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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 20, 2018

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

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[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2016 [4]Appointed 24 April 2017
[5]Retired 31 December 2016 [6]Retired 24 April 2017

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Filed 2 February 2016

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ADMINISTRATIVE LAW

Administrative Law—judicial review—service of petition—In an action arising from the dismissal of a Highway Patrol Trooper, the superior court properly exercised its discretion in allowing the Highway Patrol to serve Sergeant Owens properly, even though outside the statutory ten-day window. The Highway Patrol timely *filed* its petition for judicial review, but improperly served the petition by *regular mail*. The superior court has the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided under N.C.G.S. 150B-46. A respondent could avoid the judicial review of a favorable ALJ decision simply by avoiding service of the losing party's petition for judicial review for 10 days. **N.C. Dep't of Pub. Safety v. Owens, 230.**

APPEAL AND ERROR

Appeal and Error—cross-appeal—notice of appeal not granted—Defendants' motion on appeal to dismiss plaintiffs' purported cross-appeal because plaintiffs failed to include notice of appeal in the record was granted. **Maldjian v. Bloomquist, 222.**

Appeal and Error—interlocutory order—discovery of emails—work product doctrine—appeal heard—An interlocutory order involving discovery of emails was considered where it involved the work product doctrine, despite defendant's failure to cite N.C.G.S. § 1-277(a) or N.C.G.S. § 7A-27. **Maldjian v. Bloomquist, 222.**

Appeal and Error—interlocutory orders and appeals—unnamed defendant—substantial right—Where the trial court granted plaintiff's cross-motion for summary judgment and declared that an uninsured motorist carrier (GuideOne) did provide plaintiff with uninsured motorist coverage in an automobile accident that she sustained in a rental car during the course of her employment, the Court of Appeals dismissed GuideOne's interlocutory appeal. GuideOne failed to demonstrate that the trial court's order affected a substantial right. N.C.G.S. § 20-279.21(b)(4) permitted but did not require GuideOne to participate in the proceedings as an unnamed underinsured motorist carrier. **Peterson v. Dillman, 239.**

Appeal and Error—interlocutory orders—contempt order—substantial right—The appeal of any contempt order affects a substantial right and is therefore immediately appealable even though the orders are interlocutory. **Spears v. Spears, 260.**

Appeal and Error—issue not raised at trial or in brief—discussed by dissenting opinion—not addressed by majority opinion—On appeal from an opinion and award of the Full Industrial Commission concluding that the North Carolina Department of Transportation's (DOT) negligence was a proximate cause of deaths resulting from a traffic accident, the Court of Appeals did not address an issue discussed by the dissenting opinion because that issue was not raised by DOT at trial or in its appellate brief. **Holt v. N.C. Dep't of Transp., 167.**

Appeal and Error—jurisdiction—Appellate Rule 3—A jurisdictional rule violation precludes the appellate court from acting in any manner other than to dismiss the appeal. N.C. App. Rule 3 is a jurisdictional rule and appeal of orders from the Business Court were properly dismissed. **Am. Mech., Inc. v. Bostic, 133.**

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Appeal and Error—new issue raised on appeal—sanctions not warranted—Monetary sanctions were not warranted where plaintiffs attempted to raise a new issue via cross-appeal and failed to include notice of appeal in the record. **Maldjian v. Bloomquist, 222.**

Appeal and Error—petitions for certiorari—Business Court—Appellate Rule 3—The Court of Appeals, in its discretion, granted petitions for certiorari relating to orders from a the regular superior court judge in order to address the merits of arguments concerning the dismissal of the appeals and to reiterate the applicability of N.C. Appellate Rule 3 to appeals from orders rendered by the Business Court. Plaintiffs' petitions for certiorari seeking appellate review of orders by a business

court judge were denied because plaintiffs failed to make any substantive arguments concerning those orders in their appellate briefs. **Am. Mech., Inc. v. Bostic, 133.**

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Appeal and Error—petitions for certiorari—Business Court—Appellate Rule 3—The Court of Appeals, in its discretion, granted petitions for certiorari relating to orders from a the regular superior court judge in order to address the merits of arguments concerning the dismissal of the appeals and to reiterate the applicability of N.C. Appellate Rule 3 to appeals from orders rendered by the Business Court. Plaintiffs' petitions for certiorari seeking appellate review of orders by a business court judge were denied because plaintiffs failed to make any substantive arguments concerning those orders in their appellate briefs. **Yates Constr. Co. Inc. v. Bostic, 133.**

Appeal and Error—preservation of issues—failure to raise constitutional issue at trial—Even if defendant had properly raised the constitutional issue of Double Jeopardy in his convictions for attempted larceny and attempted common law robbery, no error would have been found because two victims required an additional fact to be proven for each offense, although both victims were in the same house. Only the attempted robbery offense involved an assault against the victim, and only the attempted larceny involved proof of ownership of the property. **State v. Miller, 313.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Child Abuse, Dependency, and Neglect—dependency—failure to obtain meaningful mental health services—An adjudication of a child as dependent was affirmed where the findings clearly established that the mother had refused to participate in, and even obstructed, the child's discharge planning. The unchallenged and otherwise binding findings of fact, showed that the mother continuously failed to obtain meaningful mental health services for the child while the child was in the mother's custody. The mother also failed to identify any viable placement alternatives outside of placement in her home at the adjudication hearing. **In re C.B., 197.**

Child Abuse, Dependency, and Neglect—effective assistance of counsel—reviewing records and subpoenaing witnesses—Adjudication orders finding children neglected and dependent were affirmed where the mother received effective assistance of counsel and was not deprived of a fair hearing. It could not be said there were was a reasonable probability of a different result had counsel fully reviewed records and subpoenaed witnesses. Moreover, the Department of Social Services presented overwhelming evidence in support of its allegations. **In re C.B., 197.**

Child Abuse, Dependency, and Neglect—findings—unchallenged findings—In a case involving two children adjudicated neglected or neglected and dependent, portions of the findings of fact challenged by the mother as to the daughter found neglected and dependent were offset by other unchallenged findings to the same effect or were supported by the evidence. **In re C.B., 197.**

Child Abuse, Dependency, and Neglect—neglect—failure to obtain meaningful mental health services—The trial court's adjudication of a child as neglected was affirmed. The findings of the trial court that are binding on appeal support the trial court's ultimate conclusion of neglect in that they established that the mother continuously failed to obtain meaningful mental health services for the child while the child was in the mother's custody, minimized and denied the seriousness of the child's condition, and even exacerbated it. This placed the child at a substantial risk of some physical, mental, or emotional impairment. **In re C.B., 197.**

Child Abuse, Dependency, and Neglect—neglect—sibling's behavior—The findings of the trial court supported the trial court's ultimate conclusion that C.B. was neglected, and the adjudication was affirmed, where the findings that were unchallenged or were otherwise binding supported the ultimate conclusion that the child was neglected. The mother allowed this child to be continually exposed to a sibling's erratic, troubling, and violent behavior; failed to obtain meaningful medical services for the troubled sibling that could have mitigated that behavior; and showed no concern for the effect on this child. **In re C.B., 197.**

CIVIL PROCEDURE

Civil Procedure—voluntary dismissal and refiling—writ of certiorari—board of adjustment—The trial court properly dismissed a refiled petition for a writ of certiorari seeking review from a determination by the Onslow County Board of Adjustment ("OCBOA") following an attempted voluntary dismissal without prejudice. Rule 41(a)(1) was not applicable in this case because a petition for writ of certiorari does not initiate an action, petitioners were not plaintiffs in the underlying action, and the underlying action had already been decided before petitioners attempted to voluntarily dismiss it. **Henderson v. Cnty. of Onslow, 151.**

Civil Procedure—voluntary dismissal—amendment of original petition—The trial court did not err by denying petitioners' motion to amend their petition for a writ of certiorari seeking review from a determination by the Onslow County Board of Adjustment where they first attempted to take a voluntary dismissal of a first petition and subsequently refiled. The trial court dismissed the petition because Rule 41(1)(a) did not apply and petitioners attempted to amend their petition. Because the petition for review had already been dismissed, there was no petition to amend. **Henderson v. Cnty. of Onslow, 151.**

CONSTITUTIONAL LAW

Constitutional Law—right to be present—sentencing clarification—Defendant's right to be present during sentencing was violated where the original sentence was for a minimum sentence that did not correspond to the orally announced maximum sentence, requiring the trial court to identify the appropriate maximum or minimum sentence. Defendant was not present when the trial court made its decision and had no opportunity to argue for the imposition of the shorter sentence. **State v. Collins, 288.**

CONTEMPT

Contempt—alimony, child support, and equitable distribution—ability to pay—In an alimony, child support, and equitable distribution case, the trial court erred by entering a contempt order concluding that defendant had the ability to either comply with an earlier order or take reasonable measures to comply. The findings of fact make defendant's inability to fully comply quite clear. Moreover, this was not a case in which a defendant simply failed to pay anything at all and there was no question of intentional suppression of earnings or hiding income. Although, plaintiff pointed to defendant's remarriage and new family, North Carolina's law does not impose limitations on an individual's right to marry or have children. **Spears v. Spears, 260.**

Contempt—alimony, child support, and equitable distribution—setting date for end of order—The trial court erred in an alimony, child support, and equitable distribution case by setting an amount for payment beyond defendant's ability to pay and by not setting a date beyond which the payment above the original amount would end. **Spears v. Spears, 260.**

Contempt—compliance hearing—held before entry of order—Although a Contempt Order and Order on Purge Condition Noncompliance were remanded on other grounds, defendant's objection to holding the compliance hearing prior to entry of the Contempt Order was correct. Particularly in the context of civil contempt, where the statute requires a written order and a person may be imprisoned for failure to comply, it is imperative that an order be entered before an obligor is held in contempt of that order. **Spears v. Spears, 260.**

COURTS

Courts—Business Court—Appellate Rules—Business Court Rules—The orders of the Business Court, just like the orders of any other superior court, must be appealed through the filing of a notice of appeal with the applicable clerk of court in accordance with the procedures set out in N.C. Appellate Rule 3, it is the Rules of Appellate Procedure, not the Business Court Rules, that establish the mandatory procedures for taking an appeal. The Business Court is a superior court and its orders are orders of a superior court rendered in a civil action for purposes of Rule 3. A matter may be designated for adjudication by the Business Court, but cases are filed with the clerk of court in the county in which the action arose and the clerk maintains the case file. **Am. Mech., Inc. v. Bostic, 133.**

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CRIMINAL LAW

Criminal Law—post-guilty plea for DNA testing—right to appointment of counsel—motion denied—In an appeal from a guilty plea to statutory rape, which arose from 12 counts of statutory rape and one count of indecent liberties, defendant's conclusory statements regarding materiality were insufficient to require the trial court to appoint him counsel or grant his motion for DNA testing. To be entitled to counsel, defendant must first establish that he is indigent and that DNA testing may be material to his wrongful conviction claim. Defendant's contention, however, was conclusory and incomplete and merely restated pertinent parts of the statute. Additionally, defendant failed to include the S.B.I. lab report that he claimed shows the hair, blood, and sperm found on the victim's underwear were never analyzed, and the record did not indicate whether the evidence still existed. **State v. Cox, 307.**

DISCOVERY

Discovery—emails—motion to compel granted—no abuse of discretion—The trial court did not abuse its discretion by granting plaintiffs' motion to compel discovery of emails, despite defendants' contention that the emails were work product, where the trial court's determination was the result of a reasoned decision. Defendants submitted the e-mails for *in camera* review and, after hearing arguments from both parties and reviewing the record, the authorities presented, and the emails at issue, the trial court exercised its judgment in ordering defendants to produce Exhibit A and Exhibit B but determining that Exhibit C was protected. **Maldjian v. Bloomquist, 222.**

Discovery—purportedly privileged documents—findings and conclusions not requested—Defendants' contention that the trial court misunderstood the appropriate legal standard regarding a motion to compel discovery of purportedly privileged documents was rejected where neither party requested findings or conclusions, and it was evident from the record that the trial court only entered its judgment without including its conclusions of law. **Maldjian v. Bloomquist, 222.**

HIGHWAYS AND STREETS

Highways and Streets—sidewalk maintenance—responsibility—The trial court erred by granting summary judgment for the City of Durham based upon the absence of a legal duty in a case arising from injuries plaintiff suffered when he fell into a hole in a sidewalk that was obscured by vegetation. N.C.G.S. § 160A-297 limits a city's responsibility to maintain certain streets and bridges, but the statute does not limit a city's responsibility to maintain sidewalks. While the City argued that it would be responsible to maintain the sidewalk *only* if it had entered into an agreement with the North Carolina Department of Transportation to provide maintenance, but the City is responsible to maintain the sidewalk *unless* it has entered into a maintenance agreement that says otherwise. There was evidence that there was no agreement for the City to assume maintenance of the sidewalk. **Steele v. City of Durham, 318.**

IMMUNITY

Immunity—governmental—sidewalk maintenance—A City's argument that it was immune from liability for a sidewalk fall under the doctrine of governmental immunity was overruled because sidewalks are specifically excluded from such immunity. **Steele v. City of Durham, 318.**

NEGLIGENCE

Negligence—sidewalk maintenance—summary judgment—The trial court erred by granting defendant-City's motion for summary judgment in a sidewalk fall case where there were genuine issues of material fact, including whether the City maintained the sidewalk in a reasonably safe manner. A reasonable juror might find that the City had constructive notice of the defect, that it was foreseeable that the failure to remedy the defect might cause injury to a pedestrian, and that the City failed to reasonably maintain this particular section of the sidewalk. **Steele v. City of Durham, 318.**

PUBLIC OFFICERS AND EMPLOYEES

Public Officers and Employees—highway patrol trooper—termination—reinstatement—In an action arising from the dismissal of a highway patrol trooper, the superior court did not err by affirming an administrative law judge's order retroactively reinstating the trooper and awarding him back pay and benefits. The employer-agency may not act arbitrarily and capriciously when terminating someone for lack of credentials. **N.C. Dep't of Pub. Safety v. Owens, 230.**

Public Officers and Employees—termination—mitigation of damages—In an action arising from the dismissal of a highway patrol trooper, the record supported the administrative law judge's findings and conclusion that the trooper was not obligated to mitigate his damages. **N.C. Dep't of Pub. Safety v. Owens, 230.**

SEARCH AND SEIZURE

Search and Seizure—strip search—cocaine—white powder on floor—reasonable suspicion—The trial court did not err by denying defendant's suppression motion where he was arrested on cocaine charges after a strip search in the house where he was arrested. The presence of a white powder where defendant had been standing gave rise to a reasonable suspicion that defendant was concealing narcotics under his clothes and the search was conducted in a private residence and in a separate room from the others who were in the apartment. **State v. Collins, 288.**

TORT CLAIMS ACT

Tort Claims Act—negligence by Department of Transportation—accident at intersection—criminal acts of third parties—not sole proximate cause—In an action brought against the North Carolina Department of Transportation (DOT) pursuant to the Tort Claims Act for deaths resulting from a traffic accident, the Full Industrial Commission did not err by concluding that the criminal acts of third parties were not the sole proximate cause of the collision and awarding plaintiffs $1,000,000 for each decedent. It was reasonably foreseeable that a vehicle speeding toward the intersection, unregulated by any traffic signal, could lead to the type of deadly accident involved in this case. If there had been a functioning traffic signal, the speeding driver would have had sixteen additional seconds to begin decelerating. **Holt v. N.C. Dep't of Transp., 167.**

WORKERS' COMPENSATION

Workers' Compensation—suitable employment—distance from home—The Industrial Commission did not err in a worker's compensation case by concluding that the employment offered to plaintiff was not suitable pursuant to N.C.G.S. § 97-2(22), and the opinion and award of the Commission was affirmed. The job that was offered plaintiff was well outside the 50-mile radius mentioned in the statute.; while defendant argued that the 50 mile radius was one of several facts to be considered, the grammatical structure of the statute placed the statute in an entirely separate clause and not with a serial list of facts to be considered. The Legislature's intent was that the 50-mile radius language be a requirement rather than merely a factor to be considered. Moreover, the Commission concluded that even if the 50-mile radius requirement was a factor and not a requirement, the distance factor significantly outweighed the others. **Falin v. Roberts Co. Field Servs., Inc., 144.**

Workers' Compensation—post-traumatic stress disorder—continuing temporary total disability—On appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff workers' compensation benefits for post-traumatic stress disorder resulting from an armed robbery at his place of employment, the Court of Appeals held that the Commission did not err by awarding temporary total disability benefits beyond 31 October 2012. Even though evidence was introduced of a doctor's note removing plaintiff from work until 31 October 2012, the same doctor testified that he did not know whether plaintiff would ever be able to return to any employment. The Commission's finding of fact on this issue supported its conclusion that plaintiff satisfied the first prong of *Russell* and was entitled to continuing temporary total disability compensation. **Pickett v. Advance Auto Parts, 246.**

Workers' Compensation—post-traumatic stress disorder—expert testimony of doctors—Commission's determination of credibility and weight—not for Court of Appeals to second-guess—On appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff workers' compensation benefits for post-traumatic stress disorder resulting from an armed robbery at his place of employment, the Court of Appeals held that the Commission did not err by relying on the expert testimony of two doctors regarding the causation of plaintiff's disability. Both doctors provided competent testimony as to the cause of plaintiff's injuries based on their evaluation and treatment of plaintiff, and the Court of Appeals refused to second-guess the Commission's credibility determinations and the weight it assigned to testimony. **Pickett v. Advance Auto Parts, 246.**

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.

AMERICAN MECHANICAL, INC., Plaintiff
v.
JEFFREY L. BOSTIC, MICHAEL HARTNETT and JOSEPH E. BOSTIC, JR., Defendants

No. COA15-385

Filed 2 February 2016

YATES CONSTRUCTION COMPANY, INC., Plaintiff
v.
JEFFREY L. BOSTIC, MICHAEL HARTNETT and JOSEPH E. BOSTIC, JR., Defendants

No. COA15-422

Filed 2 February 2016

PHILLIPS AND JORDAN, INC., Plaintiff
v.
JEFFREY L. BOSTIC, MICHAEL HARTNETT and JOSEPH E. BOSTIC, JR., Defendants

No. COA15-525

Filed 2 February 2016

1. Appeal and Error—petitions for certiorari—Business Court—Appellate Rule 3

The Court of Appeals, in its discretion, granted petitions for certiorari relating to orders from a superior court judge in order to address the merits of arguments concerning the dismissal of the appeals and to reiterate the applicability of N.C. Appellate Rule 3 to appeals from orders rendered by the Business Court. Plaintiffs' petitions for certiorari seeking appellate review of orders by a business court judge were denied because plaintiffs failed to make any substantive arguments concerning those orders in their appellate briefs.

2. Courts—Business Court—Appellate Rules—Business Court Rules

The orders of the Business Court, just like the orders of any other superior court, must be appealed through the filing of a notice of appeal with the applicable clerk of court in accordance with the procedures set out in N.C. Appellate Rule 3. It is the Rules of Appellate Procedure, not the Business Court Rules, that establish

the mandatory procedures for taking an appeal. The Business Court is a superior court and its orders are orders of a superior court rendered in a civil action for purposes of Rule 3. A matter may be designated for adjudication by the Business Court, but cases are filed with the clerk of court in the county in which the action arose and the clerk maintains the case file.

3. Appeal and Error—jurisdiction—Appellate Rule 3

A jurisdictional rule violation precludes the appellate court from acting in any manner other than to dismiss the appeal. N.C. App. Rule 3 is a jurisdictional rule and appeal of orders from the Business Court were properly dismissed.

Appeal by plaintiffs from orders entered 8 October 2014 and 9 October 2014 by Judge Louis A. Bledsoe, III in Randolph County Superior Court, Rockingham County Superior Court, and Graham County Superior Court. Heard in the Court of Appeals 7 October 2015.

McKinney Law Firm, P.A., by Zeyland G. McKinney, Jr., and Stiles Law Office, PLLC, by Eric W. Stiles, for plaintiffs-appellants.

Nexsen Pruet, PLLC, by David S. Pokela and Christine L. Myatt, for defendant-appellee Jeffrey L. Bostic.

Smith Moore Leatherwood LLP, by D. Erik Albright and Matthew Nis Leerberg, for defendant-appellee Michael Hartnett.

DAVIS, Judge.

The issue in these three consolidated appeals is whether a party's submission of a notice of appeal to the North Carolina Business Court ("the Business Court") through its electronic filing system complies with Rule 3 of the North Carolina Rules of Appellate Procedure. American Mechanical, Inc., ("American Mechanical"), Yates Construction Company, Inc. ("Yates Construction"), and Phillips and Jordan, Inc. ("Phillips and Jordan") (collectively "Plaintiffs") appeal from three orders entered by the Honorable Louis A. Bledsoe, III dismissing each of their appeals. After careful review, we affirm.

Factual Background

These three appeals all arose out of allegations that Bostic Construction, Inc. ("Bostic Construction") and its corporate officers misused and fraudulently misappropriated loans that the company had

obtained in connection with various construction projects. Because the appeals involve common issues of law and fact, we have consolidated them pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

Bostic Construction was a construction management company that primarily focused on the development and construction of apartment complexes and other multi-residential dwellings located near college campuses. It relied on subcontractors to supply labor and materials for its construction projects, delegating substantial portions of the construction to its subcontractors while maintaining overall management responsibility for the projects.

In 2003 and 2004, the company's financial well-being began to deteriorate substantially, and in 2005, Bostic Construction was placed into involuntary bankruptcy by its creditors. Plaintiffs are licensed contractors who performed subcontracting work on various apartment projects for Bostic Construction and were each listed as creditors of the company in the bankruptcy proceeding.

Following the settlement of the bankruptcy case, Plaintiffs each filed separate civil complaints against Jeffrey L. Bostic, Joseph E. Bostic, Jr.[1], Melvin Morris, Tyler Morris, and Michael Hartnett (collectively "Defendants"), who served as Bostic Construction's corporate officers. In their complaints, Plaintiffs alleged that Defendants had engaged in a "common scheme to commingle, misuse, and misappropriate the construction loans provided to finance the construction projects" at issue by making "preferential payments out of the construction loan proceeds for their own personal benefit" rather than utilizing the loan proceeds to fund the construction costs and pay the subcontractors for labor and materials. Plaintiffs alleged that Defendants had engaged in these practices while Bostic Construction was "on the verge of insolvency so as to amount to a dissolution" of the company. In their complaints, each Plaintiff asserted a constructive fraud claim against Jeffrey L. Bostic and Melvin Morris and an aiding and abetting constructive fraud claim against all Defendants. In its complaint, Phillips and Jordan also brought an unfair trade practices claim against all Defendants.

Each of these lawsuits was designated a mandatory complex business case pursuant to N.C. Gen. Stat. § 7A-45.4 and assigned to the

1. Plaintiffs' claims against Joseph E. Bostic, Jr. were discontinued by operation of Rule 4(e) of the North Carolina Rules of Civil Procedure based on Plaintiffs' failure to properly serve him with process.

Honorable Calvin E. Murphy. Defendants subsequently filed motions to dismiss each of Plaintiffs' complaints pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure.

On 1 June 2012, Judge Murphy entered an order in the action brought by Phillips and Jordan determining that (1) Bostic Construction's bankruptcy settlement did not prevent Phillips and Jordan from bringing its direct claims against the company's officers; (2) Phillips and Jordan's allegations in support of its constructive fraud claim sufficiently stated a claim for relief; (3) its cause of action for aiding and abetting constructive fraud was legally deficient; and (4) its unfair trade practices claim was barred by the statute of limitations.

For these same reasons, Judge Murphy entered orders in the other two actions in January 2013 dismissing the aiding and abetting constructive fraud claims of American Mechanical and Yates Construction and allowing their constructive fraud claims to proceed. Because the claim for aiding and abetting constructive fraud was the only cause of action brought against Tyler Morris and Michael Hartnett, Judge Murphy's orders dismissing this claim effectively removed them as parties from the three lawsuits.

In May 2013, Plaintiffs voluntarily dismissed their constructive fraud claims against Melvin Morris. As a result, Plaintiffs' constructive fraud claims against Jeffrey L. Bostic were the only remaining matters for resolution. On 19 and 20 June 2013, Jeffrey L. Bostic filed motions for summary judgment in each of Plaintiffs' three cases. Judge Murphy heard the motions on 17 December 2013 and in May 2014 entered orders granting summary judgment in his favor with regard to each of the constructive fraud claims asserted against him.

Plaintiffs each submitted a notice of appeal through the Business Court's electronic filing system seeking review of Judge Murphy's orders on the motions to dismiss and motions for summary judgment (collectively "Judge Murphy's Orders"). Plaintiffs did not file their notices of appeal with the clerks of court of the counties where the actions had been filed until approximately three months after the summary judgment orders were entered.

Jeffrey L. Bostic and Michael Hartnett moved to dismiss Plaintiffs' appeals in each of the three cases for failure to comply with the requirements of Rule 3 of the Appellate Rules, and Judge Bledsoe entered orders on 8 and 9 October 2014 (collectively "Judge Bledsoe's Orders") granting the motions and dismissing Plaintiffs' appeals. Plaintiffs filed their notices of appeal from Judge Bledsoe's Orders on 29 October 2014.

Analysis

I. Petitions for Certiorari

[1] Our appellate courts have explained on multiple occasions 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." *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980); *see also Lightner v. Boone*, 221 N.C. 78, 84, 19 S.E.2d 144, 148 (1942) (concluding that plaintiffs whose appeal was dismissed by trial court based on their failure to take timely action had "followed the proper procedure in noting their exception to the order of the judge striking [their appeal] and applying for a writ of *certiorari*"), *superseded by statute on other grounds as recognized in Matthews v. Watkins*, 91 N.C. App. 640, 650-51, 373 S.E.2d 133, 139 (1988), *aff'd per curiam*, 324 N.C. 541, 379 S.E.2d 857 (1989).

In recognition of this well-established rule and in response to Defendants' motions seeking dismissal of their appeals, Plaintiffs filed petitions for certiorari on 24 July 2015 seeking review by this Court of (1) Judge Bledsoe's Orders dismissing their appeals; and (2) Judge Murphy's Orders ruling on their substantive claims. In our discretion, we elect to grant the petitions for certiorari as they relate to Judge Bledsoe's Orders in order to address the merits of their arguments concerning the dismissal of the appeals and to reiterate the applicability of Appellate Rule 3 to appeals from orders rendered by the Business Court. *See High Point Bank & Trust Co. v. Fowler*, ___ N.C. App. ___, ___, 770 S.E.2d 384, 386-87 (2015) (explaining that in its discretion this Court may grant party's certiorari petition or treat party's appellate brief as petition for certiorari in order to review trial court's order dismissing appeal); *see also Evans*, 46 N.C. App. at 328-29, 264 S.E.2d at 767-68 ("elect[ing] to treat defendant's attempted appeal in this case as a petition for a writ of certiorari" and ultimately concluding that defendant's appeal "was properly dismissed" by trial court).

However, we deny Plaintiffs' petitions for certiorari in which they seek appellate review of Judge Murphy's Orders. Plaintiffs have offered no actual argument in their appellate briefs as to why Judge Murphy's Orders were erroneous. Instead, Plaintiffs' briefs *solely* address the issue of whether Judge Bledsoe's dismissal of their appeals was proper. Thus, we conclude that because Plaintiffs have failed to make any substantive arguments concerning Judge Murphy's Orders in their appellate briefs, the granting of certiorari to review these orders would be inappropriate. *See State v. Doisey*, ___ N.C. App. ___, ___, 770 S.E.2d

177, 179 (2015) (dismissing defendant's appeal where defendant sought certiorari to obtain appellate review of trial court's ruling refusing to order post-conviction DNA testing but then failed to "bring forward on appeal any argument that the trial court erred in denying his motion for DNA testing"); *see also Craver v. Craver*, 298 N.C. 231, 235-37, 258 S.E.2d 357, 361-62 (1979) (reversing this Court for granting certiorari after defendant's appeal was dismissed by trial court as untimely and then reviewing underlying order from which dismissed appeal was being taken "without benefit of arguments or briefs" because doing so denied opposing party "the critical opportunity to be heard on the merits of the appeal"). Therefore, the only issue we address below is whether Judge Bledsoe properly dismissed Plaintiffs' appeals based on their failure to comply with Appellate Rule 3.

II. Application of Rule 3 to Appeals from the Business Court

[2] Plaintiffs' argument that their appeals were improperly dismissed is foreclosed by our recent decision in *Ehrenhaus v. Baker*, ___ N.C. App. ___, 776 S.E.2d 699 (2015). In *Ehrenhaus*, this Court held that a party's electronic submission of a notice of appeal to the Business Court's electronic filing system is insufficient to satisfy Rule 3's requirement that a litigant seeking to appeal a civil order or judgment must file "notice of appeal with *the clerk of superior court*" within the applicable time periods set forth in subsection (c) of the rule. *Id.* at ___, 776 S.E.2d at 708 (emphasis added).

While the *appellants* in *Ehrenhaus* filed a timely notice of appeal with the clerk of superior court in Mecklenburg County (the county where the action had been filed), *id.* at ___, 776 S.E.2d at 703, the *cross-appellant* — like Plaintiffs in the present case — transmitted a notice of appeal to the Business Court's electronic filing system and did not file the notice of appeal with the Mecklenburg County Clerk of Court until well after the applicable deadline set out in Rule 3 had expired, *id.* at ___, 776 S.E.2d at 708-09. As a result, the Honorable James L. Gale of the Business Court dismissed the cross-appeal as untimely. *Id.* at ___, 776 S.E.2d at 709. The cross-appellant sought certiorari, requesting that we reverse the dismissal of his appeal and arguing that the electronic notice of appeal with the Business Court was legally sufficient. *Id.* at ___, 776 S.E.2d at 709. We disagreed, holding as follows:

> Plaintiff attempted to cross-appeal from Judge Murphy's Order . . . . However, Plaintiff did not properly give notice of appeal. Instead of filing the notice of appeal with the clerk of superior court as required by Rule 3(a)

> of the North Carolina Rules of Appellate Procedure, *see* N.C.R. App. P. 3(a) ("Any party entitled by law to appeal from a judgment or order of a superior . . . court rendered in a civil action . . . may take appeal by filing notice of appeal *with the clerk of superior court* and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule." (emphasis added)), the only notice of appeal submitted by Plaintiff within the requisite time period was filed with the North Carolina Business Court using its electronic filing system.

Id. at ___, 776 S.E.2d at 708-09.

Because questions concerning the interplay between the Business Court, its electronic filing system, and Appellate Rule 3 are now once more before this Court in these three consolidated cases, we take this opportunity to further explain our holding in *Ehrenhaus* that a party seeking to appeal an order or judgment rendered in *any* district or superior court, *including the Business Court*, must file its notice of appeal with the clerk of court of the county in which the action was filed in order to establish appellate jurisdiction.

Rule 3 states, in pertinent part, as follows:

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

N.C.R. App. P. 3(a).

Plaintiffs contend that their submission of notices of appeal through the Business Court's electronic filing system was sufficient to confer appellate jurisdiction upon this Court because (1) the Business Court maintains its own electronic filing system that operates independently of a local clerk of court; and (2) by virtue of the General Rules of Practice and Procedure for the North Carolina Business Court ("Business Court Rules"), its litigants are encouraged to transmit all documents and materials by means of the electronic filing system. In support of their argument, Plaintiffs cite Rules 6.4 and 6.6 of the Business Court Rules, which state as follows:

> **6.4 – Notice of Electronic Filing**. Electronic transmission of a paper to the Business Court file server in

> accordance with these Rules, together with the receipt of a Notice of Electronic Filing automatically generated by the Electronic filing and service system as authorized by the Court, shall constitute filing of the paper with the Business Court for purposes of timing under the North Carolina General Statutes, the North Carolina Rules of Civil Procedure, and the Business Court Rules, and shall constitute entry of that paper on the Business Court Docket. An electronic filing with the Business Court is deemed complete only upon receipt of such Notice of Electronic Filing by the person filing the paper.
>
> **6.6 – Date and Time of Filing.** When information has been filed electronically, the official information of record is the electronic recording of the information as stored on the Court's file server, and the filing date and time is deemed to be the date and time recorded on the Court's file server for transmission of the Notice of Electronic Filing, which date and time is stated in the body of such Notice. In the event that information is timely filed, the date and time of the electronic filing shall govern the creation or performance of any further right, duty, act, or event required or permitted under North Carolina law or applicable rule, unless the Court rules that the enforcement of such priority on a particular occasion would result in manifest injustice.

B.C.R. 6.4, 6.6.

Plaintiffs contend that — when read together — Rule 6.4 (stating that electronic filing "constitute[s] filing . . . for purposes of timing under the North Carolina General Statutes, the North Carolina Rules of Civil Procedure, and the Business Court Rules") and Rule 6.6 (providing that "the filing date and time is deemed to be the date and time recorded on the Court's file server for transmission of the Notice of Electronic Filing") "govern[ ] for purposes of the creation and performance of any further right or act permitted under North Carolina law, such as the act of taking an appeal."

However, it is the Rules of Appellate Procedure — not the Business Court Rules — that establish the mandatory procedures for taking an appeal. *See State v. Berryman*, 360 N.C. 209, 214, 624 S.E.2d 350, 355 (2006) ("The Rules of Appellate Procedure govern in *all* appeals from the courts of the trial division to the courts of the appellate division."

(citation, quotation marks, and ellipses omitted and emphasis added)). The Business Court *is a superior court* and its orders are, therefore, "order[s] of a superior . . . court rendered in a civil action" for purposes of Rule 3. N.C.R. App. P. 3(a).

Pursuant to N.C. Gen. Stat. § 7A-45.4, any party may designate an action as a mandatory complex business case if it involves a material issue concerning securities, antitrust law, trademark law, intellectual property, trade secrets, the law governing corporations and limited liability companies, or certain contract disputes between business entities. N.C. Gen. Stat. § 7A-45.4(a) (2013). If such a designation is preliminarily approved by the Chief Justice, the matter is designated and administered as a complex business case and "[a]ll proceedings in the action shall be before the Business Court Judge to whom it has been assigned." N.C. Gen. Stat. § 7A-45.4(f). The Chief Justice holds the authority to designate certain special superior court judges to preside over these complex business cases. N.C. Gen. Stat. § 7A-45.3 (2013). Pursuant to this statute, "[a]ny judge so designated shall be known as a Business Court Judge and shall preside in the Business Court." *Id.*

Thus, while the Business Court is tasked with the adjudication of cases involving specialized subject matters by judges who have been designated for this purpose, it remains a part of the superior court division of the General Court of Justice. *See Estate of Browne v. Thompson*, 219 N.C. App. 637, 640, 727 S.E.2d 573, 576 (2012) ("The Business Court is a special Superior Court . . . ."), *disc. review denied*, 366 N.C. 426, 736 S.E.2d 495 (2013); *see also Bottom v. Bailey*, ___ N.C. App. ___, ___, 767 S.E.2d. 883, 889 (2014) (same). A matter may be designated for adjudication by the Business Court, but cases are not originally filed there. Instead, they are filed with the clerk of court in the county in which the action arose. N.C. Gen. Stat. § 7A-45.4(b). Moreover, once a matter has been designated as a complex business case, the clerk of court still maintains the case file. Therefore, unless and until the Appellate Rules are amended to provide otherwise, the orders of the Business Court — just like the orders of any other superior court — must be appealed through the filing of a notice of appeal with the applicable clerk of court in accordance with the procedures set out in Rule 3.

Plaintiffs attempt to draw an analogy between the Business Court and the North Carolina Industrial Commission, arguing that just as appeals from the Industrial Commission do not require the filing of a notice of appeal with the clerk of court in the county where the matter arose, no such requirement exists for a party appealing an order from the Business Court. Plaintiffs' argument ignores, however, the fact

that the Industrial Commission — unlike the Business Court — is an administrative agency rather than a court of justice. *See Letterlough v. Akins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962) ("The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions . . . ."). Accordingly, the taking of an appeal from a ruling of the Industrial Commission is governed not by Appellate Rule 3 but rather by Appellate Rule 18. *See* N.C.R. App. P. 18 (setting forth requirements for taking appeal "from administrative agencies, boards, or commissions"); *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 267-68 (2007) (rejecting party's argument that appeal from Industrial Commission was untimely under Rule 3 and explaining that "[t]his is not a civil case; this is a direct appeal from an administrative agency. As such, it is governed by Rule 18 . . . ."), *disc. review denied*, 362 N.C. 513, 668 S.E.2d 783 (2008).

[3] Having determined that Plaintiffs' appeals were subject to Rule 3, the only remaining question is whether Plaintiffs' failure to comply with Rule 3 mandated dismissal of the appeals rather than some lesser sanction. As our Supreme Court explained in *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008), "rules of procedure are necessary in order to enable the courts properly to discharge their duty of resolving disputes," and consequently, "failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice." *Id.* at 193, 657 S.E.2d at 362 (citation, quotation marks, brackets, and ellipses omitted). In *Dogwood* — our Supreme Court's most recent and comprehensive discussion of "the manner in which the appellate courts should address violations of the appellate rules" — the Court noted three categories of violations under the Appellate Rules: "(1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." *Id.* at 193-94, 657 S.E.2d at 362-63.

While noting that plain error review or Rule 2 may in exceptional circumstances cure a party's waiver of an issue in the trial court and that generally a party's nonjurisdictional rule violations should not lead to the dismissal of an appeal, the Supreme Court explained that a jurisdictional rule violation, conversely, "precludes the appellate court from acting in any manner other than to dismiss the appeal." *Id.* at 197, 657 S.E.2d at 365.

> It is axiomatic that courts of law must have their power properly invoked by an interested party. . . . The appellant's compliance with the jurisdictional rules governing

> the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case.

Id. at 197, 657 S.E.2d at 364-65 (internal citations omitted).

Rule 3 is a jurisdictional rule. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure."). Thus, because (1) Rule 3 applies to appeals from orders issued by the Business Court; and (2) a party's compliance with Rule 3 is necessary to establish appellate jurisdiction, Judge Bledsoe properly dismissed Plaintiffs' appeals based on their failure to file timely notices of appeal with the clerks of court in the counties in which the cases were filed. *See Wallis v. Cambron*, 194 N.C. App. 190, 192, 670 S.E.2d 239, 241 (2008) (dismissing plaintiffs' appeal "for failure to timely file a notice of appeal pursuant to the North Carolina Rules of Appellate Procedure, Rule 3(c)").[2]

Conclusion

For the reasons stated above, we affirm the orders entered by Judge Bledsoe dismissing Plaintiffs' appeals.

AFFIRMED.

Judges STEPHENS and STROUD concur.

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2. In their alternative argument, Plaintiffs contend that even if the "filing [of their notices of appeal] in the Business Court was inadequate, the time for filing the notice in the proper forum was tolled by Defendant's failure to serve the Order and attach a proper certificate of service" such that their belated filing of notices of appeal with the respective clerks of court was timely under Rule 3. Here, however, the Business Court served Judge Bledsoe's Orders on the parties. *See E. Brooks Wilkins Family Med., P.A. v. WakeMed*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, slip op. at 8-9 (filed Jan. 5, 2016) (No. COA15-217) (holding that trial courts possess authority to serve their own orders on the parties to the case). Moreover, Plaintiffs admit that they had actual notice of the orders within three days of their entry. *See id.* at ___, ___ S.E.2d at ___, slip op. at 11 ("[A] litigant's actual notice of a final order within three days of its entry triggers [Appellate] Rule 3(c) and notice of appeal must be filed within thirty days of the date of entry."). Thus, we reject Plaintiffs' alternative argument.

[245 N.C. App. 144 (2016)]

FRANKLIN FALIN, Employee, Plaintiff
v.
THE ROBERTS COMPANY FIELD SERVICES, INC., Employer, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, INC., Third-Party Administrator), Defendants

No. COA15-565

Filed 2 February 2016

Worker's Compensation—suitable employment—distance from home

The Industrial Commission did not err in a worker's compensation case by concluding that the employment offered to plaintiff was not suitable pursuant to N.C.G.S. § 97-2(22), and the opinion and award of the Commission was affirmed. The job that was offered plaintiff was well outside the 50-mile radius in the statute. While defendant argued that the 50-mile radius was one of several facts to be considered, the grammatical structure of the statute placed the statute in an entirely separate clause and not with a serial list of facts to be considered. The Legislature's intent was that the 50-mile radius language be a requirement rather than merely a factor to be considered. Moreover, the Commission concluded that even if the 50-mile radius requirement was a factor and not a requirement, the distance factor significantly outweighed the others.

Appeal by defendant from opinion and award entered 24 March 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 November 2015.

Ricci Law Firm, P.A., by Brian M. Ricci, for plaintiff-appellee.

Ward and Smith, P.A., by William Joseph Austin, Jr., for defendant-appellant.

BRYANT, Judge.

Where the Full Commission did not err in concluding that employment offered to plaintiff was not suitable pursuant to N.C. Gen. Stat. § 97-2(22), we affirm the Opinion and Award of the Full Commission.

In October of 2012, Franklin Falin, plaintiff, a resident of Kingsport, Tennessee, sought and accepted a construction job with The Roberts Company Field Services, Inc., defendant, specifically seeking work as an iron worker. The project plaintiff would work on was in Aurora,

North Carolina, over 415 miles from his home. On his application dated 15 October 2012, plaintiff indicated that he was "available for Out-of-Town jobs."

On 10 December 2012, plaintiff suffered a compensable injury to his left leg. When a large beam fell, it pinned plaintiff's leg against another beam, causing him to sustain a fracture to his left leg below the knee. Plaintiff's injury occurred at the job site in Aurora, North Carolina. That same day, Dr. Michael Kuhn performed surgery on plaintiff's leg. The surgery involved left tibial intermedullary nailing with two proximal and two distal locking screws. Plaintiff was discharged on 12 December 2012 and returned home to Kingsport, Tennessee for additional medical treatment. Defendants duly accepted liability.

On 19 December 2012, plaintiff visited Dr. Gregory Jeansonne of Associated Orthopaedics of Kingsport, Tennessee. Plaintiff reported significant pain as well as continued soft tissue swelling in his leg. He was told to keep his activity level to a minimum and was kept on non-weight-bearing status. As of 4 February 2013, Dr. Jeansonne allowed weight-bearing as tolerated in a CAM walker.

On 4 March 2013, plaintiff reported aching pain in the left knee with extended periods of ambulation. He also reported aching pain at the fracture site. The CAM walker was discontinued. On 13 March 2013, Dr. Jeansonne recommended formal physical therapy for knee/ankle range of motion and strengthening. On 29 April 2013, plaintiff reported continued pain and swelling with increased activities such as physical therapy. On 24 May 2013, Dr. Jeansonne ordered a functional capacity evaluation ("FCE"). The FCE demonstrated that plaintiff could perform medium-level work.

In a letter dated 15 July 2013, Dr. Jeansonne noted that plaintiff had acceptable alignment at the fracture site. Dr. Jeansonne placed plaintiff at maximum medical improvement ("MMI") and assigned a nine percent disability rating to the lower extremity.

On 2 August 2013, Dr. Jeansonne reviewed defendant's job description for a Tool Clerk position. Dr. Jeansonne determined that plaintiff was "qualified to return to that job from an orthopedic standpoint." Although employed by defendant as an iron worker at the time of the injury, plaintiff's work history was diversified; he previously worked as a handyman, a machine operator, an assembly line worker, and a roofer.

On 20 August 2013, defendant offered plaintiff the Tool Clerk position at the Odfjell Project in Charleston, South Carolina. The position

paid $21.00 per hour, plus a $7.00 per hour per diem, returning plaintiff to his pre-injury average weekly wages. The Tool Clerk position was within plaintiff's work restrictions and required that an employee perform at the medium level. The project in Charleston was 338 miles from plaintiff's residence in Tennessee.

On 26 August 2013, plaintiff accepted a job at Southern Classic Auto Wash for minimum wage. Plaintiff later began working as a traffic controller for Professional Management Services Group ("PMS Group"). Both jobs were near plaintiff's home in Tennessee. On 27 August 2013, plaintiff rejected the Tool Clerk position.

On 6 September 2013, defendant filed a Form 24, Application to Terminate or Suspend Payment of Compensation. Defendant averred that plaintiff's refusal to accept suitable employment justified termination of disability benefits based on N.C. Gen. Stat. §§ 97-2(22) and 97-32. On 17 September 2013, plaintiff submitted his response to the Form 24, contending that the job offered to him was not within 50 miles of his residence.

The Industrial Commission declined to make a ruling on the Form 24 application; therefore, the matter went to hearing on the issue of whether plaintiff's disability benefits, known as Temporary Partial Disability ("TPD") pursuant to N.C. Gen. Stat. § 97-30, should be terminated based on plaintiff's refusal to accept suitable employment. On 27 May 2014, a Deputy Commissioner heard testimony from plaintiff and a representative of defendant, and on 30 July 2014, the Deputy Commissioner filed his Opinion and Award in favor of plaintiff.

Defendant appealed to the Full Commission. Following a hearing, two members of the Full Commission issued an Opinion and Award holding that the job offered to plaintiff was not suitable employment because it was outside the 50-mile radius from plaintiff's residence, and one member dissented with a separate opinion. The 2-1 decision of the Full Commission was handed down on 24 March 2015. Defendant appeals.

On appeal, defendant argues the Full Commission erred in its Conclusions of Law Nos. 3, 5, and 7, which are stated as follows:

> 3. Because the North Charleston tool clerk job was located 338 miles from plaintiff's permanent residence in Kingsport, it did not constitute "suitable employment" for plaintiff. The Commission concludes that a plain reading of N.C. Gen. Stat. § 97-2(22) compels this conclusion

> as the North Charleston job was located 338 miles from plaintiff's residence, far in excess of the 50-mile radius statutory requirement. However, even if distance-from-residence is but one factor to be considered in the analysis, the sheer distance involved here still overwhelms the other factors and as such the tool clerk job does not constitute "suitable employment." *Id.*
>
> . . .
>
> 5. Thus, defendant may not terminate payment of TPD compensation to plaintiff at this time as he has not unjustifiably refused suitable employment. N.C. Gen. Stat. § 97-32.
>
> . . .
>
> 7. The Commission concludes that one of the 2011 amendments that was designed to encourage claimants to return to work, that is, the enhancement of TPD compensation provision of N.C. Gen. Stat. § 97-30, fits neatly into the circumstances of this claim. As an iron worker, plaintiff made very good wages for someone with a limited formal education, but the compensable injury he sustained while working for defendant consigned plaintiff with work limitations that now prevent him the opportunity to make those wages as an iron worker anywhere for any employer. Ongoing TPD compensation to plaintiff recognizes and compensates for that reality. N.C. Gen. Stat. § 97-30.

Defendant's main contentions are that the Full Commission erred by holding the plain reading of N.C. Gen. Stat. § 97-2(22) compels the conclusion that the Charleston tool clerk job did not constitute suitable employment for plaintiff and that, therefore, defendant could not terminate payment of TPD compensation to plaintiff where he had not unjustifiably refused suitable employment. Because Conclusion of Law No. 7 is more a policy statement than a conclusion of law, we need not address any argument as to that issue.

Defendant first argues that the Full Commission erred in its Conclusion of Law No. 3 by determining that the plain reading of N.C. Gen. Stat. § 97-2(22)(2014), *amended by* 2015 N.C. Sess. Laws. 2015-286, compels the conclusion that a tool clerk job offered to plaintiff in Charleston, South Carolina did not constitute "suitable employment" within the meaning of the statute. Specifically, defendant argues that a

plain reading of the statute, as well as the legislative intent behind the statute, both show that the requirement in N.C. Gen. Stat. § 97-2(22) that "suitable employment" must be within a 50-mile radius of plaintiff's residence is only one of several factors to be weighed in the analysis.

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (internal citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). We note for the record that defendant does not challenge any of the Findings of Fact made by the Commission; therefore, we consider these binding on appeal. *Smith v. DenRoss Contracting*, U.S., Inc., 224 N.C. App. 479, 483, 737 S.E.2d 392, 396 (2012). Further, defendant challenges only three of the Commission's eight Conclusions of Law.

North Carolina General Statute § 97-2(22) of the Workers' Compensation Act, defines "suitable employment" as follows:

> The term "suitable employment" means employment offered to the employee . . . that . . . (ii) after reaching maximum medical improvement is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located within a 50-mile radius of the employee's residence at the time of injury or the employee's current residence if the employee had a legitimate reason to relocate since the date of injury. No one factor shall be considered exclusively in determining suitable employment.

N.C.G.S. § 97-2(22) (2014), *amended* by 2015 N.C. Sess. Laws 2015-286. The North Carolina appellate courts have not interpreted N.C. Gen. Stat. § 97-2(22) since its enactment in 2011.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by this Court." *First Bank v. S & R Grandview, L.L.C.*, ___ N.C. App. ___, ___,755 S.E.2d 393, 394 (2014) (citations omitted). "The primary objective of statutory interpretation is to give

effect to the intent of the legislature." *Id.* (citation omitted). "The plain language of the statute is the primary indicator of legislative intent." Id. (citation omitted). "When, however, 'a statute is ambiguous, judicial construction must be used to ascertain the legislative will.' " *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136–37 (1990)). Ambiguity arises when statutory language is "fairly susceptible of two or more meanings." *State v. Sherrod*, 191 N.C. App. 776, 778–79, 663 S.E.2d 470, 472 (2008) (quoting *Abernethy v. Bd. of Comm'rs of Pitt Cnty.*, 169 N.C. 631, 636, 86 S.E. 577, 580 (1915)). "In determining legislative intent, [this Court] may 'assume that the legislature is aware of any judicial construction of a statute.' " *Blackmon v. N.C. Dep't of Corr.*, 343 N.C. 259, 265, 470 S.E.2d 8, 11 (1996) (quoting *Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 648, 362 S.E.2d 294, 301 (1987)).

The North Carolina appellate courts have long held that placement of punctuation within a statute is used as a means of "making clear and plain" the English language therein; therefore, punctuation and placement should be regarded in the process of statutory interpretation. *See Stephens Co. v. Lisk*, 240 N.C. 289, 293–94, 82 S.E.2d 99, 102 (1954). Furthermore, "[o]rdinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." *Dunn v. Pac. Emp'rs Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (citations omitted).

Defendant concentrates on the last sentence of the section of the statute at issue: "No one factor shall be considered exclusively in determining suitable employment." N.C.G.S. § 97-2(22). In focusing on this last sentence of the statute, defendant argues that the "50-mile radius" language within the statute is not a requirement but rather a factor to be balanced against the others: "the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience . . . ." *Id.* In other words, defendant asserts that the structure of the statute specifies several factors that should be weighed, the "50-mile radius" factor being one of the five in the series not to be "considered exclusively in determining suitable employment." *Id.*

However, defendant ignores the grammatical construction of the statute, which separates the 50-mile radius requirement as an entirely separate clause, not joined to the other "factors" by a comma, and thus not part of that serial list of factors. The statute could easily have been written in the reverse order, which negates the fact that the 50-mile radius requirement is an element in a series: "The term 'suitable employment'

means employment offered to the employee that . . . is located within a 50-mile radius of the employee's residence . . . ." *Id.* In fact, the factors in the series are distinguished from the 50-mile radius requirement grammatically in that the factors are all nouns (i.e., vocational skills, education, etc.) and the 50-mile radius requirement is an adjectival phrase ("located within a 50-mile radius"). "Every element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb). When linked items are not like items, the syntax of the sentence breaks down . . . ." *The Chicago Manual of Style* § 5.212 (16th ed. 2010).

The legislature could have chosen to write the statute to include distance as a factor in defining "suitable employment": "The term 'suitable employment means employment offered to the employee that . . . is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, experience, *and the work or project site's distance from the employee's residence* . . . ." N.C.G.S. § 97-2(22) (words and emphasis added). This the legislature did not do. Therefore, to read the statute as including the 50-mile radius requirement as a "factor" would ignore the "ordinary rules of grammar" and disregard the legislature's intent that the 50-mile radius language be a requirement rather than merely a factor to be considered. *See Dunn*, 332 N.C. at 134, 418 S.E.2d at 648. Our statutory analysis is consistent with the ultimate conclusions reached by the Full Commission.

Further, as noted, none of the Findings of Fact are challenged. In Conclusion of Law No. 3, the Commission stated "even if distance-from-residence is but one factor to be considered in the analysis, the sheer distance involved here still overwhelms the other factors and as such the tool clerk job does not constitute suitable employment.' " Therefore, by the Commission's own analysis it concluded that even if the 50-mile radius requirement is a factor and not a requirement, the distance factor significantly outweighed the others. "[T]he Full Commission is the sole judge of the weight and credibility of the evidence. This Court is not at liberty to reweigh the evidence and to set aside the findings simply because other conclusions might have been reached." *McLeod v. Wal-Mart Stores, Inc.*, 208 N.C. App. 555, 560, 703 S.E.2d 471, 475 (2010) (citation and quotation marks omitted).

We also note that defendant does not challenge Conclusion of Law No. 4, which states:

> Plaintiff was justified in his refusal of the North Charleston tool clerk job because of the great distance from his home and the indefinite duration of time that it would have required him to be away from his family. Plaintiff also found suitable and steady employment relatively quickly after his treating physician released him to return to work at medium duty. *Id.*; N.C. Gen. Stat. § 97-32.

Therefore, based on the Commission's analysis in reaching Conclusion of Law No. 3, and based on the full record before us, Conclusion of Law No. 5— "defendant may not terminate payment of TPD compensation to plaintiff at this time as he has not unjustifiably refused suitable employment"—was properly supported and not erroneous as a matter of law. Accordingly, defendant's argument is overruled.

We affirm the Opinion and Award of the Full Commission.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

RUSSELL HENDERSON, AND WIFE, JULIE HENDERSON, PETITIONERS
v.
THE COUNTY OF ONSLOW, RESPONDENT

No. COA14-1355

No. COA14-1356

Filed 2 February 2016

1. Civil Procedure—voluntary dismissal and refiling—writ of certiorari—board of adjustment

The trial court properly dismissed a refiled petition for a writ of certiorari seeking review from a determination by the Onslow County Board of Adjustment following an attempted voluntary dismissal without prejudice. Rule 41(a)(1) was not applicable in this case because a petition for writ of certiorari does not initiate an action, petitioners were not plaintiffs in the underlying action, and the underlying action had already been decided before petitioners attempted to voluntarily dismiss it.

2. Civil Procedure—voluntary dismissal—amendment of original petition

The trial court did not err by denying petitioners' motion to amend their petition for a writ of certiorari seeking review from a determination by the Onslow County Board of Adjustment where they first attempted to take a voluntary dismissal of a first petition and subsequently refiled, and the trial court dismissed the petition because Rule 41(1)(a) did not apply and petitioners attempted to amend their petition. Because the petition for review had already been dismissed, there was no petition to amend.

Judge TYSON dissenting.

Appeal by petitioners from orders entered 5 February 2014 and 21 May 2014 by Judges Charles H. Henry and Arnold O. Jones, respectively, in Onslow County Superior Court. Heard in the Court of Appeals 18 May 2015.

Michael Lincoln, P.A., by Michael Lincoln, for petitioners-appellants.

Onslow County Attorney Lesley F. Moxley, by Assistant Attorney Kaelyn Avery, for respondent-appellee.

GEER, Judge.

Petitioners Russell and Julie Henderson have brought two separate appeals related to petitions for writ of certiorari they filed in superior court seeking review from a determination by the Onslow County Board of Adjustment ("OCBOA"). As the issues presented in the appeals are interrelated and involve common questions of law, we have consolidated the appeals for purposes of decision.

On appeal, petitioners primarily argue that they had a right under Rule 41(a)(1) of the Rules of Civil Procedure to voluntarily dismiss their first petition for writ of certiorari without prejudice and refile it within one year without the refiled petition being deemed untimely. Because we hold that Rule 41(a)(1) did not apply to petitioners' petition for writ of certiorari, and the superior court otherwise had no jurisdiction to hear the refiled petition, the trial court properly dismissed the refiled petition in File No. 13 CVS 2589. While petitioners also argue that the trial court erred in File No. 10 CVS 4596 by denying their motion to amend the petition, because petitioners had voluntarily dismissed that petition, there

was no existing petition to amend, and we, therefore, affirm the trial court's denial of the motion to amend.

Facts

Petitioners own a six-bedroom, four-bathroom house located at 162 Peninsula Manor in Hubert, North Carolina in Onslow County ("Peninsula Manor property") that they rent out. The Peninsula Manor property is zoned for residential use, but, on occasion, people have rented the house for weddings and family reunions. On 26 May 2010, the Onslow County Chief Zoning and Environmental Office ("the zoning office") issued petitioners a notice of violation, stating that the holding of weddings and family reunions on the Peninsula Manor property violated the residential zoning ordinance. Petitioners appealed the citation to the OCBOA, which heard the matter on 10 August 2010. On 26 October 2010, the OCBOA upheld the notice of violation.

On 23 November 2010, petitioners filed a petition for review of the OCBOA decision pursuant to N.C. Gen. Stat. § 153A-345(e) in the Onslow County Superior Court in File No. 10 CVS 4596. On 28 June 2012, respondent filed a motion to dismiss for failure to prosecute and lack of subject matter jurisdiction "in that the Respondents were not properly served within 30 days pursuant to G.S. § 153A-345(e2)." The clerk of superior court issued a writ of certiorari on 29 June 2012 and directed respondents to prepare and certify to the superior court the record of proceedings. However, on 30 July 2012, petitioners dismissed their petition by filing a "NOTICE OF VOLUNTARY DISMISSAL" that stated "plaintiffs hereby voluntarily dismiss this action pursuant to Rule 41(a) of the Rules of Civil Procedure **WITHOUT** prejudice."

On 5 July 2013, petitioners refiled their petition for writ of certiorari in Onslow County Superior Court in File No. 13 CVS 2589. On 11 September 2013, respondent filed a motion to dismiss the refiled petition on multiple bases, including lack of subject matter jurisdiction. The superior court granted respondent's motion to dismiss on 5 February 2014, stating:

> IT APPEARING to the Court that the Petitioners dismissed an appeal in the nature of certiorari from a decision by the Onslow County Board of Adjustment and then attempted to re-file the appeal within the one-year time period allowed for in civil actions under Rule 41(a) of the North Carolina Rules of Civil Procedure;

> IT FURTHER APPEARING to the Court that Rule 41(a) is not applicable to appeals in the nature of certiorari from decisions by the Board of Adjustment because appeals of this nature are not civil actions as contemplated by Rule 41(a);
>
> IT FURTHER APPEARING to the Court that the initial dismissal of the appeal was thereby with prejudice, which barred any re-filing, and therefore, the Court does not have subject matter jurisdiction in this matter; and
>
> IT FURTHER APPEARING to the Court that the Respondent's Motion to Dismiss is proper and should be allowed.

Petitioners timely appealed to this Court from the order of dismissal in File No. 13 CVS 2589. Subsequent to that appeal, on 16 April 2014, petitioners filed a motion to amend the petition in File No. 10 CVS 4596 pursuant to Rule 15 of the Rules of Civil Procedure, asserting that they had attempted to voluntarily dismiss the petition in that case because the petition was filed pursuant to N.C. Gen. Stat. § 153A-345(e) when it should have been filed pursuant to N.C. Gen. Stat. §§ 153A-349 and 160A-393. The motion to amend contended that the voluntary dismissal without prejudice in File No. 10 CVS 4596 was a "nullity" and, therefore, petitioners should be allowed to amend their petition to comply with the applicable statutes.

On 21 May 2014, the superior court denied the motion to amend "on the basis of undue delay, unfair prejudice due to the pending appeal in 13 CVS 2589, and futility of the amendment." Petitioners timely appealed to this Court from the order denying their motion to amend on 12 June 2014.

I

[1] We first address petitioners' argument that the trial court erred in 13 CVS 2589 in dismissing the refiled petition for lack of jurisdiction. We review a lower tribunal's decision regarding whether it had jurisdiction over a matter de novo. *Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003). "Under the *de novo* standard, the trial court is required to consider the question of jurisdiction 'anew, as if not previously considered or decided' " by the lower tribunal. *Id.* at 213-14, 585 S.E.2d at 243 (quoting *Raleigh Rescue Mission, Inc. v. Bd. of Adjustment of City of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002)).

N.C. Gen. Stat. § 153A-345(e2) (2011), which has since been repealed, applied to the petition for writ of certiorari filed in this case.[1] That statute provided:

> Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later.

Id. Therefore, a petition for writ of certiorari seeking review of the OCBOA's decision in this case had to be filed in accordance with the 30-day deadline in N.C. Gen. Stat. § 153A-345(e2).

Although the petition for review in 13 CVS 2589 was filed more than three years after the OCBOA's decision, petitioners contend that it was still timely because they voluntarily dismissed their initial petition, filed in 10 CVS 4596, without prejudice pursuant to Rule 41(a) (1) of the Rules of Civil Procedure and, in accordance with that Rule, refiled the petition in 13 CVS 2589 within one year of the dismissal. Respondent, however, contends that Rule 41(a)(1) does not apply to petitions for writ of certiorari.

The Rules of Civil Procedure "govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C.R. Civ. P. 1. In *Darnell v. Town of Franklin*, 131 N.C. App. 846, 849, 508 S.E.2d 841, 844 (1998) (quoting N.C.R. Civ. P. 1), this Court concluded that "[a] petition for writ of certiorari is a pleading filed in the superior court and is within the scope of the Rules of Civil Procedure" because certiorari proceedings are " 'proceedings of a civil nature' " within the meaning of Rule 1.

We fully agree with the dissenting opinion that the Rules of Civil Procedure apply to "all actions and proceedings of a civil nature."

1. N.C. Gen. Stat. § 153A-345.1 (2013) now provides that the provisions of N.C. Gen. Stat. § 160A-388 (2013) apply to counties as well as cities and towns. N.C. Gen. Stat. § 160A-388(e2)(2) still provides for a 30-day deadline for the filing of a petition for writ of certiorari seeking review of a board of adjustment decision.

N.C.R. Civ. P. 1. Because proceedings of certiorari are " 'proceedings of a civil nature,' " as *Darnell* held, the Rules of Civil Procedure apply. 131 N.C. App. at 849, 508 S.E.2d at 844 (emphasis omitted) (quoting N.C.R. Civ. P. 1). However, although the Rules of Civil Procedure apply to certiorari proceedings, not every Rule of Civil Procedure is applicable to petitions for writ of certiorari. For example, Rule 38(b) of the Rules of Civil Procedure states that "[a]ny party may demand a trial by jury of any issue triable of right by a jury[.]" In a general sense, Rule 38(b) "applies" to certiorari proceedings because it is one of the Rules of Civil Procedure, and the certiorari proceeding is a "proceeding of a civil nature." However, in a more specific sense, Rule 38(b) does not "apply" to certiorari proceedings in that the rights included therein are not *applicable* to certiorari proceedings. A petition for writ of certiorari is not an "issue triable of right by a jury." *Id.* Similarly, because a petition for writ of certiorari does not initiate an action, because petitioners are not plaintiffs in the underlying action, and because the underlying action had already been decided before petitioners attempted to voluntarily dismiss it, Rule 41(a)(1) was not applicable in the case before us.

Contrary to the suggestion of the dissenting opinion, the Court in *Darnell* did not hold that each of the Rules of Civil Procedure applies to certiorari proceedings. Instead, our appellate courts have held that certain of the Rules of Civil Procedure apply to petitions for writ of certiorari filed in the trial court, while others do not. *See Philadelphus Presbyterian Found., Inc. v. Robeson Cnty. Bd. of Adjustment*, ___ N.C. App. ___, 754 S.E.2d 258, 2014 N.C. App. LEXIS 51, at *15, 2014 WL 47325, at *6 (unpublished) ("[N]either this Court nor the Supreme Court has ever held that the North Carolina Rules of Civil Procedure, considered in their entirety, apply in *certiorari* proceedings conducted pursuant to N.C. Gen. Stat. § 160A-393, which, as we have already noted, bear a much greater resemblance to appellate proceedings than to ordinary civil actions."), *disc. review denied*, 367 N.C. 504, 758 S.E.2d 873 (2014).

Thus, on the one hand, the Supreme Court in *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 656, 662 (1990), held a superior court hearing a petition for writ of certiorari may not grant summary judgment pursuant to Rule 56 of the Rules of Civil Procedure because "[m]otions for summary judgment are properly heard in the trial courts" and "[h]ere, the superior court judge was sitting as an appellate court, not a trial court." On the other hand, this Court has held that Rule 62 of the Rules of Civil Procedure relating to the stay of proceedings pending appeal does apply to certiorari proceedings. *See Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 667, 504 S.E.2d 296, 299 (1998)

("[W]e believe that Rule 62 does apply to a superior court's review under 160A-381 of a town council's grant or denial of a special use permit, even though the superior court reviews that decision as an appellate court.").

As the Supreme Court emphasized in *Batch*, certain Rules of Civil Procedure do not apply to petitions for writ of certiorari because they are not relevant to those proceedings. Rule 56 is inapplicable because of the nature of the standard of review: "The sole question before the trial court regarding this administrative proceeding was whether the decision of the Town Council of Chapel Hill was based upon findings of fact supported by competent evidence [in the certified record] and whether such findings support the conclusion reached by the town." 326 N.C. at 12, 387 S.E.2d at 662. Because of this standard of review, the trial court could not grant a motion for summary judgment, which, under Rule 56, would necessarily be based on evidence presented in the first instance to the trial court and require the trial court to substitute its assessment of the evidence for that of the Town. *Id.* at 11, 387 S.E.2d at 662. Rule 56 is simply not relevant to petitions for writ of certiorari seeking review of decisions of a board of adjustment.

In *Darnell*, this Court specifically addressed whether Rule 15 applies to a petition for writ of certiorari. The Court quoted Rule 15: " 'A party may amend his pleading once as a matter of course at any time before a responsive pleading is served.' " 131 N.C. App. at 849, 508 S.E.2d at 844 (quoting N.C.R. Civ. P. 15). After reviewing the language of Rule 15, the Court noted "that Rule 15 is not limited to 'civil actions' but applies to 'pleadings.' " *Id.* at 850, 508 S.E.2d at 844. The Court, therefore, held: "Having determined that the petition was a 'pleading' within the meaning of the Rules of Civil Procedure, the trial court had the authority to grant the motion to amend the petition . . . ." *Id.*

Darnell thus instructs that we look first at the actual language of the Rule of Civil Procedure to determine whether it applies to proceedings pursuant to petitions for writ of certiorari. The pertinent portion of Rule 41(a)(1) relied upon by petitioners provides:

> *[A]n action or any claim therein* may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a

> plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. *If an action commenced* within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, *a new action* based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

(Emphasis added.) Rule 41(a)(1) thus is confined to "actions" and, in contrast to Rule 15, is not made applicable to pleadings.

It is well established that a petition for writ of certiorari is not a civil action. As this Court explained in *Little v. City of Locust*, 83 N.C. App. 224, 349 S.E.2d 627 (1986):

> A petition for certiorari is not an action for civil redress or relief as is a suit for damages or divorce; a petition for certiorari is simply a request for the court addressed to judicially review a particular decision of some inferior tribunal or government body. . . . [A] petition for certiorari is not the beginning of an action for relief . . . ; in effect it is an appeal from a decision made by another body or tribunal. Certiorari was devised by the early common law courts as a substitute for appeal and it has been so employed in our jurisprudence since the earliest times.

Id. at 226-27, 349 S.E.2d at 629. Because a petition for writ of certiorari is not a civil action within the meaning of the Rules of Civil Procedure and because Rule 41(a)(1) applies only to civil actions, Rule 41(a)(1) by its express terms does not apply to petitions for writ of certiorari.

In addition, this Court has already held that when a party seeks review of a quasi-judicial zoning decision denying a special use permit, the "matter [is] not commenced by the filing of" the pleading in the superior court challenging the denial, but rather is "commenced by the filing of plaintiff's application for a special use permit with defendant[.]" *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 888-89, 599 S.E.2d 921, 924 (2004). Likewise, here, this proceeding was not commenced with the filing of the petition for writ of certiorari. Instead, this proceeding was initiated by the zoning office when it issued petitioners a notice of violation. Assuming that Rule 41(a)(1) did apply to this proceeding, if any party could be deemed the plaintiff, it would have to be the zoning office, which initiated the proceedings. In filing the petition for writ of certiorari, petitioners were simply following the only *route*

of appeal available to them from the final decision of the OCBOA, when they filed the 23 November 2010 petition for writ of certiorari. *See*, *e.g.*, *Batch*, 326 N.C. at 11, 387 S.E.2d at 662 (holding that "[i]n reviewing the errors raised by plaintiff's petition for writ of certiorari, the superior court was sitting as a court of appellate review"). Petitioners could no more voluntarily dismiss the petition for writ of certiorari and refile it outside the statutorily-mandated time frames than could a party file a notice of appeal, dismiss it, and refile it after the 30-day deadline for appeals had run.

Moreover, Rule 41(a)(1) provides that a plaintiff may dismiss the action "at any time before the plaintiff rests his case[.]" Our courts have interpreted "rests his case" to include not only a plaintiff resting his or her case at trial, but also to motions for summary judgment when the plaintiff has had an opportunity to present evidence and make arguments on the merits of his or her claims. *See*, *e.g.*, *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 591-92, 248 S.E.2d 430, 432-33 (1978) ("The decision of the court resulting from a motion for summary judgment is one on the merits of the case. All parties have an opportunity to present evidence on the question before the court. Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has 'rested his case' within the meaning of Rule 41(a)(1)(i) of the North Carolina Rules of Civil Procedure. He cannot thereafter take a voluntary dismissal under Rule 41(a)(1)(i)."). *Compare Wesley v. Bland*, 92 N.C. App. 513, 515, 374 S.E.2d 475, 476 (1988) (holding that although plaintiffs submitted affidavits in opposition to summary judgment motion, plaintiffs had not rested their case under Rule 41(a)(1)(i) because "[w]hen it was plaintiffs' attorney's turn to speak, he orally took a voluntary dismissal" and "prior to this plaintiffs' attorney had not been given an opportunity to present additional evidence or argue his clients' position").

Under the *Maurice* test, even assuming petitioners could be considered plaintiffs, they would have "rested their case" in the proceeding before the OCBOA after they submitted evidence and argued their position on the merits of their challenge to the notice of violation. Consequently, Rule 41(a)(1)(i) would not authorize a voluntary dismissal in the superior court.

Therefore, we hold that Rule 41(a)(1) is simply not relevant to petitions for writ of certiorari seeking review of decisions of a board of adjustment. Because Rule 41(a)(1) did not apply to File No. 10 CVS 4596 and, therefore, did not allow petitioners to refile their petition within a

year of the voluntary dismissal of the 10 CVS 4596 petition, the petition filed in 13 CVS 2589 was untimely, and the trial court properly dismissed it. *See Teen Challenge Training Ctr., Inc. v. Bd. of Adjustment of Moore Cnty.*, 90 N.C. App. 452, 455, 368 S.E.2d 661, 664 (1988) (affirming dismissal of untimely petition for certiorari to superior court).

II

[2] Petitioners argue alternatively that if the trial court properly dismissed their petition in 13 CVS 2589 because Rule 41(a)(1) did not apply to the proceedings in 10 CVS 4596, then their dismissal was a "nullity," and the trial court should have granted their motion to amend the petition in 10 CVS 4596 pursuant to Rule 15. We disagree.

While *Darnell* holds that Rule 15 does apply to petitions for writ of certiorari, at the time petitioners moved to amend the petition in 10 CVS 4596, the petition had already been dismissed and there was no proceeding pending. Even though Rule 41(a)(1) did not apply to 10 CVS 4596, as the parties initiating the certiorari proceedings, petitioners still had the ability to voluntarily dismiss their petition just as a party may seek to dismiss an appeal in this Court. *See Camden Sewer Co. v. Mayor & City Council of Salisbury*, 157 Md. 175, 184, 145 A. 497, 500 (1929) ("We are of the opinion that ordinarily and as a general rule the complainant is master of his own litigation and has the right to dismiss his proceedings at any time up to a final determination of the case, by following the approved practice of making application to the court for leave so to do[.]").

Petitioners voluntarily dismissed the petition in 10 CVS 4596 and the fact that they did so under a mistaken understanding of the applicability of Rule 41(a)(1) does not render that dismissal null and void. Consequently, because the petition for review had already been dismissed, there was no petition to amend, and the trial court did not err in denying the motion to amend.

AFFIRMED.

Chief Judge McGEE concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

I agree with the majority's conclusion that the Rules of Civil Procedure apply to certiorari proceedings. I cannot concur and respectfully dissent from the majority's conclusion that Rule 41 of the Rules of Civil Procedure does not apply to certiorari proceedings before the superior court. The rationale adopted by the majority's opinion does not permit parties on petitions for writ of certiorari to have advance knowledge of which rules will apply to their proceeding. Rule 41 is a part of the statutorily enacted North Carolina Rules of Civil Procedure, which expressly applies to all "proceedings of a civil nature" including certiorari proceedings reviewing decisions of local government and state agencies or otherwise. N.C. Gen. Stat. § 1A-1, Rule 1 (2013).

In the alternative and under our binding precedents, I would allow Petitioners to amend their original petition under Rule 15 of the Rules of Civil Procedure. I also respectfully dissent from the majority opinion's conclusion that the trial court properly denied petitioners' motion to amend the original petition in File No. 10 CVS 4596.

<u>I. "Actions and Proceedings of a Civil Nature"</u>

The Rules of Civil Procedure, including Rule 41 at issue here, apply to "all *actions and proceedings of a civil nature*," to include civil proceedings of certiorari before the superior courts. N.C. Gen. Stat. § 1A-1, Rule 1 (emphasis supplied). This Court has specifically addressed and held a petition for writ of certiorari seeking review of a local government action

> is a *pleading* filed in the superior court and is within the scope of the Rules of Civil Procedure which 'shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and *proceedings of a civil nature* except when a differing procedure is prescribed by statute.'

Darnell v. Town of Franklin, 131 N.C. App. 846, 849, 508 S.E.2d 841, 844 (1998) (emphasis in original) (quoting N.C. Gen. Stat. § 1A-1, Rule 1). The statute applicable here does not prescribe a "differing procedure." *Id.* In *Darnell*, the Court determined the petition for writ of certiorari was a "pleading," and held Rule 15 of the Rules of Civil Procedure allowed the petitioner to amend the petition. *Id.* at 849-50, 508 S.E.2d at 844.

The purpose of the Rules of Civil Procedure is to provide all parties and the court with prior notice and certainty of the governing procedural

processes for civil proceedings. The Rules of Civil Procedure are an entrée and not a buffet. No court is free *post hoc* to pick and choose *ad hoc* which and when the statutorily required Rules will apply. Due process is denied if a party cannot determine in advance which procedural rules will be applied and enforced by the court in a particular civil proceeding.

II. Precedents of this Court

In many prior cases, our Court has applied the Rules of Civil Procedure to *certiorari* proceedings. In *Mize v. Cnty. of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1985), we considered whether the superior court erred by dismissing the petitioners' claim for failure to join a necessary party under Rule 12(b)(7) of the Rules of Civil Procedure. This Court held the trial court abused its discretion under the Rule by failing to allow the petitioners to amend the petition to join the Zoning Board of Adjustment as a party to the certiorari review. *Id.* at 283-84, 341 S.E.2d at 770.

In *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 645 S.E.2d 105 (2007), the petitioners sought review by writ of certiorari of the Environmental Assessment and Finding of No Significant Impact prepared by the North Carolina Department of Transportation ("NCDOT") for a particular improvement program. NCDOT moved to dismiss the petition based on, *inter alia*, Rules 12(b)(1), (2), and (6) of the Rules of Civil Procedure. *Id.* at 467-68, 645 S.E.2d at 107. The trial court concluded it lacked subject matter jurisdiction, because the petitioners were not aggrieved persons under N.C. Gen. Stat. § 150B-43 and had failed to exhaust all administrative remedies before seeking judicial review. *Id.* at 468, 645 S.E.2d at 107.

Petitioners then filed a "Motion to Alter or Amend Order" pursuant to Rule 59(e) of the Rules of Civil Procedure. *Id.* (citing N.C. Gen. Stat. § 1A-1, Rule 59(e)). This Court conducted a lengthy analysis of whether the superior court erred in denying the petitioners' Rule 59(e) motion, and concluded the trial court "properly held that the Motion to Alter or Amend violated Rule 7(b)(1) [of the Rules of Civil Procedure] and was not a proper Rule 59(e) motion." *Id.* at 470, 645 S.E.2d at 108-09.

In *Bailey & Assocs. Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 193, 689 S.E.2d 576, 588 (2010), we held the trial court did not err under Rule 60 of the Rules of Civil Procedure by denying a motion to dismiss issues raised by the petition for writ of certiorari.

In *Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 667, 504 S.E.2d 296, 299 (1998), we held Rule 62 of the Rules of Civil Procedure applies to the superior court's review of a town council's grant or denial of a special use permit. *Compare*, *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990) (holding a motion for summary judgment under Rule 56 of the Rules of Civil Procedure was improper on the issues raised in the certiorari petition, because the superior court could not admit or rely upon factual considerations, not considered by the town council and not included in the administrative record).

The majority opinion cites this Court's unpublished opinion in *Philadelphus Presbyterian Found., Inc. v. Robeson Cnty. Bd. of Adjustment*, __ N.C. App. __, 754 S.E.2d 258, 2014 N.C. App. LEXIS 51 (unpublished), *disc. review denied*, 367 N.C. 504, 758 S.E.2d 873 (2014). This non-binding opinion highlights the predicament of inconsistent application of the Rules of Civil Procedure to these proceedings. In that case, the Robeson County Board of Commissioners approved an application for a conditional use permit relating to rock blasting operations. *Id.* at *4. The petitioners sought review in the superior court by petition for writ of certiorari, but failed to join a necessary party. *Id.*

This Court reviewed the trial court's denial of the petitioners' motion to allow them to join the necessary party. *Id.* at *11-12. This Court declined to hold the Rules of Civil Procedure applied to the proceeding on certiorari, but held:

> [D]espite the absence of any statutory justification for concluding that the principles enunciated in N.C. Gen. Stat. § 1A-1, Rule 15, should be incorporated into *certiorari* proceedings conducted pursuant to N.C. Gen. Stat. § 160A-393, we do agree that *some sort of amendment procedure should, in appropriate circumstances, be available in such proceedings. As a result, we will assume, without deciding, that the principles enunciated in N.C. Gen. Stat. § 1A-1, Rule 15, govern the allowance of amendment motions in certiorari proceedings conducted pursuant to N.C. Gen. Stat. § 160A-393.*

Id. at *16 (second emphasis supplied). The Court's unpublished opinion in *Philadelphus* failed to cite or recognize the unanimous and controlling precedent of *Darnell v. Town of Franklin*, 131 N.C. App. at 849, 508 S.E.2d at 844 on this precise issue, but yet agreed with its conclusion that amendments are allowed under Rule 15.

This Court in *Philadelphus* recognized the inherent problems arising from conducting civil proceedings without clearly defined and uniformly applied procedural rules. The Rules of Civil Procedure are the statutorily adopted and binding rules to govern these "proceedings of a civil nature." N.C. Gen. Stat. § 1A-1, Rule 1.

III. Rule 41

I disagree with the majority's holding that, while the Rules of Civil Procedure apply to certiorari proceedings, Rule 41 is specifically inapplicable. Rule 41, in relevant part states:

> . . . [A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, *or any claim therein*, *is dismissed without prejudice under this subsection*, *a new action based on the same claim may be commenced within one year after such dismissal* unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(2013) (emphasis supplied).

The majority's opinion holds Rule 41 is inapplicable to certiorari proceedings because certiorari proceedings are not "actions." The majority opinion narrowly construes *Little v. City of Locust*, in which this Court stated, "a petition for writ of *certiorari* is not *the beginning* of an action." 83 N.C. App. 224, 226, 349 S.E.2d 627, 629 (1986) (second emphasis supplied).

While a petition for writ of certiorari is not necessarily the beginning of an action, it is not precluded from the statutory definition of "action." An "action" is defined as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2 (2013). The

statutory definition of "action" applies to certiorari petitions, in which the petitioner seeks review of the local government's decision for the purpose of protecting their rights and seeking "the redress or prevention of a wrong." *Id.*

The majority also incorrectly interprets the definition of a "plaintiff" under Rule 41, and concludes the rule does not apply to "petitioners" because they are not "plaintiffs." Their analysis again ignores the statutes and prior case law.

"In civil actions the party complaining is the plaintiff[.]" N.C. Gen. Stat. § 1-10 (2013). "The interchangeable use of the words 'plaintiff' and 'petitioner' is found in our case law as well as our statutes. For all practical purposes, the words 'petitioner' and 'plaintiff' are synonymous." *Housing Authority of Greensboro v. Farabee*, 284 N.C. 242, 246, 200 S.E.2d 12, 15 (1973).

I also disagree with the majority's assertion that, even if the petitioners are "plaintiffs" under Rule 41, they "rested their case" before the Board of Adjustment after they submitted evidence and argued their position. The Rules of Civil Procedure may or may not expressly apply to proceedings before the Board of Adjustment as they do in superior court. Plaintiff could not have "rested his case" before that tribunal for purposes of Rule 41, which applies to the certiorari proceeding before the superior court. Plaintiff could not have "rested his case" under the Rules of Civil Procedure before his case was in a court of justice.

I agree with the majority's opinion that the Rules of Civil Procedure apply to certiorari proceedings. I do not agree with their conclusion that Rule 41 is inapplicable to certiorari proceedings. Because we all agree the Rules of Civil Procedure apply to certiorari proceedings, the party asserting application of the rule is entitled to the presumption of general applicability. Since the parties and the court must presume the Rules of Civil Procedure apply to this proceeding, the burden rests upon the party asserting non-applicability to show the reasons and to show prejudice. Respondent has failed to and cannot show any prejudice here.

IV. Motion to Amend the Petition

Petitioners originally filed their petition for writ of certiorari on 23 November 2010 (File No. 10 CVS 4596). On 30 June 2012, Petitioners filed a notice of voluntary dismissal under Rule 41 stating the dismissal was voluntarily entered *without prejudice*. Petitioners re-filed their petition within one year of their voluntary dismissal without prejudice (File No. 13 CVS 2589). The superior court concluded Rule 41 was inapplicable to

certiorari proceedings and dismissed the re-filed petition. Thereafter, on 16 April 2014, petitioners moved to amend the original petition to comply with the applicable statues.

If Rule 41 does not apply to certiorari proceedings, to prevent prejudice, I would alternatively hold Petitioners are allowed to amend their petition in File No. 10 CVS 4596 under Rule 15, which we all agree clearly applies to these proceedings.

The majority concludes Petitioners are unable to amend their original petition, because they had dismissed the petition *without prejudice* and the petition no longer existed before the court. If the majority is correct that Rule 41 does not apply to certiorari proceedings, the notice of voluntary dismissal in File No. 10 CVS 4596, which was entered pursuant to Rule 41, is a nullity and void. In that instance, the petition in File No. 10 CVS 4596 remains a viable proceeding. Rule 41 cannot be parsed or re-written by the majority to allow a binding dismissal, and to disregard Petitioners' express condition of "without prejudice" and the right to re-file under the same rule.

We all agree and our Court has previously held that Rule 15 of the Rules of Civil Procedure applies to certiorari proceedings and petitions for writ of certiorari may be amended under the Rule. *Darnell*, 131 N.C. App. 849-50, 508 S.E.2d at 844. Onslow County has not shown and cannot show any prejudice by allowing petitioners to amend their petition under Rule 15.

V. Conclusion

The Rules of Civil Procedure apply to certiorari proceedings before the superior court. *Id.* It is patently unfair to allow a party or the court to pick and choose, after the fact, which of the statutorily enacted Rules, by which it will be bound. In light of the numerous precedents and our holding here that the Rules of Civil Procedure do apply, the petitioners and courts must presume the particular Rule at issue applies, unless the party who contests the application of the Rule carries the burden and shows prejudice for the Rule to be inapplicable.

Rule 41 of the Rules of Civil Procedure equally applies to civil proceedings before the superior court. Pursuant to Rule 41, petitioners were allowed to dismiss *without prejudice* and re-file their petition for writ of certiorari within a year of the voluntary dismissal. *Id.* Onslow County has not and cannot show any prejudice by being bound by the Rules of Civil Procedure upon review.

In the absence of the right to dismiss without prejudice *and re-file* under Rule 41, petitioner clearly retained the right to amend its petition under Rule 15. I respectfully dissent.

DANIEL AND LISA HOLT, ADMINISTRATORS OF THE ESTATE OF HUNTER DANIEL HOLT; STEVEN GRIER PRICE, INDIVIDUALLY; STEVEN GRIER PRICE, ADMINISTRATOR OF THE ESTATE OF McALLISTER GRIER FURR PRICE; STEVEN GRIER PRICE, ADMINISTRATOR OF THE ESTATE OF CYNTHIA JEAN FURR, PLAINTIFFS
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA15-445

Filed 2 February 2016

1. Appeal and Error—issue not raised at trial or in brief—discussed by dissenting opinion—not addressed by majority opinion

On appeal from an opinion and award of the Full Industrial Commission concluding that the North Carolina Department of Transportation's (DOT) negligence was a proximate cause of deaths resulting from a traffic accident, the Court of Appeals did not address an issue discussed by the dissenting opinion because that issue was not raised by DOT at trial or in its appellate brief.

2. Tort Claims Act—negligence by Department of Transportation—accident at intersection—criminal acts of third parties—not sole proximate cause

In an action brought against the North Carolina Department of Transportation (DOT) pursuant to the Tort Claims Act for deaths resulting from a traffic accident, the Full Industrial Commission did not err by concluding that the criminal acts of third parties were not the sole proximate cause of the collision and awarding plaintiffs $1,000,000 for each decedent. It was reasonably foreseeable that a vehicle speeding toward the intersection, unregulated by any traffic signal, could lead to the type of deadly accident involved in this case. If there had been a functioning traffic signal, the speeding driver would have had sixteen additional seconds to begin decelerating.

Judge ELMORE dissenting.

Appeal by Defendant from opinion and award entered 29 December 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 September 2015.

DeVore Acton & Stafford, PA, by Fred W. DeVore, III, F. William DeVore IV and Derek P. Adler; and Rawls Scheer Foster & Mingo PLLC, by Amanda A. Mingo, for Plaintiffs-Appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General Melody R. Hairston and Special Deputy Attorney General Amar Majmundar, for Defendant-Appellant.

McGEE, Chief Judge.

Cynthia Jean Furr ("Furr") was driving her two-year-old daughter McAllister Grier Furr Price ("McAllister") in her automobile ("the Furr car") in the early evening of 4 April 2009. Furr was driving the approximately one-half mile from her home to her church, where she was the musical director. As Furr attempted to make a left-hand turn from her street, Riverpointe Drive, onto Highway 49 in the direction of downtown Charlotte, the Furr car was broadsided by a Mitsubishi ("the Stasko car") driven by twenty-year-old Tyler Stephen Stasko ("Stasko"). Eleven-year-old Rex Evan Thomas ("Rex") and thirteen-year-old Hunter Daniel Holt ("Hunter") were passengers in the Stasko car at the time of the collision. Furr, McAllister, and Hunter died as a result of injuries sustained in the collision. This collision occurred in a four-way intersection ("the intersection") where Riverpointe Drive and Palisades Parkway intersected with Highway 49.

According to the findings of fact of the Full Commission of the North Carolina Industrial Commission ("Industrial Commission"), before the collision, Stasko was driving Rex and Hunter home from a day trip to Carowinds amusement park. The Stasko car was heading in a westerly direction on Highway 49, away from Charlotte and towards Lake Wylie and South Carolina. While Stasko was stopped for the traffic signal at the intersection of Shopton Road, Rex and Hunter noticed two female friends in an adjacent vehicle driven by Carlene Atkinson ("Atkinson"). The kids "began gesturing and joking with each other." "When the light at Shopton Road turned green, Mr. Stasko and Ms. Atkinson sped off at a high rate of speed in the direction of the Palisades/Riverpointe intersection." Stasko and Atkinson were apparently engaging in a race. The traffic signal at Shopton Road was the last traffic signal or sign Stasko would encounter before the collision. There was no traffic signal or sign

regulating traffic on Highway 49 at the intersection. There was a stop sign on Riverpointe Drive, requiring drivers to stop before entering or crossing Highway 49.

> After coming to the stop sign on Riverpointe Drive, Cynthia Furr crossed Hwy 49 in order to make a left turn and proceed east on Hwy 49. She slowed prior to concluding the left turn in order to allow eastbound traffic on Hwy 49 to clear. At the Riverpointe Drive intersection, Mr. Stasko's vehicle, which was traveling in the left through lane, collided with the left side of Ms. Furr's vehicle at an estimated speed of 86 miles per hour.

Atkinson, who was "some distance behind" the Stasko car when it impacted the Furr car, stopped briefly at the scene of the accident, and then "left the accident scene without offering assistance or waiting for law enforcement personnel to arrive."

Beginning in 2000, the area around the intersection underwent significant changes. Prior to 2000, Highway 49, in the vicinity of Riverpointe Drive, was a two-lane highway with a speed limit of 45 miles per hour. Riverpointe Drive terminated at its intersection with Highway 49, and there was no roadway continuing on the opposite side of Highway 49 from Riverpointe Drive. By late 2005, Highway 49 had been widened to a four-lane highway, and the speed limit had been increased to 55 miles per hour. Defendant North Carolina Department of Transportation ("DOT") was responsible for this project ("the DOT project"). In addition, a four-way intersection had been created by the addition of Palisades Parkway across Highway 49 from the terminus of Riverpointe Drive. Palisades Parkway was constructed by Crescent Resources, LLC ("Crescent") as a means of connecting its new housing development to Highway 49. Pursuant to an agreement with DOT, Crescent was permitted to construct Palisades Parkway and add designated turn lanes on Highway 49, which included two dedicated turn lanes for the west-bound lanes and one dedicated turn lane for the east-bound lanes. Subsequent to these projects, a person making a left-hand turn from Riverpointe Drive onto Highway 49 East had to drive over or by the following: one dedicated turn lane for west-bound traffic turning right onto Riverpointe Drive; two west-bound lanes of traffic; two dedicated turn lanes for west-bound traffic to turn left onto Palisades Parkway; one dedicated lane for east-bound traffic to turn left onto Riverpointe Drive; and two east-bound lanes of traffic. There was also a dedicated turn lane for east-bound traffic to turn right onto Palisades Parkway. In addition to being aware of east and west-bound traffic on Highway 49, a driver would have to be

aware of traffic from Palisades Parkway attempting to either turn onto east or west-bound Highway 49, or attempting to cross Highway 49 to access Riverpointe Drive.

The plan for the intersection included installation of traffic signals, which were to be funded by Crescent and installed by DOT. At the time of the 4 April 2009 collision no signals had been installed, even though one of DOT's district engineers had warned Crescent in 2006 that a signal was needed "at [that] time."

This action was brought in the Industrial Commission pursuant to the Tort Claims Act by Steven Grier Price, as the administrator of the estates of Furr and McAllister; and Daniel and Lisa Holt, as the administrators of Hunter's estate (together, "Plaintiffs"). Plaintiffs alleged that DOT negligently failed to install traffic signals at the intersection, and that this negligence was a proximate cause of the collision that killed Furr, McAllister, and Hunter.

The following relevant stipulations were entered by Plaintiffs and DOT:

> 3. This case arises out of a fatal automobile crash on 4 April 2009, at the intersection of Highway 49 and Riverpointe Drive. A car driven by Tyler Stasko collided with a vehicle driven by Cynthia Jean Furr. Highway 49 is a state maintained highway. Prior to the accident, Highway 49 had been widened and a fourth leg (Palisades Parkway) had been added to the intersection. The claimants contend that a proximate cause of the accident was the failure of [DOT] to install a traffic signal at the intersection. [DOT] stipulates that it had a duty to install a signal and that it breached that duty; however, [DOT] contends that said breach was not a proximate cause of the collision. Rather, [DOT] contends that the acts of others, including the intervening and superseding criminal acts of Mr. Stasko and Ms. Atkinson, were the proximate cause of the collision. Cynthia Jean Furr and her daughter, McAllister Grier Furr Price, were killed in the car driven by Ms. Furr. Hunter Daniel Holt was killed as a passenger in the vehicle driven by Tyler Stasko.
>
> 4. At all times relevant to this action, Highway 49 was a road constructed and maintained by [DOT].
>
> 5. Originally, Highway 49 was a two lane road, but beginning in the early 2000's, [DOT] undertook a construction project to widen and improve Highway 49.

> 6. During the project, Crescent Resources sought to construct a road opposite Riverpointe Drive, called Palisades Parkway. This road was intended to service a new subdivision known as The Palisades.
>
> 7. As a part of a conditional zoning agreement with the Mecklenburg County Planning Commission, Crescent agreed to fund a traffic signal at the Highway 49/Palisades Parkway/Riverpointe Drive intersection. Although Palisades Parkway was connected to Highway 49 prior to the subject accident, Crescent did not pay those funds at any time prior to the crash in 2009.
>
> 8. A traffic signal was not installed prior to the crash of 4 April 2009.

Because of DOT's stipulation that it had a duty to install a traffic signal at the intersection, and that it breached that duty, the sole issue before the Industrial Commission was whether DOT's breach of its duty was a proximate cause of the collision and resulting deaths. A deputy commissioner entered a decision and order on 14 February 2014. Because the deputy commissioner found that DOT could not have foreseen Stasko's criminal acts, the deputy commissioner concluded that the failure to erect a traffic signal was not a proximate cause of the deaths. Plaintiffs appealed to the Full Commission.

The Full Commission reversed the decision of the deputy commissioner, concluding:

> [DOT's] breach of its duty to install a traffic signal at the . . . intersection was a proximate cause of the accident that resulted in the deaths of Cynthia Furr, McAllister Furr Price and Hunter Holt. The Commission concludes that the intervening negligence of Mr. Stasko and Ms. Atkinson was also a proximate cause of the accident, but not the sole proximate cause. As such, [DOT] is not insulated from liability for its negligence.

In support of this conclusion, the Full Commission found the following relevant facts:

> 5. The compass orientation of curving Hwy 49 is such that the road travels east to west, with the easterly direction headed toward Charlotte and the westerly direction headed towards the Buster Boyd Bridge and South Carolina. There is a hill to the left of the intersection of

Hwy 49 and Riverpointe Drive that limits visibility of the intersection and drivers on Hwy 49.

6. The subject intersection was significantly altered during [DOT's] widening project and the construction by Crescent. Some of the modifications included a right hand turn lane onto Riverpointe Drive, dual left turn lanes on Hwy 49 onto Palisades Parkway, dual left turning lanes on Palisades Parkway onto Hwy 49 in the direction of South Carolina, and removal of the grass median between the east and west travel lanes in the eastern leg of the intersection towards Charlotte.

7. On 10 January 2006, [DOT's] District Engineer, Louis L. Mitchell, wrote to Kublins Transportation Group, a consultant for Crescent, and advised that the traffic signal needed to be installed "at this time." Although Crescent completed and [DOT] approved the intersection, Crescent did not fund and [DOT] did not install a traffic signal at that time. [DOT] did not install a traffic signal prior to 4 April 2009.

. . . .

10. Detective Jesse D. Wood of the Charlotte-Mecklenburg Police Department was the lead investigator into this crash. Det. Wood testified, and the Commission finds, that prior to stopping at the Shopton Road intersection, Mr. Stasko had encountered several other traffic signals and had obeyed each. The Commission further finds that the greater weight of the evidence shows that Mr. Stasko and Ms. Atkinson had not been racing prior to leaving the Shopton Road intersection.

. . . .

16. Daren Marceau is an expert in civil engineering, traffic crash investigation, traffic crash reconstruction, and human factors. Mr. Marceau explained that there are national standards of American Association of State Highway and Transportation Officials ("AASHTO") regarding sight distances at intersections. Mr. Marceau testified, and the Commission finds, that even before the addition of Palisades Parkway, the sight distance to the east on Hwy 49 from Riverpointe Drive, and the sight distance of the

intersection for vehicles traveling west on Hwy 49 was inadequate due to a vertical curve, a hill, in the highway just before the Riverpointe intersection.

. . . .

18. Mr. Marceau, Mr. Flanagan [DOT's expert] and Det. Wood all testified that if a traffic signal had been installed, the signal and presence of the intersection would have been visible to drivers traveling west for approximately one-half mile on Hwy 49. With the traffic signal visible for one-half mile to a driver traveling west on Hwy 49 at 86 mph, the presence of the intersection and the right of way direction from the signal would have been evident for approximately twenty-one (21) seconds. Without the signal, the intersection became visible at 650 feet and it would take the same driver only approximately five (5) seconds to cover that distance.

19. On 4 April 2009, there were no warning signs or other devices on Hwy 49 to warn drivers of the approaching Riverpointe intersection.

20. Plaintiff's expert, Mr. Marceau, reviewed nine similar accidents at the Riverpointe intersection which had occurred following the start of [DOT's] widening project and prior to the fatal crash on 4 April 2009. Mr. Marceau testified that in his expert opinion, and the Commission finds, that had the Riverpointe intersection been properly signalized, the crash on 4 April 2009 would not have occurred. Mr. Marceau based his opinion on the lack of visibility of the Riverpointe intersection and the driving behavior of Mr. Stasko prior to the crash. Mr. Marceau noted that both Mr. Stasko and Ms. Atkinson had stopped at traffic signals prior to the Riverpointe intersection and that there was no history of either of them running stoplights. Mr. Marceau testified, "I never had a doubt that they would've stopped at this traffic signal." [1]

1. DOT contests this portion of finding of fact 20. However, this sentence merely states what Mr. Marceau's testimony was. The Full Commission did not find as fact that Stasko or Atkinson would, without a doubt, have stopped at the traffic signal had one been present. We assume, however, that Mr. Marceau's testimony informed the Full Commission's proximate cause findings.

> 21. [DOT's] expert, Mr. Flanagan, did not have an opinion as to whether the Riverpointe intersection was dangerous or whether the lack of a signal contributed to the crash.
>
> . . . .
>
> 24. Given [DOT's] stipulation that a signal was needed, the lack of sight distance to and from the intersection, the speed limit of the roadway, the size of the intersection, and the number of previous similar accidents at this intersection, the Commission finds that the accident that resulted in the deaths of Cynthia Furr, McAllister Furr Price and Hunter Holt was a foreseeable consequence of [DOT's] stipulated breach of duty in failing to install a traffic signal at that intersection.

The Full Commission ruled that DOT's failure to install traffic signals at the intersection, which DOT stipulated constituted a breach of its duty to the public, was a proximate cause of the accident and resulting deaths. The Full Commission awarded the estates of the deceased $1,000,000.00 for each decedent. DOT appeals.

I.

[1] DOT's sole argument on appeal is that the "Industrial Commission erred when it failed to determine that the criminal acts of third-parties were the sole proximate cause of the collision." We disagree.

It is well established that

> [t]he standard of review for an appeal from the Full Commission's decision under the Tort Claims Act "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding. "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." Thus, "when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision."

Simmons v. Columbus Cty. Bd. of Educ., 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (citations omitted). " '[T]he [Industrial] Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony,' findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citations and quotation marks omitted). Although DOT contests certain findings of fact, because we find competent record evidence supporting the relevant findings of fact recited above, they are binding on appeal. *Id.* We discuss the Full Commission's finding that the accident was "a foreseeable consequence of [DOT's] stipulated breach of duty in failing to install a traffic signal at that intersection" in greater detail below. *See Gaines v. Cumberland Cnty. Hosp. Sys., Inc.*, 203 N.C. App. 213, 219, 692 S.E.2d 119, 122 (2010) (" '[p]roximate cause is ordinarily a question of fact' ") (citation omitted).

The dissenting opinion contends that we should reverse the Full Commission's decision and order for two distinct reasons: (1) because "DOT's breach of duty was not an actual cause of [P]laintiffs' injuries[,]" and (2) assuming *arguendo* DOT's breach of duty was an actual cause of the accident, the intentional criminal acts of Stasko and Atkinson were unforeseeable and therefore constituted "an independent, intervening cause absolving DOT of liability." However, only the *proximate* cause argument, and not any *actual* cause argument, was raised by DOT at trial, and now on appeal. DOT stipulated that "it had a duty to install a signal and that it breached that duty; [DOT] contend[ed at the hearing] that said breach was not a proximate cause of the collision." However, there is no mention of "actual cause" in the stipulations. Further, the Full Commission's decision and order identifies the only issue to be decided by the Full Commission, other than damages, as "[w]hether the death[s] of [Furr, McAllister, and Hunter were] proximately caused by the failure of [DOT] to install a traffic signal at the intersection of Pallisades Parkway and Highway 49[.]" This Court cannot, in this situation, base our opinion on arguments not first made before, and passed on by, the Industrial Commission.

> Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states that in order "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must "obtain a ruling upon the party's request, objection, or motion." By failing to raise the issue

> of default at trial, respondent has failed to preserve it for appellate review.

In re Foreclosure of a Deed of Trust Executed By Rawls, __ N.C. App. __, __, 777 S.E.2d 796, 801 (2015) (citation omitted).

In addition, the sole issue DOT brought forth on appeal was the following: "The Industrial Commission erred when it failed to determine that the criminal acts of third-parties were the sole proximate cause of the collision." This is the sole issue we are authorized to answer. N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Because DOT did not make a cause-in-fact, or "actual cause" argument on appeal, it is not properly before us. *Id.*; *State v. Dinan*, __ N.C. App. __, __, 757 S.E.2d 481, 485, *disc. review denied*, 367 N.C. 522, 762 S.E.2d 203 (2014). It is not the job of this Court to make DOT's argument for it. *Id.*

II.

DOT argues it was unforeseeable that Stasko and Atkinson would engage in a "drag race" "committed in complete disregard of the law." DOT argues: "Our State's jurisprudence has affirmed, and reaffirmed, the concept that 'the intervening or superseding criminal acts of another preclude liability of the initial negligent actor when the injury is caused by the criminal acts.' *Tise v. Yates Construction Co.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997)." DOT's selective quoting from *Tise* would seem to indicate that the "concept" discussed in *Tise* represents a *per se* rule. This is not the case, as the full quotation in *Tise* makes clear:

> *The general rule* is that the intervening or superseding criminal acts of another preclude liability of the initial negligent actor when the injury is caused by the criminal acts. As our Court of Appeals noted . . .,
>
>> [t]he doctrine of superseding, or intervening, negligence is well established in our law. In order for an intervening cause to relieve the original wrongdoer of liability, the intervening cause must be a new cause, which intervenes between the original negligent act and the injury ultimately suffered, and which breaks the chain of causation set in motion by the original wrongdoer and becomes itself solely responsible for the injury.

Id. at 460-61, 480 S.E.2d at 680 (emphasis added) (citations omitted). "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another[ ] is *reasonable unforeseeability* on the part of the original actor of the subsequent intervening act and resultant injury." *Id.* at 461, 480 S.E.2d at 680-81 (emphasis added) (citations and quotation marks omitted). This is true whether or not the alleged superseding act is criminal in nature. *See Id.*

Regarding superseding proximate causes, our Supreme Court has held:

> It is immaterial how many new events or forces have been introduced if the original cause remains operative and in force. In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.
>
> . . . .
>
> [T]he principle is stated this way: "In order to be effective as a cause superseding prior negligence, the new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result; a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that reasonably might not have been anticipated."
>
> "If the intervening cause is in reality only a condition on or through which the negligence of the defendant operates to produce an injurious result, it does not break the line of causation so as to relieve the original wrongdoer from responsibility for the injury. A superseding cause cannot be predicated on acts which do not affect the final result of negligence otherwise than to divert the effect of the negligence temporarily, or of circumstances which merely accelerate such result.
>
> "'The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.'"

> Ordinarily, "the connection is not actually broken if the intervening event is one which might in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation."
>
> The test of foreseeability as an element of proximate cause does not require that the tortfeasor should have been able to foresee the injury in the precise form in which it occurred. "All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.'"

Riddle v. Artis, 243 N.C. 668, 671-72, 91 S.E.2d 894, 896-97 (1956) (citations omitted).

We agree with the Full Commission that the acts of Stasko and Atkinson combined with DOT's breach of duty to cause the collision and resulting deaths. We further hold that it was reasonably foreseeable that a vehicle speeding toward the intersection, unregulated by any traffic signal, could lead to the type of accident and injury involved in this case.

In opposition to this holding, DOT argues :

> Traffic signals are not intended as a mechanism to keep individuals from engaging in criminal acts. While it may be foreseeable to Defendant that an individual may exceed the posted speed limit by 5 or even 10 miles per hour, it is impossible for Defendant to design a roadway upon which drivers may safely race one another at almost 90 miles per hour. Traffic laws and traffic control devices are only effective when individuals obey them.

DOT's focus on the criminal nature of Stasko's actions is misplaced. All that is required is that DOT "might have foreseen that some injury would result from [its] act or omission, or that consequences of a generally injurious nature might have been expected." *Riddle*, 243 N.C. at 672, 91 S.E.2d at 897 (citation and quotation marks omitted). Clearly, it was foreseeable that the failure to install traffic lights at a dangerous and complicated intersection could result in "some injury" or "consequences of a generally injurious nature." *Id.* The Full Commission found as fact

that "the sight distance to the east on Hwy 49 from Riverpointe Drive, and the sight distance of the intersection for vehicles travelling west on Hwy 49 was inadequate due to a vertical curve, a hill, in the highway just before the Riverpointe intersection." The Full Commission also found that the expanded size of the intersection, including the multiple travel and turning lanes, made the intersection more dangerous than it had been prior to the DOT project. The Full Commission further found:

> With the traffic signal visible for one-half mile to a driver traveling west on Hwy 49 at 86 mph, the presence of the intersection and the right of way direction from the signal would have been evident for approximately twenty-one (21) seconds. Without the signal, the intersection became visible at 650 feet and it would take the same driver only approximately five (5) seconds to cover that distance.

One of the more foreseeable scenarios at the intersection would include a vehicle cresting the hill in the westbound lane at a high rate of speed and impacting another vehicle attempting to cross over the westbound lanes of Highway 49. The fact that Stasko was speeding, and thus breaking the law, did not render his actions unforeseeable. *Id.* at 669, 672, 91 S.E.2d at 895-97 (the defendant's actions could be found to be a proximate cause of an accident even though concurrent tortfeasor was operating his vehicle "at a high and unlawful rate of speed"). Speeding is likely the most prevalent infraction committed upon our highway system. Though the State refers repeatedly to Stasko's actions as "drag racing," Stasko's reason for speeding is immaterial. "The test of foreseeability as an element of proximate cause does not require that the tortfeasor should have been able to foresee the injury in the precise form in which it occurred." *Riddle*, 243 N.C. at 672, 91 S.E.2d at 897. Nor do we find Stasko's very high rate of speed to have rendered the accident unforeseeable as a matter of law.

The Industrial Commission was the trier of fact. "What is the proximate or a proximate cause of an injury is ordinarily a question for [the trier of fact]. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the [trier of fact]." *Short v. Chapman*, 261 N.C. 674, 680, 136 S.E.2d 40, 45 (1964) (citation omitted). Contrary to the implication in DOT's argument, proximate cause need not be proven to an absolute certainty. *Id.* at 682, 136 S.E.2d at 47 ("absolute certainty . . . that [the injury] proximately resulted from the wrongful act need not be shown to support an instruction thereon") (citation omitted); *Id.* at 681, 136 S.E.2d at 46 ("if more than one legitimate inference can be drawn from

the evidence, the question of proximate cause is to be determined by the [trier of fact]") (citation omitted). As this Court has stated:

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was *probable* under all the facts as they existed.
>
> "[I]t is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. Proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case."

Gaines, 203 N.C. App. at 219, 692 S.E.2d at 122 (emphasis added) (citations omitted).

In the present case it is, of course, conceivable that the accident would have occurred even had there been properly functioning traffic signals in the intersection. It is conceivable that Stasko would have failed to see the light, or that he would have ignored a red light at the peril of his life. It is also conceivable, and much more likely, that Stasko would have seen a red light and stopped or slowed, avoiding the accident. As DOT itself argues, "had [Stasko] simply reduced his speed, . . . Furr would have had additional time to move out of the path of [Stasko's] vehicle." Had there been a properly functioning traffic signal, Stasko would have had approximately sixteen additional seconds to notice the intersection and initiate deceleration. It was the province of the Full Commission, as trier of fact, to make a determination based on the facts, law, and common sense, concerning whether Stasko's high-speed racing behavior indicated that he would have completely ignored a properly functioning traffic signal. *Id.* The Full Commission found that it did not.

Further, had the signal been red for traffic on Highway 49, Furr would not have needed to stop in the intersection to wait for eastbound Highway 49 traffic to clear. Had the signal been green for Highway 49 traffic, Furr would have been safely stopped on Riverpointe Drive awaiting the signal change. We find the Full Commission's finding that DOT's breach of duty was a proximate cause of the accident to be supported

by the evidence, and to have been "the exercise of good common sense in the consideration of the evidence [in this] case." *Id.* (citation omitted).

The dissenting opinion states that "[t]he determinative factor is not whether Stasko would have obeyed or ignored the traffic signal but whether the lack of a traffic signal was the proximate cause of the collision." It is true that the relevant issue is whether "the lack of a traffic signal was [a] proximate cause of the collision." However, as the existence of proximate cause is, in this case, a question of fact, it is appropriately "an inference of fact to be drawn from other facts and circumstances." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 566 (1984). There is a difference between inference and mere speculation or conjecture, and Mr. Marceau was qualified to give his opinion that, based on the facts and circumstances before him, the accident would not have occurred absent DOT's breach of its duty.

DOT argues that the "Industrial Commission has essentially concluded that [DOT] is, and shall be, strictly liable for virtually any accident that occurs on State roadways." Our decision in no manner leads to that result. It is not only foreseeable, but inevitable, that vehicles will speed on the roadways managed and maintained by DOT. We cannot agree with the deputy commissioner and the dissenting opinion that it is only foreseeable that motorists will speed five to ten miles per hour over the posted limit, when it is common knowledge that violations for speeds at or exceeding Stasko's in this instance are, sadly, too common. The dissenting opinion poses several "what if" questions:

> Had there been a properly functioning traffic signal, neither this Court nor any expert in North Carolina can say that, based solely on that premise, Stasko would have had sixteen additional seconds to initiate deceleration. What if the traffic signal, conceivably visible one[-]half miles from the intersection, or for twenty-one seconds based on Stasko's speed, was green? Would Stasko have initiated deceleration? What if Stasko was looking behind for Atkinson's car and did not notice that there was a traffic signal ahead? What if the traffic signal turned yellow at the moment Stasko was cresting the hill, around 650 feet from the intersection? What if Stasko did not decelerate for the yellow light and consequently drove through a "fresh" red light, and Furr immediately went through the green light on Riverpointe Drive, and their cars collided in the intersection? Would DOT be liable based on the incline of the hill, lack of sight distance, or roadway design?

As an initial matter, because there was competent evidence in support of both the finding that the traffic signal would have been visible for approximately one-half mile on Stasko's approach, and the finding that the signal would, based on Stasko's speed, have alerted Stasko to the presence of the intersection approximately twenty-one seconds before he would have entered the intersection, we must operate based upon the assumption that these facts are true. *Simmons*, 171 N.C. App. at 727-28, 615 S.E.2d at 72. It is not only a *red* traffic signal that alerts a driver to the presence of an upcoming intersection, and thus warns that driver of potential traffic entering the intersection, but also the mere presence of the signal which alerts drivers to the fact of the approaching intersection. It is a reasonable inference that a driver will prepare for the potential need to stop even when approaching a green signal, as a green signal will always turn from green to yellow to red and back again. A green signal that is a half-mile distant has a very reasonable chance of changing to red before a driver reaches the intersection it governs, even when that driver is driving at a very high rate of speed. It is highly unlikely that Stasko would have been looking behind him, in search of Atkinson or for any other reason, for twenty-one seconds. It is also highly unlikely Stasko would have taken his eyes off the road in front of him for sixteen or even five seconds.[2] And, as stated above, had a properly functioning signal been green for Stasko, it would have been red for Furr, and she would not have entered the intersection. It is of course *possible* that Stasko would have still collided with Furr even had there been a properly functioning traffic signal. However, Plaintiffs' burden is not so high as to require they prove to an absolute certainty that the accident would not have occurred absent DOT's breach of its duty. As correctly noted by the dissenting opinion, "Proximate cause is an inference of fact to be drawn from other facts and circumstances." *Hairston*, 310 N.C. at234, 311 S.E.2d at 566. Though it is possible that acts accompanying Stasko's "racing" behavior, other than speeding, played a role in the accident, we cannot say that this potentiality breaks the chain of proximate cause as a matter of law. The Full Commission considered all the facts surrounding Stasko's racing behavior, but still inferred proximate cause from the totality of the facts and circumstances before it. This was the Full Commission's province as the trier of fact, not ours.

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2. The Full Commission found as fact: "With the traffic signal visible for one-half mile to a driver traveling west on Hwy 49 at 86 mph, the presence of the intersection and the right of way direction from the signal would have been evident for approximately twenty-one (21) seconds. Without the signal, the intersection became visible at 650 feet and it would take the same driver only approximately five (5) seconds to cover that distance." The addition of a traffic signal would have provided Stasko an additional sixteen seconds in which to become aware of the approaching intersection.

Not every intersection requires traffic signals. It is the duty of DOT to take reasonable care in identifying those intersections that do require traffic signals, for both the efficient regulation of traffic and the safety of motorists and pedestrians. If an accident occurs at an intersection not requiring a traffic signal, DOT will not be held liable for failing to erect a traffic signal, even where a signal would have prevented the accident. That is because DOT cannot be held liable where it has breached no duty. Where DOT has installed and maintained properly functioning traffic signals, it will not be found liable when accidents like the one before us occur; again, because it will have breached no duty with regard to the traffic signal. In answer to the dissenting opinion's query on this matter, DOT could be held liable for an accident caused by "a driver who is texting and approaching an unregulated intersection" if DOT had a duty to install a traffic signal at that intersection, DOT breached that duty, and the breach of that duty was found by the trier of fact to be a proximate cause of the accident. This is true even if the driver's texting was a concurrent proximate cause. DOT could *not* be held liable if the trier of fact rationally determined that the lack of a traffic signal was *not* a proximate cause of the accident, or that the texting activity in that situation was such as to break the causal link and was therefore the *sole* proximate cause of the resulting accident. When there is a conflict in the evidence, or evidence may reasonably be interpreted in differing ways, it is generally the province of the trier of fact to make the proximate cause determination, and that is what has happened in this case. The dissenting opinion places its focus on what it determines was the unforeseeability of Stasko's egregious conduct. However, in this case, the relevant issue was whether it was foreseeable that absent a functioning traffic signal, a speeding motorist would crest the hill approaching the intersection and collide with another motorist entering the intersection from another direction.

DOT and the dissenting opinion rely on *Tise*. We simply note that in *Tise* our Supreme Court held:

> In the instant case, the police officers responding to the initial call to the construction site investigated and acted to prevent the criminal acts of unknown third parties. While the officers were called to the site to investigate possible tampering with the grader equipment, Tise's injuries caused by the criminal acts of third parties in their unauthorized operation of the grader could not have been foreseeable from the officers' acts of attempting to disable the grader. The criminal acts in this case were an

> intervening cause that relieved the City of any actionable negligence by cutting off the proximate cause flowing from the acts of the agents of the City in attempting to disable the grader. This superseding cause was a new cause, which intervened between the original negligent act of the City and the injury ultimately suffered by Tise. The third party criminal acts in this case broke the chain of causation set in motion by the police officers.

Tise, 345 N.C. at 461-62, 480 S.E.2d at 681. Our Supreme Court reached this holding by reasoning that even if the police were negligent in failing to properly secure a construction site subsequent to having received a call pertaining to alleged tampering with construction equipment, the result of that negligence, an officer who subsequently returned to the scene and was crushed to death by stolen construction equipment as he sat in his cruiser on a nearby street, was not foreseeable. These facts are in stark contrast to a situation where a speeding automobile enters an intersection and collides with another automobile. The first fact pattern borders on the bizarre; the second is all too common.

Further, not all accidents occurring at intersections where DOT *has* breached its duty to install traffic signals will lead to DOT liability, because proximate cause must first be proved. If a properly functioning traffic signal simply could not have prevented an accident, the lack of a traffic signal cannot be a proximate cause of that accident as a matter of law.[3] If there is some question concerning whether a properly functioning traffic signal could have prevented an accident in an intersection in which DOT breached its duty to install same, the issue of proximate cause is one of fact to be determined by the trier of fact. If, for example, Stasko had been ignoring red lights prior to the collision in the intersection, it is quite possible the Full Commission, and this Court, would have reached a different decision. However, those are not the facts before us. Our holding stands for the unremarkable proposition that DOT is liable for its breaches of duty when those breaches result in the kind of injury the intended prevention of which created the duty in the first place.

The dissenting opinion contends that our holding "will lead to an impractical standard with far-reaching consequences." We disagree. We

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3. For example, proximate cause in the present case could not be proven based upon the lack of a traffic signal if the accident resulted from Stasko suffering a medical emergency and losing consciousness instead of Stasko speeding. This hypothetical presumes the medical emergency occurred at a time before a properly functioning traffic signal would have had an opportunity to regulate Stasko's driving.

have simply applied well-established standards to the facts before us. On the other hand, it is difficult to imagine under what circumstances DOT *could* be held liable for breaching its duty to install traffic signals in dangerous intersections were we to adopt the reasoning of the dissenting opinion. This is so because it would rarely, if ever, be possible to prove that the installation of a properly functioning traffic signal would have, without any doubt, prevented an accident from occurring in any particular intersection. There are infinite potential variables all acting together to produce any singular result. Were the trier of fact required to rule out with absolute certainty the possibility that any of these potential variables were the actual sole proximate cause of an accident, it is difficult to see how a plaintiff could ever sufficiently prove the proximate cause necessary to make a case for negligence. However, under our law, plaintiffs are not saddled with this impossible burden. Because we find there was competent evidence supporting the Full Commission's findings of fact, and because these findings of fact were sufficient to support its conclusions of law and decision, we must defer to the Full Commission's determinations of credibility and the weight to be given the evidence. *Young*, 353 N.C. at 230, 538 S.E.2d at 914.

AFFIRMED.

Judge DAVIS concurs.

Judge ELMORE dissents with separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that DOT's breach of duty was a proximate cause of the accident. Although the majority rejects DOT's challenge to certain findings of fact by summarily finding competent record evidence to support them, I agree with DOT that competent evidence is lacking.

I would reverse the Commission's decision for two reasons: (1) DOT's breach of duty was not an actual cause of plaintiffs' injuries; and (2) even if actual cause was established, I would find that the intentional criminal acts of Stasko and Atkinson could not have been reasonably foreseen by DOT and, therefore, constitute an independent, intervening cause absolving DOT of liability.

Pursuant to N.C. Gen. Stat. § 143-293, a party may appeal from the decision of the Commission to the Court of Appeals. "Such appeal

shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2013). "Competent evidence is evidence 'that a reasonable mind might accept as adequate to support the finding.' " *In re Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (quoting *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005)). "We review the Full Commission's conclusions of law *de novo*." *Holloway v. N.C. Dep't of Crime Control & Pub. Safety*, 197 N.C. App. 165, 169, 676 S.E.2d 573, 576 (2009) (citations omitted).

To satisfy the causation element of a negligence claim, the claimant "must prove that defendant's action was both the cause-in-fact (actual cause) and the proximate cause (legal cause)[.]" *State v. Lane*, 115 N.C. App. 25, 28, 444 S.E.2d 233, 235 (1994). "If a plaintiff is unable to show a cause-in-fact nexus between the defendant's conduct and any harm, our courts need not consider the separate proximate cause issue of foreseeability." *Hawkins v. Emergency Med. Physicians*, ___ N.C. App. ___, ___, 770 S.E.2d 159, 165 (Apr. 7, 2015) (No. COA14-877). "The standard for factual causation . . . is familiarly referred to as the 'but-for' test, as well as a *sine qua non* test. Both express the same concept: an act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred." Restatement (Third) of Torts: Phys. & Emot. Harm § 26 (2010).

"Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred[.]" *Lord v. Beerman*, 191 N.C. App. 290, 294, 664 S.E.2d 331, 334 (2008) (quoting *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)) (quotations omitted). "[E]vidence is insufficient if it merely speculates that a causal connection is possible." *Id.* at 295, 664 S.E.2d at 335. "An inference of negligence cannot rest on conjecture or surmise. . . . This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proof." *Sowers v. Marley*, 235 N.C. 607, 609, 70 S.E.2d 670, 672 (1952) (citations omitted). "Proximate cause is an inference of fact to be drawn from other facts and circumstances." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 566. "[T]he general rule of law is that if between the negligence and the injury there is the intervening crime or wilful and malicious act of a third person producing the injury but that such was not intended by the defendant, and could not have been reasonably foreseen by it, the

causal chain between the original negligence and accident is broken." *Ward v. R.R.*, 206 N.C. 530, 532, 174 S.E. 443, 444 (1934) (citations and quotations omitted).

The majority concludes that there is competent evidence to support finding of fact number twenty, which states, "Mr. Marceau testified that in his expert opinion, and the Commission finds, that *had the Riverpointe intersection been properly signalized, the crash on 4 April 2009 would not have occurred*. Mr. Marceau based his opinion on the lack of visibility of the Riverpoint intersection and the driving behavior of Mr. Stasko prior to the crash." (emphasis added.) I disagree. The Commission's finding, and this Court's approval, that but for DOT's failure to install a traffic signal, this collision would not have occurred is speculative and is not supported by any competent evidence. DOT's omission was not the actual cause of plaintiffs' injuries.

Here, Mr. Marceau, a forensic traffic engineer, testified "as an expert in the area of civil engineering, traffic crash investigation, traffic crash reconstruction, and human factors as it pertains to automobile accident investigation." Yet he did not base his testimony on scientific, technical, or other specialized knowledge that would assist the trier of fact to understand the evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 702 (2013). Moreover, his testimony was not based upon sufficient facts or data, and it was not the product of reliable principles and methods that were reliably applied to the facts of this case. *See id.* Instead, Mr. Marceau testified as follows:

> Q. [W]hat opinions and conclusions did you reach?
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> A. My—my conclusions were that this traffic signal, it should've been here a long time before this crash ever happened, that—and further, had the traffic signal been in place before the crash, that the crash would have been prevented. Had the traffic signal been in place and been operating, Ms. Furr would've received a green light, and pulled forward on a green light, and Mr. Stasko would've stopped for a yellow or a red, and the crash wouldn't have occurred.
>
> Q. How do you know that Mr. Stasko would've—what—what in your research—what in your investigation would lead you to the conclusion that Mr. Stasko would have stopped at that stoplight versus running through the stoplight at the speed he was going?

> A. Several things during my investigation. Mr. Stasko and—and Ms. Atkinson had both stopped at stoplights prior to this intersection. There was no history of them running stoplights. They'd been stopping at—at traffic signals, and I—I think I heard the detective testify this morning the kids in the car were horsing around, and goofing off, communicating junk with each other, and—and they were stopping at all the traffic signals. I—I—I didn't—I never had a doubt that they would've stopped at this traffic signal.

On cross-examination, regarding Mr. Marceau's opinion above, counsel for DOT asked, "But that's not based on any scientific evaluation, is it?" Mr. Marceau responded, "It's based on what I've read from affidavit, and testimony, and from hearing the officer testify."

In *Young v. Hickory Business Furniture*, our Supreme Court explained that when "expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. . . . Indeed, this Court has specifically held that 'an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.' " 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (quoting *Dean v. Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975)).

Like the expert witness in *Young*, Mr. Marceau's "responses were forthright and candid, and demonstrated an opinion based solely on supposition and conjecture." *Young*, 353 N.C. at 233, 538 S.E.2d at 916–17. In *Young*, our Supreme Court held that such evidence was incompetent and insufficient to support the Industrial Commission's findings of fact. *Id.* at 233, 538 S.E.2d at 917. Likewise, here the evidence was incompetent to support the Commission's finding that, had the intersection been properly signalized, the crash would not have occurred.

John Flanagan, who testified as an expert in accident reconstruction and engineering, performed several calculations about the effect of different speeds combined with perception/reaction time on the total stopping distance. In his opinion, he stated that it would be possible for someone driving at a speed of eighty-six miles per hour to stop his vehicle before entering the intersection, that he did not know why Stasko did not stop, and that the onset of a driver's perception/reaction time would be delayed if he was not being attentive to what is going in front of him. Detective Jesse Wood also prepared a collision reconstruction summary and testified to his findings, which incorporated drag factor, deceleration rate, perception/reaction time, and stopping distance.

Detective Wood found "at 86 miles per hour, using a deceleration rate of .71 that Stasko could have brought his vehicle to a stop in 536 feet[,]" which is short of the estimated sight distance of 586 to 650 feet from the crest of the hill to the intersection. Mr. Marceau agreed that, based on Detective Wood's calculations, if the driver had a one-and-a-half second perception/reaction time, mathematically, the driver could have stopped prior to the collision. Mr. Marceau noted, though, that "in the real world situation where we have multiple things to pay attention to," the perception and reaction time may be longer, and one-and-a-half seconds is not appropriate. He stated, "I think even my numbers show that if he had acted faster than, I think I said 2.7 or 2.8 seconds, and he slammed on his brakes, he could've avoided the crash, and he could've skidded through a stop, and brought his car to a stop." As the majority correctly points out, the Commission is the trier of fact and may choose how much weight to place on testimony. Nevertheless, the evidence must still be competent to support the Commission's findings.

Regarding proximate cause, the majority concludes that there is competent evidence to support finding of fact number twenty-four, which states,

> 24. Given defendant's stipulation that a signal was needed, the lack of sight distance to and from the intersection, the speed limit of the roadway, the size of the intersection, and the number of previous similar accidents at this intersection, the Commission finds that the accident that resulted in the deaths of Cynthia Furr, McAllister Furr Price and Hunter Holt was a foreseeable consequence of defendant's stipulated breach of duty in failing to install a traffic signal at that intersection.

In attempting to show why the Commission's decision is supported by competent evidence, the majority states,

> Had there been a properly functioning traffic signal, Stasko would have had approximately sixteen additional seconds to notice the intersection and initiate deceleration. It was the province of the Commission, as trier of fact, to make a determination based on the facts, law, and common sense, concerning whether Stasko's high-speed racing behavior indicated that he would have completely ignored a properly functioning traffic signal. . . .
>
> Further, had the signal been red for traffic on Highway 49, Furr would not have needed to stop in the intersection

> to wait for eastbound Highway 49 traffic to clear. Had the signal been green for Highway 49 traffic, Furr would have been safely stopped on Riverpointe Drive awaiting the signal change. We find the Commission's finding that DOT's breach of duty was a proximate cause of the accident to be supported by the evidence[.]

The determinative factor is not whether Stasko would have obeyed or ignored the traffic signal but whether the lack of a traffic signal was the proximate cause of the collision. As the Deputy Commissioner found, whether "it is reasonable to assume that [Stasko] would have slowed and prepared to stop because of the signal" is "speculative and not germane to the issue of foreseeability."

Had there been a properly functioning traffic signal, neither this Court nor any expert in North Carolina can say that, based solely on that premise, Stasko would have had sixteen additional seconds to initiate deceleration. What if the traffic signal, conceivably visible one-and-a-half miles from the intersection, or for twenty-one seconds based on Stasko's speed, was green? Would Stasko have initiated deceleration? What if Stasko was looking behind for Atkinson's car and did not notice that there was a traffic signal ahead? What if the traffic signal turned yellow at the moment Stasko was cresting the hill, around 650 feet from the intersection? What if Stasko did not decelerate for the yellow light and consequently drove through a "fresh" red light,[1] and Furr immediately drove through the green light on Riverpointe Drive, and their cars collided in the intersection? Would DOT be liable based on the incline of the hill, lack of sight distance, or roadway design?

Mr. Marceau testified, "When people run red lights, it happens—I've—I've actually looked at thousands of—studied numbers on this. It happens in several different batches, but it's typically portions of a second or a second after the light has turned red." He further stated, "They're—they're distracted, not paying attention, whatever. It's not—we just—we just—unless someone's drunk, or high, or something like that, you know, impaired, we just don't have people just running through red lights out in the middle of nowhere." Significantly, the majority admits, "If a properly functioning traffic signal simply could not have prevented an accident, the lack of a traffic signal cannot be a proximate cause of that accident as a matter of law." I contend that is the precise

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1. Mr. Marceau testified that the clearance time on this intersection would likely be two seconds.

scenario in front of us. No evidence shows that such omission was a cause in fact of the injuries, much less a proximate cause. *Gillespie v. Coffey*, 86 N.C. App. 97, 100, 356 S.E.2d 376, 378 (1987).

The findings indicate that Stasko did not intentionally hit the Furr car and that Stasko did not engage his brakes. The findings do not indicate that there was a vehicle in the right-hand lane preventing Stasko from swerving right. The majority can speculate that "it is, of course, conceivable that the accident would have occurred even had there been properly functioning traffic signals in the intersection. It is conceivable that Stasko would have failed to see the light, or that he would have ignored a red light at the peril of his life. It is also conceivable, and much more likely, that Stasko would have seen a red light and stopped or slowed, avoiding the accident." But that is all we can do—speculate. And that is all that the Commission did.

I also disagree with the majority's holding "that it was reasonably foreseeable that a vehicle speeding toward the intersection, unregulated by any traffic signal, could lead to the type of accident and injury involved in this case." Although the majority maintains that DOT's focus on the criminal nature of Stasko's actions is misplaced and the reason for his speeding is immaterial, the entirety of Stasko and Atkinson's conduct must be analyzed in determining foreseeability. *See Ramsbottom v. R.R.*, 138 N.C. 39, 41, 50 S.E. 448, 449 (1905) (explaining that proximate cause is established if "any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed"). The majority states, "The fact that Stasko was speeding, and thus breaking the law, did not render his actions unforeseeable."

Here, however, as the Deputy Commissioner concluded, "foreseeable acts of speeding are those instances where a driver is travelling five to ten miles an hour over the limit, as opposed to more than 30 miles over the posted speed." As explained below, Stasko was not merely speeding. Plaintiff's expert, Mr. Marceau, testified to the following:

> A. [Marceau] We—we know that the Atkinson vehicle was behind [Stasko] and to his right. We're not exactly sure where it was.
>
> Q. And could that impact also his—his—the human factors part—his though[t] processes as to whether swerving is the right idea to do, or braking is the right idea, or a combination of the two is the right thing to do?

> A. [Marceau] Absolutely. He's—he's been jockeying positions with this other vehicle, changing lanes, forward, backward, around each other for the last one-point—well, 1.5 miles from the traffic signal at Shopton. So he has a moving target around him, much like a pilot flying near another plane. You have to make sure where the other plane is before you change your course, or a (unintelligible), or anybody else in motion.

Stasko was convicted of three counts of involuntary manslaughter, and Atkinson pled guilty to three counts of involuntary manslaughter based on their involvement. The facts establish that Stasko was not only speeding, but racing—"jockeying positions" with a "moving target." Although some speeding is foreseeable, Stasko's erratic and hazardous conduct was not reasonably foreseeable. I note that the law "fix[es] [defendant] with notice of the exigencies of traffic, and he must take into account the prevalence of that 'occasional negligence which is one of the incidents of human life.' " *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (quoting *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966); citing Restatement (Second) of Torts § 447, comment c (1965)). However, the evidence shows that this was not a simple case of occasional negligence. As the Deputy Commissioner concluded, "it is unreasonable to impute upon [DOT] the duty to protect the general public from any and all intentional criminal acts. It is not possible, nor is it feasible."

In *Westbrook v. Cobb*, the plaintiff argued that "it need not be shown that defendant could foresee what would happen, nor is it relevant that the eventual consequences . . . were improbable. Rather, all plaintiff needs to show is that defendant set in motion a chain of circumstances that led ultimately to plaintiff's injury." 105 N.C. App. 64, 68, 411 S.E.2d 651, 654 (1992). This Court stated that the plaintiff's injury must nonetheless be "the natural result of a continuous sequence of actions set into motion by defendant's initial act[.]" *Id.* at 69, 411 S.E.2d at 654. We noted, "[P]roximate cause is to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. [I]t is inconceivable that any defendant should be held liable to infinity for all the consequences which flow from his act, some boundary must be set." *Id.* at 68–69, 411 S.E.2d at 654 (quoting *Sutton v. Duke*, 277 N.C. 94, 108, 176 S.E.2d 161, 169 (1970)) (quotations omitted).

As discussed at the oral argument, if Stasko had been breaking other laws, such as texting or driving while intoxicated, would plaintiffs still argue that the lack of a traffic signal was the proximate cause of the

collision? Conceivably, based on the majority's logic, a plaintiff may now argue that a driver who is texting and approaching an unregulated intersection would have been able to avoid a collision if a traffic signal was installed because the driver likely would have had increased sight distance and would have stopped texting in time to stop at a red light. The majority's opinion leaves DOT susceptible to liability that it should not be forced to incur.

As I conclude that there is no competent evidence to support the Commission's findings of fact on foreseeability and proximate cause, I similarly conclude that the conclusions of law listed below are not supported by any other findings of fact.

The Commission entered the following conclusions of law:

> 2. The issue before the Commission is whether the intervening acts of negligence by Mr. Stasko and Ms. Atkinson are such that they relieve defendant of its liability for its negligence. When considering intervening acts of negligence, the North Carolina Court of Appeals explained, "[t]he first defendant is not relieved of liability unless the second independent act of negligence could not reasonably have been foreseen." *Hester v. Miller*, 41 N.C. App. 509, 513, 255 S.E.2d 318, 321 (1979) (citation omitted). The court explained further, "[t]he foreseeability standard should not be strictly applied. It is not necessary that the whole sequence of events be foreseen, only that some injury would occur." *Id.*
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> . . . .
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> 4. The Commission concludes that the actions of Mr. Stasko and Ms. Atkinson were reasonably foreseeable by defendant. "Experience assures us that [people] do in fact frequently act carelessly, and when such action is foreseeable as an intervening agency, it will not relieve the defendant from responsibility for [its] antecedent misconduct." *Murray v. Atl. Coast Line R. Co.*, 218 N.C. 392, 411, 11 S.E.2d 326, 339 (1940) (citation omitted).
>
> 5. The Commission concludes that defendant's stipulated breach of its duty to install a traffic signal at the Riverpointe intersection was a proximate cause of the accident that resulted in the deaths of Cynthia Furr, McAllister Furr Price and Hunter Holt. The Commission

> concludes that the intervening negligence of Mr. Stasko and Ms. Atkinson was also a proximate cause of the accident, but not the sole proximate cause. As such, defendant is not insulated from liability for its negligence.

I note that the quote in conclusion of law number four represents the opinion of the authors of Harper's Law of Torts and Justice Seawell, dissenting, not our Supreme Court. In conclusion of law number two, the Commission states that the issue is whether the intervening acts of negligence by Stasko and Atkinson relieve DOT of its liability for negligence. However, before determining whether DOT is relieved of its liability, it must first be determined that DOT is liable. In *Hester*, quoted by the Commission in conclusions of law two and three, this Court stated,

> In cases involving rearend collisions between a vehicle slowing or stopping on the road without proper warning signals, and following vehicles, the test most often employed by North Carolina courts is foreseeability. The first defendant is not relieved of liability unless the second independent act of negligence could not reasonably have been foreseen. The foreseeability standard should not be strictly applied. It is not necessary that the whole sequence of events be foreseen, only that some injury would occur.

Hester v. Miller, 41 N.C. App. 509, 513, 255 S.E.2d 318, 321 (1979) (internal citations omitted). I disagree with the application of that foreseeability analysis here. *Hester* dealt with multiple defendants who were involved in a chain-reaction vehicle collision. *Id.* at 512, 255 S.E.2d at 320. I believe the decision in *Hester* is factually distinguishable, and the discussion regarding foreseeability generally in an ordinary negligence case differs from that of foreseeability involving an intervening actor. I find the analysis in *Tise v. Yates Construction Company, Inc.*, relevant here.

In *Tise*, cited by DOT, police officers responded to a call that unknown persons were tampering with equipment at a construction site. 345 N.C. 456, 457, 480 S.E.2d 677, 678 (1997). When they arrived at the site, the officers did not see any suspects and did not have any information regarding who to contact about the security of the equipment, so they left. *Id.* Later, four individuals went to the construction site and one of them drove a grader onto the roadway. *Id.* One of the officers was sitting in his parked patrol car on the roadway and was crushed by the grader. *Id.* The owner of the construction company claimed that the

City, through its police department, negligently handled the initial call, which was a proximate cause of the officer's death. *Id.* at 459, 480 S.E.2d at 679. Our Supreme Court concluded that the officer's "injuries caused by the criminal acts of third parties . . . could not have been foreseeable from the officers' acts of attempting to disable the grader." *Id.* at 461, 480 S.E.2d at 681. It further stated, "The criminal acts in this case were an intervening cause that relieved the City of any actionable negligence by cutting off the proximate cause flowing from the acts of the agents of the City in attempting to disable the grader." *Id.* "This superseding cause was a new cause, which intervened between the original negligent act of the City and the injury ultimately suffered[.]" *Id.*

Here, as in *Tise*, the third-party criminal acts broke the chain of causation set in motion by DOT's breached duty. Stasko's decision to race another vehicle at eighty-six miles per hour on a residential highway where the speed limit was fifty-five miles per hour and where both drivers had children in their vehicles cut off the proximate cause flowing from DOT's omission.

The majority, in discounting the relevance of *Tise*, relies on *Riddle v. Artis*. In *Riddle*, our Supreme Court stated, " 'The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury.' " 243 N.C. at 671, 91 S.E.2d at 896–97 (quoting *Butner v. Spease*, 217 N.C. 82, 6 S.E.2d 808 (1940); citing *Beach v. Patton*, 208 N.C. 134, 179 S.E. 446 (1935)).

In *Beach*, Riddick was driving on a highway and was involved in a collision. *Beach*, 208 N.C. at 135, 179 S.E. at 446. For some fifteen minutes after the collision, Riddick's car remained on the highway. *Id.* Patton, who was driving at a negligent rate of speed, was forced to go around Riddick's car to avoid hitting it. *Id.* Patton's car fatally struck Beach, who was standing on the shoulder on the opposite of the highway. *Id.* Beach's administrator claimed that Riddick's negligent act of leaving his vehicle on the highway proximately caused Beach's death. *Id.* at 135, 179 S.E. at 446–47. Our Supreme Court stated, to hold that the defendant owed a duty to the plaintiff

> to foresee that a third person would operate a car in such a negligent manner as to be compelled to drive out on to the shoulder of the highway in order to avoid a collision with a car parked on the opposite side thereof, and thereby strike a person standing on the shoulder, would

> not only "practically stretch foresight into omniscience," *Gant v. Gant*, 197 N.C. 164, 148 S.E. 34 (1929), but would, in effect, require the anticipation of "whatsoever shall come to pass." We apprehend that the legal principles by which individuals are held liable for their negligent acts impose no such far-seeing and all-inclusive duty.

Id. at 136, 179 S.E. at 447.

I think most are in agreement that DOT can reasonably foresee that a driver traveling on its roadways might speed. However, to say that DOT could reasonably foresee that two drivers would engage in a road race, one vehicle would collide with another vehicle at eighty-six miles per hour on a fifty-five-miles-per-hour roadway, the impact causing the second vehicle "to become airborne and flip several times before landing in the median area" would also "require the anticipation of whatsoever shall come to pass." *Beach*, 208 N.C. at 136, 179 S.E. at 447. To diminish Stasko's actions to mere speeding and label them reasonably foreseeable is unfounded. *See Yancey v. Lea*, 354 N.C. 48, 53–54, 550 S.E.2d 155, 158 (2001) (noting that gross negligence has been found where "defendant is driving at excessive speeds" or "defendant is engaged in a racing competition"). Affirming the Commission's decision will lead to an impracticable standard with far-reaching consequences.

Accordingly, I respectfully dissent from the majority's opinion. The decision of the Full Commission should be reversed, and this case should be remanded to the Full Commission with instruction to affirm the Deputy Commissioner's decision.

IN THE MATTER OF C.B. & S.B.

No. COA15-724

Filed 2 February 2016

1. Child Abuse, Dependency, and Neglect—findings—unchallenged findings

In a case involving two children adjudicated neglected or neglected and dependent, portions of the findings of fact challenged by the mother as to the daughter found neglected and dependent were offset by other unchallenged findings to the same effect or were supported by the evidence.

2. Child Abuse, Dependency, and Neglect—neglect—failure to obtain meaningful mental health services

The trial court's adjudication of a child as neglected was affirmed. The findings of the trial court that were binding on appeal supported the trial court's ultimate conclusion of neglect in that they established that the mother continuously failed to obtain meaningful mental health services for the child while the child was in the mother's custody, minimized and denied the seriousness of the child's condition, and even exacerbated it. This placed the child at a substantial risk of some physical, mental, or emotional impairment.

3. Child Abuse, Dependency, and Neglect—dependency—failure to obtain meaningful mental health services

An adjudication of a child as dependent was affirmed where the findings clearly established that the mother had refused to participate in, and even obstructed, the child's discharge planning. The unchallenged and otherwise binding findings of fact, showed that the mother continuously failed to obtain meaningful mental health services for the child while the child was in the mother's custody. The mother also failed to identify any viable placement alternatives outside of placement in her home at the adjudication hearing.

4. Child Abuse, Dependency, and Neglect—neglect—sibling's behavior

The findings of the trial court supported the trial court's ultimate conclusion that C.B. was neglected, and the adjudication was affirmed, where the findings that were unchallenged or were otherwise binding supported the ultimate conclusion that the child was neglected. The mother allowed this child to be continually exposed

to a sibling's erratic, troubling, and violent behavior; failed to obtain meaningful medical services for the troubled sibling that could have mitigated that behavior; and showed no concern for the effect on this child.

5. Child Abuse, Dependency, and Neglect—effective assistance of counsel—reviewing records and subpoenaing witnesses

Adjudication orders finding children neglected and dependent were affirmed where the mother received effective assistance of counsel and was not deprived of a fair hearing. It could not be said there was a reasonable probability of a different result had counsel fully reviewed records and subpoenaed witnesses. Moreover, the Department of Social Services presented overwhelming evidence in support of its allegations.

Judge TYSON dissenting.

Appeal by Respondent-Mother from orders entered 13 February and 26 March 2015 by Judge Andrea F. Dray in District Court, Buncombe County. Heard in the Court of Appeals 29 December 2015.

John C. Adams, for petitioner-appellee Buncombe County Department of Social Services.

Armstrong & Armstrong Law, by Amanda Armstrong, for guardian ad litem.

Rebekah W. Davis for respondent-appellant Mother.

McGEE, Chief Judge.

Appeal by Respondent-Mother ("Mother") from adjudication and disposition orders, adjudicating C.B. neglected and S.B. neglected and dependent, and continuing custody of S.B. with DSS. We affirm.

I. Procedural Background

C.B. and S.B. are twin sisters and were ten years old when the Buncombe County Department of Social Services ("DSS") filed the juvenile petitions in the present case. The petitions alleged that C.B. was a neglected juvenile and that S.B. was a neglected and dependent juvenile. The trial court entered an order awarding nonsecure custody of S.B. to DSS on 27 May 2014. The trial court held an adjudication hearing

("the hearing") on 18 December 2014 and entered orders on 13 February 2015 adjudicating C.B. as a neglected juvenile and S.B. as a neglected and dependent juvenile. The trial court held a disposition hearing on 12 February 2015 and entered orders on 26 March 2015 continuing custody of C.B. with her mother under the supervision of DSS and continuing custody of S.B. with DSS. Mother appeals.

II. Factual Challenges

A. Standard of Review

Appellate review of an adjudication order is limited to determining "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Pittman*, 149 N.C. App. 756, 763–64, 561 S.E.2d 560, 566 (2002) (citation and quotation marks omitted). If the appellate court makes these determinations in the affirmative, it must uphold the trial court's decision, "even where some evidence supports contrary findings." *Id.* at 764, 561 S.E.2d at 566. "It is not the role of this Court to substitute its judgment for that of the trial court." *Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003). Unchallenged findings are binding on appeal. *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006), *aff'd*, 361 N.C. 345, 643 S.E.2d 587 (2007). Moreover, "erroneous findings unnecessary to the determination do not constitute reversible error" where an adjudication is supported by sufficient additional findings grounded in clear and convincing evidence. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

B. Unchallenged Findings

Mother brings numerous challenges to the findings of fact in the adjudication orders as to C.B. and S.B. The following unchallenged findings of fact are pertinent to an understanding of Mother's arguments on appeal:[1]

> 13. On [15 March] 2014, [DSS] received a report that alleged the following: that [Mother] slaps [S.B.] and calls her degrading names. The report further alleged that [S.B.] has extreme behavior problems, including punching herself.
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> . . .

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1. The findings of fact in each child's order are virtually identical. All quoted findings herein are taken from the adjudication order as to S.B.

15. The report was screened in and assigned to social worker . . . Amanda Wallace [("Ms. Wallace")].

. . .

18. [Ms.] Wallace testified that [S.B.] had been hospitalized at Copestone [psychiatric hospital] on five (5) occasions, as specified below. [S.B.'s] therapist recommended intensive in-home services for [S.B.], upon discharge. [Mother] was aware of this recommendation but did not comply. [Mother] felt that [S.B.'s] issues could be handled at home and that all [S.B.] needed was "someone to talk to". On [17 March] 2014, [Mother] told [Ms.] Wallace that she had cancelled an appointment with Access Family Services, for an assessment for outpatient services for [S.B.], because she "didn't get a good vibe" from her conversation with the provider. [Mother] committed to finding another provider for these services, but ultimately failed to do so.

19. After the initial interview with [Mother], [DSS] received a new report that alleged that [S.B.] had a "blow up" at a local Ingles and was admitted to Copestone for evaluation. She was released from Copestone on [9 April] 2014, only to be readmitted later that day, after she ran from her mother, climbed up a tree, and refused to come down. The Asheville City Fire Department and Asheville City Police, responded and plucked [S.B.] from the tree, at which point she assaulted an Asheville City Police Officer by biting that officer. [S.B.] is ten years old.

. . .

21. On [21 April] 2014, [S.B.] was discharged from Copestone. However, immediately after she was discharged, [S.B.] had another outburst. She assaulted school staff and locked herself in a closet at school. After she was extracted from the closet, she was readmitted into Copestone. During this incident, [S.B.] reported that [Mother] was forcing her to take the wrong medication while at school.

. . .

26. A treatment team meeting with the hospital staff and [social worker Craig] Flores [("Mr. Flores")] was scheduled for Monday, [19 May] 2014. The team was developing a plan for [S.B.] to be discharged from the hospital and was exploring a more appropriate placement for [S.B.'s] discharge. [Mother] was aware of this meeting and had agreed to attend. However, [Mother] later refused to attend that meeting. At that time the discharge plan for [S.B.] was that she was to be released to a Psychiatric Residential Treatment Facility (PRTF) upon her release from Copestone.

27. After the treatment team meeting, [Mr.] Flores went to [Mother's] home to see why she did not attend the meeting. [Mother] stated that she would not cooperate with the hospital or [DSS] to develop a discharge plan. [Mother] stated that [S.B.] only had a fever. [Mother] also refused to sign releases to allow [DSS] and the hospital to develop a discharge plan.

. . .

30. [Mr.] Flores testified that on [22 May] 2014, [Mother] stated to him that she had "taken care of everything"; that she would no longer work with [DSS]; that she would not sign releases to Copestone; that she would not enroll [S.B.] in a PRTF as recommended by [S.B.'s] discharge plan. [Mother] disclosed that she did not agree with the discharge plan and that she wanted [S.B.] to be grounded at home in order to reconnect with her family identity. [Mother] ultimately signed a referral to Eliada as a PRTF. However, this action was not in compliance with the discharge recommendation, in that the document signed was only a consent to place, and [Mother] knew that Eliada did not have a bed available for 30–40 days.

. . .

35. The Court further finds that [Mother] testified to behaviors that she and the minor children suffered in the housing project, which are supported by medical records; however, said records recommended that the minor children [should] be assessed, especially [S.B.], which [Mother] failed to do. Additionally, [Mother]

> was not in compliance with discharge orders for Copestone, and did not protect [C.B.] from [S.B.'s] behaviors. [Mother's] preferred treatment for [S.B.] to come home and be in the familial environment was directly in conflict with medical recommendations.

The trial court further found that C.B. and S.B. did "not receive proper care, supervision or discipline" from Mother and that they "live[d] in an environment injurious to [each girl's] welfare." It also found that Mother was "unable to provide for [S.B.'s] care or supervision and lack[ed] an appropriate alternative child care arrangement" for her.

C. Challenged Findings as to S.B.

[1] Mother challenges numerous findings in the adjudication order as to S.B.[2]

Finding of fact 16 in the adjudication order as to S.B. provides that

> 16. [Ms.] Wallace's investigation determined that [S.B.] has been hospitalized at Copestone several times, including four separate times during the investigation. [S.B.'s] behaviors are extremely negative and have directly limited her access to services. For example, [S.B.] is no longer allowed to ride the bus to school, and the local church bus refuses to allow her to ride.

Mother contends that "[t]he evidence [presented at the hearing showed] that [S.B.] refused to ride the bus and that this is why [Mother] had to take [S.B.] to school and pick her up in the afternoon." Ms. Wallace and Mother did testify at the hearing that S.B. did not want to ride the bus. However, Ms. Wallace also testified about an incident in which S.B. "ran away from [a] church bus and climbed up a tree, [and] that she had to be taken to the ER for evaluation." Ms. Wallace also testified that S.B. would run away from school, attack school personnel, and generally acted "uncontrollable." She confirmed that "those behaviors affected [S.B.'s] ability to ride the school bus[.]" Even assuming Mother's challenge regarding S.B. being "no longer *allowed* to ride the [school] bus" is

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2. Mother challenges finding of fact 12, which provides that "[t]he verified Juvenile Petition[s] [were] entered into evidence without objection by any party." Mother contends only that "[t]he record does not show that the petition[s] [were] entered into evidence." Although there were general references to documents being admitted into evidence at the hearings, we agree with Mother to the extent that it is not clear whether the verified petitions as to S.B. and C.B. were admitted into evidence at the hearing. However, Mother provides no further argument on this issue and, therefore, we do not believe it is conclusive as to her appeal.

meritorious, the portion of finding of fact 16 that "[S.B.'s] behaviors are extremely negative and have directly limited her access to services" is supported by clear and convincing evidence. Mother does not challenge the remainder of finding of fact 16. Therefore, all but the last sentence in finding of fact 16 is binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

Findings of fact 17, 22, and 33 in the adjudication order as to S.B. provide that

> 17. [Ms.] Wallace interviewed [Mother]. [Mother] denied calling [S.B.] names. [Mother] admitted that [S.B.] had been hospitalized several times due to [S.B.'s] behaviors. However, [Mother] minimized [S.B.'s] behaviors. She did agree to follow up with mental health services for [S.B.] However, [Mother] ultimately failed to cooperate with services recommended for [S.B.]
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> 22. While [Mother] initially agreed to follow up with [S.B.'s] medical health needs, it became clear through subsequent interviews and actions that [Mother] minimizes [S.B.'s] behaviors and does not accept that [S.B.'s] behaviors are rooted in mental health problems. [Mother] also believes that the hospital "reprogrammed" [S.B.] to turn . . . against [Mother].
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> 33. After review of all the documentary evidence and the relevant testimony of the parties, the Court finds as fact the allegations in the Juvenile Petition and makes the following ultimate findings of fact. [S.B.] has been hospitalized due to psychiatric concerns no less than 5 times in 4 months, and she is engaging in behaviors requiring the intervention of mental health services. [S.B.] was in Copestone in March of 2004 [sic], and displaying aggressive, assaultive, dangerous behaviors, and [Mother] did make efforts to get [S.B.] medical treatment; however, [Mother] failed to grasp the severity of [S.B.'s] mental health issues, and failure to do so placed [S.B.] at risk.

Mother challenges only the statements in findings of fact 17, 22, and 33 suggesting Mother "minimize[d] [S.B.'s] behavior or fail[ed] to grasp the

severity of it." At the hearing, Ms. Wallace testified that S.B. (1) regularly attacked other people, including school personnel and a police officer; (2) ran away from home and school; and (3) had to be hospitalized at Copestone multiple times. Ms. Wallace further testified that, in her conversations with Mother, Mother (1) "didn't characterize [S.B.'s behaviors] as severe[;]" (2) demonstrated that she did "not understand[ ] the severity of [S.B.'s] mental health issues[;]" and (3) believed S.B.'s mental health issues could be addressed at home without any outside "intervention[.]" Mr. Flores also testified that Mother failed to demonstrate an understanding of the extent of S.B.'s mental health needs, was even confused as to "why Copestone[, a psychiatric hospital,] was keeping [S.B.] so long because [Mother believed S.B.] was only admitted . . . for having a fever[,]" and that Mother's plan upon S.B.'s discharge was to merely "bring [S.B.] home[.]" Accordingly, the challenged statements in findings of fact 17, 22, and 33 are supported by clear and convincing evidence. Mother does not challenge the remainder of findings of fact 17, 22, and 33. Therefore, all of those findings are binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

Finding of fact 20 in the adjudication order as to S.B. provides that

> 20. [Ms.] Wallace's investigation determined that [C.B.] was present during the incident at Ingle's, specified above, and has been present during each incident that resulted in [S.B.] being involuntarily committed to Copestone. On this occasion, [C.B.] had to "run around Ingles" in an effort to find her sister, was worried about her, and expressed fear that [S.B.] was going to be hurt as a result of [S.B.'s] behaviors. [Mother] failed to protect [C.B.] from [S.B.'s] behaviors, and [Mother's] solution was that everyone "just needed to step out", and allow [Mother] to get [S.B.] grounded at home.

Mother challenges only the statement in finding of fact 20 that Mother "failed to protect [C.B.] from [S.B.'s] behaviors" during the incident at Ingles because, Mother contends, she was not present during the incident and, therefore, was unable to "protect" C.B. at that time. Although we believe Mother likely takes too narrow a view of what the trial court meant when it found that Mother "failed to protect [C.B.] from [S.B.'s] behaviors," even assuming Mother's challenge is meritorious, the remaining, unchallenged, portion of this finding is binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337.

Findings of fact 23, 31, 32 and 34 in the adjudication order as to S.B. provide that

> 23. [Mother] refused to allow Intensive In Home Services to work with her family. [Mother] admitted to [Ms.] Wallace that she believes [S.B.'s] behaviors are making her and [S.B.'s] sister put their lives on hold. [Mother] is extremely defensive and rejects outside intervention into her family, despite the fact that [S.B.] remains hospitalized due to her extreme behaviors. [Mother] is unwilling or unable to understand [S.B.'s] needs, and refuses to make changes in her life to address [S.B.'s] needs. [Mother] does not have any emotional protective capacity and agitates [S.B.], making the situation more out of control.
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> 31. [Mr.] Flores testified that [Mother] stated many times her belief that [S.B.] suffered from seizures and that was the only reason that [S.B.] was hospitalized. [S.B.] was tested at Copestone for seizures and no seizure disorder was identified. [Mr.] Flores was able to find no medical record that supported the conclusion that [S.B.] suffered from [a] seizure disorder. [Mother] never asked [DSS] to secure a second medical opinion on this issue. Despite all of the information to the contrary, [Mother] continues to believe that [S.B.] suffers from [a] seizure disorder, rather than from mental health issues.
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> 32. [Mother] testified that she had signed all treatment plans for [S.B.], prior to [13 May] 2014, but that she believed that [DSS's] treatment plans caused [S.B.] to have seizures, and that these treatment plans endangered her daughter. [Mother] believes that [S.B.] suffers from Post-Traumatic Stress Disorder (PTSD), due to a bullying incident that occurred at the family's housing project, but that this issue could be handled by her at home. [Mother] acknowledged that [C.B.] was present during the incidents of [S.B.'s] behaviors specified above, but had no concerns about exposing [C.B.] to [S.B.'s] behaviors.
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> . . .

34. The Court finds that [Mother] testified that [S.B.'s] only problems were a fever and a seizure, which is not evidenced in the Copestone records. Treatment medical doctors had acknowledged that [Mother's] presence with [S.B.] makes [S.B.'s] behaviors worse, and doctors felt there was a nexus between [Mother] and [S.B.'s] worsening behaviors. The doctors felt a PRTF placement was necessary to cut this connection. Throughout this case [DSS] has worked diligently with [Mother] to meet the needs of [S.B.] [Mother] refused intensive in-home treatment. [Mother] did sign some initial papers for Eliada, but not a release for [S.B.] to be placed there. [Mother] did state she and [C.B.] were being held hostage by [S.B.'s] behaviors, and [C.B.] was exposed to [S.B.'s] behaviors. [Mother] took no protective steps to keep [C.B.] from being exposed to [S.B.'s] behaviors, and when [Mother] was offered an opportunity to have [C.B.] evaluated, she refused.

Mother contends that the statements in findings of fact 23 and 34 suggesting that Mother would not agree to intensive in-home services for S.B. are not supported by the evidence. Ms. Wallace testified at the hearing that Mother consistently refused to let S.B. receive intensive in-home services and instead insisted that S.B. be cared for by Mother or receive less-intense, periodic outpatient services, which Ms. Wallace testified did not "effectively treat [S.B.'s] mental health needs[,]" lasted only two weeks, and ended when S.B. was readmitted to Copestone. Ms. Wallace further testified that, instead of Mother disagreeing with the potential efficacy of intensive in-home services for S.B., Mother stated she refused to let S.B. receive intensive in-home services because she did not want providers "coming to" her home and because Mother "thought she could handle [S.B.'s mental health needs] at home" by herself. Moreover, although Mother contends in her brief that she "was willing" to have S.B. receive intensive in-home services by the time medical personnel felt S.B. needed placement in a psychiatric residential treatment facility ("PRTF"), we find no evidence from the adjudication hearing to support this contention. Therefore, the challenged statements in findings of fact 23 and 34 are supported by clear and convincing evidence.

Mother also contends that statements in findings of fact 31, 32, and 34 suggesting that Mother believed S.B.'s behaviors were the result of fevers and seizures are not supported by the evidence. However, Mr. Flores testified Mother conveyed to him "her belief that [S.B.'s] only

real issue was having a seizure disorder[.]" Mother even testified that S.B. was admitted to Copestone only "because [S.B] had a fever and her eyes rolled back in her head and she passed out and had an episode." Therefore, the challenged statements in findings of fact 31, 32, and 34 are supported by clear and convincing evidence. Mother also does not contest the trial court's finding that medical personnel at Copestone could find no evidence that S.B. suffered from seizures.

With regards the adjudications of S.B. as neglected and dependent, the challenged statements in findings of fact 23, 31, 32 and 34 are supported by clear and convincing evidence; Mother does not challenge the remainder of findings of fact 23, 31, 32 and 34.[3] Therefore, they are binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

Findings of fact 24 and 25 in the adjudication order as to S.B. provide that

> 24. On [15 May] 2014, the case was substantiated and transferred to In Home [social worker Mr.] Flores. [Mr.] Flores met with [Mother] on [15 May] 2014. [Mother] refused to agree to any services, [and she] refused to follow up with any mental health services for [S.B.] [Mother] also refused to participate in a comprehensive clinical assessment, as she found that "offensive." [Mother] did acknowledge that [Mr.] Flores had a "calming energy" and stated she would allow him to conduct home visits.
>
> 25. [S.B.] was hospitalized in Copestone after being admitted on [14 May] 2014. [S.B.] has serious mental health needs that [Mother] refuses to ensure that those needs are met. [Mother] refuses to sign any releases or work with the hospital to plan for [S.B.'s] discharge. [S.B.] does not want to return to [Mother's] home.

Mother contends that the statements in findings of fact 24 and 25 suggesting that Mother "refused to participate in any services and would not agree to work with the hospital on a discharge plan" are not supported by the evidence. As a preliminary matter, findings of fact 26 and 27, which are not challenged by Mother, establish that Mother "would not

3. However, Mother does challenge another part of finding of fact 32 with regard to C.B.'s neglect adjudication, discussed *infra*.

cooperate with the hospital or [DSS] to develop a discharge plan" and in fact "refused to sign releases to allow [DSS] and the hospital to develop [any] discharge plan." *See C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337. Moreover, Mr. Flores testified at the hearing that Mother did, in fact, refuse to participate in S.B.'s discharge planning because "she wasn't in agreement with . . . the doctor's recommend[ed]" treatment plan, which – absent DSS filing the present action – could have resulted in S.B. continuing to reside at Copestone psychiatric hospital indefinitely.[4] Accordingly, the challenged statements in findings of fact 24 and 25 are supported by clear and convincing evidence. Mother does not challenge the remainder of findings of fact 24 and 25. Therefore, they are binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

1. S.B.'s Neglect Adjudication

[2] Mother first challenges the trial court's adjudication of S.B. as neglected. A neglected juvenile is defined, in part, as one "who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2013). "[T]his Court require[s] [that] there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment" as a consequence of the alleged neglect. *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (citations, quotation marks, and emphasis in original omitted).

Findings of fact 16, 23, and 25, and finding of fact 18, which is not challenged by Mother, show that S.B. had to be committed to Copestone five times in only four months, that S.B. "has serious mental health needs[, and] that [Mother] refuses to ensure that those needs are met." Findings of fact 17, 22, 23, 31, 32, and 34, and finding of fact 27, which is not challenged by Mother, show that, although Mother "initially agreed to follow up with [S.B.'s] medical health needs, it became clear through subsequent interviews and actions that [Mother] minimize[d] [S.B.'s] behaviors and [did] not accept that [S.B.'s] behaviors are rooted in mental health problems." Findings of fact 31, 32, and 34, and finding of fact 27, which is not challenged by Mother, specifically show that Mother

4. Psychiatric hospitals are "the most intensive and restrictive type of [mental health] facility" in the state. 10a N.C.A.C. 27g.6001.

believed S.B.'s extreme and violent behavior was the result of fevers or seizures. Findings of fact 17, 22, and 23 also establish that Mother was "unwilling or unable to understand [S.B.'s] needs, . . . refuse[d] to make changes in her life to address [S.B.'s] needs[,] . . . does not have any emotional protective capacity[,] and agitates [S.B.], making the situation more out of control." Furthermore, findings of fact 16 and 20, and findings of fact 19 and 21, which are not challenged by Mother, show that S.B. continued to have erratic and violent behavior while in Mother's custody and while she was not receiving meaningful mental health services. Yet, findings of fact 20 and 23, and findings of fact 18, 30, and 35, which are not challenged by Mother, show that Mother's "preferred treatment for [S.B. was for S.B.] to come home and be in the familial environment[, which] was directly in conflict with medical recommendations." Findings of fact 24 and 25, and findings of fact 26 and 27, which are not challenged by Mother, show that Mother refused to "cooperate with the hospital or [DSS] to develop a discharge plan" for S.B. during a subsequent hospitalization at Copestone and "refused to sign releases to allow [DSS] and the hospital to develop a discharge plan."

The binding facts, discussed above, support the trial court's ultimate conclusion that S.B. was neglected. Contrary to Mother's contention in her brief, the present case was not brought merely because "[M]other and the hospital [had a disagreement] concerning the next step in [S.B.'s] treatment." Instead, the binding findings of the trial court establish that (1) while S.B. was in Mother's custody, Mother continuously failed to obtain meaningful mental health services for S.B. that could have prevented or mitigated S.B.'s need for repeated hospitalizations at Copestone; (2) greatly minimized and denied the seriousness of S.B.'s condition; and (3) even exacerbated it. Mother also obstructed the creation of any discharge plan for S.B. while S.B. was hospitalized at Copestone, and thereby continued to subject S.B. to "the most intensive and restrictive type of [mental health] facility" in the state, 10a N.C.A.C. 27g.6001, even though all of the evidence presented at the hearing indicated that such continued placement would not have been medically "appropriate[.]"

This Court is sensitive to the difficult and momentous decisions that parents of children with severe mental illness must face. Indeed, we agree with the dissent that it likely would be inappropriate for the State to utilize neglect proceedings to resolve disagreements between parents and doctors over equally appropriate treatment options. We further agree with the dissent that parents have a "fundamental right . . . to make decisions concerning the care, custody, and control of their children," but respectfully note that this right is protected only "so long as a parent

adequately cares for his or her children[.]" *Troxel v. Granville*, 530 U.S. 57, 66–68, 147 L. Ed. 2d 49, 57–58 (2000); *accord Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994) ("[S]o long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves."). "A parent's rights with respect to [his or] her child[ren] have thus never been regarded as absolute, but rather are limited[,] . . . critically, [by] the child[rens'] own complementary interest in preserving . . . [their] welfare and protection[.]" *Troxel*, 530 U.S. at 88, 147 L. Ed. 2d at 70 (Stevens, J., dissenting).

Indeed, our Courts have long held that constitutional "protection of the parent's interest is not absolute [and] . . . 'the rights of the parents are a counterpart of the responsibilities they have assumed.' " *Price v. Howard*, 346 N.C. 68, 76, 484 S.E.2d 528, 533 (1997) (quoting *Lehr v. Robertson*, 463 U.S. 248, 257, 77 L. Ed. 2d 614, 624 (1983)). "[T]he constitutionally-protected paramount right of parents to custody, care, and control of their children" does not extend to "neglect[ing] the welfare of their children[.]" *Petersen*, 337 N.C. at 403–04, 445 S.E.2d at 905. At some point, a parent's unjustified unwillingness or inability to obtain meaningful medical care for her child who is experiencing serious illness rises to the level of neglect, and that is something the Constitution and the laws of this state will not protect. *See* N.C.G.S. 7B-101(15) (specifically defining a neglected juvenile as one "who does not receive proper care . . . from the juvenile's parent, . . . or who is not provided necessary medical care; . . . or who lives in an environment injurious to the juvenile's welfare[.]"); *accord In re A.R.*, 227 N.C. App. 518, 520, 742 S.E.2d 629, 631 (2013) (finding neglect, in part, where a child had "serious health issues including cysts on his only kidney and an enlarged bladder" and the parents repeatedly failed to obtain appropriate medical care for those conditions); *cf. In re Huff*, 140 N.C. App. 288, 300, 536 S.E.2d 838, 846 (2000) (holding that questions of "medical neglect" are "appropriate considerations" in an action to terminate parental rights, even though "[s]uch findings . . . infring[e] on the [constitutionally-protected] autonomy of the parents to some degree[.]").

In the present case, the findings of the trial court that are binding on appeal support the trial court's ultimate conclusion that S.B. was neglected. They establish that Mother continuously failed to obtain meaningful mental health services for S.B. while S.B. was in Mother's custody, minimized and denied the seriousness of S.B.'s condition, and even exacerbated it. This placed S.B. at a substantial risk of some physical, mental, or emotional impairment. *See McLean*, 135 N.C. App. at 390,

521 S.E.2d at 123. Accordingly, we affirm the trial court's adjudication of S.B. as neglected.

2. S.B.'s Dependency Adjudication

[3] Mother next challenges the trial court's adjudication of S.B. as dependent. She contends that the findings of fact and evidence do not support the trial court's conclusion of law that S.B. was a dependent juvenile. Specifically, she argues that the findings of fact "reflect [only a] disagreement between . . . [M]other and the hospital concerning the next step in [S.B.'s] treatment."

A juvenile may be adjudicated dependent when the juvenile's parent, guardian or custodian "is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2013). When determining that a child is dependent "[u]nder this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the [trial] court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007). However, it has been "consistently held that in order for a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives." *In re L.H.*, 210 N.C. App. 355, 364, 708 S.E.2d 191, 197 (2011).

In the present case, the trial court made the ultimate finding that Mother was "unable to provide for [S.B.'s] care or supervision and lack[ed] an appropriate alternative child care arrangement." The unchallenged and otherwise binding findings of fact, discussed above, show that Mother continuously failed to obtain meaningful mental health services for S.B. while S.B. was in Mother's custody. Mother also failed to identify any "viable" placement alternatives outside of placement in her home at the adjudication hearing.[5] *See id.* Although Mother argues in her brief that she "was never given a chance to suggest an appropriate alternative child care arrangement" for S.B., the findings of the trial court clearly establish that Mother refused to participate in, and even obstructed, S.B.'s discharge planning. Accordingly, we affirm the trial court's adjudication of S.B. as dependent.

5. Mother testified at the adjudication hearing that she was also willing to place S.B. in a PRTF called Eliada, but according to testimony from Mr. Flores, Eliada would not have had an opening for S.B. for "[a]t least 30 to 40 days[.]"

D. Challenged Findings as to C.B.'s Neglect Adjudication

[4] Mother challenges the trial court's adjudication of C.B. as neglected. She contends that the findings of fact and evidence do not support the trial court's conclusion of law that C.B. was a neglected juvenile. Specifically, she argues that the trial court adjudicated C.B. a neglected juvenile "just because . . . Mother would not agree to a comprehensive clinical assessment of [C.B.] and [because C.B.] saw some of S.B.'s extreme behaviors." (capitalization modified without brackets).

As already discussed, a juvenile is neglected if the juvenile lives in an environment injurious to the juvenile's welfare or that poses a "substantial risk" to the juvenile's wellbeing. *McLean*, 135 N.C. App. at 390, 521 S.E.2d at 123; *see* N.C.G.S. 7B-101(15). "In determining whether a juvenile is a neglected juvenile, it [also] is relevant whether that juvenile lives in a home where another juvenile has been subjected to . . . neglect[.]" *Id.*

In addition to the factual challenges, discussed above, Mother specifically challenges part of finding of fact 32 in the adjudication order as to C.B., stating that Mother "had no concerns about exposing [C.B.] to [S.B.'s] behaviors[,]" and argues that this finding "was not a fair reflection of the evidence." However, during the adjudication hearing, Ms. Wallace testified that Mother acknowledged she and C.B. were "held hostage" by S.B.'s behaviors and that they "couldn't live their lives because they had to be on guard with [S.B.]" Finding of fact 20 shows that C.B. had been "present during each incident that resulted in [S.B.] being involuntarily committed to Copestone." This finding also recounts an incident where C.B. "had to 'run around [an] Ingles' [while S.B. was having a 'blow up'] in an effort to find her sister, was worried about her, and expressed fear that [S.B.] was going to be hurt as a result of [S.B.'s] behaviors[.]" According to Ms. Wallace, C.B. was exposed to numerous similar incidents that made C.B. feel "scared" and alone. Many of these incidents involved acts of violence by S.B. Yet, Mother was unwilling or unable to obtain meaningful mental health services for S.B. while S.B. was at home with her and C.B., thereby continuing to expose C.B. to S.B.'s behaviors unabated. Moreover, Mother testified at the adjudication hearing that she was "waiting for [the issues with S.B.] to be over" before seeking any kind of therapy or help for C.B. and that, generally, she "was not concerned for" C.B.'s wellbeing as a result of S.B.'s "fits[.]" Accordingly, there was sufficient clear and convincing evidence presented at the adjudication hearing to support the contested portion of finding of fact 32 that Mother "had no concerns about exposing [C.B.] to

[S.B.'s] behaviors." Therefore, this finding is binding on appeal. *See C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

Mother may be correct that "the sibling of [a] child with mental health issues will be exposed to things that a parent wishes the sibling did not have to experience" and that it would pose an "impossible standard" to "expect a parent to anticipate when and where the problems will arise[.]" Again, this Court is sensitive to the innumerable challenges that parents of children with severe mental illness must face, especially when siblings are involved. However, in the present case, and notwithstanding whether Mother was willing to have C.B. undergo a comprehensive clinical assessment, all of the unchallenged or otherwise binding findings of the trial court support the trial court's ultimate conclusion that C.B. was neglected. Mother (1) allowed C.B. to be continually exposed to S.B.'s erratic, troubling, and violent behavior; (2) failed to obtain meaningful medical services for S.B. while S.B. was in her custody that could have mitigated that behavior; and (3) showed no concern for the effect this might have on C.B. Accordingly, we affirm the trial court's adjudication of C.B. as neglected.

III. Mother's Claim of Ineffective Assistance of Counsel

[5] Mother's final contention is that she received ineffective assistance of counsel "because her attorney did not review [S.B.'s] medical records" from Copestone or subpoena the hospital psychiatrist and social worker during the adjudication hearing. (capitalization modified without brackets).

"[D]ecisions such as which witnesses to call, [or] whether and how to conduct examinations . . . are strategic and tactical decisions that are within the exclusive province of the attorney. Trial counsel are necessarily given wide latitude in these matters." *State v. Rhue*, 150 N.C. App. 280, 290, 563 S.E.2d 72, 79 (2002) (citation and quotation marks omitted). To prevail upon a claim that counsel's assistance was ineffective, a parent must show that: (1) counsel's performance was deficient and (2) the deficient performance was so serious as to deprive the parent of a fair hearing. *In re S.N.W.*, 204 N.C. App. 556, 559, 698 S.E.2d 76, 78 (2010). The client must show that "counsel's conduct fell below an objective standard of reasonableness . . . [and that had] counsel [not] made [the alleged] error [in question], even [if it was] an unreasonable error, . . . there is a reasonable probability . . . there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 561–63, 324 S.E.2d 241, 248 (1985). "[T]he burden to show that counsel's

performance fell short of the required standard is a heavy one for [the client] to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001).

Mother has not carried that burden. As a preliminary matter, Mother acknowledges in her brief that S.B.'s medical records from Copestone were entered into evidence and that the trial court reviewed S.B.'s medical records *in camera* for about two hours.[6] Mother does take issue with DSS's characterization of S.B. during the adjudication hearing as having "severe mental health issues," and she contends the medical records would have shown that S.B.'s extreme behavior emanated instead from "psychosocial [issues,] . . . caused by the relationship with her mother." Assuming Mother is correct, this would seem to hurt, rather than help, Mother's position that S.B. was not living in an environment injurious to her welfare while in Mother's custody.

Mother also contends that the medical records would have informed Mother's testimony and helped explain the hospital's reasoning behind its actions and treatment decisions. However, this does not get at the heart of the allegations pertaining to S.B. in her neglect and dependency petition – that S.B. was at risk because Mother was unwilling or unable to ensure that S.B. received medically necessary mental health services. Accordingly, we are unable to say "there is a reasonable probability . . . there would have been a different result in the proceedings" had counsel fully reviewed and elicited testimony on the contents of S.B.'s medical records at the adjudication hearing. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

Moreover, even assuming *arguendo* that counsel's performance was deficient as Mother claims, and that it "fell below an objective standard of reasonableness" as defined by *Braswell*, 312 N.C. 561–62, 324 S.E.2d at 248, DSS presented "overwhelming" evidence to support the adjudications of S.B., and Mother does not contend that counsel's representation was otherwise not "vigorous and zealous." *See In re Dj.L.*, 184 N.C. App. 76, 86, 646 S.E.2d 134, 141 (2007) (finding no ineffective assistance of counsel where, (1) assuming *arguendo*, "counsel failed to make proper objections to testimony [during a termination of parental rights hearing;] . . . failed to develop defenses to the grounds alleged for termination; and . . . did not subpoena witnesses" the parent felt were important to her case; (2) "DSS presented overwhelming evidence to support at

6. S.B.'s medical records from Copestone have been included in the record on appeal.

least one ground for termination of respondent's parental rights[;]" and (3) "[c]ounsel's representation, while not perfect, was vigorous and zealous."). Accordingly, Mother was not deprived of a fair hearing, *see id.*, and the adjudication orders of the trial court are affirmed. Mother does not directly challenge the disposition orders on appeal.

AFFIRMED.

Judge STEPHENS concurs.

Judge TYSON dissents with separate opinion.

Tyson, Judge, dissenting.

The majority's opinion affirms the trial court's adjudication that both S.B. and C.B. are neglected juveniles. The trial court's findings of fact do not support this conclusion of law. The majority's opinion also holds Mother has failed to carry her burden to show she received ineffective assistance of counsel. Prior precedents guide this Court not to make such a factual determination based on the paucity of the record before us. I respectfully dissent.

I. Standard of Review

This Court reviews a trial court's adjudication of neglect to determine: "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations and internal quotation marks omitted). We review the trial court's conclusion that a juvenile is abused, neglected, or dependent *de novo* on appeal. *In re N.G.*, 186 N.C. App. 1, 13, 650 S.E.2d 45, 53 (2007) (citations and internal quotation marks omitted), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

II. Adjudication of Neglect

Mother argues the trial court erred by finding S.B. and C.B. are neglected juveniles. She contends the trial court's findings of fact are not supported by clear, cogent, and convincing evidence. The majority's opinion states "[t]he binding facts . . . support the trial court's ultimate conclusion that S.B. was neglected." I disagree.

N.C. Gen. Stat § 7B-101(15) defines a "neglected juvenile" as:

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where . . . another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2013).

Our Supreme Court has recognized "not every act of negligence on the part of parents . . . constitutes 'neglect' under the law and results in a 'neglected juvenile.' " *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (holding an anonymous call reporting an unsupervised, naked two-year-old in the driveway, without more, does not constitute neglect as intended by the legislature). The determination of neglect is a fact-specific inquiry. A parent's conduct must be reviewed on a case-by-case basis, taking into consideration the totality of the circumstances. *Speagle v. Seitz*, 354 N.C. 525, 531, 557 S.E.2d 83, 86 (2001), *cert. denied*, 536 U.S. 923, 153 L. Ed. 2d 778 (2002).

The trial court must find "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline" in order to adjudicate a juvenile as neglected. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citations and internal quotation marks omitted). Also, when determining whether a juvenile is neglected, "the trial judge may consider a parent's complete failure to provide the personal contact, love, and affection that exists in the parental relationship." *In re Yocum*, 158 N.C. App. 198, 204, 580 S.E.2d 399, 403 (citation and quotation marks omitted), *aff'd per curiam*, 357 N.C. 568, 597 S.E.2d 674 (2003).

A. S.B.'s Adjudication of Neglect

No allegations or evidence offered by DSS tend to show Mother is unfit or has abused either of her daughters, abuses drugs or alcohol, deprived them of financial support, transportation, food, clothing, shelter, medical care, educational opportunities, abandoned them by not

giving her time and resources, or failed to show parental love, comfort, care, or discipline. What is before us is a disagreement between the daughters' mother and a doctor and social worker over alternative recommendations of preferred therapies and treatment to address S.B.'s conduct.

N.C. Gen. Stat. § 7B-101(15) is not intended and cannot be used by DSS to gain a corrosive leverage over a parent's disagreements with alternative treatments and therapies for her child. Such an application erodes a parent's "fundamental right . . . to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000) (citations omitted). The facts here are no different than a parent who refuses a doctor's or counselor's recommendation to prescribe and administer Ritalin, a psychotropic drug, to her child, or a parent who refuses to allow blood transfusions, an organ transplant, or other invasive procedures to be performed or administered to her child without consent.

Reasonable people may disagree over the best course of treatment or conduct to follow. When that occurs, the fundamental rights and decision of the parent prevail over the recommendations of the non-parent and the State. The fact that the parent disagrees with the doctor, counselor, or social worker is not neglect. The parent's decision is legally and constitutionally entitled to support, deference and respect by the State and its actors. In the end, in the absence of any showing that the parent is unfit or refusing to allow emergency, life-saving treatment, the parent's final decision over the choices among alternative treatments and therapies to help her child trumps those favored by DSS. *Id.*

The "parental liberty interest 'is perhaps the oldest of the fundamental liberty interests' the United States Supreme Court has recognized." *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel*, 530 U.S. at 66, 147 L. Ed. 2d at 57). The Supreme Court of the United States held this liberty interest must be given great deference, stating:

> so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel, 530 U.S. at 68-69, 147 L. Ed. 2d at 58 (citation omitted).

Our Supreme Court also recognized the importance of this fundamental liberty interest in *Owenby v. Young*, 357 N.C. at 145, 579 S.E.2d at 266.

> We acknowledged the importance of this liberty interest nearly a decade ago when this Court held: absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail. The protected liberty interest complements the responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.

Id. (citations and internal quotation marks omitted). *See also Peterson v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994); *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

Here, Mother is informed and well-aware of S.B.'s mental health needs, and is exercising her constitutionally protected right to "custody, care, and control" of her children. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266. The record reflects Mother's prevailing right to prefer S.B.'s "issues [to] be handled at home[.]" Mother's preference for in-home treatment for S.B. appears to be a result of her "belie[f] that the hospital 'reprogrammed' [S.B.] to turn against" Mother.

Mother has taken S.B. to Copestone each time she required hospitalization. This evidence of Mother clearly responding to the dire needs of her severely mentally ill child must not be overlooked. Mother also recognized SW Flores had a "calming energy" around S.B., and allowed him to conduct home visits. Mother declined to participate in a comprehensive clinical assessment, because she found it "offensive." Mother has also expressed concern that "she believed that the Department's treatment plans caused [S.B.] to have seizures, and that these treatment plans endangered her daughter."

Mother's actions and choices regarding the "custody, care, and control" of her children is a utilization of her "protected liberty interest." *Id.* The fact that Mother's choices for S.B.'s care differ from the suggestions from S.B.'s medical providers cannot diminish the presumption that she is acting in the best interest of her children. The record certainly does not lend any support to a finding that Mother is unfit or neglects the welfare of her children. *Id.* This Court sets a dangerous precedent if it allows a difference of opinion regarding mental health recommendations to erode or supplant this historic and fundamental liberty interest

for parents to make critical and binding decisions over the care of their children.

The majority opinion's assumption that the trial court's findings of fact "support the trial court's ultimate conclusion that S.B. [and C.B. were] neglected" is error and should be reversed. These findings are not sufficient to defeat the paramount presumption of "the right of parents to establish a home and to direct the upbringing and education of their children." *Owenby*, 357 N.C. at 144, 579 S.E.2d at 266. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400, 67 L. Ed. 2d 1042, 1045-46 (1923) (noting the Fourteenth Amendment's guarantee against deprivation of life, liberty or property without due process of the law includes an individual's right to establish a home and bring up children).

B. C.B.'s Adjudication of Neglect

The majority's opinion concludes the trial court properly adjudicated C.B. and S.B. as neglected juveniles. This conclusion is based on the notion that "Mother was unwilling or unable to obtain meaningful mental health services for S.B. while S.B. was at home with her and C.B., thereby continuing to expose C.B. to S.B.'s behaviors unabated."

The fact that a sibling lives in a family home with a special needs child does not constitute "an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15). The lives of any parent or sibling raising, caring for, and living in a home with a special needs child or other family member will undoubtedly be impacted by, and in many cases severely impacted by, the inordinate amount of time, resources and familial emotions expended for the care and upbringing of a family member with special needs. While such home environments may be challenging and cause siblings to carry these experiences into their adult lives, it is a gross abuse for DSS to assert that being exposed to and helping care for a special needs sibling supports either an allegation or an adjudication of neglect.

The trial court's findings of fact show Mother disagrees with the alternative treatment *recommendations* for S.B. Mother has a fundamental and constitutionally protected right to remain at the helm of rearing and caring for her children. Mother should not be chastised and penalized for exercising her "constitutionally protected paramount right . . . to custody, care, and control of [her] children" by disagreeing with alternative treatment recommendations. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266. The clear, cogent, and convincing evidence before this Court does not support a conclusion that either S.B. or C.B. are neglected juveniles. In the absence of any allegation or evidence that Mother is unfit, DSS

cannot use the special needs of one child to assert a sibling is neglected by sharing the same home.

III. Ineffective Assistance of Counsel

Mother argues the trial court's order should also be vacated because she was provided ineffective assistance of counsel. Mother contends her attorney's failure to "review [S.B.'s] medical records" or subpoena the hospital psychiatrist and social worker during the adjudication amounts to ineffective and deficient representation and resulted in severe prejudice to her. Whether or not this is correct cannot be determined from the record before us.

The majority's opinion concludes Mother has failed to carry her burden to "show that counsel's performance fell short of the required standard[.]" *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). I disagree.

> It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing [the party] to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations and internal quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005).

On the record before us, this Court can only speculate whether counsel for Mother's failure to review S.B.'s medical records and subpoena relevant witnesses to testify at the hearing "fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citation omitted). In accordance with established precedents, I vote to remand this issue to the trial court for additional hearing, evidence, and findings of fact to further develop the record on this issue.

IV. Conclusion

The trial court's findings of fact do not support its ultimate conclusion that S.B. and C.B. are neglected juveniles. The record clearly shows Mother repeatedly sought medical treatment for S.B. when necessary. Mother's authority and decision to disagree with the recommendations of some of the treatment providers and the State's actors is a valid and protected exercise of her parental rights. Her decisions are constitutionally protected and insufficient to support an adjudication of neglect. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266.

Having S.B.'s sibling, C.B., present in the home during the daily living and sharing in S.B.'s struggles does not constitute neglect. DSS cannot lawfully assert these allegations are sufficient to usurp Mother's constitutionally protected rights to make final decisions over "the custody, care, and control of [her] children[,]" which must be respected and supported by the State. *Id.* It is preposterous for DSS to assert or for the trial court to find that C.B. is neglected merely by living in the same home with her twin sister, who has special needs.

This case and S.B.'s needs are not a game over who wins and who loses. It concerns who is the ultimate decision-maker when choosing among alternative treatments for S.B.'s care. The Constitution and the Supreme Court of the United States, and the Supreme Court of North Carolina have repeatedly answered this issue in favor of the fit parent.

The record before us is insufficient to establish whether Mother was saddled with ineffective assistance of counsel at the adjudication and disposition. I vote to reverse the trial court's adjudications of neglect and to remand for hearing on the ineffective assistance of counsel claim. I respectfully dissent.

MALDJIAN v. BLOOMQUIST

[245 N.C. App. 222 (2016)]

JOSEPH A. MALDJIAN AND MARIANA MALDJIAN, PLAINTIFFS
v.
CHARLES R. BLOOMQUIST, CAROLINE BLOOMQUIST, SIDNEY HAWES, AND KATE HAWES, DEFENDANTS

No. COA15-697

Filed 2 February 2016

1. Appeal and Error—interlocutory order—discovery of emails—work product doctrine—appeal heard

An interlocutory order involving discovery of emails was considered where it involved the work product doctrine, despite defendant's failure to cite N.C.G.S. § 1-277(a) or N.C.G.S. § 7A-27.

2. Discovery—purportedly privileged documents—findings and conclusions not requested

Defendants' contention that the trial court misunderstood the appropriate legal standard regarding a motion to compel discovery of purportedly privileged documents was rejected where neither party requested findings or conclusions, and it was evident from the record that the trial court only entered its judgment without including its conclusions of law.

3. Discovery—emails—motion to compel granted—no abuse of discretion

The trial court did not abuse its discretion by granting plaintiffs' motion to compel discovery of emails, despite defendants' contention that the emails were work product, where the trial court's determination was the result of a reasoned decision. Defendants submitted the e-mails for in camera review and, after hearing arguments from both parties and reviewing the record, the authorities presented, and the emails at issue, the trial court exercised its judgment in ordering defendants to produce Exhibit A and Exhibit B but determining that Exhibit C was protected.

4. Appeal and Error—cross-appeal—notice of appeal not granted

Defendants' motion on appeal to dismiss plaintiffs' purported cross-appeal because plaintiffs failed to include notice of appeal in the record was granted.

5. Appeal and Error—new issue raised on appeal—sanctions not warranted

Monetary sanctions were not warranted where plaintiffs attempted to raise a new issue via cross-appeal and failed to include notice of appeal in the record.

Appeal by defendants from Order entered 12 February 2015 by Judge Mark E. Klass in Davie County Superior Court. Heard in the Court of Appeals 2 December 2015.

FITZGERALD LITIGATION, by Andrew L. Fitzgerald, for plaintiffs.

WILSON HELMS & CARTLEDGE, LLP, by Stuart H. Russell and Lorin J. Lapidus, for defendants.

ELMORE, Judge.

Charles R. Bloomquist, Caroline Bloomquist, Sidney Hawes, and Kate Hawes (defendants) appeal from the trial court's order granting Joseph A. Maldjian and Mariana Maldjian's (plaintiffs) motion to compel production of Exhibit A and Exhibit B. Plaintiffs attempt to cross-appeal part of the trial court's order denying plaintiffs' motion to compel production of Exhibit C. Defendants filed a motion to dismiss plaintiffs' purported cross-appeal and a motion for sanctions. Consistent with defendants' motion, we dismiss plaintiffs' cross-appeal but we deny defendants' motion for sanctions. After careful consideration, we affirm the trial court's order.

I. Background

In 2013, the Bloomquists purchased land from plaintiffs for their daughter, Kate Hawes, and son-in-law, Sidney Hawes. Pursuant to a general warranty deed recorded 20 May 2013, plaintiffs conveyed the land at 1803 Cana Road in Mocksville (the Cana Road property) to the Bloomquists. Kate and Sidney Hawes leased the property from the Bloomquists. The substantive issue underlying this lawsuit is a dispute over the deed: the Maldjians claim that they only conveyed twenty-two acres whereas the Bloomquists claim they purchased the full sixty-two acre tract. According to the Offer to Purchase and Contract, twenty-two acres were to be surveyed. The brief description on the deed states "62.816 acres Cana Road." The current appeal only pertains to the discovery stage of the proceeding.

On 26 February 2014, Mariana Maldjian e-mailed Kate and Sidney Hawes stating, *inter alia*,

> [T]here was an error on the deed, and it listed the full 63 acres, instead of just the 22 acres that your parents had purchased. . . .
>
> [T]he taxes were paid for this year by Dr. Bloomquist for both your 22 acres, and for our 41 acres, and I want to facilitate the return of the tax money to Dr. Bloomquist for the tax he paid on our acreage.
>
> I don't have your parents email [sic], so please forward this note to them also. Thank you in advance for your cooperation in correcting this matter. I think there might be some misunderstanding with the neighbors, I assured them that there is no way you would try to take advantage of a situation that was so clearly just a mistake in recording the deed!

After failing to reach an agreement regarding the deed, plaintiffs filed a complaint on 11 March 2014 asserting the following causes of action: reformation of deed, trespass, unjust enrichment, conversion, and theft. Plaintiffs later filed an amended complaint on 30 April 2014, asserting the same causes of action but adding a claim for rent against all defendants and a claim for punitive damages against the Bloomquists. The Davie County Superior Court entered an order on 2 July 2014 granting defendants' motion to dismiss plaintiffs' claims for trespass, conversion, and punitive damages with prejudice, and granting plaintiffs' oral motion to amend the amended complaint to allege that plaintiffs have no adequate remedy at law.

Plaintiffs filed a request for production of documents and first set of interrogatories on 26 March 2014. Defendants responded, asserting attorney work product and attorney-client privilege regarding question number three, and joint defense privilege and marital privilege regarding question number five. As a result, plaintiffs filed a motion to compel, requesting that defendants produce the documents that they claim are protected by the joint defense privilege. In the motion, plaintiffs included the privilege log that defendants submitted and specifically requested that defendants disclose the 26-27 February 2014 e-mails, the 26 February 2014 e-mail, and the 10 March 2014 e-mails, arguing that they are not shielded by the joint defense privilege.

On 15 December 2014, the trial court held a hearing and defendants submitted the e-mails at issue for *in camera* review. The court designated the e-mails as Exhibit A (26 February 2014 e-mail), Exhibit B (26-27 February 2014 e-mails), and Exhibit C (10 March 2014 e-mails). On 12 February 2015, the court entered an order granting plaintiffs' motion to compel production of Exhibit A and Exhibit B, and it denied plaintiffs' motion to compel production of Exhibit C. Defendants filed notice of appeal on 23 February 2015. Plaintiffs did not file notice of appeal. In plaintiffs' brief, they purport to cross-appeal the denial of their motion regarding Exhibit C. In response, defendants filed a motion to dismiss and a motion for sanctions because plaintiffs did not include their notice of cross-appeal in the record on appeal.

II. Analysis

[1] "An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999) (citations omitted). When "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under sections 1-277(a) and 7A-27(d)(1)." *Id.* at 166, 522 S.E.2d at 581.

Defendants assert that this Court has jurisdiction because "this instant appeal involves an interlocutory order compelling discovery of materials purportedly protected by the work product doctrine[,]" codified at N.C. Gen. Stat. § 1A-1, Rule 26(b)(3). Defendants state that "orders compelling discovery of materials purportedly protected by . . . the work product doctrine are immediately appealable[.]" Remarkably, defendants fail to cite to N.C. Gen. Stat. § 1-277(a) or N.C. Gen. Stat. § 7A-27 despite their request for sanctions against plaintiffs for violating N.C.R. App. P. 28(b)(4). Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires an appellant's brief to provide "[a] statement of the grounds for appellate review. Such statement *shall* include citation of the statute or statutes permitting appellate review."

Nonetheless, we review defendants' appeal based on their argument that the e-mails are privileged under the work product doctrine. *See Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581 (holding that the challenged order affects a substantial right when a party asserts a statutory privilege that is not frivolous or insubstantial); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361,

365 (2008) (Noncompliance with Rule 28(b), "while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction[ ]" and "normally should not lead to dismissal of the appeal.").

"Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Patrick v. Wake County Dep't of Human Servs.*, 188 N.C. App. 592, 595, 655 S.E.2d 920, 923 (2008) (citation omitted). "A trial court's actions constitute an abuse of discretion upon a showing that a court's actions are manifestly unsupported by reason and so arbitrary that [they] could not have been the result of a reasoned decision." *Id.* (quoting *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998)) (quotations omitted).

A. Order Granting Motion to Compel Production of Exhibit A and Exhibit B

[2] Defendants first argue, "[T]he trial court misapplied North Carolina jurisprudence when it partially granted plaintiffs' motion to compel based solely upon the incorrect legal standard 'for good cause shown.' " After acknowledging that a trial court is not required to make findings of fact and conclusions of law unless requested by a party, defendants argue that the trial court made an "incorrect conclusion of law." Plaintiffs state, "The argument reads as a technical 'gotcha' and lacks substantive merit."

In its entirety, the trial court's order states,

> THIS MATTER CAME ON FOR HEARING before the undersigned at the 15 December 2014 Session of the Davie County, North Carolina, General Court of Justice, Superior Court Division on Plaintiffs' Motion to Compel. In response to Plaintiffs' Motion, Defendants submitted the e-mail communications at issue for *in camera* review and designated the e-mails as Exhibit A, Exhibit B and Exhibit C. After reviewing the e-mail communications *in camera*, reviewing the record in the case, authorities presented and arguments of counsel, and for good cause shown, the undersigned:
>
> (1) GRANTS Plaintiffs' Motion to Compel as to the e-mail communications submitted by Defendants to the court for *in camera* review as Exhibit A and Exhibit B and ORDERS Defendants to produce the e-mail communications within ten (10) days from entry of this Order; and

> (2) DENIES Plaintiffs' Motion to Compel as to the e-mail communication submitted by Defendants to the court for *in camera* review as Exhibit C.

Pursuant to Rule 52 of the North Carolina Rules of Civil Procedure, findings of fact and conclusions of law are necessary only when requested by a party. N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2013). "It is presumed, when the Court is not required to find facts and make conclusions of law and does not do so, that the court on proper evidence found facts to support its judgment." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113–14, 223 S.E.2d 509, 510–11 (1976) (citations omitted).

Here, neither party requested findings of fact and conclusions of law. We reject defendants' contention that the trial court misunderstood the appropriate legal standard regarding a motion to compel discovery of purportedly privileged documents based solely on its introductory statement. Rather, it is evident from the record that the trial court did not include its conclusions of law in the order and only entered its judgment.

[3] Alternatively, defendants argue that the trial court abused its discretion in granting plaintiffs' motion to compel because defendants established that the e-mails were shielded from discovery pursuant to the work product doctrine or the joint defense/common interest doctrine. Defendants claim, "Ms. Bloomquist's emails outline a defense strategy, identify pertinent materials to mount a defense, discuss of the selection of counsel to represent all defendants, and include interrelated mental impressions." We disagree.

"[T]he party asserting work product privilege bears the burden of showing '(1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent.' " *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001) (citations omitted). "If a document is created in anticipation of litigation, the party seeking discovery may access the document only by demonstrating a 'substantial need' for the document and 'undue hardship' in obtaining its substantial equivalent by other means." *Id.* at 28, 541 S.E.2d at 789 (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)). "The protection is allowed not only [for] materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Id.* at 28, 541 S.E.2d at 788–89 (quoting *Willis v. Power Co.*, 291 N.C.

19, 35, 229 S.E.2d 191, 201 (1976)) (quotations omitted). "Because work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose[,] which is to safeguard the lawyer's work in developing his client's case." *Id.* at 29, 541 S.E.2d at 789 (citations and quotations omitted).

Pursuant to the abuse of discretion standard, defendants must establish that the trial court's determination was manifestly unsupported by reason and so arbitrary that it could not have been the result of a reasoned decision. *See Patrick*, 188 N.C. App. at 595, 655 S.E.2d at 923. Here, however, the trial court's determination was the result of a reasoned decision. Defendants submitted the e-mails at issue to the trial court for *in camera* review. After hearing arguments from both parties and reviewing the record, the authorities presented, and the e-mails at issue, the trial court exercised its judgment in ordering defendants to produce Exhibit A and Exhibit B but determining that Exhibit C was protected. Moreover, we presume that the court, on proper evidence, found facts to support its judgment. *See Sherwood*, 29 N.C. App. at 113–14, 223 S.E.2d at 510–11. Accordingly, the trial court made a reasoned decision and did not abuse its discretion.

Because defendants present no binding authority to support their argument regarding the common interest doctrine, we take this issue as abandoned. *See* N.C.R. App. P. 28(b)(6) (2009).

B. Defendants' Motion to Dismiss Plaintiffs' Cross-Appeal

[4] Defendants argue that "plaintiffs, as cross-appellants have failed to include notice of their cross-appeal in the record on appeal in this cause (COA 15-697) as mandated by Rules 3 and 9 of the North Carolina Rules of Appellate Procedure." Thus, defendants claim that plaintiffs' purported cross-appeal must be dismissed on jurisdictional grounds.

Plaintiffs state that they filed a cross-appeal but included it in the record for related case COA 15-729 and not in the record for this case. Additionally, plaintiffs "fully concede that the appeal of a denial of a motion to compel is not, under North Carolina jurisprudence, ordinarily appealable before final judgment. Here, [plaintiffs] contend and ask this Court to review the one single document that was not ordered to be compelled because this partial denial of the motion is the exact same motion being appealed by the defendants." Alternatively, plaintiffs "ask this Court receive the cross-appeal as a petition for writ under Rule 21." The only authority that plaintiffs include is *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980), citing it for the proposition that "[t]he purpose of not allowing interlocutory appeals is to prevent fragmentary and premature appeals."

"Under Rule 3(a) of the Rules of Appellate Procedure, a party entitled by law to appeal from a judgment of superior court rendered in a civil action may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner. This rule is jurisdictional." *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991) (citing *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 301 S.E.2d 98 (1983)). "If the requirements of this rule are not met, the appeal must be dismissed." *Id.* (citing *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 394 S.E.2d 683 (1990)). "The appellant has the burden to see that all necessary papers are before the appellate court." *Id.* (citing *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965)). "The notice of appeal must be contained in the record." *Id.* (citing *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971)). Accordingly, because plaintiffs failed to include notice of appeal in the record in this case, we grant defendants' motion to dismiss plaintiffs' purported cross-appeal.

C. Defendants' Motion for Sanctions

[5] Pursuant to Rules 34 and 37 of the Rules of Appellate Procedure, defendants move for "an order imposing monetary sanctions in the form of expenses, including reasonable attorney fees, incurred by defendants in having to defend against plaintiffs' frivolous interlocutory cross-appeal." They claim that monetary sanctions are "particularly necessary here given plaintiffs' egregious conduct."

In *Spivey v. Wright's Roofing*, this Court denied a motion for sanctions, stating, "Although we agree . . . that Defendants' position was not a strong one and interpret the underlying theme of Defendants' challenge to the Commission's order to be more equitable than legal in nature, we conclude, '[i]n our discretion,' that sanctions should not be imposed upon counsel pursuant to Rule 34. 225 N.C. App. 106, 119, 737 S.E.2d 745, 753–54 (2013) (quoting *State v. Hudgins*, 195 N.C. App. 430, 436, 672 S.E.2d 717, 721 (2009)).

Here, although plaintiffs attempt to raise a new issue via cross-appeal and failed to include notice of appeal in the record in this case, we do not think that sanctions are warranted. Accordingly, we deny defendants' motion.

III. Conclusion

The trial court did not abuse its discretion in granting plaintiffs' motion to compel production of Exhibit A and Exhibit B. We grant

defendants' motion to dismiss plaintiffs' purported cross-appeal and we deny defendants' motion for sanctions.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

N.C. DEPARTMENT OF PUBLIC SAFETY; N.C. HIGHWAY PATROL, Petitioner-Employer
v.
KEVIN DAIL OWENS, Respondent-Employee

No. COA15-367

Filed 2 February 2016

1. Administrative Law—judicial review—service of petition

In an action arising from the dismissal of a Highway Patrol trooper, the superior court properly exercised its discretion in allowing the Highway Patrol to serve Sergeant Owens properly, even though it was outside the statutory ten-day window. The Highway Patrol timely *filed* its petition for judicial review but improperly served the petition by *regular mail*. The superior court had the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided under N.C.G.S. 150B-46. A respondent could avoid the judicial review of a favorable administrative law judge decision simply by avoiding service of the losing party's petition for judicial review for 10 days.

2. Public Officers and Employees—Highway Patrol trooper—termination—reinstatement

In an action arising from the dismissal of a Highway Patrol trooper, the superior court did not err by affirming an administrative law judge's order retroactively reinstating the trooper and awarding him back pay and benefits. The employer- agency may not act arbitrarily and capriciously when terminating someone for lack of credentials.

3. Public Officers and Employees—termination—mitigation of damages

In an action arising from the dismissal of a Highway Patrol trooper, the record supported the administrative law judge's findings

and conclusion that the trooper was not obligated to mitigate his damages.

Appeal by Petitioner-Employer from orders entered 8 December 2014 and 19 December 2014 by Judge Paul L. Jones in Lenoir County Superior Court. Respondent-Employee cross-appeals from orders entered 6 November 2014 and 19 December 2014 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 24 September 2015.

The McGuinness Law Firm, by J. Michael McGuinness, and Carraway Law Firm, by Lonnie W. Carraway, for the Respondent-Employee/Petitioner-Appellee/Cross-Appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Vanessa N. Totten, for the Petitioner-Employer/Respondent-Appellant/Cross-Appellee.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for Amicus Curiae, the North Carolina Police Benevolent Association and Southern States Police Benevolent Association.

DILLON, Judge.

The North Carolina Department of Public Safety and the North Carolina Highway Patrol (collectively, the "Highway Patrol") appeal from orders reversing the separation of Kevin Dail Owens ("Sergeant Owens") from his employment. Sergeant Owens cross-appeals from the final corrected order reversing his separation from his employment as well as an earlier order denying his motion to dismiss for lack of jurisdiction. For the following reasons, we affirm these orders.

I. Background

This matter involves an appeal by the Highway Patrol and a cross-appeal by Sergeant Owens.

Sergeant Owens was employed with the Highway Patrol in 1995. His employment was terminated on 1 November 2012. He was rehired by the Highway Patrol nine months later in August 2013. Notwithstanding his reinstatement, he petitioned for a contested case hearing challenging his November 2012 termination, seeking to have his reinstatement applied retroactively back to November 2012 such that he would not have any break in service and to recover back pay and benefits for those nine months.

A contested case hearing was held before an administrative law judge (the "ALJ"). By order entered 24 June 2014, the ALJ concluded that the Highway Patrol's termination of Sergeant Owens was improper and ordered that his reinstatement be retroactive to November 2012 without any break in service and that he receive back pay and benefits.

The Highway Patrol subsequently filed a petition in superior court for judicial review of the ALJ's order. Sergeant Owens moved the superior court to dismiss the petition, contending that the Highway Patrol failed to serve him with the petition within the time allowed by statute. The superior court denied Sergeant Owens' motion to dismiss and granted the Highway Patrol additional time to properly serve Sergeant Owens. Subsequently, though, the superior court sided with Sergeant Owens on the merits, affirming the ALJ's order reinstating Sergeant Owens retroactively with back pay and benefits.

On appeal to this Court, the Highway Patrol challenges the superior court's decision affirming the ALJ's order.

On cross-appeal, Sergeant Owens argues that our Court should not even reach the merits of the Highway Patrol's appeal, contending that the superior court erred by denying his motion to dismiss the Highway Patrol's petition for judicial review.

II. Sergeant Owens' Cross-Appeal

[1] Before reaching the merits of the Highway Patrol's appeal, we first address the merits of Sergeant Owens' cross-appeal. Specifically, Sergeant Owens contends that the superior court should have granted his motion to dismiss the Highway Patrol's petition for judicial review of the ALJ's order on the ground that he was not properly served the petition within the time allowed by N.C. Gen. Stat. § 150B-46. We disagree.

N.C. Gen. Stat. §§ 150B-45 and 46 are the sections of the Administrative Procedure Act which set forth the procedures for the *filing* and *serving* of a petition for judicial review of a final decision in a contested case hearing.

N.C. Gen. Stat. § 150B-45(a) provides that the person seeking judicial review must *file* the petition in the superior court "within 30 days after [being] served with the written copy of the [ALJ's] decision." Subsection (b) of that statute provides that "[f]or good cause shown[,] the superior court may accept an untimely [filed] petition[,]" otherwise, the right to judicial review is waived. N.C. Gen. Stat. § 150B-45(b).

N.C. Gen. Stat. § 150B-46 states that the party seeking judicial review must *serve* copies of the petition on the other parties "[w]ithin 10 days after the petition is filed with the [superior] court," further providing that the service be either by personal service or by certified mail. However, unlike G.S. 150B-45 which allows the superior court to grant additional time for the *filing* of the petition, there is no express provision in G.S. 150B-46 which authorizes the superior court to extend the time for *serving* the petition.

In the present case, the Highway Patrol timely *filed* its petition for judicial review. However, it improperly served the petition by *regular mail*, a means not authorized by G.S. 150B-46. After the 10-day period for service had expired, Sergeant Owens moved to dismiss the petition for improper service, contending that the superior court lacked personal jurisdiction over him. The superior court, though, granted the Highway Patrol's motion for additional time to serve the petition, and the Highway Patrol subsequently served the petition properly (by certified mail) some months after it originally filed the petition in the superior court.

Sergeant Owens argues that the superior court should have granted his motion to dismiss. Essentially, the question raised by Sergeant Owens' challenge is whether the superior court had the authority to grant the Highway Patrol more time to accomplish service beyond the 10 days, absent any express language in G.S. 150B-46 authorizing the superior court to extend the time.

In a published decision, our Court held that the superior court does not err by dismissing a petition for judicial review where there had not been proper service of the petition within 10 days of the filing of the petition in accordance with G.S. 150B-46. *Follum v. N.C. State. Univ.*, 198 N.C. App. 389, 395, 679 S.E.2d 420, 424 (2009). The *Follum* Court did not express a view as to whether the superior court had the authority to grant more time to a party to accomplish service outside the 10 days provided for by G.S. 150B-46. In a subsequent *unpublished* opinion, though, a panel of our Court expressly held that the superior court lacked the authority to provide an extension beyond the 10-day limit to serve the petition and, therefore, *must* grant the non-petitioning party's motion to dismiss when proper service is not effected within the 10-day timeframe. *Schermerhorn v. N.C. State Highway Patrol*, 223 N.C. App. 102, 732 S.E.2d 394 (2012) (unpublished) (holding that "[b]ecause there is no language in N.C. Gen. Stat. § 150B-46 nor the rest of the general statutes providing for an extension to serve a petition for judicial review, we hold it was error for the trial court to grant Petitioner the extension").

Under G.S. 150B-46, proper service can only be accomplished by either personal service or by certified mail. Personal service may be accomplished by handing a copy of the petition to the respondent. Certified mail is a form of delivery which requires that the recipient sign for the mail, and service by certified mail is accomplished when the mailing is signed for by the recipient. The General Assembly did not provide that service could be accomplished by depositing a copy of the petition in a mailbox. Therefore, under the reasoning in the unpublished *Schermerhorn* opinion, a respondent could avoid the judicial review of a favorable ALJ decision simply by avoiding service of the losing party's petition for judicial review for 10 days, *e.g.*, by leaving town or by refusing to sign for certified mail, whereupon the losing party's right to judicial review might be lost forever.

We do not believe that the General Assembly intended such a harsh result that is suggested in *Schermerhorn*. Rather, we hold that the superior court has the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided for under G.S. 150B-46. We further hold that, in the present case, where Sergeant Owens did receive a copy of the petition (though through regular mail) within ten days of the filing of the petition, the trial court did not err in exercising its discretion in allowing the Highway Patrol to serve Sergeant Owens properly, though outside the ten-day window. And once proper service was accomplished, the superior court obtained personal jurisdiction over Sergeant Owens.

III. The Highway Patrol's Appeal

Having concluded that the superior court properly exercised jurisdiction, we turn to the merits of the Highway Patrol's appeal.

On appeal, the Highway Patrol argues that the superior court erred in affirming the ALJ's order retroactively reinstating Sergeant Owens and awarding him back pay and benefits. We affirm the superior court's order.

A. Factual and Procedural Background

The circumstances concerning Sergeant Owens' termination and reinstatement are as follows: In 2005, Sergeant Owens began working as a District Sergeant, a position which required him to maintain certain credentials. To maintain these credentials and, therefore, be qualified to work as a District Sergeant, Sergeant Owens was required to complete annual firearms training and eight hours of other training.

In November 2010, the State Bureau of Investigation notified the Highway Patrol that Sergeant Owens was the subject of a criminal investigation relating to his alleged involvement with obtaining illegal prescriptions from a nurse he was dating. On 2 December 2010, due to the ongoing active criminal investigation, Sergeant Owens was placed on "administrative duty," essentially working in a civilian position performing general office duties (e.g., answering the phone and making copies) within the Highway Patrol. As a consequence, Sergeant Owens was required to surrender his vehicle, badge and firearms and was not allowed to perform any enforcement duties or supervise other officers during this time. While Sergeant Owens was on administrative duty, the Highway Patrol was not able to hire another District Sergeant to perform his duties, but rather the two other District Sergeants in his Troop had to "pick up the slack" caused by his absence.

Throughout all of 2011, Sergeant Owens was allowed to remain on administrative duty while the criminal investigation into his alleged drug crimes continued. During this time, though, Sergeant Owens' supervisor, Colonel Gilchrist, did not allow Sergeant Owens to complete the firearms training or other training which were required to maintain his credentials. These credentials, though, were not required to perform the administrative duties to which Sergeant Owens' had been temporarily assigned.

On 10 April 2012, Sergeant Owens was indicted in federal court on fourteen felony charges for illegal drug prescriptions.

On 10 October 2012, while the federal charges were still pending, a federal judge entered an order in the criminal matter allowing Sergeant Owens to possess a firearm temporarily for the purpose of completing the annual firearms training required by the Highway Patrol and further directed the Highway Patrol to allow Sergeant Owens to complete this training. Colonel Gilchrist, however, refused to allow Sergeant Owens to complete his firearms training.

On 26 October 2012, Sergeant Owens received notice that he was being considered for "administrative separation" (termination) from his employment based on (1) his *loss of certain credentials* necessary to perform the duties of a District Sergeant and (2) his *unavailability* to perform the duties of a District Sergeant. A pre-dismissal conference was held in which Sergeant Owens was allowed the opportunity to be heard and to present evidence.

On 1 November 2012, almost two years after being placed on administrative duty and while his federal criminal charges were still pending,

Colonel Gilchrist administratively separated (terminated) Sergeant Owens from his employment with the Highway Patrol.

In February 2013, Colonel Gilchrist retired.

In March 2013, the federal felony drug charges against Sergeant Owens were dismissed.

In April 2013, a Lieutenant with the Highway Patrol invited Sergeant Owens to reapply for his old job, which he did *three months later* in July 2013. On 12 August 2013, Sergeant Owens completed his firearms certification and was reinstated with the Highway Patrol as a District Sergeant.

Subsequently, Sergeant Owens filed for a contested case hearing to challenge his November 2012 termination. After an extensive hearing on the matter, the ALJ entered an extensive order with 139 findings of fact and 86 conclusions of law. In his order, the ALJ determined that Sergeant Owens' November 2012 termination was not handled in accordance with the law and directed that that his reinstatement be retroactive to 1 November 2012 such that he would not have any break in service and that he be awarded all back pay and benefits. The ALJ's order was affirmed by the superior court.

B. Analysis

1. Decision to Terminate Sergeant Owens

[2] The Highway Patrol argues that the ALJ erred in reversing the decision of Colonel Gilchrist to terminate Sergeant Owens on 1 November 2012 and that the superior court erred in affirming the ALJ's error.

Our standard of review in such matters are as follows: "The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. North Carolina Dep't of Human Res., N.C. Special Care Ctr.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). "[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *North Carolina Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (internal marks omitted) (emphasis in original).

Turning to the merits of the appeal, Colonel Gilchrist separated Sergeant Owens on 1 November 2012 for Sergeant Owens' *loss of credentials* and for his *unavailability*. The Highway Patrol states in its Reply brief filed with our Court that it is *not* challenging the

determination that Colonel Gilchrist failed to comply with the policy concerning separation for *unavailability*.[1]

The Highway Patrol, however, challenges the ALJ's conclusion that Colonel Gilchrist improperly terminated Sergeant Owens on the basis of the *loss of credentials*. The Highway Patrol argues that the requirement that all leave time be exhausted to separate an employee for *unavailability (see footnote 1)* does not apply to a decision to separate an employee due to the *loss of any credentials* necessary in performing the job. The Highway Patrol points to 25 NCAC 01J .0614(4) which states that "[d]ismissal means the involuntary termination or ending of the employment of an employee for disciplinary purposes *or failure to obtain or maintain necessary credentials*" (emphasis added) and to 25 NCAC 01J .0615(d) (now codified in 25 NCAC 01J .0616) which states that the "[f]ailure to obtain or maintain the required credentials constitutes a basis for dismissal *without prior warning*" (emphasis added).

Here, the ALJ found that Sergeant Owens, indeed, had lost certain credentials required to perform the duties of a District Sergeant while he was on administrative duty. However, the ALJ determined that the Highway Patrol had acted arbitrarily and capriciously in terminating Sergeant Owens on this basis. Specifically, the ALJ made a number of findings which were not challenged by the Highway Patrol, including (1) that Sergeant Owens lost his credentials through no fault of his own but because the Highway Patrol prevented him from doing so; (2) that the Highway Patrol relied on an order entered by a federal magistrate in Sergeant Owens' criminal case which prohibited Sergeant Owens from possessing a firearm as its justification, ignoring the subsequent order from the federal judge modifying the magistrate's order to allow Sergeant Owens to possess a firearm to complete his certification; and (3) that when he was terminated, Sergeant Owens was still on administrative duty performing functions which did not require that he be credentialed.

1. The Administrative Code states that an employee is "unavailable" when he is unable "to return to all of the position's essential duties" due to sickness or "other extenuating circumstances[.]" 25 NCAC 01C.1007(d)(1)(b). Here, the ALJ essentially found that Colonel Gilchrist felt that the Highway Patrol simply could not continue to wait beyond the twenty-three (23) months it had given Sergeant Owens to work out his legal problems and that the Highway Patrol needed someone working as a District Sergeant. However, the ALJ determined that Colonel Gilchrist failed to fully comply with the rule concerning unavailability which states, in part, that "[a]n employee may be separated on the basis of unavailability when the employee remains unavailable for work *after all applicable leave credits and leave benefits have been exhausted*[.]" 25 NCAC 01C .1007(a). Here, the ALJ determined - and the Highway Patrol appears to concede - that Sergeant Owens still had unexhausted leave credits and leave benefits when he was terminated.

The Administrative Code may allow for an employee to be terminated without prior warning for the failure to maintain required credentials; however, an employee so terminated is entitled to relief from an ALJ where the employer-agency acts arbitrarily and capriciously in terminating him on this basis. N.C. Gen. Stat. § 150B-23(a)(4) (2013). Here, the superior court did not err in affirming the ALJ's conclusion that the Highway Patrol acted arbitrarily and capriciously in terminating Sergeant Owens on the basis of loss of credentials. For instance, it was arbitrary and capricious for the Highway Patrol to prevent Sergeant Owens from taking his annual firearms training (necessary to retain his credentials), though the Highway Patrol was under no disability to allow the training to take place, and then terminate Sergeant Owens for his failure to complete said training. The ALJ's conclusion in this regard is supported by its uncontested findings.

We note that the Highway Patrol does challenge other findings and conclusions. However, we do not believe that these challenged findings and conclusions are essential to the ALJ's conclusion that the Highway Patrol acted arbitrarily and capriciously. For instance, the Highway Patrol argues that the ALJ impermissibly determined that the Highway Patrol was *required* to follow the directive by the federal judge in Sergeant Owens' criminal case which appears to order the Highway Patrol to allow Sergeant Owens to complete his firearms training. Specifically, the Highway Patrol contends that the federal judge lacked the power to compel the Highway Patrol, a non-party to Sergeant Owens' federal criminal action, to do anything. However, even if the federal judge lacked such power, the Highway Patrol still had the obligation not to act arbitrarily and capriciously when it terminated Sergeant Owens for failure to maintain his credentials.

2. Duty to Mitigate Back Pay

[3] The Highway Patrol next argues that even if Sergeant Owens was improperly terminated on 1 November 2012, the trial court erred in affirming the conclusion of the ALJ that Sergeant Owens was not obligated to mitigate his damages. Specifically, the Highway Patrol contends that Sergeant Owens should not be entitled to back pay and benefits for the *entire* nine months he was separated where he was asked to reapply for his old job five months into his separation (in April 2013) but waited three additional months to do so. The ALJ, however, made certain findings concerning this issue which support its conclusion that Sergeant Owens was entitled to the benefits for the entire nine months. For instance, the ALJ determined that the Highway Patrol failed to meet its burden to prove that the Highway Patrol would have rehired

Sergeant Owens had he applied earlier, noting that the Colonel that replaced Colonel Gilchrist was never called to testify that he would have rehired Sergeant Owens sooner. Further, the ALJ found that the Highway Patrol had sent a form to Sergeant Owens indicating that he would not be rehired if he reapplied, suggesting that it was reasonable for Sergeant Owens to believe, at least for a period of time, that it would have been futile for him to reapply. Accordingly, the ALJ concluded that the Highway Patrol failed to meet its burden to show that Sergeant Owens failed to mitigate. Though the Highway Patrol points to evidence which tends to support an alternate conclusion, we hold that the ALJ's findings are supported by the record. This argument is overruled.

IV. Conclusion

Regarding Sergeant Owens' cross-appeal, we hold that the superior court had personal jurisdiction over Sergeant Owens and, therefore, overrule his arguments on his cross-appeal. Regarding the Highway Patrol's appeal, we affirm the orders of the trial court affirming the order of the ALJ.

AFFIRMED.

Judges HUNTER, JR., and DIETZ concur.

JANICE N. PETERSON, Plaintiff
v.
NANCY PEARSON DILLMAN and JACOB P. DILLMAN, Defendants

No. COA15-901

Filed 2 February 2016

Appeal and Error—interlocutory orders and appeals—unnamed defendant—substantial right

Where the trial court granted plaintiff's cross-motion for summary judgment and declared that an uninsured motorist carrier (GuideOne) did provide plaintiff with uninsured motorist coverage in an automobile accident that she sustained in a rental car during the course of her employment, the Court of Appeals dismissed GuideOne's interlocutory appeal. GuideOne failed to demonstrate that the trial court's order affected a substantial right. N.C.G.S. § 20-279.21(b)(4) permitted but did not require GuideOne to

participate in the proceedings as an unnamed underinsured motorist carrier.

Appeal by unnamed defendant from order entered 18 February 2015 by Judge W. Allen Cobb, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 13 January 2016.

Abrams & Abrams, P.A., by Douglas B. Abrams, Noah B. Abrams and Melissa N. Abrams and Davis Law Group, P.A., by Brian F. Davis, for plaintiff-appellee.

John M. Kirby for appellant GuideOne Mutual Insurance Company.

Jerome P. Trehy, Jr. for amicus curiae North Carolina Advocates for Justice.

Jennifer A. Welch for amicus curiae N.C. Association of Defense Attorneys.

TYSON, Judge.

GuideOne Mutual Insurance Company ("GuideOne"), an unnamed defendant, appeals from an order denying its motion for summary judgment and granting partial summary judgment in favor of Janice N. Peterson ("Plaintiff"). The order appealed from does not contain a Rule 54(b) certification by the trial court.

GuideOne has failed to clearly demonstrate a substantial right, which would be lost absent immediate appellate review. We dismiss GuideOne's interlocutory appeal.

I. Background

Plaintiff was employed as a home-health nurse for HomeCare Management Services, LLC ("HomeCare"). Plaintiff drove her personal vehicle to clients' homes to perform healthcare services as a part of her employment. On 1 June 2011, HomeCare purchased an insurance policy with GuideOne ("the GuideOne Policy") which provided liability insurance for "covered 'autos.' " Sometime prior to 30 December 2011, Plaintiff's personal vehicle was damaged in a car accident. While her vehicle was being repaired, Plaintiff rented a 2012 Dodge Avenger for her personal and employment use.

On 30 December 2011, Plaintiff was driving the rented Dodge Avenger from HomeCare's offices to her first appointment of the day. While en route, Plaintiff was struck head-on by a car being driven by Jacob Dillman. Dillman allegedly had swerved to avoid hitting a stopped car in his lane of travel. The airbags in the Dodge Avenger failed to deploy during the crash. Plaintiff suffered catastrophic injuries.

On 25 April 2013, Plaintiff filed the present lawsuit against Chrysler Group, LLC; EAN Holdings, LLC; Enterprise Leasing Company-Southeast, LLC; TRW Automotive U.S., LLC; Nancy Pearson Dillman, and Jacob P. Dillman in connection with the 30 December 2011 collision. Plaintiff subsequently filed an amended complaint adding Enterprise Holdings, Inc. as a defendant. Due to their status as potential underinsured motorist carriers, and consistent with N.C. Gen. Stat. § 20-279.21 (2013), Plaintiff sent copies of the complaint and summons to both GuideOne and at least one other unnamed defendant, Ironshore Specialty Insurance Group ("Ironshore").

On 14 November 2014, Plaintiff filed a notice of voluntary dismissal with prejudice of the complaint, which had asserted claims against Chrysler Group, LLC; EAN Holdings, LLC; Enterprise Holdings, Inc.; Enterprise Leasing Company-Southeast, LLC; and TRW Automotive U.S. LLC.

On 9 October 2013, GuideOne filed an answer to the complaint. Plaintiff filed an amended complaint on 4 November 2013, and GuideOne filed an answer and counterclaim on 9 December 2013.

On 23 January 2015, GuideOne moved for summary judgment. GuideOne contended its policy does not provide underinsured motorist coverage ("UIM coverage") for Plaintiff's injuries, because the rented Dodge Avenger was not an "insured vehicle" for the purposes of UIM coverage under the policy. On 30 January 2013, Plaintiff filed a cross-motion for summary judgment.

GuideOne's and Plaintiff's cross-motions were scheduled to be heard on 9 February 2015. Earlier that day, and prior to the hearing on those motions, the trial court granted Plaintiff's motion for summary judgment against unnamed defendant Ironshore, due to a failure to appear or to respond to the complaint. Plaintiff's counsel represented to the court that because the Ironshore claim had been dealt with, the claim involving GuideOne was the "only thing left" in the lawsuit.

On 18 February 2015, the trial court granted Plaintiff's cross-motion for summary judgment, and denied GuideOne's motion for summary

judgment. The court "declar[ed] that GuideOne's policy does provide Plaintiff with [UIM coverage] payment not exceeding the applicable limits of the policy in the amount of $1,000,000.00 plus interest from the date of the entry of this judgment." On 9 March 2015, after entry of the trial court's order, but before entry of GuideOne's notice of appeal, the trial court vacated and set aside the grant of summary judgment and default judgment entered against Ironshore.

GuideOne filed a notice of appeal on 12 March 2015.

II. Issues

GuideOne contends the trial court erred by determining: (1) the GuideOne policy provides UIM coverage to Plaintiff for injuries she sustained from the collision; (2) the Financial Responsibility Act, N.C. Gen. Stat. § 20-279.21 *et seq.*, required UIM coverage for the collision; and (3) the UIM policy limits under the GuideOne policy available to Plaintiff are $1,000,000.00.

III. Appellate Jurisdiction

We must first determine whether GuideOne's appeal is properly before this Court. An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). An interlocutory order does not settle all pending issues and "directs some further proceeding. . . to [reach] the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80 (citation omitted), *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

Here, the trial court's order denying GuideOne's motion for summary judgment and partially granting Plaintiff's cross-motion for summary judgment did not settle all of the pending issues in the case. The trial court's order did not dispose of Plaintiff's claims against Ironshore, and issues of liability and damages remain.

The Ironshore claim was revived when the trial court vacated the default judgment previously entered against it. Further, as GuideOne concedes in its brief, the trial court must determine other facets of the claim, such as stacking, offsets, and credits under the GuideOne policy. During oral arguments, counsel stated issues of liability and damages also remain pending. The trial court's order is not a final judgment. Plaintiff's appeal is interlocutory.

A. Appeal from an Interlocutory Order

An interlocutory order is generally not immediately appealable. *Earl v. CGR Dev. Corp.*, ___ N.C. App. ___, ___, 773 S.E.2d 551, 553 (2015); N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013). The "general prohibition against immediate appeal exists because '[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.' " *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568-69 (2007) (quoting *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382. However,

> there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Feltman v. City of Wilson, ___ N.C. App. ___, ___, 767 S.E.2d 615, 619 (2014). Here, the order appealed from does not contain a N.C. Gen. Stat. § 1A-1, Rule 54(b) certification by the trial court. *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, ___ N.C. App. ___, ___, 772 S.E.2d 495, 499, *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___, 2015 N.C. LEXIS 1253 (2015).

The merits of GuideOne's interlocutory appeal may only be considered if GuideOne demonstrates its deprivation of some substantial right that would be lost absent immediate appeal. *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("Essentially a two-part test has developed -- the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." (citation omitted)).

B. Substantial Right Analysis

GuideOne argues the trial court's order affects a substantial right because: (1) whether GuideOne provides UIM coverage determines whether it has a right to participate in the underlying action; and (2) the finding below is analogous to a duty to defend. We reject both of GuideOne's contentions.

1. Right to Participate in Underlying Action

To demonstrate a substantial right, GuideOne points to the language of N.C. Gen. Stat. § 20-279.21(b)(4), which provides in relevant part:

> Upon receipt of notice [of the complaint], the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and present therein a claim against other parties[.]

N.C. Gen. Stat. § 20-279.21(b)(4) (2013). GuideOne argues N.C. Gen. Stat. § 20-279.21(b)(4) only allows a UIM carrier the right to appear in defense of the claim. Whether GuideOne is a UIM carrier is a threshold question of whether it may participate in the suit.

GuideOne correctly asserts an insurer must be an "underinsured motorist insurer" before it can participate. *Id.* GuideOne cannot demonstrate a substantial right on this issue. The trial court's order ordered, adjudged, and decreed that "GuideOne's policy does provide Plaintiff with underinsured motorist coverage payments[.]" Under the trial court's order, and for the purpose of N.C. Gen. Stat. § 20-279.21(b)(4), at this time GuideOne is an "underinsured motorist insurer" and may participate in the lawsuit to the fullest extent allowed under that statute to the final decree.

That a court on appellate review may later determine GuideOne is not an underinsured motorist insurer under the terms of its policy does not diminish GuideOne's ability to fully participate in the suit to the final decree. N.C. Gen. Stat. § 20-279.21(b)(4). Since GuideOne may participate in the action, it cannot demonstrate a "substantial right which would be lost absent immediate review" on this basis. *Feltman*, ___ N.C. App. at ___, 767 S.E.2d at 619.

2. Duty to Defend

GuideOne also argues a substantial right exists, requiring immediate appellate review, because the trial court's order is "analogous to a finding that GuideOne has a duty to defend the underlying action." We disagree.

An underinsured motorist insurer "may elect, *but may not be compelled*, to appear in the action in its own name[.]" N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis supplied). N.C. Gen. Stat. § 20-279.21(b)(4) "does not require that an underinsured motorist carrier be served with pleadings as a party, nor does it require that such carrier appear in the action." *Darroch v. Lea*, 150 N.C. App. 156, 160, 563 S.E.2d 219, 222 (2002) (citation omitted).

GuideOne cites two decisions of this Court, *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 527 S.E.2d 328 (2000) and *Cinoman v. Univ. of N.C.*, ___ N.C. App. ___, 764 S.E.2d 619 (2014) to assert the trial court's ruling and present status of the case equates to a duty to defend. We disagree. Neither *Lambe Realty* nor *Cinoman* involved an underinsured motorist insurer nor the language of N.C. Gen. Stat. § 20-279.21(b)(4), which explicitly provides a UIM carrier may elect, *but may not be compelled*, to participate in the suit. *Lambe Realty Inv.*, 137 N.C. App. at 3, 527 S.E.2d at 330 (considering whether a potential tortfeasor in a declaratory judgment action was an insured under the terms of a commercial liability insurance policy); *Cinoman*, ___ N.C. App. at ___, 764 S.E.2d at 621 (considering whether a potential tortfeasor in a medical malpractice suit was an insured under the terms of a liability insurance trust fund).

The plain language of N.C. Gen. Stat. § 20-279.21(b)(4) states GuideOne is under no duty to be named or required to appear in this action. We cannot agree with GuideOne that its *choice to* enter the action is tantamount to a *duty* to defend an insured. GuideOne is free to participate, or decline to participate, in any and all portions of the proceedings in the trial court. GuideOne has failed to demonstrate a "substantial right which would be lost absent immediate review" on this assertion. *Feltman*, ___ N.C. App. at ___, 767 S.E.2d at 619.

IV. Conclusion

All parties agree that GuideOne's appeal from the trial court's 18 February 2015 order is interlocutory. GuideOne may participate fully in any proceedings to the final decree. The summary judgment order appealed from is not certified as immediately appealable by the trial court pursuant to Rule 54(b).

N.C. Gen. Stat. § 20-279.21(b)(4) permits, but does not require, GuideOne to participate in the proceedings as an unnamed underinsured motorist carrier. GuideOne has not shown a substantial right exists, which would be lost absent immediate appellate review. GuideOne's

appeal is dismissed without prejudice to any claims it may assert on appeal after final judgment is entered.

DISMISSED.

Judges CALABRIA and DAVIS concur.

ANTONIO PICKETT, Employee, Plaintiff
v.
ADVANCE AUTO PARTS, Employer, ACE AMERICAN INSURANCE COMPANY, Carrier (SEDGWICK CMS, Third-Party Administrator), Defendants

No. COA15-285

Filed 2 February 2016

1. Workers' Compensation—post-traumatic stress disorder—expert testimony of doctors—Commission's determination of credibility and weight—not for Court of Appeals to second-guess

On appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff workers' compensation benefits for post-traumatic stress disorder resulting from an armed robbery at his place of employment, the Court of Appeals held that the Commission did not err by relying on the expert testimony of two doctors regarding the causation of plaintiff's disability. Both doctors provided competent testimony as to the cause of plaintiff's injuries based on their evaluation and treatment of plaintiff, and the Court of Appeals refused to second-guess the Commission's credibility determinations and the weight it assigned to testimony.

2. Workers' Compensation—post-traumatic stress disorder—continuing temporary total disability

On appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff workers' compensation benefits for post-traumatic stress disorder resulting from an armed robbery at his place of employment, the Court of Appeals held that the Commission did not err by awarding temporary total disability benefits beyond 31 October 2012. Even though evidence was introduced of a doctor's note removing plaintiff from work until 31 October 2012, the same doctor testified that he did not know whether plaintiff would ever be able to return to any employment.

The Commission's finding of fact on this issue supported its conclusion that plaintiff satisfied the first prong of *Russell* and was entitled to continuing temporary total disability compensation.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission entered 15 October 2014 by Commissioner Danny Lee McDonald. Heard in the Court of Appeals 9 September 2015.

The Quinn Law Firm, by Nancy P. Quinn, for employee, plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Carolyn T. Marcus, for employer and third-party administrator, defendant-appellants.

McCULLOUGH, Judge.

Advance Auto Parts ("employer") and ACE American Insurance Company ("carrier") through Sedgwick CMS ("administrator") (together "defendants") appeal from an opinion and award of the North Carolina Industrial Commission (the "Commission") awarding worker's compensation benefits in favor of Antonio Pickett ("employee"). For the following reasons, we affirm.

I. Background

Employee was employed by employer as a salesperson and driver and was working in the Advance Auto Parts store on Randleman Road in Greensboro on the morning of 3 September 2012 when an armed robbery occurred at the store. That morning, shortly after nine o'clock, the perpetrator entered the store, pointed a gun at employee, and demanded money. While the perpetrator pointed the gun at employee, the general manager, the only other person in the store at the time, removed the cash drawers from several registers and placed them on the counters. The perpetrator then grabbed the money and fled. Following the robbery, plaintiff complained of chest pains and a throbbing headache but was required by the assistant manager to work the remainder of his shift. Employee has not returned to work since that day.

Subsequent to the robbery, employee sought treatment from Dr. Dean, employee's primary care physician, from Dr. Morris, a psychologist, and from other medical professionals for symptoms including discomfort, vision and hearing loss, arm weakness, elevated blood pressure, chest pain, and various psychological issues. Dr. Dean and Dr.

Morris both diagnosed employee as suffering from post-traumatic stress disorder as a result of the 3 September 2012 robbery.

On 10 September 2012, a representative of employer completed a Form 19 reporting employee's injury to the Commission. In that form, employer documented that it knew of employee's injury on 3 September 2012 and disability began on 6 September 2012. On 24 October 2012, employer completed a Form 22 documenting the days worked by employee and employee's earnings. Employee completed a Form 18 on 18 December 2012 and initiated a workers' compensation claim for a psychological injury resulting from the robbery by filing the Form 18 with the Commission on 21 December 2012. Employer denied employee's workers' compensation claim in a Form 61 dated 16 January 2013. In denying employee's claim, employer reasoned that it "[had] not received any records that support that any indemnity ore [sic] medical benefits are causally related to the incident that occurred on [3 September 2012]." Upon employer's denial of his claim, employee filed a Form 33 request that his claim be assigned for hearing, which the Commission received on 4 February 2013. Employer responded by Form 33R dated 14 February 2013.

Employee's case was assigned and came on for hearing before Deputy Commissioner Keischa M. Lovelace in Pittsboro on 29 August 2013. At the hearing, the Deputy Commissioner heard testimony from employee and the general manager. The record was then left open to allow the parties time to take additional testimony and to submit contentions, briefs, and proposed opinions and awards. The record was closed on 10 February 2014. By that time, the record included deposition testimony from Dr. Dean and Dr. Morris, both of whom diagnosed employee with post-traumatic stress disorder.

On 11 March 2014, the Deputy Commissioner filed an opinion and award in favor of employee. Defendants gave notice of appeal from the Deputy Commissioner's opinion and award on 27 March 2014.

Following the filing of a Form 44 by defendants and briefs by both sides, employee's case came on for hearing before the Full Commission on 11 August 2014. Upon review of the Deputy Commissioner's opinion and award, the record of the proceedings before the Deputy Commissioner, and the briefs and arguments of the parties, the Full Commission filed an opinion and award on 15 October 2014 affirming the Deputy Commissioner's opinion and award. Specifically, the Full Commission granted employee's "claim for worker's compensation benefits for injuries sustained on 3 September 2012" and ordered defendants

to pay as follows: (1) "temporary total disability compensation in the amount of $163.66 beginning 3 September 2012 and continuing until [employee] returns to work or further Order of the Commission[;]" (2) a reasonable attorney's fee as directed; (3) "all related medical or psychological treatment incurred or to be incurred for plaintiff's psychological conditions which are reasonably necessary to effect a cure, provide relief and/or lessen the period of disability . . . [;]" and (4) "the hearing costs to the . . . Commission in the amount of $220.00."

Defendants gave notice of appeal from the Full Commission's opinion and award on 14 November 2014.

II. Discussion

Review of an opinion and award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This '[C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. The Commission's conclusions of law are reviewed *de novo*. *Coffey v. Weyerhaeuser Co.*, 218 N.C. App. 297, 300, 720 S.E.2d 879, 881 (2012).

1. Compensability

[1] In the first issue on appeal, defendants contend the Commission erred in determining employee met his burden to establish a compensable injury. Specifically, defendants contend employee failed to present sufficient competent evidence to establish that his injuries were causally related to the 3 September 2012 robbery.

For an injury to be compensable under The North Carolina Workers' Compensation Act ("the Act"), it must be an injury by accident arising out of and in the course of the employment. N.C. Gen. Stat. § 97-2(6) (2013); *see also Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). This Court has acknowledged that "a mental or psychological illness may be a compensable injury[.]" *Bursell v. General Elec. Co.*, 172 N.C. App. 73, 78, 616 S.E.2d 342, 346 (2005). "The burden of proving each and every element of compensability is upon the plaintiff." *Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 35, 384 S.E.2d

549, 553, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989). Our Supreme Court has explained as follows regarding causation:

> There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question. The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself. There will be many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of. On the other hand, where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.

Click, 300 N.C. at 167, 265 S.E.2d at 391 (internal quotation marks and citations omitted).

> However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.

Holley v. ACTS, Inc., 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (internal quotation marks and citations omitted).

The admission of expert testimony is governed by Rule 702 of the North Carolina Rules of Evidence. That rule provides in pertinent part as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2013).

In this case, after issuing findings regarding the evaluation and treatment of employee by Dr. Dean and Dr. Morris, the Full Commission made the following findings regarding causation:

> 16. Dr. Dean opined to a reasonable degree of medical certainty, and the Commission finds, that the 3 September 2012 robbery was an acute event that was the main cause of [employee's] acute anxiety and post-traumatic stress disorder. Dr. Dean also opined to a reasonable degree of medical certainty, and the Commission finds, that the acute anxiety, stress, blood pressure elevation, and reliving the robbery were a significant component to [employee's] chest symptoms. [Employee's] hearing loss and vision/perception issues were most consistent with a conversion reaction, "where your body responds physically to something that's completely emotional -- emotionally distressing, but not really based on something neurological that we could diagnose." Dr. Dean opined to a reasonable degree of medical certainty, and the Commission finds, that [employee's] conversion reaction was caused by the 3 September 2012 robbery.
>
> . . . .
>
> 27. Dr. Morris opined to a reasonable professional certainty that [employee's] PTSD was caused by the 3 September 2012 robbery, which further bolsters Dr. Dean's causation opinion regarding the same.

The Commission then concluded as follows:

> 7. On 3 September 2012, [employee] sustained a compensable injury by accident arising out of the course and scope of his employment with defendant-employer as the result of an armed robbery occurring at the store where [employee] was working. The circumstances of

> [employee's] injury on 3 September 2012 constituted an interruption of his normal work routine and the introduction thereby of unusual circumstances likely to result in unusual results. [Employee] sustained an injury by accident arising out of and in the course of his employment with defendant-employer resulting in mental injury. Based upon the preponderance of the evidence in view of the entire record, including Dr. Dean's causation opinions and Dr. Morris' diagnoses, [employee] has proven that his post-traumatic stress disorder and other psychological problems, including his conversion reaction, were caused or aggravated by the 3 September 2012 injury by accident.

Defendants now challenge the portions of this conclusion relating to causation by attacking the competency of Dr. Morris' and Dr. Dean's expert testimony and the credibility of employee. We address these issues in reverse of the order defendants raise them on appeal.

Defendants challenge the Commission's reliance on Dr. Dean's and Dr. Morris' opinions in part because "[their] decisions regarding [employee's] diagnosis were based on [employee's] subjective complaints[,]" which defendants assert are not credible because "[employee] exaggerated his version of the incident . . ., failed to reveal evidence of his prior workers' compensation claim, and tried to deny pre-existing conditions . . . ." Specifically, defendants assert that "[employee] did not present as a credible witness and therefore, the information which he presented to his physicians cannot be trusted." We hold this challenge to employee's credibility is extremely injudicious.

As noted above, it is a well settled principal in workers' compensation cases that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274.

In this case, it is clear the Commission found employee to be credible as the Commission concluded in conclusion number two that "[employee's] testimony regarding the circumstances of the 3 September 2012 armed robbery and [employee's] statements to his health care providers regarding his physical and psychological condition following the armed robbery are found to be credible and convincing." This Court will not second-guess the Commission's credibility determination. Furthermore, we will not hold that the testimony of Dr. Dean and Dr. Morris is incompetent on the basis that Dr. Dean and Dr. Morris relied on employee's statements.

Concerning Dr. Dean's medical opinion as to causation, defendants contend the Commission erred in relying on Dr. Dean's opinion because there was an insufficient basis for the opinion. Although Dr. Dean testified to a reasonable medical certainty that employee's anxiety, PTSD, cardiac symptoms, and loss of vision and hearing were the result of the robbery after examining, diagnosing, and treating employee, defendants contend "Dr. Dean's opinions are undermined by his own testimony, which establishes that his impressions of [employee's] symptoms and their cause are based solely on [employee's] own reports and the temporal link between the incident and their onset." We are not persuaded by defendants' arguments.

At the outset, we reiterate that the Commission found employee to be credible and convincing. Thus, Dr. Dean did not err in relying on employee's statements in forming his opinion on the cause of employee's symptoms.

As to the temporal component of defendants' argument, defendants rely on *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000). In *Young*, our Supreme Court noted that the "Commission's findings of fact with regard to the cause of [an employee's] fibromyalgia were based entirely upon the weight of [a rheumatologist's] opinion testimony as an expert in the fields of internal medicine and rheumatology." *Id.* at 230, 538 S.E.2d at 914-15. Upon review of the rheumatologist's deposition testimony, the sole evidence pertaining to the rheumatologist's opinion, the Court held the rheumatologist's opinion in 1995 that the employee's fibromyalgia was likely related to the employee's 1992 work-related back injury was based entirely upon conjecture and speculation, and therefore was not competent evidence of causation. *Id.* at 231, 538 S.E.2d at 915. The Court explained that the rheumatologist had testified about the difficulty in ascribing a cause for fibromyalgia because of its uncertain etiology and had "acknowledged that he knew of several other potential causes of [the employee's] fibromyalgia" but "he did not pursue any testing to determine if they were, in fact, the cause[.]" *Id.* Where the record supported "at least three potential causes of fibromyalgia . . . other than [the employee's] injury in 1992[,]" *id.* at 232, 538 S.E.2d at 916, the Court held the rheumatologist's reliance on the maxim "*post hoc, ergo propter hoc*," meaning "after this, therefore because of this[,]" to assign a cause or aggravation of fibromyalgia was improper. *Id.* The Court reasoned that "[i]n a case where the threshold question is the cause of a controversial medical condition, the maxim of '*post hoc, ergo propter hoc*,' is not competent evidence of causation[]" because the maxim "assumes a false connection between causation and temporal sequence." *Id.*

Upon review of the facts of the present case, we are not convinced that *Young* is controlling. First, the present case is distinguishable from *Young* because this case involves the diagnosis of a psychological injury with resultant physical symptoms. It is obvious to this Court that temporal sequence or proximity is not only relevant, but a necessary consideration in diagnosing psychological conditions such as *post*-traumatic stress disorder. (Emphasis added). Second, Dr. Dean did not merely rely on the temporal link. It is clear from Dr. Dean's testimony and the Commission's findings based on Dr. Dean's testimony that Dr. Dean relied on employee's account of the robbery and his symptoms to assign a cause to employee's psychological and physical symptoms. Dr. Dean described how employee was anxious as he relived the robbery in vivid detail. Moreover, Dr. Dean was able to rule out other potential causes of employee's symptoms. Dr. Dean testified that employee's neurological symptoms were not consistent with a neurological exam, leading to initial diagnoses of an acute stress reaction and early conversion reaction. Furthermore, upon employee's complaints of chest pain, a cardiac catheterization was performed which revealed there were no cardiac causes for employee's chest pain. Dr. Dean then testified again that employee's symptoms were likely the result of a conversion reaction – a physical response to something completely emotional. Although Dr. Dean had been employee's primary care physician for years and treated employee for various health issues prior to the robbery, including fluctuating blood pressure, anxiety, depression, and back pain, Dr. Dean's testimony clearly linked employee's psychological and physical symptoms, or the exacerbation of those symptoms, in the months following the 3 September 2012 robbery to that event.

Considering that Dr. Dean's impressions were formed based on his impressions of employee's account of the robbery and his symptoms, the exclusion of other potential causes, and the temporal link between the occurrence of the symptoms and the robbery, we hold Dr. Dean's testimony was not based merely on speculation and conjecture; there was a sufficient basis for Dr. Dean's expert opinion testimony as to the cause of employee's injuries. Consequently, the Commission did not err in relying on Dr. Dean's testimony regarding causation.

Dr. Dean's testimony alone would have been sufficient to support the Commission's determination that employee suffered a compensable injury. Yet, as the Commission found, Dr. Morris' causation opinion bolsters Dr. Dean's opinion.

In challenging the Commission's reliance on Dr. Morris' testimony as to the cause of employee's injuries, defendants contend the Commission

erroneously found and concluded that Dr. Morris is an expert in psychology and erroneously relied on Dr. Morris' testimony as evidence of causation. Defendants rely solely on Rule 702 and *Young*. Again, we are not persuaded by defendants' arguments.

Concerning the designation of Dr. Morris as an expert in psychology, the Commission found and concluded that Dr. Morris was an expert after summarizing Dr. Morris' education and experience in finding of fact eighteen as follows:

> After obtaining his Ph.D., Dr. Morris has served as the assistant director of counseling at Purdue University, as an inpatient psychologist with the VA Hospital in Wisconsin, and as the clinical director of the mental health division of Child and Family Services in Raleigh, North Carolina. After moving to Charlotte, Dr. Morris became a member of the clinical faculty in the psychology department at UNC-Charlotte and served as the chief psychologist at Carolinas Medical Center with the responsibility of directing outpatient services. Dr. Morris has also served as a director of counseling centers in Iowa and Maryland and taught at the doctoral level in Oregon.

Defendants do not dispute that finding of fact eighteen is supported by Dr. Morris' deposition testimony; in fact, defendants acknowledge that Dr. Morris additionally testified that he was trained and licensed to diagnose and treat patients. Instead, defendants attempt to lessen the relevance of Dr. Morris' credentials in the present case by pointing out that the subject of Dr. Morris' doctoral dissertation, "if there was a correlation between the race of the teacher and students' perceptions of the classroom environment[,]" is of no significance in this case and by pointing out that, although Dr. Morris has worked in various positions, Dr. Morris has not worked in any position very long. Defendants do not cite any authority to support the suggestion that the subject of Dr. Morris' doctoral dissertation or the length of time that Dr. Morris worked at each position prevent Dr. Morris from qualifying as an expert in psychology. Moreover, it is clear to this Court that the Commission did not err in determining Dr. Morris to be an expert in psychology. The Commission's designation is supported by Dr. Morris' education and experience as set forth in finding of fact eighteen.

Yet, even if Dr. Morris was properly accepted as an expert, defendants further contend the Commission erred in relying on Dr. Morris' causation opinion because Dr. Morris' testimony did not meet the

requirements of Rule 702. Specifically, defendants contend Dr. Morris failed to provide sufficient facts and data to support his opinion and failed to demonstrate that his testimony was based on reliable principles and methods applied to the facts of the case. Defendants further assert that it is suspicious that Dr. Morris initially provided only one medical report and later produced undetailed records after defendants filed a motion to compel. Defendants contend the lack of detailed records indicates that Dr. Morris did not maintain medical records throughout the treatment of employee. Thus, defendants contend Dr. Morris' testimony is not credible and should be given no weight.

Upon review of the record, we hold the Commission did not err. We further note that defendants' contention that Dr. Morris did not keep medical records is speculative and not supported by the evidence.

Dr. Morris testified concerning his evaluations of employee that led to the post-traumatic stress disorder diagnosis, beginning with Dr. Morris' initial assessment of employee on 10 October 2012. Based on Dr. Morris' testimony, the Commission made finding of fact twenty-three summarizing Dr. Morris' treatment. Finding of fact twenty-three provides as follows:

> 23. Throughout the fall of 2012, [employee] had weekly therapy sessions with Dr. Morris. During these sessions, Dr. Morris used clinical interviews, behavioral observations, and psychological diagnostic tools to develop a diagnosis and treatment recommendations. In a 24 January 2013 report, Dr. Morris comprehensively summarized his assessment and observations. Dr. Morris concluded that "it is an understatement to say that [employee] needs therapy." [Employee] needs professional assistance to address his post-traumatic stress disorder symptoms and to restore his sense of personal and professional pride. Dr. Morris explained:
>
>> The robbery has destabilized his emotional groundedness to the point where he experiences an unhealthy level of hypervigilance when confronted with individuals or situations that remind[] him of the situation, and a perpetual sense of unease when feeling overwhelmed by multiple stressors. Without therapy, and possibly medication, [employee] will be at considerable risk for further emotional, vocational, and social deterioration.

> Dr. Morris explained that hypervigilance is when a person is constantly looking around the room, taking everything in, trying to locate each door or each chair. A person with PTSD is hypervigilant as they are looking for a way to escape in case something occurs.

This finding is supported by evidence in the record and we hold this finding is sufficient to support the Commission's reliance on Dr. Morris' testimony as evidence of causation.

Where Dr. Dean and Dr. Morris both provided competent expert testimony as to the cause of employee's injuries based on their evaluations and treatment of employee, the Commission did not err in relying on their opinions in determining that employee suffered a compensable injury. We will not second-guess the Commission's credibility determinations and the weight it assigned to testimony.

2. Continuing Disability

[2] As detailed in the background above, the Commission ordered defendants to pay "temporary total disability compensation in the amount of $163.66 beginning 3 September 2012 and continuing until [employee] returns to work or further Order of the Commission." Even though we have held the Commission did not err in determining employee suffered a compensable injury, defendants contend that employee failed to establish disability lasting beyond 31 October 2012. Thus, defendants contend the Commission erred in awarding temporary total disability benefits beyond 31 October 2012.

In the Act, "[t]he term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9). The employee bears the burden of proving disability. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

> The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek

> other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. (internal citations omitted).

In support of the award of ongoing benefits in this case, the Commission concluded as follows:

> 10. Based upon the preponderance of the evidence in view of the entire record, and as the result of his 3 September 2012 injury by accident and causally related psychological injuries, plaintiff has satisfied the first prong of *Russell* and is entitled to be paid by defendants temporary total disability compensation . . . beginning 3 September 2012 and continuing until [employee] returns to work or further Order of the Commission." (Citations omitted).

Defendants do not specifically challenge any findings, but instead contend the Commission erred in determining employee met his burden of proving ongoing disability because the only evidence related to disability in this case was a note by Dr. Dean on 27 September 2012 removing employee from work until 31 October 2012. Thus, defendants claim employee was not entitled to benefits for any period beyond 31 October 2012. We disagree.

The evidence in this case shows that Dr. Dean did initially produce a note on 27 September 2012 to excuse employee from work until 31 October 2012. Yet, Dr. Dean later testified that he wanted a psychologist to clear employee before employee returned to work. The Commission noted Dr. Dean's testimony about employee's return to work and "Dr. Dean's impression [that] Advance Auto Parts posed a 'very stressful situation' and that [employee] would relive the [robbery] if he returned to that environment" in finding of fact fifteen.

As defendants state in their brief, "[the] only testimony which supports a finding that [employee] is incapable of work in any employment as a consequence of the 3 September 2012 incident is that of Dr. Morris." Defendants, however, rely on their previous argument that Dr. Morris does not qualify as an expert and did not provide competent opinion testimony. As we have already discussed, the Commission properly designated Dr. Morris as an expert in psychology and properly accepted his opinion testimony. As to employee's return to work, the Commission made finding of fact twenty-five based on Dr. Morris' testimony. Finding of fact twenty-five provides as follows:

> 25. In his opinion, Dr. Morris does not believe [employee] will be able to return to work for Advance Auto Parts due to its association with the robbery, his life being threatened, and that he could have been killed. Dr. Morris is unable to state whether [employee] can return to any employment at this time. As Dr. Morris explained:
>
> > [A]n individual with PTSD, they almost need to have a resting spot or like a place where they can sort of just pull everything together, reflect, because most of the time the mind is racing . . . once they arrive at that place where they feel comfortable, they feel that they're making progress, that people understand them, that their story has been heard and they've been validated, then they can move forward.
>
> Dr. Morris further explained that [employee] has not yet reached this point in his therapy and, until he reaches this point, the kind of employment [employee] can handle cannot be determined. Whether [employee] will be employable in the future depends upon how soon he can "resolve some of the feelings and thoughts that he has been carrying around in his head since the incident." [Employee] has not yet reached maximum medical improvement. Based upon the preponderance of the evidence in view of the entire record and Dr. Morris' testimony, the Commission finds that [employee] cannot work in any employment as a result of his psychological conditions.

Although the Commission did find that "Dr. Morris is unable to state whether [employee] can return to any employment at this time[,]" it is evident from a review of Dr. Morris' testimony that Dr. Morris' uncertainty was not concerning whether employee could return to work for another employer at that particular point in time, but whether employee would ever be able to return to work for another employer. The question asked to Dr. Morris was, "[D]o you have an opinion, based on your treatment of [employee] and your professional experience, whether [employee] would be able to return to work for another employer?" Dr. Morris responded, "I don't know yet[,]" and continued to explain the progress he needed to see in employee's therapy before he could determine if employee could return to work. When the Commission's finding is considered with Dr. Morris' testimony, it is evident that the correct

interpretation of the Commission's finding is, at the time Dr. Morris gave his testimony, he was unable to state whether employee would ever be able to return to any employment. This interpretation is further supported by consideration of finding of fact twenty-five in its entirety.

We hold finding of fact twenty-five, which is supported by the evidence, supports the Commission's conclusion that employee has satisfied the first prong of *Russell* and is entitled to continuing temporary total disability compensation.

III. Conclusion

For the reasons discussed, the opinion and award of the Full Commission is affirmed.

AFFIRMED.

Judges STEPHENS and ZACHARY concur.

JULIE SPEARS, Plaintiff
v.
JAMES GREGORY SPEARS, Defendant

No. COA14-1133

Filed 2 February 2016

1. Appeal and Error—interlocutory orders—contempt order—substantial right

The appeal of any contempt order affects a substantial right and is therefore immediately appealable even though the orders are interlocutory.

2. Contempt—alimony, child support, and equitable distribution—ability to pay

In an alimony, child support, and equitable distribution case, the trial court erred by entering a contempt order concluding that defendant had the ability to either comply with an earlier order or take reasonable measures to comply. The findings of fact made defendant's inability to fully comply quite clear. Moreover, this was not a case in which a defendant simply failed to pay anything at all, and there was no question of intentional suppression of earnings or hiding income. Although plaintiff pointed to defendant's remarriage

and new family, North Carolina's law does not impose limitations on an individual's right to marry or have children.

3. Contempt—alimony, child support, and equitable distribution—setting date for end of order

The trial court erred in an alimony, child support, and equitable distribution case by setting an amount for payment beyond defendant's ability to pay and by not setting a date beyond which the payment above the original amount would end.

4. Contempt—compliance hearing—held before entry of order

Although a Contempt Order and Order on Purge Condition Noncompliance were remanded on other grounds, defendant's objection to holding the compliance hearing prior to entry of the Contempt Order was correct. Particularly in the context of civil contempt, where the statute requires a written order and a person may be imprisoned for failure to comply, it is imperative that an order be entered before an obligor is held in contempt of that order.

Appeal by defendant from orders entered on 27 May 2014 by Judge Ronald L. Chapman in District Court, Mecklenburg County. Heard in the Court of Appeals on 21 May 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and Jonathan D. Feit, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

STROUD, Judge.

Although this case began on or about 31 July 2008 and several interlocutory orders have been entered since its inception, the first orders for which James Gregory Spears ("defendant") had a right of immediate appeal were entered on 27 May 2014. These orders held defendant in civil contempt for his continuing failure to pay more than his entire disposable income each month towards his obligations of payment of credit card debt, child support, alimony, and attorneys' fees, ordered his imprisonment, and required him to pay an additional $900.00 per month over and above the established obligations for an indefinite time in order to purge himself of contempt. Defendant appeals from these orders, and we vacate.

I. Background

Julie Spears ("plaintiff") and defendant married in 1991 and three children were born to the marriage. They separated on or about 1 January 2008, and plaintiff filed a complaint seeking child custody, child support, post-separation support, alimony, attorneys' fees, and equitable distribution on or about 31 July 2008. The parties were divorced on 15 October 2008.[1] On or about 12 December 2008, defendant filed his answer and counterclaims for child custody and equitable distribution. On 19 December 2008, defendant remarried to his second wife.

The procedural history of this case is extremely complex due to the repeated pattern of entry of orders many months after the hearings upon which they were based and changes in circumstances during the long lapses in time between hearings and entry of orders, which has resulted in the situation presented, in which there still is not a final order addressing all of the parties' obligations as to equitable distribution, alimony, and child support. Nor has defendant ever been able to have a court hear his claims for modification of his support obligations based upon his allegations of substantial changes of circumstances, since no final order has been entered which he could move to modify or which the court could modify. In this appeal, we are trying to hit a moving target.

On 16 December 2008, the trial court held a hearing upon plaintiff's claims for post-separation support, temporary child support, and attorneys' fees. On or about 10 February 2009, the trial court entered a temporary support order based upon the December 2008 hearing. The trial court found that defendant was employed by the United States Army and had an average gross monthly income of $7,339.00. Plaintiff was not employed outside of the home although she was seeking employment. The trial court found that defendant's reasonable needs and expenses were $2,500.00 per month. Based on the North Carolina Child Support Guidelines, the trial court ordered defendant to pay child support of $1,561.00 per month beginning 15 December 2008 and to continue to provide medical insurance for the children. The trial court also ordered defendant to pay post-separation support of $1,800.00 per month beginning 1 December 2008 as well as $2,500.00 in attorneys' fees to plaintiff's counsel. In addition, defendant was ordered to make timely payments on several credit cards, for which he would be given "appropriate credit" upon resolution of the equitable distribution claims.

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1. The absolute divorce was entered in Indiana, where a full year of separation prior to filing for the divorce is not required. *See* Ind. Code Ann. § 31-15-2-5 (LexisNexis 2007).

On or about 22 May 2009, plaintiff filed a motion to hold defendant in contempt for failure to pay the full amounts of child support and post-separation support required under the temporary support order. The trial court entered an order on 16 September 2009 holding defendant in civil contempt for his failure to comply with the temporary support order. In addition to the ongoing temporary child support and post-separation support, the trial court ordered defendant to pay $9,000.00 for post-separation support arrears, at the rate of $500.00 per month starting 15 September 2009 and continuing until paid in full. He was also ordered to pay plaintiff's attorneys' fees in the amount of $6,650.00 with the terms of payment to be "deferred until equitable distribution."

On or about 20 December 2009, defendant filed a motion to stay proceedings because he had been stationed in Afghanistan on or about 11 August 2009 for a period of one year. Although our record does not reveal the trial court's ruling, if any, upon the motion to stay, no additional court proceedings occurred until December 2011.

A. Defendant's Obligations under the February 2013 Order

On 12 and 13 December 2011, the trial court heard the matters of equitable distribution, alimony, child custody, child support, and attorneys' fees. Ultimately, the trial court signed an order as a result of this hearing on or about 31 January 2013, *nunc pro tunc* to 18 May 2012,[2] which was filed and entered on 4 February 2013 ("the February 2013 Order").

In the February 2013 Order, the trial court found that defendant's gross monthly income from the United States Army was $10,561.02. He had financial responsibility for three other children born to his second wife of $1,046.88 per month. Based on the North Carolina Child Support Guidelines, the trial court ordered defendant to pay $1,880.48 per month in child support, effective as of 1 March 2009, the first day of the first

2. 18 May 2012 is the date of a letter from the trial court to counsel for the parties setting forth the trial court's rulings and directing plaintiff's counsel to prepare the order. Although we cannot address the propriety of the "*nunc pro tunc*" signing of the February 2013 Order because it is not a subject of this appeal, we note that "[*n*]*unc pro tunc* orders are allowed *only* when a judgment has been actually rendered . . . provided that the fact of its rendition is satisfactorily established and no intervening rights are prejudiced." *Whitworth v. Whitworth*, 222 N.C. App. 771, 777-78, 731 S.E.2d 707, 712 (2012) (emphasis added and quotation marks and brackets omitted). "[E]ntry of the order *nunc pro tunc* does not correct the defect because what the court did not do then cannot be done now simply by use of these words[.]" *Id.* at 778, 731 S.E.2d at 712 (quotation marks, brackets, and ellipses omitted).

month after entry of the temporary support order. Because the prior temporary support order established a monthly child support obligation of $1,561.00 and the February 2013 Order made the increase in defendant's monthly child support obligation retroactive, the February 2013 Order also established defendant's arrears of child support from 1 March 2009 through January 2013 as $15,015.56, or ($1,880.48 - $1,561.00) x 47 months, and the trial court ordered defendant to pay this in full on or before 15 April 2014. The trial court also ordered defendant to continue to provide medical and dental insurance for the children.

As to the alimony obligation, the trial court found that defendant had shared expenses of $900.00 per month and individual expenses of $1,149.47 per month. After payment of all of his expenses, child support obligation, and debt assigned to him in equitable distribution, the trial court found that defendant had "in excess of $2,500 net per month in surplus income." The trial court also found that plaintiff had a monthly deficit of over $4,000.00, based upon her expenses, income, and payment of debt assigned to her in equitable distribution. The trial court ordered defendant to pay alimony in the amount of $2,500.00 per month from 1 January 2012 through December 2013, $1,750 per month from January 2014 through December 2015, and $1,250.00 per month from January 2016 until terminated by a "statutorily-terminating event." The order established defendant's alimony arrears from 1 January 2012 through January 2013 as $9,100.00 and ordered that defendant pay this sum within sixty days of entry of the order.[3]

The February 2013 Order also included equitable distribution and allocated certain marital credit card debts to defendant to be paid in the amount of $1,250.00 per month. The parties did not have any significant liquid marital assets, so the trial court did not distribute any accounts or other sources of cash that were large enough to serve as a source of payment for the various obligations owed by defendant. The trial court also ordered that defendant pay a distributive award of $21,000.00 to plaintiff at the rate of $875.00 per month beginning 1 January 2014. In addition, the trial court ordered that defendant pay $23,150.00 in attorneys' fees at the rate of $250.00 per month beginning 15 February 2013 and an additional $1,000.00 in attorneys' fees to be paid within sixty days of entry of the order.[4]

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3. Based upon a date of entry of 4 February 2013, the alimony arrears would have been due by 5 April 2013.

4. Based upon a date of entry of 4 February 2013, the $1,000.00 amount would have been due by 5 April 2013.

Both parties filed post-trial motions after entry of the February 2013 Order. On or about 22 February 2013, plaintiff filed a motion requesting a new trial "solely to address the military Reserve Component Survivor Benefit Plan[.]" On or about 22 February 2013, defendant filed motions under North Carolina Rules of Civil Procedure 52 and 59 to amend the findings of fact and for a new trial. *See* N.C. Gen. Stat. § 1A-1, Rules 52, 59 (2013). Defendant's motion included allegations that during the fourteen-month delay between the trial and entry of the order, his income and financial situation had changed significantly, but that he was unable to file a motion to modify because the change in his financial circumstances occurred before entry of the February 2013 Order.

On 18 April 2013, plaintiff filed a motion for contempt alleging that defendant had failed to pay various sums he was ordered to pay, including the $9,100.00 alimony arrears due by 5 April 2013 and $5,831.15 in additional arrears based upon his partial payments of the obligations for child support, credit card debt, alimony, and attorneys' fees, with total arrears of $14,931.15 alleged. Plaintiff also sought attorneys' fees arising from her motion for contempt.

Although the court did not *enter* orders addressing plaintiff's and defendant's post-trial motions until about 7 August 2013, according to those orders, the trial court apparently announced its decision to deny defendant's post-trial motions and to grant plaintiff's post-trial motion at a hearing on 26 April 2013. On or about 26 July 2013, based upon this announcement, defendant filed a motion to modify alimony and child support alleging a reduction in his income due to a change in his military assignment.[5] Specifically, at the time of the trial in December 2011, defendant was stationed in South Korea and received various allowances based on that assignment so that his gross income was about $10,700.00 per month. In August 2012, defendant was reassigned to South Carolina and his income was reduced to about $9,200.00 per month, which increased to about $9,490.00 per month as of January 2013. He also alleged that from this amount, he had mandatory deductions for housing and taxes, leaving him with a net monthly income of $5,420.00, although the order required him to pay a total of $6,755.00 per month, or $1,335.00 more than his monthly net income.

On or about 26 July 2013 and 27 November 2013, plaintiff filed "supplemental" motions for contempt updating the amounts of arrears which

5. In his motion to modify, defendant alleged: "Since Defendant's Rule 52 and 59 motions were denied, and since the presiding Judge indicated he believed Defendant could file a motion to modify, Defendant is now filing this motion to modify."

she claimed defendant had failed to pay. On or about 7 August 2013, the trial court entered an order granting plaintiff's post-trial motion.[6] The trial court ordered a new trial to address issues concerning "any survivor benefit plan(s) relating to [defendant's] military retirement benefits" and ordered that the February 2013 Order "should be amended after such new trial" to address these issues. According to our record, a final amended order has not yet been entered.

Also on or about 7 August 2013, the trial court entered its order denying defendant's post-trial motions finding that he was not "without a remedy" because

> this Court believes that North Carolina law would permit him to move to modify his alimony and child support obligations based on alleged changes in circumstances that occurred between the time this Court issued its letter ruling on May 18, 2012, and the time this Court entered the Judgment on February 4, 2013. This Court does not now address whether such alleged changes in circumstances would warrant modifying any of Defendant/Husband's obligations, however, as such issue would have to be resolved in connection with a motion to modify.

But defendant alleged that the reduction in his income occurred after the December 2011 trial and *before* the entry of the February 2013 Order; thus, a motion to modify is not a proper "remedy[.]" *See Head v. Mosier*, 197 N.C. App. 328, 333, 677 S.E.2d 191, 195 (2009) (holding that for a court to modify a child support order, it must first "determine whether there has been a substantial change in circumstances since the date the existing child support order was *entered*") (emphasis added). As noted above, defendant filed such a motion to modify on or about 26 July 2013, based upon the trial court's belief that this would be a proper remedy. According to our record, the trial court has not yet heard the motion.[7]

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6. As noted above, the trial court had announced this ruling on 26 April 2013.

7. We further note that the fourteen-month delay between the December 2011 trial and the entry of the February 2013 Order, which is still not final, will be compounded by the additional delay until a final order is entered after a hearing of plaintiff's post-trial motion. *See Plomaritis v. Plomaritis*, 222 N.C. App. 94, 110-11, 730 S.E.2d 784, 795 (2012) ("As the 18 month delay was more than a *de minimis* delay and was prejudicial under the facts of this case, it would require a new hearing for the parties to provide additional evidence[.]") (quotation marks omitted).

B. Contempt Order and Order on Purge Condition Noncompliance

On 2 December 2013, the trial court held a hearing on plaintiff's contempt motions and a show cause order issued as a result of those motions.[8] The order from this hearing ("the Contempt Order") was not entered until nearly six months later, on 27 May 2014, and since there were additional proceedings between 2 December 2013 and 27 May 2014 which influenced that order, we will address those proceedings before noting the provisions of the ultimate 27 May 2014 Contempt Order.

The trial court held another hearing on 22 January 2014, which was referred to as a "review hearing" to assess defendant's compliance with certain "purge conditions, including any and all efforts he has made to free-up the $900.00 [per month] in additional funds." On 22 January 2014, the trial court ordered defendant to be incarcerated for civil contempt until such time as he paid $5,369.70. Defendant's parents paid this sum, defendant was released from the custody of the Mecklenburg County Sheriff's Office, and this amount was remitted to plaintiff. In addition to the incarceration and payment of $5,369.70, the trial court entered another order ("the Order on Purge Condition Noncompliance") based upon the 22 January 2014 hearing, filed on 27 May 2014, which states that on 2 December 2013, the trial court had rendered its decision

> holding Defendant/Husband in civil contempt of the February 2013 Order, sentencing him to imprisonment for so long as such contempt continued, and suspending the sentence of imprisonment conditioned upon his compliance with the following purge conditions:
>
> a. Defendant/Husband shall immediately begin paying at least $900.00 more per month to Plaintiff/Wife over and above his total monthly obligations due under the February 2013 Order, and
>
> b. Defendant/Husband's efforts in this regard must include, at the very least, downwardly adjusting the

8. The Contempt Order states that all three contempt motions were heard, but the transcript indicates that only the first two were considered, since the "Second Supplemental Motion for Contempt" (which is the motion filed 27 November 2013) had been served upon defendant less than five business days before the hearing. *See* N.C. Gen. Stat. § 5A-23(a1) (2013). The trial court stated that it would consider contempt as of 26 July 2013, which would cover the time periods of the first two contempt motions filed, and based upon the transcript and the dates found in the order, this is what happened, despite the order's recitation that the trial court heard the motion filed 27 November 2013.

> federal income taxes being withheld from his gross monthly income.

In the Order on Purge Condition Noncompliance, the trial court further found:

> 4. Defendant/Husband's counsel objected to this Court conducting the compliance hearing on January 22, 2014, given that an Order had not yet been entered as a result of the December 2, 2013 contempt hearing. The Court overruled such objection.
>
> . . . .
>
> 9. With respect to the second purge condition, Defendant/Husband downwardly adjusted the federal income taxes being withheld from his gross monthly income.
>
> 10. However, Defendant/Husband did not consult any tax professional to ascertain whether he downwardly adjusted such income tax withholdings to the greatest extent possible.
>
> 11. Nor does Defendant/Husband know whether he can further reduce such withholdings.
>
> 12. By not bringing to the hearing documentation regarding his research and attempts to reduce his income tax withholdings, Defendant/Husband has left this Court without the ability to make a satisfactory determination as to what additional amount he could receive in net monthly income.
>
> 13. Defendant/Husband's attempts to reduce expenses regarding the beach house he co-owns with his current wife likewise are unsatisfactory, and they display an unacceptable disrespect for his children with Plaintiff/Wife, Plaintiff/Wife, the law, and this Court.
>
> 14. In sum, Defendant/Husband has failed to comply with the purge conditions set by this Court.

On 27 May 2014, the trial court entered the Contempt Order as a result of the 2 December 2013 hearing. In this order, the trial court made the following pertinent findings of fact:

> 16. The total amount Defendant/Husband paid to Plaintiff/Wife from February 2013 through July 2013 was (a)

$3,670.80 less than his total monthly court-ordered obligations for during such time period; and (b) $12,770.80 less than all of his court-ordered obligations during such time period given the $9,100.00 alimony arrearage payment due and owing on or before April 5, 2013.

17. Defendant/Husband knew at all material times about his payment obligations set forth in the February 2013 Order.

18. Defendant/Husband willfully failed to comply with the February 2013 Order from February 2013 through July 2013, in that he had the ability to either (a) pay more towards his court-ordered obligations during such time period; or (b) take reasonable measures to enable him to pay more towards his court-ordered obligations during such time period, yet deliberately did not do so.

19. This is so based on the following circumstances that existed or occurred during such time period;

a. Defendant/Husband received $9,491.30 in gross monthly income from the U.S. Army, $1,965.00 of which comprised a housing allotment.

b. The U.S. Army automatically withheld such allotment from Defendant/Husband's gross monthly income to cover housing for himself, his current wife, and their four (4) minor children.

c. Defendant/Husband's net monthly income totaled $5,352.76 after deducting the following from his gross monthly income: (i) non-discretionary withholdings for federal income taxes ($1,110.88), social security taxes ($451.59), Medicare taxes ($105.61), state taxes ($440.00), and the aforementioned housing allotment ($1,965.00); and (ii) discretionary withholdings for life insurance ($27.00) and dental insurance ($6.50).

d. Defendant/Husband paid less than $5,352.76 per month to Plaintiff/Wife in February ($1,748.20 less), March ($853.12 less), April ($267.00 less), June ($793.34 less), and July ($793.32 less).

e. Defendant/Husband and his current wife paid roughly $600.00 per month to service debt owed to his

parents for a beach house in North Carolina, which his current wife and their children visit no more than three times per year.

f. Defendant/Husband and his current wife did not discuss the possibility of selling the beach house to generate income and reduce expenses in an effort to meet his court-ordered obligations.

g. Defendant/Husband received a federal income tax refund of $8,903.00 for tax year 2012, all of which was attributable to his income.

h. Defendant/Husband remitted less than one-half of such refund to Plaintiff/Wife because, according to him, his current wife was entitled to one-half of such refund notwithstanding that the entire refund was attributable to his income.

i. Defendant/Husband could have reduced his federal income tax withholdings by approximately $740.00 per month given the size of the refund for tax year 2012 ($8,903.00 ÷ 12 months = $741.91), but he did not do so.

20. As of December 2, 2013, Defendant/Husband's gross monthly income from the U.S. Army was the same as that recited above.

21. As of December 2, 2013, Defendant/Husband and his current wife were still paying approximately $600.00 per month to service debt owed to his parents for the North Carolina beach house.

22. Defendant/Husband reduced his current family's net monthly income by approximately $600.00 per month by participating in the decision to purchase the beach house and service the debt related thereto.

23. Paying $600.00 per month to service the debt on the beach house from February 2013 through July 2013 amounts to $3,600.00 ($600.00 x 6 months = $3,600.00). If such payments had instead been applied to Defendant/Husband's total monthly obligations under the February 2013 Order for such time period, his arrearage concerning such obligations would be $70.80, rather than $3,670.80.

> 24. Defendant/Husband's failure to (a) consider the possibility of having a discussion with his current wife regarding selling the beach house; (b) engage in such a discussion; and (c) state anything other than he could not get his current wife to agree to sell the beach house, evinces his stubborn resistance towards his court-ordered payment obligations.
>
> 25. For present purposes only, Defendant/Husband has the ability to free-up at least $300.00 more per month by selling the beach house.
>
> 26. Defendant/Husband can free-up as much as $740.00 more per month by downwardly adjusting the amount of federal income taxes being withheld from his gross monthly income.
>
> 27. For present purposes only, Defendant/Husband has the ability to free-up at least $600.00 more per month by downwardly adjusting the amount of federal income taxes being withheld from his gross monthly income.
>
> 28. In addition to the above, Defendant/Husband has demonstrated his disregard for his familial and legal obligations relating to his prior marriage to Plaintiff/Wife by (a) remarrying as quickly as he did; and (b) growing his family with his current wife.

The Contempt Order decrees in pertinent part:

> 4. Defendant/Husband is sentenced to imprisonment for as long as the civil contempt continues, with such sentence being suspended upon his compliance with the following purge conditions:
>
> > a. Defendant/Husband shall immediately begin paying at least $900.00 more per month to Plaintiff/Wife over and above his total monthly obligations due under the February 2013 Order, and
> >
> > b. Defendant/Husband's efforts in this regard must include, at the very least, downwardly adjusting the federal income taxes being withheld from his gross monthly income.

> 5. This Court shall conduct a review hearing at 8:30 a.m. on Wednesday, January 22, 2014, to assess Defendant/Husband's compliance with these purge conditions, including any and all efforts he has made to free-up the $900.00 in additional funds.

The trial court also awarded plaintiff attorneys' fees arising from her contempt motions but did not determine the amount.

In the Order on Purge Condition Noncompliance, which was also entered on 27 May 2014, the trial court further decreed:

> 1. This Court hereby activates the sentence of imprisonment for Defendant/Husband's continuing civil contempt of the February 2013 Order for the time period February 2013 through July 2013.
>
> 2. Defendant/Husband shall be released from such imprisonment when he remits $5,639.70 for the benefit of Plaintiff/Wife, and such remittance shall include the $1,405.90 check if Plaintiff/Wife receives it.
>
> 3. From the point of remittance forward, Defendant/Husband's civil contempt shall continue unless he makes payments consistent with the February 2013 Order and the purge conditions set by this Court.
>
> 4. The amount of attorneys' fees to be awarded Plaintiff/Wife is deferred for future determination.
>
> 5. This Court retains jurisdiction over this cause for such other orders as may become appropriate.

Defendant timely filed notice of appeal from the Contempt Order and the Order on Purge Condition Noncompliance, both entered on 27 May 2014.[9]

II. Appellate Jurisdiction

[1] Although the trial court's orders are interlocutory, defendant contends that the orders are immediately appealable because they affect a substantial right. "The appeal of any contempt order . . . affects a

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9. Perhaps due to the delay in entry of the two orders and the fact that they were entered on the same day, the two orders have interrelated provisions which require us to consider both of them to understand each one individually, although we will address the issues raised as to each order independently to the extent possible.

substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002). Accordingly, we hold that this appeal is properly before us.

III. Discussion

Defendant argues that the trial court erred in (1) concluding that he has the ability to either comply, or take reasonable measures that enable him to comply, with the February 2013 Order; (2) concluding that he has the ability to comply with the purge conditions established in the Contempt Order; (3) establishing impermissibly vague purge conditions; (4) reviewing his compliance with the purge conditions before entering the Contempt Order that set forth those purge conditions; and (5) awarding plaintiff attorneys' fees arising from her contempt motions.

A. Standard of Review

We review orders for contempt to determine if the findings of fact support the conclusions of law: "The standard of review we follow in a contempt proceeding is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003) (quotation marks omitted).

B. Contempt Order

"This will be a slightly unusual contempt order[.]"[10]

[2] Defendant first argues that the trial court erred by concluding that he has the ability to either comply with the February 2013 Order or take reasonable measures to enable him to comply, even based upon the trial court's actual findings as to his income, expenses, and assets. This is not so much a legal argument as a mathematical one. The findings of fact make defendant's inability to fully comply quite clear.

N.C. Gen. Stat. § 5A-21(a) provides:

> Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;

10. This was the trial court's description of the Contempt Order when it was announced.

> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is *able to comply* with the order or is able to *take reasonable measures* that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2013) (emphasis added). "For civil contempt to be applicable, the defendant . . . must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order." *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E.2d 786, 787 (1980). "The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order." *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999).

Defendant challenges the following conclusions of law in its Contempt Order:

> 7. Defendant/Husband willfully failed to comply with the February 2013 Order from February 2013 through July 2013, in that he had the ability to either (a) *pay more* towards his court-ordered obligations during such time period; or (b) take reasonable measures to enable him to *pay more* towards his court-ordered obligations during such time period, yet deliberately did not do so.
>
> 8. Defendant/Husband is in continuing civil contempt of the February 2013 Order.
>
> 9. Defendant/Husband has the present ability to comply, or otherwise take reasonable measures to enable him to comply, with the purge conditions decreed herein.

(Emphasis added.)

Thus, the trial court did not conclude that defendant had the ability to pay *all* of his obligations under the February 2013 Order, only that he could have paid "more" or that he could have taken reasonable measures to enable him to pay "more[.]"

i. Ability to Comply with February 2013 Order

According to the trial court's findings of fact in the Contempt Order and the February 2013 Order establishing the obligations, defendant's income and expenses were as follows:

Defendant's gross income	$9,491.30	Contempt Order, Finding of Fact 19(a)
Housing allotment deduction	($1,965.00)	Contempt Order, Finding of Fact 19(a)
Non-discretionary withholding for federal income taxes	($1,110.88)	Contempt Order, Finding of Fact 19(c)
Social security taxes	($451.59)	Contempt Order, Finding of Fact 19(c)
Medicare taxes	($105.61)	Contempt Order, Finding of Fact 19(c)
State taxes	($440.00)	Contempt Order, Finding of Fact 19(c)
Discretionary withholding for life insurance	($27.00)	Contempt Order, Finding of Fact 19(c)
Discretionary withholding for dental insurance	($6.50)	Contempt Order, Finding of Fact 19(c)
Defendant's shared expenses	($900.00)	February 2013 Order, Finding of Fact 138
Defendant's individual expenses	($1,149.47)	February 2013 Order, Finding of Fact 138
Defendant's financial responsibility for children with second wife	($1,046.88)	February 2013 Order, Finding of Fact 129
Defendant's disposable income	$2,288.37	

Thus, defendant was left with a disposable income of $2,288.37. He was under order to pay the following amounts each month during the time period of February 2013 until July 2013:

Credit card payments (per equitable distribution)	$1,250.00	February 2013 Order, Decretal Provision 4
Child support	$1,880.48	February 2013 Order, Decretal Provision 11
Alimony	$2,500.00	February 2013 Order, Decretal Provision 17

Attorneys' fees	$250.00	February 2013 Order, Decretal Provision 23
Total monthly obligation	$5,880.48	

Based upon the amounts as determined by the trial court, defendant would have a shortfall of $3,592.11 each month. On top of that shortfall, defendant was also required to pay a lump sum of $9,100.00 in alimony arrears by 5 April 2013. We note that in the February 2013 Order, the trial court had also ordered defendant to pay a lump sum of $1,000.00 in attorneys' fees by 5 April 2013, but the trial court did not mention this amount in its Contempt Order. Accordingly, the trial court's findings of fact demonstrated that defendant lacked the ability to comply with the February 2013 Order.

We also note that this is not a case in which a defendant simply failed to pay anything at all. The trial court found that during the time period addressed by the order's findings, February 2013 to July 2013, defendant should have paid ongoing obligations totaling $35,282.88, but he paid $31,612.08, or only $3,670.80 less than owed for the ongoing obligations. His total arrears increased to $12,770.80 because of the preexisting $9,100.00 alimony arrearage.

ii. Taking Reasonable Measures

Defendant next argues that the trial court erred in concluding that he could have taken reasonable measures to comply with the February 2013 Order by "freeing up" $900.00 more per month to pay to plaintiff. The trial court found that defendant could "free up" $300.00 per month by selling his and his second wife's beach house and $600.00 per month by" downwardly adjusting the amount of federal income taxes being withheld from his gross monthly income." But even assuming *arguendo* that defendant could "free up" $900.00 per month, he still could not have complied with the February 2013 Order because, as discussed above, his obligations exceeded his disposable income by $3,592.11 per month, not including the $9,100.00 alimony arrearage.

Defendant's counsel pointed out the mathematical impossibility for defendant to "free up" enough funds to pay his obligations during argument before the trial court:

> [Defendant's counsel]: And what—where I'm going with this is there is no way to free up enough cash flow to pay everything. That even if he had zero taxes taken out, his gross income is not enough to meet—meet the obligations.

> So there is nothing he can do to increase cash flow to satisfy this.
>
> THE COURT: I've already found there is, haven't I?
>
> [Plaintiff's counsel]: Yes.
>
> [Defendant's counsel]: Well, Your Honor, he is—he is under obligation to pay eighty-two thousand dollars to her in 2013. His gross income in 2013 was eighty-two thousand dollars. His gross income. So no matter how he adjusts his taxes, the—he can't free up the cash flow. And—
>
> THE COURT: Then you're going to have to appeal my prior decision.

Of course, defendant has not yet had the opportunity to appeal the "prior decision"; that order is still not final and appealable thanks to the trial court's order granting plaintiff's motion for a new trial regarding defendant's military retirement benefits. The merits of the February 2013 Order are not before us. But even if that "prior decision" is ultimately modified by the trial court or reversed or vacated on a future appeal, defendant has already been held in contempt and ordered incarcerated for his failure to comply with it, so we must address his ability to pay.

In the Contempt Order, as to defendant's ability to pay "more" than he had been paying, the trial court faulted defendant for failing to force his second wife to sell their beach house despite the fact that defendant testified that they owned the house as tenants by the entirety. Under N.C. Gen. Stat. § 39-13.6(a), "[n]either spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse." N.C. Gen. Stat. § 39-13.6(a) (2013). The trial court seemed to recognize this rule:

> THE COURT: . . . Is there a way—do you believe, folks, there is a way for me to order him to take some unilateral action related to the beachfront property; whether his wife cooperates or not?
>
> [Defendant's counsel]: You're saying whether you could order him to sell it whether she wants to or not?
>
> THE COURT: Well, no, I'm not saying—I don't believe I can order that.

Additionally, the Contempt Order also notes that there is a mortgage on the property, so even if it were sold, there is no evidence or finding

of the amount of equity in the house or that defendant would receive net proceeds from the sale. It appears that a sale would only eliminate the monthly mortgage payment and would not provide a source of additional funds to pay off arrears.

Also in regard to defendant's failure to be able to pay "more" than he had been paying, even if he could not pay all of his obligations, the trial court found that he showed "disregard for his familial and legal obligations" by "remarrying as quickly as he did" and "growing his family with his current wife[,]" or having additional children. But he had remarried and already had three additional children at the time of entry of the February 2013 Order. His support obligation for three additional children was specifically found in that order; he and his second wife had only their fourth child after entry of the February 2013 Order. Plaintiff and the trial court may believe that defendant would have been wise not to remarry and that he and his second wife should not have had any children, and certainly not four, but North Carolina's law does not impose limitations on an individual's right to marry or have children. We cannot discern how defendant's exercise of these fundamental rights to marry and procreate, in this particular situation, demonstrates a "disregard for his familial and legal obligations[.]"

We further note that there is no question in this case of intentional suppression of earnings or hiding income. Defendant is employed by the United States Army, and his income information is clear and undisputed. Accordingly, we hold that the trial court erred in its conclusion that defendant could have taken "reasonable measures" to comply with the February 2013 Order, based upon the trial court's own findings as to defendant's income and expenses and the manner in which the trial court found that he could "free up" additional funds.

iii. Partial Compliance

Plaintiff responds that the trial court need not find that defendant has the ability to pay the entire amount of the obligations to hold him in contempt, but it is sufficient that the trial court find that he had the ability to pay at least a portion of the sums owed and that he willfully failed to pay as much as he could have. We agree with plaintiff that an interpretation of the cases which would always require a finding of full ability to pay would "encourage parties to completely shirk their court-ordered obligations if they lack the ability to fully comply with them." Yet the cases do not go quite so far as plaintiff suggests. An obligor may be held in contempt for failure to pay less than he could have paid, even if not the entire obligation, but the trial court must find that he has the ability to fully comply with any purge conditions imposed upon him.

The seminal case on this issue from our Supreme Court is *Green v. Green*, a civil contempt proceeding for nonpayment of alimony, in which the Court held that the trial court's findings of fact were insufficient to support its order that the defendant be imprisoned until he paid the amounts owed in full:

> The judge who heard the proceedings in contempt recited the findings of fact made by the judge who granted the order allowing alimony, and added two others, in words as follows: "I further find that said defendant could have paid at least a portion of said money, as provided in said order, and that he has willfully and contemptuously failed to do so. I further find that he is a healthy and able-bodied man for his age, being now about fifty-nine years old." So, notwithstanding the finding of the fact that the defendant was able to pay only a part of the amount ordered to be paid, he was to be committed to the common jail until he should comply with the order making the allowance in the nature of alimony, that is, until he should pay the whole amount. Clearly, the judgment can not be supported on that finding of fact.

Green v. Green, 130 N.C. 578, 578-79, 41 S.E. 784, 785 (1902).

Although the Court in *Green* did not state this explicitly, it seems that the defendant paid nothing toward his alimony obligation and that the trial court found that he could have paid "at least a portion" of the amounts owed. *Id.*, 41 S.E. at 785. Indeed, this sort of vague finding that an obligor could have paid "more" could be made in almost any case where the obligor has paid nothing at all, since most obligors probably have the ability to pay $1.00 per month, for example. Presumably, the defendant in *Green* had the ability to pay some significant amount but less than the full amount. The problem with the trial court's order in *Green* was that it went too far with the remedy—despite a finding that the defendant had the ability to pay only a portion of the sums owed, he was imprisoned "until he should pay the whole amount." *Id.* at 579, 41 S.E. at 785. In addition, we can also infer from this opinion that the only source of the defendant's funds was his labor and that he was "healthy and able-bodied[,]" thus able to work to earn funds to pay the plaintiff, although he could not work while in jail. *Id.* at 578-79, 41 S.E. at 785. He apparently did not have investments or other sources of funds upon which to draw. *See id.*, 41 S.E. at 785. Based upon the trial court's findings, the order showed that the defendant had the ability to earn enough income to pay only part of his alimony before he went to jail; while in

jail, he would have no ability to pay anything although he was ordered to pay in full. *Id.*, 41 S.E. at 785. For these reasons, the Court found error. *Id.*, 41 S.E. at 785.

Green has been followed for over 100 years in both alimony cases and child support cases. *See, e.g.*, *Brower v. Brower*, 70 N.C. App. 131, 134, 318 S.E.2d 542, 544 (1984) ("Though the order appealed from requires defendant's imprisonment for continuing civil contempt until he pays $10,590, it is supported only by a finding that he had the present ability to pay a portion of that sum. A similar order was struck down by our Supreme Court in *Green v. Green*, 130 N.C. 578, 41 S.E. 784 (1902). Since the same law still abides, the order in this case must also be vacated."); *Mauney v. Mauney*, 268 N.C. 254, 257-58, 150 S.E.2d 391, 394 (1966); *Clark v. Gragg*, 171 N.C. App. 120, 125-26, 614 S.E.2d 356, 360 (2005); *Bishop v. Bishop*, 90 N.C. App. 499, 502, 506, 369 S.E.2d 106, 108, 110 (1988). These cases are all very fact-specific.

Considering the facts before us, this case is very much like *Green*. The trial court did not find that defendant had the ability to pay his obligations in full, but only in part, yet still ordered him to (1) pay those obligations in full; and (2) pay an additional $900.00 per month "over and above" those obligations.[11] We are not addressing a case in which a trial court has held an obligor in contempt despite a finding that he does not have the ability to pay in full although he does have the ability to pay *more* than he paid, and where the trial court has set purge conditions which the obligor has the ability to pay but is less than payment in full. Here, the trial court held defendant in contempt for failure to do something he did not have the ability to do, based upon the trial court's own findings, and then ordered him to pay even more as part of his purge conditions. In addition, as discussed above, defendant had paid a substantial portion of his obligations under the February 2013 Order. Accordingly, we hold that the trial court erred in holding defendant in civil contempt and thus vacate its Contempt Order.

C. Order on Purge Condition Noncompliance

[3] Defendant next challenges the Order on Purge Condition Noncompliance, because he did not have the ability to comply with the purge conditions set forth in the Contempt Order and the purge

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11. The trial court established the first purge condition: "[Defendant] shall immediately begin paying at least $900.00 more per month to [plaintiff] over and above his total monthly obligations due under the February 2013 Order[.]"

conditions were impermissibly vague. Since the Order on Purge Condition Noncompliance and the Contempt Order were entered on the same date and are interrelated orders, we believe it is necessary to address the issues raised by the Order on Purge Condition Noncompliance as well, despite the fact that we are vacating the Contempt Order.

In the Contempt Order, the trial court established two purge conditions:

> a. Defendant/Husband shall immediately begin paying at least $900.00 more per month to Plaintiff/Wife *over and above* his total monthly obligations due under the February 2013 Order, and
>
> b. Defendant/Husband's efforts in this regard must include, at the very least, downwardly adjusting the federal income taxes being withheld from his gross monthly income.

(Emphasis added.) In the Order on Purge Condition Noncompliance, the trial court concluded that defendant had failed to comply with both purge conditions.

In establishing purge conditions, the trial court must satisfy two requirements. First, the trial court must make findings of fact as to defendant's present ability to comply with the purge conditions. In *McMiller v. McMiller*, this Court explained this requirement:

> In the instant case, the trial judge found as fact only that defendant "has had the ability to pay as ordered." This finding justifies a conclusion of law that defendant's violation of the support order was willful[;] however, standing alone, this finding of fact does not support the conclusion of law that defendant has the present ability to purge himself of the contempt by paying the arrearages.
>
> To justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages. The majority of cases have held that to satisfy the "present ability" test defendant must possess some amount of cash, or asset readily converted to cash. For example, in [*Teachey*, 46 N.C. App. 332, 264 S.E.2d 786], defendant could pay $4825 in arrearages either by selling or

> mortgaging mountain property in Virginia. *Accord Jones v. Jones*, 62 N.C. App. 748, 303 S.E.2d 583 (1983) (defendant could not pay $6540 in arrearages because land he owned was already heavily mortgaged).
>
> In the case at bar, there was no finding relating to defendant's ability to come up with $4320.50 in readily available cash. The only finding by the trial court related to defendant's past ability to pay the child support payments. No finding was made as to [the defendant's] present ability to pay the arrearages necessary to purge himself from contempt.

McMiller v. McMiller, 77 N.C. App. 808, 809-10, 336 S.E.2d 134, 135-36 (1985) (citations omitted).

Second, the trial court must clearly specify what defendant must do to purge himself of contempt and exactly when he must do it. *See* N.C. Gen. Stat. § 5A-22(a) (2013) ("The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt."). In *Wellons v. White*, this Court explained this requirement:

> Furthermore, a contempt order "must specify how the person may purge himself of the contempt." N.C. Gen. Stat. § 5A-22(a) (2011); *see also Cox*, 133 N.C. App. at 226, 515 S.E.2d at 65 (holding that a contempt order must "clearly specify what the defendant can and cannot do"); [*Scott v. Scott*, 157 N.C. App. 382, 394, 579 S.E.2d 431, 439 (2003)] (holding that requirements to purge civil contempt may not be "impermissibly vague").

Wellons v. White, ___ N.C. App. ___, ___, 748 S.E.2d 709, 722 (2013). A trial court may not hold a person in civil contempt indefinitely. *Id.* at ___, 748 S.E.2d at 722-23.

i. Ability to Comply with Purge Conditions

Regarding the first purge condition, the trial court found that defendant had the ability to "free up" some funds to pay "more" and that he should thus pay $900.00 per month "over and above his total monthly obligations due under the February 2013 Order" for some indefinite period of time. There was some confusion in the record regarding whether defendant was to pay $900.00 more than he had been paying (but still less than the entire obligation) or whether he was to pay $900.00 more than the obligations as set by the February 2013 Order.

When rendering the Contempt Order in December 2013, the trial court stated that he would order defendant to pay $900.00 *more than he had been paying* (which was less than the full obligation):

> Now, I am ordering that [defendant] begin to pay at least—I am not making a finding that this is the maximum amount he can pay; *I'm finding that I can determine from this evidence that he has the ability to pay at least this much more than he has been paying.* [Plaintiff's counsel], stop me if you—if you think there's another way to word this. *I guess the question is what he's been paying if I'm going to do it this way.* But there is at least six hundred dollars plus six hundred—plus three hundred; at least nine hundred dollars more available for him to pay per month. And I expect him to start paying that immediately, and I expect that when he reports back either by his own presence or through counsel to demonstrate what steps he has made to free up that nine hundred dollars per month. At the very least that would be an adjustment in his withholding.

(Emphasis added.)

But the Contempt Order entered on 27 May 2014 does not require defendant to pay $900.00 more than he had been paying, as the trial court stated above, and we are bound by the order as it was entered. *See Oltmanns v. Oltmanns*, ___ N.C. App. ___, ___, 773 S.E.2d 347, 351 (2015) ("[T]he written entry of judgment is the controlling event for purposes of appellate review[.]"); *In re Estate of Walker*, 113 N.C. App. 419, 420, 438 S.E.2d 426, 427 (1994) ("[The] announcement of judgment in open court merely constitutes the rendition of judgment, not its entry. . . . Entry of judgment by the trial court is the event which vests jurisdiction in this Court, and the judgment is not complete for the purpose of appeal until its entry. Since entry of judgment is jurisdictional, this Court has no authority to hear an appeal where there has been no entry of judgment.") (citation omitted). The Contempt Order instead decrees that defendant "shall immediately begin paying at least $900.00 more per month to [plaintiff] *over and above* his total monthly obligations due under the February 2013 Order[.]" (Emphasis added.) This would be a total of $6,780.48 per month—despite the trial court's findings, as tabulated above, that show that defendant did not have the ability to pay the full amounts owed under the February 2013 Order.

In addition, to enter an order that defendant pay $900.00 *more than he had been paying*, the order would have to make a finding as to a

particular set amount that he had been paying.[12] The findings of fact show that he paid different amounts in different months, ranging from $3,604.56 to $9,303.26 during the relevant time period. The order would be too indefinite to be enforceable if it required him to pay $900.00 more than an unspecified number. *See Morrow v. Morrow*, 94 N.C. App. 187, 189, 379 S.E.2d 705, 706 (1989) ("A judgment must be complete and certain, indicating with reasonable clearness the decision of the court, so that such judgment may be enforced. If the parties are unable to ascertain the extent of their rights and obligations, a judgment may be rendered void for uncertainty.") (citation omitted), *cert. denied*, 326 N.C. 365, 389 S.E.2d 816 (1990). But the Contempt Order as entered does specify a number, which is the total obligation due under the February 2013 Order, plus $900.00 per month "over and above" that amount. Based upon the trial court's findings of fact and conclusions of law, defendant did not have the ability to pay the entire monthly obligation owed under the February 2013 Order, much less $900.00 in addition to that amount.

ii. Impermissibly Vague Purge Conditions

The Contempt Order also fails to set a date upon which the monthly payment of $900.00 "over and above" the February 2013 Order's obligations would end. Plaintiff argues that the absence of an ending date for the monthly payment of $900.00 "over and above" the February 2013 Order's obligations indicates that this additional payment is simply a monthly payment towards the arrears of $12,770.80, which would end on a definite date when the arrears were paid in full. Plaintiff contends that the $900.00 monthly payments would satisfy the first purge condition in "just over 14 months" since "$12,770.80 delinquency ÷ $900.00 additional payment = 14.189 months)." This is a reasonable argument, but it might be more convincing if the amount paid each month would divide evenly by a number of months. By plaintiff's logic, the order implies that defendant must pay $900.00 for fourteen months and 18.98 percent of that amount in the fifteenth month, or $170.80. Even if this was the trial court's intent, the order is impermissibly vague as written. *See id.*, 379 S.E.2d at 706. Accordingly, we hold that the trial court erred in failing to establish a definite date by which defendant could have purged himself of the contempt. *See Wellons*, ___ N.C. App. at ___, 748 S.E.2d at 722 ("We will not allow the district court to hold [the defendant] indefinitely in contempt."). We also note that in the Order on Purge Condition Noncompliance, the trial court repeated this error when it ordered that

12. The trial court noted the need to determine this number during rendition of the ruling: "I guess the question is what he's been paying if I'm going to do it this way."

defendant's "civil contempt shall continue unless he makes payments consistent with the February 2013 Order and the purge conditions set by this Court."

Regarding the second purge condition, the trial court found that defendant could "free up" $600.00 per month by "downwardly adjusting the amount of federal income taxes being withheld from his gross monthly income." The trial court's second purge condition was: "[Defendant's] efforts in this regard must include, at the very least, downwardly adjusting the federal income taxes being withheld from his gross monthly income." In the Order on Purge Condition Noncompliance, the trial court found that defendant had in fact "downwardly adjusted the federal income taxes being withheld from his gross monthly income." Nevertheless, the trial court found that defendant had failed to satisfy the second purge condition because he "did not consult any tax professional to ascertain whether he downwardly adjusted such income tax withholdings *to the greatest extent possible*." (Emphasis added.)

The second purge condition to "at the very least, downwardly adjust[] the federal income taxes being withheld from his gross monthly income" would seem to be sufficiently definite as written, but the Order on Purge Condition Noncompliance goes beyond the condition as stated and adds additional requirements. The Contempt Order, both as rendered in open court and as written and entered, did not direct defendant to consult a tax professional or to lower his withholdings "to the greatest extent possible." Theoretically, "to the greatest extent possible" could mean that defendant would claim exemptions to eliminate *all* federal tax withholdings, but then he would likely owe taxes and penalties for underpayment upon filing his income tax returns. Because defendant "downwardly adjust[ed] the federal income taxes being withheld from his gross monthly income[,]" in accordance with the Contempt Order's second purge condition, the trial court's finding of fact on this issue does not support its conclusion of law that defendant had failed to satisfy the second purge condition. Accordingly, we vacate the Order on Purge Condition Noncompliance.

D. Premature Compliance Hearing

[4] Although we are vacating the Contempt Order and the Order on Purge Condition Noncompliance as discussed above, we also address defendant's argument that the trial court erred in conducting a compliance hearing on 22 January 2014, four months *before* the entry of the Contempt Order for which compliance was being determined. Both the Contempt Order and the Order on Purge Condition Noncompliance

were entered on 27 May 2014, despite the fact that the hearing regarding contempt occurred on 2 December 2013 and the hearing regarding non-compliance with purge conditions occurred on 22 January 2014. In other words, the order setting forth defendant's purge conditions and obligations was not in writing and entered until nearly six months after he was to begin complying with it. Defendant's counsel specifically objected to the hearing on compliance for this reason, as noted by the trial court's Finding of Fact 4: "Defendant/Husband's counsel objected to this Court conducting the compliance hearing on January 22, 2014, given that an Order had not yet been entered as a result of the December 2, 2013 contempt hearing. This Court overruled such objection." We conclude that defendant's objection to holding the compliance hearing prior to entry of the Contempt Order was correct.

Our courts have stated this rule many times, but perhaps it bears repeating: An order is entered "when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2013); *see also Watson v. Price*, 211 N.C. App. 369, 370, 712 S.E.2d 154, 155, *disc. review denied*, 365 N.C. 356, 718 S.E.2d 398 (2011). N.C. Gen. Stat. § 5A-23(e) specifically requires entry of a written order for civil contempt. N.C. Gen. Stat. § 5A-23(e) (2013) ("At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a). If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.") An order cannot be modified or enforced or appealed before it is entered. *See Carland v. Branch*, 164 N.C. App. 403, 405, 595 S.E.2d 742, 744 (2004) ("Since there was no order 'entered' when defendant filed her motion to modify, there was nothing to modify."); *Watson*, 211 N.C. App. at 371, 712 S.E.2d at 155 ("[A] judgment that has merely been rendered, but which has not been entered, is not enforceable until entry."); *Estate of Walker*, 113 N.C. App. at 420, 438 S.E.2d at 427 ("Since entry of judgment is jurisdictional, this Court has no authority to hear an appeal where there has been no entry of judgment."). The announcement of an order in court merely constitutes rendition of the order, not its entry. *Estate of Walker*, 113 N.C. App. at 420, 438 S.E.2d at 427. The final order as written, signed, and filed—the order as entered—is the controlling order, not the rendition. *See Oltmanns*, ___ N.C. App. at ___, 773 S.E.2d at 351 ("[T]he written entry of judgment is the controlling event for purposes of appellate review[.]").

We fully understand the challenges faced by trial courts and counsel in getting written orders prepared, signed, and entered quickly, but particularly in the context of civil contempt, where the statute requires a written order and a person may be imprisoned for failure to comply, it is imperative that an order be entered before an obligor is held in contempt of that order. *See* N.C. Gen. Stat. § 5A-23(e). This is especially important in a case like this, since defendant's purge conditions as announced at the 2 December 2013 hearing were not at all clear or definite, as highlighted by the quote from the trial court at the beginning of our discussion of the Contempt Order. In fact, the trial court directed counsel:

> So you all figure that out, and if they put some idea to you about what steps he can take to free up money from that beachfront property, he'd best come in with his explanation about why he couldn't do it or shouldn't do it. Make sense? This will be a slightly unusual contempt order, but in honor of a non-family law attorney joining us today, I guess we'll see what happens.

Accordingly, should the trial court enter a contempt order on remand, it should sign and file a written order establishing clear, specific purge conditions and addressing defendant's ability to comply with those purge conditions.[13]

IV. Conclusion

For the foregoing reasons, we vacate the Contempt Order and the Order on Purge Condition Noncompliance and remand the case to the trial court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges McCULLOUGH and INMAN concur.

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13. Because we are vacating the Contempt Order and the Order on Purge Condition Noncompliance and remanding this case, we do not address the issue of whether the trial court erred in awarding plaintiff attorneys' fees arising from her contempt motions, but any ruling upon attorneys' fees contained in those orders is also vacated since it is contained in the vacated orders.

STATE v. COLLINS

[245 N.C. App. 288 (2016)]

STATE OF NORTH CAROLINA, Plaintiff
v.
SHAMELE COLLINS, Defendant

No. COA15-540

Filed 2 February 2016

1. Search and Seizure—strip search—cocaine—white powder on floor—reasonable suspicion

The trial court did not err by denying defendant's suppression motion where he was arrested on cocaine charges after a strip search in the house where he was arrested. The presence of a white powder where defendant had been standing gave rise to a reasonable suspicion that defendant was concealing narcotics under his clothes, and the search was conducted in a private residence and in a separate room from the others who were in the apartment.

2. Constitutional Law—right to be present—sentencing clarification

Defendant's right to be present during sentencing was violated where the original sentence was for a minimum sentence that did not correspond to the orally announced maximum sentence, requiring the trial court to identify the appropriate maximum or minimum sentence. Defendant was not present when the trial court made its decision and had no opportunity to argue for the imposition of the shorter sentence.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 8 September 2014 by Judge William Z. Wood in Forsyth County Superior Court. Heard in the Court of Appeals 20 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Robinson, Bradshaw & Hinson, P.A., by Andrew A. Kasper, for defendant-appellant.

ZACHARY, Judge.

Shamele Collins (defendant) appeals from judgment entered on his pleas of guilty to trafficking in cocaine, possession of cocaine with intent to sell or deliver, misdemeanor possession of marijuana, possession of drug paraphernalia, and resisting, delaying, or obstructing a law enforcement officer. Defendant reserved his right to appeal the trial court's denial of his motion to suppress evidence obtained at the time of his arrest. On appeal defendant argues that the trial court erred by denying his suppression motion, on the grounds that the evidence was obtained during an unlawful search that violated defendant's rights under the Fourth Amendment to the United States Constitution, and that the trial court violated defendant's right to be present during his sentencing. We find no error in the trial court's denial of defendant's suppression motion, but vacate the judgment and remand for resentencing.

I. Factual and Procedural Background

On 13 December 2012, defendant was arrested on charges of trafficking in cocaine by possession of more than 28 but less than 200 grams of cocaine, possession of cocaine with intent to sell and deliver, possession of cocaine within 1000 feet of an elementary school, maintaining a dwelling for the purpose of keeping and selling a controlled substance, misdemeanor possession of marijuana, possession of drug paraphernalia, and resisting an officer. On 16 December 2013, the Grand Jury of Forsyth County indicted defendant for trafficking in cocaine by possession of more than 28 but less than 200 grams of cocaine, possession of cocaine with intent to sell and deliver, misdemeanor possession of marijuana, possession of drug paraphernalia, and resisting an officer. On 29 August 2014, defendant filed a motion to suppress evidence obtained at the time of defendant's arrest, on the grounds that the evidence was acquired as the result of an unlawful search that violated his rights under the Fourth Amendment to the United States Constitution.

A hearing was conducted on defendant's suppression motion on 8 September 2014. Evidence elicited at the hearing tended to show the following: Winston-Salem Police Officer J.G. Gordon testified that on 13 December 2012 he was dispatched to an apartment on Franciscan Drive in Winston-Salem in order to assist the North Carolina Alcohol Law Enforcement Division (ALE) in serving a warrant on Jessica Farthing, who lived at the Franciscan Drive apartment. When Officer Gordon entered the apartment he smelled burned marijuana. Officer Gordon assisted the ALE officers by running a computer check of the names of those present in the apartment. Defendant initially told the officers that his name was "David Collins," but Officer Gordon was unable to find a

listing in the online database for a person named "David Collins" with biographical information that matched defendant's. ALE officers then found identification in the apartment with the name "Shamele Collins." Officer Gordon used an online photograph to confirm that defendant was actually Shamele Collins, and learned that the State of New York had an outstanding warrant for defendant's arrest and extradition on a narcotics charge.

Officer C. Honaker of the Austin, Texas, Police Department testified that on 13 December 2012 he was employed as a Winston-Salem Police Officer and had been dispatched to the Franciscan Drive apartment to aid in the arrest of Ms. Farthing. When Officer Honaker entered the apartment he noticed a "moderate to strong odor of burnt marijuana" inside. Officer Honaker and another law enforcement officer conducted a protective sweep of the apartment and found defendant and another man hiding upstairs. Officer Honaker placed defendant in handcuffs and conducted an external search of defendant's clothing and pockets, but did not find any contraband. Officer Honaker then escorted defendant downstairs and directed him to sit on the couch.

Based on the outstanding warrant for defendant's arrest, the odor of marijuana about defendant's person, and the fact that the defendant gave the officers a false name, Officer Honaker decided to conduct a "strip search" of defendant. Officer Honaker, assisted by Officer J.B. Gerald, moved defendant from the living room into the dining room in order to "secure his privacy" because "there were other people in the living room." Officer Honaker, Officer Gerald, and defendant were the only ones in the dining area. Officer Honaker informed defendant that he was going to conduct a strip search and removed defendant's handcuffs in the hopes that defendant would cooperate with the search. Defendant, however, refused to consent to the search. Defendant was wearing shoes and pants, but no shirt. When Officer Honaker attempted to remove the belt from defendant's pants, defendant struggled, preventing a search. Officer Honaker then lowered defendant to the ground and reattached the handcuffs. At that time, Officer Honaker observed a residue on the ground where defendant had been standing, which Officer Honaker described as a "small crystalline white, off-white rock substance" that appeared to be cocaine. Officer Honaker informed the trial court that he saw the white powder on the floor prior to removing any of defendant's clothing. After Officer Honaker noticed the white crystalline material, he "completed a strip search of [defendant's] person." When Officer Honaker lowered defendant's pants, he "noticed that [defendant's] butt cheeks were clenched," so Officer Honaker lowered defendant's boxers

and "saw a plastic baggie with white residue in it - the buttocks crack." Officer Gerald also observed "what appeared to be cocaine in [defendant's] buttocks area." Officer Honaker ultimately removed "several plastic baggies . . . two of which contained an off-white substance" and "a third baggie that contained a green vegetable-like substance consistent with marijuana" from between defendant's buttocks. After he conducted the search, Officer Honaker "realized there was also some [white powder] beneath where [defendant] was sitting on the sofa" as well as a trail of white material "coming down the stairs to the sofa where [defendant] was sitting." Defendant was arrested for offenses arising from his possession of drugs, for resisting an officer, and for the outstanding New York warrant.

At the close of the hearing, the trial court announced its ruling denying the defendant's suppression motion. Later that day, defendant entered pleas of guilty to the charged offenses, reserving his right to appeal the denial of his motion to suppress evidence. The trial court consolidated the convictions for purposes of sentencing and orally rendered a judgment sentencing defendant to thirty-five to forty-two months imprisonment. Defendant gave notice of appeal in open court. On 8 September 2014, the trial court entered a written judgment sentencing defendant to thirty-five to fifty-one months imprisonment. On 10 September 2014, the trial court entered an order memorializing its denial of defendant's suppression motion.

II. Standard of Review

Defendant first argues on appeal that the trial court erred by denying his motion to suppress evidence seized at the time of his arrest. The standard of review of a trial court's ruling on a defendant's suppression motion is well-established:

> The scope of appellate review of a trial court's order granting or denying a motion to suppress evidence "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." . . . If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal.

State v. Fowler, 220 N.C. App. 263, 266, 725 S.E.2d 624, 627 (2012) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982), and citing *State v. Barnard*, 184 N.C. App. 25, 28, 645 S.E.2d 780, 783 (2007),

aff'd, 362 N.C. 244, 658 S.E.2d 643 (2008)). "However, when, as here, the 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. Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citing *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal citation omitted)). In this case, defendant does not challenge the sufficiency of the evidence supporting the trial court's findings of fact, which are therefore conclusively established on appeal. The issue presented on appeal is whether the trial court's unchallenged findings of fact support its conclusion of law that "the search conducted [of defendant] was a reasonable lawful search and the defendant's rights under the 4th and 5th Amendments [to the Constitution] were not violated."

Defendant also argues that the trial court erred as a matter of law by entering a judgment that imposed a longer prison sentence than the trial court had announced when it orally rendered judgment in court. Questions of law are reviewed *de novo* by this Court. *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013) (citing *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Denial of Defendant's Suppression Motion

At the time of defendant's arrest, he was in possession of two bags of cocaine and a bag containing marijuana, all of which were seized by Officer Honaker. These items were found between defendant's buttocks when defendant's pants were removed and his underwear was removed or pulled down. On appeal, defendant argues that evidence of the drugs found on his person should have been suppressed because the drugs were discovered during an unlawful "strip search" in violation of defendant's rights under the Fourth Amendment to the United States Constitution. We disagree.

A. Legal Principles

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. " '[T]he Fourth Amendment precludes only those intrusions into privacy of the body which are unreasonable under the circumstances.' " *State v. Norman*, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990) (quoting *State v. Cobb*, 295 N.C. 1, 20, 243 S.E.2d 759, 770 (1978) (internal citation omitted)).

> Generally, warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment of the United States Constitution. However, a well-recognized exception to the warrant requirement is a search incident to a lawful arrest. Under this exception, if the search is incident to a lawful arrest, an officer may "conduct a warrantless search of the arrestee's person and the area within the arrestee's immediate control."

State v. Logner, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001) (quoting *State v. Thomas*, 81 N.C. App. 200, 210, 343 S.E.2d 588, 594 (1986) (other citations omitted)). " 'A search is considered incident to arrest even if conducted prior to formal arrest if probable cause to arrest exists prior to the search and the evidence seized is not necessary to establish that probable cause.' " *State v. Robinson*, 221 N.C. App. 267, 276, 727 S.E.2d 712, 719 (2012) (quoting *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195 (1991) (internal citations omitted)). Officer Honaker's search of defendant is properly classified as a search incident to arrest. There was an outstanding warrant for defendant's arrest. In addition, defendant was charged with, and ultimately pleaded guilty to, the offense of resisting, delaying or obstructing a law enforcement officer, based on giving a false name to the officers.

" '[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal liberty.' " *State v. Peck*, 305 N.C. 734, 740, 291 S.E.2d 637, 641 (1982) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968)). Moreover, the Court has advised that:

> [t]he test for determining the reasonableness of the search under the Fourth and Fourteenth Amendments to the United States Constitution "is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

State v. Scott, 343 N.C. 313, 327, 471 S.E.2d 605, 613 (1996) (quoting *State v. Primes*, 314 N.C. 202, 211, 333 S.E.2d 278, 283 (1985) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481, 99 S. Ct. 1861 (1979)). On appeal, defendant cites a number of federal cases. It is axiomatic that:

> "North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court." Even so, despite the fact that they are "not binding on North Carolina's courts, the holdings and underlying rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute."

In re Fifth Third Bank, 216 N.C. App. 482, 488-89, 716 S.E.2d 850, 855 (2011) (quoting *Enoch v. Inman*, 164 N.C. App. 415, 420, 596 S.E.2d 361, 365 (2004), and *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 488, n.4, 687 S.E.2d 690, 695 n.4 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010)), *cert. denied*, 366 N.C. 231, 731 S.E.2d 687 (2012).

> In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court[,] . . . [and] decisions of the North Carolina Supreme Court construing federal constitutional . . . provisions, and we are bound by those interpretations. We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court.

Johnston v. State, __ N.C. App. __, __, 735 S.E.2d 859, 865 (2012) (citing *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749 (2006), and *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)), *aff'd*, 367 N.C. 164, 749 S.E.2d 278 (2013).

C. Discussion

[1] As discussed above, the issue for our determination is whether the trial court's findings of fact support its conclusion that the search of defendant's person did not violate defendant's Fourth Amendment right to be free of unreasonable searches. In its order, the trial court made the following findings of fact:

> 1. On December 13, 2012, Winston Salem Police Department's Street Crimes Unit was asked to assist Alcohol Law Enforcement (ALE) in serving an Outstanding Warrant for a Jessica Farthing[.]

. . .

5. [Winston-Salem Police] Officer Honaker had been advised that Farthing's boyfriend may also be in the residence and might have outstanding warrants as well.

6. Officers Honaker, Gerald, and Gordon smelled an odor of burned marijuana ranging from moderate to strong inside the residence.

. . .

8. There were two subjects located upstairs[:] the defendant and another male named [Steven] Duren.

9. [Officer] Honaker thought the defendant . . . [was] hiding.

10. Officer Honaker smelled marijuana on the defendant's person. He patted down and searched the defendant upstairs, including going into his pockets.

11. The defendant and the other subject from upstairs were taken downstairs to the couch.

12. Officers tried to ascertain the defendant's name, [but] the defendant gave Officer Honaker . . . a false name. . . .

. . .

14. Another officer or agent in the residence located a piece of paper with the name 'Shamele Collins' on it[.]

15. . . . [Officer Gordon] determine[d] that Shamele Collins, the defendant, had an outstanding warrant out of New York for Dangerous Drugs. Officer Gordon confirmed that the warrant was still active and that New York would extradite.

16. Officer Gordon advised Officer Honaker of the outstanding warrant for the defendant's arrest.

17. After finding out about the warrant, Officer Honaker took the defendant into the dining room/kitchen area, which was off the living room.

18. Officer Honaker removed the defendant's handcuffs.

19. The defendant was wearing pants and shoes but no shirt.

20. Officer Honaker advised the defendant that he was going to strip search him and the defendant did not consent.

21. [When Officer] Honaker attempted to remove the defendant's belt, the defendant grabbed toward that area. Officer Honaker believed this was a furtive move by the defendant and that the defendant may have been trying to sucker punch him.

22. Officer Honaker took the defendant to the ground using an "arm bar."

23. The defendant was placed back into handcuffs.

24. At that point Officer Honaker noticed a white crystal substance consistent with cocaine on the floor where the defendant had been standing in the kitchen/dining area.

25. Officer Honaker then searched the defendant without the defendant's consent.

26. Officer Honaker removed the defendant's shoes then his socks and searched them. Then Officer Honaker either pulled down or removed his pants and then pulled down or removed the defendant's boxers.

27. Officer Honaker saw that the defendant was clenching his butt cheeks.

28. Officer Honaker removed plastic baggies from between the defendant's butt cheeks, [of which two] contained an off white rock substance consistent with crack cocaine and one contained what the officer believed to be marijuana.

29. One of the bags [of] cocaine was torn open and the cocaine was coming out.

30. After the search Officer Honaker noticed more cocaine where the defendant had been sitting on the couch and a trail of cocaine coming down the stairs where the defendant had been moved.

31. At some point during the incident Officer Honaker became aware that the defendant was in fact Jessica Farthing's boyfriend.

32. The defendant was arrested for the outstanding warrant from New York and the drug charges from this incident.

On the basis of its findings of fact the trial court reached the following conclusions of law:

> 2. The place the search was conducted was in the dining area, removed or away from other people and that provided some privacy.
>
> 3. The scope was either pulling or removing down defendant's pants and boxers to expose his buttocks which was intrusive.
>
> 4. The manner in which the search was performed was reasonable under the circumstances. The court finds that there were exigent circumstances including: the fact that the crystals [were] on the floor where defendant was standing indicated that they were leaving the defendant's person quickly leading to possible loss or destruction of evidence and that the bag of cocaine was not sealed leading to a danger to the defendant of absorbing some of the substance through his large intestine. The search was conducted by officers of the same sex and the only female present at the residence, according to the evidence, was Jessica Farthing the defendant's girlfriend.
>
> 5. The officers had justification to perform the search. Officer Honaker had a specific basis to believe drugs were hidden on the defendant because of the cocaine where the defendant was standing and the odor of marijuana coming from defendant's person. Further the defendant's actions of giving a false name, attempting to conceal his identity to avoid arrest further justified the search.
>
> 6. The search of the defendant, although intrusive in manner, was conducted in a reasonable manner and it was incident to arrest.
>
> 7. Based on the foregoing the court finds that the search conducted was a reasonable lawful search and the defendant's rights under the 4th . . . Amendment[ ] were not violated.

We conclude that the trial court's unchallenged findings of fact support its conclusion that the search of defendant's person, although intrusive, was reasonable under the factual circumstances presented and did not violate defendant's rights under the Fourth Amendment. In reaching

this conclusion, we have carefully considered defendant's arguments, but do not find them persuasive.

Defendant maintains that a search that is determined to be a "strip search" is violative of a defendant's Fourth Amendment rights unless we find that the search was reasonable under the factual circumstances together with the existence of additional facts that are applicable to "strip searches." Specifically, defendant contends that in *State v. Battle*, 202 N.C. App. 376, 388, 688 S.E.2d 805, 815 (2010), this Court determined that a "strip search" is unreasonable unless supported by "probable cause and exigent circumstances."

> However, we "note that neither the United States Supreme Court nor the appellate courts of this State have clearly defined the term strip search." As the United States Supreme Court recently stated . . . 'The term is imprecise." . . . For that reason, there is no precise definition of what a 'strip search' actually is. Moreover, the United States Supreme Court has specifically stated that [it] "would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen."

Robinson, 221 N.C. App. at 277, 727 S.E.2d at 719 (quoting *Battle*, 202 N.C. App. at 381, 688 S.E.2d at 811; *Florence v. Bd. of Chosen Freeholders*, __ U.S. __, __, 132 S. Ct. 1510, 1515, 182 L. Ed. 2d 566, 574 (2012); and *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 374, 129 S. Ct. 2633, 2641, 174 L. Ed. 2d 354, 364 (2009)). We also note that in *Robinson*, 221 N.C. App. at 281, 727 S.E.2d at 722, decided after *Battle*, this Court "conclude[d] that the mode of analysis outlined in *Battle* . . . only applies in the event that the investigating officers lack a specific basis for believing that a weapon or contraband is present beneath the defendant's underclothing." *Id.* Thus, it would appear that where, as in the present case, there exists probable cause to believe that contraband was secreted beneath the defendant's clothing, we are not required either to "officially" deem this to be a "strip search"[1] or to find the existence of exigent circumstances before we can declare the search of this defendant to be reasonable. We are not, however, required

1. In his appellate brief, defendant repeatedly asserts that he was subject to "a strip and body cavity search." The evidence is undisputed, however, that the contraband was discovered as soon as defendant's underwear was lowered or removed and that Officer Honaker did not search defendant's "body cavities."

to reach a definite conclusion on the validity of defendant's proposed approach to the determination of the constitutionality of the search at issue. Assuming, *arguendo*, that the trial court was required to find the existence of exigent circumstances and evidence supporting a reasonable belief that defendant was secreting a controlled substance from under his outer clothing, we conclude that both of these factors were present in this case. In reaching this conclusion, we rely in part upon the following undisputed facts:

> 1. Law enforcement officers were present in the apartment to arrest Ms. Farthing, who lived there.
>
> 2. When defendant was asked by law enforcement officers to identify himself, he gave a false name.
>
> 3. When a law enforcement officer ran defendant's true name on a database, the officers learned that there was an outstanding warrant for arrest and extradition of defendant from New York for a narcotics offense.
>
> 4. The house and defendant's person had the odor of marijuana.
>
> 5. Based on defendant's giving a false name and the fact that defendant smelled of marijuana, Officer Honaker told defendant that he intended to conduct a "strip search" of defendant.
>
> 6. Prior to removing defendant's pants, Officer Honaker observed particles of white crystalline powder on the floor where defendant had been standing.

Defendant argues on appeal that the search was conducted in the absence of any particularized suspicion that he was concealing drugs on his person or that there were any exigent circumstances. Defendant's only support for this position is his assertion that, in assessing the reasonableness of Officer Honaker's search, the trial court was barred from consideration of the cocaine observed on the floor where defendant had been standing. Defendant contends that, pursuant to this Court's holding in *Battle*, exigent circumstances must be present before the "initiation" of a strip search and that in this case the search was "initiated" when Officer Honaker grabbed at defendant's belt. During the hearing on defendant's suppression motion, however, defendant was specifically asked by the trial court to comment on the relevance of the cocaine on the floor to the issue of the reasonableness of the search. Defendant's only argument was that the presence of powder on the floor did not

provide "grounds for arrest" because it had not been "field tested" at that point. Defendant never argued that the trial court could not consider the presence of the powder because Officer Honaker observed the powder after he had decided to search defendant.

N.C.R. App. Proc. 10(a)(1) provides that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and that the party must also "obtain a ruling upon the party's request, objection, or motion." "Where a theory argued on appeal was not raised before the trial court, the appellate court will not consider it because '[a] defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal.' " *State v. Henry*, __ N.C. App. __, __, 765 S.E.2d 94, 99 (2014) (quoting *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004)). Accordingly, because defendant failed to raise the timing of Officer Honaker's observation of powder on the floor "as an issue in the trial court at the hearing on his motion to suppress, the issue is not properly before this Court on appeal, and we therefore will not consider it." *Id.* (citing *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991), and *Benson*, 323 N.C. at 321, 372 S.E.2d at 519).

We conclude that in ruling on defendant's motion to suppress evidence the trial court could properly consider the fact that Officer Honaker saw a white crystalline substance on the ground where defendant had been standing. This observation created the exigent circumstances found by the trial court in that "the fact that the crystals [were] on the floor where defendant was standing indicated that they were leaving the defendant's person quickly leading to possible loss or destruction of evidence and that the bag of cocaine was not sealed leading to a danger to the defendant of absorbing some of the substance through his large intestine." The presence of a white powder where defendant had been standing also gave rise to a reasonable suspicion that defendant was concealing narcotics under his clothes.

Defendant further contends that the search was unreasonable because there were others present in the apartment who might have observed the officer's search of defendant. In support of this contention, defendant cites cases discussing searches conducted by the side of a road or in another public location. In this case, however, defendant was searched in the dining area of a private apartment. In its order the trial court concluded in relevant part that the "place the search was conducted was in the dining area, removed or away from other people and

that provided some privacy" and that "[t]he search was conducted by officers of the same sex and the only female present at the residence, according to the evidence, was Jessica Farthing the defendant's girlfriend." We find that the undisputed findings that the search was conducted in a private residence and in a separate room from the others who were in the apartment adequately supported the trial court's conclusion that the law enforcement officers exercised reasonable concern for defendant's privacy. For the reasons discussed above, we conclude that the trial court did not err by denying defendant's suppression motion.

IV. Right to be Present at Sentencing

[2] Defendant also argues that his sentence was imposed in violation of his right to be present when the judgment against him was entered. This argument has merit.

"It is well-settled that a defendant has a right to be present at the time that his sentence is imposed." *State v. Leaks*, __ N.C. App. __, __, 771 S.E.2d 795, 799, *disc. review denied*, __ N.C. __, 775 S.E.2d 870 (2015) (citing *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999)). In *Leaks* the "trial court, in the presence of defendant, sentenced defendant . . . to a minimum term of 114 months and a maximum term of 146 months imprisonment. Subsequently, the trial court entered written judgment reflecting a sentence of 114 to 149 months active prison time." This Court held:

> Given that there is no indication in the record that defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment. . . . Under the North Carolina structured sentencing chart, if the trial court intended to sentence defendant to 114 months minimum incarceration, it was required to impose the 149 month maximum term. However, if the trial court intended to impose a maximum term of 146 months, it was required to impose the corresponding minimum term of 111 months imprisonment. Regardless, there is no evidence that defendant was present when the trial court entered its written judgments. Because the written judgments reflect a different sentence than that which was imposed in defendant's presence during sentencing, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment.

Leaks, __ N.C. App. at __, 771 S.E.2d at 799-800 (citing *Crumbley* and *State v. Hanner*, 188 N.C. App. 137, 141, 654 S.E.2d 820, 823 (2008)).

In the instant case, the trial court orally sentenced defendant to a prison term of thirty-five to forty-two months. The written judgment sentenced defendant to imprisonment for thirty-five to fifty-one months. As in *Leaks*, the original sentence was for a minimum sentence that did not correspond to the orally announced maximum sentence, requiring the trial court to either identify the appropriate maximum sentence where the minimum sentence is thirty-five months, or to identify the correct minimum sentence for a maximum sentence of forty-two months. Defendant was not present when the trial court made its decision and had no opportunity to argue for the imposition of the shorter sentence. Accordingly, the facts of this case are indistinguishable from *Leaks*, and require us to remand for resentencing.

For the reasons discussed above, we hold that the trial court did not err by denying defendant's motion to suppress evidence obtained at the time of his arrest, and that the judgment in this case must be vacated and the case remanded for a new sentencing hearing.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judge BRYANT concurs in the result.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that the strip search was reasonable and did not violate defendant's rights under the Fourth Amendment. I would conclude that the trial court erred in denying defendant's motion to suppress as the officers did not have a justification to perform the strip search. No exigent circumstances or supporting facts existed prior to initiating the strip search to justify the heightened intrusion into defendant's right to privacy. Alternatively, there were no reasonable grounds to believe that defendant was secreting a controlled substance under his outer clothing, obviating the need for exigent circumstances and additional facts. The trial court's conclusions of law in paragraphs four, five, and seven are not supported by any competent evidence.

On appeal, defendant argues that at the inception of the strip search, neither particularized probable cause nor exigent circumstances justified

the strip search. Defendant argues, "[T]he trial court improperly relied on Officer Honaker's observation of the white crystal substance on the floor in determining whether the totality of the circumstances justified the search." Further, he argues, "The smell of marijuana did not provide Officer Honaker with the requisite probable cause to believe [defendant] had contraband concealed in his underwear or buttocks[.]" Defendant also claims that his arrest, based on a drug offense that "occurred at a different time and in a different state" did not justify the strip search. Lastly, "Whether [defendant] gave a false name to avoid arrest does not speak to—let alone provide probable cause to believe—that [defendant] had secreted contraband beneath his underwear or in his buttocks, and thus cannot serve as justification for the strip and cavity search." I agree.

In *State v. Battle*, this Court stated, "For a search to comply with the requirements of Fourth Amendment jurisprudence, there must be sufficient supporting facts and exigent circumstances *prior* to initiating a strip search to justify this heightened intrusion into a suspect's right to privacy." 202 N.C. App. 376, 392, 688 S.E.2d 805, 817 (2010). The majority cites to *State v. Robinson*, decided by this Court after *Battle*. In *Robinson*, we "conclude[d] that the mode of analysis outlined in *Battle* and adopted in *Fowler* only applies in the event that the investigating officers lack a specific basis for believing that a weapon or contraband is present beneath the defendant's underclothing." *State v. Robinson*, 221 N.C. App. 266, 281, 727 S.E.2d 712, 722 (2012); *State v. Fowler*, 220 N.C. App. 263, 268, 725 S.E.2d 624, 629 (2012) ("[T]he requirements of probable cause and exigent circumstances must be established to justify the strip searches of defendant in the present case, as enunciated in *Battle*.") *see also State v. Johnson*, 225 N.C. App. 440, 451, 737 S.E.2d 442, 449 (2013); ("*Battle* does not apply because there was sufficient information to provide a sufficient basis for believing that contraband was present beneath defendant's underwear.") (citations and quotations omitted). As a result, in *Robinson*, we held that the evidence "indicate[d] that various items of drug-related evidence were observed in the vehicle in which Defendant was riding, that Defendant made furtive movements towards his pants, and that Detective Tisdale felt a hard object between Defendant's buttocks." *Robinson*, 221 N.C. App. at 281, 727 S.E.2d at 722. "For that reason, it is clear that Detective Tisdale had ample basis for believing that contraband would be discovered beneath Defendant's underclothing." *Id.*

The majority declines to decide whether the trial court was required to find the existence of exigent circumstances and evidence supporting a reasonable belief that defendant was secreting a controlled substance

from under his outer clothing. Assuming that it was, the majority concludes that both were present. The majority finds exigent circumstances in the fact that the crystals found on the floor in the dining room indicated that they were leaving defendant's person quickly, leading to possible destruction of evidence and danger to defendant. Additionally, the majority finds that the presence of the white powder also gives rise to a reasonable suspicion that defendant was concealing narcotics under his clothes. For the reasons stated below, this evidence, found only after initiating the strip search, cannot provide a justification to conduct the search.

The mode of analysis outlined in *Battle* applies because the investigating officers lacked sufficient information providing a specific basis for believing that a weapon or contraband was present beneath defendant's underclothing. *Robinson*, 221 N.C. App. at 281, 727 S.E.2d at 722. Accordingly, I contend that the trial court was required to find exigent circumstances and sufficient supporting facts justifying the heightened intrusion into defendant's right to privacy, and that neither requirement was present here. Although *Battle* dealt with a roadside strip search and the strip search conducted here took place inside a home, the place in which the strip search was conducted is only one factor in the totality of the circumstances inquiry, and the analysis is still controlling.

In addressing exigent circumstances and the justification for initiating the strip search, the trial court's conclusions of law state the following:

> The court finds that there were exigent circumstances including: the fact that the crystals on the floor where defendant was standing indicated that they were leaving the defendants person [sic] quickly leading to possible loss or destruction of evidence and that the bag of cocaine was not sealed leading to a danger to the defendant of absorbing some of the substance through his large intestine. . . .
>
> The officers had justification to perform the search. Officer Honaker had a specific basis to believe drugs were hidden on the defendant because of the cocaine where the defendant was standing and the odor of marijuana coming from defendant's person. Further the defendant's actions of giving a false name, attempting to conceal his identity to avoid arrest further justified the search.

I respectfully disagree with the majority's conclusion that based on Rule 10 of our Rules of Appellate Procedure we cannot consider

defendant's argument that the trial court erred in considering the presence of the white powder in justifying the strip search.

At the hearing, the trial court stated to defendant's counsel, "[The State's] saying it's a search incident to the arrest. Do you have any response?" Defendant's counsel responded that this was not a search incident to arrest because the police officers did not have probable cause to arrest defendant. Defendant's counsel argued that the police officers only knew that there was an outstanding warrant possibly for defendant that they needed to look into and that they smelled burnt marijuana in the residence. The trial court then asked defendant's counsel, "What about the powder on the floor?" He responded that, without knowing what the substance was, there were no grounds for an arrest.

Based on this, the majority concludes that "because defendant failed to raise the timing of Officer Honaker's observation of powder on the floor 'as an issue in the trial court at the hearing on his motion to suppress, the issue is not properly before this Court on appeal, and we therefore will not consider it.' " I contend, however, that defendant may properly argue on appeal that the trial court's conclusions of law were in error. "Conclusions of law are reviewed de novo and are fully reviewable on appeal." *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citations and quotations omitted).

Here, Officer Honaker made the decision to conduct a strip search of defendant when defendant was in the living room. Accordingly, the trial court was required to analyze the justification for the strip search based on facts known to the officers up to that point. The State may not justify the strip search based on facts acquired after initiating the strip search, even if such facts became known just prior to the most intrusive part of the search—removal and/or lowering of defendant's pants and boxers. Thus, the fact that Officer Honaker observed a white powder on the floor in the dining room after attempting unsuccessfully to disrobe defendant cannot justify his earlier decision to conduct the strip search. Likewise, it cannot serve as the exigent circumstance or supporting fact.

In *Battle*, this Court stated the following:

> More relevant to our analysis, Defendant's reaction to Detective Curl's attempts to unzip her pants was not, as the trial court stated, "immediately prior to [Defendant's] being search[ed]." At the time Defendant reached towards the top of her pants, Detective Curl had already initiated the strip search, as she was in the process of attempting to unzip Defendant's pants. Defendant's actions during the

> strip search cannot retroactively serve as a basis for justifying that strip search.

202 N.C. App. at 392, 688 S.E.2d at 817 (emphasis added). Here, the trial court similarly concluded that defendant's reaction to Officer Honaker's attempt to unbuckle his belt was before the strip search began, and that conclusion cannot stand.

As in *Battle*, I would conclude that the strip search violated defendant's Fourth Amendment rights. Without considering the white powder, the only justification for conducting the strip search was the smell of marijuana, defendant providing a false first name, and an outstanding warrant in New York for a drug offense. The officers went to Farthing's home looking for Farthing. They were not looking for defendant, they were not acting on a confidential informant's tip that defendant was carrying drugs, *see Fowler*, 220 N.C. App. at 273, 725 S.E.2d at 631 (emphasizing that the strip search "of defendant was based on corroborated information that defendant himself would be carrying drugs"), and they did not feel a blunt object in defendant's crotch area during the patdown, *see Johnson*, 225 N.C. App. at 452, 737 S.E.2d at 449 ("[M]ost significantly, Trooper Hicks felt a blunt object in defendant's crotch area during the pat-down, directly implicating defendant's undergarments."). "The record shows that the strip search was conducted on the mere *possibility* that drugs would be found on Defendant's person. . . . This fails to meet constitutional muster." *Battle*, 202 N.C. App. at 392, 688 S.E.2d at 818. There must be more than a mere possibility that a suspect could be hiding contraband in his undergarments "in order to justify an intrusion of the magnitude of a strip search." *Id.* at 399, 688 S.E.2d at 822.

STATE OF NORTH CAROLINA
v.
JEFFREY SCOTT COX, Defendant

No. COA15-574

Filed 2 February 2016

Criminal Law—post-guilty plea for DNA testing—right to appointment of counsel—motion denied

In an appeal from a guilty plea to statutory rape, which arose from 12 counts of statutory rape and one count of indecent liberties, defendant's conclusory statements regarding materiality were insufficient to require the trial court to appoint him counsel or grant his motion for DNA testing. To be entitled to counsel, defendant must first establish that he is indigent and that DNA testing may be material to his wrongful conviction claim. Defendant's contention, however, was conclusory and incomplete and merely restated pertinent parts of the statute. Additionally, defendant failed to include the S.B.I. lab report that he claimed showed the hair, blood, and sperm found on the victim's underwear were never analyzed, and the record did not indicate whether the evidence still existed.

Appeal by defendant from Order entered 7 November 2013 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 2 December 2015.

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

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant.

ELMORE, Judge.

Jeffrey Scott Cox (defendant) appeals from the trial court's order entered 7 November 2013 denying his motion for postconviction DNA testing and appointment of counsel. After careful consideration, we affirm.

I. Background

On 19 May 2008, defendant was indicted on twelve counts of statutory rape of a person who is thirteen, fourteen, or fifteen years old, and

one count of taking indecent liberties with a child. Pursuant to a plea agreement entered on 22 July 2008, defendant pled guilty to one count of statutory rape, and the State dismissed the remaining charges. The trial court found the following two aggravating factors and sentenced defendant to 300 to 369 months' imprisonment: (1) "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense[;]" and (2) "defendant took advantage of [a] victim whom defendant knew had already been sexually offended upon previously." Upon completion of his sentence, the trial court ordered defendant to enroll in satellite-based monitoring. No transcript is available from the hearing in which the trial court accepted defendant's guilty plea.

On 1 April 2013, defendant filed a *pro se* motion for DNA testing. Defendant asserted, *inter alia*, that four items related to the investigation—hairs, blood, sperm, and DNA swabbings—were not subjected to DNA testing, can now be subjected to newer and more accurate testing, or have a reasonable probability of contradicting prior test results. Defendant claimed that the State Bureau of Investigation (S.B.I.) lab report "explicitly notes that the hair samples were returned 'unanalyzed.' " He maintained that the S.B.I. lab report states that the DNA swabbings taken from defendant "were also 'not analyzed.' " Defendant further stated, "The ability to conduct the requested DNA testing is material to the Defendant's defense because: a. DNA testing should be done to compare DNA from the hairs, blood, and spermatozoa from the victim's underwear to the swabbings (DNA Swabbings) taken from the defendant." He asserted that testing "would be 'material' because if the DNA did not match, then that would have shown that someone else had sex with the alleged victim and not the Defendant." Defendant included an affidavit of innocence and his Department of Corrections account statement evidencing his indigence.

Also on 1 April 2013, defendant filed a motion to locate and preserve evidence and an *ex parte* motion for reduction of sentence. On 5 July 2013, defendant filed a renewed motion for appointment of counsel. The Brunswick County Superior Court held a hearing on 8 October 2013, and the following occurred:

> MR. COX: I also—I also have—the reason why I am requesting, here's the S.B.I. report.
>
> THE COURT: Let me see that, please, sir.
>
> MR. COX: Uh,—

> THE COURT: I haven't seen that. Don't say anything else.
>
> MR. COX: I'm not; I'm not. I'm requesting counsel.
>
> THE COURT: I understand that. Okay. Madame D.A., I'll let you look at this. It appears that both the items that were sent into the S.B.I.,—
>
> MS. RADFORD: Yes, ma'am.
>
> THE COURT:—Maybe every single one were [sic] analyzed—
>
> MS. RADFORD: Yes, Ma'am.
>
> THE COURT: —And, so, that's the basis of his motion. I'll let you take a look at that. I don't know if you have a certified true copy of that exhibit. If not we will provide a copy; I'll ask Madame Clerk if they can find it from the files to see if a certified one is any different from the one that was submitted and then we will go from there. Alright, thank you, sir.

The S.B.I. report was not included in the record on appeal.

On 7 November 2013, the Brunswick County Superior Court held another hearing. Defendant made two new motions: one was for appropriate relief based on the imposition of aggravating factors, and the second was for DNA testing as well as the appointment of counsel. The court stated,

> I denied your motion for appropriate relief on June 6 of 2012. But I also ordered the Appellate Public Defender's Office to take a look at your case to see if it were appropriate [sic] that they, on your behalf, file a Motion for Cert to the North Carolina Supreme Court to see if they would help you petition the Court to rehear anything. And that team of defense attorneys at the Appellate Public Defender's Office denied the request in that they determined, in their professional opinion, that filing a petition of Writ of Certiorari was not appropriate for your case for whatever reason.

Defendant submitted arguments regarding the aggravating factors, and the court stated,

> [T]he Court is going to note your request with regard to the motion as to the aggravating factors and the DNA, and respectfully deny the same without further hearing because the Court finds that you have presented no compelling reason before this Court—for this Court to allow you to relitigate an MAR that has been upheld by the Court of Appeals of this state.

Defendant appeals.

II. Analysis

"The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal. The court shall appoint counsel in accordance with rules adopted by the Office of Indigent Defense Services upon a finding of indigency." N.C. Gen. Stat. § 15A-270.1 (2013).

The standard of review for a denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief. *State v. Gardner*, 227 N.C. App. 364, 365, 742 S.E.2d 352, 354, *review denied*, 367 N.C. 252, 749 S.E.2d 860 (2013). "Findings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*." *Id.* at 365–66, 742 S.E.2d at 354. "[T]he defendant has the burden . . . of establishing the facts essential to his claim by a preponderance of the evidence." *State v. Collins*, ___ N.C. App. ___, ___, 761 S.E.2d 914, 920 (June 17, 2014) (No. COA13-1043) (quoting *State v. Hardison*, 143 N.C. App. 114, 120, 545 S.E.2d 233, 237 (2001)) (quotations omitted).

"The general rule is that a trial court need only make specific findings of facts and conclusions of law when a party requests the trial court do so in a civil case." *Gardner*, 227 N.C. App. at 370, 742 S.E.2d at 356 (citing *Couch v. Bradley*, 179 N.C. App. 852, 855, 635 S.E.2d 492, 494 (2006)). "N.C. Gen. Stat. § 15A-269 contains no requirement that the trial court make specific findings of facts[.]" *Id.*

Defendant's sole argument is that the trial court erred in refusing to appoint counsel because defendant's *pro se* motion for DNA testing sufficiently alleged indigency and materiality, as required by N.C. Gen. Stat. § 15A-269(c).

The State argues that defendant's motion was properly denied for two reasons. First, "because defendant pled guilty to statutory rape, it was not possible for him to make a threshold showing of materiality

under section 15[A]-269(c)[.]"[1] Second, "assuming *arguendo*[ ] defendant could possibly make a showing of materiality notwithstanding his guilty plea, he failed to do so in this instance." The S.B.I. report is not included in the record, the trial judge's comments indicate the listed items in the report were in fact analyzed by the S.B.I., and nothing in the record shows that the biological evidence is available for testing.

N.C. Gen. Stat. § 15A-269(a) provides the following:

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C. Gen. Stat. § 15A-269(a) (2013).

The court shall grant the motion for DNA testing if

> (1) The conditions set forth in subdivisions (1), (2), and (3)of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(b) (2013).

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1. This Court has previously declined to decide this issue in a number of cases, and we fail to reach it here.

Pursuant to subsection (c) of that statute, "the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner . . . upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction." N.C. Gen. Stat. § 15A-269(c) (2013). Thus, to be entitled to counsel, defendant must first establish that (1) he is indigent and (2) DNA testing may be material to his wrongful conviction claim. *Id.*

This Court has previously stated that the materiality threshold to appoint counsel under subsection (c) (that the testing "may be material" to his claim) is no less demanding than the materiality threshold to bring a motion under subsection (a)(1) (that the testing "is material" to his claim). *Gardner*, 227 N.C. App. at 368, 742 S.E.2d at 355. Defendant's burden to show materiality "requires more than the conclusory statement that '[t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense.' " *Id.* at 369, 742 S.E.2d at 356 (quoting *State v. Foster*, 222 N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012)).

Here, defendant failed to meet his burden of showing materiality. Thus, defendant failed to establish a condition precedent to the trial court's authority to grant his motion and appoint him counsel. In defendant's motion for DNA testing, he claimed that "there is a very reasonable probability that [the DNA testing] would have shown that the Defendant was not the one who had sex with the alleged victim and, thus, completely contradict the judgment convicting the Defendant for statutory rape." Defendant's contention, however, is conclusory and incomplete, and he merely restates pertinent parts of the statute. As we have previously stated, "the defendant must provide *specific reasons* that the requested DNA test would be significantly more accurate and probative of the identity of the perpetrator or accomplice or that there is a reasonable probability of contradicting the previous test results." *Collins*, ___ N.C. App. at ___, 761 S.E.2d at 922–23. Here, defendant failed to assert specific reasons.

Additionally, defendant failed to include the S.B.I. lab report that he claims shows the hair, blood, and sperm found on the victim's underwear were never analyzed. The record does not indicate whether the evidence still exists. After entering a plea of guilty, "evidence shall be preserved for the earlier of three years from the date of conviction or until released." N.C. Gen. Stat. § 15A-268(a6)(3) (2013). Accordingly, defendant cannot show that the DNA testing would be material to his defense. Defendant pleaded guilty knowingly and of his own free will, admitting that he was "in fact guilty" and agreeing "that there are facts to

support [the] plea." Defendant's conclusory statements regarding materiality were insufficient to require the trial court to appoint him counsel or grant his motion.

III. Conclusion

Because defendant failed to make the requisite showing of materiality, the trial court did not err in denying defendant's motion for postconviction DNA testing or in refusing to appoint him counsel.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
RONALD ANTHONY MILLER, Defendant

No. COA15-162

Filed 2 February 2016

Appeal and Error—preservation of issues—failure to raise constitutional issue at trial

Even if defendant had properly raised the constitutional issue of double jeopardy in his convictions for attempted larceny and attempted common law robbery, no error would have been found because two victims required an additional fact to be proven for each offense, although both victims were in the same house. Only the attempted robbery offense involved an assault against the victim, and only the attempted larceny involved proof of ownership of the property.

Appeal by defendant from judgments entered 23 July 2014 by Judge Mark E. Powell in Macon County Superior Court. Heard in the Court of Appeals 8 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Lora C. Cubbage, for the State.

The Phillips Black Project, by John R. Mills, for defendant-appellant.

GEER, Judge.

Defendant Ronald Anthony Miller appeals from judgments entered on convictions of multiple offenses. On appeal, however, defendant challenges only his convictions of attempted larceny and attempted common law robbery. Defendant argues that sentencing him for both convictions violates the constitutional prohibition on double jeopardy because the attempted larceny conviction was a lesser-included offense of the attempted robbery charge. Since defendant did not raise this constitutional issue at trial, he failed to preserve this issue for appeal. Even if the double jeopardy issue were properly before us, we would find no error because defendant committed each charged offense against a different victim.

Facts

Defendant was indicted on charges arising out of three separate incidents all occurring in the early morning hours of 25 July 2013. He was acquitted of the charges related to one incident, but convicted of charges arising out of the two other incidents. On appeal, defendant challenges only the convictions related to one of the two incidents. With respect to that incident, the State's evidence tended to show the following facts.

Defendant entered the residence of George and Shirley Hardy during the early morning of 25 July 2013 while they were sleeping. The Hardys' 15-year-old granddaughter, Katie, and a friend were visiting from Florida and were also sleeping inside. Katie woke up when defendant entered her room, turned on the lights, and asked her where the car keys were. Katie noticed that defendant had a box cutter knife in his hand and became "[r]eally scared." She told defendant that the keys were upstairs, and he followed her up the stairs with the box cutter pointed in her direction. By entering the room where her grandmother was sleeping and making noise while looking for the keys, Katie intended to wake her grandmother, which she succeeded in doing. Defendant then instructed Katie to head downstairs and go inside a vacant room. When Katie got downstairs, she refused to enter the vacant room. Soon afterward, her grandfather, who also was awakened by the noise, "stormed downstairs," and defendant left the house.

Defendant was later apprehended. As a result of the incident at the Hardys' home and two other incidents the same night, defendant was indicted for first degree burglary with a deadly weapon enhancement, false imprisonment, possession of burglary tools, injury to real property,

attempted felony larceny, attempted common law robbery, second degree kidnapping, a second count of first degree burglary, breaking and entering a motor vehicle, misdemeanor larceny, assault on a female, and assault by strangulation. He was also indicted for attaining habitual felon status.

With respect to the indictments pertinent to this appeal, the indictment for attempted felony larceny stated that defendant "attempt[ed] to steal, take, and carry away a set of keys, the personal property of another, George Hardy." In the indictment for attempted common law robbery, the State alleged that defendant "attempt[ed] to steal, take, and carry away . . . a set of keys . . . from the person and presence of Katie Hardy by means of an assault upon her consisting of putting her in fear of bodily harm by threat of violence."

Defendant's indictment for possession of burglary tools was dismissed by the trial court. Defendant was later convicted by a jury of all remaining offenses except for second degree kidnapping, the second count of first degree burglary, breaking and entering a motor vehicle, misdemeanor larceny, and assault by strangulation. On 23 July 2014, the trial court sentenced defendant to a presumptive-range term of 157 to 201 months for first degree burglary, assault on a female, false imprisonment, and injury to real property, a presumptive-range term of 29 to 47 months for attempted larceny, and a presumptive-range term of 73 to 100 months for attempted common law robbery, with each term to be served consecutively. Defendant timely appealed to this Court.

Discussion

Defendant's only contention on appeal is that his consecutive sentences for attempted larceny and attempted common law robbery violate the prohibition on double jeopardy because both convictions arise out of the same conduct. In response, the State argues that defendant failed to raise any objection before the trial court based on double jeopardy, and, therefore, this Court should not review this issue.

Generally, " '[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.' " *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (quoting *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)). "Furthermore, our appellate rules require a party to make 'a timely request, objection, or motion [at trial], stating the specific grounds for the [desired] ruling' in order to preserve an issue for appellate review." *State v. Mulder*, ___ N.C. App. ___, ___, 755 S.E.2d 98, 101 (2014) (quoting N.C.R. App. P. 10(a)(1)).

Even though defendant concedes that he did not raise this double jeopardy issue below, he asks this Court to arrest judgment on one of his convictions. He claims that this double jeopardy violation amounts to a "fatal defect in the . . . judgment which appears on the face of the record," and, therefore, he may raise the double jeopardy issue for the first time on appeal. *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998). We do not agree.

This Court has examined this exact double jeopardy issue in *Mulder* and we find it controlling here. In *Mulder*, the defendant argued, like the defendant here, that his convictions for a lesser-included offense and a greater offense violated the constitutional prohibitions on double jeopardy. ___ N.C. App. at ___, 755 S.E.2d at 100. Also, like defendant here, the defendant in *Mulder* failed to preserve this issue before the trial court and requested this Court to arrest the judgment on the basis of a "fatal defect on the face of the record" pursuant to this Court's opinion in *Wilson*. ___ N.C. App. at ___, 755 S.E.2d at 101. However, this Court explicitly rejected this argument, holding that "[a] double jeopardy problem is *distinct* from a 'fatal flaw which appears on the face of the record.' " *Id.* at ___, 755 S.E.2d at 101. This Court concluded that by failing to raise the double jeopardy issue below, he had waived the issue on appeal. *Id.* at ___, 755 S.E.2d at 101.

In the alternative, defendant requests, like the defendant in *Mulder*, that we invoke Rule 2 of the Rules of Appellate Procedure, so as to suspend the Rules of Appellate Procedure and review this double jeopardy issue. "Appellate Rule 2 specifically gives 'either court of the appellate division' the discretion to 'suspend or vary the requirements or provisions of any of [the] rules' in order '[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.' " *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 204-05 (2007) (quoting N.C.R. App. P. 2). "The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary." *Mulder*, ___ N.C. App. at ___, 755 S.E.2d at 101. Despite our discretionary authority to invoke Rule 2, our Supreme Court has directed we do so "cautiously." *Hart*, 361 N.C. at 315, 644 S.E.2d at 205. Given that we find no "manifest injustice" to defendant or any fact that implicates the "public interest," we decline to invoke Rule 2 in this case.

Even if we were to invoke Rule 2, we would hold that defendant has failed to show a violation of the Double Jeopardy Clause because each offense at issue involved a different victim. The indictment alleged that George Hardy was the victim of the attempted larceny of his keys, while

Katie was the victim of an attempted common law robbery when defendant threatened her with the box cutter in order to get her to retrieve the keys.

As a general rule, "it is well established that two or more criminal offenses may grow out of the same course of action . . . ." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Furthermore, "even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same." *State v. Murray*, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984). Thus, here, the existence of two different victims requires an additional fact to be proven for each offense that is not required to prove the other offense. Furthermore, the attempt to take property from Katie was carried out "by means of an assault upon her consisting of putting her in fear of bodily harm by threat of violence[,]" whereas this was not the case with George Hardy. Likewise, the attempted larceny charge required proof that that the keys belonged to George Hardy, while proof of ownership was unnecessary to prove the attempted armed robbery committed against Katie.

Our courts have applied similar logic in other cases. *See State v. Gibbs*, 29 N.C. App. 647, 650, 225 S.E.2d 837, 839 (1976) (indicating double jeopardy clause was not violated where defendant was indicted for two counts of armed robbery where he took female employee's purse and also corporation's money); *State v. Johnson*, 23 N.C. App. 52, 56, 208 S.E.2d 206, 209 (1974) ("Here defendants threatened the use of force on separate victims and took property from each of them. . . . [E]ach separate victim was deprived of property. The armed robbery of each person is a separate and distinct offense, for which defendant[] may be prosecuted and punished."). Furthermore, we find this logic prevalent in other jurisdictions. *See Clay v. State*, 593 P.2d 509, 510 (Okla. Crim. App. 1979) ("[I]t is clear that offenses committed against different individual victims are not the same for double jeopardy or dual punishment purposes, even though they arise from the same episode or transaction."), *overruled in part on other grounds*, *Davis v. State*, 993 P.2d 124 (Okla. Crim. App. 1999); *Gandy v. State*, 159 So. 2d 71, 73 (Ala. Ct. App. 1963) ("The facts which appellant insists are presented by the record show an entirely separate and distinct offense with respect to each victim. The defense of double jeopardy was not available to the accused.").

Although we know of no existing precedent that examines the issue of double jeopardy under the exact factual situation resulting in the offenses charged here, we can infer from prior case law that when two different victims are subject to the same criminal actions resulting in charges of armed robbery and larceny, double jeopardy is not implicated. In *State v. Hurst*, 82 N.C. App. 1, 20, 346 S.E.2d 8, 19 (1986), *rev'd on other grounds*, 320 N.C. 589, 359 S.E.2d 776 (1987), this Court found that the charged offenses of larceny and armed robbery were mutually exclusive, and therefore in violation of double jeopardy, because the offender took "the same goods *from the same person* at one time." (Emphasis added.) Thus, because defendant committed the first offense of attempted larceny upon entering the Hardys' home with the intent of taking and carrying away his keys and then committed the second separate offense of attempted common law robbery upon threatening Katie with box cutters in an attempt to take and carry away her grandfather's keys, defendant could properly be convicted of and sentenced for both offenses.

Because, however, defendant has not argued any basis for overturning his convictions that was preserved for appellate review, we hold that defendant received a trial free of prejudicial error.

NO ERROR.

Judges BRYANT and TYSON concur.

SHERMAN L. STEELE, Plaintiff
v.
CITY OF DURHAM, Defendant

No. COA15-246

Filed 2 February 2016

1. Highways and Streets—sidewalk maintenance—responsibility

The trial court erred by granting summary judgment for the City of Durham based upon the absence of a legal duty in a case arising from injuries plaintiff suffered when he fell into a hole in a sidewalk that was obscured by vegetation. N.C.G.S. § 160A-297 limited a city's responsibility to maintain certain streets and bridges, but the statute did not limit a city's responsibility to maintain sidewalks. While the

City argued that it would be responsible to maintain the sidewalk *only* if it had entered into an agreement with the North Carolina Department of Transportation to provide maintenance, the City was responsible to maintain the sidewalk *unless* it had entered into a maintenance agreement that said otherwise. There was evidence that there was no agreement for the City to assume maintenance of the sidewalk.

2. Negligence—sidewalk maintenance—summary judgment

The trial court erred by granting defendant-City's motion for summary judgment in a sidewalk fall case where there were genuine issues of material fact, including whether the City maintained the sidewalk in a reasonably safe manner. A reasonable juror could find that the City had constructive notice of the defect, that it was foreseeable that the failure to remedy the defect might cause injury to a pedestrian, and that the City failed to reasonably maintain this particular section of the sidewalk.

3. Immunity—governmental—sidewalk maintenance

A City's argument that it was immune from liability for a sidewalk fall under the doctrine of governmental immunity was overruled because sidewalks are specifically excluded from such immunity.

Appeal by plaintiff from order entered 13 August 2014 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 26 August 2015.

Office of the City Attorney, by Kimberly M. Rehberg, for the City of Durham.

*Perry, P*erry & Perry, P.A., by Robert T. Perry, for plaintiff-appellant.

CALABRIA, Judge.

Sherman L. Steele ("plaintiff") appeals from an order granting summary judgment in favor of the City of Durham ("the City"). This negligence case presents the issue of whether the City or the State owed a legal duty to maintain a reasonably safe sidewalk located within the City limits beside a State Municipal System Highway. We conclude that because there was no contract delegating maintenance of the sidewalk, the City, not the State, had a statutory duty to maintain the sidewalk in a reasonably safe manner. In addition, plaintiff's forecast of evidence

presents genuine issues of material fact as to the City's negligence and plaintiff's contributory negligence, precluding summary judgment. Therefore, we reverse and remand.

I. Background

Around midnight on 7 August 2011, plaintiff was walking in the City along the eastern sidewalk of South Alston Avenue, also known as North Carolina State Highway 55 ("Highway 55"), when he stepped into a hole in the sidewalk and fell. Plaintiff sustained injuries to his shoulder, which required arthroscopic surgery. According to plaintiff's evidence, the hole was not visible due to overgrown vegetation. On 10 July 2013, plaintiff filed an action against the City,[1] alleging negligence in failing to inspect, maintain, and repair the sidewalk. The City filed its answer, defenses, and affirmative defenses. On 2 May 2014, the City filed a motion for summary judgment.

During the summary judgment hearing on 14 July 2014, the City presented evidence that the pertinent stretch of Alston Avenue was a State right-of-way because it runs beside Highway 55, which is part of the State Highway System, as defined by 19A N.C.A.C. 2D.0404(2). Plaintiff presented affidavits from five residents who live near the pertinent area of Alston Avenue; in summary, the residents indicated that City employees had generally maintained the area by trimming back vegetation and placing a cone in the hole in the sidewalk. Plaintiff also presented the deposition of Dwight Murphy, the Operations Manager for the City's Public Works Department. Murphy stated that he was notified of plaintiff's injury and investigated the hole, which he discovered appeared to be caused by a utility vault in the sidewalk. Murphy noted there was a cone in the hole but stated it did not belong to the City. Murphy was not aware of which entity—the City or the NCDOT—was responsible for maintaining the subject sidewalk. Murphy formerly worked for the City of Greensboro, where the State maintained certain sidewalks adjacent to state-owned highways. However, after learning of plaintiff's injury, Murphy stated that he discovered "[i]n Durham, the State does not maintain any sidewalks." Plaintiff also pointed to 19A N.C.A.C. 2D.0404(c)(6), promulgated by the NCDOT, which provides that the State's maintenance duty does not extend to sidewalks.

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1. Plaintiff has also filed an action with the North Carolina Industrial Commission against the North Carolina Department of Transportation ("NCDOT"), which has been stayed pending the resolution of this appeal.

In summary, it is undisputed that plaintiff fell and sustained injuries on a portion of the sidewalk which runs along Highway 55, also known as Alston Avenue, which is a "State Municipal System Highway," as defined by 19A N.C.A.C. 2D0404(a)(3). On 13 August 2014, the trial court considered the evidence and both parties' arguments and granted summary judgment in favor of the City. Plaintiff appeals.

II. Negligence

Plaintiff contends the trial court erred by granting summary judgment in favor of the City. Specifically, plaintiff contends that the forecast of evidence, viewed in the light most favorable to plaintiff, shows that (1) the City had a legal duty to maintain the sidewalk, (2) genuine issues of material fact exist as to whether the City provided a reasonably safe sidewalk, and (3) plaintiff was not contributorily negligent. We agree.

A. Legal Duty

[1] Turning first to whether the City owed plaintiff a legal duty, "[w]hen there is no dispute as to the facts . . . the issue of whether a duty exists is a question of law for the court." *Mozingo by Thomas v. Pitt Cty. Mem'l Hosp., Inc.*, 101 N.C. App. 578, 588, 400 S.E.2d 747, 753 (1991) (citations omitted), *aff'd*, 331 N.C. 182, 415 S.E.2d 341 (1992). Absent a legal duty, there can be no negligence. *Turner v. North Carolina Dept. of Transp.*, 223 N.C. App. 90, 93, 733 S.E.2d 871, 874 (2012) (citation omitted). This duty may arise by statute or operation of law. *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955) (citation omitted). Plaintiff contends the City owed him a statutory duty to keep the sidewalk reasonably safe. We agree.

The City acknowledges its statutory authorization to maintain sidewalks within its corporate boundaries under N.C. Gen. Stat. § 160A-296, which imposes upon municipalities "[t]he duty to keep the public streets, *sidewalks*, alleys, and bridges [within its corporate limits] in proper repair" and "[t]he duty to keep the public streets, *sidewalks*, alleys, and bridges [within its corporate limits] . . . free from unnecessary obstructions[.]" N.C. Gen. Stat. § 160A-296 (a)(1)-(2) (2015) (emphasis added). The statute vests municipalities with authority and control of all public passages, except certain streets and bridges, located within its municipal boundaries:

> (a) A city shall have general authority and control over all public streets, *sidewalks*, alleys, bridges, and other ways of public passage within its corporate limits except to the

> extent that authority and control over certain streets and bridges is vested in the Board of Transportation [NCDOT].

N.C. Gen. Stat. § 160A-296(a) (2015) (emphasis added). Furthermore, we take judicial notice, pursuant to N.C. Gen. Stat. § 150B-21.22 (2015), of the following relevant provision of the North Carolina Administrative Code relating to the maintenance of the state highway system within a municipality: "The maintenance of sidewalks is a municipal responsibility." 19A N.C.A.C. 2D.0404(c)(6).

The City asserts that while it has a general duty regarding sidewalks, this particular sidewalk does not fall within the purview of the statute, but rather within an exception provided for in N.C. Gen. Stat. § 160A-297, because Highway 55 is a "state-maintained road." The City argues:

> Appellant would have the Court completely ignore the fact that the sidewalk in question is in the right-of-way of [Highway 55], which is a state-maintained road. While it is true that [N.C. Gen. Stat. §] 160A-296 creates a statutory duty to maintain "streets, sidewalks, alleys and bridges," that duty is limited to municipal "streets, sidewalks, alleys and bridges" and does not extend to those that made [sic] a part of the State Highway System.

In other words, the City contends that under N.C. Gen. Stat. § 160A-297, it is responsible only for sidewalks within its municipal borders that do not run along "state-maintained roads." It is true that N.C. Gen. Stat. § 160A-297 limits a city's responsibility to maintain certain *streets* and *bridges*:

> (a) A city shall not be responsible for maintaining streets or bridges under the authority and control of the [NCDOT], and shall not be liable for injuries to persons or property resulting from any failure to do so.

N.C. Gen. Stat. § 160A-297 (2015). But the statute does not limit a city's responsibility to maintain *sidewalks*.

The City's arguments overlook the fact that the applicable statutes and regulations governing maintenance of roadways define all of the different *components* of the roadway itself separately—such as pavements, storm drainage or storm sewers, open drainage, shoulders, and sidewalks. *See* 19A N.C.A.C. 2D.0404(a) (defining roadways and components). The cases cited by the City address streets or bridges—not

sidewalks—and thus are inapplicable to the instant case. Although the terms "street" or "highway" are often used generally in these statutes and regulations to refer to roadways used by motor vehicles, the statutes and regulations also set forth distinctly whether the State or municipality is responsible to maintain the various *components* of the roadways. This distinction depends upon whether the roadway is within the "State Highway System as described in [N.C. Gen. Stat. §] 136-44.1," a "State Municipal Street System or Highway," a "Non-State System Municipal Street or Highway," or a "Rural Highway or Street." *See* 19A N.C.A.C. 2D.0404(a)(2)-(5). The area in question is a "sidewalk," as defined by 19A N.C.A.C. 2D.0404(a)(13), which runs parallel to Highway 55, a "State Municipal . . . Highway," as defined by 19A N.C.A.C. 2D.0404(a)(3); according to 19A N.C.A.C. 2D.0404(c)(6), "[t]he maintenance of sidewalks is a municipal responsibility."

In its attempt to demonstrate that NCDOT is solely responsible to maintain this particular sidewalk, the City offered the plans and municipal agreement between the State Highway Commission and the City, entered in 1970, for the widening and improvement of "Alston Avenue from Price Street north to the Expressway." But this agreement addresses only the construction and financing of the project; it does not allocate responsibility for maintenance of the road or sidewalk after construction. In addition, the City offered the affidavit of H. Wesley Parham, P.E., who has "worked for the City of Durham since 1986" and was "employed as Assistant Transportation Director for the [NCDOT]." Parham's affidavit states that the plans for the 1970 project included the area where plaintiff fell and that he is not aware of any "re-engineering or construction improvements" at the location since the 1970 project was completed. Parham also stated that he is unaware of any "agreement that applies to the City of Durham which would require the City to assume street and/or sidewalk maintenance and improvement responsibility" for the relevant area of sidewalk.

Essentially, the City argues that it would be responsible to maintain the sidewalk *only* if it had entered into an agreement with the NCDOT to provide maintenance, and it has not done so. But the City is responsible to maintain the sidewalk *unless* it has entered into a maintenance agreement that says otherwise. *See* N.C. Gen. Stat. § 160A-296 (a)(1)-(2); *see also* 19A N.C.A.C. 2D.0404(c)(6). The City's responsibility to maintain the sidewalk was created by N.C. Gen. Stat. § 160A-296 and by 19A N.C.A.C. 2D.0404, and the City has not forecast any evidence that the NCDOT has

agreed to take on maintenance responsibility for this sidewalk.[2] All of the evidence forecast by both the City and plaintiff shows that the City was responsible to maintain this particular sidewalk. Therefore, the trial court could not properly grant summary judgment for the City based upon the absence of a legal duty to maintain the sidewalk, and we must consider the remaining issues.

B. Genuine Issues of Material Fact

[2] Plaintiff contends the trial court erred by granting the City's motion for summary judgment because there were genuine issues of material fact regarding whether the City maintained the sidewalk in a reasonably safe manner. We agree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983) (citation omitted).

> The city is not liable for an injury sustained by such a fall unless a reasonable person, observing the defect prior to the accident, would have concluded that it was of such a nature and extent that, if it were allowed to continue, an injury to some person using the sidewalk in a proper manner could reasonably be anticipated.

Waters v. City of Roanoke Rapids, 270 N.C. 43, 48, 153 S.E.2d 783, 787 (1967) (citations omitted). "[T]he duty of a municipality to keep its

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2. For projects completed since July of 1978, there would normally be a pedestrian facilities maintenance agreement setting out maintenance responsibilities for a sidewalk, based upon 19A N.C.A.C. 2D.0406: "The Department shall execute a pedestrian facilities maintenance agreement specifying responsibility for long term maintenance with the lead government entity or other local sponsor prior to construction for a proposed sidewalk." 19A N.C.A.C. 2D.0406(e). When the sidewalk along Alston Avenue was constructed in 1970, this provision was not in effect, and under the forecast of evidence for purposes of summary judgment, there was no "pedestrian facilities maintenance agreement" for this project.

streets and sidewalks in a reasonably safe condition implies the duty of reasonable inspection from time to time." *Rogers v. City of Asheville*, 14 N.C. App. 514, 517, 188 S.E.2d 656, 658 (1972) (citation omitted). "The happening of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive." *Willis v. City of New Bern*, 137 N.C. App. 762, 765, 529 S.E.2d 691, 693 (2000) (quotation marks and citation omitted).

"Constructive [notice] of a dangerous condition can be established in two ways: the plaintiff can present direct evidence of the duration of the dangerous condition, or the plaintiff can present circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time." *Price v. City of Winston-Salem*, 141 N.C. App. 55, 63, 539 S.E.2d 304, 309 (2000) (citation omitted). "When observable defects in a highway [or sidewalk] have existed for a time so long that they ought to have been observed, notice of them is implied, and is imputed to those whose duty it is to repair them." *Desmond v. City of Charlotte*, 142 N.C. App. 590, 596, 544 S.E.2d 269, 273 (2001) (citing *Fitzgerald v. Concord*, 140 N.C. 110, 113, 52 S.E. 309, 310 (1905) (citation omitted)). Sidewalks must be reasonably safe during the day and at night under such light as the municipality provides. *Waters*, 270 N.C. at 47, 153 S.E.2d at 787 (citation omitted).

To assert an actionable claim of negligent sidewalk maintenance against a city, a pedestrian must present evidence that:

> (1) [the plaintiff] fell and sustained injuries; (2) the proximate cause of the fall was a defect in or condition upon the sidewalk; (3) the defect was of such a nature and extent that a reasonable person, knowing of its existence, should have foreseen that if it continued some person using the sidewalk in a proper manner would be likely to be injured by reason of such condition; (4) the city had actual or constructive notice of the existence of the condition for a sufficient time prior to the plaintiff's fall to remedy the defect or guard against injury therefrom.

Cook v. Burke County, 272 N.C. 94, 97, 157 S.E.2d 611, 613 (1967) (quotation marks and citation omitted).

In the instant case, plaintiff's affidavit establishes sufficient evidence of the first and second elements. Plaintiff's forecast of evidence suggests that plaintiff was walking along the sidewalk at night and a defect on the surface of the sidewalk caused plaintiff to sustain injuries. Plaintiff

also presented affidavits from five residents of Alston Avenue indicating the hole existed in the sidewalk for at least five years and that employees of the City occasionally trimmed the vegetation growing from the sidewalk and the hole. Furthermore, although Murphy testified that he was unaware that an orange cone, which signals "caution," was placed inside a portion of the hole, there is evidence from an Alston Avenue resident that employees of the City replaced the cone after cutting the grass near the hole. Plaintiff's evidence also indicates that although the City maintained the vegetation around the hole, at the time of the incident, this hole had not been trimmed and the overgrown vegetation may have obstructed plaintiff's view of the hole and orange cone.

From the forecast of evidence, we conclude a reasonable juror might find that the City had constructive notice of the defect, that it was foreseeable that the failure to remedy the defect might cause injury to a pedestrian, and that the City failed to reasonably maintain this particular section of the sidewalk. In fact, Murphy, a City employee, testified by deposition that he was not aware that the City was responsible for this section of the sidewalk. Additionally, the forecast of evidence might also support a finding that a defect of this magnitude, in addition to the orange warning cone, should have alerted plaintiff to the danger of the sidewalk and his own negligence would bar recovery against the City. In any event, there is conflicting evidence regarding whether the City breached the standard of care in its maintenance of the sidewalk that must be resolved by a jury. Since we are not satisfied that the affidavits presented at the summary judgment hearing support the trial court's conclusion that there were no genuine issues as to any material fact regarding the City's maintenance of the sidewalk, we conclude the trial court erred by granting the City's motion for summary judgment.

C. Governmental Immunity

[3] We have considered the City's argument that it was immune from liability under the doctrine of governmental immunity and overrule its contention because sidewalks are specifically excluded from such immunity. *See, e.g.*, *Sisk v. City of Greensboro*, 183 N.C. App. 657, 659, 645 S.E.2d 176, 179 ("If the activity complained of is governmental, the municipality is entitled to governmental immunity. Maintenance of a public road and highway is generally considered a governmental function; however, exception is made in respect to streets and sidewalks of a municipality.") (citation omitted), *disc. review denied*, 361 N.C. 569, 650 S.E.2d 813 (2007).

III. Conclusion

According to the applicable North Carolina General Statutes and regulations, absent an agreement to the contrary, the City was responsible to maintain this sidewalk which runs parallel to Highway 55 within its municipal borders. After determining that the City owed plaintiff a statutory duty of care, we reviewed the record evidence and conclude genuine issues of material fact were presented as to whether the City had actual or constructive notice of the defective condition of this sidewalk. These issues of fact are directly relevant to whether the City was negligent. Therefore, the trial court's order granting summary judgment for the City must be reversed, and this case must be remanded for further proceedings.

Reversed and remanded.

Judges STROUD and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 2 February 2016)

A.C.L. MORTG. SERVS., L.L.C. v. RUNSKIPSHOP, L.L.C. No. 15-249	Rockingham (13CVS1244)	Affirmed in Part, Reversed in Part and Remanded
DIAL v. BRITTHAVEN, INC. No. 15-753	Robeson (14CVS2029)	Affirmed
HOWARD v. CHAMBERS No. 15-590	Durham (13CVS3675)	Affirmed
HUNTER-RAINEY v. N.C. CENT. UNIV. No. 15-178	Wake (13CVS16721)	Reversed and Remanded
IN RE PRICE No. 15-639	Ashe (12SP18)	Dismissed
IN RE FOX DEN DEV., LLC No. 15-471	Iredell (13SP685)	Affirmed
MALDJIAN v. BLOOMQUIST No. 15-729	Davie (14CVS115)	Dismissed
SOLOMON v. SCOPE SERVS., INC. No. 15-851	Durham (13CVS1688)	Affirmed
STATE v. EURY No. 15-709	Mecklenburg (14CRS213551) (14CRS27470)	Remanded for resentencing
STATE v. FELTON No. 15-268	Pasquotank (13CRS51905)	No Error
STATE v. GRAY No. 15-500	Edgecombe (12CRS52271-72) (12CRS52275-77)	NO ERROR IN AISBI AND BURGLARY CONVICTIONS AND SENTENCES; VACATE SENTENCES FOR MM AND REMAND FOR RESENTENCING; VACATE DEFENDANT GILCHRIST'S FELONIOUS CCW JUDGMENT, ENTER JUDGMENT ON MISDEMEANOR CCW AND RESENTENCE; IAC CLAIM DENIED.

STATE v. MANESS No. 15-497	Randolph (12CRS55707) (12CRS55709)	Dismissed
STATE v. McLENDON-BROWN No. 15-302	Anson (12CRS51900)	No Error
STATE v. MOLINA No. 15-695	Union (12CRS53911)	No Error
STATE v. PUGH No. 15-666	Martin (08CRS51562-63) (08CRS51566) (09CRS227)	No Error
STATE v. ROGERS No. 15-642	Randolph (12CRS56252)	Vacated
STATE v. SELLERS No. 15-733	Forsyth (13CRS50254-55) (13CRS50262-67) (13CRS50269-70) (13CRS50559-63)	Vacated and Remanded
STATE v. SHAW No. 15-573	Catawba (13CRS1159)	No Error
STATE v. STASIV No. 15-806	Columbus (14CRS51654)	No Error
STATE v. WHITE No. 15-871	Edgecombe (12CRS50367)	No Error
STATE v. YORK No. 15-419	Forsyth (12CRS62096) (12CRS62730) (12CRS63017) (13CRS50468) (13CRS7746)	No Prejudicial Error
WHITEHURST v. ALEXANDER CNTY. No. 15-265	Alexander (14CVS274)	Affirmed; Remanded for Correction of Clerical Error.
WILLIAMS v. CHANEY No. 15-812	Lincoln (08CVD1549)	Vacated and Remanded

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