata* based upon the federal court order.
>
> Neither the 25-foot easement nor the 10-foot easement runs along a common boundary of the Parker's Landing Subdivision tract and the Hedgepeth tract. *Therefore, the easements adjudicated by the federal court cannot be determinative of Hedgepeth's boundary claims* in [the present action].

Id. at __, 762 S.E.2d at 873 (emphasis supplied).

This Court's prior holding is law of the case. Under the doctrine of law of the case, "once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994). We are bound by this Court's previous determination that "the easements adjudicated by the federal court cannot be determinative of Hedgepeth's boundary claims[.]" *Hedgepeth I*, __ N.C. App. at __, 762 S.E.2d at 873.

At the hearing on Defendant's motion for summary judgment, Defendant's counsel argued judicial estoppel bars Plaintiff's present boundary dispute allegations, and asserted Plaintiff had previously stipulated to the location and relative ownerships of the subdivision and his property in the pre-trial order in the federal court action. It is unclear from the record and the order whether the trial court granted summary judgment in favor of Defendant under the doctrine of judicial estoppel.

Under the guidelines set forth in *Whitacre* and its progeny, we cannot conclude Plaintiff's current factual assertion — that the south line of his property overlaps with Defendant's Parker's Landing Drive property — is "*clearly* inconsistent" with his factual allegations that he had an easement and access rights across Parker's Landing Drive in the federal complaint. *Whitacre*, 358 N.C. at 29, 591 S.E.2d at 888-89 (emphasis supplied).

Both parties admitted during oral argument that the federal court action could have resulted in the same outcome *even if* Plaintiff had asserted his boundary overlappage claims in that action. This reinforces our conclusion of an absence of a "clearly inconsistent" factual position by Plaintiff — the first, and the only requisite, element to trigger the application of judicial estoppel. *Wiley v. UPS, Inc.*, 154 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004) ("The first factor, and the only factor that is an essential element which must be present for judicial estoppel to apply, is that a party's subsequent position must be clearly inconsistent with its earlier position." (citations and internal quotation marks omitted)).

In the federal court action, the counsel for both parties signed a pre-trial order, in which they stipulated "[the] POA is the owner of Parker's Landing Drive as shown on the Plats." This Court cannot reasonably interpret this factual stipulation to bind the boundary lines of the Hedgepeth Tract.

> It has been the policy of [our appellate courts] to encourage stipulations and to restrict their effect to the extent

> manifested by the parties in their agreement. In determining the extent of the stipulation[,] we look to the circumstances under which it was signed and the intent of the parties as expressed by the agreement. Similarly, stipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished.

Rickert v. Rickert, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972) (citations and internal quotation marks omitted).

The federal court litigation involved Plaintiff's easement and access rights over Parker's Landing Drive to the Hedgepeth Tract. The alleged admissions and stipulations related to an assertion of access easements across Parker's Landing Drive. No stipulations were made concerning the underlying ownership or the location of a disputed boundary line.

The location of the true boundary lines of the respective properties was simply not at issue in the federal court action. The federal court's order did not address, nor rely on, any underlying ownership of property on the location of the boundary lines which are now in dispute. Judicial estoppel "seeks to protect *courts*, not litigants, from manipulation." *Whitacre*, 358 N.C. at 24, 591 S.E.2d at 885 (emphasis supplied) (citation omitted).

Adjudicating Plaintiff's boundary claims does not threaten "the integrity of the judicial process" by leading to "inconsistent court determinations or the perception that either the first or the second court was misled." *Id.* at 28, 29, 591 S.E.2d at 888, 889 (citation and internal quotation marks omitted). In light of the outcome of the federal court litigation, we also cannot conclude Plaintiff's assertion of a boundary overlap "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 29, 591 S.E.2d at 889 (citation omitted).

V. Conclusion

The essential element which must be present in order for a court to apply the doctrine of judicial estoppel — a "clearly inconsistent" statement by a party — is wholly absent from the facts at bar. The underlying purpose of judicial estoppel is to protect the integrity of the court

system, which is not achieved by applying it to the facts at bar. The trial court erred by granting summary judgment in favor of Defendant.

The trial court's order granting summary judgment in favor of Defendant is reversed. This cause is remanded for further proceedings.

REVERSED AND REMANDED.

Judges STROUD and DIETZ concur.

CHRISTINE HOLDER, PLAINTIFF
v.
CALEB KUNATH, DEFENDANT

No. COA15-250

Filed 5 January 2016

Domestic Violence—protective order—dueling motions—dismissed without a hearing

Where plaintiff and defendant both filed motions for domestic violence protective orders (DVPO), the trial court erred by dismissing plaintiff's motion on the grounds that it was a "Dueling 50B" to defendant's motion. Plaintiff was entitled to a hearing on her motion, and the fact that both plaintiff and defendant had filed motions for DVPOs was not an adequate basis for dismissing plaintiff's motion without a hearing.

Appeal by plaintiff from order entered 8 September 2014 by Judge Mack Brittain in Polk County District Court. Heard in the Court of Appeals 25 August 2015.

Pisgah Legal Services, by Faith Foote, Olivia A. Williams, Thomas K. Gallagher, Erin B. Wilson, and Robin L. Merrell; and Roberts & Stevens, P.A., by Ann-Patton Hornthal, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

GEER, Judge.

Plaintiff Christine Holder appeals from the district court's order dismissing her complaint and motion for a domestic violence protective

order ("DVPO") against defendant Caleb Kunath on the grounds that the motion was a "Dueling 50B" to defendant's motion for a DVPO against plaintiff. Our review of the record reveals that the district court conducted a hearing only on defendant's motion. No hearing was held on plaintiff's motion, which was ultimately dismissed without a hearing on the grounds that plaintiff's motion was a "Dueling 50B." Because plaintiff was entitled to a hearing and the fact that plaintiff and defendant had both filed motions for DVPOs was not an adequate basis for dismissing plaintiff's motion without a hearing, we reverse the trial court's order of dismissal and remand for a hearing.

Facts

Plaintiff and defendant were in a dating relationship for approximately 18 months. Eventually, plaintiff and defendant ended their relationship, and on 25 August 2014, a conflict occurred between plaintiff and defendant that resulted in defendant being arrested for injury to personal property, interference with emergency communication, breaking and entering, and assault on a female. Defendant ultimately pled guilty to the charges of assault and breaking and entering.

Subsequently, defendant filed a complaint and motion for a DVPO against plaintiff that was given the case number 14 CVD 209. In his complaint, defendant alleged that plaintiff intentionally forced him out of his father's vehicle while driving, with the intention to inflict bodily harm. The district court granted an ex parte DVPO in defendant's case against plaintiff on 2 September 2014 and sent plaintiff a notice that a hearing on defendant's DVPO would take place on 8 September 2014.

Plaintiff subsequently filed her own complaint and motion for a DVPO against defendant on 3 September 2014. In her complaint, plaintiff alleged that on 25 August 2014, defendant broke into her residence, assaulted her, caused her bodily injury, terrorized her six-year-old son, and damaged the premises. Plaintiff also alleged that defendant threatened her with a knife. Plaintiff's complaint was given the file number 14 CVD 211. The district court entered an ex parte DVPO against defendant on 3 September 2014. Plaintiff's complaint and motion were also calendared for a hearing on 8 September 2014.

Although both plaintiff's and defendant's motions were set for hearing on 8 September 2014, the record indicates that only defendant's motion, in 14 CVD 209, was heard. The transcript caption refers only to 14 CVD 209, with no reference to plaintiff's case against defendant, 14 CVD 211. At the hearing, the trial judge referred to defendant as the

plaintiff, and plaintiff as the defendant. No reference was made at the hearing to plaintiff's motion for a DVPO against defendant.

During the hearing on 8 September 2014, both parties appeared pro se. Defendant testified first and claimed that on 25 August 2014, he went to plaintiff's home to retrieve his belongings, but that plaintiff prevented him from doing so. Defendant also testified that plaintiff took his father's vehicle and drove it with defendant in the back of the hatch, causing damage to the vehicle and bruising defendant's ribs. On cross-examination, defendant admitted to breaking into plaintiff's residence on 25 August 2014 and to taking plaintiff's phone and throwing it. However, he denied threatening or assaulting plaintiff. Defendant also acknowledged that on or about 3 September 2014, he pled guilty to the assault and breaking and entering charges arising out of the 25 August 2014 events.

Plaintiff then testified that on 25 August 2014, defendant broke into and entered her home, assaulted her, and tried to throw her through a glass coffee table. Plaintiff testified further that defendant fractured her collarbone and that these events took place in front of her six-year-old autistic son. Plaintiff also testified that the reason she took defendant's vehicle was to flee defendant. On cross-examination, plaintiff admitted to threatening defendant.

At the conclusion of the hearing, the trial judge stated that since defendant was the plaintiff, he had the burden "to prove the facts to [the trial judge] by the greater weight of the evidence." Further, the trial judge indicated that he had "heard two different stories from two different people, neither of whom have -- would know of any reason why either of you would not be truthful and honest about what happened." The trial judge concluded that since he could not determine who was telling him the correct version of what took place on 25 August 2014, defendant ("the plaintiff" in that proceeding) had not met his burden. Therefore, the trial judge dismissed the ex parte DVPO that was previously entered against plaintiff ("the defendant" in that 8 September 2014 proceeding).

The trial judge then asked defendant whether he had pled guilty the week before the hearing to criminal charges of assault on a female and breaking and entering, and defendant stated that he had and that he had attended an anger management class. The trial judge also stated, "I assume there was restriction put on you in criminal court that you should not have contact with [plaintiff]; is that correct?," to which defendant responded, "That is correct."

The transcript for the 8 September 2014 hearing indicates that the proceedings concluded at 9:43 a.m. At 10:13 a.m., the trial judge filed an order in 14 CVD 209 concluding that defendant (referred to as "the plaintiff" at the hearing) had failed to prove grounds for issuance of a DVPO and stating: "Court not able to determine whether plaintiff's or defendant's version of story is correct version."

Nothing in the transcript or record indicates plaintiff's motion for a DVPO against defendant was ever heard or even referenced by the lower court. However, the trial judge also entered an order dismissing plaintiff's proceeding against defendant in 14 CVD 211 at the same time, 10:13 a.m., that he filed the order dismissing defendant's motion. The trial judge wrote on a generic form dismissal order not specifically intended for use in DVPO proceedings that the reason for the dismissal of plaintiff's proceeding was simply: "Dueling 50B to 14 CVD 209." The trial judge did not indicate whether the dismissal of plaintiff's motion against defendant was with or without prejudice. Plaintiff timely appealed the order to this Court.

Discussion

On appeal, plaintiff argues that the trial court erred by dismissing her complaint and motion for a DVPO on the basis that it was a "Dueling 50B to 14 CVD 209" without first holding an actual hearing on her motion. We agree.

In *Hensey v. Hennessy*, 201 N.C. App. 56, 67, 685 S.E.2d 541, 549 (2009), this Court held that "neither the Rules of Civil Procedure nor Chapter 50B exempts hearings pursuant to N.C. Gen. Stat. § 50B-3 from the requirement that the trial court hear testimony from witnesses." This Court ruled in *Hensey* that the "most troubling aspect" of that case was that the hearing transcript indicated the trial judge granted a DVPO "without hearing any evidence because he 'heard it on the criminal end.' " *Id.*

Nothing in the record indicates that the trial judge in this case held a hearing on plaintiff's motion for a DVPO against defendant. Nowhere in the transcript is it apparent that the trial judge was even aware during the hearing of plaintiff's motion or that he had two cases pending, until he entered orders dismissing both cases. Further, the hearing transcript caption identifies the file number as 14 CVD 209, with no reference to plaintiff's case, file number 14 CVD 211. In addition, during the hearing, the only case referenced was defendant's, 14 CVD 209. The trial judge never indicated that he was conducting a hearing on or receiving evidence in plaintiff's case, and he never notified plaintiff that he was

dismissing her case prior to filing the order. The trial judge was, however, required under *Hensey* to actually conduct a hearing on plaintiff's motion before entering an order in that case.

In addition, N.C. Gen. Stat. § 50B-2(c)(5) (2013) (emphasis added) provides that "[u]pon the issuance of an ex parte order . . . *a hearing shall be held* within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later." Similarly, N.C. Gen. Stat. § 50B-3(b) (2013), which governs the granting of mutual DVPOs when, as here, both parties have filed motions, states that the court must ensure that "the right of each party to due process is preserved" before entering mutual orders. Under both the federal and state constitutions, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32, 96 S. Ct. 893, 902 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187, 1191 (1965)). Because the record is devoid of any indication that the trial judge was aware of plaintiff's motion at the time of the hearing or that any hearing was held on plaintiff's motion, plaintiff's statutory and due process rights to a hearing were violated.

Additionally, the order ultimately entered by the trial judge does not provide a sufficient basis for the dismissal. The trial judge, without specifying that the dismissal was with or without prejudice, gave as the reason for the dismissal simply: "Dueling 50B to 14 CVD 209." It is not clear what specifically the trial judge was concluding. To the extent that the order can be read as concluding that simply because both parties had filed motions for a DVPO, plaintiff was not entitled to proceed, we know of no authority that would support such a conclusion.

Indeed, N.C. Gen. Stat. § 50B-3(b) specifically allows a trial court to enter mutual orders to be issued if the following conditions are met:

> Protective orders entered, including consent orders, shall not be mutual in nature except where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved.

Here, the trial judge indicated at the hearing on defendant's motion that he found both plaintiff's and defendant's testimony regarding the incident on 25 August 2014 to be credible, announcing that he "heard two different stories from two different people, neither of whom have

-- would know of any reason why either of you would not be truthful and honest about what happened." The trial judge then denied defendant a DVPO on the grounds that the "Court [is] not able to determine whether plaintiff's or defendant's version of story is [the] correct version."

The trial judge, however, never referenced plaintiff's motion at the 8 September 2014 hearing. If he had been aware of plaintiff's motion, he could have entered mutual orders with respect to both plaintiff and defendant under N.C. Gen. Stat. § 50B-3(b) based on his belief that the parties were each credible. Having two dueling DVPO motions did not require denial of both of the motions.

We cannot conclude that the trial judge would still have denied plaintiff's motion if he had understood that the dueling nature of the parties' motions did not require denial. Specifically, we note that, at the hearing on defendant's motion, the trial judge, in his questioning, made sure that an order had been entered in defendant's criminal case, barring defendant from having any contact with plaintiff. This concern that an order be in place for plaintiff's protection suggests that the trial court was likely to grant plaintiff's motion if he had applied the law as set forth in N.C. Gen. Stat. § 50B-3(b). Consequently, the trial court erred in denying plaintiff's motion based on it being a "Dueling 50B."

Conclusion

Accordingly, we reverse the district court's order dismissing plaintiff's motion for a DVPO. We remand to the district court for a hearing on plaintiff's motion and the entry of an appropriate order.

REVERSED AND REMANDED.

Judges BRYANT and TYSON concur.

IN RE FLS OWNER II, LLC

[244 N.C. App. 611 (2016)]

IN THE MATTER OF THE APPEAL OF FLS OWNER II, LLC FROM THE DECISION OF THE RANDOLPH COUNTY BOARD OF EQUALIZATION AND REVIEW REGARDING THE VALUATION OF CERTAIN PROPERTY FOR TAX YEAR 2011

No. COA14-1399

Filed 5 January 2016

Taxation—property—industrial solar system—method of appraisal

A decision by the North Carolina Property Tax Commission about the assessment of an industrial solar system was remanded where the taxpayer met its burden of production with evidence that the County used an arbitrary or illegal method of appraising the value of the solar heating system and that appraisal substantially exceeded the true value in money of the property. The County used a press release from the Governor's website to determine the system's value, failed to follow statutory guidelines for appraisal, and did not consider the obsolescence of the equipment.

Appeal by FLS Owner II, LLC from final decision entered 15 September 2014 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 6 May 2015.

Turrentine Law Firm, PLLC, by S.C. Kitchen, for Taxpayer-Appellant.

Shelley T. Eason, for Randolph County-Appellee.

CALABRIA, Judge.

Taxpayer, FLS Owner II, LLC ("FLS"), appeals from a final decision of the North Carolina Property Tax Commission ("the Commission") affirming the appraisal of FLS's solar heating system by Randolph County ("the County") for *ad valorem* tax purposes. We reverse the decision of the Commission and remand.

I. Background

FLS purchased an industrial solar heating system ("the system") for $1,700,000 from its parent company, FLS Energy, Inc., on 15 August 2010. FLS then leased the system for use in a manufacturing facility ("the facility") in Asheboro. The system was designed specifically for, and was installed directly onto, the facility. It consists of two hundred

solar panels, two heat exchangers, piping inside and outside of the facility, and two 10,000-gallon storage tanks, as well as "sleeves, bracers, and connectors associated with the system." The system produces hot water solely for the facility's industrial manufacturing processes.

According to stipulations by both parties, the County discovered the system in 2011 and initially appraised it at "a value of $571,000 based on [ ] an original cost of $635,000 [as] shown on the building permit." "The [C]ounty amended [its appraisal] in November of 2011 to show a value of $1,056,917 based on a press release from the North Carolina Governor's Office showing the original cost for the [system] to be $1,174,352."

FLS contested the County's appraisal, and a hearing was held before the Commission on 13 May 2014 ("the hearing"). During the hearing, Howard Blair Kincer ("Mr. Kincer") testified for FLS as an expert in the "appraisal of solar energy equipment and systems." Mr. Kincer testified, in part, that under a "cost comparison approach[,]" the value of the system was $56,000, because that was how much it would cost to replace the system with an equivalent conventional heating system. As a result, the County's appraisal of the system was almost nineteen times larger than Mr. Kincer's appraisal. The County maintained that it correctly appraised the system based on the cost of replacing it with another solar heating system. At the close of FLS's evidence, the County moved to dismiss the case. On 15 September 2014, the Commission entered a final decision ("the decision") which dismissed the case and affirmed the County's valuation of the system at $1,056,917. FLS appeals.

II. Standard of Review

The North Carolina Supreme Court has outlined the standard of review for appeals from final decisions of the Commission as follows:

> We review decisions of the Commission pursuant to [N.C. Gen. Stat.] § 105-345.2 [(2013)]. Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission. Under the whole-record test, however, the reviewing court merely determines whether an administrative decision has a rational basis in the evidence.

In re Appeal of Greens of Pine Glen Ltd., 356 N.C. 642, 646–47, 576 S.E.2d 316, 319 (2003) (citations and internal quotation marks omitted).

Because this appeal presents a dispositive issue of statutory construction, we conduct a *de novo* review.

III. Analysis

FLS challenges the decision of the Commission to affirm the County's appraisal of the system for *ad valorem* tax purposes. "*Ad valorem* tax assessments are presumed to be correct." *Id.* at 647, 576 S.E.2d at 319.

> However, a taxpayer may rebut this presumption if it produces competent, material and substantial evidence establishing that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property.

Id. This is a "two-prong test[.]" *Id.* However, "[i]n attempting to rebut the presumption of correctness, the burden upon the aggrieved taxpayer is one of *production* and not persuasion." *In re Blue Ridge Mall LLC*, 214 N.C. App. 263, 267, 713 S.E.2d 779, 782 (2011) (emphasis added) (citation and internal quotation marks omitted). "Once a taxpayer produces sufficient evidence to rebut the presumption, the burden shifts to the taxing authority to show that its methods [do] in fact produce true values[.]" *In re IBM Credit Corp.*, 201 N.C. App. 343, 345, 689 S.E.2d 487, 489 (2009) (citation and internal quotation marks omitted).

A. Classification of Property

As a preliminary matter, we note that the County appraised FLS's system as "personal property" under N.C. Gen. Stat. § 105-317.1 (2013). Neither party disputes this classification. Since FLS's appeal turns almost entirely on determining the correct "replacement cost" of the system, the County would have had to consider this "replacement cost" while conducting its appraisal, regardless of whether the system was properly classified as real or personal property. *See* N.C. Gen. Stat. §§ 105-317(a)(2), -317.1(a) (respectively).

B. Application of N.C. Gen. Stat. § 105-277(g)

FLS contends the County used an arbitrary or illegal method to appraise the value of the system and that this appraised value "substantially exceeded" the system's "true value" as defined by North Carolina's Tax Code. *See* N.C. Gen. Stat. §§ 105-277(g) (requiring that buildings equipped with solar heating or cooling systems be "assessed for taxation in accordance with each county's schedule of values for buildings

equipped with conventional heating or cooling systems") 283 (2013) (stating that all property must be "valued at its true value in money"). Specifically, FLS argues the County erred by appraising the system based upon the "reproduction cost" of the system. Under this method, the County reached it appraisal by determining the "replacement cost" of constructing another, identical solar heating system. FLS contends subsection 105-277(g) required the County to appraise the system based on the "replacement cost" of an equivalent conventional heating system. FLS also argues the Commission erred by concluding as a matter of law that subsection 105-277(g) was not applicable to the present case in affirming the County's appraisal. The interpretation of subsection 105-277(g) is a matter of first impression for this Court, and we agree with FLS.

Subsection 105-277(g) provides that

> [b]uildings equipped with a solar energy heating or cooling system, or both, are hereby designated a special class of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution. Such buildings shall be assessed for taxation *in accordance with each county's schedules of value for buildings equipped with conventional heating or cooling systems* and no additional value shall be assigned for the difference in cost between a solar energy heating or cooling system and a conventional system typically found in the county. As used in this classification, the term "system" includes all controls, tanks, pumps, heat exchangers and other equipment used directly and exclusively for the conversion of solar energy for heating or cooling. The term "system" does not include any land or structural elements of the building such as walls and roofs nor other equipment ordinarily contained in the structure.

N.C. Gen. Stat. § 105-277(g) (emphasis added). It is well settled that

> [t]he principal goal of statutory construction is to accomplish the legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish. If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so. When the statute under consideration is one concerning taxation, special canons of statutory

> construction apply. If a taxing statute is susceptible to two constructions, any uncertainty in the statute or legislative intent should be resolved in favor of the taxpayer.

Lenox, Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citations and internal quotation marks omitted). For the following reasons, we conclude the statute is susceptible to competing reasonable constructions.

Subsection 105-277(g) specifically provides that "[*b*]*uildings* equipped with a solar energy heating or cooling system . . . are hereby designated a special class of property" and sets forth the manner in which "[s]uch *buildings* shall be assessed for taxation[.]" N.C. Gen. Stat. § 105-277(g) (emphasis added). According to the County, this language necessarily means that "the statute's financial benefit goes to the building, not to the solar heating and cooling system itself[.]" The essence of this argument is that subsection 105-277(g) serves a very limited purpose: installation of (usually very expensive) solar equipment increases the value of the building to which it is attached. This increase in value subjects the building's owner to greater *ad valorem* tax liability. The County contends when a building is equipped with a solar heating or cooling system, it must be assessed for taxation without regard to the increased value of the real property due to the installation of such a system.

Even so, as FLS argues in its brief, the remainder of subsection 105-277(g) defines solar energy heating and cooling systems as entirely distinct from the buildings to which they are attached. *See* N.C. Gen. Stat. § 105-277(g) ("[T]he term 'system' includes all controls, tanks, pumps, heat exchangers and other equipment *used directly and exclusively* for the conversion of solar energy for heating or cooling . . . [and] *does not include any land or structural elements of the building* such as walls and roofs nor other equipment ordinarily contained in the structure." (emphasis added)).

The explicit mention of system components provides one explanation of the legislation's scope. In particular, the specific identification of these components categorizes what hardware qualifies for subsection 105-277(g)'s tax benefit, and the language excluding "structural elements of the building" categorizes what hardware is not within the legislation's reach. *See* John H. Minan & William H. Lawrence, *State Tax Incentives to Promote the Use of Solar Energy*, 56 Tex. L. Rev. 835, 842 (1978) ("Specific identification of system components that qualify for tax relief aids the precision and clarity of [solar tax relief] legislation. Including 'all controls, tanks, pumps, heat exchangers, and other hardware necessary to effect installation' within the reach of the tax

incentive is an illustration of this approach. A corollary approach is to specify investments outside the ambit of the legislation. An example of this technique is the specific exclusion of walls and roofs unless they are integral parts of the system, specially designed to provide additional heating or cooling.”).

Yet the statute also provides that “no additional value shall be assigned for the *difference in cost between a solar energy heating or cooling system and a conventional system*[,]” N.C. Gen. Stat. § 105-277(g) (emphasis added), which FLS argues is a value that effectively has nothing to do with a building as a distinct property. Consequently, subsection 105-277(g) could be interpreted to mean that the General Assembly intended for this subsection to apply specifically to the appraisal of solar heating and cooling systems that are attached to buildings, and not to buildings alone.

This interpretation is bolstered by the Act’s title. When, as here, “the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose.” *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 782 (1981); *see also Sykes v. Clayton*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968) (title of a bill is “a legislative declaration of the tenor and object of the act”). 1977 Sess. Laws ch, 965, which enacted subsection 105-277(g), was specifically entitled “An Act to Classify *Solar Energy Systems* for Ad Valorem Tax Purposes.” (emphasis added). The Act’s title, when read in conjunction with subsection 105-277(g)’s language, clearly shows that solar energy systems are, at least in part, a discrete class of property at which the legislation is aimed.

All told, we do not believe the General Assembly intended to preclude subsection 105-277(g) from applying in the instant case. As noted above, to the extent that subsection 105-277(g) “is susceptible to two constructions, any uncertainty in the statute or legislative intent should be resolved in favor of” FLS. *Lenox*, 353 N.C. at 664, 548 S.E.2d at 517. We are also unable to resolve the practical ramifications of the County’s position on appeal. Specifically, the County argues that FLS should not benefit from the appraisal restrictions in subsection 105-277(g) because “[t]he statute’s financial benefit goes to the building, not to the solar heating and cooling equipment itself[.]”

This interpretation of subsection 105-277(g) would allow functionally identical properties to be taxed at radically different rates, depending on whether the building and the solar heating system were owned by the same individual. According to the County’s position, the owner of

a solar heating system located on a plot of land it did not own would be unable to benefit from subsection 105-277(g)'s appraisal restrictions. Thus, if "[t]he statute's financial benefit [really did go] to the building," a building-owner who did not own the building's solar heating system would recoup a windfall tax break for property it did not own. Yet the owner of the solar heating unit would have to pay taxes on its system as if it were nineteen times more valuable than an identical system next door, which happened to be owned by the same individual who owns the building.

The County's argument regarding subsection 105-277(g)'s application to this case turns on the ownership of either the system or the facility—if FLS owned the facility, or if the facility owned the system, we would not be here. We do not believe the General Assembly intended such a disparate, disjointed application of the State's Tax Code, which requires that there be "[u]niform appraisal standards" for assessing *ad valorem* taxes within a given class of properties. N.C. Gen. Stat. § 105-283. Indeed, the "application of two distinct valuation methodologies to properties in the same class which results in systematic discrimination against one group of property owners is a clear violation of uniformity." *In re Appeal of Winston-Salem Joint Venture*, 144 N.C. App. 706, 713–14, 551 S.E.2d 450, 455 (2001) (citing *Allegheny Pitts. v. Webster County*, 488 U.S. 336, 345, 102 L.Ed.2d 688, 698 (1989)). As the County aptly points out in its brief, "statutes such as [subsection 105-277(g)] describe a particular *class* of property for [partial] exclusion from the tax base rather than providing an exemption for its *owner*." (emphasis added). *See In re Appeal of Springmoor, Inc.*, 348 N.C. 1, 9, 498 S.E.2d 177, 182 (1998) ("[Tax exemption statutes] must bear a substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (citations and internal quotation marks omitted)). Accordingly, for the purpose of assessing *ad valorem* taxes under North Carolina's Tax Code, N.C. Gen. Stat. §§ 105-317(a)(2), -317.1(a), solar heating and cooling systems are to be appraised with "no additional value . . . assigned for the difference in cost between a solar energy heating or cooling system and a conventional system typically found in the county." N.C. Gen. Stat. § 105-277(g).[1]

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1. The County also seems to imply in its brief that FLS's solar heating system is not a "solar energy heating or cooling system" for the purposes of subsection 105-277(g) because FLS's solar heating system creates hot water for industrial processes and "does not provide heating or cooling for [the facility's] employees or officers in bathrooms, kitchens, or other interior areas of the [f]acility." We find no basis for this distinction in the language of subsection 105-277(g), and we note that other parts of North Carolina's Tax Code take an expansive view of what constitutes a solar heating or cooling system. *See*

Here, the County appraised FLS's system as business personal property. Section 105-317.1 sets forth specific factors the County was required to use in its appraisal of the system. The County failed to employ any of these factors, but instead relied on a press release from then-Governor Beverly Perdue's website which listed the property at $1,174,352. Significantly, the record does not reveal the origin of this value.

After applying trending schedules promulgated by the North Carolina Department of Revenue, the County arrived at its valuation figure of $1,056,917. This Court has previously rejected the use of historical cost in conjunction with trending tables to value specialty equipment for purposes of property tax. *See IBM Credit Corp.*, 201 N.C. App. at 351-52, 689 S.E.2d at 493 (reasoning that using historical cost and applying trending factors to computer equipment misses "a critical step in the appraisal analysis, particularly when technological improvements in the equipment being trended . . . may have all the utility of the machine being appraised but sell for less money than the subject machine cost several years previous").

The County's valuation of the property also failed to consider the tax credits for the system, which were "used up" once the system was constructed. As a result, the County's valuation taxed FLS for a value that was no longer present in the system.

IV. Conclusion

In sum, the County used a press release from Governor Perdue's website to determine the system's value, failed to follow statutory guidelines for appraisal, and did not "consider the obsolescence of the equipment due to the equipment being overbuilt, the income produced by the equipment, and [the] transfer of tax credits prior to valuation[.]" FLS has therefore met its burden of production by producing evidence that the County used an arbitrary or illegal method of appraising the value of the solar heating system. *See Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319. And since expert testimony established that the County's appraised value of the solar heating system was approximately nineteen times greater than the value of an equivalent conventional

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N.C. Gen. Stat. § 105-129.15 (2013) ("Solar energy equipment [is equipment] that uses solar radiation as a substitute for traditional energy for *water heating*, active space heating and cooling, passive heating, daylighting, generating electricity, distillation, desalination, detoxification, or the *production of industrial or commercial process heat*. The term also includes related devices necessary for collecting, storing, exchanging, conditioning, or converting solar energy to other useful forms of energy." (emphasis added)).

heating system, FLS has also met its burden of production by producing evidence that the County's appraisal "*substantially* exceeded the true value in money of the property," *id.*, as that value is defined by North Carolina's Tax Code. *See* N.C. Gen. Stat. §§ 105-277(g), -283. Accordingly, we reverse the final decision of the Commission and remand for further proceedings consistent with this opinion. Given our disposition of this case, we need not consider the other arguments raised by FLS on appeal.

REVERSED AND REMANDED.

Judges STROUD and TYSON concur.

JEFFREY J. JOHNSON AND WIFE, DONNA N. JOHNSON, AND GARY A. PROFFIT AND WIFE, BETTY JO PROFFIT, PLAINTIFFS

v.

STARBOARD ASSOCIATION, INC., A NORTH CAROLINA NONPROFIT CORPORATION, JOHN MCGUIRT, CHARLES ADAMS, ERIC O'BRIAN, WILLIAM CARTER, HELEN BUNCH, SYD SCHENK, CATHY MOSS, BUD AYERS, BETTY GRAHAM, DARRYL RICE, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF DIRECTORS OF STARBOARD ASSOCIATION, INC., AND ABBOTT ENTERPRISES, INC., A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA15-451

Filed 5 January 2016

1. Estoppel—collateral—special assessment by homeowners association—issue litigated in prior lawsuit

Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the judgment of the trial court concluding that the special assessment was invalid and directing a verdict for plaintiffs. While defendants argued on appeal that the homeowners association was not required to separate windows and doors from common property in its 2010 Special Assessment, the Court of Appeals held that this argument was barred by collateral estoppel. The dismissal of a prior foreclosure proceeding pursuant to Rule 41(b) operated as a final adjudication on the merits, and the issue here was identical to the issue litigated and necessary to the judgment at issue in a previous case appealed to the Court of Appeals and Supreme Court.

2. Associations—homeowners—special assessment—affirmative defense of implied contract—proposed renovations not voluntarily accepted

Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the trial court's denial of defendants' motion for a directed verdict on their affirmative defense of implied contract arising from improvements to Building 33. Even assuming the affirmative defense could be sustained where the homeowners association unlawfully assessed costs against condominium unit owners, viewing the evidence in the light most favorable to the plaintiffs there existed sufficient evidence that plaintiffs did not voluntarily accept the proposed renovations to Building 33.

3. Associations—homeowners—special assessment—action not derivative—injury to plaintiffs

Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the trial court's denial of defendants' motion to dismiss under Rules 12(b)(6) and 12(b)(7). Plaintiffs were not required to bring the declaratory action by or on behalf of the homeowners association. Property owners are permitted to sue their homeowners associations for declaratory relief, and a derivative action would not have been appropriate here because plaintiffs were not alleging injury to the association or seeking to recover on its behalf.

Appeal by defendants from Judgment for Declaratory Relief entered 26 March 2014 by Judge Jeffrey P. Hunt in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 2015.

Kenneth T. Davies for plaintiffs.

VERNIS & BOWLING OF CHARLOTTE, PLLC, by R. Gregory Lewis, for defendants.

ELMORE, Judge.

On 26 March 2014, the trial court directed verdict for plaintiffs in an action for declaratory judgment, concluding that a special assessment levied against condominium unit owners was invalid. On appeal, now for the second time, defendants argue that (1) the trial court erred

in entering judgment in favor of plaintiffs because Starboard was not required to separate the cost of windows and doors from the cost of common property improvements in its 2010 Special Assessment; (2) the trial court erred in denying defendants' motion for directed verdict on their affirmative defense of implied contract; and (3) the trial court erred in denying defendants' motions to dismiss pursuant to Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure. We affirm.

I. Background

This case arises out of a series of improvements made by Starboard Association, Inc. (Starboard) to its resort condominium property, Starboard by the Sea, located on Ocean Isle in Brunswick County, North Carolina. Starboard was incorporated on 18 June 1981, for the purpose of administering the operation and management of the Starboard by the Sea condominiums, which consist of 139 residential units, located in 33 separate buildings.

Jeffrey J. Johnson, Donna N. Johnson, Gary Proffit, and Betty Jo Proffit (plaintiffs) acquired Unit B of Building 33, as tenants in common, on 6 August 2004. As owners of Unit B, plaintiffs are mandatory members of Starboard and are subject to the Declaration of Condominium and By-laws. Starboard filed its Declaration of Condominium (Original Declaration) and By-laws on 2 July 1981, with the Brunswick County Register of Deeds. Between 1981 and 2003, the Original Declaration was amended several times. Thereafter, on 2 November 2009, Starboard filed the Amended and Restated Declaration of Condominium for Starboard by the Sea Condominium g/b Starboard Association, Inc. (Restated Declaration) in Brunswick County.

A. The First Special Assessment (Buildings 1–32)

On 9 October 2004, at Starboard's Annual Members Meeting, the members considered an extensive exterior renovation proposal for Buildings 1–32; Building 33 was not considered in the proposal. The members in attendance voted 35 to 1 to authorize a general vote of all unit owners for the renovation project. In March 2005, Starboard mailed ballots to the unit owners soliciting votes for the renovation project, but ultimately failed to garner the 75 percent vote that the Starboard Board of Directors (the Board) believed it needed to move forward with the project.

Starboard took no further action on the proposed renovations until the next Annual Members Meeting, held on 8 October 2005. At the meeting, another vote was taken to move forward with the renovations

to Buildings 1–32, and the members in attendance voted 33 to 29 to approve the project. In late 2005, the Board levied a special assessment against the owners of the 126 units in Buildings 1–32 to pay for the renovations (First Assessment). The First Assessment included the costs to purchase, remove, and replace windows and doors for Buildings 1–32. The renovations were completed 31 December 2007.

B. The Second Special Assessment (Building 33)

On 10 August 2007, the Board informed the Building 33 unit owners that it was soliciting bids to renovate Building 33. The renovations were to be funded by a new special assessment levied solely against the three unit owners in Building 33. On 8 November 2007, the Board approved the special assessment in the amount of $55,000.00 per unit, to be assessed individually against each of the Building 33 unit owners (Second Assessment).

While they agreed that maintenance to the common area was overdue, plaintiffs objected to the Second Assessment. In particular, plaintiffs argued that Building 33 unit owners were assessed at $55,000.00 per unit, compared to $38,000.00 for similar units in Buildings 1–32; Building 33 unit owners were given only two months to tender the Second Assessment, while the owners in Buildings 1–32 had five months to tender the First Assessment; multiple repair requests by the Building 33 unit owners had been ignored for several years, causing excess and unnecessary deterioration to the common areas of Building 33; and no vote of the general membership was taken to proceed with the Second Assessment.

Despite plaintiffs' concerns, the Board proceeded with the project, though it did reduce the Second Assessment by $1,000.00 per unit, totaling $54,000.00 assessed against each Building 33 unit owner. The Second Assessment was to be paid in two installments, due 15 December 2007 and 15 February 2008. On 15 December 2007, plaintiffs paid the first installment, in the amount of $27,000.00, under protest. Plaintiffs refused to pay the second installment.

C. The Foreclosure Proceeding and Appellate Decisions

On 20 August 2008, Starboard initiated foreclosure proceedings against plaintiffs due to their alleged "failure to timely pay assessments and other charges levied by [Starboard]." Plaintiffs objected to the foreclosure on 7 October 2008, challenging the validity of the $30,887.00 debt. The matter was transferred to Brunswick County Superior Court and, by consent, venue was then changed to Mecklenburg County. At the conclusion of the hearing, on 3 August 2009, the trial court determined that

the Second Assessment was unlawful because it was not computed on a *pro rata* basis, as required by the Unit Ownership Act and the Original Declaration, as amended. Therefore, the alleged debt which formed the basis of Starboard's claim of lien and the foreclosure proceeding was invalid. The trial court entered an order of dismissal and judgment of the foreclosure proceeding on 11 December 2009, from which Starboard appealed.

On appeal, this Court agreed with the trial court that the Second Assessment was invalid. *In re Johnson (Johnson I)*, 212 N.C. App. 535, 539–43, 714 S.E.2d 169, 172–74 (2011) (Hunter, Robert C., J., dissenting in part). Under the Unit Ownership Act, costs for repairs and maintenance to the general common areas must be assessed against all unit owners *pro rata*. N.C. Gen. Stat. § 47A-12 (2013); *see also* N.C. Gen. Stat. § 47A-3(2) (2013) (providing default definition of "common areas and facilities"). Each unit owner's *pro rata* contribution is based on the fair market value of the unit in relation to the aggregate fair market value of all units. N.C. Gen. Stat. § 47A-6(a) (2013). The common area renovations to Building 33 included new vinyl siding, renovations to the stairways and decks, pylon repairs, and other capital repairs and renovations. *Johnson I*, 212 N.C. App. at 542, 714 S.E.2d at 174. These renovation costs should have been assessed against all Starboard members according to their *pro rata* share, rather than solely against Building 33 unit owners. *Id.*

However, the Second Assessment also included the cost to renovate exterior windows and doors in Building 33, which are *not* common areas under the Original Declaration, as amended. *Id.* Therefore, Starboard had the authority to assess the cost of the windows and doors solely against the unit owners in Building 33 "in such proportion as may be determined by the Board." *Id.* Because the trial court "dismissed the foreclosure action without making separate findings or conclusions for the renovations for the windows and doors that exclusively benefitted the unit owners of Building 33 and the portions of the renovations that were for common areas," we vacated the trial court's order and remanded. *Id.* Starboard was required to make a new assessment that separated the cost of the windows and doors from the cost to renovate the common areas and facilities. *Id.*

Based upon Judge Robert C. Hunter's dissenting opinion, Starboard appealed to the Supreme Court of North Carolina. The Supreme Court, addressing only whether the assessment was unlawful because it was not uniform, affirmed the Court of Appeals majority:

> The trial court's findings of fact support its conclusions of law that the assessment levied against [plaintiffs] was invalid because it violated N.C.G.S. § 47A-12 and Article XXIII of the amended Declaration. Consequently, we affirm the decision of the Court of Appeals that [Starboard's] assessment against [plaintiffs'] unit for the Building 33 renovations was unlawful, because it was not applied uniformly nor calculated in accord with [plaintiffs'] percentage undivided interest in the common areas and facilities, as required by the Unit Ownership Act and the amended Declaration. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to those matters remains undisturbed.

In re Johnson (Johnson II), 366 N.C. 252, 255, 741 S.E.2d 308, 310 (2012).

On remand, Starboard declined to offer any new evidence in support of its petition for foreclosure. The trial court dismissed Starboard's foreclosure proceeding pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. Starboard did not appeal.

D. The 2010 Special Assessment and Instant Litigation

After the foreclosure proceeding, the Board authorized another special assessment in its Resolution dated 30 January 2010 (2010 Special Assessment). The parties stipulated that the 2010 Special Assessment was levied for the purposes set forth in the Resolution, which provides, in pertinent part, as follows:

> RESOLVED, that the Board of Directors of the Association, after consideration and in light of [the foreclosure proceeding], has deemed it advisable and in the best interest of the Association, *to reallocate the assessments previously approved, assessed, allocated and paid in accordance with Article XVI of the "Declaration of Condominium,"* . . . which were in the total amounts of $960,000 for three bedroom units in 2005; $352,000 for one bedroom units in 2006; $3,600,000 for three bedroom units in 2006; and $162,000 for ocean front units in 2007–2008.
>
> FURTHER RESOLVED that to avoid any future claims or allegations regarding the previous assessments and their allocations, *the Board resolves to present to the membership a Special Assessment in the total amount of $5,074,000 for 2010* ($960,000 for three bedroom units;

> $352,000 for one bedroom units; $3,600,000 for three bedroom units; and $162,000 for ocean front units) in accordance with Article XXIII, Section D of the [Restated Declaration] . . . .
>
> . . . .
>
> FURTHER RESOLVED, *this Special Assessment shall be used for the expenses of construction in 2005, 2006 and 2007–2008* . . . .

(emphasis added.)

The $5,074,000.00 figure represents the total cost to renovate Buildings 1–33. Furthermore, the parties stipulated that the renovations to Buildings 1–33 included renovations to the common areas, as well as the replacement of exterior windows and doors. Thus, the 2010 Special Assessment, while assessed *pro rata* against all unit owners, was based upon past renovations and was not limited to the cost of renovating the common areas of the condominiums. Rather, to form the 2010 Special Assessment, defendants merely added the costs of the First Assessment to the costs of the Second Assessment—both of which included the cost of windows and doors.

The 2010 Special Assessment was approved in June 2010, though defendants did not take action to collect the costs from plaintiffs until 23 January 2013. Thereafter, plaintiffs filed this lawsuit on 31 May 2013, requesting, *inter alia*, a declaratory judgment that the 2010 Special Assessment was invalid. The matter came to trial on 3 March 2014, in Mecklenburg County Superior Court before the Honorable Jeffrey P. Hunt, and a jury was duly empaneled. The trial court granted defendants' Motion for Severance, Bifurcation, or Separate Trials, pursuant to Rule 42 of the North Carolina Rules of Civil Procedure, and ordered a separate trial on plaintiffs' claim for declaratory judgment.

At the close of the evidence, the parties had stipulated to nearly all of the relevant factual issues and made respective Rule 50 motions for directed verdict. The trial court denied the motions, except for plaintiffs' motion as to the one remaining issue to be submitted to the jury: "Did the 2010 special assessment implemented by defendants apportion windows and doors separately from the common property of the Development?" There being no evidence to the contrary, the trial court answered, "NO," and granted plaintiffs' motion for directed verdict on the issue.

Pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the trial court entered Judgment for Declaratory Relief in favor of plaintiffs on 26 March 2014, reserving the parties' remaining claims and defenses for a later hearing and certifying that there was no just reason for delay. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013) ("[T]he court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal . . . ."). The trial court concluded as a matter of law that the 2010 Special Assessment was invalid for the following reasons:

> 1. It failed to apportion doors and windows separately from common areas; and to affix numbers thereto in violation of the "Amended and Restated Declarations of Condominium;" and
>
> 2. It failed to comply with the holding of the N.C. Court of Appeals opinion herein cited in finding of fact #6 above [*Johnson I*];
>
> 3. Failed to comply with the holdings of the N.C. Supreme Court opinion, herein cited in finding #6 above [*Johnson II*].

Defendants appeal from the judgment.

II. Discussion

Defendants present three arguments on appeal: (1) the trial court erred in entering judgment in favor of plaintiffs because Starboard was not required to separately apportion the cost of windows and doors from the cost of common property improvements in its 2010 Special Assessment; (2) the trial court erred in denying defendants' motion for directed verdict on their affirmative defense of implied contract; and (3) the trial court erred in denying defendants' motions to dismiss pursuant to Rules 12(b)(6) and 12(b)(7) on the grounds that plaintiffs lack standing to sue and failed to join a necessary party. We address each of defendants' arguments in turn.

A. The Cost of Windows and Doors in the 2010 Special Assessment

[1] Defendants do not challenge the trial court's entry of directed verdict for plaintiffs on whether the 2010 Special Assessment did, in fact, apportion windows and doors separately from the common property. Rather, without pointing to any specific finding or conclusion in the judgment, defendants argue that the trial court erred "by finding as

fact and concluding as a matter of law that Starboard was required to separate windows and doors from common property in its 2010 Special Assessment." Plaintiffs, in response, contend that defendants' argument is barred by collateral estoppel. Moreover, even if estoppel does not apply, plaintiffs argue that the trial court's findings of fact and conclusions of law are supported by substantial evidence. We agree with plaintiffs that defendants are estopped from raising this issue on appeal.

"Under the doctrine of collateral estoppel, or issue preclusion, 'a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.' " *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127, 128 (1996) (quoting *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986)). For collateral estoppel to apply, the party asserting the doctrine must show the following:

> that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [the party asserting collateral estoppel and the party against whom collateral estoppel is asserted] were either parties to the earlier suit or were in privity with parties.

McInnis, 318 N.C. at 429, 349 S.E.2d at 557 (citing *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973)). North Carolina has abandoned the third requirement—"mutuality of estoppel"— where the doctrine is asserted defensively, "provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whiteacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citing *McInnis*, 318 N.C. at 433–34, 349 S.E.2d at 560; *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 166, 557 S.E.2d 610, 613 (2001), *aff'd per curiam*, 355 N.C. 485, 562 S.E.2d 422 (2002)).

In determining whether an issue is "identical" to one that was "actually litigated and necessary" to the prior judgment, four additional criteria must be satisfied:

> (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in

> the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citing *King*, 284 N.C. at 358, 200 S.E.2d at 806). However, "[i]t is well settled that the estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties when in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." *Flynt v. Flynt*, 237 N.C. 754, 757, 75 S.E.2d 901, 903 (1953) (citation and quotation marks omitted).

In the present case, all of the requirements of collateral estoppel have been satisfied. First, the dismissal of the foreclosure proceeding pursuant to Rule 41(b) operated as a final adjudication on the merits. *See* N.C. Gen. Stat. § 1-1A, Rule 41(b) (2013) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication on the merits.").

Second, the issue here—whether the Board was required to separately apportion the cost of exterior doors and windows from the common property in the 2010 Special Assessment—is identical to the issue actually litigated and necessary to the judgment at issue in *Johnson I* and *Johnson II*. In *Johnson I*, this Court was asked to review the trial court's dismissal of the foreclosure action against plaintiffs based on the Board's failure to allocate the cost of the common area improvements in the Second Assessment on a *pro rata* basis among all unit owners. *Johnson I*, 212 N.C. App. at 539, 714 S.E.2d at 172. We concluded that the Second Assessment was unlawful in that common area improvements were not assessed *pro rata* as required by Chapter 47A and the Original Declaration, as amended, but the Board otherwise had authority to assess costs for exterior windows and doors solely against plaintiffs. *Id.* at 542–43, 714 S.E.2d at 174. Because the trial court dismissed the foreclosure action without making separate findings as to which portion of the debt was for common area improvements and which was for exterior windows and doors, we vacated the trial court's order and remanded for further proceedings. *Id.* at 543, 714 S.E.2d at 174. The Board was further required to perform a new assessment that would separate the cost of plaintiffs' windows and doors from the cost of common area improvements. *Id.* Since our Supreme Court affirmed in *Johnson II*, 366 N.C. at 260, 741 S.E.2d at 313, no pertinent facts have changed which would alter the legal rights or relationships of the parties. The 2010 Special

Assessment merely combines the First Assessment, which was not challenged, with the Second Assessment, which was declared invalid, and the relevant language in the Restated Declaration is identical to that in the Original Declaration, as amended.

Finally, plaintiffs need not prove mutuality of estoppel. Plaintiffs are asserting collateral estoppel defensively, and defendants Starboard and the individually-named Board members had a full and fair opportunity to litigate the issue in the previous action. Therefore, we conclude that defendants are estopped from re-litigating the issue of whether the cost of the exterior doors and windows had to be separately apportioned from the cost of common area improvements in the 2010 Special Assessment.

B. Defendants' Rule 50 Motion on Affirmative Defense of Implied Contract

[2] Next, defendants argue that the trial court erred in denying defendants' motion for directed verdict on their affirmative defense of implied contract arising from the improvements to Building 33.[1] We disagree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

"An implied contract rests on the equitable principle that one should not be allowed to enrich himself unjustly at the expense of the other and on the principle that what one ought to do, the law supposes him to have promised to do." *Orange Water & Sewer Auth. v. Town of Carrboro*, 58 N.C. App. 676, 683, 294 S.E.2d 757, 761 (1982) (citing *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E.2d 829 (1968)). " 'To recover in *quantum meruit*, a plaintiff must show that (1) services were rendered to the

1. In *Johnson II*, while our Supreme Court noted that defendants' implied contract claim was "cognizable under North Carolina law," the court did not address the merits because it was never pleaded in the proceeding, as required by Rule 8. *Johnson II*, 366 N.C. at 259, 741 S.E.2d at 312–13.

defendant; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously.' " *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 346, 634 S.E.2d 548, 556 (2006) (quoting *Wing v. Town of Landis*, 165 N.C. App. 691, 693, 599 S.E.2d 431, 433 (2004)).

Defendants cite no relevant legal authority which permits recovery in *quantum meruit* for costs unlawfully assessed against condominium unit owners, and we question whether, on these facts, such a defense can be sustained. *See Ron Medlin Constr. v. Harris*, 364 N.C. 577, 581, 704 S.E.2d 486, 489 (2010) ("[A]n 'unlicensed person' is precluded from recovering damages 'based on *quantum meruit*' for work performed pursuant to an unenforceable contract." (citation and quotation marks omitted)); *Richardson v. Bank of Am., N.A.*, 182 N.C. App. 531, 561–63, 643 S.E.2d 410, 429–30 (2007) (denying recovery in *quantum meruit* where sale of single-premium credit insurance was made in violation of statute); *Thompson v. Thompson*, 313 N.C. 313, 314–15, 328 S.E.2d 288, 290 (1985) ("[I]t is generally held that if there can be no recovery on an express contract because of its repugnance to public policy, there can be no recovery on *quantum meruit*." (citation omitted)); *Brady v. Fulghum*, 309 N.C. 580, 586, 308 S.E.2d 327, 331 (1983) (recognizing that unlicensed contractors "have been precluded from maintaining actions if they must rely on their illegal act to justify recovery"); *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 273, 162 S.E.2d 507, 512–13 (1968) ("To deny an unlicensed person the right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors." (citation omitted)); *Covington v. Threadgill*, 88 N.C. 186, 189–90 (1883) (holding that a contract for the sale of intoxicating liquors was illegal because it was "contrary to the declared policy of the law, and in direct violation of its express provision," and "[b]eing thus illegal, . . . no action in affirmance of it can be sustained by the courts . . ."); *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 329, 330 S.E.2d 664, 667 (1985) ("The same rule which prevents an unlicensed contractor from recovering for breach of the construction contract also denies recovery on the theory of *quantum meruit*." (citation omitted)); *cf. Miles v. Carolina Forest Ass'n*, 141 N.C. App. 707, 713–14, 541 S.E.2d 739, 742 (2001) (holding invalid the amendments purporting to extend a declaration because the declaration itself did not authorize an extension, but remanding to determine existence of implied contract).

Assuming *arguendo* that defendants could sustain this affirmative defense, viewing the evidence in the light most favorable to the plaintiffs and resolving all contradictions, inconsistencies, and conflicts in their favor, there existed sufficient evidence to submit it to the jury. Specifically, there was evidence that plaintiffs did not voluntarily accept the renovation project proposed by the Board: plaintiffs voted against the renovations to Building 33; the parties never agreed on the cost of the renovations; plaintiffs tendered their first payment of the Second Assessment with a letter from counsel stating that the payment was being made under protest, as plaintiffs "object to the assessment for various reasons"; and the Board informed plaintiffs, by letter dated 17 December 2007, that the Second Assessment would be involuntarily imposed upon the Building 33 unit owners and that "[t]his decision has been made and is not open for further debate or changes at this point." Therefore, we find no error in the trial court's denial of defendants' motion for directed verdict on the issue of implied contract.

C. Defendants' Motions to Dismiss

[3] Finally, defendants argue that the trial court erred in denying their motion to dismiss plaintiffs' claim pursuant to Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure because plaintiffs were required to bring the declaratory judgment action by or on behalf of Starboard. We disagree.

"In our *de novo* review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

As plaintiffs correctly point out, the Declaratory Judgment Act affords to "*[a]ny interested person* under a . . . written contract or other writing[ ] constituting a contract" the right to "have determined any question of construction or validity arising under the instrument, . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254 (2013) (emphasis added). In addition, our courts have routinely permitted property owners to sue their homeowners associations for declaratory relief. *See, e.g.*, *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 561, 633 S.E.2d 78, 88–89 (2006) (holding that, in declaratory action brought by property owners against homeowners association, disputed amendment to declaration of restrictive covenants was invalid and unenforceable); *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 397–99, 584 S.E.2d 731, 733–34 (2003) (holding challenged fine unlawful in declaratory

action by property owners against homeowners association); *Miesch v. Ocean Dunes Homeowners Ass'n*, 120 N.C. App. 559, 559–62, 464 S.E.2d 64, 65–66 (1995) (holding fees imposed by association invalid in declaratory action brought by condominium owners against homeowners association). Furthermore, a derivative action would be inappropriate in this case because plaintiffs are not alleging injury to Starboard and are not seeking to recover on its behalf. *See Stewart v. Kopp*, 118 N.C. App. 161, 165, 454 S.E.2d 672, 675 (1995) ("We note that even if the Board had exceeded its authority, a member's derivative action would not have been the appropriate cause of action, since plaintiff alleged no injury to the Association by the Board's action and was not seeking to recover on behalf of the Association."). Therefore, we conclude that the trial court did not err in denying defendants' motions to dismiss.

III. Conclusion

The declaratory judgment in favor of plaintiffs was entered without error. Defendants' first argument regarding the cost of windows and doors in the 2010 Special Assessment is barred by collateral estoppel. In addition, the trial court did not err in denying defendants' motion for directed verdict on their affirmative defense of implied contract because, even assuming such a defense is cognizable on these facts, there is sufficient evidence that plaintiffs did not voluntarily accept the Board's proposed renovations to Building 33. Finally, the trial court did not err in denying defendants' motion to dismiss under Rules 12(b)(6) and 12(b)(7) because plaintiffs were entitled to bring suit individually against Starboard. We, therefore, affirm the judgment of the trial court.

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

MONTESSORI CHILDREN'S HOUSE OF DURHAM, PLAINTIFF
v.
PHILIP BLIZZARD AND PATRICIA BLIZZARD, DEFENDANTS

No. COA15-406

Filed 5 January 2016

Contracts—web page statements—magazine advertisements—not part of contract

In a breach of contract action brought by Montessori Children's House of Durham ("MCHD") to collect unpaid tuition from parents who withdrew their child before the school year began due to a change in class size, the Lower Elementary Tuition Agreement did not contain language requiring MCHD to maintain a maximum class size or a certain student/teacher ratio. Moreover, language on class size on MCHD's official webpage and in two of its magazine advertisements was not incorporated by reference.

Appeal by defendants from judgment entered 4 November 2014 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 21 October 2015.

Bryant, Lewis & Lindsley, P.A., by David O. Lewis, for plaintiff-appellee.

Ekstrand & Ekstrand LLP, by Robert Ekstrand, for defendants-appellants.

DAVIS, Judge.

Philip Blizzard ("Philip") and Patricia Blizzard (collectively "Defendants") appeal from the trial court's judgment awarding Montessori Children's House of Durham ("MCHD") $12,914.57 plus attorneys' fees and costs on MCHD's breach of contract claim against them. On appeal, Defendants contend that the trial court erred by failing to conclude that MCHD breached the parties' contract, thereby excusing Defendants' nonperformance of their own contractual obligations. After careful review, we affirm.

Factual Background

MCHD is a private school operating in Durham, North Carolina. MCHD's "Lower Elementary" program encompasses grades one through

three and offers a curriculum encompassing both traditional and nontraditional subjects. During the time period relevant to this action, MCHD maintained an official webpage, which stated, in part, that in the Lower Elementary program "[e]ach classroom has up to 20 students . . . ." In addition, MCHD advertised in several local publications, including Chapel Hill Magazine and Durham Magazine, and these advertisements listed the student/teacher ratio of MCHD's elementary program as 10:1.

In 2011, Defendants met with MCHD's Head of School, Happy Sayre-McCord ("Sayre-McCord"), about the potential enrollment of their daughter as a first-grader at the school. Defendants subsequently enrolled their daughter at MCHD for the 2011-12 school year and then renewed her enrollment for the 2012-13 academic year. During this time period, their daughter's class did not contain more than 20 students.

Around March of 2013, Defendants began to have reservations about re-enrolling their daughter at MCHD for the upcoming 2013-14 school year as they were concerned about the "direction" of their daughter's education and the amount of "teacher time" she was receiving. On 22 March 2013, Sayre-McCord left Philip a voicemail informing him that his daughter's class was nearly full. Defendants ultimately decided to re-enroll her, and on 25 March 2013, Defendants and MCHD entered into a written contract — the 2013-14 Lower Elementary Tuition Agreement ("the Agreement") — pursuant to which (1) MCHD agreed to enroll Defendant's daughter as a student for the 2013-14 academic school year; and (2) Defendants agreed to pay MCHD $12,610.00 in tuition.

During this time period, MCHD maintained an "Additional Fees & Replacement Policy 2013-2014," which provided, in pertinent part, as follows:

> ***Replacement Policy & Fee:*** Please be aware that once you sign any Tuition Agreement, you are obligated to pay the full year's tuition for that program and no reduction or credit will be granted if a student is withdrawn or does not attend, unless the withdrawal is made at the specific request of The School for reasons other than non-payment of tuition. In the event of withdrawal at the request of The School, tuition owed will be prorated according to the academic year elapsed. While this policy may cause a hardship in some cases, MCHD's budget rests almost entirely on the tuition it receives. MCHD enters into binding contracts based upon the contracts it enters into with parents, so we must rely on you to honor your financial obligation

> to us, regardless of the reason you may need to withdraw your child.
>
> Notwithstanding this obligation, parents may apply to the school to be placed in the Replacement Program. Entry into the Replacement Program is conditioned upon the submission of an application form, payment of a non-refundable Replacement Fee ($550 for MCHD, $300 for School Plus!, and/or $50 for Before School Care), and all financial obligations to the School being current. Replacement occurs when the school receives a signed Tuition Agreement for a newly enrolled student at the same program level, after that level is full. If a replacement is found, the parents will no longer be obligated for tuition in excess of the amount as prorated to the school year remaining when the new student begins attending school. . . .

In early May of 2013, Defendants learned from the parents of another student in their daughter's class that MCHD had decided to increase the size of the class for the upcoming year to 24 or 25 students. Based on this information, Defendants submitted an application on behalf of their daughter to Montessori Community School, another private school in the area, and their application was accepted.

Defendants did not make their first tuition payment to MCHD as required under the Agreement by the 1 July 2013 due date. On 9 July 2013, Philip emailed Sayre-McCord to inform her that his daughter would not be attending MCHD for the upcoming school year. In this email, he stated that this decision was due to Defendants' unhappiness over the fact that "MCHD has decided to abandon its limit of 20 students per class by admitting 24-25 students to [the] Lower-El class for the coming academic year." Philip also asked to be released from his tuition obligations under the Agreement. In response to Philip's email, Sayre-McCord sent Defendants a letter by certified mail quoting the terms of the Agreement and informing them that regardless of whether Defendants' daughter actually attended MCHD for the 2013-14 academic year, Defendants would still be liable for the tuition payments provided for under the Agreement.

Based on Defendants' continued refusal to make any of the tuition payments required under the Agreement, on 5 November 2013, MCHD filed a breach of contract claim against Defendants in Durham County District Court. A bench trial was held on 28 October 2014 before the Honorable James T. Hill. On 4 November 2014, the trial court entered

judgment in favor of MCHD in the amount of $12,914.57 along with attorneys' fees and costs. On 2 December 2014, Defendants filed a notice of appeal.

Analysis

It is well established that

> [i]n a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hanson v. Legasus of N.C., LLC, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501-02 (2010) (citation omitted).

In the present case, Defendants do not specifically challenge any of the trial court's findings of fact. Instead, they focus their argument exclusively on the trial court's conclusion of law that MCHD was entitled to prevail on its breach of contract claim. They contend that this conclusion was erroneous because MCHD breached the Agreement by enrolling more than 20 students in their daughter's class, thereby relieving them of their tuition obligations under the Agreement.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). "It is well settled that where one party breaches a contract, the other party is relieved from the obligation to perform." *Ball v. Maynard*, 184 N.C. App. 99, 108, 645 S.E.2d 890, 897, *disc. review denied*, 362 N.C. 86, 656 S.E.2d 591 (2007).

Our Supreme Court has held "that the purport of a written instrument is to be gathered from its four corners." *Ussery v. Branch Banking & Trust Co.*, __ N.C. __, __, 777 S.E.2d 272, 279 (2015) (citation, quotation marks and ellipses omitted). "When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Lynn v. Lynn*, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (citation, quotation marks, and ellipses omitted), *disc. review denied*, 364 N.C. 613, 705 S.E.2d 736 (2010).

When a contract expressly incorporates a document by reference, however, that document becomes a part of the parties' agreement. *See Booker v. Everhart*, 294 N.C. 146, 152, 240 S.E.2d 360, 363 (1978) ("To incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein.").

Here, the Agreement stated, in pertinent part, as follows:

> **2013-14**
> **Lower Elementary**
> **Tuition Agreement**
>
> This Agreement is made and entered into between the Montessori Children's House of Durham (MCHD) — The School, and **Patricia Blizzard and Phil Blizzard** — The Parent(s)/Guardian(s).
>
> The School hereby accepts [Defendants' daughter] (The Child) for enrollment as a pupil for the 2013-2014 academic year, beginning in or after August 2013. As the School may not be suited to your child's needs, The School reserves the right to request that a new student withdraw during an initial six-week trial period if deemed in the best interests of The Child and/or The School.
>
> Except as indicated above, children are enrolled only for the entire year, or the remainder of a school year if enrolled after the opening date. Parent(s)/Guardian(s) understand that they are obligated to pay the full year's tuition, and that no reduction or credit will be granted if a pupil is withdrawn unless the withdrawal is made at the specific request of the school for reasons other than non-payment of tuition. In the event Parent(s)/Guardian(s) do not send or cease sending their child to school, the entire unpaid balance of tuition is immediately due and payable, regardless of payment option chosen.
>
> The Parent(s)/Guardian(s) agree(s) to pay $12,610 MCHD tuition for the 2013-2014 academic year, due July 1, 2013. For your convenience, you may elect to pay your obligation on an annual or semiannual basis, or over 10 months' time.
>
> . . . .

> In the event Parent(s)/Guardian(s) fail(s) to make any payment due under this Agreement on its respective due date, the same shall be a default and breach of this Agreement. The School shall have the right to collect interest computed at the rate of one and one half (1.5%) percent per month for balances owed of $1000 or greater, or a flat fee of $15 per month for balances under $1000, or the highest rate allowable by law, on any outstanding balance due until paid. . . . Parent(s)/Guardian(s) shall be responsible for, and shall promptly pay to the School upon demand, all costs and expenses (including, without limitation, reasonable attorney's fees and court costs) incurred by the School in connection with the collection of payments due under this Agreement. The School may initiate any and all actions, at law or equity, to enforce its rights and remedies.
>
> . . . .
>
> The Child and The Child's Parent(s)/Guardian(s) agree to comply with and be subject to the school's rules and policies, including those set forth in the MCHD Family Handbook as amended from time to time. Parent(s)/Guardian(s) understand their obligations under this Tuition Agreement and do so acknowledge with their signature(s) below[.]

It is clear that the Agreement itself does not contain any language requiring MCHD to maintain a maximum class size or a certain student/teacher ratio applicable to their daughter's class. Instead, Defendants attempt to rely upon language on this subject contained on MCHD's official webpage and in two of its magazine advertisements.

The Agreement does not, however, incorporate by reference MCHD's webpage or its advertisements. Indeed, the only language in the Agreement that could possibly be construed as incorporating any documents by reference reads as follows:

> The Child and The Child's Parent(s)/Guardian(s) agree to comply with and be subject to the school's rules and policies, including those set forth in the MCHD Family Handbook as amended from time to time.[1]

1. We note that this provision — as worded — appears to impose an obligation on MCHD's *parents and students* rather than on MCHD itself.

Defendants do not contend that MCHD's Family Handbook — which is not contained in the record on appeal — contains any provisions limiting MCHD's ability to increase its class size. Nor have they pointed us to any "rules" or "policies" that would preclude MCHD from doing so.

The portion of MCHD's webpage containing the language upon which Defendants rely states the following:

> MCHD's Lower Elementary program is comprised of children in grades 1-3. *Each classroom has up to 20 students*, balanced according to age and gender. Classes run from 8:20 a.m. to 3:00 p.m. Monday through Friday, with an hour break at noon for lunch and outdoor play. Characteristic of the Montessori model, students remain in the same classroom for three consecutive years.

(Emphasis added).

The advertisement placed in Chapel Hill Magazine is in the form of a table that contains information not only about MCHD but also regarding 13 other local private schools. The table contains columns for (1) "Focus"; (2) "Grades"; (3) "Total Enrollment"; (4) "Student/Faculty Ratio"; (5) "Yearly Tuition"; and (6) "Special Requirements." Under the "Student/Faculty Ratio" column, the following information is stated for MCHD: "Toddler (18 months-3 y/o), 6:1; Preschool, 11:1; Elementary, 10:1."

Likewise, the advertisement in Durham Magazine contains a table with the same columns and lists the information about MCHD alongside comparable information for eight other local private schools. The student/teacher ratio information provided as to MCHD in this advertisement is identical to that contained in the Chapel Hill Magazine advertisement.

Defendants also reference a meeting they had with Sayre-McCord that took place in the fall of 2011. Philip testified as follows regarding statements made by Sayre-McCord during this meeting:

> We asked what the student class size limit was. She told us 20. She told us that the teachers in the class would be the one certified teacher, and then an assistant would be in each class, so that translated to a ten to one ratio. And that's also what you see in the magazines that they've been advertising.
>
> . . . .

> Sayre-McCord expressed that they did have concerns about [Defendants' daughter] coming in, given that they were already at 19 students, and that this might be a heavy workload.

In arguing that the language regarding class size and student/teacher ratios contained on MCHD's webpage and in its advertisements along with the above-quoted statements on these subjects by Sayre-McCord should be deemed contractual terms of the Agreement, Defendants rely almost entirely on our decision in *Ryan v. Univ. of N.C. Hosps.*, 128 N.C. App. 300, 494 S.E.2d 789, *disc. review improvidently allowed*, 349 N.C. 349, 507 S.E.2d 39 (1998). However, their reliance on Ryan is misplaced.

In *Ryan*, the plaintiff, a graduate medical student, entered into a contract with University of North Carolina Hospitals ("the University") for a residency program pursuant to which he would provide medical services and receive educational training "that complied with the Accreditation Council for Graduate Medical Education." *Id.* at 300, 494 S.E.2d at 790 (internal quotation marks omitted). After problems arose between the University and the plaintiff, he brought suit under several legal theories, including breach of contract. In support of this claim, he asserted that "the University breached the Essentials of Accredited Residencies by the failure to provide a one month rotation in gynecology." *Id.* at 301-03, 494 S.E.2d at 790-91 (internal quotation marks omitted).

On appeal, we reversed the trial court's dismissal of his breach of contract claim. While refusing to engage in an "inquiry into the nuances of educational processes and theories," *id.* at 302, 494 S.E.2d at 791 (internal quotation marks omitted), we held that he had "alleged facts sufficient to support his claim for breach of contract on the basis of the University's failure to provide him a one month rotation in gynecology." *Id.* at 303, 494 S.E.2d at 791.

In so holding, we cited with approval the decision of the United States Court of Appeals for the Seventh Circuit in *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992). In *Ross*, a former student and basketball player at Creighton University sued the university for, among other things, breach of contract based on his allegation that the parties had agreed "in exchange for [the plaintiff's] promise to play on its basketball team, [the university would] allow him an opportunity to participate, in a meaningful way, in the academic program of the [u]niversity despite his deficient academic background." *Id.* at 415-16. The Seventh Circuit held that in order to state a breach of contract claim in this context, a plaintiff "must point to an *identifiable contractual promise* that the

[school] failed to honor." *Id.* at 417 (emphasis added). The court concluded that the plaintiff had done so by alleging the university had failed to comply with specific promises made to him regarding the provision of a tutor and opportunities for him to attend tutoring sessions. *Id.*

We do not believe that the principles discussed and applied in *Ryan* support Defendants' argument here. While there are a number of ways in which *Ryan* can be meaningfully distinguished from the present case, the most basic one is that here — unlike the plaintiff in *Ryan* — Defendants are unable to show an "identifiable contractual promise" that MCHD failed to honor.

Although the opinion in *Ryan* is not entirely clear on this point, it appears the contract at issue in that case expressly required the University to provide a training program for the plaintiff that complied with the policies of the Accreditation Council for Graduate Medical Education Residency Review Committee, *see Ryan*, 128 N.C. App. at 300, 494 S.E.2d at 790, meaning both that (1) the plaintiff's breach of contract claim was based on a violation of an explicit contractual term; and (2) the contents of the committee's policies were incorporated by reference into the contract.[2]

In the present case, conversely, the Agreement does not mention class size or student/teacher ratios. Nor does it incorporate by reference any documents that do address these topics. Defendants have failed to direct our attention to any controlling caselaw — or, for that matter, any case at all — holding that statements contained on a private school's webpage or in its advertisements that are not expressly incorporated by reference into a contract for admission to the school should nevertheless be treated as binding contractual terms.

It is also important to note that the statements forming the basis for Defendants' argument were not promises at all. Rather, they simply described characteristics of MCHD's classes that existed at the time and did not purport to make any commitment that these characteristics would never change. Likewise, Philip's testimony about Defendants' meeting with Sayre-McCord prior to their daughter's enrollment for the 2011-12 academic year does not indicate that she promised them MCHD would strictly maintain the then-existing class size and student/teacher ratio in subsequent years. Moreover, it appears from the record that Defendants' daughter's class for the 2011-12 academic year (as well as

2. Furthermore, the contract in *Ryan* was, in part, an employment contract, which further distinguishes it from the contract between MCHD and Defendants.

for the following academic year) did, in fact, conform to the size limit and student/teacher ratio mentioned by Sayre-McCord during this meeting.

We further note that MCHD's webpage also makes reference to various other characteristics of the school such as (1) MCHD's efforts to balance classes by gender and age; (2) the starting and ending times for daily classes; and (3) the provision to students of an hour-long period for lunch and outdoor play. While conceding that not all of these statements should be deemed binding contractual terms under the Agreement, Defendants offer no viable objective principle for differentiating between, on the one hand, statements on a school's webpage that merely describe certain current characteristics of the school that are potentially subject to change and, on the other hand, statements on a webpage relating to aspects of its operations that the school is legally bound to maintain and that are impliedly written into every tuition contract between MCHD and the parents of an enrolled student. Nor are we able to discern such a principle.

The meeting of the minds between MCHD and Defendants was memorialized by the Agreement. MCHD fulfilled its part of the bargain by enrolling Defendants' daughter for the upcoming academic year. Defendants, conversely, breached their contractual obligations by failing to make the tuition payments they obligated themselves to pay by assenting to the Agreement. Moreover, under the plain terms of the contract, because Defendants' daughter did not withdraw at the request of MCHD, the fact that she never actually attended the school for the 2013-14 academic year did not excuse Defendants' nonperformance of their tuition obligations. Therefore, the trial court did not err by ruling in favor of MCHD on its breach of contract claim and by entering judgment against Defendants.

Conclusion

For the reasons stated above, we affirm the judgment of the trial court.

AFFIRMED.

Judges STEPHENS and STROUD concur.

JULIE MORGAN-McCOART, Plaintiff
v.
CLAUDIA LEE MATCHETTE, Individually, as Guardian of the Estate of Ruth T. Simpson, and as Trustee of the Trust of Ruth T. Simpson, Defendants

No. COA15-416

Filed 5 January 2016

Jurisdiction—subject matter—trusts—claims in trustee's individual capacity and as trustee

Where one sister (plaintiff) filed a complaint for breach of contract in District Court against her sister (defendant), who served as trustee of their mother's revocable trust, the Court of Appeals affirmed in part and reversed in part the District Court's order dismissing plaintiff's claims for lack of subject matter jurisdiction. The Court of Appeals affirmed the order as to the claims against defendant in her capacity as trustee, but the Court reversed the order as to the claims against defendant in her individual capacity for breach of the Resignation Agreement. Pursuant to N.C.G.S. § 36C-2-203, the Clerk of Superior Court has original jurisdiction over all proceedings concerning the internal affirms of trusts.

Appeal by Plaintiff from order entered 6 February 2015 by Judge F. Warren Hughes in Watauga County District Court. Heard in the Court of Appeals 7 October 2015.

Walker DiVenere Wright, by Anne C. Wright, for the Plaintiff-Appellant.

Bruce L. Kaplan for the Defendants-Appellees.

DILLON, Judge.

Julie Morgan-McCoart ("Plaintiff") appeals from an order dismissing her claims for lack of subject matter jurisdiction.

I. Background

The facts relevant to this appeal as alleged in Plaintiff's complaint are as follows: Plaintiff and Claudia Lee Matchette ("Defendant") are sisters. Their mother is Ruth T. Simpson.

In 2008, Ms. Simpson created a revocable trust (the "Trust"), funding it primarily with the proceeds derived from the sale of her residence.

Also in 2008, Ms. Simpson executed a Durable Power of Attorney (the "Durable POA"), designating Plaintiff as her attorney-in-fact and Defendant as her alternate attorney-in-fact.

In 2009, Ms. Simpson was declared incompetent by the Superior Court of Watauga County. At the time, Plaintiff served as the trustee of Ms. Simpson's Trust and Defendant served as the alternate trustee.

Plaintiff lived in California, which made it difficult for her to carry out her duties under the Trust and the Durable POA. Accordingly, in November 2009, Plaintiff and Defendant entered into an agreement (the "Resignation Agreement") and submitted it to the Clerk of Superior Court (the "Clerk"). The Resignation Agreement provided, in part, that:

> (1) Defendant would assume the role of trustee under the Trust;
>
> (2) Plaintiff would submit a request to the Clerk for reimbursement of expenses she incurred while she served as Ms. Simpson's attorney-in-fact and as trustee of the Trust;
>
> (3) Plaintiff would not contest Defendant being named as their mother's guardian by the Clerk in the incompetency proceeding; and
>
> (4) Defendant would keep Plaintiff informed of their mother's address and mental and physical status.

In 2010, Plaintiff petitioned the Clerk to be paid $22,405.56 by Ms. Simpson and the Trust. Specifically, Plaintiff requested to be reimbursed $13,856.76 for certain expenses that she claims to have incurred while serving as the trustee of the Trust and as Ms. Simpson's attorney-in-fact under the Durable POA, and to receive an "annual distribution" of $8,548.80 as a beneficiary under the Trust. The Clerk entered an order allowing Plaintiff to recover only $1,906.04 in expense reimbursements and $0 for a beneficiary distribution from the Trust, rejecting the remaining $20,499.52 she had sought.

In September 2014, Plaintiff filed a complaint for breach of contract in District Court against Defendant, individually, as trustee of the Trust, and as Ms. Simpson's general guardian.[1] Upon Defendant's motion, the

1. Plaintiff's original complaint also alleged a claim for breach of fiduciary duty and constructive fraud. Based on the allegations, it appears that this claim was directed, at least in part, against Defendant in her capacity as guardian of and attorney-in-fact for their mother and as trustee of the Trust. In this prayer for relief, Plaintiff requested that Defendant be ordered to make whole their mother's estate for Defendant's failure to comply with her fiduciary duties. However, Plaintiff has voluntarily dismissed this claim.

trial court entered an order dismissing Plaintiff's complaint pursuant to Rule 12(b)(1) of the Rules of Civil Procedure, concluding that it did not have subject matter jurisdiction over Plaintiff's claims but that jurisdiction lay with the Clerk. Plaintiff timely appealed.

II. Standard of Review

The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

III. Analysis

On appeal, Plaintiff argues that the trial court erred in granting Defendant's motion to dismiss for lack of subject matter jurisdiction. Specifically, Plaintiff contends that her breach of contract claim is not a "related proceeding" as defined by N.C. Gen. Stat. § 35A-1203, and therefore, she was not required to file the claim with the Clerk.

In her complaint, Plaintiff seeks relief in various forms and names Defendant as a party, not only in her individual capacity, but also in her capacity as trustee of the Trust and in her capacity as general guardian of their mother. Our Court has noted the distinction between claims which are "justiciable matters of a civil nature," for which original general jurisdiction is vested in the trial division, and claims which are properly before the Clerk pursuant to North Carolina statutory authority. *See* N.C. Gen. Stat. § 35A-1203 (2014) (providing that the Clerk has original jurisdiction for the appointment of "general guardians for incompetent persons *and of related proceedings*," and retains jurisdiction in order to ensure compliance with the Clerk's orders) (emphasis added); *see also* N.C. Gen. Stat. § 36C-2-203 (2014) (providing that the Clerk shall have "original jurisdiction over all proceedings concerning the internal affairs of trusts").

In analyzing the merits of Plaintiff's argument, here, we are tasked to review each prayer for relief sought by Plaintiff to determine whether the District Court properly dismissed each individual claim for want of subject matter jurisdiction. *See Ingle v. Allen*, 53 N.C. App. 627, 281 S.E.2d 406 (1981) (looking to the prayer for relief to determine which claims against the administrator of an estate were properly brought in superior court and which claims should have been brought before the clerk).

A. Claim for $20,499.52

In her first prayer for relief, Plaintiff seeks the following: "She recover judgment against Defendant, individually, or as Trustee, in the amount

of $20,499.52, plus interest at the legal rate[.]" This amount appears to represent the full amount Plaintiff sought, but which was rejected from the Clerk. In any event, because her claim against Defendant *as trustee* differs from her claim against Defendant *individually*, we address each claim separately.

1. Against Defendant as Trustee of the Trust

Plaintiff appears to make two claims against the Trust: (1) reimbursement for expenses she incurred while she served as the trustee of the Trust before resigning as trustee in 2009; and (2) an annual gift she claims she is entitled to as a beneficiary under the Trust. N.C. Gen. Stat. § 36C-2-203 provides that the Clerk shall have "original jurisdiction over all proceedings concerning the internal affairs of trusts," which include "the administration and distribution of trusts . . . and the determination of other matters involving trustees and trust beneficiaries[.]" N.C. Gen. Stat. § 36C-2-203 (2014). Here, Plaintiff has already submitted to the jurisdiction of the Clerk for the adjudication of these claims. Therefore, we hold that the District Court properly dismissed these claims, concluding that the Clerk had jurisdiction. Accordingly, we affirm the portion of the District Court's order dismissing Plaintiff's claim for $20,499.52 against Defendant, in her capacity as trustee of the Trust.

2. Against Defendant, Individually

Plaintiff also seeks to "recover judgment against Defendant, individually . . . in the amount of $20,499.52[.]" This claim appears to be based on Plaintiff's assumption that Defendant became contractually obligated, personally, to reimburse Plaintiff's expenses submitted to the Clerk pursuant to the Resignation Agreement, whether approved or denied by the Clerk. Therefore, we treat Plaintiff's claim as one based in contract against Defendant, in her individual capacity.

We agree with Plaintiff that the District Court has jurisdiction to hear this claim regarding her contractual relationship with Defendant, in her individual capacity. *See Ingle*, 53 N.C. App. at 629, 281 S.E.2d at 408. Accordingly, we reverse the District Court's order to the extent that it dismissed Plaintiff's claim against Defendant, in her individual capacity, for $20,499.52.[2]

2. We take no position as to the *merits* of Plaintiff's claims against Defendant, in her individual capacity, or as to whether these claims would survive a motion to dismiss for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Rather, our review is limited to whether the District Court has subject matter jurisdiction.

B. Claim for Specific Performance of Contract

In her complaint, Plaintiff prays that "Defendant, individually, be ordered to comply with the terms of the Resignation Agreement . . . to ensure reasonable communication and information is given to Plaintiff from Defendant concerning their mother's health, care, status, location, and contact information." In her brief, Plaintiff argues that Defendant has a contractual obligation under the Resignation Agreement to keep her informed of their mother's well-being and whereabouts, apart from any obligation Defendant might otherwise have to do so in her capacity as guardian, attorney-in-fact, or as trustee. Therefore, as with her claim discussed in section (A)(2) above, we treat Plaintiff's claim here as one based in contract against Defendant, in her individual capacity. As such, the District Court has subject matter jurisdiction to hear this claim. Accordingly, we reverse the District Court's order to the extent that it dismissed Plaintiff's claim against Defendant, in her individual capacity, for specific performance to keep Plaintiff advised of their mother's health and whereabouts under the Resignation Agreement. *See* footnote 2, *supra*.

C. Costs and Expenses of the Action

In her complaint, Plaintiff prays that she "recover the costs and expenses of this action from Defendant[.]" Here, Plaintiff is not specific as to whether she seeks this relief from Defendant, individually, or in some other capacity. Because Plaintiff has dismissed her claim for breach of fiduciary duty/constructive trust; *see* footnote 1, *supra*; the only claims remaining are (1) against Defendant, individually, for $20,499.52, and for specific performance, both pursuant to the Resignation Agreement, and (2) against Defendant, as trustee of the Trust, for $20,499.52. We hold that any claim for costs and expenses associated with Plaintiff's claims against Defendant, individually, is properly in District Court, and any claim for costs and expenses associated with Plaintiff's claim against Defendant, in her capacity as trustee of the Trust, must be heard by the Clerk. Accordingly, we affirm, in part, and reverse, in part, the District Court's order with respect to Plaintiff's claim for costs and expenses.

IV. Conclusion

We affirm the trial court's grant of Defendant's motion to dismiss Plaintiff's claim against Defendant, in her capacity as trustee of the Trust. However, to the extent that Plaintiff seeks relief from Defendant for breach of the Resignation Agreement, in her individual capacity *only* (and not against Defendant in her capacity as trustee, guardian, or

attorney-in-fact), the ruling of the trial court is reversed, and the matter is remanded to the District Court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges GEER and HUNTER, JR., concur.

MICHAEL J. ROSSI AND JAMES D. ROSSI, PLAINTIFFS
v.
ROBERT J. SPOLORIC, DEFENDANT

No. COA15-728

Filed 5 January 2016

1. Judgments—foreign—motion for continuance—denied

Where defendant had more than two months' notice of a hearing on his motion for relief from a foreign judgment and he filed a motion for continuance the day of the hearing, the trial court did not abuse its discretion by denying defendant's motion for continuance.

2. Judgments—foreign—motion to introduce affidavit—denied

On appeal from an order granting enforcement of a foreign judgment against defendant, the Court of Appeals held that the trial court did not abuse its discretion by denying defendant's motion to introduce into evidence an affidavit in support of his motion for relief, notice of defenses, and motion for stay. Defendant made no request for enlargement of time within which to file and serve the affidavit prior to or along with his motions. Even assuming defendant showed excusable neglect when he asserted that an "unanticipated sequence of events" required the affidavit in lieu of live testimony, defendant failed to show that the trial court's denial of his motion was "so arbitrary that it could not be the result of a reasoned decision."

3. Judgments—foreign—full faith and credit—presumption not overcome

Where the trial court granted enforcement of a foreign judgment against defendant, the trial court did not err by concluding that the Pennsylvania judgment was entitled to full faith and credit. Defendant failed to present any evidence—either through a properly

and timely filed sworn affidavit or through evidence or testimony under oath at the hearing—to overcome the presumption that the Pennsylvania judgment was entitled to full faith and credit. The arguments of defendant's counsel regarding Pennsylvania's lack of personal jurisdiction over defendant were not evidence.

Appeal by defendant from order entered 5 February 2015 by Judge J. Carlton Cole in Dare County Superior Court. Heard in the Court of Appeals 3 December 2015.

Gray & Lloyd, LLP, by E. Crouse Gray, Jr., for plaintiff-appellees.

Phillip H. Hayes for defendant-appellant.

TYSON, Judge.

Robert J. Spoloric ("Defendant") appeals from order granting enforcement of a foreign judgment rendered in favor of Michael J. Rossi and James D. Rossi ("Plaintiffs"). We affirm.

I. Background

On 20 February 2014, Plaintiffs filed a complaint against Defendant in the Court of Common Pleas of Westmoreland County, Pennsylvania ("the Pennsylvania Complaint"). Plaintiffs alleged Defendant had failed to re-pay the sum of $49,000.00 plus interest as evidenced by two promissory notes allegedly executed by him.

The Pennsylvania Complaint listed a Kitty Hawk, North Carolina address for Defendant. The Pennsylvania Complaint and summons was sent via certified mail to Defendant at the North Carolina address. Defendant was sent a "Notice of Defend" concomitantly with the complaint and summons, advising him to take action within 20 days after service of the notice and complaint, or to risk a default judgment.

Defendant physically received the Pennsylvania Complaint and summons on 5 March 2014. Defendant failed to file any defenses or otherwise respond to the Pennsylvania Complaint. On 22 May 2014, Plaintiffs filed a "Praecipe to enter a default judgment" which directed the "Prothonotary of Westmoreland County, Pennsylvania. . . to enter a Judgment in favor of [Plaintiffs] and against [Defendant]." Judgment was entered against Defendant in the amount of $68,499.26 plus the cost of the suit and interest on the principle debt at a rate of 10% per annum beginning on 22 May 2014 ("the Pennsylvania Judgment").

On 22 July 2014, Plaintiffs filed a "Notice of Filing of Foreign Judgment" with the Dare County Superior Court. This Notice of Filing was served on Defendant by the Dare County Sheriff's Department on 28 July 2014. More than thirty days later, on 28 August 2014, Defendant filed a motion for relief, notice of defenses to the foreign judgment, and motion for stay.

Defendant asserted three defenses to enforcement of the foreign judgment: (1) insufficiency of service upon Defendant of the pleadings in the case from which the foreign judgment originated; (2) lack of personal jurisdiction of Defendant in the foreign state and court; and (3) lack of competent evidence offered in support of the foreign judgment. Defendant did not file any affidavits in support of the motion.

On 20 November 2014, Plaintiffs noticed a hearing on Defendant's motion for relief, notice of defenses to foreign judgment and motion for stay. The notice set the hearing date over two months later for 26 January 2015.

Three days before the hearing, on 23 January 2015, Defendant served an amended motion for relief, notice of defenses to foreign judgment, and motion for stay on Plaintiff's counsel. The motion was filed with the court on 26 January 2015. The amended motion limited Defendant's defenses to the lack of personal jurisdiction over Defendant in the foreign state and court.

Also on 23 January 2015, Defendant served a motion to continue on Plaintiffs' counsel. The motion was filed with the court on the hearing date of 26 January 2015, the day of the scheduled hearing. In the motion, Defendant's counsel stated he anticipated offering the live testimony of Defendant, but asserted a "business conflict had arisen with Defendant" that required him to fly to Miami, Florida on the day of the hearing.

The motion to continue stated after he learned of the scheduling conflict, Defendant's attorney assisted Defendant in filing an affidavit in support of his motion for relief, notice of defenses and motion for stay. The affidavit was also served on Plaintiffs' counsel on 23 January 2015.

A hearing was held on Defendant's motion and defense on 26 January 2015. At the hearing, the trial court denied Defendant's motion to continue. Defendant made an oral motion to introduce the affidavit served on Plaintiffs' counsel on 23 January 2015 into evidence. The trial court denied Defendant's motion.

Defendant's counsel then argued the Pennsylvania Judgment was not entitled to full faith and credit, on the grounds the Pennsylvania

court lacked personal jurisdiction over Defendant at the time the judgment was entered. Defendant presented no evidence to support this argument. Following arguments of counsel, the trial court found "there is a valid. . . judgment, and that [Plaintiffs] ha[ve] met the presumption" of correctness in a foreign judgment.

Following the hearing, the court issued a written order on 3 February 2015: (1) denying Defendant's motion to continue; (2) denying Defendant's oral motion to allow Defendant's affidavit; and (3) ordering the Pennsylvania Judgment to be entered and entitled to full faith and credit, and as enforceable under the laws of the State of North Carolina in the same manner as any judgment in this State.

Defendant gave timely notice of appeal on 24 February 2015.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to continue; (2) denying his motion to introduce his affidavit; and (3) concluding as a matter of law the foreign judgment is entitled to full faith and credit and is enforceable pursuant to the laws of the State of North Carolina. We address each of Defendant's arguments *seriatim*.

III. Motion to Continue

Defendant argues the trial court erred by denying his motion to continue. He asserts the denial of his motion deprived him of the opportunity to be heard, resulting in a violation of substantial justice. We disagree.

A. Standard of Review

"We review a trial court's resolution of a motion to continue for abuse of discretion." *State v. Morgan*, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004) (citation omitted). Before ruling on a motion to continue, "the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice." *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976). The moving party has the burden of proof of showing sufficient grounds to justify a continuance. *Id.* at 482, 223 S.E.2d at 386.

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).

B. Analysis

[1] On 20 November 2014, Plaintiffs filed a notice to bring Defendant's motion for relief, notice of defenses and motion for stay for a hearing, to be held over two months later on 26 January 2015. Three days before the scheduled hearing, Defendant served a motion to continue on 23 January 2015. The motion was not filed until 26 January 2015, the day of the hearing. At the 26 January 2015 hearing, the trial court considered Plaintiffs' and Defendant's arguments regarding the relative merits of continuing the hearing to accommodate Defendant's flight schedule.

Evidence tends to show Defendant knew the hearing would be held on 26 January 2015 on or about 20 November 2015, when Plaintiffs sent notice of the hearing. Defendant was provided more than two month's advance notice to schedule his attendance at the hearing. Viewed within the timeline of this case, Defendant has failed to show, and we do not find, the denial of his motion to continue was "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

Defendant made his decision of the relative priorities and risks of either attending the long scheduled and previously noticed hearing or attending to his out of state business. Defendant's assignment of error is overruled.

IV. Motion to Introduce Defendant's Affidavit

Defendant contends the trial court erred in denying his motion to introduce his affidavit. We disagree.

A. Standard of Review

As with a motion to continue, a trial court's evidentiary rulings "are subject to appellate review for an abuse of discretion, and will be reversed only upon a finding that the ruling was so arbitrary that it could not be the result of a reasoned decision." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 644-45, 643 S.E.2d 28, 32, *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007) (citation omitted).

B. Analysis

[2] The North Carolina Rules of Civil Procedure control actions to enforce foreign judgments. N.C. Gen. Stat. § 1C-1705(b) (2013). Pursuant to Rule 6(d), a party filing an affidavit in support of his or her motion shall serve it contemporaneously with the motion:

> A written motion. . . and notice of the hearing thereof *shall be served not later than five days before* the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. . . . When a motion is supported by affidavit, the *affidavit shall be served* with the motion[.]

N.C. Gen. Stat. § 1A-1, Rule 6(d) (2013) (emphasis supplied).

Any motion for the enlargement of time in which an act, such as the filing of an affidavit, is to be done must be made prior to the expiration of the period originally prescribed:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged *if request therefor is made before the expiration of the period originally prescribed*[.] . . . Upon motion made after the expiration of the specified period, the judge *may* permit the act to be done where the failure to act was the result of excusable neglect.

N.C. Gen. Stat. § 1A-1, Rule 6(b) (2013) (emphasis supplied).

"Clearly, Rule 6(b) gives the trial court wide discretionary authority to enlarge the time within which an act may be done." *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 130, 203 S.E.2d 421, 423 (1974). In this case, Defendant made no request for enlargement of time within to file and serve the affidavit prior to or along with the filing of his motion for relief, notice of defenses and motion for stay. "If the request for enlargement of time is made after the expiration of the period of time within which the act should have been done, there must be a showing of excusable neglect." *Id.* at 131, 203 S.E.2d at 423.

Defendant's oral motion to allow consideration of his affidavit asserted an "unanticipated sequence of events" transpired, which required the filing of an affidavit in lieu of live testimony. Presuming, without deciding, this assertion shows excusable neglect, the decision to enlarge the time still rested within the sound discretion of the trial court, which will not be disturbed absent a showing of an abuse of discretion.

Defendant argues the trial court failed to follow this Court's decision in *Gillis v. Whitley's Disc. Auto. Sales, Inc.*, 70 N.C. App. 270,

319 S.E.2d 661 (1984) which would compel the trial court to allow the introduction of his late-filed affidavit. In *Gillis*, a contract dispute arose between plaintiff and defendant. *Id.* at 272, 319 S.E.2d at 662. The defendant moved for partial summary judgment and a hearing was scheduled. *Id.* On the day of the hearing, the plaintiff filed an affidavit, which was relied upon by the trial court in making its findings of fact and conclusions of law. *Id.* at 275, 319 S.E.2d at 665.

On appeal, the defendant contended the affidavit was inadmissible under N.C. R. Civ. P. 56(c), and admission of the affidavit was error. *Id.* This Court disagreed and noted a "trial court may exercise its *discretionary powers* under [N.C. Gen. Stat.] § 1A-1, Rule 6(b) [] to order the time within which to file and serve the affidavits enlarged if the request is made prior to making the motion[.]" *Id.* at 276, 319 S.E.2d at 665 (emphasis supplied). The court held that while the filing of the affidavit on the day of the hearing "violated the technical requirements" of Rule 6(d), defendant was not prejudiced and the affidavit was admissible. *Id.*

Gillis is distinguishable from these facts. In *Gillis*, the trial court exercised its discretion to allow the admission of the late-filed affidavit. *Id.* In this case, however, the trial court exercised its discretion to deny the admission of the late-filed affidavit. As noted *supra*, the decision to enlarge the time allowed to take an act after the time prescribed has past, such as the filing of an affidavit, is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *Id.* Defendant has not shown, and we do not find, the trial court's refusal to allow Defendant's motion to introduce his affidavit "was so arbitrary that it could not be the result of a reasoned decision." *Lord*, 182 N.C. App. at 644-45, 643 S.E.2d at 32. Defendant's argument is overruled.

V. Enforceability of the Foreign Judgment

Defendant argues the trial court erred by concluding the Pennsylvania Judgment is entitled to full faith and credit and is enforceable as any judgment rendered in this State. He argues Pennsylvania lacked personal jurisdiction over him, barring enforcement of the judgment in this State.

A. Standard of Review

In questions of personal jurisdiction, this Court "considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record; . . . we are not free to revisit questions of credibility or weight that have already been decided by the trial court."

Deer Corp. v. Carter, 177 N.C. App. 314, 321, 629 S.E.2d 159, 165 (2006) (citation omitted). "If the findings of fact are supported by competent evidence, we conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights." *Id.* at 321-22, 629 S.E.2d at 165. Objections to personal jurisdiction may be waived by agreement, neglect or failure to timely object. *See Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315, 11 L.Ed.2d 354, 358 (1964) ("[P]arties to a contract may agree in advance to the jurisdiction of a given court"); *Montgomery v. Montgomery*, 110 N.C. App. 234, 238-39, 429 S.E.2d 438, 440 (quoting *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953)) ("Essentially, a defendant's consent constitutes his waiving personal jurisdiction where the courts would not otherwise be able to exercise personal jurisdiction. The defendant 'may consent to the jurisdiction of the court without exacting performance of the usual legal formalities as to service of process' because those legal formalities are a personal privilege which the defendant is free to relinquish.").

B. Analysis

[3] The Uniform Enforcement of Foreign Judgments Act ("the Act"), N.C. Gen. Stat. § 1C-1701 *et seq.*, provides "one method whereby plaintiffs may seek the enforcement in North Carolina of judgments from other states." *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 300, 429 S.E.2d 435, 436 (1993) (citation omitted). Pursuant to the Act, a judgment creditor must file with the clerk of superior court a "copy of [the] foreign judgment authenticated in accordance with an act of Congress or the statutes of this State." N.C. Gen. Stat. § 1C-1703(a) (2013). The introduction into evidence of a copy of the foreign judgment, authenticated pursuant to Rule 44 of the Rules of Civil Procedure, establishes a presumption that the judgment is entitled to full faith and credit. *Lust*, 110 N.C. App. at 300, 429 S.E.2d at 436.

"In challenging a foreign judgment a defendant has the right to interpose proper defenses. He may defeat recovery by showing want of jurisdiction either as to the subject matter or as to the person of defendant. However, jurisdiction will be presumed until the contrary is shown." *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 525, 146 S.E.2d 397, 400 (citations omitted). "In the absence of such proof, the judgment will be presumed valid." *Wachovia Bank & Trust Co., N.A. v. Chambless*, 44 N.C. App 95, 100, 260 S.E.2d 688, 692 (1979) (citing *Dansby v. Insurance Co.*, 209 N.C. 127, 134, 183 S.E. 521, 525 (1936)).

Here, Plaintiffs filed a properly authenticated copy of the Pennsylvania Judgment with the Clerk of Superior Court of Dare County on 22 July 2014. This filing established a presumption for Plaintiffs that the judgment is valid and entitled to full faith and credit. At the hearing, Defendant's attorney conceded Plaintiffs had complied with the statutory requirements for filing and service of the Pennsylvania Judgment.

After the initial showing by Plaintiffs and the presumption was raised, the burden rested on Defendant to interpose defenses and present proof to show the judgment was invalid. *Thomas*, 266 N.C. at 525, 146 S.E.2d at 400. Defendant "needed to present evidence to rebut the presumption that the judgment is enforceable by asserting a defense under [N.C. Gen. Stat.] § 1C-1705(a)." *Seal Polymer Indus.-Bhd v. Med-Express, Inc., USA*, 218 N.C. App. 447, 448, 725 S.E.2d 5, 6-7 (2012). Defendant failed to file an affidavit with his motion for relief from judgment, notice of defenses and motion for stay in compliance with Rule 6(d) of the Rules of Civil Procedure, failed to seek an enlargement of time to file the affidavit, and failed to present any evidence at the 26 January 2015 hearing to rebut the presumption of validity.

At the 26 January 2015 hearing, Defendant's counsel argued the Pennsylvania courts lacked personal jurisdiction over Defendant. However, it "is axiomatic that the arguments of counsel are not evidence." *Basmas v. Wells Fargo Bank, N.A.*, ___ N.C. App. ___, ___, 763 S.E.2d 536, 539 (2014) (quoting *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004)). These "conclusory statement[s] alone [are] insufficient to establish the affirmative defense of lack of personal jurisdiction." *Seal Polymer Indus.-Bhd*, 218 N.C. App. at 449, 725 S.E.2d at 7.

Defendant failed to present any evidence, either through a properly and timely filed sworn affidavit, or through evidence or testimony under oath at the hearing, to overcome the presumption that the Pennsylvania Judgment was entitled to full faith and credit. Defendant's argument is overruled.

VI. Conclusion

Defendant failed to show the trial court abused its discretion by denying Defendant's motion to continue. Defendant failed to proffer, and we do not find, any showing that the trial court's decision was "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Defendant was provided more than two months prior notice of the scheduled hearing on his motions and defenses and chose not to be present at the hearing.

Defendant's proposed affidavit failed to comply with Rule 6(d) of the North Carolina Rules of Civil Procedure. Defendant has failed to show the trial court abused its discretion in denying Defendant's oral motion to introduce his late-filed affidavit in the absence of his personal appearance.

Defendant's counsel's arguments regarding Pennsylvania's lack of personal jurisdiction over Defendant were not evidence. Defendant failed to present any evidence to overcome the presumption that the properly filed Pennsylvania Judgment is entitled to full faith and credit. The hearing was free from errors Defendant preserved and argued. The judgment of the trial court is affirmed.

AFFIRMED.

Judges STROUD and DIETZ concur.

LISA G. SAIN AND JAMES W. SAIN, PLAINTIFFS
v.
ADAMS AUTO GROUP, INC. AND CAPITAL ONE AUTO FINANCE, INC., DEFENDANTS

No. COA15-813

Filed 5 January 2016

1. Motor Vehicles—claims against previous seller—sold car to dealership that sold car to plaintiffs—fraud, unfair and deceptive trade practices, and negligence—dismissed

Where plaintiffs purchased a used car from Adams Auto Group, which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court did not err by dismissing the claims for fraud, unfair and deceptive trade practices, and negligence against defendant Capital One. Plaintiffs' amended complaint contained no allegations tending to show that Capital One made any direct statements to plaintiffs, that plaintiffs' decision to purchase the vehicle was based on any actual misrepresentations or omissions by Capital One, or that Capital One owed any duty to plaintiffs.

2. Appeal and Error—issue abandoned at order argument

Where plaintiffs' counsel announced during oral argument that plaintiffs were abandoning an issue they had raised on appeal, the Court of Appeals affirmed that portion of the trial court's order.

3. Motor Vehicles—unfair and deceptive trade practices claim—seller knew or should have known of frame damage

Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court erred by dismissing their claim against Adams for unfair and deceptive trade practices. Plaintiffs' claim for unfair and deceptive practices was based on Adams' alleged misrepresentation of the condition of the vehicle after purchasing it at auction, where it was announced prior to Adams' purchase that the vehicle had sustained frame damage. Plaintiffs also alleged that Adams should have known their claims were valid and nevertheless refused to repair the car or rectify the situation.

4. Motor Vehicles—car with frame damage—claims for fraud, tortious breach of contract, civil conspiracy, and negligence—"As Is—No Warranty" agreement

Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court did not err by dismissing plaintiffs' claims against Adams for fraud, tortious breach of contract, civil conspiracy, and negligence. The "As Is—No Warranty" agreement was part of the Buyer's Guide and sales contract and was incorporated by reference in the pleadings.

5. Motor Vehicles—car with frame damage—"As Is—No Warranty" agreement—expressly incorporated into pleadings by reference

Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the Court of Appeals rejected plaintiffs' argument that the trial court improperly considered a document outside the pleadings when it took into account the Buyer's Guide "As Is—No Warranty" agreement as a part of the sales contract. The document was expressly incorporated by reference in plaintiffs' complaint. The existence of the document was first introduced by counsel for plaintiffs, so any error was invited by plaintiffs.

Appeal by plaintiffs from order entered 28 April 2015 by Judge Hugh B. Lewis in Catawba County Superior Court. Heard in the Court of Appeals 3 December 2015.

Law Offices of Jason E. Taylor, PC, by Lawrence B. Serbin and Jason E. Taylor, for plaintiffs-appellants.

Meier Law, P.L.L.C., by Stephen W. Kearney, for defendant-appellee Adams Auto Group, Inc.

McGuire Woods LLP, by Amanda W. Abshire and Terrence M. McKelvey, for defendant-appellee Capital One, N.A.

TYSON, Judge.

Lisa G. Sain and James W. Sain ("Plaintiffs") appeal from order allowing the motions to dismiss of Adams Auto Group, Inc. and Capital One, N.A. (collectively, "Defendants"). We affirm in part, reverse in part, and remand.

I. Factual Background

Plaintiffs purchased a used 2010 Honda Civic automobile ("the vehicle") from defendant, Adams Auto Group ("Adams") on 18 January 2013. The vehicle was previously owned by the Freemans, who are not a party to this action. The Freemans had financed their purchase of the vehicle through defendant, Capital One. The vehicle was involved in a collision in June 2012. Capital One subsequently repossessed the vehicle after the Freemans declined to retake possession of the vehicle after it was repaired.

Capital One sold the vehicle to Adams at an Automotive Dealer Exchange Services of America ("ADESA") auction in Charlotte, North Carolina on 20 September 2012. It was announced during the auction, and prior to sale, that the vehicle had sustained frame damage.

Plaintiffs purchased the vehicle from Adams for $15,843.70. The salesperson purportedly told Plaintiffs, to the best of his knowledge, the vehicle had not been involved in a collision or other occurrence to the extent that the cost of repairs exceeded 25% of the vehicle's fair market value. Adams also provided a "Carfax report," which stated the vehicle had two previous owners and no accident or damage had been reported to Carfax. Plaintiffs signed a Buyer's guide "As Is—No Warranty" disclosure and agreement as part of their sales contract to purchase the vehicle.

The vehicle began to experience various mechanical problems sometime after the date of purchase. Plaintiffs took the vehicle to

Hickory Used Car Superstore to explore trading it in for another vehicle. Plaintiffs allegedly first learned the vehicle had previously sustained frame damage through an "AutoCheck report" at this time.

Plaintiffs brought the vehicle to Hendrick Honda for repairs, where it was discovered a motor mount and an antilock braking system ("ABS") modulator valve were broken. Plaintiffs contacted their insurance agent, who produced an auto loss history report on the vehicle. According to the report, a claim on the policy covering the vehicle was filed on 22 June 2012 and $7,539.00 had been paid out for property damages on that claim. The specific cost of actual repairs to the vehicle itself was not disclosed.

Plaintiffs filed a complaint against Adams on 13 March 2014. Plaintiffs alleged claims against Adams for: (1) fraud; (2) tortious breach of contract; (3) civil conspiracy; (4) unfair and deceptive trade practices, pursuant to N.C. Gen. Stat. § 75-1.1 (2013) ("the UDTPA"); and (5) negligence.

On 4 December 2014, Plaintiffs filed an amended complaint, in which they added Capital One as a party-defendant to all claims, except for tortious breach of contract. Plaintiffs averred Capital One had failed to disclose the condition of the vehicle prior to selling it to Adams at auction.

Defendant Adams filed an answer to Plaintiffs' claims. Capital One did not answer Plaintiffs' complaint. Capital One and Adams each filed separate motions to dismiss all pending claims pursuant to the North Carolina Rules of Civil Procedure, Rule 12(b)(6) on 20 January 2015 and 2 February 2015, respectively.

Defendants' motions to dismiss were heard on 16 March 2015. During the hearing, counsel for Plaintiffs contended it was "reasonable that a person would rely on a chain of title or a damage history that's created by the chain of title when purchasing a car, especially if they're buying it 'as-is,' which is what happened here." The trial court asked, "And did the Sains purchase this car 'as-is'? Was it denoted on the purchase sticker?" Counsel for Plaintiffs responded, "I believe so, Your Honor, yes, sir." The trial court also asked Adams' counsel whether he had any knowledge about the vehicle being purchased "as-is."

Counsel for Adams stated he was aware of this fact, as evidenced by a document entitled "Buyer's Guide," acquired during the discovery phase of the original complaint. Adams' counsel offered to show the trial court a copy of this document. Plaintiffs' counsel made no objection.

The trial court entered an order allowing both Defendants' motions to dismiss, and dismissed all of Plaintiffs' claims with prejudice. The trial court made the following pertinent conclusions of law in its order:

> 1. There is no direct reliance on any misrepresentations of Defendant Capital One and Defendant Adams Auto Group by Plaintiffs Lisa G. Sain and James W. Sain.
>
> 2. Defendants Capital One and Adams Auto Group did not enter into an agreement, or conspire, to commit any wrongful overt acts to injure future purchasers of the Honda Civic.
>
> 3. Plaintiffs cannot assert an Unfair or Deceptive Trade Practice Act (UDTPA) claim against Defendant Capital One based on Defendant Adams Auto Group's purported refusal to redress Plaintiffs' alleged grievances.
>
> 4. Plaintiffs' Amended Complaint fails to appropriately allege a duty owed by either Defendant Adams Auto Group or Defendant Capital One on each of Plaintiffs' claims or causes of action. Where there is no duty there can be no liability of Defendants Adams Auto Group and/or Defendant Capital One to Plaintiffs Lisa G. Sain and James W. Sain.

Plaintiffs gave timely notice of appeal to this Court.

II. Issues

Plaintiffs argue the trial court erred by: (1) allowing Capital One's motion to dismiss based on a lack of privity; (2) dismissing Plaintiffs' claim for civil conspiracy by improperly testing the facts of the case; (3) allowing Adams' motion to dismiss based on Plaintiffs' lack of direct reliance on any misrepresentation by Adams, and a lack of any duty owed to Plaintiffs; and, (4) dismissing Plaintiffs' claim for tortious breach of contract based on the trial court's consideration of a document outside the pleadings.

III. Standard of Review

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.

> The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Holleman v. Aiken, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584-85 (2008) (citation and quotation marks omitted).

"Dismissal is warranted (1) when the face of the complaint reveals that no law supports plaintiffs' claim; (2) when the face of the complaint reveals that some fact essential to plaintiffs' claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiffs' claim." *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000) (citation and internal quotation marks omitted).

"[T]he trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." *Id.* (citations omitted). This Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, __ N.C. App. __, __, 752 S.E.2d 661, 663-64 (2013) (citation omitted).

III. Analysis

A. Capital One's Motion to Dismiss

[1] Plaintiffs argue the trial court erred by allowing Capital One's motion to dismiss. They assert the trial court wrongfully concluded Capital One did not make any misrepresentations to Plaintiffs directly, nor did Plaintiffs have any direct dealing with Capital One. Plaintiffs contend the trial court erroneously concluded privity was required for Plaintiffs to have any viable claims against Capital One. Plaintiffs also argue the trial court erred by concluding Capital One did not owe a duty to Plaintiffs. We disagree.

1. Fraud and Violation of the UDTPA

It is well-established to state a claim for fraud, a plaintiff must allege: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (citations omitted). "An essential element of actionable fraud is that the false representation or concealment be made *to the party acting thereon*." *Hospira Inc. v. AlphaGary Corp.*, 194 N.C. App. 695,

699, 671 S.E.2d 7, 11 (emphasis in original) (citation omitted), *disc. review. denied*, 363 N.C. 581, 682 S.E.2d 210 (2009).

A plaintiff who brings a claim under N.C. Gen. Stat. § 75-1.1 (2013) must allege: "(1) the defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Capital Resources, LLC v. Chelda, Inc.*, 223 N.C. App. 227, 239, 735 S.E.2d 203, 212 (2012) (citation and quotation marks omitted), *disc. review dismissed and cert. denied*, __ N.C. __, 736 S.E.2d 191 (2013).

"Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, *the plaintiff must show 'actual reliance' on the alleged misrepresentation* in order to establish that the alleged misrepresentation 'proximately caused' the injury of which plaintiff complains." *Tucker v. Blvd. at Piper Glen LLC*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002) (emphasis supplied) (citation omitted). Here, the trial court determined "[t]here is no direct reliance on any misrepresentations of Defendant Capital One[.]"

Plaintiffs' arguments misconstrue the trial court's conclusion by equating direct reliance with privity of contract. Nowhere in the order did the trial court conclude privity of contract was required for Plaintiffs to sufficiently allege claims for fraud or violation of the UDTPA. Contrary to Plaintiffs' argument, the trial court's order clearly shows it *did not* dismiss their claims against Capital One based on a lack of privity. *Id.*

Plaintiffs' amended complaint is wholly devoid of allegations tending to show Capital One made any direct statements to Plaintiffs, or Plaintiffs' decision to purchase the vehicle was based on any actual misrepresentations or omissions made by Capital One. In their amended complaint, Plaintiffs aver Capital One misrepresented the vehicle's condition at an ADESA auction. Plaintiffs did not purchase the vehicle at the auction. Plaintiffs do not contend they were present at the auction or had any knowledge of Capital One's alleged misrepresentations when they decided to purchase the vehicle from Adams.

2. Negligence

Plaintiffs' amended complaint lacks any factual allegations which tend to establish any duty owed by Capital One to Plaintiffs. Plaintiffs alleged Capital One "had a duty reasonably to know, investigate, and/or determine the condition, prior collision record, and status of the vehicle it sold, and to accurately represent that condition to potential and/or actual purchasers, including Plaintiff[s]."

Plaintiffs cite N.C. Gen. Stat. § 20-71.4 in support of their argument that Capital One owed a duty to Plaintiffs, the ultimate consumers, to disclose the collision and damage. Plaintiffs' reliance on N.C. Gen. Stat. § 20-71.4 to support this claim is misplaced.

N.C. Gen. Stat. § 20-71.4 makes it unlawful "for any transferor of a motor vehicle" to

> [t]ransfer a motor vehicle up to and including five model years old when the transferor has knowledge that the vehicle has been involved in a collision or other occurrence to the extent that the cost of repairing that vehicle . . . exceeds twenty-five percent (25%) of its fair market retail value at the time of the collision or other occurrence, without disclosing that fact in writing *to the transferee* prior to the transfer of the vehicle.

N.C. Gen. Stat. § 20-71.4(a)(1) (2013) (emphasis supplied).

To the extent N.C. Gen. Stat. § 20-71.4, a misdemeanor criminal statute, imposed a duty on Capital One to disclose certain information, the plain language of the statute requires, and limits, any disclosure to be made "to the transferee." *Id.* There is no dispute that the facts at bar clearly show the transferee, with respect to Capital One, was Adams, *not* Plaintiffs. *See Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 610-11, 566 S.E.2d 818, 822-24 (2002) (declining to find vehicle-owner plaintiff had sufficiently alleged a duty owed by prior transferor, where the vehicle was sold by prior transferor to defendant auto dealership prior to purchase by plaintiff).

Plaintiffs have failed to allege any direct reliance on Capital One's statements or omissions, if any, regarding the vehicle's condition announced at a dealer's auction. Plaintiffs' fraud and UDTPA claims against Capital One fail as a matter of law. Plaintiffs have also failed to sufficiently allege Capital One owed any legal duty directly to Plaintiffs. The trial court properly allowed Capital One's motion to dismiss Plaintiffs' fraud, UDTPA, and negligence claims, as alleged against defendant Capital One. This argument is overruled.

B. Civil Conspiracy

[2] Plaintiffs argue the trial court improperly "tested the facts" of the case when it dismissed Plaintiffs' civil conspiracy claim against both Defendants. Counsel for Plaintiffs announced they were abandoning this issue during oral argument. The portion of the trial court's order dismissing this claim against both Defendants is affirmed.

C. Adams' Motion to Dismiss

Plaintiffs argue the trial court erred by dismissing their claims against Adams. Plaintiffs contend allegations in their amended complaint sufficiently tend to establish Plaintiffs relied on Adams' misrepresentations regarding the vehicle's condition. Plaintiffs also argue Adams had a duty to disclose the vehicle's true condition and to inspect the vehicle.

The trial court allowed Adams' motion to dismiss for the following reasons: (1) there was no direct reliance on any misrepresentations made by Adams; (2) Adams and Capital One did not enter into an agreement "to commit any wrongful overt acts to injure future purchasers" of the vehicle; (3) Plaintiffs could not assert a UDTPA violation based on Adams' "purported refusal to redress Plaintiffs' alleged grievances[;]" and (4) Plaintiffs' complaint "fail[ed] to appropriately allege a duty owed by" Adams.

1. UDTPA Claim

[3] Plaintiffs argue the trial court erred by dismissing their claim against Adams for violating N.C. Gen. Stat. § 75-1.1. Plaintiffs contend dismissal was not warranted at this stage in the litigation. We agree.

> A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. A practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. In order to prevail in a Chapter 75 claim, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff or to his business.

Huff v. Autos Unlimited, Inc., 124 N.C. App. 410, 413, 477 S.E.2d 86, 88 (1996) (citations and internal quotation marks omitted), *cert. denied*, 346 N.C. 279, 487 S.E.2d 546 (1997); *see also Myers v. Liberty Lincoln-Mercury, Inc.*, 89 N.C. App. 335, 337, 365 S.E.2d 663, 664 (1988) (holding a purchaser does not have to prove fraud, bad faith, or intentional deception to sustain unfair and deceptive practice claim); *Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 470-71, 343 S.E.2d 174, 180 (1986) (holding plaintiff must only show defendant's actions or statements had the capacity or tendency to deceive and that plaintiff suffered actual injury as a proximate result of defendant's statements).

"Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citations omitted). This Court held the fact that a purchaser signed an "As Is—No Warranty" agreement upon buying a used vehicle is not fatal to his or her claim for a violation of the UDTPA. *See Huff*, 124 N.C. App. at 412, 477 S.E.2d at 88; *Torrance v. AS & L Motors, Ltd.*, 119 N.C. App. 552, 554, 459 S.E.2d 67, 69; *disc. review denied*, 341 N.C. 424, 461 S.E.2d 768 (1995).

It is a violation of the UDTPA for an employee of an auto dealership to make a statement to a customer leading the customer to believe the vehicle has not been involved in a collision, when the employee knows this to be untrue. *Torrance*, 119 N.C. App. at 556, 459 S.E.2d at 70. An auto dealer's failure to "conduct a simple visual inspection of the car once a dealer knows of its involvement in an accident" may also subject the dealer to liability under the UDTPA "under certain circumstances." *Huff*, 124 N.C. App. at 414, 477 S.E.2d at 89.

Here, Plaintiffs' claim for unfair and deceptive practices is based on Adams' alleged misrepresentation of the condition of the vehicle after purchasing it at auction, where it was announced prior to Adams' purchase that the vehicle had frame damage. Plaintiffs also allege in their complaint Adams "should have determined or known that Plaintiff's [sic] claims were in fact valid, and nevertheless thereafter refused, and continues to refuse to repair, rectify, or financially compensate [Plaintiffs.]"

Plaintiffs' amended complaint, treating all factual allegations contained therein as true, sufficiently alleged a claim against defendant Adams for a violation of the UDTPA to survive Adams' motion to dismiss. The portion of the trial court's order dismissing Plaintiffs' claim against Adams for unfair and deceptive trade practices is reversed and this cause remanded on that issue.

2. Fraud, Tortious Breach of Contract, and Negligence Claims

[4] At the hearing on Defendants' motions to dismiss, counsel for Plaintiffs admitted Plaintiffs had signed a Buyer's Guide "As Is—No Warranty" disclosure as part of the sales agreement at the time they purchased the vehicle. This agreement stated, in part: "You will pay all costs for any repairs. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." This fact, and the language of the provision itself, directly negate Plaintiffs' allegations that they relied on any purported misrepresentations Adams made about the vehicle to support the remainder of their claims.

In *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 423 S.E.2d 504 (1992), *disc. review denied*, 333 N.C. 574, 429 S.E.2d 567 (1993), the plaintiff purchased a used airplane after signing a "Purchase Agreement," which provided the plaintiff understood the airplane was "being sold 'AS IS,' " with no representations or warranties.

The plaintiff filed a complaint against the previous owner for fraud and violation of the UDTPA after he experienced problems with the brakes and the plane's steering mechanism. *Id.* at 244, 423 S.E.2d at 506. This Court held the plaintiff failed to establish essential facts to his claims by virtue of the written and signed "as is" sales agreement:

> [B]ecause [plaintiff] effectively agreed when he signed the Purchase Agreement that defendants made no representations whatsoever with regard to the plane, plaintiff is unable to establish the making of a *false* representation. Moreover, plaintiff failed to establish concealment of a material fact on the part of defendants because plaintiff presented no evidence that defendants knew of any defects in the plane.

Id. at 250, 423 S.E.2d at 510 (emphasis in original) (citation omitted).

Here, it is undisputed that Plaintiffs purchased the vehicle "As Is—No Warranty[.]" Plaintiffs are "unable to establish the making of a false representation[,]" which Plaintiffs must prove to prevail on their fraud claim. *Id.* (emphasis omitted). The facts Plaintiffs alleged in their amended complaint do not assert a valid fraud claim against Adams.

Our review of the allegations and record also reveals no indication Adams knew of the vehicle's extensive damage prior to purchasing it at auction. The CarFax report, which Adams shared with Plaintiffs, also failed to reveal any reported incidents of damage to the vehicle. "The required scienter for fraud is not present without both knowledge and an intent to deceive, manipulate, or defraud." *RD & J Properties v. Lauralea-Dilton Enterprises, LLC*, 165 N.C. App. 737, 745, 600 S.E.2d 492, 498-99 (2004) (citation omitted). *See also Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385 391 (1988) (holding a reckless disregard of the truth of a statement may be sufficient to satisfy the "false representation" element of fraud, but is insufficient to meet the "intent to deceive" requirement). Plaintiffs did not and cannot sufficiently allege the scienter requirement to support a fraud claim based on the facts at bar.

Plaintiffs cannot avoid responsibility for their agreement and prevail on their remaining claims against Adams, because they admittedly and expressly bought the car "as is," with no warranty. This fact negates crucial elements of all of Plaintiffs' remaining claims against Adams. The trial court properly dismissed Plaintiffs' claims against Adams. This argument is overruled.

D. Consideration of a Document Outside the Pleadings

[5] Plaintiffs argue the trial court erred by dismissing their tortious breach of contract claim against Adams. Plaintiffs contend the trial court improperly considered a document outside the pleadings when it took into account the Buyer's Guide "As Is—No Warranty" agreement as a part of the sales contract. We disagree.

Our review of the record shows it appears the only document other than the pleadings, which was before the trial court in connection with Defendants' motions to dismiss was the "As Is—No Warranty" agreement Plaintiffs signed when they purchased the vehicle. This document was contained in the Buyer's Guide, which was part of the sales contract between Plaintiffs and Adams.

The sales contract for the vehicle, including the Buyer's Guide "As Is—No Warranty" agreement, was expressly incorporated by reference in Plaintiffs' complaint. The trial court properly considered the "As Is—No Warranty" agreement in connection with the motion to dismiss as part of the pleadings. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60-61, 554 S.E.2d 840, 847 (2001) (holding trial court did not err by reviewing loan agreement when ruling on motion to dismiss where loan agreement was subject of plaintiff's complaint).

We also note the existence of the "As Is—No Warranty" agreement was first introduced by *counsel for Plaintiffs* at the beginning of the hearing on Defendants' motions to dismiss. Plaintiffs' counsel informed the trial judge Plaintiffs had signed an "As Is—No Warranty" agreement at the time they had purchased the vehicle. The trial judge asked Adams' attorney whether he knew this to be a fact. Adams' attorney responded in the affirmative, and stated he had a copy of the document on hand. Counsel for Plaintiffs did not object or question the document's validity at any point.

Even presuming error, the transcript of the hearing clearly shows any error the trial court committed by reviewing and considering this document was invited error by Plaintiffs. Invited error has been defined as:

> "a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining." The evidentiary scholars have provided similar definitions; e.g., "the party who induces an error can't take advantage of it on appeal", [sic] or more colloquially, "you can't complain about a result you caused."

21 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5039.2, at 841 (2d ed. 2005) (footnotes omitted); *see also Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced." (citations omitted)).

Plaintiffs' argument on appeal is "merely attempting to close the barn door after the horse was out." *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 79, 185 S.E.2d 278, 283 (1971), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972); *see also* Cambridge Idioms Dictionary 395-96 (2nd ed. 2006) ("Closing/shutting the stable door after the horse has bolted" refers to "trying to stop something bad happening when it has already happened and the situation cannot be changed.").

IV. Conclusion

Plaintiffs did not purchase the vehicle from Capital One at auction. Plaintiffs' amended complaint did not contain any allegations tending to show Capital One made any direct statements to Plaintiffs, or that Plaintiffs' decision to purchase the vehicle was based upon Plaintiffs' reliance on any misrepresentations made by Capital One.

The trial court did not require Plaintiffs to establish privity of contract with Capital One. The trial court properly dismissed Plaintiffs' claims of fraud and violation of UDTPA against Capital One.

Plaintiffs' amended complaint lacks any factual allegations which would tend to establish Capital One owed any duty to Plaintiffs. The trial court properly dismissed Plaintiffs' negligence claim against Capital One.

Plaintiffs complaint, regarding all factual allegations as true, sufficiently alleged a claim for unfair and deceptive trade practices against Adams to survive dismissal. The trial court erred by prematurely allowing Adams' motion to dismiss as it pertains solely to this claim.

Plaintiffs purchased the vehicle with a written and signed "As Is—No Warranty" agreement as a part of the sales contract. This fact is undisputed and defeats Plaintiffs' remaining claims against Adams.

The trial court did not err by dismissing Plaintiffs' remaining claims against Adams.

The "As Is—No Warranty" agreement was part of the Buyer's Guide and sales contract, incorporated by reference in the pleadings. The trial court properly considered this document as part of the pleadings. Counsel for Plaintiffs initially informed the trial judge Plaintiffs had purchased the car "as is." Any error committed by the trial court in considering this document was invited error by Plaintiffs.

The order from which Plaintiffs appeal is affirmed as to all claims against Capital One, affirmed in part as to Plaintiffs' fraud, tortious breach of contract, civil conspiracy, and negligence claims against Adams, and reversed and remanded as to Plaintiffs' claim for unfair and deceptive trade practices against Adams.

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

Judges STROUD and DIETZ concur.

RICHARD B. SPOOR, Individually and Derivatively, Plaintiff
v.
JOHN M. BARTH, JR., JOHN M. BARTH, JOHN DOES 1-5, and
J.R. INTERNATIONAL HOLDINGS, LLC, Defendants

No. COA15-172

Filed 5 January 2016

1. Statutes of Limitation and Repose—fraud—breach of contract—unfair trade practices—issue of material fact on accrual of action

Where the president (Junior) of a company (AmerLink) attempted to purchase the chairman and majority shareholder's (plaintiff) interest in the company and allegedly engaged in fraud to do so, the trial court erred by granting summary judgment in favor of defendant Barth (Senior) on the grounds that plaintiff did not commence the action for fraud, breach of contract as a third-party beneficiary, and unfair and deceptive trade practices against him within the relevant statutes of limitations. The Court of Appeals rejected Senior's argument that the clock began to tick when plaintiff learned of co-defendant Junior's alleged fraudulent actions. There was a genuine issue of material fact as to when Senior's alleged fraud was

or should have been discovered by plaintiff. A jury could have determined that plaintiff's causes of action did not accrue until 18 August 2009, when Senior notified AmerLink's bankruptcy attorneys that Senior had no intention of financing AmerLink's Chapter 11 bankruptcy, contrary to the assurances made by Junior.

2. Jurisdiction—standing—fraud claims—separate and distinct from corporation's injury—lawsuit not precluded by bankruptcy proceeding

Where the president (Junior) of a company (AmerLink) attempted to purchase the chairman and majority shareholder's (plaintiff) interest in the company and allegedly engaged in fraud to do so, the trial court erred by granting summary judgment in favor of defendants Junior and Barth (Senior) on the grounds that plaintiff lacked standing. The Court of Appeals agreed with plaintiff that the adversary proceeding filed by the AmerLink bankruptcy trustee did not preclude plaintiff, Junior, or Senior from bringing claims against each other in their individual capacities. Plaintiff relied upon his agreement with Senior and Junior when he, in his individual capacity, invested his majority interest AmerLink shares into JRI, a corporation owned 50% by plaintiff and 50% by Junior. Plaintiff's alleged injury was separate and distinct from that of AmerLink shareholders or AmerLink itself.

Appeal by plaintiff from order entered 19 June 2014 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 26 August 2015.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Sidney S. Eagles, Jr., and Barry Nakell for plaintiff-appellant.

Manning Fulton & Skinner, P.A., by Judson A. Welborn and J. Whitfield Gibson, for defendant-appellee John Barth, Jr.

Wilson & Ratledge, PLLC, by Reginald B. Gillespie, Jr. and N. Hunter Wyche, Jr., and Foley & Lardner LLP, by Michael J. Small and David B. Goroff, for defendant-appellee John M. Barth.

McCULLOUGH, Judge.

Plaintiff Richard Spoor appeals from an order of the trial court granting summary judgment in favor of defendants John M. Barth and

John M. Barth, Jr. Based on the reasons stated herein, we reverse the order of the trial court.

I. Background

On 5 October 2011, plaintiff Richard Spoor filed a complaint against John M. Barth, Jr. ("Junior"), John Doe, Sr., and John Does in Wake County Superior Court. On 14 February 2012, plaintiff filed his first amended complaint against Junior, John Barth, Sr. ("Senior"), John Does 1-5, and JR International Holdings, LLC ("JRI") (collectively "defendants").

On 16 February 2012, Junior removed the case to the United States District Court for the Eastern District of North Carolina. On 31 October 2012, the action was remanded to Wake County Superior Court.

On 16 June 2012, plaintiff filed his Second Amended Complaint against defendants. The complaint alleged as follows: Plaintiff was the chairman and majority shareholder of AmerLink, Ltd. ("AmerLink"). AmerLink was a North Carolina corporation "engaged in the business of selling packages of materials for the construction of log homes." Junior was President of AmerLink and Senior was Junior's father. JRI is a North Carolina corporation. Plaintiff owns 50% and Junior owns 50% of JRI. In September 2006, Junior became President and CEO of AmerLink and Junior told plaintiff that he was interested in purchasing plaintiff's controlling interest in AmerLink with the use of Senior's funds. In Fall 2007, Junior and Senior first attempted to purchase plaintiff's controlling interest. Senior visited and inspected the AmerLink facility and discussed with National Consumer Cooperative Bank ("NCB"), AmerLink's principal lender, the financial situation for a purchase. A proposed contract went through three or four drafts before Junior and Senior decided not to complete the purchase at that time.

Plaintiff alleged that by January 2008, Junior became aware that based on his mismanagement, AmerLink was facing financial difficulty. Junior told AmerLink's Vice-President that he wanted to show NCB a "higher than accurate sales volume" and asked the Vice-President to make false entries in AmerLink's sales and delivery reports to reflect this. When the Vice-President refused to falsify reports, Junior directed the Vice-President to send sales and delivery reports to Junior only.

In the summer of 2008, a second proposal regarding Junior and Senior's purchase of plaintiff's controlling interest in AmerLink was discussed. Plaintiff alleged that on or about 11 June 2008, Junior became aware that AmerLink was insolvent and was unable to purchase materials to fulfill its contracts. Regardless of this fact, Junior directed

AmerLink staff to encourage customers to enter into sales agreements with AmerLink, to send deposits and additional funds to AmerLink, and to schedule deliveries. Junior became aware that he needed funds in excess of $2 million from Senior in order to keep AmerLink operating. From September 2007 through September 2008, Junior prepared false financial and delivery reports for AmerLink and directed AmerLink employees to falsify reports in order to conceal AmerLink's dire financial situation. Junior prepared these false reports "in order to mislead Plaintiff on the current state of AmerLink's sales and profits, to keep his position as President and CEO of AmerLink, Ltd., and to facilitate his purchase of Plaintiff's majority interest in AmerLink, Ltd."

Plaintiff and Junior settled on an arrangement to accomplish their purpose of having Junior purchase plaintiff's majority interest in AmerLink through JRI, a North Carolina corporation formed by them. Plaintiff agreed to put all of his AmerLink shares into JRI. Junior agreed to put funds equivalent to the value of plaintiff's shares into JRI. Both Junior and plaintiff agreed that the value of plaintiff's AmerLink shares was $8 million and Junior agreed to invest $8 million primarily obtained from Senior. Junior and plaintiff also agreed that JRI, which was jointly owned by Junior and plaintiff, would invest its funds in AmerLink and become the majority shareholder of AmerLink. AmerLink would then obtain the "capital investment it needed to rescue it from insolvency and enable it to continue doing business." The plan also included for Junior to eventually purchase plaintiff's interest in JRI, making Junior the controlling owner of AmerLink.

Plaintiff further alleged that on 8 October 2008, plaintiff learned in a letter from an employee that Junior had been submitting false reports containing inflated sales and delivery figures. The letter provided no specifics but stated that the employee was " 'resigning under duress' because he could no longer trust [Junior] and would not be a party to 'lies and deception at AmerLink, Ltd.' " A few hours after receiving the letter, plaintiff met with Junior and confronted Junior with the information he had just received. Junior admitted falsifying the reports but stated that he was "just 'fudging' the numbers a little bit, by small amounts, minor numbers." On 10 October 2008, plaintiff called Senior and left a message on Senior's answering device informing him of the following: that plaintiff was upset with Junior; plaintiff learned that Junior had been falsifying reports; Junior had been "running the company down" and concealing AmerLink's financial situation; there was a need to correct AmerLink's problems and to accomplish this, they needed the JRI deal in order to "get an infusion of capital" for AmerLink. On 13 October

2008, the AmerLink Board replaced Junior with plaintiff as CEO. Junior remained president and continued to assert that Senior would be making a sizable cash investment in AmerLink.

On 16 October 2008, pursuant to the agreement between himself and Junior, plaintiff transferred his AmerLink shares into JRI. Although the agreement required Junior to provide his investment of $8,000,000, he failed to do so. On 17 October 2008, Junior represented to plaintiff that $1.6 million from Senior was on its way to JRI. Accordingly, Junior and plaintiff signed and sent UBS Financial Services ("UBS") a written request in JRI's name to prepare a wire transfer for $1.6 million, once funds were available, from JRI's account into AmerLink's account. However, the funds were never received in JRI's account.

Plaintiff alleged that on or about 7 November 2008, Senior agreed to loan Junior up to $3 million, plus interest, to invest into JRI in order to overcome the problems arising from Junior's deception. Senior wrote a check payable to JRI in the amount of $300,000, signifying the initial $300,000 of Senior's loan of up to $3 million. Plaintiff and Junior endorsed this check and deposited it into AmerLink's account.

On 26 November 2008, Senior confirmed the 7 November 2008 loan agreement in writing to Junior in an e-mail in which he wrote "I will initially loan up to $3,000,000 to [JRI] with the understanding that $300,000 has already been contributed." On 11 November 2008, Junior sent plaintiff an e-mail, attaching a "proposed schedule of payments to [JRI]" that included as follows:

$300,000	Paid on November 7, 2008
$1.7M	Paid by November 14, 2008
$1.3M	Paid when loan closes on new Barth residence
$600,000	Paid when Lantern Ridge Residence sells
$4.1M	Remaining to be paid as soon as my father is in a position to do so. This final payment may be made in full or in part.

Also on 11 November 2008, Junior directed AmerLink staff to continue to tell customers that new investment funds were on the way. On 13 November 2008, Junior assured plaintiff that $1.7 million was on its way from Senior to UBS for JRI. Thereafter, Junior and plaintiff signed another request that UBS wire $1.7 million from JRI. However, because the funds were never received in the JRI account, no funds were ever transferred by UBS.

Although the first payment had already been made in the form of a $300,000 check from Senior to JRI, no additional payments were made into JRI by Junior. On 15 December 2008, plaintiff received AmerLink's financial reports for the 30 September 2008 end of the fiscal year and learned that AmerLink's actual financial situation was worse than Junior had represented. Plaintiff alleged that Junior had falsified the reports of AmerLink "to a far more severe degree than he had admitted." Plaintiff closed the doors of AmerLink on or about 15 December 2008.

The complaint further alleged that on 11 February 2009, plaintiff, through counsel, sent a letter to Junior advising him of his failure to make his contribution of funds to JRI, stating that Junior had knowingly and intentionally made false representations to the AmerLink Board of Directors, and demanding that Junior immediately remedy the situation by paying $8 million to JRI. On 12 February 2009, AmerLink filed for Chapter 11 bankruptcy. On 11 March 2009, Junior caused AmerLink's bankruptcy attorney to advise the Bankruptcy Court that within ten days AmerLink would seek approval of a $7.5 million loan from JRI and would use those funds to "complete its existing orders for log homes." A letter very similar to the letter sent from plaintiff's counsel to Junior on 11 February 2009 was sent to Senior on 20 February 2009.

Plaintiff alleged that on 9 March 2009, Senior sent Junior an e-mail for AmerLink's bankruptcy attorney that stated that he would "work with NCB to achieve a mutually agreeable solution . . . regarding issues of their security" and that he would "provide financing, as needed, to meet the operating budget requirements of AmerLink LTD." On 17 March 2009, Junior wrote to plaintiff that he had sent an e-mail to AmerLink's bankruptcy attorney "about the money, told her it's in." Senior sent $200,000 to Junior for deposit into the JRI account. In April 2009, Senior agreed to loan Junior and his wife $7,500,000 at a rate of 2.5% interest. The $7,500,00 sum provided for the $8,000,000, less the $300,000 that Junior had provided by check directly to JRI and the $200,000 in Junior's bank account. On 11 April 2009, a Saturday, Junior allegedly informed plaintiff via e-mail "[m]oney to go in Monday. Do not worry about it. We will have funds available."

During the months of April and May, Junior sent plaintiff several e-mails regarding the transfer of funds from Senior, stating things such as "I believe we will absolutely make it work[,]" "[t]hings are going really well. We are knocking out all of the contract details to everything finalized with funding[,]" "[e]verything is coming together[,]" and "[d]ocs to be signed early in the week. Everything else to follow. Coming together as always planned." Plaintiff's complaint further alleged that

in June 2009, Junior and plaintiff had discussions about changing their plans so that Junior would purchase plaintiff's interest in AmerLink and/or JRI outright. However, nothing materialized from those discussions. Throughout the month of July, e-mails were exchanged between Junior and plaintiff, Junior and AmerLink's bankruptcy attorney, and Junior and NCB. AmerLink's bankruptcy attorney met with plaintiff and Junior, wanting to know when the $200,000 loaned by Senior to Junior would be deposited in AmerLink's operating account. Junior's attorney reported that it "would be deposited on Monday." Thereafter, Junior forged a bank statement and delivered it to AmerLink's bankruptcy attorney to reflect a $120,000 deposit into AmerLink's bank account when no deposit had been made. This forged bank statement was one of two parts of a criminal information for the felony of bankruptcy fraud of which Junior was convicted on 13 May 2010 based on his plea of guilty in the United States District Court for the Eastern District of North Carolina.

The complaint also alleged that on 17 August 2009, Junior submitted to AmerLink's bankruptcy attorney an e-mail purporting to be from Senior which committed to providing "money necessary to purchase the AmerLink loan from NCB. I understand that this may be $8.2M. This loan will be made upon plan confirmation." The following day on 18 August 2009, Senior notified AmerLink's bankruptcy attorney that he was not the source of the 17 August 2009 e-mail and that "he has no intention to provide any financing in connection with the AmerLink Chapter 11." AmerLink's attorneys promptly applied to convert their Chapter 11 bankruptcy to a Chapter 7 bankruptcy. The 17 August 2009 e-mail was the second part of a criminal information for the felony of bankruptcy fraud of which Junior was convicted on 13 May 2010 based on his guilty plea in the United States District Court for the Eastern District of North Carolina.

Plaintiff's complaint advanced the following claims against defendants: breach of contract; breach of contract as third party beneficiary; breach of fiduciary duty (constructive fraud); fraud; punitive damages; unfair and deceptive trade practices ("UDTP"); civil conspiracy; and a derivative claim.

On 27 January 2014, Senior filed a motion for summary judgment, arguing that (1) plaintiff did not commence the action against Senior within the statute of limitations because he knew or should have known about the alleged scheme more than four years prior to commencing the present action and (2) plaintiff lacked standing to assert the claims made against Senior because all such claims were property of the

Chapter 7 bankruptcy estate of AmerLink and all such claims were settled by the bankruptcy trustee[1].

On 20 February 2014, Junior filed a motion for summary judgment arguing that plaintiff lacked standing because all such claims were the property of the Chapter 7 bankruptcy estate of AmerLink and were settled by the trustee in an agreement resolving the litigation against plaintiff, Junior, Senior, and others that the trustee brought in the form of an adversary proceeding in the AmerLink bankruptcy proceeding.

Following a hearing held on 15 May 2014, the trial court entered an order on 19 June 2014, granting summary judgment in favor of defendant Senior as to both bases of statute of limitations and lack of standing. The trial court also entered summary judgment in favor of defendant Junior based on lack of standing. The trial court dismissed plaintiff's claims against defendants Senior and Junior with prejudice.

On 30 June 2014, plaintiff filed a motion for reconsideration pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. The trial court denied this motion through an order entered 2 September 2014. On 17 September 2014, plaintiff filed a notice of voluntary dismissal as to defendant JRI. On 19 September 2014, plaintiff filed notice of appeal from the 19 June 2014 summary judgment order and from the 2 September 2014 order denying his motion for reconsideration.

II. Standard of Review

The North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

> A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. A defendant may meet this burden by: (1) proving that an essential

1. On 23 April 2011, the AmerLink bankruptcy trustee filed an adversary proceeding against Junior, Spoor, Senior, JRI and several others based on claims such as fraudulent conveyances, preferential transfers, breach of fiduciary duties, constructive trust, unjust enrichment, civil conspiracy, etc. This adversary proceeding was settled on 6 September 2011. The settlement agreement was approved by the Bankruptcy Court on 19 September 2011.

> element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.

James v. Clark, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828 (1995) (citation and quotation marks omitted).

"[T]he record is to be viewed in the light most favorable to the nonmovant, giving it the benefit of all inferences which reasonably arise therefrom." *Epps v. Duke Univ.*, 122 N.C. App. 198, 202, 468 S.E.2d 846, 849 (1996) (citation omitted). "[W]e review the trial court's order de novo to ascertain whether summary judgment was properly entered." *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 87, 747 S.E.2d 220, 225-26 (2013).

III. Discussion

Plaintiff argues that the trial court erred by granting summary judgment in favor of (A) Senior on the grounds that plaintiff did not commence an action against Senior within the time required under the relevant statute of limitations and in favor of (B) both Junior and Senior based on lack of standing.

A. Statute of Limitations

[1] In his first argument, plaintiff contends that the trial court erred by granting summary judgment in favor of Senior on the grounds that plaintiff failed to commence an action within the relevant statute of limitations. We agree.

Plaintiff filed his first complaint on 5 October 2011 but did not include Senior as a defendant until he filed his 14 February 2012 first amended complaint. Plaintiff alleged the following claims[2] against Senior: breach of contract as third party beneficiary; fraud; and UDTP.

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and

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2. Plaintiff also filed a civil conspiracy claim against Senior in his 14 February 2012 amended complaint. "This Court has applied the three-year limitations period of N.C. Gen. Stat. § 1-52(5) to a civil conspiracy claim." *Carlisle v. Keith*, 169 N.C. App. 674, 685, 614 S.E.2d 542, 549 (2005). However, because plaintiff does not specifically argue that the trial court erred in granting summary judgment in favor of Senior on the civil conspiracy claim, we deem this argument abandoned. N.C. R. App. P. 28(a) (2015) (stating that "[i]ssues not presented and discussed in a party's brief are deemed abandoned").

maintain a suit arises." *Pierson v. Buyher*, 330 N.C. 182, 186, 409 S.E.2d 903, 905 (1991) (citation omitted). "[A]n action for breach of contract must be brought within three years from the time of the accrual of the cause of action. . . . The statute begins to run on the date the promise is broken." *Penley v. Penley*, 314 N.C. 1, 19-20, 332 S.E.2d 51, 62 (1985) (citations omitted); *see* N.C. Gen. Stat. § 1-52(1) (2013). An action for fraud must be brought within three years as well. For fraud "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9). "For purposes of N.C.G.S. 1-52(9), 'discovery' means either actual discovery or when the fraud should have been discovered in the exercise of 'reasonable diligence under the circumstances.' " *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (citation omitted). "[W]here a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for purposes of the statute of limitations." *Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984). "Ordinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances. This is particularly true when the evidence is inconclusive or conflicting." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 386. Finally, a claim for UDTP "shall be barred unless commenced within four years after the cause of action accrues." N.C. Gen. Stat. § 75-16.2 (2013). "Under North Carolina law, an action accrues at the time of the invasion of plaintiff's right. For actions based on fraud, this occurs at the time the fraud is discovered or *should have been discovered* with the exercise of reasonable diligence." *Nash v. Motorola Communications & Electronics, Inc.*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989) (citations and quotation marks omitted) (emphasis in original). Therefore, plaintiff's claims against Senior are subject to either a three-year or four-year statute of limitations.

In the present case, Senior's motion for summary judgment stated that plaintiff's claims against Senior were barred by the statute of limitations because plaintiff knew, or should have known, of the alleged fraud more than four years prior to commencing the action against Senior. Senior argued in his motion and argues now that in December 2007, plaintiff failed to exercise reasonable diligence in discovering the alleged fraud. Senior asserts that plaintiff "became aware that [Junior] had been providing him with false sales information reports" and referred to Junior as a "m***erf***ing liar" in a conversation with Tom Slocum, an officer and director of AmerLink. Senior also argued that plaintiff discovered greater evidence of Junior's alleged fraud in early October 2008 when an AmerLink employee, David Zotter, included in his resignation

letter that Junior could not be trusted. Lastly, Senior argues that on 11 February 2009, plaintiff's attorney sent a letter to Junior accusing Junior of instances of fraud and threatening to sue Senior and Junior if AmerLink did not file a petition for relief under Chapter 11 of the United States Bankruptcy Code. Accordingly, because plaintiff waited more than three years to file his first amended complaint, Senior argues that plaintiff's claims should be time-barred.

We note that Senior's arguments are misplaced as they center around when plaintiff's actions accrued as to Junior. Because the trial court granted summary judgment in favor of Senior only on the basis of a lapse in the statute of limitations, we review the evidence to determine when each cause of action accrued as to Senior only. The December 2007 incident on which Senior relies regards plaintiff's discovery of the alleged fraudulent actions of Junior. Furthermore, we note that Senior's arguments that plaintiff discovered even more evidence of Junior's alleged fraud in October 2008 and that on 11 February 2009 plaintiff's attorney sent a letter to Junior accusing him of fraud only deals with the circumstances surrounding the accrual of actions against Junior.

Viewed in the light most favorable to the non-moving party, plaintiff's evidence demonstrates that Junior informed plaintiff that he was interested in purchasing plaintiff's controlling interest in AmerLink using funds provided by Senior before the fall of 2007. Junior and plaintiff made a plan to accomplish their purpose in having Junior purchase plaintiff's controlling interest in AmerLink by forming JRI. Junior and plaintiff agreed that plaintiff would put all his AmerLink shares into JRI and Junior would put funds equivalent to the value of plaintiff's shares into JRI. Plaintiff and Junior agreed that the value of plaintiff's shares was $8 million and so that would be the amount obtained primarily from Senior. JRI would then invest its funds in AmerLink and JRI would become the majority shareholder of AmerLink. The plan was for Junior to eventually purchase plaintiff's interest in JRI, allowing for Junior to be the controlling owner of AmerLink. In October 2008, plaintiff learned from an employee that Junior had been submitting false reports inflating AmerLink's sales and delivery figures. When plaintiff confronted Junior, Junior admitted to the false reports but claimed he was "just 'fudging' the numbers a little bit, by small amounts, minor numbers." Plaintiff informed Senior of the falsifying of reports by Junior via a telephone message on 10 October 2008. Junior told plaintiff that he had admitted to his father that he had been falsifying the reports but ensured plaintiff that "everything will be fine, that [Senior] had told him that everything was going to go through." On 7 November 2008, Senior wrote a check

payable to JRI in the amount of $300,000. This check was endorsed by plaintiff and Junior on behalf of JRI and deposited into AmerLink's bank account. On 11 November 2008, Junior sent plaintiff an e-mail, setting out a proposed schedule of payments to JRI. Plaintiff alleged that "[d]espite repeated assurance by [Junior] that he would make additional payments" to JRI, Junior failed to make any additional payments besides the $300,000 payment made by Senior in November 2008. AmerLink filed for bankruptcy under Chapter 11 on or about 12 February 2009 relying on the misrepresentations from Junior that Senior would be providing an $8 million investment in AmerLink. On 17 August 2009, Junior submitted to AmerLink's bankruptcy counsel a document that he represented to be an e-mail from Senior committing to providing "money necessary to purchase the Amer[L]ink loan from NCB. I understand that this may be $8.2M. This loan will be made upon plan confirmation." It was not until 18 August 2009 that Senior notified AmerLink's bankruptcy attorneys that Senior was not the source of the e-mail and had "no intention to provide any financing in connection with the AmerLink Chapter 11."

Giving plaintiff the benefit of all reasonable inferences, we hold that plaintiff's pleadings present a genuine issue of material fact as to when Senior's alleged fraud was discovered or should have been discovered by plaintiff. Because the forecast of evidence was inconclusive and conflicting, "a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 386. A jury could determine that plaintiff's causes of action did not accrue until 18 August 2009 when Senior notified AmerLink's bankruptcy attorneys that Senior had no intention of financing AmerLink's Chapter 11 bankruptcy, contrary to the assurances made by Junior. Therefore, plaintiff's first amended complaint filed 14 February 2012 that included Senior as a defendant would have been commenced within the three-year statute of limitations for the breach of contract and fraud claims and commenced well within the four-year statute of limitations for the UDTP claim. Accordingly, we hold that the trial court erred by granting summary judgment in favor of Senior on the basis of a lapse of the statute of limitations.

B. Standing

[2] In his second argument on appeal, plaintiff contends that the trial court erred in granting summary judgment in favor of both Junior and Senior on the ground that plaintiff lacked standing. Plaintiff argues that the adversary proceeding filed by the AmerLink bankruptcy trustee does not preclude plaintiff, Junior, or Senior from bringing claims against each other in their individual capacities. Plaintiff also argues that his claims

are fundamentally different from the claims of a generic shareholder in a derivative suit and that he owns his own claims, not AmerLink, the bankruptcy estate, nor the trustee. We agree.

"In order for a court to have subject matter jurisdiction to hear a claim, the party bringing the claim must have standing." *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C. App. 102, 106, 744 S.E.2d 130, 133 (2013). " '[S]tanding' to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain resolution of that controversy." *Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer*, 209 N.C. App. 369, 379, 705 S.E.2d 757, 765 (2011).

"When a corporation enters bankruptcy, any legal claims that could be maintained *by the corporation* against other parties become part of the bankruptcy estate, and claims that are part of the bankruptcy estate may only be brought by the trustee in the bankruptcy proceeding." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 25, 560 S.E.2d 817, 822 (2002) (citations omitted) (emphasis in original). The issue of whether plaintiff's claims are property of the bankruptcy estate compels us to examine the nature of plaintiff's claims under state law. *Id.* at 26, 560 S.E.2d at 822.

> Under North Carolina law, directors of a corporation generally owe a fiduciary duty *to the corporation*, and where it is alleged that directors have breached this duty, the action is properly maintained *by the corporation* rather than any individual creditor or stockholder. However, where a cause of action is founded on injuries peculiar or personal to an individual creditor or stockholder, so that any recovery would not pass to the corporation and indirectly to other creditors, the cause of action belongs to, and is properly maintained by, that particular creditor or stockholder.

Id. (citations and quotation marks omitted) (emphasis in original).

"A 'derivative proceeding' is a civil action brought . . . 'in the right of' a corporation, . . . while an individual action is . . . [brought] to enforce a right which belongs to [plaintiff] personally." *Morris v. Thomas*, 161 N.C. App. 680, 684, 589 S.E.2d 419, 422 (2003) (citation omitted). "The well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of

their stock." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). Our Supreme Court has adopted two exceptions to this general rule:

> [A] shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself.

Energy Investors Fund, L.P. v. Metric Constr., Inc., 133 N.C. App. 522, 524, 516 S.E.2d 399, 400 (1999) (citation omitted).

The record before us demonstrates that on 23 April 2011, the AmerLink bankruptcy trustee filed an adversary proceeding against Junior, plaintiff, Senior, JRI and several others based on claims such as fraudulent conveyances, preferential transfers, breach of fiduciary duties, constructive trust, unjust enrichment, civil conspiracy, etc. The bankruptcy trustee alleged, *inter alia*, that plaintiff, Junior, and other AmerLink directors engaged in the creation of new companies and transfer of assets to companies in an effort to sell a substantial portion of plaintiff's ownership interest in AmerLink. The trustee also alleged that an employee stock option plan was adopted at the urging of plaintiff and Junior effective 1 October 2005 and that plaintiff, Junior, and AmerLink's directors' actions were solely for the purpose of creating a means for plaintiff to extract as much cash as possible from the business and for Junior to be in a position to take control of the company. This adversary proceeding was settled on 6 September 2011. The trustee dismissed with prejudice all claims and causes of action against Senior, Junior, and plaintiff and released them from claims by the trustee or bankruptcy estate. Several parties, including plaintiff, Junior, Senior, and JRI agreed to "waive all claims *against the estate*, including all rights associated with the proofs of claim filed in the underlying bankruptcy case, and all other claims now known or hereafter acquired *against the Trustee, individually and as Trustee, counsel for the Trustee, the Trustee's attorneys and attorneys' employees, and the bankruptcy estate*." (emphasis added). The settlement agreement was approved by the Bankruptcy Court on 19 September 2011.

As explicitly stated in the settlement agreement, Junior, Senior, and plaintiff waived all claims against the estate, the trustee, individually

and as trustee, counsel for the trustee, the trustee's attorneys and attorneys' employees, and the bankruptcy estate. It also released Junior, Senior, and plaintiff from claims by the trustee or bankruptcy estate. However, the settlement agreement did not provide for waiver of individual actions between plaintiff, Junior, or Senior.

Plaintiff argues that he was not an AmerLink shareholder at the time his actions accrued against Junior and Senior. Nonetheless, even if plaintiff was an AmerLink shareholder at the time his claims accrued against Junior and Senior, plaintiff's breach of contract, fraud, and UDTP claims arise from Junior and Senior's alleged conduct in their individual capacities. Relying on the agreement between himself and Junior, plaintiff, in his individual capacity, invested his majority interest AmerLink shares into JRI on 16 October 2008. Junior and plaintiff agreed that the value of plaintiff's shares was $8 million. Junior had previously agreed to put funds equivalent to the value of plaintiff's shares into JRI with financial assistance from Senior but thereafter failed to fulfill his obligation to plaintiff.

Plaintiff may maintain an individual action against Junior and Senior because plaintiff alleges that he suffered an injury, separate and distinct from other AmerLink shareholders or AmerLink itself. Plaintiff's alleged injury of investing $8 million worth of AmerLink stock into JRI directly affected plaintiff and was separate and distinct from an injury sustained by a basic AmerLink shareholder or AmerLink. Plaintiff's claims are not based on the diminution of the value of AmerLink stock. No other AmerLink shareholder, no other individual, nor AmerLink can allege the following: that they were fraudulently induced into investing $8 million worth of AmerLink shares into JRI, relying on the assurances from Junior that he would invest funds equivalent to plaintiff's shares, primarily obtained from Senior; that Junior breached an agreement in forming JRI by failing to invest $8 million into JRI; and, that Junior and Senior committed an UDTP causing injury to plaintiff. These claims belong to plaintiff alone. Because plaintiff's claims do not belong to AmerLink, they were not the property of AmerLink's bankruptcy estate. Accordingly, we reject Junior and Senior's arguments that AmerLink's bankruptcy estate had exclusive standing to bring the challenged claims and that plaintiff's claims are derivative.

Furthermore, Junior and Senior contend that plaintiff suffered no injury because AmerLink was insolvent before plaintiff pledged any shares to JRI and therefore, the AmerLink shares had no value. However, we note that there was evidence that both plaintiff and Junior agreed to the value of plaintiff's AmerLink shares as $8 million at the time they

made an agreement. The record also demonstrates that on 7 November 2008, Senior wrote a check payable to JRI in the amount of $300,000. The check was endorsed by Junior and plaintiff on behalf of JRI and deposited into AmerLink's account. Taking this evidence in the light most favorable to plaintiff, plaintiff's shares were of some value above zero, leaving a genuine issue of material fact as to the value of plaintiff's shares.

Based on the foregoing, we hold that plaintiff had standing to sue Junior and Senior and that the trial court erred by granting summary judgment in favor of Junior and Senior on the standing issue. Accordingly, we reverse the order of the trial court.

IV. Conclusion

Where the trial court erred in granting summary judgment in favor of Senior on the issue of statute of limitations and in favor of both Senior and Junior on the issue of lack of standing, we reverse the order of the trial court.

REVERSED.

Judge STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
BRITTANY ALLMAN, Defendant

No. COA15-40

Filed 5 January 2016

Search and Seizure—motion to suppress—search warrant—nexus between drug-related activity and residence

Where two men who lived in defendant's residence were engaged in dealing drugs and lied to officers about where they lived, the Court of Appeals affirmed the trial court's order granting defendant's motion to suppress evidence of drug-related activity seized following execution of a search warrant at her residence. The allegations in the affidavit indicating that the two men were involved in drug dealing and engaged in behaviors common to drug dealers were not sufficient to implicate any particular place where the men might have been engaged in drug-related activity.

Judge DILLON dissenting.

Appeal by the State from order entered 2 October 2014 by Judge Jack Jenkins in New Hanover County Superior Court. Heard in the Court of Appeals 7 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellee.

GEER, Judge.

The State appeals from an order granting defendant Brittany Allman's motion to suppress evidence of drug-related activity seized following the execution of a search warrant at her residence. On appeal, the State argues that the search warrant application revealed circumstances -- including the fact that two other residents of the house were engaged in drug dealing and had lied to officers about where they lived -- that gave rise to probable cause to believe evidence of drug-related activity would be found in defendant's residence. However, we conclude that these circumstances, along with others in the search warrant affidavit, amount at most to circumstances that our case law has held to be insufficient to establish probable cause that evidence of illegal activity exists at the location identified in the search warrant application. We, therefore, affirm the trial court's order granting defendant's motion to suppress.

Facts

Half-brothers Jeremy Lee Black and Sean Alden Whitehead lived at 4844 Acres Drive ("the Acres Drive residence") in Wilmington, North Carolina together with Logan McDonald and defendant, who was Mr. Black's girlfriend. Officers obtained a search warrant for the Acres Drive residence to search for evidence relating to the sale of controlled substances. Officers conducted the search of the Acres Drive residence while defendant was present and found various controlled substances and paraphernalia. Defendant was then arrested.

On 19 March 2012, defendant was indicted for possession of marijuana, possession of a schedule I controlled substance, manufacturing a schedule I controlled substance, possession with intent to sell or deliver marijuana, maintaining a vehicle or dwelling for the sale or distribution

of a controlled substance, and possession of drug paraphernalia. On 2 June 2014, defendant filed a motion to suppress the evidence obtained in the search of the Acres Drive residence, arguing that the search warrant did not allege sufficient facts to support probable cause that evidence of drug-related crimes would be found at the Acres Drive residence and, therefore, violated N.C. Gen. Stat. § 15A-244 (2013). On 2 October 2014, the trial court entered an order granting defendant's motion to suppress.

The application for a search warrant was supported by the affidavit of Detective Anthony Bacon of the Vice and Narcotics Unit of the New Hanover County Sheriff's Office. After Detective Bacon set out in the affidavit his experience and certain "common characteristics" that "people who use illegal controlled substances share," Detective Bacon then made the following factual assertions to support a search of the Acres Drive residence.[1] On 21 January 2012, Agent Joe Cherry of the Brunswick County Sheriff's Office called Detective Bacon and told him that he had conducted a vehicle stop on Highway 74/76 eastbound just before the New Hanover County Line. Agent Cherry identified the driver as Mr. Black and the passenger as Mr. Whitehead. According to Agent Cherry, when he asked Mr. Whitehead about his whereabouts prior to the traffic stop, Mr. Whitehead told him that Mr. Black and he were half-brothers, that they left their residence at 30 Twin Oaks Drive in Castle Hayne, N.C., and that they then visited a friend in Brunswick County. Mr. Whitehead told Agent Cherry that they were on their way back to 30 Twin Oaks Drive.

Agent Cherry further told Detective Bacon that, during the roadside interview, he called for a K-9 unit and the dog alerted to the presence of controlled substances during an exterior "sniff." Agent Cherry said he then searched the car and discovered 8.1 ounces of marijuana packaged in a Ziploc bag, which was inside a vacuum-sealed bag, which in turn was inside a manila envelope. Agent Cherry said he also found over $1,600.00 in cash. Agent Cherry reported to Detective Bacon that Mr. Whitehead told Agent Cherry that he kept some marijuana in his vehicle at 30 Twin Oaks Drive -- Mr. Whitehead claimed that he kept the marijuana in the vehicle so that his mother would not know about it. Agent Cherry also said that Mr. Whitehead owned two cell phones and one of those phones contained text messages related to the sale of marijuana.

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1. The search warrant identified the residence to be searched as 4814 Acres Drive, while the residence actually searched was at 4844 Acres Drive. Defendant did not make any arguments below pertaining to the discrepancy between the address listed in the application and the address actually searched, and that discrepancy is not an issue on appeal.

Detective Bacon then described Mr. Whitehead's prior record of being charged with trafficking marijuana and sale and distribution of marijuana and of having been convicted of possession with intent to sell and deliver marijuana. The affidavit noted that Mr. Black had been charged with cocaine distribution and possession of marijuana in the State of Florida, while, in North Carolina, Mr. Black had pled guilty to first degree burglary.

Detective Bacon asserted that according to Division of Motor Vehicles records, both Mr. Black and Mr. Whitehead listed their home address at 30 Twin Oaks Drive. The car Mr. Black was driving when stopped by Agent Cherry was registered to 30 Twin Oaks Drive. Detective Bacon obtained a search warrant for 30 Twin Oaks Drive, but discovered, when executing the warrant, that Mr. Black and Mr. Whitehead did not live there. Detective Bacon found no evidence of Mr. Black's or Mr. Whitehead's belongings at 30 Twin Oaks Drive. Instead, Mr. Black's and Mr. Whitehead's mother, Elsie Black, and their stepfather lived there. Ms. Black said that her sons lived at "4814 Acres Drive" and described the residence to Detective Bacon. She also said that there should be an old red truck and an old white truck at the house. According to Ms. Black, her sons had a roommate named Logan McDonald. She said that her sons used her address as a mailing address, but had been living on Acres Drive for approximately three years.

Another detective went to 4814 Acres Drive and found the property matched the description given by Ms. Black. The detective checked the registration of the old red truck and the old white truck, and one was registered to Mr. Black and the other was registered to Mr. McDonald.

Finally, Detective Bacon asserted that he "knows through training and experience, subjects who deal in illegal controlled substances often use different mailing addresses and lie to law enforcement about their home address to conceal their illegal activities."

The trial court found that when Detective Bacon served the search warrant on the Acres Drive house, the door was opened by defendant and Mr. McDonald. Once inside, the detectives found various amounts of marijuana in the living room, and a search of defendant's room yielded a shotgun. The detectives also located a wall safe behind a tapestry in defendant's room, although defendant did not know the safe was there and could not provide the combination. The detectives eventually opened the safe and found syringes filled with a liquid substance believed to be psilocybin mushrooms.

The trial court further found that prior to applying for the search warrant, Detective Bacon had not conducted surveillance or an investigation of the Acres Drive residence to determine whether probable cause existed to believe that evidence of violations of the North Carolina Controlled Substances Act had occurred or were occurring there. Also, prior to submitting the search warrant application, Detective Bacon "had not received any information that there would be controlled substances found, kept, sold, manufactured or otherwise located at the residence of 4844 College Acres Drive [in] Wilmington, NC." Further, Detective Bacon's supporting affidavit attached to the warrant application contained no information that the Acres Drive residence would contain evidence constituting a violation of the North Carolina Controlled Substances Act, and, consequently, "did not contain any nexus between the controlled substances sought to be found and the residence located at 4844 Acres Drive[,] Wilmington, NC."

Based on these findings, the trial court made the following conclusions of law. Because, at the time he applied for the search warrant, Detective Bacon "did not have any information that controlled substances were likely to be found on the premises[,]" and he "did not allege in his affidavit . . . that anyone had seen controlled substances at the residence or that any controlled substances were being sold, kept or manufactured" at the Acres Drive residence, the facts alleged in Detective Bacon's affidavit were insufficient, under the totality of the circumstances, to support a finding of probable cause. Therefore, the trial court concluded, the evidence taken from defendant "was in violation of her rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and the parallel provisions of the Constitution of the State of North Carolina. In addition, the evidence was obtained in substantial violation of the provisions of Chapter 15A of the North Carolina General Statutes."

Based on these conclusions of law, the trial court ordered the evidence obtained against defendant from the Acres Drive residence to be suppressed. On 14 October 2014, the State gave notice of appeal from the order granting defendant's motion to suppress, certifying that the appeal was not taken for the purpose of delay pursuant to N.C. Gen. Stat. § 15A-979(c) (2013).

Standard of Review

In arguing that the trial court should have denied the motion to suppress, the State argues that Detective Bacon's affidavit alleged sufficient

facts to support the existence of probable cause to search the Acres Drive residence.

> Our standard of review of an order granting or denying a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. [A] trial court's conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*. [T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.

State v. Hudgins, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (internal citations and quotation marks omitted).

Discussion

The State first challenges the trial court's findings of fact that Detective Bacon did not conduct surveillance on the Acres Drive residence to determine if there was probable cause to search that location; that Detective Bacon had not received any information that there would be controlled substances at the Acres Drive residence; and that Detective Bacon's affidavit did not have any information that the Acres Drive residence would contain evidence constituting a violation of the North Carolina Controlled Substances Act. These findings of fact simply identify what the trial court deemed to be lacking in Detective Bacon's affidavit. They show the trial court's reasoning in determining -- as set out in the final finding of fact challenged by the State -- that Detective Bacon's affidavit "did not contain any nexus between the controlled substances sought to be found [at] the residence located at 4844 Acres Drive[,] Wilmington, NC."

We agree with the State that this last finding is more properly characterized as a conclusion of law. *See State v. Oates*, 224 N.C. App. 634, 644, 736 S.E.2d 228, 235 (2012) (treating trial court's determination of existence of "sufficient nexus between the objects sought and the place to be searched" as conclusion of law), *appeal dismissed*, 366 N.C. 585, 740 S.E.2d 473 (2013). However, the trial court's mislabeling of that conclusion of law as a finding of fact is immaterial to the question whether the trial court properly concluded that Detective Bacon's affidavit was insufficient to support issuance of the search warrant.

To perform a search in North Carolina, under article I, section 20 of the State Constitution, an officer must have " 'probable cause to believe that a crime has been [or is being] committed and that evidence of it can likely be found at the described locus *at the time of the search*.' " *State v. Smith*, 124 N.C. App. 565, 571, 478 S.E.2d 237, 241 (1996) (quoting *United States v. Ricciardelli*, 998 F.2d, 8, 10 (1st Cir. 1993)). Additionally, a search warrant must comply with N.C. Gen. Stat. § 15A-244. *State v. Hyleman*, 324 N.C. 506, 509, 379 S.E.2d 830, 832 (1989).

That statute provides,

> Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:
>
> (1) The name and title of the applicant; and
>
> (2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. *The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched;* and
>
> (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

N.C. Gen. Stat. § 15A-244 (emphasis added).

Our Supreme Court has explained that "probable cause cannot be shown by conclusory affidavits stating only the belief of the affiant or an informer that probable cause exists to issue the warrant. Recital of some of the circumstances underlying this belief is essential." *Hyleman*, 324 N.C. at 509, 379 S.E.2d at 832 (internal citation omitted). While our case law supports the premise that " 'first-hand information of contraband seen in one location will sustain a finding to search a second location[,]' " *Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235 (quoting *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 357 (1990)), " 'evidence obtained in one location cannot provide probable cause for the search of another location when the evidence offered does not implicate the premises to

be searched[,]' " *id.* (quoting *State v. Washburn*, 201 N.C. App. 93, 101, 685 S.E.2d 555, 561 (2009)).

This Court has held, in applying N.C. Gen. Stat. § 15A-244(3), that "[t]he affidavits must establish a nexus between the objects sought and the place to be searched." *McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357. "Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place." *Id.* A search warrant applicant need not have direct information connecting a particular place to be searched with fruits of a crime. *Id.* However, " '[d]ifficult problems can arise . . . where such direct information . . . is not available and it must be determined what reasonable inferences may be entertained concerning the likely location of those items.' " *Id.* (quoting Wayne R. LaFave, *Search and Seizure*, § 3.7(d) at 103 (2d ed. 1987)).

In interpreting the requirement of a "nexus," our Supreme Court, in *State v. Campbell*, 282 N.C. 125, 130, 191 S.E.2d 752, 756 (1972), held that an affidavit was insufficient to establish probable cause when the affidavit stated only that (1) the officer had arrest warrants charging the defendant and two other residents of the premises with the sale and possession of narcotics; (2) the three residents had all sold narcotics to an SBI agent and, based on the officer's personal knowledge and interviews with informants and local police officers, were actively involved in drug sales, and (3) the defendant leased the premises. The Court observed that "[n]owhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched." *Id.* at 131, 191 S.E.2d at 757. Further, "[n]owhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling." *Id.* The Court concluded that an inference that narcotic drugs were illegally possessed on the premises at issue did "not reasonably arise from the facts alleged." *Id.*

This case is materially indistinguishable from *Campbell*. Nothing in Detective Bacon's application and affidavit indicated that he observed or received information that drugs were possessed or sold at the Acres Drive residence. The State argues, however, that such an inference arose as a natural and reasonable inference from circumstances indicating that Mr. Black and Mr. Whitehead were engaged in drug trafficking. The State points to Detective Bacon's allegations in the warrant affidavit that he learned Mr. Black and Mr. Whitehead had been previously convicted of crimes involving marijuana and that Agent Cherry found marijuana,

cash, and a cell phone with messages consistent with sales of marijuana in Mr. Whitehead's possession during the traffic stop. These facts were relevant to whether Mr. Black and Mr. Whitehead were engaged in drug dealing, but the Supreme Court in *Campbell* held that information that a defendant was an active drug dealer was not sufficient, without more, to support a search of the dealer's residence.

Indeed, our Supreme Court recently described *Campbell* as controlling when "the affidavit . . . included no information indicating that drugs had been possessed in or sold from the dwelling to be searched." *State v. McKinney*, 368 N.C. 161, 166, 775 S.E.2d 821, 826 (2015). By contrast, in *McKinney*, the affidavit was found sufficient when it alleged that (1) a citizen complained about heavy traffic in and out of the defendant's apartment with visitors making abbreviated stays; (2) officers conducted surveillance of the apartment and saw a Pontiac arrive and the driver enter the apartment, emerge six minutes later, and drive off; (3) officers stopped the Pontiac for a traffic violation and the driver had $4,258.00 in cash and a gallon-size plastic bag containing marijuana remnants; and (4) the driver's cell phone had a series of text messages sent and received just before the driver's arrival at the defendant's apartment, suggesting that the driver had just completed a delivery of drugs to the apartment. *Id.* at 162, 166, 775 S.E.2d at 823, 825. The Court emphasized: "[T]he information available to the officer and provided to the magistrate at the time the search warrant was requested and issued sufficiently indicated that the transaction adumbrated in the texts was consummated moments later *in defendant's apartment*. Thus, this case is distinguishable from *Campbell* . . . ." *Id.* at 166, 775 S.E.2d at 825 (emphasis added).

This case resembles *Campbell* and not *McKinney*. The affidavit here contained no allegations evidencing the probable presence of drugs at the Acres Drive house. No one observed any activity suggestive of drug trafficking or usage at the house, and nothing connected the Acres Drive house with the cash, marijuana, and texts suggestive of drug sales uncovered during the traffic stop. The State has cited no opinions of this Court or the Supreme Court indicating that an affidavit comparable to the one in this case is sufficient to support a search warrant. While the State points to the allegation that Mr. Black and Mr. Whitehead lied about their residence, that lie, while perhaps suggestive that drugs might be present at their actual residence, does not make the drugs' presence probable, especially given the affidavit's allegation that Mr. Whitehead claimed he kept his drugs in his vehicle.

Unlike this case, in the cases relied upon by the State – *State v. Sinapi*, 359 N.C. 394, 610 S.E.2d 362 (2005), *State v. Riggs*, 328 N.C.

213, 400 S.E.2d 429 (1991), *Oates*, *State v. Crawford*, 104 N.C. App. 591, 410 S.E.2d 499 (1991), and *State v. Byrd*, 60 N.C. App. 740, 300 S.E.2d 16 (1983) -- the warrants authorizing searches of the suspect residences were upheld because officers had discovered some specific and material connection between drug activity and the place to be searched. *See Sinapi*, 359 N.C. at 395, 610 S.E.2d at 363 (affiant performed inventory of trash bag located on curb of suspect residence that revealed eight marijuana plants); *Riggs*, 328 N.C. at 215-16, 400 S.E.2d at 431 (affiant successfully coordinated controlled purchase of drugs using confidential source at suspect residence); *Oates*, 224 N.C. App. at 645, 736 S.E.2d at 236 (affiant had knowledge that defendant was traveling from New York to "a specific location -- . . . '451 McKoy Street in Clinton, North Carolina' -- . . . for the purpose of selling drugs"); *Crawford*, 104 N.C. App. at 596, 410 S.E.2d at 501 (affidavit indicated that while suspect residence was under surveillance, it had "traffic pattern . . . with visitors only staying in the apartment for about one minute" and also during that time "five persons were arrested for possession within an hour [of each other] . . . 'as they exited [the suspect] residence' "); *Byrd*, 60 N.C. App. at 744, 300 S.E.2d at 18-19 (affiant successfully conducted controlled purchase of drugs using informant at suspect residence).

In *State v. Mavrogianis*, 57 N.C. App. 178, 291 S.E.2d 163 (1982), also cited by the State, a connection between drugs and a student's college dormitory room gave rise to the inference that evidence of drug-related activity would be found in the student's car that was also parked on campus. In that case, the only circumstances supporting the issuance of a search warrant were that "[t]he defendant was a student living on campus [at North Carolina State University]. He possessed, actually or constructively, a dormitory room and an automobile. There was reliable information that he was dealing in marijuana; that marijuana was seen in his room and on his person." *Id.* at 181, 291 S.E.2d at 164.

This Court found that these circumstances supported probable cause to search the defendant's automobile for drugs, even though the officers did not have any direct information that drugs were located in the vehicle, because "[a] man of reasonable caution would be warranted in believing that a university student living on campus, who possessed and dealt in drugs, had drugs in both his dormitory room and his automobile parked on campus, even though the drug was seen only in his dormitory room." *Id.* In reaching this conclusion, this Court highlighted the special circumstance of selling drugs out of a college dormitory room: "A college student living on campus and dealing in drugs would probably find the operation of the illicit trading within the confines of a dormitory room

. . . to be fraught with the danger of discovery and apprehension. The student's automobile would be a convenient instrumentality for receiving, storing, and delivering his illicit merchandise." *Id.*

In other words, the fact that the defendant, a suspected drug dealer, had a reduced expectation of privacy in his dorm room, provided a fair probability that drugs would be found in the defendant's automobile, the only other place that the student had available to store drugs and the only place over which he had complete control. Here, on the other hand, the circumstances provide no particular and material connection, or inference of such a connection, between drug trafficking and the Acres Drive residence. Unlike the unique circumstances in *Mavrogianis* of a drug-dealing student, the State has made no showing that Mr. Black and Mr. Whitehead were more likely to store their drugs in the Acres Drive residence than somewhere else. The evidence of drug trafficking found at the traffic stop, and the totality of other circumstances, do not directly implicate the Acres Drive residence as a repository for evidence related to drug trafficking, any more than did the circumstances set out in *Campbell*.

Although the State also cites numerous federal decisions in support of its argument, *see*, *e.g.*, *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986) ("In the case of drug dealers, evidence is likely to be found where the dealers live."), those cases, no matter how persuasive, cannot override controlling North Carolina authority. To the extent that those federal cases conflict with our case law, we are bound by decisions of our Supreme Court. *See Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992) ("[T]his Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions[.]"), *rev'd on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993).

Because we cannot meaningfully distinguish *Campbell* and because nothing in *McKinney*, the Supreme Court's most recent ruling, undermines the controlling nature of *Campbell*, we are bound by that decision, especially in the absence of the State citing any controlling decision with comparable circumstances. Based on *Campbell*, we hold that the trial court did not err in concluding that the allegations in the affidavit indicating that Mr. Black and Mr. Whitehead were involved in drug dealing and engaged in behaviors common to drug dealers were not sufficient to implicate any particular place where Mr. Black and Mr. Whitehead might have been engaged in drug-related activity. Because the affidavit filed by Detective Bacon did not reveal a sufficient nexus between Mr. Black's and Mr. Whitehead's drug-related activity and the Acres Drive residence, we affirm the trial court's order granting defendant's motion to suppress.

AFFIRMED.

Judge ELMORE concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

Because I believe that there was a substantial basis for the magistrate to conclude that probable cause existed to search Defendant's residence, I respectfully dissent.

In *State v. McKinney*, 368 N.C. 161, 775 S.E.2d 821 (2015), our Supreme Court restated some basic principles regarding our role in reviewing the sufficiency of an officer's supporting affidavit to justify the issuance of a search warrant.

> The affidavit must detail "the facts and circumstances establishing probable cause to believe that items are in the places . . . to be searched." *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824 (citing N.C. Gen. Stat. § 15A-244(3) (2013)).
>
> "A magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a 'fair probability' that contraband will be found in the place to be searched." *Id.* (internal marks omitted).
>
> "This standard for determining probable cause is flexible" and permits "the magistrate to draw 'reasonable inferences' from the evidence in the affidavit[.]" *Id.*
>
> "Probable cause requires not certainty, but only *a probability or substantial chance* of criminal activity." *Id.* at 165, 775 S.E.2d at 825 (emphasis in original) (internal marks omitted).
>
> "The magistrate's determination of probable cause is given 'great deference' and after-the-fact scrutiny should not take the form of a *de novo* review. Instead, a reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for concluding that probable cause existed." *Id.* (internal marks omitted).

Based on these principles, I agree with the State that the trial court erred in granting Defendant's motion to suppress.

Defendant lives in a residence in Wilmington with her boyfriend (Mr. Black) and *his* half-brother (Mr. Whitehead). Defendant was arrested for drug-related offenses after officers obtained a warrant to search the Wilmington residence. The officers obtained the search warrant after discovering drugs and evidence of drug dealing in a car driven by Mr. Black and in which Mr. Whitehead was the sole passenger.

The issue in the case is whether the facts in the officer's affidavit were sufficient to support the magistrate's determination that there was a fair probability that officers would find illegal drugs *in the Wilmington residence*. Our Supreme Court held that an affidavit for a warrant to search a defendant's residence was "fatally defective" where it merely stated that the defendant was a known drug dealer and attempted to sell narcotics to an undercover officer and otherwise contained no facts or circumstances which "implicate[d] the premises to be searched." *State v. Campbell*, 282 N.C. 125, 131, 191 S.E.2d 752, 756-57 (1972).

In a decision this past summer, our Supreme Court reached a contrary result, sustaining a warrant to search the defendant's apartment where the supporting affidavit stated that a visitor to the apartment was pulled over immediately after his visit to the apartment and drugs and other evidence of drug dealing were found in the visitor's car. *See McKinney*, 368 N.C. at 162, 775 S.E.2d at 823. The Court stated that the affidavit differed from the affidavit at issue in *Campbell* because it contained facts which created a "nexus between [the visitor's] vehicle and [the] defendant's apartment[.]" *Id.* at 166, 775 S.E.2d at 825. Specifically, the affidavit stated that the visitor's cell phone contained a text exchange which occurred shortly before the visitor arrived at the defendant's apartment and which suggested the "preparation for and negotiation of a drug transaction[.]" *Id.* The Court held that the case was distinguishable from its 1972 *Campbell* decision because the affidavit in *Campbell* "included no information indicating that drugs had been possessed in or sold from the dwelling to be searched." *Id.* at 166, 775 S.E.2d at 826.

I respectfully disagree with the majority that the affidavit in the present case "is materially indistinguishable from *Campbell*." It is true that the affidavit, here, did not contain the same *type* of information in the supporting affidavit in *McKinney*, that is, information showing that the vehicle where the drugs were found had just left the premises to be searched. However, unlike in *Campbell*, the officer's affidavit here *did* contain other information which implicated the Wilmington residence, namely, that the occupants of the vehicle where illegal drugs were found repeatedly lied about where they lived. For instance, the officer testified that *prior* to the drugs being found in their vehicle, the brothers

lied to the officers about their place of residence, stating that they lived on Twin Oaks Drive in Castle Hayne, (located some miles north of their actual residence in Wilmington). Also, *after* officers found 8.1 grams of marijuana, a large amount of cash, cell phone text messages indicative of a drug transaction, and other evidence of drug dealing, the brothers repeated the lie, stating that they kept the drugs in their car so that their mother, who also lived at the Castle Hayne residence, would not know about their involvement in illegal drugs. Later, the mother informed an investigating officer that her sons did not live in Castle Hayne but that her sons had lived at the Wilmington residence for three years and only used the Castle Hayne residence to receive mail.

In conclusion, the affidavit in the present case did not contain information that anyone had seen illegal drugs at the Wilmington residence or that anyone found with illegal drugs had just left the Wilmington residence. I believe, though, that the information did, otherwise, implicate the Wilmington residence; namely, the repeated lies the brothers told the officers about where they lived. Though this information did not establish *with certainty* that drugs would be found at the Wilmington residence, it contained facts and circumstances from which a magistrate, exercising common sense, could conclude that there was a "probability or substantial chance" that drugs or evidence of other criminal activity would be discovered at the Wilmington residence. Accordingly, my vote would be to reverse the trial court's order suppressing the evidence discovered during the search of the Wilmington residence. *See*, *e.g.*, *People v. Nunez*, 242 Mich. App. 610, 614, 619 N.W.2d 550, 552 (2000) (Michigan court holding that the "[d]efendant's denial that he lived at [a certain] apartment, combined with the reasonable inference that drug traffickers often keep evidence of illicit activity in their homes, provided a substantial basis for the magistrate's finding of probable cause to search the apartment").

STATE v. CHAPMAN

[244 N.C. App. 699 (2016)]

STATE OF NORTH CAROLINA
v.
THOMAS STEVEN CHAPMAN
AND
STATE OF NORTH CAROLINA
v.
STEPHANIE MARIE THIBAULT

No. COA15-439

Filed 5 January 2016

1. Evidence—hearsay—air pistol—statement from an owner's manual—not hearsay—used to explain test fire

There was no error, plain or otherwise, in a prosecution for robbery with a dangerous weapon involving an air pistol where a state's witness read a statement from the owner's manual for the purpose of explaining his conduct when performing a test fire rather for the truth of the dangerousness of the weapon.

2. Constitutional Law—effective assistance of counsel—no objection at trial—testimony not hearsay

Defendant's trial counsel in a prosecution for robbery with a dangerous weapon was not deficient in not objecting to a recitation by a detective of a statement in the owner's manual of the pistol. The statement was admitted for nonhearsay purposes and the Confrontation Clause was not violated. As a result, an objection in the trial court on hearsay grounds or Confrontation grounds would have been meritless.

3. Jury—request to view evidence—judge's failure to exercise discretion

In a prosecution for robbery with a dangerous weapon, the trial court did not exercise its discretion by responding to the jury's request to review testimony by saying that the transcript was not available. However, there was not prejudice; there was other evidence to the same purpose.

4. Appeal and Error—preservation of issues—argument at trial and on appeal—different

In a prosecution for robbery with a dangerous weapon, the merits of defendant's argument on appeal were not considered where defendant's motion to dismiss at trial was on a different ground from the argument she sought to make on appeal.

5. Evidence—experiment—test firing of air pistol—admissible

In a prosecution for robbery with a dangerous weapon, a video of a detective test firing the air pistol used in the robbery was properly admitted. In his experiment, Detective Sergeant Cranford utilized the same weapon brandished during the robbery and fired it at a target from several close-range positions that were comparable to the various distances from which the air pistol had been pointed. Detective Sergeant Cranford noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect that greater air pressure would have on the force of the projectile and its impact on a target.

6. Appeal and Error—preservation of issues

In a prosecution for robbery with a dangerous weapon, the merits of defendant's argument about a detective reading a warning statement in the manual of the air pistol used in the robbery were not considered on appeal. Defendant did not make the same arguments at trial and on appeal.

Appeal by defendants from judgments entered 21 October 2014 by Judge Lynn S. Gullett in Union County Superior Court. Heard in the Court of Appeals 21 September 2015.

Roy Cooper, Attorney General, by Alexandra M. Hightower, Assistant Attorney General, and Oliver G. Wheeler IV, Assistant Attorney General, for the State.

Bryan Gates for defendant-appellant Thomas Steven Chapman.

Parish & Cooke, by James R. Parish, for defendant-appellant Stephanie Marie Thibault.

DAVIS, Judge.

Thomas Steven Chapman ("Chapman") and Stephanie Marie Thibault ("Thibault") (collectively "Defendants") appeal from the trial court's judgments entered on the jury's verdicts finding each of them guilty of robbery with a dangerous weapon. After careful review, we conclude that Defendants received a fair trial free from prejudicial error.

Factual Background

The State's evidence at trial tended to establish the following facts: On 14 April 2013, Colin Adkins ("Adkins") was working the night shift as a store clerk at the Market Express convenience store in Stallings, North Carolina. At approximately 10:00 p.m. that evening, a man entered the store wearing a black hooded sweatshirt "with a graphic across the front," jeans, tennis shoes, and a blue bandana pulled up over his face and nose. The man pulled out a black and silver firearm that "looked about the size of a thirty-eight special" and told Adkins to give him "everything in the register." Initially, the man pointed the gun at Adkins' head and upper body. He then moved behind the counter and pressed the gun into Adkins' ribs. Adkins handed approximately $1,000.00 from one of the store's cash registers to the man. Although the bandana was covering most of the man's face, Adkins could see that he was "Caucasian." Adkins also estimated that the man was about six feet tall.

The Market Express is connected to a McDonald's restaurant, and Deputy Ian Gross ("Deputy Gross"), a deputy sheriff with the Union County Sheriff's Office, was off-duty and waiting in the drive-thru line of the McDonald's at the time of the robbery. As he was placing his order, Deputy Gross observed a white male in a black hoodie run out of the Market Express. Upon inquiring what was happening, Deputy Gross was informed that the Market Express had just been robbed.

Deputy Gross turned his vehicle around and drove across the street in the direction the man had been running. He lost sight of the man for approximately 15 seconds but then noticed a single car in the parking lot of the Grand Asian Market, which was closed at the time. Deputy Gross decided to pursue the vehicle, a teal Nissan Maxima, and followed it for approximately two miles, noting the Maxima's license plate number in the process. As he was following the Maxima, he observed that the vehicle's occupants "appeared to be a female driver and a male passenger."

Deputy Gross returned to the McDonald's to meet the law enforcement officers who had arrived on the scene and report the license plate number of the Maxima. Officers performed a computer check on the license plate number and determined that the listed address for the registered owner of the vehicle was located in the Brandon Oaks neighborhood in Indian Trail, North Carolina. Officers drove to this address and found a teal Nissan Maxima matching the description and license plate number Deputy Gross had provided. The hood of the vehicle was still warm, and the officers saw a black hooded sweatshirt inside the car.

Deputy Michael Crenshaw ("Deputy Crenshaw") with the Union County Sheriff's Office approached the front door of the residence located at this address. Before he had the opportunity to knock on the door, a white female — later identified as Thibault — exited the home and walked toward him. Deputy Crenshaw asked Thibault who was inside the residence, and she replied that her mother, sister, and grandmother were in the home. When Deputy Crenshaw "asked her specifically if there were . . . any males inside the home," Thibault responded in the negative. However, as Deputy Crenshaw was speaking with Thibault, he observed a white male who appeared to be about six feet tall hiding behind the front door.

Deputy Crenshaw drew his weapon and ordered the male, who was later identified as Chapman, to exit the home. The other officer on the scene, Corporal J.W. Weatherman ("Corporal Weatherman") of the Stallings Police Department, conducted a pat-down search of Chapman and discovered a large amount of cash on his person.

Law enforcement officers obtained a search warrant for the home and discovered in Thibault's bedroom a pair of jeans, a blue bandana, a black and silver Colt Defender Air Pistol, and a wallet, which contained a North Carolina-issued identification card and driver's license in Chapman's name. Detective Sergeant R.H. Cranford ("Detective Sergeant Cranford") recovered the air pistol from the bedroom and "render[ed] the weapon safe" by removing the air cartridge and allowing the pressurized gas to escape the cartridge. As Detective Sergeant Cranford unscrewed the air cartridge, he could hear the sound of gas leaving the canister. After discovering the above-described items in Thibault's room, Detective Sergeant Cranford arrested Defendants.

On 2 September 2014, a grand jury returned bills of indictment charging Defendants with robbery with a dangerous weapon. Defendants' cases were joined for trial, and a jury trial was held in Union County Superior Court before the Honorable Lynn S. Gullett beginning on 13 October 2014. As a part of its case against Defendants, the State introduced a videotape of a test fire Detective Sergeant Cranford had conducted utilizing the air pistol recovered from Thibault's bedroom. The video showed Detective Sergeant Cranford firing the air pistol at a sheet of plywood from various distances.

Following the State's case-in-chief, Thibault elected to testify in her own defense. She testified that she had known Chapman since 2007 or 2008 and that he would stay at her home "a couple times a week." She

stated that on the night of 14 April 2013, Chapman came to her house at approximately 7:00 p.m. Thibault offered him leftover spaghetti, but Chapman told her he would "rather get some McDonald's" and that he needed to go out and get cigarettes anyway.

Thibault testified that she accompanied Chapman as he first drove to the Market Express to buy cigarettes. Chapman entered the store by himself and stood in line to purchase the cigarettes. She explained that he then left the store, returned to the car, and pulled into the drive-thru lane for the McDonald's. Thibault testified that they then returned to her house at which point she took a shower, and shortly thereafter the police arrived. Thibault stated that she had not known that the Market Express was robbed, had no reason to believe that Chapman was involved in the robbery, did not drive the get-away car for the robbery, and was not present in the Grand Asian Market parking lot that evening. Thibault also testified that she and her nephew had fired the air pistol at targets in the yard earlier in the day on 14 April 2013 and that the BBs they fired barely made it to the target because the air canister in the air pistol was low and the pressure was weak.

The jury returned verdicts on 21 October 2014 finding both Defendants guilty of robbery with a dangerous weapon. The trial court determined that Chapman had a prior record level of two and sentenced him to a presumptive-range term of 73 to 100 months imprisonment. The court determined that Thibault's prior record level was one and sentenced her to a presumptive-range term of 64 to 89 months imprisonment. Defendants gave oral notice of appeal in open court.

Analysis

On appeal, Defendants both contend that the trial court (1) plainly erred by admitting into evidence a statement from the owner's manual for a Colt Defender CO2 Air Pistol because the statement constituted inadmissible hearsay; and (2) erred in failing to exercise its discretion with regard to the jury's request to review certain evidence in the course of its deliberations. In addition, Thibault separately argues that (1) the trial court erred in denying her motion to dismiss; (2) the videotape showing several test fires of the air pistol was improperly admitted; (3) she received ineffective assistance of counsel by virtue of her attorney's failure to object to the admission of the statement from the owner's manual for the air pistol; and (4) the trial court erred in allowing the warning label for the air pistol to be read into evidence. We address each of these arguments in turn.

I. Admission of Statement from Owner's Manual

[1] Defendants first contend that the trial court erred in allowing Detective Sergeant Cranford to read a statement from the owner's operation manual for a Colt Defender Air Pistol to the jury because this evidence constituted inadmissible hearsay and violated the Confrontation Clause. Defendants concede that they failed to object to this evidence at trial and are therefore limited to plain error review.

On plain error review, Defendants bear the burden of showing that a fundamental error occurred at trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* (citation and quotation marks omitted).

It is a well-settled principle that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and that "whenever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Braxton*, 352 N.C. 158, 190, 531 S.E.2d 428, 447 (2000) (citations, quotation marks, and alteration omitted), *cert. denied*, 531 U.S. 1130, 148 L.Ed.2d 797 (2001). "A statement which explains a person's subsequent conduct is an example of such admissible nonhearsay." *State v. Canady*, 355 N.C. 242, 248, 559 S.E.2d 762, 765 (2002).

Here, Detective Sergeant Cranford was asked a series of questions regarding his performance of a test fire using the air pistol recovered from Thibault's bedroom. He testified that he obtained the manual for the Colt Defender Air Pistol "[t]o understand the safety and the operation for that particular model of air pistol." Detective Sergeant Cranford and the prosecutor then had the following exchange:

> [Prosecutor]: Okay. Can you explain the information that you relied upon before conducting your test, and read that to the jury.
>
> [Detective Sergeant Cranford]: According to the owner's operation manual, it's a 1.77 caliber, 4.5 millimeter CO2 powered, shoot still BB's only, velocity of 440 feet per second, danger distance of 325 yards.

Detective Sergeant Cranford proceeded to explain that he had conducted the test fire by firing the air pistol four times from various

distances at a plywood target that was one-fourth of an inch thick. He noted that the information contained in the manual led him to shoot the air pistol at a slight angle when he was in close range of the target "to eliminate possible ricochet" and avoid injury to himself.

Defendants contend that Detective Sergeant Cranford's recitation from the manual of the air pistol's velocity and danger distance was offered to prove that the gun used to commit the robbery was capable of firing projectiles at a speed of 440 feet per second and was dangerous from a distance of 325 yards away such that it constituted a dangerous weapon for purposes of the criminal offense for which they were charged. Based on our review of the trial transcript, however, we conclude that Detective Sergeant Cranford's testimony reciting the above-quoted statement from the owner's manual concerning the danger distance and velocity of the air pistol was offered for a proper nonhearsay purpose — that is, to explain his conduct when performing the test fire — rather than for the purpose of providing the velocity and danger distance of the air pistol to demonstrate that it was, in fact, a dangerous weapon. Therefore, the admission of this evidence was not error at all much less plain error. *See State v. Wade*, 213 N.C. App. 481, 493, 714 S.E.2d 451, 459 (2011) (explaining that before trial court's action "can be plain error, it must be error"), *disc. review denied*, 366 N.C. 228, 726 S.E.2d 181 (2012).

[2] In a related argument, Thibault contends that her trial counsel provided ineffective assistance by failing to object to the admission of this testimony. In order to successfully establish an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citation and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.E.2d 116 (2006). Thibault cannot make this showing here.

As we previously explained, the testimony at issue was offered for a nonhearsay purpose. As a result, an objection in the trial court on hearsay grounds would have been meritless. Moreover, it is also well settled that nonhearsay statements do not offend the Confrontation Clause. *See State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (explaining that "admission of nonhearsay raises no Confrontation Clause concerns"

(citation and quotation marks omitted)), *cert. denied*, 537 U.S. 896, 154 L.Ed.2d 165 (2002). Because any objection to Detective Sergeant Cranford's recitation of the statement from the manual on either hearsay or Confrontation Clause grounds would have lacked merit, Thibault's trial counsel was not deficient by failing to raise these objections. *See Phillips*, 365 N.C. App. at 131, 711 S.E.2d at 143 (holding that trial counsel's "failure to object to [a] long-standing evidentiary rule was not objectively unreasonable" and rejecting proposition "that, to avoid being ineffective, defense counsel is required to argue a position untenable under existing North Carolina law").

II. Exercise of Discretion Regarding Jury's Request to Review Testimony

[3] Defendants' next argument is that the trial court erred by failing to exercise its discretion in connection with the jury's request to review certain testimony and that this error was prejudicial. For the reasons set out below, we hold that the trial court did so err but that Defendants have failed to show the prejudice necessary to receive a new trial as a result of this error.

Pursuant to N.C. Gen. Stat. § 15A-1233(a),

> [i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2013). This statutory requirement codifies the well-established common law rule that "the decision whether to grant or refuse a request by the jury for a restatement of the evidence after jury deliberations have begun lies within the discretion of the trial court." *State v. Johnson*, 346 N.C. 119, 124, 484 S.E.2d 372, 375 (1997).

Our appellate courts have held on a number of occasions that when a trial court "denies a request by the jury to review a transcript based upon its erroneous belief that it has no power or discretion to grant the request, such a denial is error." *State v. White*, 163 N.C. App. 765, 769, 594 S.E.2d 450, 452, *disc. review denied*, 358 N.C. 738, 602 S.E.2d 681 (2004); *see also State v. Starr*, 365 N.C. 314, 318, 718 S.E.2d 362, 366

(2011) (noting "the well-settled rule that a trial court does not exercise its discretion when, as evidenced by its response, it believes it cannot comply with the jury's transcript request").

In this case, during its deliberations the jury sent a note to the trial court requesting (1) Deputy Gross' statement from the night of the incident; (2) Deputy Gross statement resulting from his meeting with an assistant district attorney; and (3) a transcript of Deputy Gross' testimony at trial. The trial court brought the jury back into the courtroom and responded to its requests as follows:

> Yes, absolutely, we will send you back the victim witness statement from Deputy Ian Gross the night of the incident. We'll send that back to the jury room to you in just a few minutes.
>
> The other two are problematic. First of all, I need to explain to you that there is not an actual witness statement that was made from Ian Gross to the District Attorney. And there is no such item in evidence so that is not available and there isn't one. So we can't provide that for you.
>
> Secondly, you have requested the transcript of Deputy Gross's testimony from the witness stand. Transcripts aren't automatically generated. That's something that takes several weeks sometimes for a court reporter to do. We can't provide that for you because it is not available at this time.
>
> And let me remind you that it is your duty to recall the testimony to the best of your ability as the jurors in this matter. But we can certainly and will be glad to provide to you the statement of Deputy Gross the night of the incident because that's all we have available from what you are requesting. So thank you and I'll send you back to the jury room. We'll send that back to you momentarily through the bailiff.

Defendants assert that the trial court's response to the jury's note asking to examine Deputy Gross' trial testimony shows that it did not exercise its discretion in denying that particular request. We agree.

The trial court's explanation that it was refusing the jury's request because a transcript was not currently available is indistinguishable from similar responses to jury requests that have been found by our Supreme

Court to demonstrate a failure to exercise discretion. *See Johnson*, 346 N.C. at 123-24, 484 S.E.2d at 375-76 (holding that trial court's statement to jurors that it "need[ed] to instruct you that we will not be able to replay or review the testimony for you . . . . must be interpreted as a statement that the trial court believed it did not have discretion to consider the request" and thus constituted a failure to exercise discretion); *State v. Ashe*, 314 N.C. 28, 35, 331 S.E.2d 652, 656-57 (1985) (explaining that trial court's statement to foreperson that "[t]here is no transcript at this point. You and the other jurors will have to take your recollection of the evidence" established that "the trial court erred . . . in not exercising its discretion in denying the request").

Here, because the trial court similarly erred by not exercising its discretion in denying the jury's request to review Deputy Gross' testimony, "we must now determine whether the trial court's failure to exercise its discretion resulted in prejudice to [Defendants]." *State v. Long*, 196 N.C. App. 22, 40, 674 S.E.2d 696, 707 (2009). A review of the pertinent caselaw reveals that a trial court's error in failing to exercise its discretion in denying a jury's request to review testimony constitutes prejudicial error when the requested testimony (1) is "material to the determination of defendant's guilt or innocence"; and (2) involves "issues of some confusion or contradiction" such that the jury would want to review this evidence to fully understand it. *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377 (citation and quotation marks omitted).

In *Johnson*, the jury asked to review the testimony of the five-year-old child victim and her aunt in a case involving charges of statutory rape and taking indecent liberties with a child. *Id.* at 123, 484 S.E.2d at 375. The trial court denied the jury's request based on its mistaken belief that it did not have the authority to allow the jury to review the testimony. *Id.* The jury then returned to its deliberations and found the defendant guilty of both charges. *Id.* The defendant appealed, and our Supreme Court concluded that the trial court's error was prejudicial to the defendant, holding as follows:

> Having determined that the trial court erred in not exercising its discretion in determining whether to permit the jury to review some of the testimony, we now consider whether these errors were so prejudicial as to entitle defendant to a new trial. We conclude they were. The evidence requested for review by the jury in this case was clearly material to the determination of defendant's guilt or innocence. The testimonies of both J, the victim, and her Aunt Barbara were central to this case, and both

> testimonies involved issues of some confusion and contradiction. The medical evidence was inconclusive as to whether J had been raped, and there was no medical proof linking the defendant to the alleged crimes. Further, there were no eyewitnesses to the alleged crimes and no witnesses who heard or saw anything unusual. Thus, J's testimony was crucial because it was the only evidence directly linking defendant to the alleged crimes. As such, J's credibility was the key to the case. J's testimony was likely difficult for the jury to follow or assess due to its often confusing and self-contradictory nature. Barbara's testimony was also important because she was the first person J told about the alleged incident, and she also had information about the incident with J's cousin Jerome, about which J and [another child] testified. Thus, whether the jury fully understood the witnesses' testimony was material to the determination of defendant's guilt or innocence. Defendant was at least entitled to have the jury's request resolved as a discretionary matter, and it was prejudicial error for the trial judge to refuse to do so.

Id. at 126, 484 S.E.2d at 377 (internal citations, quotation marks, and brackets omitted).

Likewise in *Long*, this Court held that the trial court's failure to exercise its discretion with regard to the jury's similar request rose to the level of prejudicial error. *Long*, 196 N.C. App. at 40-41, 674 S.E.2d at 707. In that case, the jury sought to review a transcript of the testimony of the victim and the defendant in a child rape case. *Id.* at 40, 674 S.E.2d at 707. We explained that the evidence requested was material to a determination of guilt and that the two testimonies were "[c]ertainly . . . contradicting as [the victim] testified she was raped and that defendant committed other sexual offenses against her, while defendant testified he had never touched her inappropriately." *Id.* at 40-41, 674 S.E.2d at 707 (internal citation, quotation marks, and brackets omitted). We further noted that the fact that the defendant had previously confessed to the charges and then recanted this confession at trial would increase the likelihood that the jury would want to review his contradictory testimony. *Id.* at 41, 674 S.E.2d at 707.

Conversely, in *Starr*, our Supreme Court concluded that the trial court's failure to exercise its discretion in denying the jury's request to review a witness' testimony was not prejudicial under the circumstances.

Starr, 365 N.C. at 320, 718 S.E.2d at 366. In *Starr*, the defendant was charged with one count of assaulting a law enforcement officer with a firearm and four counts of assaulting a firefighter with a firearm arising out of an incident at the defendant's apartment complex. *Id.* at 315, 718 S.E.2d at 364. The four firefighters and a police officer were dispatched to the defendant's apartment complex after receiving a 911 call reporting water leaking into one of the units. *Id.* The defendant was the upstairs resident from whose unit the leak appeared to originate, and due to a concern that the defendant might be in need of medical assistance, the firefighters and police officer "knocked loudly" on his door and identified themselves. *Id.* The defendant did not respond, and they forced entry. *Id.* One of the firefighters, Marvin Spruill ("Spruill"), saw the defendant standing approximately 12 feet away and pointing a gun in their direction. Spruill and another firefighter heard a "pop" sound before the defendant was ordered to — and, in fact, did — drop his weapon. *Id.*

The jury asked to review Spruill's testimony, and its request was denied by the trial judge, who stated "we don't have the capability of realtime transcripts so we cannot provide you with that." *Id.* at 317, 718 S.E.2d at 365 (emphasis omitted). The jury then returned guilty verdicts for the four counts of assaulting a firefighter with a firearm and acquitted the defendant of the one count of assaulting a law enforcement officer with a firearm. *Id.* at 316, 718 S.E.2d at 364. On appeal, the defendant argued that he was entitled to a new trial based on the trial court's failure to exercise its discretion. Our Supreme Court rejected his contention, explaining that

> Defendant bears the burden of showing that he has been prejudiced by the trial court's error in not exercising discretion in accordance with N.C.G.S. § 15A-1233(a). He must show "a reasonable probability that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a).
>
> Defendant argues that "[t]he jury's review of Fireman Spruill's testimony could have reasonably resulted in not guilty verdicts for [defendant] on one or more of the guilty verdicts of the four firemen." Defendant has not carried his burden of proving that the error was prejudicial. He does not explain how the review of Spruill's testimony would have created a reasonable possibility that a different result would have been reached at his trial. The jury

> had the opportunity to see and hear Spruill's testimony at trial, *see State v. Covington*, 290 N.C. 313, 344, 226 S.E.2d 629, 649-50 (1976), and the testimony was not confusing or contradicted, *see Johnson*, 346 N.C. at 126, 484 S.E.2d at 377. Further, Spruill's testimony was not " 'material to the determination of defendant's guilt or innocence.' " *Id.* (quoting *Lang*, 301 N.C. at 511, 272 S.E.2d at 125). Specifically, the requested testimony was incriminating to defendant and came from a witness for the prosecution, unlike alibi testimony or other testimony that would tend to benefit a defendant. *See State v. Hudson*, 331 N.C. 122, 144-45, 415 S.E.2d 732, 744 (1992), *cert. denied*, 506 U.S. 1055, 113 S.Ct. 983 (1993); *Lang*, 301 N.C. at 511, 272 S.E.2d at 125. In addition, Spruill's testimony was not "the only evidence directly linking defendant to the alleged crimes." *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377. Rather, three other witnesses gave testimony that corroborated Spruill's testimony. Defendant thus has not demonstrated a reasonable possibility that a different result would have been reached at his trial had the error not been committed.

Id. at 319-20, 718 S.E.2d at 366.

Here, both Defendants contend that Deputy Gross' testimony was pivotal in the State's case against them such that the trial court's error in failing to exercise its discretion concerning the jury's request to review that testimony constituted prejudicial error. Chapman contends that he "was prejudiced because without Gross' testimony there was no link between Chapman and the Market Express robbery. None of the persons present at the time of the robbery were able to identify Chapman as the person who robbed the store."

Thibault argues that she was prejudiced because Deputy Gross "placed a female driver in the vehicle with the person who appeared to have robbed [the Market Express]. His accuracy and credibility were crucial to both the State and the defense cases." We address Defendants' respective arguments in turn.

As was the case in *Starr*, the witness testimony at issue here is incriminating as to Chapman and came from a witness for the prosecution. Gross' trial testimony implicating a person matching Chapman's physical description in the robbery was consistent with his statement to law enforcement officers the night of the incident — a statement the jury

was permitted to review during deliberations. Moreover, and contrary to Chapman's argument on appeal, Gross' testimony was not the only evidence linking Chapman to the crime. Adkins also provided a description of the robber's appearance and attire which was consistent with Chapman's physical characteristics and the clothing found in the search of the Nissan Maxima and Thibault's home. Finally, a large amount of cash was found on Chapman's person, and a wallet containing his identification card and driver's license was discovered by law enforcement officers in the same room as and in close proximity to the air pistol and blue bandana.

Thus, the circumstances of the present case are distinguishable from our decision in *State v. Thompkins*, 83 N.C. App. 42, 348 S.E.2d 605 (1986). In that case, we held that the trial court's failure to exercise its discretion with regard to the jury's request to review the testimony of the individual who identified the defendant as the perpetrator of the offenses was prejudicial error. In *Thompkins*, a felonious breaking or entering and larceny case, the stolen property was not found in the defendant's possession, and the witness' testimony identifying him as the man she saw "carrying a large object in his hands" from the rear of the burglarized home was the only evidence linking the defendant to the crimes. *Id.* at 44, 348 S.E.2d at 606.

Here, conversely, while Gross' testimony was important in explaining how law enforcement officers came to investigate the Nissan Maxima and Thibault's home, their subsequent investigation yielded additional evidence linking Chapman to the crime — namely, the cash found on his person, the air pistol, and the clothing that matched the description provided by Adkins. Chapman's contention that the trial court's error was prejudicial is therefore overruled.

Thibault asserts that the trial court's error was prejudicial to her because Gross' testimony identified a female as the driver of the vehicle that left the scene of the Market Express robbery with the male suspect. Thibault contends that this testimony was the only evidence that implicated her because it was the sole support for the State's theory that she either acted in concert with or aided and abetted Chapman in committing the robbery. We disagree.

First, Thibault's own trial testimony placed her in the Nissan Maxima at the Market Express on the night of the robbery. She admitted that she accompanied Chapman to the Market Express and the adjoining McDonald's in the Nissan earlier that evening, she remained in the vehicle while Chapman went inside the store to purchase cigarettes, and

they then drove around to the McDonald's drive-thru lane so he could buy a sandwich. Second, the air pistol and blue bandana were discovered by law enforcement officers in *her* bedroom in *her* own residence, and the Maxima implicated in the robbery was *her* vehicle. Finally, Thibault falsely responded in the negative when asked by Deputy Crenshaw whether there were any men present in her home despite the fact that Chapman was in actuality only a few feet away — hiding behind the front door she had walked through only moments earlier.

For these reasons, Gross' testimony that a female "appeared" to be driving the car he followed that night was not the only evidence indicating that she participated in the Market Express robbery. Moreover, Gross' testimony overall was favorable to the State rather than to Thibault. *See Starr*, 365 N.C. at 319-20, 718 S.E.2d at 366 (rejecting defendant's attempt to show error was prejudicial where testimony at issue was "incriminating to defendant and came from a witness for the prosecution" and did not constitute the only evidence linking defendant to offense). Therefore, Thibault has failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different had the jury had the opportunity to review Gross' trial testimony. As such, she has not demonstrated prejudicial error.

III. Denial of Thibault's Motion to Dismiss

[4] Thibault contends that the trial court erred by denying her motion to dismiss the robbery with a dangerous weapon charge for insufficient evidence because the State failed to prove that "she knowingly committed the crime as an actor in concert or as an aider or abettor." At trial, however, Thibault's motion to dismiss the charge against her was based on an entirely different ground — insufficiency of the evidence as to the "dangerous weapon" element of the offense. In asserting this motion, her attorney stated the following:

> In this case, Your Honor, the uncontroverted evidence is that the state is alleging that a BB air pistol was used in the commission of this alleged robbery. And we don't feel that the state has provided sufficient evidence of its nature of being a dangerous weapon to satisfy the element required for robbery with a dangerous weapon.
>
> We contend there has been no evidence showing that the manner in which it was used, in which the BB gun was used, rises to the level of being a dangerous weapon. Based upon that, we would ask Your Honor to dismiss the charge of robbery with a dangerous weapon.

It is well established that "the law does not permit parties to swap horses between courts in order to get a better mount before an appellate court." *Geoscience Grp., Inc. v. Waters Constr. Co.*, ___ N.C. App. ___, ___, 759 S.E.2d 696, 703 (2014) (citation, quotation marks, and alteration omitted). Consequently, when a defendant presents one argument in support of her motion to dismiss at trial, she may not assert an entirely different ground as the basis of the motion to dismiss before this Court. *See State v. Shelly*, 181 N.C. App. 196, 207, 638 S.E.2d 516, 524 ("When a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived."), *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007).

Because Thibault has failed to properly preserve the specific argument she now seeks to make on appeal regarding the basis upon which her motion to dismiss should have been granted, we decline to reach the merits of her argument. *See State v. Euceda-Valle*, 182 N.C. App. 268, 271-72, 641 S.E.2d 858, 861-62 (refusing to consider defendant's argument on appeal regarding denial of motion to dismiss charge of intentionally maintaining a vehicle for keeping a controlled substance; defendant moved to dismiss charge at trial on basis that he lacked actual knowledge that cocaine was in Nissan and did not have an ownership interest in that vehicle but then "present[ed] a different theory to support his motion to dismiss" on appeal, asserting that "the State failed to prove that he possessed the Nissan with the cocaine in the trunk for a substantial period of time"), *appeal dismissed and disc. review denied*, 361 N.C. 698, 652 S.E.2d 923 (2007).

IV. Videotape of Test Fire

[5] Thibault next asserts that the videotape showing Detective Sergeant Cranford test firing the Colt Defender Air Pistol was improperly admitted because the State failed to demonstrate that "the capabilities of the air pistol at the time of the experiment were substantially similar to those at the time of the taking of the property."

It is well established that "[t]he determinative question in reviewing whether a weapon may be considered dangerous [for purposes of robbery with a dangerous weapon], is whether the evidence was sufficient to support a jury finding that a person's life was in fact endangered or threatened." *State v. Hall*, 165 N.C. App. 658, 665, 599 S.E.2d 104, 108 (2004) (citation, quotation marks, and emphasis omitted). In prior cases involving pellet or BB guns, we have held that the State presented sufficient evidence of the dangerous nature of the weapon by demonstrating that it "was capable of denting a quarter-inch piece of cedar plywood at

distances up to two feet" and that the defendant had pointed the weapon at the victim's face from a distance of six to eight inches. *Id.* at 665-66, 599 S.E.2d at 108; *see also State v. Westall*, 116 N.C. App. 534, 540-41, 449 S.E.2d 24, 28 (holding that "there was clearly sufficient evidence to permit the jury to decide whether defendant committed robbery with a dangerous weapon" where evidence showed that (1) defendant had placed pellet gun directly against victim's back; and (2) the pellet gun was capable of "totally penetrating a quarter-inch of plywood"), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994).

In the present case, the videotape viewed by the jury showed Detective Sergeant Cranford performing a similar experiment to test the shooting capabilities of this particular air pistol. Specifically, he fired the air pistol four times at a plywood sheet from various distances while another law enforcement officer videotaped him doing so.

Thibault contends that the videotaped experiment should not have been admitted into evidence here because (1) during the test fire, the State utilized a new, unopened air cartridge, which contained a higher level of air pressure and thus was capable of firing a projectile with greater impact than an air cartridge that has previously been used; and (2) Thibault testified that she and her nephew had fired the air pistol recovered from her home just a few hours before the robbery at which time the air pistol's CO2 cartridge was so low that the shots they fired barely made it to the target.

> Experimental evidence is competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence. The absence of exact similarity of conditions does not require exclusion of the evidence, but rather goes to its weight with the jury. The trial court is generally afforded broad discretion in determining whether sufficient similarity of conditions has been shown.

State v. Locklear, 349 N.C. 118, 147, 505 S.E.2d 277, 294 (1998) (internal citations omitted), *cert. denied*, 526 U.S. 1075, 143 L.Ed.2d 559 (1999).

Our Court has held the substantial similarity requirement for experimental evidence "does not require precise reproduction of circumstances." *State v. Clifton*, 125 N.C. App. 471, 477, 481 S.E.2d 393, 397, *disc. review improvidently allowed*, 347 N.C. 391, 493 S.E.2d 56 (1997). The trial court must consider whether the differences between conditions can be explained by the witness so that any effects arising from the dissimilarity may be understood by the jury, and "[c]andid

acknowledgement of dissimilarities and limitations of the experiment" is generally sufficient to prevent experimental evidence from being prejudicial. *Id.*

Here, Detective Sergeant Cranford testified that he utilized the actual Colt Defender Air Pistol that he recovered from Thibault's bedroom to conduct the test fire. He explained that (1) he had previously released the pressurized air from the cartridge that was in the air pistol when it was first recovered in order to "render the weapon safe prior to transporting it [and] storing it"; and (2) the owner's manual for the weapon cautioned users to "never attempt to reuse a CO2 capsule for any purpose." Consequently, when he performed the test fire he loaded the air pistol with a new CO2 cartridge that complied with the specifications recommended in the Colt Defender owner's manual. In discussing his experiment at trial, he acknowledged both that the pressure level of an air cartridge dissipates over time and use, decreasing the force with which the BB is projected from the gun, and that while he had heard the sound of gas escaping when he unscrewed the cartridge to "render the weapon safe," he was unsure of the precise amount of air that was present within the cartridge at the time of the weapon's recovery.

We conclude that the trial court did not err in admitting the video of the test fire. In his experiment, Detective Sergeant Cranford utilized the same weapon Chapman brandished during the robbery and fired it at a target from several close-range positions that were comparable to the various distances from which the air pistol had been pointed at Adkins. Detective Sergeant Cranford noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect that greater air pressure would have on the force of the projectile and its impact on a target. *See State v. Jones*, 287 N.C. 84, 99, 214 S.E.2d 24, 34 (1975) (holding that "[p]recise reproduction of circumstances is not required" when witness accounts for and explains effect of any dissimilarities); *see also State v. Golphin*, 352 N.C. 364, 434, 533 S.E.2d 168, 215 (2000) (explaining with regard to experimental evidence that "exclusion is not required when the conditions are not exactly similar; rather, it goes to the weight of the evidence with the jury"), *cert. denied*, 532 U.S. 931, 149 L.Ed.2d 305 (2001). Moreover, the trial transcript reveals that Detective Sergeant Cranford was cross-examined by defense counsel on this issue.

We further note that while Thibault asserts the air pressure of the cartridge had been severely diminished on the day of the robbery, she does not take issue with the State's evidence that during the time period

in which the robbery took place the air pistol was operable, loaded with an air cartridge and BB pellets, and pointed at a target from a very close range — conditions that were replicated in the test fire. Thibault's argument on this issue is therefore overruled.

V. Warning Label

[6] Finally, Thibault argues that the portion of Detective Sergeant Cranford's testimony in which he read the warning statement included in the owner's manual for the Colt Defender Air Pistol was improperly admitted because this statement constituted inadmissible hearsay and violated the Confrontation Clause. Specifically, he testified as follows regarding the warning statement:

> [Prosecutor]: [D]id you obtain an owner's manual for that weapon?
>
> [Detective Sergeant Cranford]: Yes.
>
> [Prosecutor]: Why did you do that?
>
> [Detective Sergeant Cranford]: To understand the safety and the operation for that particular model of air pistol.
>
> . . . .
>
> [Prosecutor]: Is there a warning beneath there that you relied upon?
>
> [Detective Sergeant Cranford]: Yes, sir. There is.
>
> [Prosecutor]: Would you read that warning that's just below that information?
>
> [Thibault's trial counsel]: Objection, Your Honor.
>
> [The Court]: Noted for the record. Overruled.
>
> [Prosecutor:] Please speak into the mic so you can be heard.
>
> [Detective Sergeant Cranford]: It says, "Warning, not a toy, adult supervision required, misuse or careless use may cause serious injury or death, may be dangerous up to 325 yards or 297 meters" in parentheses.

Unlike the other testimony by Detective Sergeant Cranford regarding the manual's contents, his testimony concerning the warning statement contained in the manual was objected to by Thibault's trial counsel. That

objection, however, was based on a different ground than that asserted by her on appeal. Rather than making the hearsay and Confrontation Clause arguments she is currently asserting, she argued instead in the trial court that the introduction of the warning statement would be unfairly prejudicial because "these warnings are created . . . in order to make protections against (sic) the manufacturer against lawsuits, and, therefore, they overinflate the possibilities of serious injury that may result from improper use." The trial court overruled her objection on that specific ground, stating that "the evidence is highly probative, and the Court doesn't believe that it's unfairly prejudicial."

As discussed above, "[a] defendant cannot swap horses between courts in order to get a better mount." *State v. Howard*, 228 N.C. App. 103, 107, 742 S.E.2d 858, 860 (2013) (citation and quotation marks omitted), *aff'd per curiam*, 367 N.C. 320, 754 S.E.2d 417 (2014). Therefore, once again, we do not reach the merits of her argument on this issue. *See id.* (refusing to review defendant's argument on appeal that evidence violated Rule 404(b) where defendant objected at trial only to evidence's prejudicial effect under Rule 403).

Conclusion

For the reasons stated above, we conclude that both Defendants received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge ELMORE concur.

STATE v. JONES

[244 N.C. App. 719 (2016)]

STATE OF NORTH CAROLINA
v.
KEYSHAWN JONES

No. COA15-804

Filed 5 January 2016

Larceny—erroneous bank deposit—no actual or constructive trespass

The trial court erred by failing to grant defendant's motion to dismiss defendant's three larceny charges where an erroneous amount was deposited directly into defendant's account and the deposit could not be recovered because defendant had removed the money. The State failed to present any substantial evidence tending to show defendant actually or constructively trespassed to take possession of the property of another, an essential element of the charge of larceny.

Appeal by defendant from judgment entered 29 October 2014 by Judge Kenneth F. Crow in Wayne County Superior Court. Heard in the Court of Appeals 17 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

TYSON, Judge.

Keyshawn Jones ("Defendant") appeals from judgment entered after a jury found him guilty of three counts of felony larceny. We vacate Defendant's convictions.

I. Background

In 2010, Defendant was working as a commercial truck driver. Defendant hired Scott Huebner ("Huebner") as his agent. The two men never met in person, but would communicate through e-mails, phone calls, and text messages. Under their arrangement, Defendant drove the routes and managed the loading and unloading of pickups and deliveries, while Huebner managed the office work.

After working together for approximately one and a half years, Huebner began to contract primarily with EF Corporation, d/b/a WEST Motor Freight of PA ("WEST Motor Freight"). Like many commercial transit companies, WEST Motor Freight contracts with agencies, who in turn contract with individual drivers to transport and deliver payloads. Shortly after Huebner made this transition, Defendant began driving exclusively for WEST Motor Freight through Huebner.

Sherry Hojecki ("Hojecki") was in charge of the billing and settlement department for WEST Motor Freight. Hojecki was responsible for managing payments to drivers, dubbed "settlements" because drivers are independent contractors rather than employees.

Some drivers, including Defendant, would receive advance payments, which would be received in one of three common ways: (1) through a "Comdata card," a prepaid corporate debit card; (2) through an advance added to a regular settlement payment; or, (3) through a "maintenance account." Hojecki testified that money held in a driver's maintenance account "belongs to the driver."

To pay drivers, Hojecki uses a specialized computer system to create a settlement statement. This statement lists the amount of money to be paid to a driver. The statement is uploaded into WEST Motor Freight's accounts payable system, and Hojecki transmits the actual payment.

On or about 10 July 2012, Huebner contacted Hojecki on Defendant's behalf to inquire about the amount of money held in Defendant's maintenance account. Hojecki told Huebner there was approximately $1,200 in the account. Huebner requested $1,200 be deposited in Defendant's bank account, via direct deposit. Hojecki created a settlement statement for the payment, uploaded it into the accounting system, processed the direct deposit, and sent the transaction to the appropriate bank for deposit into Defendant's bank account.

The morning after conducting this transaction, Hojecki prepared a physical copy of the driver settlement report, which outlined the direct deposit she had made the previous day. The physical copy was to be mailed to Defendant.

While preparing the mailing, Hojecki realized she had keyed in an extra two zeros on Defendant's settlement statement, which resulted in a $120,000.00 payment being made to Defendant's account, rather than $1,200.00. After various deductions and fees, $118,729.49 was deposited into Defendant's bank account. Hojecki testified the money errantly deposited above the amount in Defendant's maintenance account into Defendant's bank account belonged to WEST Motor Freight.

After realizing the error, Hojecki alerted her superior. Consistent with her superior's directives, she filled out a report, requested the transaction be stopped, and sent it to the bank. Hojecki later learned the bank was unable to stop the transaction, and the money had been deposited into Defendant's bank account. Hojecki contacted Huebner and requested he contact Defendant to inform him a mistake had been made and the transaction was being reversed.

After speaking with Hojecki, Huebner called Defendant on 12 July 2012 to "find out what needed to be done to make sure everything went the way it needed to." Huebner testified he called Defendant and told him a "transfer that was coming in was going to be. . . for the wrong amount, and a reversal was put through, and that [Defendant] needed to make sure that his bank account remained positive so there were no issues." Huebner elaborated:

> Once I told him that the transfer would come in and immediately reverse we did talk about the amount that would come in[.] . . . He did say that he'd be more than willing to take that amount and then work it off over time, which I told him would probably not be accepted by [WEST Motor Freight]. . . . I did tell him that if the bank account was negative and the reversal didn't come through, that would be a problem, so make sure not to touch the money. . . . [Defendant] said that if the money didn't come out he would just go ahead and write a check to [WEST Motor Freight] to give it back to them.

The next day, Huebner again contacted Defendant and inquired about the payment and the reversal. Huebner testified Defendant told him that his account had the "exact amount in it that it was supposed to have," so the reversal must have been completed.

Huebner, Defendant's agent, received notice from Hojecki that the transaction was not able to be reversed. Following a series of conversations, Defendant eventually informed Huebner he had filed for bankruptcy and the bankruptcy courts must have taken the erroneously transferred money. Huebner testified Defendant affirmatively stated he did not write any checks or transfer any money out of the account, after receiving Huebner's phone call about the excess transfer.

Donna Oldham ("Oldham"), a Vice President and City Officer at the North Carolina State Employees' Credit Union ("SECU"), was in charge of the day-to-day operations of the West Ash Street branch of SECU in Goldsboro, North Carolina. Oldham testified that on 15 July 2012,

Defendant performed seven separate ATM cash withdraws of $1,000 each at a SECU ATM.

Oldham testified in addition to the seven ATM cash withdraws, Defendant performed two "internet transfers," of $10,000.00 each, from his checking and into a savings account belonging to Defendant. Both of these transactions occurred on 15 July 2012.

Terry Pridgen ("Pridgen"), a financial services representative with SECU, also worked at the West Ash Street SECU branch in Goldsboro. She was tasked with, among other duties, assisting members perform checking deposits and withdrawals. Pridgen testified Defendant came into the West Ash Street branch on 16 July 2012 to perform several withdrawals from his account.

Pridgen noticed there was a recent large deposit into the account, so she asked Defendant why such a large sum was deposited into his account. Pridgen testified Defendant stated he "was in business with someone else, and that he had sold his part out, so they directly deposited the money to him for his part of the business."

Defendant performed several transactions on 16 July 2012. Defendant purchased a cashier's check payable to "Robert Browning, Chapter 13" in the amount of $21,117.80, and a second cashier's check payable to Marshall Coleman in the amount of $2,000.00. Defendant also withdrew $66,744.00 and $10,988.00 in two separate transactions, and used that money to purchase a third cashier's check, payable to himself, in the amount of $67,732.00. Finally, Defendant deposited $5,000.00 each into two accounts, belonging to Shaquida Lane and Sadie Jones, respectively.

On 23 July 2012, Defendant took the $67,732.00 cashier's check into a SECU branch on Wayne Memorial Drive in Goldsboro, where SECU senior teller Dianne Stewart ("Stewart") assisted him. Defendant advised Stewart he wished to deposit $60,000.00 into an account held by Shaquida Lane, and the remainder to be given to him in cash. Stewart assisted Defendant in completing the transactions.

On 1 April 2013, Defendant was indicted with three counts of larceny and three counts of possession of stolen goods. The indictment alleged Defendant stole and possessed US currency, the property of WEST Motor Freight, in the amounts of $7,000.00, $20,000.00, and $89,861.80 respectively. The case proceeded to trial on 27 October 2014. At the close of State's evidence, the State moved to dismiss the three counts of possession of stolen property, which was granted.

Defendant then made a motion to dismiss the remaining three counts of larceny based on insufficiency of the evidence. After considering the arguments of counsel, the trial court denied the motion. On 31 July 2014, the jury returned a verdict and found Defendant to be guilty of three counts of larceny.

Defendant gave notice of appeal in open court.

II. Issue

In Defendant's sole argument, he contends the trial court erred in denying his motion to dismiss for insufficiency of the evidence.

III. Defendant's Motion to Dismiss

Defendant asserts his motion to dismiss should have been granted, because the State failed to present substantial evidence of each essential element of the crimes alleged. We agree.

A. Standard of Review

This Court reviews the denial of a motion to dismiss in a criminal trial *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). Upon a defendant's motion to dismiss due to insufficient evidence, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Nicholson*, 355 N.C. 1, 51, 558 S.E.2d 109, 143 (2002) (citations omitted). All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Additionally, circumstantial evidence may be sufficient for the State to withstand a motion to dismiss when "a reasonable inference of defendant's guilt may be drawn from the circumstances." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citations and quotations omitted). If so, it is the jury's role and duty to determine whether the defendant is actually guilty. *Id.*

B. Analysis

Defendant argues the State failed to provide substantial evidence of each essential element of the crime of larceny. He contends that because Hojecki, on behalf of WEST Motor Freight, deposited the $118,729.49 into his bank account willingly, the essential element of a trespass is lacking. We agree.

"The essential elements of felony larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled in part on other grounds by State v. Barnes*, 324 N.C. 539, 540, 380 S.E.2d 118, 119 (1989). By statute, larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony. N.C. Gen. Stat. § 14-72(a) (2013).

1. Actual Trespass

Our Supreme Court has stated the taking of the property of another "involves a trespass either actual or constructive." *State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968). "The taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass." *Id.* "[T]o constitute a larceny, the *taking* must be such as amounts to a *trespass*. Every larceny includes a trespass; and if there be no trespass in taking the goods, there can be no felony committed in carrying them away." *State v. Webb*, 87 N.C. 558, 559 (1882) (emphasis in original) (citation omitted).

An actual trespass occurs when a defendant "unlawfully takes the property from the owner's possession by an act of trespass." *Bowers*, 273 N.C. at 655, 161 S.E.2d at 14. In this case, Defendant did not take the $118,729.49 from WEST Motor Freight's possession by an act of actual trespass. The money was removed from WEST Motor Freight's bank account and was deposited by Hojecki (WEST Motor Freight's employee) into Defendant's bank account without any actual action taken by Defendant.

2. Constructive Trespass

Unlike an actual trespass, a "constructive trespass" occurs "when possession of the property is fraudulently obtained by some trick or artifice." *Id.* In this case, there was no "trick" or "artifice," which allowed Defendant to fraudulently obtain possession of the money deposited into his account. As noted *supra*, the money was deposited into Defendant's bank account by WEST Motor Freight, through Hojecki. Defendant did

not trick WEST Motor Freight to deposit extra money into his account; rather, the money was deposited by mistake, and the mistake in the correct amount to be deposited was WEST Motor Freight's, not Defendant's.

The State argues the taking did not occur when Hojecki deposited the $118,729.49 into Defendant's account, but rather the taking occurred after Defendant had been made aware of the erroneous transfer and, subsequent to that knowledge, took control of those funds, moved, and used them for his own purposes. We disagree.

The State's interpretation would require WEST Motor Freight to be in constructive possession of the $118,729.49 it erroneously deposited into Defendant's bank account, such that Defendant constructively trespassed upon that possession by "taking control" of the money deposited into his own bank account. Our Supreme Court has held that "constructive possession of property requires 'an intent and capability to maintain control and dominion' over it.[]" *State v. Weaver*, 359 N.C. 246, 259, 607 S.E.2d 599, 606-07 (2005) (citations omitted). Presuming WEST Motor Freight intended to maintain control and dominion over the money it volitionally deposited into Defendant's account, WEST Motor Freight retained no ability to maintain control and dominion. The evidence showed Hojecki attempted, but failed, to reverse the direct deposit transaction to recover possession and control of the funds.

WEST Motor Freight relinquished possession of and control over the money at the time it was transferred into Defendant's account. It did not actually or constructively continue to possess the money once the transfer into Defendant's account was completed. Defendant came into lawful possession of the $118,729.49 in his account.

"Generally one who lawfully acquired possession of the goods or money of another cannot commit larceny by feloniously converting them to his own use, for the reason that larceny, being a criminal trespass on the right of possession, . . . cannot be committed by one who, being invested with that right, is consequently incapable of trespassing on it." *State v. Bailey*, 25 N.C. App. 412, 416, 213 S.E.2d 400, 402 (1975) (citation omitted). The State's argument is overruled.

State v. Jones

We agree with Defendant that this case is analogous to *State v. Jones*, 177 N.C. App. 269, 628 S.E.2d 436, *disc. review denied*, 360 N.C. 580, 636 S.E.2d 190 (2006). In *Jones*, the victim, Ora Evans, buried $13,400 in cash in her ailing mother's backyard. She was concerned it might be stolen by home healthcare workers. 177 N.C. App. at 270, 628 S.E.2d at 437. The

money was buried with a note declaring Evans and her son to be the owners of the money. *Id.* Evans' mother eventually died, and the house was rented to Karenna Jones ("the defendant"). *Id.*

Two years later, Evans remembered she had buried the $13,400.00, went to the house being rented to the defendant, and attempted to locate the buried money. *Id.* She was unable to do so before the defendant ordered Evans off the property. *Id.* After Evans left, the defendant "got curious" and dug in the backyard, eventually finding and spending the buried money. *Id.* at 270-71, 628 S.E.2d at 438. The defendant was charged and convicted of felony larceny. *Id.* at 271, 628 S.E.2d at 438.

This Court noted the defendant was in lawful possession of the real property where the money was buried, and had a valid lease entitling her to "lawful possession of the real property and consequently, the money [Evans] buried in the real property." *Id.* at 272, 628 S.E.2d at 439. The Court acknowledged that "[a]s noted by [the defendant], upon the facts presented in [that] case, 'the crime [she] may have committed'. . . would [have been] conversion by a lessee." *Id.* The Court reversed the defendant's larceny conviction, holding "the defendant here did not trespass and thus did not commit felonious larceny." *Id.*

The facts presented in *Jones* are common and related to the facts presented here. Like *Jones*, Defendant had lawful possession of his bank account and consequently, the money located in that bank account. While Defendant clearly knew the large sum had been erroneously deposited into his account by WEST Motor Freight, Defendant did not actually or constructively trespass on the property of another in making withdrawals and purchasing cashier's checks with the money deposited in his own bank account. Consequently, Defendant "did not trespass and thus did not commit felonious larceny." *Id.* As these three larceny convictions are the only issues before us, we express no opinion on what, if any, other crimes Defendant may have committed.

IV. Conclusion

The State failed to present any substantial evidence tending to show Defendant actually or constructively trespassed to take possession of the property of another, an essential element of the charge of larceny. The trial court erred in failing to grant Defendant's motion to dismiss the crimes of which Defendant was charged at the close of the State's evidence. Defendant's three larceny convictions are vacated.

VACATED

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
TODD JOSEPH MARTIN

No. COA15-468

Filed 5 January 2016

1. Criminal Law—motion for appropriate relief—ineffective assistance of counsel—evidentiary hearing

Defendant was entitled to an evidentiary hearing on a motion for appropriate relief claiming ineffective assistance of counsel where the factual circumstances, in conjunction with defense counsel's own admissions that he made nonstrategic decisions that probably had an impact on the jury's finding of guilt, were such that a hearing should have been held to fully develop the validity of defendant's ineffective assistance of counsel claim.

2. Criminal Law—motion for appropriate relief—postconviction discovery—evidentiary hearing

The trial court erred by denying defendant's motion for appropriate relief without an evidentiary hearing on whether defendant had received the postconviction relief requested in a motion.

Appeal by Defendant from order entered 9 December 2014 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 5 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

N.C. Prisoner Legal Services, Inc., by Lauren E. Miller, for Defendant.

INMAN, Judge.

This case arises from a motion for appropriate relief alleging ineffective assistance of counsel in the second of two criminal trials, the first trial having resulted in a hung jury on all but one charge. We hold that because the motion raised disputed issues of fact, the trial court was required to conduct an evidentiary hearing before denying relief, and we therefore reverse the order below and remand the matter.

Defendant Todd Joseph Martin ("Defendant") appeals the order which denied his motion for appropriate relief ("MAR"), without holding an evidentiary hearing, on the grounds that: (1) his trial counsel's performance fell within the range of reasonable professional assistance; (2) counsel's performance did not prejudice Defendant; and (3) any errors committed were harmless beyond a reasonable doubt and did not contribute to the guilty verdicts. On appeal, Defendant contends that the trial court erred by: (1) denying Defendant access to postconviction discovery statutorily authorized by N.C. Gen. Stat. § 15A-1415(f); (2) denying Defendant's motion for appropriate relief without holding an evidentiary hearing; and (3) concluding that Defendant's counsel was not constitutionally ineffective.

After careful review, we reverse the trial court's order and remand for further proceedings.

Factual and Procedural Background

On 2 November 2009, Defendant was tried on charges of first degree kidnapping, attempted murder, first degree rape, two counts of first degree sexual offense, and assault by strangulation against his then-wife Mary[1] based on incidents that occurred on 19 August 2008. On 6 November 2009, the jury found Defendant guilty of assault by strangulation. It remained deadlocked on the remaining charges. The trial court declared a mistrial as to the remaining charges.

The case came on for trial again on 3 January 2011, Judge Benjamin G. Alford presiding. Defendant was represented by a new attorney, Philip Clarke, III ("Mr. Clarke" or "defense counsel"), after his original attorney withdrew. The testimony at trial tended to establish the following: In 2008, Defendant and Mary separated but Defendant remained actively involved with the couple's two children who remained in the family home with Mary. According to Mary's testimony, during the evening of 18 August 2008, Defendant ate with her and the children and helped get them ready for bed. After that, Defendant left to go to work. Mary denied that Defendant was planning on returning to the home that night to sleep on the sofa. During the early morning hours, Mary awoke and noticed that her television, which she generally kept on, was off and saw her husband lying on the floor beside her bed, naked and sleeping. Mary began yelling at him that he had to leave. Defendant then climbed on top of her, removed her shorts, and starting penetrating her vaginally.

1. We have used a pseudonym in an effort to protect the victim's identity.

Mary further testified that Defendant took her cell phone away and handcuffed her to the bed using a set of novelty handcuffs from his nightstand. Mary denied that she and Defendant had used the handcuffs before but acknowledged that they kept other novelty items in the top drawer of the nightstand. She was able to release the handcuffs, but once Defendant realized that she had done so, he stood on the bed, pulled her up by her hair, and forced his penis into her mouth. He flipped her onto her stomach after she tried to pull away and put her in a choke hold. He told her that he would kill her and "put [her] in a pond" near the house. Eventually, Mary lost consciousness. During cross-examination, Mary claimed that she was screaming and yelling during the entire incident prior to losing consciousness.

When Mary woke up, Defendant was penetrating her anally, and she was lying in a pool of urine on the bed. Mary testified that when Defendant was "ready to finish," he pulled her up and ejaculated in her mouth. Defendant laid on the bed and eventually fell asleep. Before he fell asleep, Defendant told Mary that he had been at a bar that night using cocaine and had planned to kill himself with a gun he kept in his truck. After Defendant was asleep, Mary found her car keys, grabbed her two children, and ran out the front door.

Mary drove to her friend Ashley Lawson's ("Ashley's") house. Mary told Ashley that Defendant had tried to kill her. Ashley called the police. Eventually, Ashley went with Mary to Carteret General Hospital where Mary worked part-time as a nurse. In the emergency room, Mary met with Sheila Martin ("Sheila"), a sexual assault nurse examiner ("SANE"), who examined Mary. Mary had been one of Sheila's students when Sheila was teaching part-time in a LPN program at the local community college. Sheila took several swabs from Mary's mouth, vagina, and anus.

At trial, Sheila testified that after Mary told her the details of the assault, Sheila conducted a head-to-toe exam. She noted petechiae—red or purple marks on the skin caused by bleeding into the skin from broken capillaries–all over Mary's face. She also noticed a mark on Mary's neck, circumferential marks on her wrists, and a small tear in the top of her mouth. Sheila also conducted a pelvic exam and noticed no bruising or tears in Mary's vaginal or rectal area. She testified that this was not uncommon and that, in many cases of rape, there is no tearing or bruising. In other words, according to Sheila, the absence of tearing

or bruising does not necessarily mean that sex was consensual. Sheila noticed some blood in Mary's cervical os, an opening between the cervix and the uterus.[2]

Mary also testified at trial about a prior incident in March 2008 when Defendant attempted to rape her but she was able to talk him out of it on that occasion, and about two other incidents, in the spring or fall of 2006 and in January or February in 2007, when Defendant had had sex with her against her will. After the incident in March 2008, Mary called the police, and Officer Horst with the Newport Police Department responded. After that incident, Mary claimed that she and Defendant began attending counseling.

Jessica Posto, a forensic biologist with the State Bureau of Investigation, ("Ms. Posto") testified at trial regarding the testing of evidence obtained from the sexual assault evidence collection kit used at the hospital and from clothing Mary was wearing the night of 18 August 2008. Ms. Posto found sperm on Mary's tank top, but vaginal, rectal, and oral swabs came back negative for semen. The vaginal swab tested positive for blood.

The only testimony defense counsel offered to rebut the State's medical evidence was that of Brent Turvey ("Mr. Turvey"). Mr. Turvey was a forensic scientist hired by the defense to explain "why evidence is, what it means, what it does not mean, very often what can be done with the evidence, [and] what hasn't been doing with the evidence." In his affidavit attached in support of Defendant's MAR, Mr. Clarke refers to Mr. Turvey as an expert in "rape investigations." However, Mr. Turvey does not have a medical background. During *voir dire*, outside the presence of the jury, Mr. Turvey claimed to have performed forensic examinations of sexual assaults for court purposes, including crime reconstruction and examinations of the physical evidence. Mr. Turvey stated that he had been asked to look at the physical evidence in this case to determine whether it supported Mary's version of the events. During his lengthy *voir dire*, Mr. Turvey testified that the physical evidence was inconsistent with the alleged version of events leading up to the sexual assault, the physical evidence was inconsistent with Mary's version of the sexual assault, and there was evidence that Mary was making false sexual assault allegations that the police failed to further investigate. Mr. Turvey attempted to testify several times about the SANE's findings, but

2. At Defendant's first trial, Sheila testified that the blood "could have been normal" and related to Mary's menstrual cycle; however, at the second trial, she was not asked about this earlier testimony or whether the blood could be related to her menstrual cycle.

Judge Alford stopped his testimony, noting that Mr. Turvey did not have a medical degree.

After *voir dire*, Judge Alford excluded Mr. Turvey's testimony, noting that:

> the Court has heard the testimony of Mr. Turvey, has reviewed his curriculum vitae. He has, the Court has reviewed his forensic examination, and from all of that this Court can only conclude that the defendant seeks through Mr. Turvey to offer certain opinions about the investigation that was done in this case about which expert testimony is not needed. He also seeks in his opinions to invade the province of the jury. He also seeks to offer opinions on the evidence involving the credibility of certain witnesses and other evidence, which is totally, totally within the province of the jury; and we don't need expert testimony to show inconsistencies in the evidence, and as such and for other reasons, this Court will not permit the admission of that testimony or his admission as an expert witness.

Judge Alford acknowledged that "inconsistencies" existed in this case but that "nobody needs an expert to show[] those inconsistencies."

Defendant, who testified on his own behalf at trial, admitted engaging in sex with Mary, but claimed that it was consensual and that nothing the couple did that night was "new." According to Defendant, after engaging in consensual sex, Mary began asking him about other women. Defendant admitted to her that he had been talking to another woman and that he was planning to see her. Defendant refused to identify the woman because it would "confirm [Mary's] suspicions." Mary became very upset and started threatening Defendant about his job and the children. Mary tried to kick him out of the house, and Defendant admitted that he placed her in a chokehold. After he released her, Defendant told her that "if [she] keep[s] fucking around [he'll] put [her] ass in that pond." Mary went to the bathroom and noticed how red her eyes were from being placed in the chokehold. Eventually, Defendant fell asleep. When he woke around 5:15 a.m., he noticed that Mary and the children were gone. Defendant called Mary's phone and knew, based on the background noises, that she was at the hospital. He drove to the hospital to try and see her, but he was refused access. Defendant was arrested later that same day.

On 7 January 2011, the jury returned not guilty verdicts for the charges of attempted murder and first degree rape. The jury found

Defendant guilty of first degree kidnapping, first degree sexual offense (fellatio), and second degree sexual offense (anal intercourse). On 7 August 2012, this Court vacated Defendant's conviction for first degree kidnapping because it violated double jeopardy. *See State v. Martin*, 222 N.C. App. 213, 221, 729 S.E.2d 717, 723 (2012). Judge Alford sentenced defendant to a minimum term of 100 months to a maximum term of 129 months imprisonment for second degree sexual offense and 288 to 355 months imprisonment for first degree sexual offense, sentences to run consecutively.[3]

On 10 March 2014, Defendant filed a MAR, arguing that his constitutional right to effective counsel was violated because of his counsel's several failings during the second trial. Defendant claimed that his counsel's failure to procure an evaluation by a medical expert to rebut the testimony of Sheila fell short of professional standards. Specifically, Defendant alleged that his counsel should have known that Mr. Turvey's testimony would be inadmissible and that another expert could have been properly admitted as an expert to discount Sheila's claims that the evidence supported rape. Defendant also claimed that his counsel was ineffective for failing to impeach Mary with her reports to Sheila and the lead detective. Specifically, Defendant contended that his trial counsel should have impeached her with her inconsistent statements about how she was handcuffed in her report to the police; her report to police that she was penetrated digitally, which she denied at trial; and a prior false allegation of rape Mary had made as a teenager.[4]

Defendant also alleged that his trial counsel was ineffective for failing to cross-examine Mary about her previous trial testimony denying that Defendant kept toiletries in the bathroom and about her conversation with Defendant at the time she was being examined in the emergency room. Defendant also alleged that his trial counsel was ineffective for failing to object to the admission of hearsay evidence contained in a written statement by Ashley, the friend who took Mary to the hospital. Ashley wrote in the statement that Mary's daughter told her that "she [had] heard mommy screaming help in her pillow."

Finally, Defendant alleged that his counsel was ineffective for failing to cross-examine the State's witnesses regarding the following

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3. Although Defendant had also been sentenced for first degree kidnapping, this Court's opinion vacating this conviction did not affect Defendant's sentences for the sexual offenses.

4. The prior false allegation was introduced by defense counsel to impeach Mary's credibility in the first trial.

information: (1) the bed sheets were never tested by police to see if there was any urine on them, even though police took the sheets into evidence; this is even more important, according to Defendant, because Mary testified at the first trial that the urine on her was from her daughter; (2) a police officer who responded to the neighboring duplex that night testified in Defendant's first trial that he did not hear any screaming even though Mary testified that she screamed throughout the incident; (3) defense counsel failed to establish that the police officer who sat with Defendant while he was being tested did not observe any signs that Defendant had been engaged in any type of assault or struggle; (4) even though Mary testified that she had not had sex with Defendant since late July or early August, photographs show an open condom wrapper and a used condom in her bedroom; (5) police failed to test the condom wrapper or used condom for evidence; and (6) police failed to take any photographs of the headboard where Mary claimed she was handcuffed during the attack.

Defendant submitted, along with his MAR, an affidavit by Mr. Clarke admitting all of the errors alleged in Defendant's MAR. Mr. Clarke stated under oath that none of his failures had been strategic decisions. Defendant also submitted an affidavit by Bonnie Price, another SANE, who has been admitted as an expert in North Carolina courts, and Sarah Olson, who is employed as Forensic Resource Counsel with IDS, showing that each was available to consult with Mr. Clarke before trial.

At the time he filed the MAR, Defendant also filed a motion for discovery, pursuant to N.C. Gen. Stat. § 15A-1415(f), contending that he was entitled to all documents generated by the law enforcement and prosecuting agencies involved in Defendant's case. On 9 December 2014, Judge Alford denied the MAR without holding a hearing. In his order denying the motions, Judge Alford made the following pertinent findings:

> 10. All questions of fact are resolved by the motion, the state's response, exhibits, affidavits, the court file, the Appellate Court decision and the trial transcripts.
>
> 11. Counsel's performance was not so deficient to have the defendant found not guilty of Attempted First Degree Murder and First Degree Rape.
>
> 12. On appeal the defendant failed to raise ineffective assistance of counsel.
>
> 13. Counsel's performance was reasonable under prevailing professional norms.

> 14. The jury was in a position to hear all the evidence and judge the credibility of all the witnesses including the testimony of the defendant.
>
> 15. Any error that may have been committed by counsel was harmless beyond a reasonable doubt and did not contribute to the verdict obtained.

Defendant timely appeals.

Analysis

[1] Defendant argues that the trial court erred by denying him an evidentiary hearing on his MAR claiming ineffective assistance of counsel. We agree, because the trial court resolved the motion by deciding issues of fact contrary to Defendant's allegations.

The procedure governing MARs is set out in N.C. Gen. Stat. § 15A-1420 (2013), and subsection (c) discusses the trial court's duty to hold an evidentiary hearing on such motions:

> (c) Hearings, Showing of Prejudice; Findings. —
>
> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.
>
> . . .
>
> (3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.

This Court reviews the trial court's conclusions of law in an order denying an MAR *de novo*.[5] *State v. Jackson*, 220 N.C. App. 1, 8, 727

5. We note that the standard of review employed by this Court in reviewing a defendant's MAR is a matter in dispute by the parties. The State is correct that a trial court's

S.E.2d 322, 329 (2012). "Whether the trial court was required to afford defendant an evidentiary hearing is primarily a question of law subject to *de novo* review." *State v. Marino*, __ N.C. App. __, __, 747 S.E.2d 633, 640 (2013), *disc. review denied*, 367 N.C. 263, 749 S.E.2d 889 (2013).

In interpreting the statutes regarding an evidentiary hearing, this Court has noted:

> Under subsection (c)(4) [of N.C. Gen. Stat. § 15A-1420], read in *pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law. Thus, the ultimate question that must be addressed in determining whether a motion for appropriate relief should be summarily denied is whether the information contained in the record and presented in the defendant's motion for appropriate relief would suffice, if believed, to support an award of relief.

Jackson, 220 N.C. App. at 6, 727 S.E.2d at 328 (internal quotation marks and citations omitted).

Here, Judge Alford disposed of Defendant's MAR without holding a hearing because all questions of fact were "resolved" by the pleadings and because Defendant failed to show that his counsel's performance was constitutionally ineffective or that Defendant suffered any prejudice as a result of his counsel's performance. Defendant's MAR was based, generally, on his claims that his trial counsel was ineffective for: (1) failing to use testimony from Defendant's first 2009 trial to impeach the witnesses during the second trial; (2) failing to obtain a qualified medical expert to rebut the testimony of Sheila; (3) failing to properly cross-examine the State's witnesses, primarily the police officers, about their failure to properly collect and test all of the evidence in the case; and (4) failing to object to the admission of Ashley's written statement regarding Mary's daughter's statement.

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decision to deny a defendant's MAR brought under N.C. Gen. Stat. § 15A-1414 is reviewed for an abuse of discretion. *See State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006). However, here, Defendant's MAR was brought under a different statute, N.C. Gen. Stat. § 15A-1415. Moreover, the issue we decide is not whether the trial court erred in denying the MAR but, rather, whether the trial court erred in denying it without holding a hearing, which requires a separate and distinct analysis.

While we do not think that all the evidence Defendant listed in his brief related to impeachment was especially compelling,[6] we are persuaded that defense counsel's failure to obtain a medical expert to rebut the testimony of Sheila, the sexual abuse nurse examiner, and his failure to properly cross-examine the State's witnesses with regard to material evidence that could have had a substantial impact on the jury's verdict, entitles Defendant to an evidentiary hearing. This was a case of "he said, she said" with no physical evidence of rape. There was no evidence of semen in Mary's vagina, anus, or mouth. While Sheila testified that the evidence she obtained during her examination of Mary did not necessarily show consensual sex, the absence of any signs of violence provided defense counsel an opportunity to contradict Mary's allegations with another medical expert, an opportunity which defense counsel inexplicably failed to take. Bonnie Price, who has been a SANE since 2002, stated in her affidavit in support of the MAR that, in her experience, about half of the examinations of patients reporting rape involve anogenital findings and half do not. This affidavit, standing on its own, was not sufficient to compel the trial court to allow the MAR, but it demonstrates the factual nature of the dispute and the significance of expert medical testimony. Because the trial court did not conduct an evidentiary hearing, we do not know what Ms. Price's further testimony would have been. The analysis of this evidence is especially material because Sheila and Mary had a prior relationship which could have undermined the credibility of Sheila's testimony.

Moreover, while Mr. Clarke attempted to introduce the expert testimony of Mr. Turvey to rebut Sheila's testimony, it was reasonably foreseeable that the trial court would exclude it because Mr. Turvey, the proposed expert, had no medical training and because the testimony was clearly outside the scope of his competency.

Finally, impeachment evidence that may undermine the State's case could be further strengthened by the fact that the police failed to collect key evidence that could have substantiated or contradicted Mary's allegations. The police did not photograph the bed's headboard where Mary claimed she was handcuffed during the rape. The bedsheets were not photographed or tested for evidence of urine. It is undisputed that the police did not test, collect, or even ask Mary about a used condom and condom wrapper found in the bedroom immediately after she reported

6. We note that Mr. Clarke actually did impeach the witnesses on some of the evidence listed in Defendant's brief. Specifically, defense counsel impeached Mary regarding the knives in the bedroom and her claim that Defendant made her bite his neck.

being raped. These obvious gaps in the police investigation as to crucial evidence should have been exposed by Mr. Clarke during trial.

In totality, our review, in conjunction with Mr. Clarke's own admissions that he made nonstrategic decisions that probably had an impact on the jury's finding of guilt, the factual circumstances of this case were such that an evidentiary hearing should have been held to fully develop the validity of Defendant's ineffective assistance of counsel claim. We do not decide whether the evidence put forth in Defendant's MAR was sufficient to entitle him to relief, but it was enough to raise a factual dispute and, therefore, entitled Defendant to an evidentiary hearing.

[2] Defendant also argues that the trial court erred by denying his MAR before Defendant had received the postconviction discovery he was entitled to under section 15A-1415 (f), (g) and requested in his motion for postconviction discovery. While it is undisputed that Defendant obtained some discovery from the original prosecuting agency's file, Defendant's appellate counsel in oral argument claimed that a "critical piece of discovery," an August 2008 videotaped interview between Mary, Detective Fuller, and someone from the rape crisis center "that was referenced by other discovery materials and by the lead detective[,]" was not provided. We remand this issue for consideration by the trial court.

N.C. Gen. Stat. § 15A-1415(f)[7] states that

> In the case of a defendant who is represented by counsel in postconviction proceedings in superior court, the defendant's prior trial or appellate counsel shall make available to the defendant's counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.

Even though Defendant filed a motion for discovery contemporaneously with his MAR and a motion to stay a decision on the MAR until his counsel had received all postconviction discovery, the trial court made no findings or conclusions regarding Defendant's access, or lack thereof, to all the postconviction discovery he was entitled to receive. The State

7. Although the statute previously applied only to capital defendants, it was amended effective 1 December 2009 and now applies to all postconviction proceedings in superior court.

conceded at oral argument that Defendant's attorney in his original 2009 trial referenced this videotape but represented that this evidence is simply "unavailable." The State argues that because there is no evidence that this tape would have made any difference at trial, Defendant is not entitled to any relief on this ground.

Because the videotape is missing, we are unable to ascertain the exact nature of the evidence on the tape, decide whether it was a material piece of evidence, or determine the status of this evidence given its undisputed existence but unclear location. The record sheds no light on why the videotape is missing. Therefore, on remand, Judge Alford should also address whether the State failed to fully comply with N.C. Gen. Stat. § 15A-1415(f) and whether Defendant is entitled to any relief due to the State's failure to provide it. *See generally State v. McDowell*, 310 N.C. 61, 73, 310 S.E.2d 301, 309 (1984) (explaining the standard of review a trial judge undertakes when reviewing a defendant's MAR and determining whether he is entitled to a new trial based on undisclosed evidence: "Would the evidence, had it been disclosed to the jury which convicted defendant, and in light of all other evidence which that jury heard, likely have created in the jury's mind a reasonable doubt which did not otherwise exist as to defendant's guilt?").

Conclusion

For the reasons set out above, because "the facts disclosed in defendant's motion for appropriate relief reveal issues of fact which could not be resolved solely on the basis of [the record]," the trial court erred in failing to conduct an evidentiary hearing that would have allowed Defendant "to produce evidence to substantiate his allegations" in the MAR. *State v. Hardison*, 126 N.C. App. 52, 57, 483 S.E.2d 459, 462 (1997). Therefore, we reverse the trial court's order and remand for hearings consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge ELMORE concur.

STATE OF NORTH CAROLINA
v.
LUCIO TORRES MARTINEZ, Defendant

No. COA15-558

Filed 5 January 2016

Automobiles—impaired driving—breath alcohol testing—information about rights—Spanish speaker—admissibility not conditioned on understanding

The trial court did not err by admitting blood alcohol test results in a prosecution for impaired driving where defendant spoke Spanish and did not fully understand English. The oral notification of rights was in English, but the written notification was in Spanish, and there was no evidence to suggest that defendant was illiterate in Spanish. Neither the plain language nor the statutory purpose of N.C.G.S. § 20-16.2 disclosed a legislative intent by the General Assembly to condition the admissibility of chemical analysis test results on a defendant's subjective understanding of the information officers and chemical analysts are required to disclose.

Appeal by Defendant from judgment entered 19 November 2013 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 21 October 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Neil Dalton, for the State.

James W. Carter for the Defendant.

DILLON, Judge.

Lucio Torres Martinez ("Defendant") appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired. We find no error.

I. Background

On 10 March 2013, Defendant was pulled over by a police officer after attempting to evade a checkpoint. Upon approaching the driver's side door of Defendant's vehicle, the officer detected a moderate odor of alcohol emanating from inside. Defendant provided the officer with an identification card, and the officer ran his information. The officer then

returned to the vehicle and asked Defendant to step outside. Defendant stumbled as he exited, steadying himself on the door.

Once Defendant was outside the vehicle, the officer began conducting field sobriety tests. It became clear that Defendant did not fully understand English. The officer called his dispatcher, who spoke Spanish, and put the dispatcher on speakerphone to translate his commands during the tests. As he conducted the tests, the officer noticed that the odor of alcohol had grown stronger. The officer then administered two portable breath tests, which both registered positively for the presence of alcohol. The officer placed Defendant under arrest for driving while impaired and took him to the Wake County Jail.

After arriving at the jail, the officer conducted a chemical analysis of the alcohol content of Defendant's breath. Before beginning the test, the officer read Defendant his implied consent rights in English and gave him a Spanish language version of those same rights in written form. The officer called his dispatcher once more and placed him on speaker phone to answer any questions Defendant might have. Defendant signed the Spanish language version of the implied consent rights form and submitted to testing. The test results revealed that Defendant had a blood alcohol content of .13.

Defendant was indicted with driving while impaired and habitual driving while impaired based on the 10 March 2013 incident. The matter came on for trial in superior court. Before jury selection began, Defendant stipulated to three prior convictions for driving while impaired. The jury found Defendant guilty of driving while impaired. The trial court arrested judgment on this conviction, entered a judgment for habitual driving while impaired based on Defendant's pretrial stipulation, and sentenced Defendant to prison for sixteen (16) to twenty-nine (29) months. Defendant appeals.[1]

II. Analysis

In his sole argument on appeal, Defendant contends that the trial court erred in admitting the results of the breath alcohol testing. Specifically, Defendant contends that N.C. Gen. Stat. § 20-16.2, which mandates that motorists be informed of their implied consent rights before being subjected to breath alcohol testing, requires that a motorist be informed orally of his or her implied consent rights in a language

1. Defendant failed to enter a timely notice of appeal and has, therefore, petitioned our Court for certiorari. We hereby grant the petition.

he or she fully understands before being subjected to such testing. According to Defendant, because he is not a native English speaker, and he was only orally informed of his implied consent rights in English before being subjected to breath alcohol testing, the results were inadmissible. We disagree.

N.C. Gen. Stat. § 20-16.2(a) states that "[a]ny person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense." N.C. Gen. Stat. § 20-16.2(a) (2013). Our Supreme Court has held that the purpose of this statute is to promote cooperation between law enforcement and the driving public in the collection of scientific evidence, thereby ensuring public safety while safeguarding against the risk of erroneous driving privilege deprivation. *Seders v. Powell*, 298 N.C. 453, 464-65, 259 S.E.2d 544, 552 (1979). The statute provides that a law enforcement officer or chemical analyst who administers a breath alcohol test based on a suspected commission of an implied consent offense "shall" inform the motorist suspected of the offense "orally and also . . . in writing" about his or her rights and the consequences of refusing to submit to testing. N.C. Gen. Stat § 20-16.2(a). However, the statute also provides that a person who is unconscious or is otherwise unable to refuse testing may nevertheless be subject to testing and that the requirements related to informing the motorist of his or her rights and the consequences of refusal are inapplicable. *Id.* § 20-16.2(b). Thus, neither the plain language nor the statutory purpose of § 20-16.2 disclose a legislative intent by our General Assembly to condition *the admissibility* of chemical analysis test results on a defendant's subjective understanding of the information officers and chemical analysts are required to disclose before conducting the testing. *See, e.g.*, *State v. Carpenter*, 34 N.C. App. 742, 744, 239 S.E.2d 596, 597 (1977) ("Having placed the information in writing before the defendant, the operator was not required to make defendant read it. If this were so, any belligerent or uncooperative defendant could defeat the evidence of the [] test results by merely refusing to read the information that was placed before him.").

In the present case, we hold that the notice requirement of N.C. Gen. Stat. § 20-16.2(a) was met notwithstanding the fact that English is not Defendant's native language. The record reveals that Defendant was informed of his rights orally and in writing as required by statute, and that while the oral notification was in English, the written notification was in Spanish. There was no evidence presented to suggest that Defendant was illiterate in Spanish. In its enactment of the requirements of subsection (a) of N.C. Gen. Stat. § 20-16.2, we believe that the General

Assembly intended to require the disclosure of the information set out in that subsection, but not to condition the admissibility of the results of chemical analysis on the defendant's understanding of the information thus disclosed. *See Carpenter*, 34 N.C. App. at 744, 239 S.E.2d at 597. Therefore, we hold that the trial court did not err in allowing the test results to be admitted into evidence over Defendant's objection. Accordingly, this argument is overruled.

III. Conclusion

We believe that Defendant received a fair trial, free from error.

NO ERROR.

Judges GEER and HUNTER, JR., concur.

STATE OF NORTH CAROLINA
v.
JAMES NATHANIEL RICKS, JR., DEFENDANT

No. COA 15-300

Filed 5 January 2016

1. Robbery—instructions—lesser included offense

The trial court did not abuse its discretion in a prosecution for robbery with a dangerous weapon by instructing on the lesser included offense of common law robbery. The contradictory evidence as to one of the elements of armed robbery (the presence of a dangerous weapon) was enough to permit the jury to rationally find defendant guilty of the lesser included offense of common law robbery.

2. False Pretenses—indictment—description of property—sufficient

There was no fatal defect in an indictment for obtaining property by false pretenses where defendaqnt challenged the indictment based on the use of "U.S. Currency" instead of a more specific description of the property. "Money" is a sufficient description; "U.S. Currency" goes beyond that requirement.

Judge DILLON concurring in part and dissenting in part.

Appeal by Defendant from judgment entered on 14 February 2013 by Judge James E. Hardin, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 24 September 2015.

Attorney General Roy Cooper, by M. Denise Stanford, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender, for Defendant-Appellant.

HUNTER, JR. Robert N., Judge.

James Nathaniel Ricks, Jr. ("Defendant") appeals from a jury verdict convicting him of common law robbery, and obtaining property by false pretenses. Defendant pled guilty to obtaining habitual felon status. Defendant contends the trial court erred by instructing the jury on the lesser included offense of common law robbery. Defendant also contends the indictment charging him with obtaining property by false pretenses is fatally defective. We find no error.

I. Factual and Procedural History

On 3 January 2012, Defendant was indicted for robbery with a dangerous weapon. On 26 March 2012, a grand jury indicted Defendant for obtaining property by false pretenses. On 24 September 2012, the grand jury issued a superseding indictment for habitual felon status against Defendant.

Defendant's jury trial began on 11 February 2013. Judge James E. Hardin, Jr. presided over Defendant's trial in Alamance County Superior Court. The State's evidence, in part, tended to show the following.

The State called Martin Hugo Bermudez Amaya ("Amaya") to testify. Amaya along with his wife and children live at the Family Car Wash. Amaya was at the business on 6 October 2011, around lunch time when Defendant's car, a gold, four-door Cadillac, parked on the premises and Defendant emerged. Amaya described his interaction with Defendant:

> He say he got a 50 inch TV and he want to sell it. And in that moment I don't even have a TV in my place. That's the reason I say, I want to see that TV . . . Because I don't have a TV in that moment for my kids . . . Well, he say about $400. I say I don't have the $400. I just got $100.

After Amaya told Defendant he only had $100, and after a phone call, Defendant asked Amaya when he could get the rest of the money. Amaya told Defendant he got paid every Friday. Defendant made a second phone call and told Amaya "his buddy told him that would be okay."

Next, Amaya got in the front passenger seat of Defendant's car. Defendant told Amaya they were going to Defendant's house to retrieve the TV. Amaya asked Defendant:

> [C]an I take another person with me in the back of his car. He say, no, you and me and my buddy can put it in the car. And I say that -- I mean, that TV don't want to fit in your car because he told me it was a 50 inch TV. And he said he got a truck to put it in.

While traveling to get the television, Amaya and Defendant engaged in small talk. Amaya was not scared at that point. Then, Amaya explained another person entered Defendant's car. Next, Amaya described what happened to him:

> [Defendant] told me that -- you see that truck right there and I said, yes. And he, that's where I got the TV. And then I start -- I don't feel in that moment comfortable because he was telling me he got a TV in his house and I know that business because I do electrical job and I know those guys right there and that business and as I told him, you lied to me. As soon as I say that, you lied to me, he just do like what, what do you say. And then when I say those words I feel like something is pulling on this side of my body [left side] and that man just told me, give me what you got. The guy that was behind me [said give me what you got]. I just look like this and I -- I like -- I mean, I look at him and I say, you know how much I got and I just got the money and I throw it on [Defendant's] leg.

Amaya described what he saw and believed to be a gun:

> Well, when I do like this I saw the gun . . . It was like a gun, black colored gun . . . Actually, I don't see how big it was but I see the gun when he point it to me in this part . . . it was dark. Like a black color . . . It was -- I mean, when I see I look like it was a gun to me . . . All I know is I saw the gun. I mean, I don't have chance to say, yeah, that's real or fake . . . Well, I was scared. I was scared and I kind nervous. . .

After Amaya threw the money on Defendant's leg, Amaya was told to get out of Defendant's car. Defendant and the other person drove off. As the car drove away, Amaya took a pen from his pocket and wrote down the license plate number.

Then, Amaya walked to City Electric and used their telephone to call his wife. Amaya told his wife what happened. Amaya's wife picked him up and drove him back to the car wash.

Once Amaya returned to the car wash, Herman Elliott ("Elliott") came and spoke to him. Elliott had a lawn mower repair shop next to Amaya's car wash business and shared a parking lot with Amaya. Amaya explained to Elliott what happened. Elliott called the police. Shortly after, Corporal Joey Surles ("Officer Surles") and Officer Gary Scott Elliott ("Officer Elliott") arrived at Amaya's business. Later that day, at a show-up, Amaya described who he saw.

> [Defendant] was standing up out of his car talking to officer and then I was -- I was in the back of the officer car and he told me if I saw someone to I know, he told me, like, if that's the man to do -- stole your money and I say, yes, sir, he is . . . The officer asked me if I know that man. I said, yes, that's the man that stole me . . . Well, I say, yes, 100% sure he is.

The State called a number of officers to testify. Officer Surles testified first. On 6 October 2011, Officer Surles was employed by the Burlington Police Department as an officer and working in that capacity when he and Officer Elliott responded to a robbery call. Amaya gave Officer Surles a statement regarding what happened. Officer Surles recounted his interview with Amaya during his testimony.

> When he got [to the intersection of Church and O'Neal in front of City Electricity Supply]—[the second black male] got into the vehicle he said he sat directly behind him and as they turned right on to O'Neal the second suspect produced a firearm and pointed it at his lower left side . . . it was a black handgun. He was not sure if it was a revolver, whether it was a revolver or semi-automatic or what brand or make or anything like that.

Then, Officer Surles explained to Amaya that a show-up would take place and that the person who robbed him may or may not be the one at the police department. After Amaya positively identified Defendant as the person who robbed him, Defendant was read his rights and placed under

arrest. Defendant waived his rights and agreed to be interviewed by the police officers. Officer Elliott primarily interviewed Defendant, Officer Surles sat in. Officer Surles described the interview with Defendant.

> Mr. Ricks [Defendant] stated that he went to 1412 East Webb Avenue to get his car washed. He stated that Mr. Martin [Amaya] asked if he had a TV to sell and Mr. Ricks told him, yes, he had one and for $90. Ricks stated that Martin wanted to see the TV or Mr. Amaya wanted to see the TV before he bought it and so he took him to look at the TV. He stated that he didn't want to take Martin to his house so he took him to the Aldi foods and he said he took the $90 and told him that he would be right back . . . After that conversation Mr. Ricks advised that he did try to scam Mr. Amaya by telling him that he had something to sell but really did not. [Defendant] advised [Officer Elliott] that [Defendant] was actually not planning to return the money . . . [Defendant] continuously stated that there was no robbery and no gun.

Next, the State called Officer Elliott to testify. Officer Elliott, a patrol officer for the Burlington Police Department, assisted Officer Surles with the robbery call. Amaya gave Officer Elliott the license plate number which was run through the search system. The search revealed that the license plate number was registered to a gold, Cadillac four door, sedan Deville. Officer Elliott further concluded that the vehicle associated with that license plate number belonged to Defendant. Officer Elliott contacted Defendant and arranged for Defendant to come by the police department.

Then, Officer Elliott described his initial interactions with Defendant.

> [Defendant] started recanting his story about that he gave a Hispanic male a ride to go buy a TV. However, the sale was not completed . . . [Defendant] reached into his left pocket and said here's the money, if I give him the money, can I go home . . . I confirmed this is the money that, in fact, the victim gave you and you kept it until now and he said, yes . . .

Next, Officer Elliott explained what happened at the show-up and Defendant's subsequent interview:

> Mr. Ricks was instructed just to stand near me. He was not in any type of restraints . . . We both stood there and

> Officer Surles notified me that it was 100 percent identification. Based on the results of the show-up and the fact that he had the victim's money in his pocket, he was subsequently arrested.
>
> [Officer Elliott] confirmed again with [Defendant] that he did intentionally -- unlawfully and intentionally take the $100 from the victim. [Defendant] said, yes . . . He confessed to planning to deprive the victim of money, taking the money from the victim . . . I probably said, did he intentionally willing to deprive someone of money. He said yes.

The State of North Carolina rested following testimonies by other witness. The Defense made a motion to dismiss both charges at the close of State's evidence. The ground for Defense's motion was based on insufficiency of the evidence. In the court's discretion, the motion was denied.

The Defense's evidence, in part, tended to show the following. James Ricks, Jr. ("Defendant") testified on his own behalf. Defendant described the incident of 6 October 2011:

> On October the 6th, when I went [to the Family Car Wash] I told him [Amaya], I said, I needed my car washed. He asked me did I have a TV for sale. I said, I got one at home, it don't work that good. He said, no, he just wanted to play videos on it with his kids. So I said, okay. I said, let's go get it. He jumps right in the car, just like he said, and we drove and got it. So on the way there I said, well, my wife is sick. I don't want to worry her to death . . . And on the way there I said, well, I'm going to stop here and run and get the TV. He said that would be good. I'll get some tater chips and a grape soda for the kids to play videos and I went on home . . . I went to the telephone . . . So I answered the telephone . . . Burlington police. He said this is Officer Elliott. I need you to come down so that I can show you a line-up.

Defendant explained his interactions with the police officers:

> I said, what you mean, sitting in the back seat of my car. He said, well, a guy been robbed at gun point out of $100. I said, man, nobody been robbed . . . I say I don't know nothing about that and that's all I said. I don't know nothing about that. I don't know nothing about nobody being robbed.

Defendant denied anyone else being in the car. Defendant denied a gun being in his car. The Defense rested after Defendant's testimony. The State did not present a rebuttal argument. At the close of all the evidence, Defense renewed its motion to dismiss the armed robbery charge and also the obtaining property by false pretenses charge based on insufficiency of the evidence. The motion was denied.

At the charge conference, the trial court said it would instruct on the lesser included offense of common law robbery. The State responded to a jury instruction that included common law robbery.

> Well, he says it didn't happen at all. So the evidence is an armed robbery. The victim testified a gun was presented to him and he threw the money down. [Defendant] says that didn't happen at all. So I would say that there is not common law robbery. But whatever Your Honor thinks best.

Defense counsel objected to a jury instruction pattern that gave instruction on the lesser included offenses of armed robbery with a dangerous weapon. Defense counsel stated "[a]gain, I'm not asking for any lesser included. I think it's either armed robbery or it's not." The trial court decided to instruct on all the lesser included offenses of robbery with a dangerous weapon.

The jury found Defendant guilty of common law robbery and obtaining property by false pretenses. Defendant pled guilty to habitual felon status. The convictions were consolidated. On 14 February 2013, the trial court sentenced Defendant, as a Level III offender, to a prison term of ninety-six to one-hundred and twenty-five months. On 26 June 2014, this Court granted Defendant's Petition for Writ of Certiorari for the purpose of reviewing the 14 February 2013 judgment.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013), which provides for an appeal of right to the Court of Appeals for any final judgment of a superior court.

III. Standard of Review

We review the issues on appeal under two different standards of review. "As to the issue of jury instructions, we note that choice of instructions is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed.2d 71 (2002). "An instruction on a lesser-included offense must

be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). Further, "[an] error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

This Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *disc. rev. denied*, appeal dismissed, 363 N.C. 586, 683 S.E.2d 215 (2009). "An attack on an indictment is waived when its validity is not challenged in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L.Ed. 2d 498 (2000). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *Id.*, 528 S.E.2d at 341.

IV. Analysis

A. Jury Instruction

[1] "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). However, "where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *Id.* at 562, 572 S.E.2d at 772. The necessity for instructing the jury as to a lesser included crime arises only when there is evidence from which the jury could find that the included crime of lesser degree was committed. *State v. Tarrant*, 70 N.C. App. 452, 320 S.E.2d 291, 294 (1984).

"Common law robbery is a lesser included offense of armed robbery or robbery with a firearm or other dangerous weapon and an indictment for armed robbery will support a conviction of common law robbery." *Id.* at 451, 320 S.E.2d at 293–94 (1984). The primary distinction between armed robbery and common law robbery is that "the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. *State v. Frazier*, 150 N.C. App. 416, 418, 562 S.E.2d 910, 912–13 (2002). In deciding whether a particular instrument is a dangerous weapon, "the determinative question is whether the evidence was sufficient to support a jury finding that

a person's life was in fact endangered or threatened." *Id.* at 419, 562 S.E.2d at 913.

On appeal, Defendant contends the instruction on common law robbery was not supported by the evidence. Defendant further contends that the trial court erred in including common law robbery when defense counsel asked the court for no instruction on any lesser included offense. We are not persuaded.

Choice of jury instruction is within the trial court's discretion when there is some evidence of the lesser offense. At trial, the State's evidence, in part, tended to show through Amaya's testimony, that a gun was used. Amaya stated that he saw a black gun when he was told to give the $100. Amaya further testified that he did not know whether or not the gun was real or plastic but that he saw the gun. Amaya also stated that he was scared and "kind nervous." Amaya told multiple people after the incident that a gun was pointed at him.

Some evidence was presented that would allow a jury to conclude on a lesser offense of common law robbery. During Defendant's testimony, Defendant denied that he had picked anyone up for a ride at the time of the incident. Defendant also denied that a gun had been used.

Armed robbery requires the crucial element of a dangerous weapon whereas common-law robbery does not. The victim, Amaya, testified that a he saw a black gun when he was demanded to give the money. The officers testified Defendant denied that a robbery had occurred, or that a gun was ever used. Defendant, in his testimony, denied that there was ever a gun, or a dangerous weapon. Therefore, the contradictory evidence as to one of the elements of armed robbery was enough to permit the jury to rationally find Defendant guilty of the lesser included offense of common law robbery.

For the foregoing reasons, there is no showing that the trial court abused its discretion in instructing on the lesser included offense. Instruction on the lesser included offense of common law robbery was proper and within the trial court's discretion. Therefore, we find no error in the jury instructions.

B. Indictment Sufficient

[2] An indictment must charge the "essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). "[T]he evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge

the offense." *State v. Walston*, 140 N.C. App. 327, 334, 536 S.E.2d 630, 635 (2000). The purpose of an indictment is to give defendant reasonable notice of the charges against him so that he may prepare for his upcoming trial. *State v. Campbell*, __ N.C. __, __, 772 S.E.2d 440, 443 (2015) (citing *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)).

The elements of obtaining property by false pretenses are "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Ledwell*, 171 N.C. App. 314, 317, 614 S.E.2d 562, 565 (2005).

In this case, the indictment states:

> . . . the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain a quantity of U.S. currency from [Amaya]. . . . The Defendant representing that he had a television to sell for a quantity of U.S. Currency, when in fact the Defendant did not have a television to sell for a quantity of U.S. Currency and never intended to have a television to sell for a quantity of U.S. Currency.

Defendant challenges the indictment for obtaining property by false pretenses based on the use of "U.S. Currency" instead of a more specific description of the property. The indictment provided no description of the number or denomination of the bills and also did not specify the amount of money at issue. Citing *Smith* and *Reese*, Defendant says that the indictment must contain the amount of money at issue. Based on what Defendant contends is a flawed indictment, Defendant asks this Court to reverse his conviction for obtaining property by false pretenses for lack of jurisdiction. We are not persuaded.

We look to a line of North Carolina Supreme Court cases beginning in 1880 to respond to Defendant's arguments. First, *State v. Reese* involved a bill of indictment charging defendant with obtaining goods and money by false pretenses. 83 N.C. 637, 638, 1880 WL 3420, 1 (1880). The indictment described the fraudulently obtained property as "goods and money . . . to the value of fifty dollars." *Id.*, 1880 WL at 1. The Supreme Court decided the bill was too vague, saying "the money obtained should have been described at least by the amount, as for instance so many dollars and cents." *Id.*, 1880 WL at 1.

However, the opinion goes on to explain the indictment in that case was issued before 1877, when the legislature enacted a new statute to address bills of indictment in larceny cases. *Id.*, 1180 WL at 1. Generally, the same degree of certainty must be used to describe the goods in indictments for obtaining property by false pretenses as in indictments for larceny. *Id.* at 639, 1880 WL at 1. The new statute, cited as the act of 1876-77, ch.68 stated:

> That in every indictment in which it shall be necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it shall be sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall be proven.

N.C. Sess. Laws 1876-77 Ch.68. That act is still in effect today. N.C. Gen. Stat. §15-149 (2013).

Following the adoption of the act of 1876-77, *Freeman* interpreted the statute as it relates to the denomination of the money taken. In *Freeman*, the defendant was charged with larceny of a purse, a key, and "thirty dollars in money." 89 N.C. 469, 470, 1883 WL 2553, 1 (1883). Defendant contended there was a fatal variance in the bill of indictment because the indictment said "thirty dollars" instead of describing the exact currency stolen as three ten dollar bills. Referencing the act of 1876-77, codified at that time as § 1190, our Supreme Court responded, "All that is necessary in a bill of indictment for the larceny of money or United States treasury notes, or any note of any bank whatever, is to describe it as *money* . . ." *Id.* at 471–472, 1883 WL at 2 (emphasis in original.). The Court went on to explain indictments "shall be sustained by proof of *any amount* of coin or treasury note . . . ." *Id.* at 472, 1883 WL at 2 (emphasis added).

The principle that the item obtained in a false pretense crime and the thing stolen in larceny must be described with the same degree of certainty was reaffirmed in 1915. *State v. Gibson*, 169 N.C. 318, 85 S.E. 7, 8 (1915). The item must be described with "reasonable certainty" and "by the name or term usually employed to describe it." *Id.*, 85 S.E.2d at 8.

Gibson involved an indictment describing the falsely obtained property as "money" when, in fact, it was a promissory note. *Id.*, 85 S.E. at 8–9. The Court held the trial court should have dismissed the indictment because it did not accurately describe the thing obtained. *Id.*, 85 S.E. at 9.

In 1941, our Supreme Court again considered an indictment in a false pretenses case, this time the defendant was charged with obtaining "goods and things of value." *State v. Smith*, 219 N.C. 400, 400, 14 S.E.2d 36, 36 (1941). Evidence tended to show defendant fraudulently obtained $150. *Id.*, 14 S.E.2d at 37. The Court explained "goods and things" was too vague and uncertain a description of the property obtained to be sufficient. Quoting *Reese*, the Court said the money "should have been described at least by the amount, as, for instance, so many dollars and cents." The Court also cited to *Gibson* for the same proposition, but that case involved whether describing a promissory note as "money" was proper, not whether money had to be described in dollars and cents.

The Court failed to look to the statute when deciding *Smith*. The Court quoted *Reese*, but failed to follow *Reese* as a whole by not considering the statute governing the description of money in indictments. This faulty citation to *Reese*, quoting one sentence no longer applicable due to the new statute, led our Court to the incorrect conclusion again in *Jones*.

The Supreme Court's most recent decision on point is *State v. Jones*. 367 N.C. 299, 758 S.E.2d 345 (2014). The indictment charged that Jones obtained "services" by false pretenses. *Id.* at 307, 758 S.E.2d at 351. The Court mentioned *Reese* and *Smith*, saying that "money" is insufficient to describe the property without going into further detail. *Id.*, 758 S.E.2d at 351. The decision rested on the term "services" and not any description of money, thus the mention of the previous holdings was merely dicta and not necessary for the holding in that case. Even so, the statement rested on the faulty precedent of *Smith* which did not rely on N.C. Gen. Stat. § 15-149.

In our decision we cannot ignore a statute directly on point. As codified today, the statute originally passed in 1877 states:

> In every indictment in which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, *it is sufficient to describe such money, or treasury note, or bank note, simply as money*, without specifying any

> particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven.

N.C. Gen. Stat. § 15-149 (2013) (emphasis added). And, while we understand the statute says it applies to larceny, indictments for larceny and obtaining property by false pretenses are required to have the same degree of certainty. *Reese*, 83 N.C. at 639, 1880 WL at 1; *Gibson*, 169 N.C. 318, 85 S.E. at 8. Additionally, shortly after the passage of the statute, our Supreme Court thought it would have applied to a false pretenses case had the timing of the indictment followed the enactment of the statute.

Thus, we now look to the statute to determine whether the indictment in this case, describing the property obtained as "a quantity of U.S. Currency" is sufficient to uphold the indictment. The statute which says describing money simply as "money" is sufficient suggests that term is enough to put a defendant on notice of the property obtained in order to prepare for his or her trial. Here, we have an indictment describing the property as "U.S. Currency," a term more specific than money.

We find it persuasive that an indictment charging defendant with obtaining "beer and cigarettes" by false pretenses is sufficient to put defendant on notice of the charges against him. *State v. Perkins*, 181 N.C. App. 209, 638 S.E.2d 59 (2007). "Beer and cigarettes" is specific enough to enable a defendant to prepare his defense. *Id.* at 215, 638 S.E.2d 595–596. The indictment was upheld despite a lack of value of the beer and cigarettes or a number of cases or packages of those items taken.

In light of N.C. Gen. Stat. § 15-149, we see no reason to treat currency differently than beer or cigarettes. "Money," as the statute explains, is a sufficient description of the property. Here, we have an indictment that goes above that requirement by describing the money as "U.S. Currency." Therefore, we find no fatal defect in the indictment.

V. Conclusion

For the foregoing reasons, we find no error and the final judgment of the trial court is affirmed.

NO ERROR.

Judge DIETZ concurs.

Judge DILLON concurring in part, and dissenting in part.

DILLON, Judge, concurring in part, and dissenting in part.

Defendant argues that the trial court erred in its jury instructions. The majority holds that there was no error on this issue. I concur.

Defendant also argues that the indictment charging him with obtaining "a quantity of U.S. currency" by false pretenses was fatally defective because this description of *the thing he obtained* was not sufficient. The majority holds that the description "a quantity of U.S. currency" does not render the indictment fatally defective. I believe, however, that our Supreme Court's decision in *State v. Reese*, 83 N.C. 637, 640 (1880), which was recently reaffirmed in *State v. Jones*, 367 N.C. 299, 307, 758 S.E.2d 345, 351 (2014), compels us to agree with Defendant. Accordingly, I respectfully dissent on this issue.

I. Supreme Court Precedents Compel the Conclusion That the Indictment is Fatally Defective

Defendant was indicted for violating N.C. Gen. Stat. § 14-100, which provides that a person is guilty of obtaining property by false pretenses where he obtains "any money, goods, . . . , services . . . , or other thing of value" by means of a false pretense. N.C. Gen. Stat. § 14-100 (2011).

Our Supreme Court has repeatedly held that an indictment is constitutionally sufficient if it "apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). For indictments charging under N.C. Gen. Stat. § 14-100, our Supreme Court has held that "*the thing obtained* [i.e., the money, goods, services, etc.] by the false pretense *must be described with reasonable certainty*, and by the name or term usually employed to describe it." *Jones*, 367 N.C. at 307, 758 S.E.2d at 351 (emphasis added) (internal marks omitted).

In the present case, "the thing obtained" by Defendant was described in the indictment as "a quantity of U.S. Currency." I believe that decisions from our Supreme Court compel us to conclude that this description is not adequate.

In 1880, our Supreme Court held in *State v. Reese* that a false pretenses indictment describing the property obtained as "money" was fatally defective, stating that "the money obtained should have been

described *at least by the amount – as, for instance, so many dollars and cents.*" *Reese*, 83 N.C. at 639 (emphasis added).

In 1941, our Supreme Court reaffirmed this holding in *State v. Smith*, 219 N.C. 400, 401, 14 S.E.2d 36, 36-37 (1941). In *Smith*, the defendant was accused of obtaining money by false pretenses; and the indictment described the money as "goods and things of value." The Court held that this description was fatally defective, and relying on its 1880 *Reese* decision, stated that the money "should have been described [in the indictment] *at least by the amount, as, for instance, so many dollars and cents*." *Id.* at 401, 14 S.E.2d at 36-37 (emphasis added).

Recently, in 2014, our Supreme Court reaffirmed both the 1880 *Reese* decision and the 1941 *Smith* decision, stating as follows:

> This Court has not had occasion to address this issue recently, but consistently has held that simply describing the property obtained as "money," *State v. Reese*, 83 N.C. 637, 640 (1880), or "goods and things of value," *State v. Smith*, 219 N.C. 400, 401, 14 S.E.2d 36, 36 (1941), is insufficient to allege the crime of obtaining property by false pretenses.

Jones, 367 N.C. at 307, 758 S.E.2d at 351. Following the reasoning in these older cases, the Court held that an indictment alleging that the defendant obtained "services," without some description as to the type of services which were fraudulently obtained, was fatally defective. *Id.* at 307-08, 758 S.E.2d at 351. The Court so held even though, like in the present case, the indictment was specific in identifying the name of the victim and the date of the offense.[1]

"U.S. Currency" is almost synonymous with "money," though admittedly, the former language does provide *some* further description, as some *unspecified* amount of dollars and cents issued by our federal government. *See State v. Gibson*, 169 N.C. 318, 320, 85 S.E. 7, 9 (1915) (defining "money" as "any lawful currency, whether coin or paper, issued by the Government as a medium of exchange"). However, this description falls short of the specificity which the Supreme Court has repeatedly indicated is *minimally required* in describing money in a false pretenses indictment, namely, that the description "*at least* [state] the amount" of "dollars and cents." *Reese*, 83 N.C. at 639 (emphasis added).

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1. The indictment at issue in *Jones* alleged, in part, that "on or about the 19th day of May, 2010, in Mecklenburg County," the defendant did "obtain services from Tire Kingdom, Inc." *See* Record on Appeal at 7, *State v. Jones*, No. COA 12-282.

I note that our Court has, on occasion, sustained indictments which seemingly conflict with the Supreme Court's decisions. For instance, in 2005 our Court sustained an indictment which described the property obtained merely as "a quantity of U.S. Currency." *State v. Ledwell*, 171 N.C. App. 314, 318, 614 S.E.2d 562, 565 (2005).[2] In *Ledwell*, our Court stated the case was distinguishable from the 1880 *Reese* case and the 1941 *Smith* case because "the [*Ledwell*] indictment [mentioned] the specific item, ["a watchband"], which defendant used to obtain the money," and therefore provided the defendant with "notice of the crime of which he [was] accused." *Id.* However, this reasoning seems flawed as the indictments in the two cited Supreme Court cases *also* mention the items which were used to obtain money. The indictment in the 1880 *Reese* case identified the item as "a large and valuable farm with team and stock thereon in the county of Northampton[.]" *Reese*, 83 N.C. at 638. The indictment in the 1941 *Smith* case identified the item as "two certain mules." *Smith*, 219 N.C. at 401, 14 S.E.2d at 36.

In the 2014 *Jones* case – which was decided by our Supreme Court 9 years after *Ledwell* – the indictment, which the Supreme Court held was defective, also identified the item used to obtain property from the victim, namely as "the credit card number belonging to Mary Berry." *See* Record on Appeal at 7, *State v. Jones*, No. COA 12-282. In conclusion, I see no meaningful difference between the *Ledwell* indictment (which was sustained) and the indictments from the three Supreme Court cases (which were declared fatally defective).

II. N.C. Gen. Stat. § 15-149 Does Not Overrule Supreme Court Precedent on This Issue

The majority relies, in part, on language in N.C. Gen. Stat. § 15-149 to conclude that the language in the present indictment is sufficient. This statute provides in relevant part as follows:

> In every indictment which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note[.]

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2. Other decisions from our Court are in accord with *Ledwell*. For instance, in 1993, an indictment which identified the thing obtained as "United States money" was sustained. *See State v. Almond*, 112 N.C. App. 137, 148, 435 S.E.2d 91, 98 (1993). In an unpublished 2006 opinion, an indictment which identified the thing obtained as "money" was sustained. *See State v. Thompson*, 2006 N.C. App. LEXIS 1962, *7.

N.C. Gen. Stat. § 15-149 (2013). The statute, by its terms, only applies to indictments for larceny (and not for obtaining property by false pretenses). However, assuming that the statute applies here, I do not believe that it saves the present indictment.

As noted by the majority, the predecessor of N.C. Gen. Stat. § 15-149 was originally enacted by our General Assembly in 1877 (the "1877 Act") and is referenced in the 1880 *Reese* decision. *See Reese*, 83 N.C. at 639. However, I do not believe that the 1880 *Reese* decision stands for the proposition that N.C. Gen. Stat. § 15-149 was intended to relieve the drafter of an indictment for obtaining money by false pretenses from describing the money "at least" by its amount. Rather, I believe that the 1880 *Reese* decision stands for the proposition that N.C. Gen. Stat. § 15-149 merely relieved the drafter of the more stringent requirement of that day to *also* "[describe] and [identify] [the exact type of] bank bills, Treasury notes, [etc.]" that were obtained. *Id.*

Unlike today, where our paper money consists of "federal reserve notes," paper money in the 1800's was issued in a variety of forms, including "bank notes" issued by various state and federally-chartered banks and "treasury notes" issued by the federal government.[3] And prior to the passage of the 1877 Act, drafters of indictments for obtaining money by larceny or by false pretenses were generally required to describe, not only the *amount* of money obtained, but also the *type* of money obtained, e.g. three $10 bank notes or two $5 dollar treasury notes, etc. *See State v. Fulford*, 61 N.C. 563, 563 (1868) (stating that "[i]t is sufficient to describe [the money] as a bank note for so many dollars on a certain bank, of the value of so many dollars").[4] And as stated by the Supreme Court in the 1880 *Reese* decision, a pre-1877 indictment which merely described the thing obtained as "money" without any further description was fatally defective. *Reese*, 83 N.C. at 639.

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3. The Citizens' State Bank in New Orleans issued a $10 bank note containing the word "DIX" (French for "ten"), which some historians believe is the genesis for the word "Dixie," an historical nickname for the southern region of the United States. *See "Dixie" Originated From Name "Dix" An Old Currency*, New Orleans American, May 29, 1916, vol. 2, no. 150, at 3. The word "greenbacks" originally described certain treasury notes with green ink used on one side which were issued by the United States to help fund the Civil War. *See Lackey v. Miller*, 61 N.C. 26 (1866).

4. *See also State v. Thomason*, 71 N.C. 146, 146-47 (1874) (holding that language indicating "two five dollar United States Treasury notes" to be sufficient); *State v. Rout*, 10 N.C. 618, 618 (1825) (holding that language indicating "one $20 bank note on the State Bank of North Carolina" was sufficient).

The Supreme Court in *Reese* noted, though, that the General Assembly had passed the 1877 Act "to remedy the difficulty of *describing and identifying* bank bills, Treasury notes, etc." *Id.* at 639 (emphasis added). However the Court still held to the view that describing the thing merely as "'money' without anything added to make it more definite, is too loose in indictments of this kind[,]" *id.* at 640, and that the money should be "described at least by the amount," *id.* at 639. The Court reaffirmed this view in the 1941 *Smith* decision and more recently in the 2014 *Jones* decision.

It is true that N.C. Gen. Stat. § 15-149 contains the language that "it is sufficient to describe such money, or treasury note, or bank note, *simply as money*" which could be construed to relieve a drafter of the requirement of providing *any* further description of the money obtained, including the *amount*. N.C. Gen. Stat. § 15-149 (emphasis added.) However, the language "simply as money" is followed in the statute by the qualifying language, "without specifying any particular coin, or treasury note, or bank note[,]", *id.*, which suggests that the statute is intended only to relieve a drafter of the requirement of describing the *type* of money, e.g., bank notes or treasury notes, which was obtained.

In conclusion, as our Supreme Court reminded us in the 2014 *Jones* decision, there is still a requirement to describe the thing obtained in an indictment for false pretenses with "reasonable certainty." *Jones*, 367 N.C. at 307, 758 S.E.2d at 351. And where the thing obtained is money, pursuant to N.C. Gen. Stat. § 15-149, it is no longer required that the indictment provide a description of each piece of money in detail (e.g. "three $10 federal reserve notes"). However, based on the 1880 *Reese* decision – as reaffirmed in the 1941 *Smith* decision and the 2014 *Jones* decision – *some* description of the money must be included in the indictment to meet the requirement that it be described with reasonable certainty. Our Supreme Court has articulated the minimal specificity required to be "at least" by its amount (e.g. "$30 in U.S. Currency").

III. Conclusion

The State essentially argues that the indictment in the present case should be sustained because it adequately apprises Defendant of what he was being charged with (e.g., by including the name of the victim and the date of the offense) and that all the elements of the crime were pleaded. However, in an indictment alleging obtaining money by false pretenses, our Supreme Court has repeatedly stated that the money be described "at least by the amount, as for instance so many dollars and cents." Since the Court of Appeals "has no authority to overrule

decisions of our Supreme Court and we have the responsibility to follow those decisions 'until otherwise ordered by our Supreme Court[,]' " *Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443, *aff'd*, 362 N.C. 599, 669 S.E.2d 310 (2008), my vote is to vacate the judgment convicting Defendant of obtaining property by false pretenses.

STATE OF NORTH CAROLINA
v.
ROBERT HUGHES SPRINGLE, DEFENDANT

No. COA15-597

Filed 5 January 2016

1. Appeal and Error—satellite-based monitoring—civil in nature—Appellate Rule 3

Defendant's petition for writ of certiorari was granted in a satellite-based monitoring (SBM) case. SBM orders are civil in nature and are governed by Rule 3 of the North Carolina Rules of Appellate Procedure. Failure to comply with Rule 3 is a jurisdictional default; however, a defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake.

2. Sentencing—recidivist—findings insufficient—out-of-state convictions

The trial court's conclusion that defendant was a recidivist was not supported by competent evidence and, therefore, could not support the conclusion that he must submit to lifetime sex offender registration and satellite-based monitoring. The conclusion that defendant was a recidivist was not supported by findings made by the trial court as to which prior conviction qualified defendant as a recidivist and, further, a stipulation to a prior record level worksheet reflecting out-of-state convictions could not constitute a legal conclusion that a particular out-of-state conviction was "substantially similar" to a particular North Carolina felony or misdemeanor.

3. Satellite-Based Monitoring—civil proceeding—ineffective assistance of counsel—not applicable

The argument that an ineffective assistance of counsel claim can be asserted in satellite-based monitoring (SBM) appeals because an SBM proceeding is not criminal in nature has been rejected.

Appeal by defendant from order entered 10 November 2014 by Judge Jack Jenkins in Carteret County Superior Court. Heard in the Court of Appeals 3 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Amanda S. Zimmer for defendant-appellant.

BRYANT, Judge.

Where the State fails to demonstrate the substantial similarity of defendant's out-of-state convictions to North Carolina crimes and where the trial court fails to determine, either orally or in writing, that the out-of-state convictions are substantially similar to North Carolina offenses for purposes of enrollment in satellite-based monitoring, we remand for resentencing.

On 7 October 2013, true bills of indictment were issued against Robert Hughes Springle, defendant, for two counts of felonious indecent exposure by an offender over the age of eighteen with a victim under the age of sixteen in violation of N.C. Gen. Stat. § 14-190.9(a1) (2013), *amended by* 2015 N.C. Sess. Laws 2015-250. On 4 September 2014, defendant pled guilty to both offenses in exchange for an active term of imprisonment of eight to ten months, with credit for time served in Case No. 11 CRS 55435, and a suspended sentence with supervised probation in Case No. 13 CRS 54303. The Honorable Benjamin Alford, Judge presiding, found a factual basis existed and accepted the plea. Judge Alford subsequently completed a Judgment and Commitment form for each offense consistent with the plea agreement defendant entered into with the State.

During the 4 September 2014 hearing, Judge Alford noted on the record that defendant was "a recidivist" and, therefore, subject to satellite-based monitoring for the remainder of his natural life. The court, however, failed to note those findings on the corresponding AOC-CR615 form, Judicial Findings and Order for Sex Offenders – Suspended Sentence.[1]

1. Judge Alford checked the box on form AOC-CR-803C titled "Special Conditions For Reportable Convictions – G.S. 15A-1343(b2)," which notes that defendant must "[r]egister as a sex offender and enroll in satellite-based monitoring if required on the attached AOC-CR-615, Side Two." However, Judge Alford did not complete the corresponding form AOC-CR-615, rather Judge Jenkins did. Judge Jenkins made the finding that defendant is a recidivist and ordered that defendant register as a sex offender for his natural life and enroll in satellite-based monitoring for his natural life.

On 10 November 2014, the Honorable Jack W. Jenkins presided over a "bring-back hearing" to resolve the question about defendant's enrollment in the satellite-based monitoring program. At the hearing, the State alleged, "[a]t 11 CRS 55435, Your Honor, I think under the [s]tatute, he is a recidivist. The State would maintain that he is, and that requires a lifetime on monitoring." The transcript does not reflect that any evidence was handed up to the court at that time to support this allegation. However, the sentencing worksheet reflects prior convictions for felony sex offense against a child and three separate prior convictions of indecent exposure. The court inquired, "But it doesn't seem to be a dispute that he is a recidivist and, therefore, it's lifetime?" Defense counsel indicated that there was no dispute. A written order was entered requiring defendant to register as a sex offender for life and to enroll in satellite-based monitoring for the remainder of his natural life.

On 9 February 2015, a hearing was held for the purpose of terminating defendant's probation, Judge Alford presiding. At the hearing, defendant's trial counsel informed the court of the following: (1) defendant wished to appeal the 10 November 2014 satellite-based monitoring enrollment order; (2) trial counsel had prepared a simple Notice of Appeal for defendant; and (3) while defendant signed the document, his trial counsel filed it with the Clerk of Court. However, that Notice of Appeal did not contain a certificate of service reflecting that it had been served on the State.

Defendant's counsel further stated that he had informed defendant there were no grounds upon which to appeal and that counsel personally considered the appeal to be "groundless," but asked Judge Alford to "look at it and see if you want to appoint counsel" for the appeal. Judge Alford appointed the Appellate Defender and ordered a transcript of the prior hearings. Defendant noted an appeal of the 10 November 2014 order on lifetime-SBM.

Petition for Writ of Certiorari

[1] Rule 21(a)(1) of our Appellate Procedures provides, "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. 21(a)(1) (2015); *see State v. Hammonds*, 218 N.C. App. P. 158, 162, 720 S.E.2d 820, 823 (2012) (allowing the defendant's petition for writ of certiorari when "it [was] readily apparent that [the] defendant ha[d] lost his appeal through no fault of his own").

On 1 June 2015, defendant filed a petition for writ of certiorari and alleged a violation of N.C. R. App. P. 4 related to the defective service of his notice of appeal. On 11 June 2015, the State filed a response to defendant's petition for writ of certiorari, also noting that notices of appeal of SBM orders are governed by Rule 3 of the North Carolina Rules of Appellate Procedure, as they are civil in nature. The State requested that this Court deny defendant's petition. On 12 June 2015, defendant filed a reply to the State's response. For the reasons that follow, we grant defendant's petition for writ of certiorari.

Our Court has interpreted SBM hearings and proceedings as civil, as opposed to criminal, actions, for purposes of appeal. Therefore, "a defendant must give notice of appeal pursuant to N.C. R. App. P. 3(a)," from an SBM proceeding. *State v. Brooks*, 204 N.C. App. 193, 194–95, 693 S.E.2d 204, 206 (2010) (citing N.C. R. App. P. 3(a)). "A party must comply with the requirements of Rule 3 to confer jurisdiction on an appellate court." *In re Moore*, ___ N.C. App. ___, ___, 758 S.E.2d 33, 36 (2014) (citing *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)). "Thus, failure to comply with Rule 3 is a jurisdictional default that prevents this Court 'from acting in any manner other than to dismiss the appeal.' " *Id.* (quoting *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008)).

However, a defect in a notice of appeal "should not result in loss of the appeal as long as the intent to appeal . . . can be fairly inferred from the notice and the appellee is not misled by the mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (quoting *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979)) (internal quotation marks omitted); *see also In re M.B.*, ___ N.C. App. ___, ___, 771 S.E.2d 615, 623 (2015) (noting that "this Court's prior holdings make clear that a notice of appeal is not defective if 'intent to appeal can be fairly inferred' " (quoting *Phelps*, 217 N.C. App. at 410, 720 S.E.2d at 791)); *State v. Williams*, ___ N.C. App. ___, ___, 761 S.E.2d 662, 664 (2014) (declining to dismiss the defendant's appeal on the basis of a defect in the notice of appeal because defendant's appeal could be fairly inferred and the State provided no indication that it was misled by the defendant's mistake).

Here, the State concedes that it has "suffered no prejudice" as a result of defendant's defective notice of appeal, which we interpret to mean that the State was not misled by the defective notice. Therefore, as defendant's notice of appeal was defective "through no fault of his own," *see Hammonds*, 218 N.C. App. at 162, 720 S.E.2d at 823, and the State

was not misled as a result thereof, we grant certiorari to permit review of the lifetime-SBM order entered against defendant.

On appeal, defendant argues (I) that the trial court's finding that he was a recidivist was not supported by competent evidence and, therefore, cannot support the conclusion that defendant must submit to lifetime sex-offender registration and satellite-based monitoring, and (II) that defendant did not receive effective assistance of counsel.

I

[2] Defendant first argues that the trial court's conclusion that he was a recidivist was not supported by competent evidence and, therefore, cannot support the conclusion that he must submit to lifetime sex-offender registration and satellite-based monitoring. Specifically, defendant contends that the conclusion that he was a recidivist was not supported by findings made by the trial court as to which prior conviction qualified defendant as a recidivist and, further, that a stipulation to a prior record level worksheet reflecting out-of-state convictions cannot constitute a legal conclusion that a particular out-of-state conviction is "substantially similar" to a particular North Carolina felony or misdemeanor.[2] We agree.

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2. A defendant, however, is not categorically precluded from stipulating to his prior record level or prior convictions in order to support a finding that a defendant is a recidivist for purposes of the SBM statute. *State v. Arrington*, 226 N.C. App. 311, 316–17, 741 S.E.2d 453, 457 (2013). In *Arrington*, this Court affirmed an SBM order, for which the defendant stipulated to his prior *North Carolina* convictions. *Id.* at 316–17, 741 S.E.2d at 456–57. This Court found that

> [t]he prior record worksheet and the stipulation by counsel to [the] defendant's prior convictions support a finding that [the] defendant had been convicted of indecent liberties with a child . . . *even though it appears that the State did not introduce the judgment or record of conviction from that case, or a copy of [the] defendant's criminal history.*

Id. at 316, S.E.2d at 456–57 (emphasis added) (citation omitted).

Even though "the State did not introduce the judgment or record of conviction," *see id.*, because the prior convictions in *Arrington* were North Carolina convictions and not out-of-state convictions, as they are in this case, there was no need for the State in *Arrington* to offer evidence that the prior convictions were "substantially similar" to North Carolina offenses, as was required here. *Cf. State v. Wright*, 210 N.C. App. 52, 70–73, 708 S.E.2d 112, 125–27 (2011) (vacating and remanding for new sentencing hearing where "the trial court erred in its classification and assignment of points to two out-of-state convictions" because the State failed to produce any evidence that the convictions were "substantially similar" to any North Carolina offenses).

On appeal from an order imposing satellite-based monitoring, this Court reviews "the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004)) (internal quotation marks omitted).

For purposes of requiring satellite-based monitoring, the State has the burden of presenting any evidence to the court that the offender is a recidivist. N.C. Gen. Stat. § 14-208.40A(a) (2015). After receiving the evidence, the court "shall determine" if the offender is a recidivist "and, if so, shall make a finding of fact of that determination . . . ." N.C.G.S. § 14-208.40A(b). A recidivist is defined as "a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4)." N.C. Gen. Stat. § 14-208.6(2b) (2015). Under N.C. Gen. Stat. § 14-208.6(4), a prior, reportable conviction includes

> [a] final conviction in another state of an offense, which if committed in this State, is *substantially similar* to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.

N.C.G.S. § 14-208.6(4)(b) (emphasis added); *see* N.C. Gen. Stat. § 15A-1340.14(e) (2014) (stating that the State must prove substantial similarity by a preponderance of the evidence). If the court finds that the offender is a recidivist, the court must order that he be enrolled in satellite-based monitoring for life. N.C. Gen. Stat. § 14-208.40A(c).

"This Court has repeatedly held a defendant's stipulation to the substantial similarity of offenses from another jurisdiction is ineffective because the issue of whether an offense from another jurisdiction is substantially similar to a North Carolina offense is a question of law." *State v. Burgess*, 216 N.C. App. 54, 59, 715 S.E.2d 867, 871 (2011) (citations omitted). "[S]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *State v. Wright*, 210 N.C. App. 52, 71, 708 S.E.2d 112, 125 (2011) (quoting *State v. Moore*, 188 N.C. App. 416, 426, 656 S.E.2d 287, 293 (2008)). Accordingly, when the State fails to demonstrate the substantial similarity of a defendant's out-of-state convictions to North Carolina crimes and when the trial court fails to determine whether out-of-state

convictions are substantially similar to North Carolina offenses, this Court will remand the case for resentencing. *Id.* at 72–73, 708 S.E.2d at 126–27.

In *Wright*, the defendant was convicted of "robbery 3rd degree" under a Connecticut statute, and had a conviction for attempted murder under a New York statute. *Id.* at 71–72, 708 S.E.2d at 126. However, remand was necessary where the State did not provide copies of either applicable state statute, and failed to provide a comparison of their respective statutory provisions to similar North Carolina statutes. *Id.* at 71–73, 708 S.E.2d at 125–26; *cf. State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998) (holding that copies of New Jersey and New York statutes along with a comparison of their provisions to the criminal laws of North Carolina were sufficient to prove by a preponderance of the evidence that the defendant's convictions in those states were substantially similar to North Carolina crimes).

Judge Alford's oral order determining that defendant was a recidivist and ordering lifetime SBM was never reduced to writing and made part of the proper record. *See Griffith v. N.C. Dep't of Corr.*, 210 N.C. App. 544, 549, 709 S.E.2d 412, 416–17 (2011) (finding that "[w]hen a [trial court's] oral order is not reduced to writing, it is non-existent and thus cannot support an appeal" (alteration in original) (citation and internal quotation marks omitted)). Judge Jenkins also found that defendant was a recidivist, but made no specific findings as to which of defendant's prior convictions qualified him to be a recidivist. This failure to make appropriate findings compromises our review of the conclusion reached by the trial court.

The North Carolina Supreme Court has stated that the requirement of making findings of fact is not a "mere formality" or an "empty ritual." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). Rather, the trial court must make findings of fact that are both "detailed" and "specific." *Id.* "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself." *Id.* at 714, 268 S.E.2d at 190.

Here, there was evidence in the record from which the trial court could have possibly determined that defendant was a recidivist for purposes of enrollment in the satellite-based monitoring program. The prior out-of-state convictions to which defendant stipulated were sex offenses that might easily have shown defendant to be a recidivist: defendant's

prior record level worksheet reflects three prior convictions for indecent exposure in South Carolina and two prior sex offense convictions in Florida.

Support for a conclusion of SBM required a determination by the trial court that defendant's prior, out-of-state convictions were reportable convictions based on G.S. § 14-208.6(b). However, no findings were made, either orally or in writing, as to which of defendant's prior convictions constituted a reportable conviction and qualified him as a recidivist.[3] *See id.* ("Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto."). As stated above, defendant's stipulation to his prior record level worksheet is "ineffective because the issue of whether an offense from another jurisdiction is substantially similar to a North Carolina offense is a question of law." *Burgess*, 216 N.C. App. at 59, 715 S.E.2d at 871 (citations omitted).

Further, the State offered no statutes from either South Carolina or Florida to prove by a preponderance of the evidence that any of the prior out-of-state convictions of defendant's were substantially similar to a North Carolina sexual offense. *See* N.C.G.S. § 15A-1340.14(e); *Wright*, 210 N.C. App. at 71–72, 708 S.E.2d at 126. There is nothing in the transcript of the hearing or in the written order to indicate the trial court found any of defendant's out-of-state convictions substantially similar to a North Carolina offense; thus, there was no competent evidence to support the trial court's finding that defendant was a recidivist.

Accordingly, because "the State failed to demonstrate the substantial similarity of [d]efendant's out-of-state convictions to North Carolina crimes and since the trial court failed to determine [that] the out-of-state convictions were substantially similar to North Carolina offenses, we must remand for resentencing." *Wright*, 210 N.C. App. at 72, 708 S.E.2d at 126.

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3. The only prior convictions which could have constituted prior reportable convictions in order to qualify defendant as a recidivist were his out-of-state convictions. Defendant's North Carolina convictions for felonious indecent exposure cannot function as "prior convictions" for purposes of categorizing defendant as a recidivist because defendant was *simultaneously* convicted of both counts of indecent exposure on 4 September 2010 in case numbers 13CRS54303 and 11CRS55435. While "prior conviction" is not defined in Article 27A of Chapter 14 of the General Statutes, which addresses the sex offender programs, under N.C. Gen. Stat. § 15A-1340.11(7), "[a] person has a prior conviction when, *on the date a criminal judgment is entered*, the person being sentenced *has been previously convicted* of a crime . . . ." N.C.G.S. § 15A-1340.11(7) (2013) (emphasis added).

[3] As to defendant's ineffective assistance of counsel claim, we agree with the State's assertion that our Court has rejected the argument that an ineffective assistance of counsel claim can be asserted in SBM appeals. *See State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) ("[A] claim for ineffective assistance of counsel is available only in criminal matters, and we have already concluded that SBM is not a criminal punishment." (citations omitted)); *see also State v. Clark*, 211 N.C. App. 60, 77, 714 S.E.2d 754, 765 (2011) ("[S]ince an SBM proceeding is not criminal in nature, defendants required to enroll in SBM are not entitled to challenge the effectiveness of the representation that they received from their trial counsel based on the right to counsel provisions of the federal and state constitutions."); *State v. Miller*, 209 N.C. App. 466, 469, 706 S.E.2d 260, 262 (2011) (noting that "IAC claims are not available in civil appeals such as that from an SBM eligibility hearing"). Accordingly, we dismiss this argument.

REVERSED AND REMANDED IN PART AND DISMISSED IN PART.

Judges CALABRIA and ZACHARY concur.

WILSON FUNERAL DIRECTORS, INC. AND PAUL E. WILSON, PETITIONERS
v.
NORTH CAROLINA BOARD OF FUNERAL SERVICE, RESPONDENT

No. COA15-321

Filed 5 January 2016

1. Appeal and Error—preservation of issues—no objection below

In a case involving the revocation of a funeral establishment permit, petitioners waived the right to object to the procedures used in the administrative proceeding where they had the opportunity to object to the alleged errors but did not do so. Petitioners should have been aware that only four of seven of the original Board members would be participating in the second hearing and Final Agency Decision.

2. Administrative Law—majority of board—required presence

If the issue was preserved for appeal, the trial court erred by finding that the administrative hearing in this matter was not

conducted by a "majority of the agency," as required by N.C.G.S. § 150B-40(b) (2013). The trial court interpreted this provision to mean that the required majority of the respondent Board must be present for and conduct the administrative hearing *in its entirety*, including the adoption of the Board's Final Agency Decision." However, N.C.G.S. § 150B-40(b) does not require the *same* majority of the Board to be present for and to conduct the administrative hearing *in its entirety*.

Appeal by respondent from Order entered 25 September 2014 by Judge C. Phillip Ginn in Henderson County Superior Court. Heard in the Court of Appeals 5 October 2015.

North Carolina Board of Funeral Service, by Stephen Dirksen and Catherine Lee for respondent-appellant.

No brief filed for petitioners-appellees.

ELMORE, Judge.

Respondent Board issued a final agency decision revoking the funeral establishment permit, preneed establishment license, and all ancillary preneed sales licenses of petitioner Wilson Funeral Directors, Inc., as well as the funeral service license and preneed sales license of petitioner Paul E. Wilson. On judicial review, the trial court reversed the Final Agency Decision, concluding that it was made in excess of the Board's statutory authority, made upon unlawful procedure, and affected by error of law. We reverse the trial court's Order on Judicial Review.

I. Background

On 14 December 2012, the North Carolina Board of Funeral Service (the Board) initiated an administrative proceeding against Wilson Funeral Directors, Inc., and its licensed operator, Paul E. Wilson (petitioners), for alleged violations in the practice of funeral service. A show cause hearing was held on 11 December 2013, with petitioners appearing *pro se*. A quorum consisting of seven members of the nine-member Board was present: Harris High, J.T. Willoughby III, Ken Stainback, Lawrence Jackson III, Stephen Aldridge III, John Shields, and Broadus Combs. Mr. Willoughby and Mr. High were serving terms set to expire on 31 December 2013.

At the conclusion of the hearing, the Board asked petitioners if they would prefer the Board enter into a closed session and render a

decision that same day, 11 December 2013, or alternatively, if petitioners would prefer to submit a proposed decision within thirty days for the Board to consider at a subsequent hearing. Mr. High, the presiding officer, informed petitioners that he and Mr. Willoughby would not participate in any subsequent hearings or vote on decisions related to petitioners' case. Petitioners opted to submit a proposed decision to be considered at a subsequent hearing, which was scheduled for 8 January 2014. Petitioners did not object to a subsequent hearing date or to new members participating in the next hearing.

The second hearing was held as scheduled on 8 January 2014, with petitioners, again, appearing *pro se*. A quorum of the Board was present with five members, including four who participated in the first hearing: Mr. Stainback, Mr. Jackson, Mr. Shields, and Mr. Aldridge. The fifth member, Elizabeth Williams-Smith, had replaced Mr. Willoughby's seat on the Board.[1] After deliberating in executive session, the Board voted unanimously to accept its own proposed findings of fact and conclusions of law in a final agency decision. The Final Agency Decision, served on petitioners 4 March 2014, revoked petitioners' funeral establishment permit, funeral service license, preneed establishment license, and preneed sales licenses.

Petitioners filed a petition for judicial review of the Board's Final Agency Decision in Henderson County Superior Court. The trial court reversed the Final Agency Decision, concluding that it was made in excess of the Board's statutory authority, made upon unlawful procedure, and affected by error of law.[2] Specifically, the trial court noted that a "majority of the Respondent's Board must be present for and conduct the administrative hearing *in its entirety*[,]" and because only four Board members were present for and conducted both hearings, the administrative hearing was not conducted by a majority of the agency as required by N.C. Gen. Stat. § 150B-40(b). The Board appeals the trial court's order reversing the Final Agency Decision.

II. Discussion

The Board challenges the trial court's order on two separate grounds. First, the Board argues that petitioners waived any right to object to the

1. Elizabeth Williams-Smith and Charles J. Graves replaced Mr. Willoughby and Mr. High on the Board. Mr. Graves attended the hearing on 8 January 2014, but recused himself from voting in the matter.

2. Although the trial court's order expressed these rulings as findings, they are properly characterized as conclusions.

procedures used because they requested a subsequent hearing and had notice of the anticipated change in the Board's composition. Second, the Board contends that the trial court erred in finding that the administrative hearing was not conducted by "a majority of the agency" pursuant to N.C. Gen. Stat. § 150B-40(b).

On judicial review of a final agency decision, the trial court may reverse or modify the decision if it determines that the petitioner's substantial rights may have been prejudiced from findings, inferences, conclusions, or decisions that are (1) in violation of constitutional provisions, (2) in excess of the agency's statutory authority, (3) made upon unlawful procedure, (4) affected by other error of law, (5) unsupported by substantial evidence, or (6) arbitrary, capricious, or an abuse of discretion. N.C. Gen. Stat. § 150B-51(b) (2013). This Court's task, in turn, "is to examine the trial court's order for error of law by '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) determining whether the court did so properly'." *Bulloch v. N.C. Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 1, 4, 732 S.E.2d 373, 377 (2012) (quoting *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007)). We review *de novo* alleged errors based on violations of subsections 150B-51(b)(1)–(4). *Id.* (citing *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658–59, 599 S.E.2d 888, 894 (2004)).

[1] We agree with the Board that petitioners waived the right to object to the procedures used in the administrative proceeding.

> A litigant may not remain mute in an administrative hearing, await the outcome of the agency decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible.

Nantz v. Emp't Sec. Comm'n, 28 N.C. App. 626, 630, 222 S.E.2d 474, 477 (citing *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086 (4th Cir. 1969)) (rejecting petitioner's contention that her Fifth Amendment rights were violated in administrative hearing where she raised privilege for the first time in superior court), *aff'd*, 290 N.C. 473, 226 S.E.2d 340 (1976); *see also First-Citizens*, 409 F.2d at 1088–89 (noting that plaintiff's right to challenge "fairness" of administrative hearings in which personnel comprising the panel changed between sessions was "suspect" where plaintiff raised no such objection at administrative stage); *Evans v. Fran-Char Corp.*, 45 N.C. App. 94, 96, 262 S.E.2d 381, 383 (1980)

(holding that superior court was without authority to hear claimant's argument that he was denied a full and fair hearing before Commission due to missing testimony where he raised issue for the first time in petition before superior court).

At the first hearing, Mr. High informed petitioners that two members of the seven-member quorum would not attend the second hearing. At the second hearing, Mr. Stainback took notice that Mr. Combs, who was present during the first hearing, was not present in the quorum. At that point, petitioners should have been aware that only four of the original Board members would be participating in the second hearing and Final Agency Decision. Because petitioners had the opportunity to object to the alleged errors but failed to do so, the trial court was not authorized to hear petitioners' appeal on the grounds asserted. *See Evans*, 45 N.C. App. at 96, 262 S.E.2d at 383 ("The Superior Court was not authorized to hear grounds for remand which could have been presented to the reviewing administrative agency but were not.").

[2] Assuming, however, that the issue was nevertheless preserved, we also agree with the Board that the trial court erred in finding that the administrative hearing in this matter was not conducted by a "majority of the agency," as required by N.C. Gen. Stat. § 150B-40(b) (2013). The trial court interpreted this provision to mean "that in conducting an administrative hearing, the required majority of the Respondent's Board must be present for and conduct the administrative hearing *in its entirety*, including the adoption of the Board's Final Agency Decision." Because only four members of the nine-member Board were present for and conducted the entire administrative hearing, the trial court determined that the Final Agency Decision was made in excess of the Board's statutory authority, made upon unlawful procedure, and affected by error of law.

In *Crawford v. Wayne County Board of Education*, our Supreme Court held that "due process and the concept of a fair hearing require only that an administrative officer who was absent when the evidence was taken consider and appraise the evidence himself." *Crawford v. Wayne Cnty. Bd. of Educ.*, 275 N.C. 354, 360, 168 S.E.2d 33, 37 (1969) (citing *Morgan v. United States*, 298 U.S. 468, 80 L. Ed. 1288 (1936)); *see also State ex rel. Banking Comm'n v. Bank of Rocky Mount*, 12 N.C. App. 112, 114, 182 S.E.2d 625, 626 (1971) (holding that Banking Commission member absent from hearing could vote in final agency decision where he reviewed transcript of hearing before issuing decision). The court also recognized, however, that "there are some decisions reaching a

contrary result upon specific statutes involved, and not as a matter of due process, ..." *Crawford*, 275 N.C. at 361, 168 S.E.2d at 37.

On judicial review to the trial court, petitioners challenged the Final Agency Decision on statutory grounds, rather than due process. The issue here, therefore, is whether the North Carolina Administrative Procedure Act demands a result different from that in *Crawford*, or more specifically, whether N.C. Gen. Stat. § 150B-40(b) requires the same majority of the Board to be present for and conduct the hearing in its entirety, including the Final Agency Decision.

"Issues of statutory construction are questions of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citing *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008)). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citing *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 641, 656, 403 S.E.2d 291, 294 (1991)). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, BSA, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). "Therefore, 'a statute clear on its face must be enforced as written.' " *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 810 (2012) (quoting *Bowers v. City of High Point*, 339 N.C. 413, 419–20, 451 S.E.2d 284, 289 (1994)).

The North Carolina Administrative Procedure Act (NCAPA) "establishes a uniform system of administrative rule making and adjudicatory procedures for agencies" to "ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process." N.C. Gen. Stat. § 150B-1(a) (2013). Article 3A of the NCAPA establishes procedures for administrative hearings conducted by occupational licensing agencies, including the North Carolina Board of Funeral Service, in "contested cases." N.C. Gen. Stat. § 150B-38(a)(1) (2013); 21 N.C. Admin. Code 34A.0109 (2014). A "contested case" refers to "an administrative proceeding . . . to resolve a dispute between an agency and another person that involves

the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." N.C. Gen. Stat. § 150B-2(2) (2013). In each contested case, an agency must give the parties an opportunity for a hearing before the agency renders a final decision. N.C. Gen. Stat. § 150B-38(b) (2013). At the hearing, the parties may "present evidence on issues of fact, examine and cross-examine witnesses, . . . submit rebuttal evidence, and present arguments on issues of law or policy." N.C. Gen. Stat. § 150B-40(a) (2013).

The conduct of hearings under Article 3A is governed by N.C. Gen. Stat. § 150B-40, which provides, in pertinent part, as follows:

> (b) Except as provided under subsection (e) of this section, *hearings under this Article shall be conducted by a majority of the agency.*
>
> . . . .
>
> (e) *When a majority of an agency is unable or elects not to hear a contested case*, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article.

N.C. Gen. Stat. § 150B-40(b), (e) (2013) (emphasis added).

Contrary to the trial court's interpretation, we do not read section 150B-40(b) to require the *same* "required majority of the Board to be present for and conduct the administrative hearing *in its entirety*, including the adoption of the Board's Final Agency Decision." While due process demands that a substitute board member "consider and appraise the evidence himself," *Crawford*, 275 N.C. at 360, 168 S.E.2d at 37, the statute imposes no limitation on the particular composition of a required numerical majority. The text only refers to "majority" in the indefinite: section 150B-40(b) requires hearings under Article 3A to be conducted by "*a majority of the agency*," and section 150B-40(e) establishes alternative procedures "when a *majority* is unable or elects not to hear a contested case." The phrase "in its entirety" does not appear in the statute; nor do we believe it is reasonably implied. To interpret such a requirement from the text of the statute, as the trial court did, would violate the canon *casus omissus pro omisso habendus est*, or "a case omitted is to be held as intentionally omitted." Therefore, absent a specific legislative mandate to the contrary, we decline to read such a requirement into the statute.

III. Conclusion

The trial court erred in reversing the Board's Final Agency Decision. Petitioners waived the right to challenge the Final Agency Decisions based on alleged erroneous procedures to which they acquiesced and raised no objection during the administrative stage. In any event, we disagree with the trial court's interpretation of N.C. Gen. Stat. § 150B-40(b) and its conclusion that the Final Agency Decision was made in excess of the Board's statutory authority, made upon unlawful procedure, and affected by error of law. Therefore, we reverse the trial court's Order on Judicial Review.

REVERSED.

Chief Judge McGEE and Judge INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JANUARY 2016)

ANZURES v. WALBECQ No. 15-611	Catawba (14CVD2473)	Dismissed
BACON v. UNIVERSAL INS. CO. No. 15-370	Davidson (14CVS1454)	Affirmed
BREATH v. ORTHOCAROLINA No. 15-669	N.C. Industrial Commission (13-733099)	Affirmed
BULLARD EX REL. Estate of Bullard v. PEAK STEEL, L.L.C. No. 15-188	Robeson (13CVS944)	Affirmed
GARCIA v. BOXER PROP. MGMT. CORP. No. 15-803	Mecklenburg (13CVS11973)	Dismissed
HERTZBERG v. FUR SPECIALISTS, INC. No. 15-280	Wake (14CVS4498)	Affirmed
IN RE H.G. No. 15-869	Alleghany (15JA2)	Affirmed
IN RE K.S.D. No. 15-814	Buncombe (15JB13)	Affirmed
IN RE R.C.O. No. 15-961	Surry (12JT103) (12JT104) (12JT105)	Affirmed
IN RE G.J. No. 15-773	Cabarrus (12JA32) (12JA33) (14JA93)	Affirmed
SHAPEMASTERS, INC. v. ACCETTURO No. 15-741	Avery (10CVS294)	Affirmed
STATE v. AGUILAR No. 15-627	Duplin (12CRS51845)	No Error
STATE v. ALBINI No. 15-606	Forsyth (13CRS52574)	No Error

STATE v. ANDERSON No. 15-509	Wake (13CRS215612) (13CRS215619) (14CRS219189)	Vacated
STATE v. AULTMAN No. 15-242	Duplin (12CRS52538) (12CRS52539)	No Error
STATE v. AYCOCK No. 15-474	Sampson (11CRS53357)	No Error
STATE v. CHASE No. 15-608	Craven (08CRS1785) (08CRS51237)	Reversed and Remanded
STATE v. CROOK No. 15-458	Buncombe (14CRS50187) (14CRS50189)	No Error
STATE v. DAVIS No. 15-133	Mecklenburg (12CRS255682) (12CRS255684)	No Error
STATE v. DUNCAN No. 15-324	Buncombe (13CRS51991)	Affirmed
STATE v. EASTER No. 15-199	Carteret (13CRS52835-36) (13CRS52942)	Vacated in part; Dismissed in part; No Prejudicial Error in part; Remanded for resentencing
STATE v. EATON No. 15-255	Forsyth (08CRS56454)	No Error
STATE v. KIRK No. 15-83	Cumberland (12CRS55758-63) (12CRS7721)	No Error
STATE v. KORNYA No. 15-795	Buncombe (14CRS85780-81)	No Error
STATE v. LESTER No. 15-397	Wake (11CRS15581) (11CRS208054) (11CRS209658)	No Error
STATE v. MARTINEZ No. 15-483	Forsyth (12CRS61197) (14CRS113)	No Error

STATE v. McCULLOCH No. 15-290	Cumberland (14CRS354)	Reversed
STATE v. MITCHELL No. 15-821	Guilford (13CRS74273)	No Error
STATE v. NEEDHAM No. 15-702	Lincoln (09CRS52250) (09CRS52252-54)	Affirmed
STATE v. NYBERG No. 15-58	Wake (12CRS204656-57) (12CRS204766-68) (12CRS205273) (12CRS209769)	No error in part; reverse and remand in part
STATE v. OLIVEROS No. 15-411	Mecklenburg (11CRS227974)	No Error
STATE v. PEARSON No. 15-700	Wayne (13CRS50396)	No Error
STATE v. RICHARDSON No. 15-215	Wake (12CRS209179)	No Error
STATE v. STEPHENS No. 15-571	Forsyth (13CRS60614)	Affirmed
STATE v. VALLEJO No. 15-388	Wake (12CRS1843) (12CRS202268)	No Error
STATE v. WILLIAMS No. 15-12	Union (13CRS50434)	No Error
STATE v. WILLIAMS No. 15-551	Forsyth (11CRS50309) (11CRS50310) (11CRS50311) (12CRS6445)	No error in part, judgment arrested in part, and remanded for resentencing
STATE v. WILSON No. 15-707	Cleveland (12CRS1566) (14CRS736)	No Error
WILLIAMSON v. WHITFIELD No. 15-543	Franklin (12CVD589)	Affirmed

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