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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 19, 2018

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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COURT OF APPEALS

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Filed 5 April 2016

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Administrative Law—ALJ decision supported by evidence—The trial court erred by concluding that an Administrative Law Judge's decision dismissing petitioner was not supported by substantial evidence. **Barron v. Eastpointe Hum. Servs., LME, 364.**

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APPEAL AND ERROR

Appeal and Error—assignments of error—not required—Assignments of error are no longer required in the record or the brief. **Barron v. Eastpointe Hum. Servs., LME, 364.**

Appeal and Error—interlocutory orders and appeals—takings claim—The Court of Appeals had jurisdiction over interlocutory orders concerning the scope of a taking for the building of a bridge. **City of Charlotte v. Univ. Fin. Props., LLC, 364.**

Appeal and Error—subject matter jurisdiction—notice of appeal—objection inherent to hearing—writ of certiorari—The Court of Appeals had subject matter jurisdiction over plaintiff's appeal from the dismissal of his common law dram shop claim. Plaintiff's objection was inherent to the hearing, and he identified the pertinent order in the Statement of Organization of Trial Tribunal and the proposed issues on appeal. Further, plaintiff's petition for writ of certiorari was granted. **Davis v. Hulsing Hotels N.C., Inc., 406.**

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CRIMINAL LAW

Criminal Law—closing argument—motion to dismiss—sequestration—truthfulness—credibility—The trial court did not abuse its discretion in an alienation of affections case by denying defendant's motions to dismiss based on portions of plaintiff's closing argument. Although the remarks concerning the wife's sequestration and her truthfulness constituted impermissible opinions as to her credibility, a review of plaintiff's closing argument in its entirety revealed these improper statements were not sufficiently egregious so as to entitle defendant to relief under Rule 59 or 60. Defendant failed to demonstrate that the amount of compensatory damages awarded was excessive. **Hayes v. Waltz, 438.**

DAMAGES AND REMEDIES

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Damages and Remedies—punitive—shooting by officer—In a case arising from a shooting by an officer, the trial court correctly denied the officer's motion for summary judgment on punitive damages. Plaintiff's complaint forecast a genuine issue of material fact regarding the officer's conduct and the officer failed to carry his burden of showing that no reasonable issue of material fact existed. **Hart v. Brienza, 426.**

DRUGS

Drugs—manufacturing methamphetamine—jury instruction—failure to show manifest injustice—The trial court did not err by instructing the jury on the manufacturing methamphetamine charge. Although the instruction could have been more precisely worded, a jury would understand from the instruction that it was required to find not only that defendant possessed these chemicals, but also that he possessed the chemicals in order to combine them to create methamphetamine. Even if the instruction was imprecise, defendant did not show that a failure to suspend the Appellate Rules would result in manifest injustice. **State v. Oxendine, 502.**

Drugs—manufacturing methamphetamine—sufficiency of indictment—specific form not required—not void for uncertainty—An indictment for manufacturing methamphetamine was sufficient. The State was not required to allege the specific form that the manufacturing activity took. The allegations in the indictment regarding possession of precursor chemicals were mere surplusage and could be disregarded. The indictment properly alleged a violation of N.C.G.S. § 90-95(a)(1). Further, the indictment was not void for uncertainty. **State v. Oxendine, 502.**

Drugs—possession of methamphetamine precursors—sufficiency of indictment—failure to allege intent or knowledge—An indictment for possession of methamphetamine precursors was insufficient because it failed to allege either defendant's intent to use the precursors to manufacture methamphetamine or his knowledge that they would be used to manufacture methamphetamine. Judgment on defendant's conviction of possession of a precursor chemical in violation of N.C.G.S. § 90-95(d1)(2)(b) was arrested. **State v. Oxendine, 502.**

EMINENT DOMAIN

Eminent Domain—taking of land—loss of visibility—not compensable—Although plaintiff argued that it was entitled to compensation for the loss of visibility for its building as a taking for the building of a bridge where there was an actual physical taking of a portion of its land, the fact that a physical taking has occurred is not enough to render compensable injuries that do not arise from the condemnor's use of the land. **City of Charlotte v. Univ. Fin. Props., LLC, 396.**

Eminent Domain—takings—construction of bridge—loss of visibility—The loss in visibility of University Financial's property to passing traffic was not part of the taking for the construction of a bridge. Landowners have no constitutional right to have anyone pass their premises, so that landowners are not compensated for changes in traffic, and there is no meaningful distinction between a diminishment in value from a reduction in traffic and one based on reduced disability to passing traffic. **City of Charlotte v. Univ. Fin. Props., LLC, 396.**

EMPLOYER AND EMPLOYEE

Employer and Employee—sexual abuse allegations—investigative team—supervisor participation—no violation of due process—In a State employee dismissal case which began with allegations of sexual harassment, petitioner did not demonstrate that his supervisor fulfilling her role on the investigative team and possibly recommending his dismissal demonstrated a personal bias or a violation of due process. **Barron v. Eastpointe Hum. Servs., LME, 364.**

Employer and Employee—sexual harassment allegations—investigative team—all female—A State employee accused of sexual harassment did not establish that an investigative team composed of an "untrained, inexperienced group of females" showed bias. It was not clear who would have been more qualified to be on the investigative team; a person's gender does not equate to disqualifying bias; and the evidence did not show gender-charged language or that investigative team's actions were informed by anything other than the facts. **Barron v. Eastpointe Hum. Servs., LME, 364.**

Employer and Employee—sexual harassment allegations—meeting with investigative team—no due process deprivation—A State employee accused of sexual harassment received proper notice and was not deprived of due process or his right to a pre-dismissal hearing when he met with an investigative team to give his side of the situation. **Barron v. Eastpointe Hum. Servs., LME, 364.**

Employer and Employee—termination—grounds—notice sufficient—A State employee accused of sexual harassment received sufficient notice of the grounds for his termination. **Barron v. Eastpointe Hum. Servs., LME, 364.**

Employer and Employee—whistleblower claim—pretextual reasons for discipline and discharge—insufficient evidence—The trial court did not err by granting summary judgment for the Department of Transportation (DOT) on a whistleblower claim where plaintiff alleged that he was disciplined and terminated in retaliation for reporting that a DOT auditing reorganization violated the Internal Audit Act and earlier Supreme Court holdings in the case. DOT articulated several legitimate, non-retaliatory reasons for disciplining and eventually terminating plaintiff, while plaintiff made no express argument, and the record revealed, no competent evidence to support any finding of pretext. **Hodge v. N.C. Dep't of Transp., 455.**

IMMUNITY

Immunity—governmental—shooting by officer—insurance policy language—In a case arising from a shooting by an officer, the defense of governmental immunity barred plaintiff's claim against the County under respondeat superior as well as the claims against the officer in his official capacity. Unambiguous language in the County's liability insurance policy clearly preserved the defense of governmental immunity. **Hart v. Brienza, 426.**

JUDGMENTS

Judgments—modification of preceding child support judgment—preceding judgment null—Although plaintiff contended that defendant was estopped from challenging a 2001 child support order because he successfully moved to reduce the amount of support, before he moved to set the order aside on jurisdictional grounds the judgment was a nullity and could be attacked at any time. **Catawba Cnty. v. Loggins, 387.**

NEGLIGENCE

Negligence—common law dram shop claim—improper dismissal at pleadings stage—The trial court erred by dismissing plaintiff's common law dram shop claim

on the pleadings. Plaintiff sufficiently pled a negligence *per se* claim. Decedent's consumption of alcohol, without more alleged in the complaint, could not bar plaintiff's claim at the pleadings stage. However, plaintiff's complaint failed to raise facts sufficient to satisfy the doctrine of last clear chance. **Davis v. Hulsing Hotels N.C., Inc., 406.**

POLICE OFFICERS

Police Officers—shooting by officer—issues of fact—reaching for shotgun— In a case arising from a shooting by an officer, the trial court did not err by denying the officer's motion for summary judgment on plaintiff's claims against him in his individual capacity. Conflicting evidence existed to create genuine issues of fact about whether plaintiff was complying with officers' commands or reaching for his shotgun, thereby justifying this officer's use of force, when the officers ordered him to "freeze" and "get on the ground." **Hart v. Brienza, 426.**

REAL ESTATE

Real Estate—condominiums—withdrawal of property—"any portion"—legal sufficiency of description—On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' argument that the use of the term "any portion" in the Declaration failed to sufficiently describe the real estate to which the right of withdrawal was meant to apply. Because Phase I and Phase II were the only discrete and clearly identifiable "portions" of the Condominium depicted on the plat, the Court of Appeals construed Skybridge's right to withdraw "any portion" as the right to withdraw either Phase I or Phase II. Skybridge's express reservation of the right to withdraw "any portion" provided a legally sufficient description of the real estate to which withdrawal rights applied. **In re Skybridge Terrace, LLC, 489.**

Real Estate—condominiums—withdrawal of property—public offering statement—inconsistent with declaration—On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC, on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' argument that they were misled by the language in the public offering statement providing that Skybridge had retained no option to withdraw real estate from the Condominium. The plain wording of the offering stated that the Declaration would control in the event of a conflict between the offering and the Declaration. **In re Skybridge Terrace, LLC, 489.**

Real Estate—condominiums—withdrawal of property—substantial compliance with Condominium Act—On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC, on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' arguments that Skybridge's Declaration failed to substantially comply with the Condominium Act and that its omissions from the Declaration were material. Because the same right of withdrawal applied to each of the two phases of the property that were actually part of the Condominium, the failure to explicitly state so on the plat was a not material omission. Likewise, Skybridge's omission from the Declaration of a time limit within

REAL ESTATE—Continued

which the right to withdraw could be exercised was not material because defendants purchased units without regard to this omission. **In re Skybridge Terrace, LLC, 489.**

TAXATION

Taxation—airplane tires—excluded as inventory owned by manufacturer— The Property Tax Commission erred by determining that certain airplane tires held in Michelin's Mecklenburg facility were subject to taxation. The tires were excluded from taxation as inventory owned by a manufacturer pursuant to N.C.G.S. § 105-273(33). **In re Michelin N. Am., Inc., 482.**

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.

ALBERT BARRON, Petitioner
v.
EASTPOINTE HUMAN SERVICES LME, Respondent

No. COA15-380

Filed 5 April 2016

1. Appeal and Error—assignments of error—not required

Assignments of error are no longer required in the record or `the brief.

2. Administrative Law—ALJ decision supported by evidence

The trial court erred by concluding that an Administrative Law Judge's decision dismissing petitioner was not supported by substantial evidence.

3. Employer and Employee—sexual abuse allegations—investigative team—supervisor participation—no violation of due process

In a State employee dismissal case which began with allegations of sexual harassment, petitioner did not demonstrate that his supervisor fulfilling her role on the investigative team and possibly recommending his dismissal demonstrated a personal bias or a violation of due process.

4. Employer and Employee—sexual harassment allegations—investigative team—all female

A State employee accused of sexual harassment did not establish that an investigative team composed of an "untrained, inexperienced group of females" showed bias. It was not clear who would have been more qualified to be on the investigative team; a person's gender does not equate to disqualifying bias; and the evidence did not show gender-charged language or that investigative team's actions were informed by anything other than the facts.

5. Employer and Employee—sexual harassment allegations—meeting with investigative team—no due process deprivation

A State employee accused of sexual harassment received proper notice and was not deprived of due process or his right to a pre-dismissal hearing when he met with an investigative team to give his side of the situation.

6. Employer and Employee—termination—grounds—notice sufficient

A State employee accused of sexual harassment received sufficient notice of the grounds for his terminal.

7. Appeal and Error—unpublished opinions—citation of unpublished opinions

Counsel was admonished to follow the Rules of Appellate Procedure in citing unpublished opinions.

Appeal by Respondent from an order entered 5 January 2015 by Judge Paul L. Jones in Superior Court, Greene County. Heard in the Court of Appeals 19 October 2015.

Gray Newell Thomas, LLP, by Angela Newell Gray, for Petitioner-Appellee.

The Charleston Group, by Jose A. Coker, R. Jonathan Charleston, Coy E. Brewer, Jr., and Dharmi B. Tailor, for Respondent-Appellant.

McGEE, Chief Judge.

Eastpointe Human Services LME ("Eastpointe"), appeals from an order of the trial court ("the trial court's order"), reversing the final decision of an administrative law judge ("the ALJ's decision") that held Eastpointe (1) had grounds to dismiss petitioner Albert Barron ("Mr. Barron") as an employee and (2) had given Mr. Barron sufficient notice of the reasons for his dismissal. The trial court held that Eastpointe "did not [meet] its burden of proof that it had 'just cause' to dismiss" Mr. Barron and that the ALJ's decision was "[a]ffected by other error of law." We reverse the order of the trial court.

I. Background

Eastpointe describes itself in its brief as

> a local political subdivision of the State of North Carolina and a managed care organization that serves twelve (12) counties in eastern North Carolina. The agency has responsibility for oversight, coordination, and monitoring of mental health, intellectual developmental disabilities, and substance use addiction services in its catchment area. Eastpointe authorizes payment of medically necessary Medicaid services for residents of the catchment

> area whose Medicaid originates in the Eastpointe region. Eastpointe also provides housing to a limited number of special needs consumers.

(footnotes omitted).

Eastpointe hired Mr. Barron in 2001. Mr. Barron became Eastpointe's Housing Coordinator in 2006, and his title was changed to Director of Housing when Eastpointe merged with two similar managed care organizations in 2012. As Director of Housing, Mr. Barron "provide[d] direction in the development of affordable housing for special needs populations . . . [u]nder minimal supervision of the Chief of Clinical Operations[.]"

A consumer of housing services ("Consumer") accused Mr. Barron, *inter alia*, of touching her sexually without her consent in August 2012 and also of promising her furniture if she entered into a relationship with him. Mr. Barron was subsequently placed on "Investigative Status with pay" and, after a pre-dismissal conference, he was dismissed from employment with Eastpointe on 19 December 2012. Mr. Barron petitioned the Office of Administrative Hearings to review his dismissal by filing a "Petition for a Contested Case Hearing[.]" After a hearing, the ALJ's decision affirmed his dismissal. Mr. Barron petitioned the Superior Court of Greene County to review the ALJ's decision, and the trial court reversed the ALJ's decision. Eastpointe appeals.

II. The Evidence

A. Mr. Barron's Interactions with Consumer

An administrative hearing was held on 23 October 2013 and 16 January 2014 (hereinafter, "the hearing") in this matter. During the hearing, Karen Holliday ("Ms. Holliday"), a Housing Specialist with Eastpointe, testified that, in late August 2012, she asked Mr. Barron to take a copy of Consumer's lease to Consumer. Mr. Barron testified that he agreed to do so and went to Consumer's home on the morning of 24 August 2012. Mr. Barron and Consumer both testified that Consumer answered the door, informed Mr. Barron that she was not properly dressed, and asked Mr. Barron to return at a later time. Mr. Barron agreed and left.

Ms. Holliday testified she received a call from Consumer's case manager, Joy Coley ("Ms. Coley"), later that day indicating Consumer was ready for Mr. Barron to deliver her lease. Consumer testified Mr. Barron returned to her home later that day and that she was in the kitchen preparing food for her two sons. Consumer testified Mr. Barron entered her home, spoke to her sons for a while, and said "y'all have a sexy

mom[.]" In response, Consumer instructed her boys to leave the kitchen. Consumer further testified

> [Mr. Barron] got up and he came around, and he told me himself how fine and sexy I was. He asked me for a hug. I gave him a hug. . . . [H]e grabbed my buttocks and turned around and pulled his hand around and grabbed my private part, and I started backing up, and he pulled me back closer to him. He told me that if I ever told anybody that he would – he would take the house away from me that he blessed me with. . . . [H]e [also] told me basically if I started seeing him that he would make sure . . . I got furniture and that he would take care of me and my boys, [that] he would make sure that I wouldn't go without.

Mr. Barron acknowledged that, later that day, he sent Consumer some text messages that read, "H[i] [Consumer], this is Albert and this is my personal cell. It was so lovely meeting with you today . . . . [P]lease send me some of those amazing pics [your] son let me [see] on [your] phone." Consumer testified she sent Mr. Barron two pictures of herself, in which she was wearing different dresses and was posing for the camera. The texts and pictures were admitted into evidence at the hearing without objection. Mr. Barron acknowledged that Consumer sent him one picture, at his request, and that he responded by texting "Gorgeous!!!" Mr. Barron testified his response of "Gorgeous!!!" was meant "to describe something elegant or something with splendor, or something like that because, like a sunset, something like that. I use that word a lot and – to put that significance on something, yeah."

Ms. Holliday testified that Consumer called her within a couple of days of Mr. Barron's visit to Consumer's home. According to Ms. Holliday, Consumer seemed

> very upset and [was] saying that Mr. Barron . . . had been really inappropriate with her and she didn't like the fact that he had disrespected her in front of her kids. And to my recollection [Consumer said] something about living room furniture and that he had promised her living [room] furniture or something to that nature. . . . [Consumer also] state[d] at that time that Mr. Barron did touch her buttocks.

Ms. Holliday testified she met with Mr. Barron the following day and confronted him about engaging in "inappropriate behavior" with Consumer, although Ms. Holliday testified she did not go into the specifics of Consumer's allegations that were sexual in nature. Mr. Barron

denied any wrongdoing. Ms. Holliday also confronted Mr. Barron about his allegedly offering Consumer furniture, which he denied. Ms. Holliday testified she did not report either of Consumer's allegations further up the chain of command because Mr. Barron was Ms. Holliday's supervisor. Regarding Consumer's allegation that Mr. Barron had offered her furniture, Mr. Barron testified he also did not report that allegation up the chain of command. Dr. Susan Corriher ("Dr. Corriher"), Eastpointe's Chief of Clinical Operations, testified that not reporting Consumer's allegations up the chain of command violated Eastpointe's Corporate Compliance Manual and Human Resources Policy and Procedure Manual.[1]

Mr. Barron testified he received another text from Consumer in September 2012 that stated: "I wonder[ ] [what] or who scared [you] to have made [you] change [your] mind about [what] all [you] said to me [before you left] my [house] that [day]." He then received a string of texts from Consumer between 31 October and 2 November 2012, stating that Consumer had a "huge surprise" for Mr. Barron, that he "screwed up[,]" and that he messed with "the[ ] [w]rong chick." Mr. Barron contacted Dr. Corriher about the texts on 2 November 2012.

B. The Investigation

Mr. Barron met with Dr. Corriher and Kenneth E. Jones ("Mr. Jones"), Eastpointe's Chief Executive Officer, on 5 November 2012 ("the 5 November meeting") to discuss Consumer's allegations and the events that had taken place since 24 August 2012. Dr. Corriher testified Mr. Barron acknowledged asking for and receiving a picture from Consumer

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1. Eastpointe's Corporate Compliance Manual states that "[i]t will be the policy of Eastpointe to take all reports of potential violations [of the law] seriously. Any such report must be directed to the Corporate Compliance Officer[.]" Eastpointe's Human Resources Policy and Procedure Manual states that, when receiving a consumer complaint that "cannot be resolved to the complainant's satisfaction without further investigation[,]"

> staff will engage the formal complaint process. The staff who will receive the complaint will document the following information within [an Eastpointe] database:
>
> - Date complaint received
> - Complainant's name and contact information
> - Relationship to the consumer (if not the consumer)
> - Brief description of the nature of the complaint
>
> . . .
>
> This information is then immediately sent to the Customer Services Lead or designee.

and that he replied by texting: "Gorgeous!!!" According to Dr. Corriher, Mr. Barron said he did not report the texts or allegations to her earlier because "the text messages had stopped at some point, and he thought it was over," and that he later reported the texts to her because Consumer had started texting him again and his attorney had advised him to do so. Dr. Corriher further testified that, during the 5 November meeting, she specifically asked Mr. Barron about Consumer's accusations that he had touched Consumer, which Mr. Barron denied.

Dr. Corriher testified that, after the 5 November meeting, she consulted with Theresa Edmondson ("Ms. Edmondson"), Eastpointe's Director of Corporate Compliance and Human Resources, and instituted an investigation into Consumer's allegations ("the investigation"). The Eastpointe staff members assigned to investigate Consumer's allegations ("the investigative team") consisted of Dr. Corriher, Ms. Edmondson, Lynn Parrish, a member of the Human Resources Department at Eastpointe, and Tashina Raynor, Eastpointe's Director of Grievance and Appeals.

Pending the results of the investigation, Mr. Barron was placed on "Investigative Status with pay" on 6 November 2012. The letter from Eastpointe notifying Mr. Barron of the change in his status ("the investigative status letter") stated, in part, that

> [t]he reports of unacceptable conduct resulting in your being placed in Investigatory Status with pay are:
>
> 1. Allegations of inappropriate relationship with a consumer[.]
>
> 2. Not reporting these allegations to your supervisor in a timely manner.

Dr. Corriher testified about a telephone interview she had with Consumer on 26 November 2012 to discuss the allegations against Mr. Barron. Dr. Corriher documented that interview, and the statements reportedly made by Consumer during the interview were generally consistent with those reported by Ms. Holliday from her initial telephone conversation with Consumer. Mr. Barron met with the investigative team on 29 November 2012 to answer questions about Consumer's allegations ("the 29 November meeting"). According to Mr. Barron, he "was very surprised" by the questions asked during the 29 November meeting, because he thought the investigative team was investigating his concerns regarding Consumer's text messages to him. Mr. Barron submitted a four-page summary of his account of the interactions between him and Consumer to the investigative team on 30 November 2012.

C. The Pre-Dismissal Conference and Dismissal Letter

Eastpointe issued Mr. Barron a notice of pre-dismissal conference, dated 13 December 2012 ("the pre-dismissal notice"), that stated, in part,

> [t]he findings of the investigative team are as follows:
>
> 1. A consumer of housing services ("Consumer") has made accusations of inappropriate conduct by you. This accusation of inappropriate conduct included speaking [to] and touching her in an inappropriate manner, promising her living room furniture, [and] communicating with her through text messaging on your personal cell phone.
>
> . . .
>
> 4. By your own admission you learned on August 29, 2012 from a co-worker that [ ] Consumer was making accusations about your inappropriate personal conduct towards her. Further, you did not report this fact to your [supervisor] until [November] 5, 2012.
>
> . . .
>
> 6. Based on text messages you presented to management, you engaged in unprofessional and inappropriate communication with [ ] Consumer.

Eastpointe held a pre-dismissal conference on 17 December 2012 ("the pre-dismissal conference"), in which Mr. Barron participated. Mr. Jones sent Mr. Barron a dismissal letter, dated 19 December 2012 ("the dismissal letter"), that stated, in part,

> our decision is to dismiss you from your position as Director of Housing effective Wednesday, December 19, 2012 at 5:00 p.m. The basis for termination includes unacceptable personal conduct and conduct unbecoming an employee that is detrimental to the agency services.
>
> The determination was based on the following[ ]:
>
> 1. A consumer of housing services made accusations of inappropriate conduct by you.
>
> 2. You confirmed you communicated with this consumer on your personal cell phone[,] . . . [and] [i]t was determined that some of the communications were not work related or professional.

3. That you learned on August 29, 2012 from a co-worker that this consumer was making accusations about you exhibiting inappropriate personal contact towards her, but did not report this to your supervisor until [November] 5, 2012.

. . .

6. You inappropriately asked this consumer for a picture, which was sent, and received by you.

D. The ALJ's Decision

Mr. Barron filed a "Petition for a Contested Case Hearing" with the Office of Administrative Hearings, dated 14 January 2013. Mr. Barron alleged in his petition that Eastpointe

> has substantially prejudiced [his] rights by acting erroneously, failing to use proper procedure, and acting arbitrarily or capriciously when it suspended and ultimately terminated the petitioner for alleged unacceptable personal conduct related to a consumer's alleged accusations of inappropriate conduct. [Mr. Barron] contends that [Eastpointe] terminated him without just cause based on false accusations.

After a hearing, the ALJ, in a decision dated 22 April 2014, made numerous findings in line with Consumer's allegations and concluded that

33. [Mr. Barron's] willful failure to report the allegations against him until matters escalated violated known and written work rules.

34. [Mr. Barron's] personal relations and touching of Consumer [ ] were inappropriate behavior[s] that constituted unacceptable personal conduct and conduct unbecoming an employee. [Mr. Barron's] interactions and text messaging with Consumer [ ] was "conduct unbecoming a state employee that is detrimental to state service[ ]" [under 25 N.C.A.C. 1J .0614(8).]

. . .

38. In this case, [Mr. Barron] did in fact engage in the conduct as alleged in four of the six enumerated bases in the [dismissal] letter of December 19, 2012, which constitutes unacceptable conduct as defined by

> [25 N.C.A.C. 1J .0614(8)]. [Eastpointe] had "just cause" for disciplining [Mr. Barron].

The ALJ's decision also noted that the dismissal letter was "inartfully" drafted but held, nonetheless, that it provided Mr. Barron with sufficient notice of the grounds for his dismissal.

E. The Trial Court's Order

In a petition dated 16 May 2014, Mr. Barron petitioned the Superior Court of Greene County to review the ALJ's decision. Mr. Barron filed with the trial court "Petitioner's Memorandum in Support of His Petition for Judicial Review" ("the Memorandum"), dated 4 December 2014.[2] The trial court's order, entered 5 January 2015, is less than two pages in length and summarily concludes that

> (2) [Eastpointe] did not [meet] its burden of proof that it had "just cause" to dismiss [Mr. Barron] for unacceptable personal conduct without warning or other disciplinary action.
>
> (3) The substantial rights of [Mr. Barron] were prejudiced because the ALJ's findings, inferences, conclusions, or decisions are:
>
> a. Affected by other error of law;
>
> b. Unsupported by substantial evidence admissible under G.S. §§150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; and,
>
> c. Arbitrary, capricious, or an abuse of discretion.
>
> (4) There is no evidence that [Mr. Barron] willfully violated any known or written work rule, engaged in conduct for which no reasonable person should expect to receive prior warnings, or conduct unbecoming a state employee that is detrimental to state service.
>
> (5) The ALJ's decision has no rational basis in the evidence.

Accordingly, the trial court reversed the ALJ's decision.

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2. Mr. Barron's Memorandum is largely replicated, almost word for word, in his brief before this Court.

III. Standard of Review

Judicial review of a final agency decision in a contested case is governed by N.C. Gen. Stat. § 150B-51 (2015). The statute "governs both trial and appellate court review" of administrative decisions. *N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 440, 462 S.E.2d 824, 826 (1995), *aff'd per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). Pursuant to N.C.G.S. § 150B-51(b),

> [t]he court reviewing a final decision may . . . reverse or modify the decision if the substantial rights of the petitioner[ ] may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . ; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

When the issue for review is whether an agency decision was supported by "substantial evidence" or was "[a]rbitrary, capricious, or an abuse of discretion," this Court determines whether the trial court properly applied the "whole record" test. N.C.G.S. § 150B-51(c). This requires

> examin[ing] all the record evidence — that which detracts from the agency's findings and conclusions as well as that which tends to support them — to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (citation and quotation marks omitted). The trial court "may not substitute its judgment for the agency's as between two conflicting views," *id.*, and it is "bound by the findings" made below if they are "supported by competent, material, and substantial evidence in view of the entire record as submitted[,]" *Bashford v. N.C. Licensing Bd. for General Contractors*, 107 N.C. App. 462, 465, 420 S.E.2d 466, 468 (1992).

We review *de novo* the question of whether an agency decision was "[a]ffected by other error of law[.]" N.C.G.S. § 150B-51(c); *see Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 279, 572 S.E.2d 184, 191 (2002) ("[W]here the initial reviewing court should have conducted *de novo*

review, this Court will directly review the [agency's] decision under a *de novo* review standard."). "However, the *de novo* standard of review . . . [also] does not mandate that the reviewing court make new findings of fact in the case. Instead, the court, sitting in an appellate capacity, should generally defer to the administrative tribunal's 'unchallenged superiority' to make findings of fact." *Early v. County of Durham, Dep't of Soc. Servs.*, 193 N.C. App. 334, 342, 667 S.E.2d 512, 519 (2008) (citation omitted). "[W]e employ the appropriate standard of review regardless of that utilized by the reviewing trial court." *Skinner*, 154 N.C. App. at 279, 572 S.E.2d at 191.

IV. Abandonment of Issues

[1] As a preliminary matter, Mr. Barron contends in his brief that Eastpointe has abandoned its arguments on appeal because it did not set out formal "assignments of error" in the record or in its brief. However, the requirement that an appellant set out "assignments of error no longer exist[s] under our Rules of Appellate procedure; [it] disappeared . . . when the Rules were revised in 2009." *Bd. of Dirs. of Queens Towers Homeowners' Assoc., v. Rosenstadt*, 214 N.C. App. 162, 168, 714 S.E.2d 765, 769 (2011). Accordingly, Mr. Barron's argument is without merit.

V. Just Cause

[2] Eastpointe contends on appeal that the trial court erred by reversing the ALJ's decision and asserts it established just cause to dismiss Mr. Barron as an employee. Mr. Barron argued to the trial court below that the ALJ erred in concluding that Eastpointe had established just cause to dismiss Mr. Barron. The trial court agreed with Mr. Barron, holding that the ALJ's decision was "[u]nsupported by substantial evidence[,]" "[a]rbitrary, capricious, or an abuse of discretion[,]" and that there was "no rational basis in the evidence" to establish just cause for Eastpointe's dismissal of Mr. Barron. We conclude that Eastpointe did have just cause to terminate Mr. Barron.

N.C. Gen. Stat. § 126-35(a) (2015) provides that "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." Establishing just cause "requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (citation, quotation marks, and brackets omitted). "[T]he first of these inquiries is a question of fact . . . [and is] reviewed under the whole record test. . . .

[T]he latter inquiry is a question of law . . . [and] is reviewed *de novo*. *Id.* at 665–66, 599 S.E.2d at 898; see N.C.G.S. § 150B-51(c).

Just cause includes "unacceptable personal conduct" by an employee. 25 N.C.A.C. 1J .0604(b). Unacceptable personal conduct is defined, in part, as

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> . . .
>
> (d) the willful violation of known or written work rules; [or]
>
> (e) conduct unbecoming a state employee that is detrimental to state service[.]

25 N.C.A.C. 1J .0614(8).

Based on the testimony of Consumer, Ms. Holliday, Dr. Corriher, and even Mr. Barron – all of which is outlined above – as well as the pictures and texts that were admitted into evidence, there was "competent, material, and substantial evidence[,]" *See Bashford*, 107 N.C. App. at 465, 420 S.E.2d at 468 – if not compelling evidence – that Mr. Barron (1) touched Consumer sexually without her consent; (2) engaged in inappropriate text messaging with Consumer; and (3) failed to report at least some of Consumer's allegations against him until matters escalated. *Id.* Accordingly, the trial court erred by concluding that the ALJ's decision was "[u]nsupported by substantial evidence[,]" "[a]rbitrary, capricious, or an abuse of discretion[,]" and that there was "no rational basis in the evidence" for Eastpointe to dismiss Mr. Barron for just cause.

VI. Alleged Due Process Violations During the Investigation

Eastpointe contends the trial court erred by reversing the ALJ's decision and asserts that Mr. Barron did not establish that his due process rights were violated during the investigation. Mr. Barron argued to the trial court that his due process rights had been violated during the investigation, and that, therefore, the ALJ's decision should have been reversed because (1) Dr. Corriher allegedly headed up the investigation and was biased against him after speaking with Consumer; (2) Eastpointe's investigative team was made up of an "untrained, inexperienced group of females . . . [who] showed bias against" him during the investigation; and (3) he was "subjected to a 'hearing' without proper notice" while the investigation was ongoing. We conclude that

Mr. Barron did not establish that his due process rights were violated during the investigation.

Career state employees are "entitled to a hearing according with principles of due process" before being dismissed from their jobs. *See Crump v. Bd. of Education*, 326 N.C. 603, 614, 392 S.E.2d 579, 584 (1990). "To make out a due process claim based on [bias], an employee must show that the decision-making board or individual possesses a disqualifying personal bias." *See Kea v. Department of Health & Human Sevs.*, 153 N.C. App. 595, 605, 570 S.E.2d 919, 925 (2002), *aff'd per curiam*, 357 N.C. 654, 588 S.E.2d 467 (2003). "The mere fact [that the person who ultimately recommends the dismissal of an employee] was familiar with the facts of [the employee's] case and acted as investigator and adjudicator on the matter is not a *per se* violation of due process." *Id.* at 605, 570 S.E.2d at 926. That person may "reach[ ] conclusions concerning [the employee's] situation prior to the [pre-dismissal] conference" when those conclusions are "based on" facts obtained during a thorough investigation. *Id.* at 606, 570 S.E.2d at 926.

A. Dr. Corriher's Role in the Investigation

[3] In the present case, Mr. Barron argued to the trial court that Dr. Corriher, his direct supervisor, headed up the investigation and was biased against him after speaking to Consumer. Mr. Barron also argued that Dr. Corriher was the one who ultimately recommended that he be dismissed.[3] However, Mr. Barron made no attempt to distinguish *Kea* from the present case. As in *Kea*, "[t]he mere fact [that Dr. Corriher] was familiar with the facts of [Mr. Barron's] case and acted as investigator and[,] [perhaps to some extent,] adjudicator on the matter [was] not a *per se* violation of due process." *See id.* at 605, 570 S.E.2d at 926. Even assuming *arguendo* that Dr. Corriher may have come to certain conclusions about Mr. Barron's situation before his pre-dismissal conference, Mr. Barron does not assert that those conclusions were "based on" anything other than the facts Dr. Corriher learned during her investigation. *See id.* at 606, 570 S.E.2d at 926. Accordingly, Mr. Barron had not demonstrated that Dr. Corriher's fulfilling her role on the investigative team and possibly recommending his dismissal demonstrated that she "possesse[d] a disqualifying personal bias" in any way. *See id.* at 605, 570 S.E.2d at 925.

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3. However, both Dr. Corriher and Mr. Barron acknowledged at the hearing that the final decision to actually dismiss Mr. Barron was made by Mr. Jones, Eastpointe's CEO. Also, notably, when asked during the hearing whether Mr. Barron knew if "the recommendation made for [his] termination [came] from Dr. Corriher [or] Theresa Edmondson[,]" Mr. Barron replied: "Not to my knowledge."

B. The Investigative Team

[4] Mr. Barron also argued to the trial court that Eastpointe's investigative team was made up of an "untrained, inexperienced group of females . . . [who] showed bias against" him during the investigation. As a preliminary matter, it is unclear to this Court as to who at Eastpointe – other than Dr. Corriher, Eastpointe's Chief of Clinical Operations; Ms. Edmiston, Eastpointe's Director of Corporate Compliance and Human Resources; and Tashina Raynor, Eastpointe's Director of Grievance and Appeals – would have been *more* qualified to oversee the investigation in the present case. Notably, Mr. Barron has been silent on that point.

We also do not believe that the investigative team consisting of a "group of females" necessarily establishes bias in the present case. Mr. Barron presented no evidence at the hearing that the investigative team used gender-charged language during the investigation or otherwise showed that the team members' interactions with Mr. Barron during the investigation were informed by anything beyond the facts of the investigation. A person's gender does not equate to having a disqualifying personal bias. Without more, Mr. Barron had not established that the investigative team "possesse[d] a disqualifying personal bias" in any way. *See id.*

C. The 29 November Meeting

[5] Mr. Barron further argued to the trial court that his due process rights were violated when he met with the investigative team during the 29 November meeting to answer questions about the situation involving Consumer. Notably, Mr. Barron raised no challenge with the trial court regarding his pre-dismissal conference, or the notice thereof. Instead, Mr. Barron contended his due process rights were violated when he was "subjected to a 'hearing' without proper notice" when he met with the investigative team during the 29 November meeting, *prior* to the pre-dismissal conference and while the investigation was still ongoing.

However, at the hearing, Mr. Barron testified that Dr. Corriher did, in fact, notify him of the 29 November meeting and informed him that the purpose of the meeting was for the investigative team to "hear [his] side" of the situation with Consumer. Moreover, Mr. Barron has never contended that he was deprived of a proper pre-dismissal conference before being dismissed from his job. Although Mr. Barron cited authority in the Memorandum, and in his brief before this Court, holding generally that career state employees are "entitled to a hearing according with principles of due process" *before being dismissed* from their jobs, *see, e.g.*, *Crump*, 326 N.C. at 614, 392 S.E.2d at 584, he has provided no further

authority or substantive argument suggesting that the 29 November meeting constituted an additional "hearing" that similarly implicated his due process rights. *See id.* Mr. Barron's argument was without merit.

VII. Notice of Reasons for Dismissal

[6] Eastpointe contends on appeal that the trial court erred by reversing the ALJ's decision and asserts it gave Mr. Barron sufficient notice of the reasons for his dismissal. Mr. Barron argued to the trial court that the ALJ's decision affirming his dismissal from Eastpointe was affected by an error of law because he was given insufficient notice of the reasons for his dismissal.

In addition to providing that career state employees may only be discharged for just cause, N.C.G.S. § 126-35(a) requires that

> [i]n cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.

N.C.G.S § 126-35(a). N.C.G.S § 126-35(a) "establishes a condition precedent that must be fulfilled by the employer before disciplinary actions are taken." *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 350, 342 S.E.2d 914, 922 (1986).

> The purpose of [N.C.G.S. §] 126-35 is to provide the employee with a written statement of the reasons for his discharge so that the employee may effectively appeal his discharge. The statute [also] was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal.

Id. at 350–51, 342 S.E.2d at 922 (citation omitted). The written notice must be stated "with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge." *Employment Security Comm. v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981).

The legal question of whether a dismissal letter is "*sufficiently* particular[,]" *id.* (emphasis added), has always been fact-specific. In *Wells*, 50 N.C. App. at 389, 274 S.E.2d at 257 (1981), the employee was "suspended . . . from his job without pay pending an investigation into allegations that [the employee had] violated laws and petitioner's policies in the performance of his duties." The employee was subsequently fired

and provided a dismissal letter, stating that the reasons for dismissal were that the employee:

> 1. Violated Agency Procedure in attempting to recruit workers from Florida by phone and personal visit.
> 2. Required growers to use crew leaders even though workers were not a part of a crew nor did the crew leader provide any service for his fee.
> 3. Forced workers to work for designated crew leader even though the workers preferred not to work in a crew. Workers who questioned assignment to a crew were threatened with loss of job or deportation.
> 4. Violated Agency Procedure by not reporting illegal aliens.

Id. at 392–93, 274 S.E.2d at 258–59. "[T]he only information given the [employee] concerning the reasons for his dismissal was contained in [that] letter of dismissal." *Id.* at 392, 274 S.E.2d at 258. Moreover, the employee subsequently "requested specific details regarding the four reasons for the dismissal . . . [and] asked for dates and the names of the individuals involved in these incidents." *Id.* at 393, 274 S.E.2d at 259. The state refused to provide the employee with that information. *Id.* Accordingly, this Court noted that the dismissal letter gave the employee "no way . . . to locate [the] alleged violations in time or place, or to connect them with any person or group of persons" and held that the employee received insufficient notice in the dismissal letter under N.C.G.S. § 126-35(a). *Id.* at 393, 274 S.E.2d at 259.

Similarly, in *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 684, 468 S.E.2d 813, 815 (1996), an employee was accused of making race-based and sex-based derogatory comments to a number of her fellow employees. She also was accused of "intimidat[ing] [other] employees and threaten[ing] reprisals if they persisted in complaining about [her] conduct." *Id.* Although the employee was given a pre-dismissal conference, the dismissal letter "fail[ed] to include the specific names of [the employee's numerous] *accusers* in her dismissal letter[.]" *Id.* at 687, 468 S.E.2d at 817 (emphasis added). Specifically, the employee's dismissal letter stated the following grounds for dismissal:

> First, I have found that while employees were working on a concrete job outside of Jackson Library in the last part of June you told a black employee, "If I was a black man, I would like to do this kind of work all day long." This

> statement . . . was a racial, and sex-based slur . . . [and] is especially serious because it is a message to employees, from their supervisor, that work in the Grounds Division is assigned based on race and sex. . . . On other occasions, you have made comments such as "no man will ever meet my standards" and you have called employees "stupid."
>
> Second, after learning that employees had complained to the management and to Human Resources about your conduct, you began to talk with employees to discourage pursuit of their complaints. Specifically, you distributed to three employees copies of discipline and notes about discipline you received last August. . . . You have also told employees, "If I go, I will take others with me." Such statements and actions constitute attempts to intimidate employees and threatened reprisals if they persisted in complaining about your conduct.

Id. at 684, 468 S.E.2d at 815. Based on the facts in *Owen*, this Court concluded the employee "was unable, at least initially, to correctly locate in 'time or place' the conduct which [the employer] cited as justification for her dismissal." *Id.* at 687, 468 S.E.2d at 817. Accordingly, we held that the employee's dismissal letter lacked "sufficient particularity . . . [and, therefore,] render[ed] the statement of reasons contained in the dismissal letter statutorily infirm" under N.C.G.S. § 126-35(a). *Id.* at 687–88, 468 S.E.2d at 817.[4]

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4. **[7]** Mr. Barron also relies heavily on *Leak v. N.C. Dep't of Pub. Instruction*, 176 N.C. App. 190, 625 S.E.2d 918 (2006) (unpublished), in his brief to support his position that the dismissal letter provided insufficient notice of the reasons for his dismissal. However, unpublished cases, such as *Leak*, are reported pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure. As noted by *Evans v. Conwood, LLC*, 199 N.C. App. 480, 490–91, 681 S.E.2d 833, 840 (2009),

> [t]his rule provides that citation of unpublished opinions is disfavored. Such an opinion may be cited if a party believes that it has precedential value to a material issue in the case, and there is no published opinion that would serve as well. When an unpublished opinion is cited, counsel must do two things: (1) they must indicate the opinion's unpublished status; and (2) they must serve a copy of the opinion on all other parties to the case and on the court.

Id. (citation and quotation marks omitted). In the present case, counsel did neither of these things. "This conduct was a violation of the Rules of Appellate Procedure. In our discretion, we hold that this conduct was not a gross violation of the Rules of Appellate Procedure meriting the imposition of sanctions. However, counsel is admonished to exercise greater care in the future citation of unpublished opinions." *See id.*

However, in *Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 923, the employee was dismissed for "personal misconduct[.]" Specifically, the employee's dismissal letter stated that the employee was dismissed for a single act: his "leadership role in assembling the meeting of October [21], 1983, in [his supervisor's] office. . . ." *Id.* We held that the dismissal letter's notice of this single, specific act was "sufficient[ly] particular[ ]" and that the employee "was clearly notified of the specific act which led to his dismissal." *Id.* at 351–52, 342 S.E.2d at 923.

In *Nix v. Dept. of Administration*, 106 N.C. App. 664, 667, 417 S.E.2d 823, 826 (1992), the employee's dismissal letter stated generally that he "was being terminated because he 'had not been performing at the level expected by [his] position classification,' [ ] because there had been no 'marked improvement' " in his job performance, and because he had exhausted his vacation and sick leave. The employee also had received previous "oral and . . . written warnings" for his unacceptable performance. *Id.* Accordingly, we held that the dismissal letter was "sufficiently specific[,] . . . since [the employee] was already on notice due to the previous two warnings that he was not performing at the expected level." *Id.* (citing *Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 922); *accord Skinner*, 154 N.C. App. at 280, 572 S.E.2d at 191 (affirming an employee's demotion where "he received two detailed written warning letters, as well as a notice of the pre-demotion conference outlining the specific grounds for the proposed disciplinary action.").

In *Mankes v. N.C. State Educ. Assistance Auth.*, 191 N.C. App. 611, 664 S.E.2d 79, slip op. at 6 (2008) (unpublished), the employee was dismissed for "unacceptable personal conduct as well as unsatisfactory performance" in her job. Her dismissal letter stated the following grounds for dismissal:

> (1) Not following designated procedures regarding the prohibition of printing and photocopying of borrower computer records, and the resulting[ ] improper use of those hardcopy records.
>
> (2) Not working your assigned tickler accounts accurately.
>
> (3) Not making adequate, documented telephone calls to borrowers.
>
> (4) Improperly working borrower accounts that have not been assigned to you.
>
> (5) Not following designated procedures regarding letter requests for borrowers applying for total and permanent disability discharges.

> (6) Not following designated procedures regarding the prohibition against the recording of borrower Social Security Numbers in your personal, unauthorized work journal.

Id., slip op. at 6–7. On appeal, the employee argued that the grounds stated in her dismissal letter were “vague criticisms” and, therefore, were not “sufficiently particular” for the purposes of N.C.G.S. § 126-35(a) under this Court’s holdings in *Wells* and *Owen*. *Id.*, slip op. at 7–8. This Court concluded, however, that *Wells* and *Owen* were distinguishable from *Mankes*. *Id.* With regard to *Wells*, we noted that

> the *only* notice the employee had as to the reasons for his dismissal were those in the letter; he received no earlier written or oral notice of the unacceptable conduct. Second, the employee in *Wells* requested that such specific information be provided, and the state refused to provide it. In the case at hand, petitioner was given notice both in writing and orally prior to this letter of dismissal, and specific instances of the complained-of conduct were provided at an earlier meeting.

Id. (citations omitted). With regard to *Owen*, we noted that

> both [grounds for dismissal in the employee’s dismissal letter] made reference to accusations made by “employees”: “[E]mployees had complained[,]” “you began to talk with employees[,]” “[y]ou have also told employees,” “attempts to intimidate employees[,]” etc. This Court noted that “not a single allegation specifically named her accuser[,]” preventing her from identifying the incidents at issue, and therefore from preparing an appropriate defense. There, however, the only reasons justifying the employee’s dismissal related to her conduct toward other employees; *the identity of those individuals was therefore a vital piece of information.* In the case at hand, the reasons given for petitioner’s dismissal were her own conduct, specific examples of which were given to petitioner by [her supervisor].

Id., slip op. at 8 (citations omitted) (emphasis added). Accordingly, we held that the employee received sufficient notice of the reasons for her dismissal under N.C.G.S. § 126-35(a). *Id.*, slip op. at 8–9.

Finally, in *Follum v. N.C. State Univ.*, 204 N.C. App. 369, 696 S.E.2d 203, slip op. at 11–12 (2010) (unpublished), an employee's dismissal letter stated that the employee "behaved inappropriately [at a 7 March 2007 meeting,] . . . refused to allow the participants – including the dean of the school – to collaborate during the meeting[,] . . . [and was] disrespectful by repeatedly interrupting others, not allowing attendees to complete their statements and dismissing advice that was offered." The employee contested his dismissal and – relying on this Court's holding in *Wells* – contended his "letter of dismissal did not allege specific acts or omissions" that formed the basis for his dismissal. *Id.*, slip op. at 10 (quotation marks omitted). On appeal, we held the employee's dismissal letter satisfied the notice requirements of N.C.G.S. § 126-35(a), in part, because the dismissal letter "identified [the employee's] conduct toward a small group of people in attendance on a specific date at a particular meeting." *Id.*, slip op. at 12.

In the present case, some of the stated grounds for Mr. Barron's dismissal are more analogous to *Leiphart*, *Nix*, *Mankes*, and *Follum* than they are to *Wells* and *Owen*. The record shows that Dr. Corriher discussed with Mr. Barron the nature of *all* of the allegations against him multiple times and that Mr. Barron participated in the 29 November meeting and in his pre-dismissal conference. The investigative status letter given to Mr. Barron stated, in part, that

> [t]he reports of unacceptable conduct resulting in your being placed in Investigatory Status with pay are:
>
> 1. Allegations of inappropriate relationship with a consumer[.]
>
> 2. Not reporting these allegations to your supervisor in a timely manner.

Mr. Barron's pre-dismissal notice stated that

> [t]he findings of the investigative team [were] as follows:
>
> 1. A consumer of housing services ("Consumer") has made accusations of inappropriate conduct by you. This accusation of inappropriate conduct included speaking [to] and touching her in an inappropriate manner, promising her living room furniture, [and] communicating with her through text messaging on your personal cell phone.
>
> . . .

4. By your own admission you learned on August 29, 2012 from a co-worker that [ ] Consumer was making accusations about your inappropriate personal conduct towards her. Further, you did not report this fact to your [supervisor] until [November] 5, 2012.

. . .

6. Based on text messages you presented to management, you engaged in unprofessional and inappropriate communication with [ ] Consumer.

Mr. Barron's dismissal letter stated that the grounds for his dismissal were as follows:

1. A consumer of housing services made accusations of inappropriate conduct by you.
2. You confirmed you communicated with this consumer on your personal cell phone[,] . . . [and] [i]t was determined that some of the communications were not work related or professional.
3. That you learned on August 29, 2012 from a co-worker that this consumer was making accusations about you exhibiting inappropriate personal contact towards her, but did not report this to your supervisor until [November] 5, 2012.

. . .

6. You inappropriately asked this consumer for a picture, which was sent, and received by you.

Regarding ground 2 in the dismissal letter, it was Mr. Barron who first reported the text message communications to Dr. Corriher and then delivered them during the 5 November meeting. Unlike in *Wells*, he was given numerous forms of written and oral notice pertaining to the troubling nature of those text messages before being dismissed; he participated in Eastpointe's month-and-a-half-long investigation into, *inter alia*, the nature of those text messages; and he fully participated in his pre-dismissal conference, during which all of the grounds that were to be in the dismissal letter were discussed – and all of which centered on a single chain of events between Mr. Barron and Consumer. *Cf. Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 923; *Follum*, slip op. at 11–12. Ground 2, specifically, states that Mr. Barron "confirmed" he communicated with a consumer on his personal phone and that "[i]t was determined that

some of the communications were not work related or professional." Mr. Barron's pre-dismissal notice further reveals that some of those communications were "text messages" that Mr. Barron provided himself. As in *Leiphart*, *Mankes* and *Fullum*, ground 2 is not based on broad accusations by numerous employees, as it was in *Owen*, but rather on determining the inappropriateness of Mr. Barron's "own conduct" to which Mr. Barron has admitted. *See Mankes*, slip op. at 8; *see also Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 923; *Follum*, slip op. at 11–12.

Although this Court has held previously that the notice requirements of N.C.G.S. § 126-35(a) are generally "prophylactic" in nature, *see Owen*, 121 N.C. App. at 687, 468 S.E.2d at 817, Mr. Barron's proffered reading of N.C.G.S. § 126-35(a) would "exalt form over substance[,]" *see White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 667, 606 S.E.2d 389, 396 (2005). In light of the robust defense Mr. Barron has been able to wage at all points since his dismissal, his full participation in the investigation, the numerous instances of oral and written notice provided to Mr. Barron, the isolated nature of the allegation, and given that the language in ground 2 is limited to determining the inappropriate nature of specific conduct admitted to by Mr. Barron, it would "strain credulity[,]" *State v. Locklear*, 7 N.C. App. 493, 496, 172 S.E.2d 924, 927 (1970), for this Court to hold that ground 2 was not "described with *sufficient* particularity" so that Mr. Barron would "know precisely what acts or omissions were the basis of his discharge" upon receipt of his dismissal letter. *See Wells*, 50 N.C. App. at 393, 274 S.E.2d at 259 (emphasis added); *see also Nix*, 106 N.C. App. at 667, 417 S.E.2d at 826; *Leiphart*, 80 N.C. App. at 350–51, 342 S.E.2d at 922 ("The purpose of [N.C.G.S. §] 126-35 is to provide the employee with a written statement of the reasons for his discharge *so that the employee may effectively appeal his discharge* . . . [and so] the employer [cannot] summarily discharg[e] an employee and then *search* [ ] for justifiable reasons for the dismissal." (emphasis added)); *Mankes*, slip op. at 8; *Follum*, slip op. at 11–12. Mr. Barron "was clearly notified of the specific act[s] which led to his dismissal . . . [under ground 2, and] [h]e is entitled to no relief on this basis." *See Leiphart*, 80 N.C. App. at 352, 342 S.E.2d at 923.

Similarly, ground 3 in the dismissal letter states that Mr. Barron "learned on August 29, 2012 from a co-worker that [a] consumer was making accusations about [him] exhibiting inappropriate personal contact towards her, but did not report this to [his] supervisor until [November] 5, 2012." We find this analogous to some of the stated grounds for dismissal in *Mankes* – that the employee was "[n]ot following designated procedures[.]" *Mankes*, slip op. at 6–7. Eastpointe had specific, written

procedures for handling *any* consumer complaints that could not be immediately resolved; those procedures required formal documentation of the complaint and reporting it up the chain of command. *See supra*, footnote 2. Mr. Barron has never disputed that he became aware on 29 August 2012 of an unresolved complaint by Consumer regarding his conduct towards her and that he did not report that complaint to Dr. Corriher, his only direct "supervisor[,]" let alone anyone else, for over two months.[5] For similar reasons stated above, we find that ground 3 in Mr. Barron's dismissal letter also provided him notice of "sufficient particularity . . . of the specific act [or omission] which led to his dismissal" on that ground. *See Leiphart*, 80 N.C. App. at 351–52, 342 S.E.2d at 923.[6]

For all the foregoing reasons, we believe that the present case is distinguishable from *Wells* and *Owen* and analogous to *Leiphart*, *Nix*, *Mankes*, and *Follum*, particularly with respect to grounds 2 and 3 in Mr. Barron's dismissal letter. Because Mr. Barron received sufficient notice under N.C.G.S. § 126-35(a) as to those grounds for his dismissal from Eastpointe, the order of the trial court is reversed.

REVERSED.

Judges ELMORE and INMAN concur.

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5. Mr. Barron's job description in the record expressly states that Dr. Corriher was Mr. Barron's only direct supervisor and provides that the role of Eastpointe's Housing Director was to "provide[ ] direction in the development of affordable housing for special needs populations . . . [u]nder minimal supervision of the Chief of Clinical Operations[.]"

6. Because we hold that Mr. Barron received sufficient notice of the reasons for his dismissal under grounds 2 and 3 in the dismissal letter, and we believe those grounds provided Eastpointe with sufficient just cause to dismiss Mr. Barron, we need not review whether Mr. Barron received sufficient notice under grounds 1 and 6 in the dismissal letter. *See generally* 25 N.C.A.C. 1J .0614(8) (defining "[u]nacceptable [p]ersonal [c]onduct" that establishes just cause for dismissal as "conduct for which no reasonable person should expect to receive prior warning; . . . the willful violation of known or written work rules; . . . [or] conduct unbecoming a state employee that is detrimental to state service[.]").

CATAWBA COUNTY, by and through its CHILD SUPPORT AGENCY,
ex. rel., SHAWNA RACKLEY, Plaintiff
v.
JASON LOGGINS, Defendant

No. COA15-711

Filed 5 April 2016

1. Child Custody and Support—support—modification

The trial court did not have the authority to enter a 2001 Modified Voluntary Support Agreement and Order where the motion for the 2001 order did not refer to the preceding 1999 order or indicate a change of circumstances. The plain language of N.C.G.S. § 50-13.7(a) required a "motion in the cause and a showing of changed circumstances" as a necessary condition for the trial court to modify an existing support order, and the order was void whether or not it was voluntary.

2. Judgments—modification of preceding child support judgment—preceding judgment null

Although plaintiff contended that defendant was estopped from challenging a 2001 child support order because he successfully moved to reduce the amount of support, before he moved to set the order aside on jurisdictional grounds the judgment was a nullity and could be attacked at any time.

Appeal by Plaintiff from an order entered 29 December 2014 by Judge Gregory R. Hayes in Catawba County District Court. Heard in the Court of Appeals 2 December 2015.

J. David Abernethy and Patrick, Harper & Dixon, by David W. Hood, for Plaintiff-Appellant.

Blair E. Cody, III, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Catawba County through its child support agency, ex. rel. Shawna Rackley ("Plaintiff") appeals from a district court order granting Jason Loggins' ("Defendant") Rule 60 motion for relief from judgment, and setting aside a 28 June 2001 modified voluntary support agreement. We affirm the trial court.

I. Factual and Procedural History

On 15 February 1999 the parties signed and filed a "Voluntary Support Agreement and Order" ("1999 Order") in Catawba County District Court. The trial court approved the agreement the same day. In the 1999 Order, Defendant agreed to pay "$0.00" in child support for his two children with Shawna Rackley, and starting 1 March 1999, to reimburse the State $1,996.00 for public assistance paid on behalf of his children. At the time, the children lived with Linda Rackley, the named plaintiff in the action. Defendant agreed the $0.00 "child support payments . . . shall continue after the children's 18th birthday and until the children graduate, otherwise cease to attend school on a regular basis, fail to make satisfactory academic progress towards graduation or reach age 20, pursuant to N.C.G.S. § 50-13.4(C)." He assigned "any unemployment compensation benefits" he received to the child support agency, and agreed to provide health insurance for his children "when it is available at a reasonable cost or when it is available through employment." The 1999 Order stated, "this case may be reviewed for modification without presenting a showing of substantial change of circumstances even if this occurs within the first three years of the establishment of the said order."

Defendant failed to reimburse the State, and on 16 October 2000 Plaintiff filed a motion to show cause. The trial court ordered Defendant to appear, and he failed to do so. He was arrested and later released on a $500.00 cash bond. On 25 January 2001, through a consent order, Defendant agreed to apply his $500.00 bond to his arrearage of $1,165.12. The trial court found he was employed at Carolina Hardwoods earning $9.95 per hour, and was able to comply with the 1999 Order. The court ordered Defendant to make the $50.00 monthly payments towards his arrears.

Without filing a motion to amend the 1999 Order, the parties entered into a "Modified Voluntary Support Agreement and Order" on 25 June 2001. Although it is entitled, "Modified," it does not reference the original voluntary support agreement ("VSA"), the 1999 Order, or even show that the District Court established paternity in 1999. It does not indicate any changed circumstances following a prior order. The parties also attached a child support worksheet that stated Defendant had a monthly gross income of $1,724.66, and recommended $419.00 for his monthly child support obligation.[1] The trial court approved the order

1. The parties attached "Work Sheet A," Form "AOC-CV-627 Rev. 10/98" of the North Carolina Child Support Guidelines. This is the correct form used to calculate child support when one parent (or a third party) has primary physical custody of all of the children for

28 June 2001 ("2001 Order").[2] This order is the basis of all controversy on appeal. In the 2001 Order, Defendant agreed to pay $419.00 per month in child support starting 1 July 2001, and reimburse the State $422.78 for public assistance given to his children. Defendant also agreed to provide his children with health insurance, which was available at the time through his employer, Crown Heritage, Inc. Unlike the 1999 Order, the 2001 Order contained no modification provision.

During the following years, Defendant failed to make monthly child support payments and payments for public assistance. Plaintiff filed several motions to show cause, which resulted in hearings and additional orders determining Defendant's ever-growing arrears.

Sometime in 2006, the children moved out of Linda Rackley's home and began living with their biological mother, Shawna Rackley. On 21 November 2006, Plaintiff filed a motion to modify the 2001 Order so child support payments would be paid directly to Shawna Rackley. The trial court granted the motion on 30 November 2006 and captioned this case with Shawna Rackley as a named party.

Without any preceding motion to modify, the parties entered into a consent order on 25 January 2007. In it, the parties agreed Defendant was in arrears of $678.00 in child support payments from a prior 2006 order, and $16,422.28 in arrears from the 1999 Order. The trial court ordered Defendant to make monthly child support payments of $419.00 with an additional $60.00 going towards arrears. Through a 5 April 2007 review order, the trial court found Defendant was in compliance with the 25 January 2007 order, and found his arrearages to be $15,572.80. The trial court ordered Defendant to continue his monthly child support payments of $419.00 plus $60.00 towards arrears.

On 7 April 2011, Defendant filed, *pro se*, a motion to modify the 2007 review order. Defendant contended circumstances had changed because he "draw[s] unemployment [and his] kids [age 17 and 18] have quit school." The trial court heard the matter 15 September 2011, and Shawna Rackley failed to appear. In a 15 September 2011 order ("2011 Order), the trial court found a change in circumstance noting

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whom support is being determined. This form does not contain a provision concerning a change in circumstance. Had the parties filed a motion to modify the 1999 Order, they would have been prompted to state the changed circumstances following the 1999 Order. However, the parties only submitted a VSA and child support worksheet, which explains the trial court's lack of findings regarding changed circumstances in the 2001 Order.

2. The 2001 Order was prepared using a DHHS ACTS form, DSS-4524 02/01 CSE/ACTS. This order does not contain a provision regarding a change in circumstances.

"Defendant was drawing unemployment benefits, since has obtained full time employment. Eldest child . . . has emancipated according to N.C.G.S. [§] 50-13.4(C)." Based on the child support guidelines, the trial court reduced Defendant's monthly child support obligation to $247.00, and found his arrears to be $6,640.75.

On 13 May 2014, Defendant filed a "Rule 60 Motion Relief from Judgment" ("Rule 60 Motion").[3] Defendant sought to set aside the 2001 Order and contended, "prior to June 28, 2001 there was [sic] not any motions filed by the Plaintiff or on her behalf to modify the 'then' existing child support obligation [of $0.00 under the 1999 Order]." The parties were heard on 31 July 2014, and Defendant contended the 1999 Order was a permanent order and the trial court did not have jurisdiction to modify it without a motion from Plaintiff showing a change in circumstances. He argued the 2001 Order was void and unenforceable as a result. Plaintiff's counsel conceded, "[t]here's no indication that [the 1999 Order] was a temporary order. We use the colloquial term 'permanent' although every order can be modified, but I would agree that that's what we normally refer to as a permanent order rather than a temporary order." Following the hearing, defense counsel tendered a draft order to the trial court without serving it upon Plaintiff's counsel. On 18 December 2014, the trial court issued an order and granted Defendant's Rule 60 Motion and set aside the 2001 Order. The trial court found the following, *inter alia*:

> 4. It is clear from the Court file there was not a Complaint filed . . . . The [1999 Order] was presumably done 'in lieu of' the filing of a Complaint for child support . . . .
>
> 5. The Defendant's initial child support obligation . . . was $0.00 per month. . . . . [The 1999 Order] did require the Defendant to reimburse the State . . . $1,966.00 for past paid public assistance.
>
> 6. That there was a subsequent, second VSA filed on the 28th day of June 2001, which is the actual subject of Defendant's Rule 60 motion. Said VSA is titled "Modified Voluntary Support Agreement and Order. . . ."
>
> 8. That N.C.G.S. § 50-13.7(a) authorizes a North Carolina court to modify or vacate an order of a North Carolina

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3. We note a clerical error in Defendant's Rule 60 motion. The motion cites N.C. R. Civ. Pro. 60(a) instead of Rule 60(b). The trial court noted Plaintiff's counsel anticipated an argument from Defendant based upon Rule 60(b), and both parties consented to the trial court hearing the motion despite this flaw.

> court providing for the support of a minor child at any time upon a motion in the cause by an interested party and a showing of changed circumstances. That said statute on its face requires that there be a "motion in the cause" prior to the entry of an order modifying child support.
>
> 9. That prior to the filing of the June 28, 2001 VSA there were no motions filed by the Plaintiff or on her behalf, to modify the "then" existing child support obligation of $0.00/month of the Defendant.
>
> 10. That N.C.G.S. § 50-13.7(a) applies to any "final" or "permanent" order entered by a North Carolina court for the support of a minor child. N.C.G.S. § 50-13.7(a) applies to and authorizes modification of Voluntary Support Agreements approved pursuant to G.S. §110-132 and 110-133.
>
> 11. The [1999 Order] was a final or permanent court order for support of a minor. . . .
>
> 22. A subsequent or second VSA does not relie[ve] the party requesting a modification from the obligation of first filing a motion in the cause . . . .

The court concluded that the 2001 Order was void and unenforceable because Plaintiff did not make a motion to modify the 1999 Order. Accordingly, the trial court set aside the 2001 Order.

On 19 December 2014, Plaintiff filed a motion under Rule 60(b)(1), (3), and (6), to set aside the above-mentioned 18 December 2014 order. Plaintiff contended the order was "erroneous and prejudicial" because Defendant did not serve the proposed order on Plaintiff prior to tendering it to the court. On 22 December 2014, the trial court granted Plaintiff's motion and set aside the 18 December 2014 order.

On 29 December 2014, the trial court entered a second order granting Defendant's Rule 60 Motion ("2014 Order"). The trial court found it did not have jurisdiction to enter the 2001 Order because there was no preceding motion from Plaintiff showing a change in circumstance. Plaintiff filed timely notice of appeal. On appeal, Plaintiff assigns error to the following: (1) the court concluded the 1999 Order was permanent instead of temporary; (2) the court did not make a finding on whether the 2001 Order was a consent order; (3) the court concluded a motion to modify must precede a modification order; (4) the court concluded the 2001 Order was void and set it aside; and (5) the trial court did not

address whether Defendant was estopped from moving to set aside the 2001 Order because the court had already reduced the child support due under the 2001 Order.

After settlement of the record, Defendant filed a motion to dismiss Plaintiff's appeal pursuant to Appellate Rule 25. Defendant contends Plaintiff cited a repealed jurisdictional statute, N.C. Gen. Stat. § 7A-27(c), in its appellate brief, and violated Appellate Rule 28(a)(6) by failing to state the applicable standard of review. Plaintiff filed a motion to amend its appellant brief pursuant to Appellate Rule 27. Plaintiff asserts its mistaken citation to N.C. Gen. Stat. § 7A-27(c) follows the legislature's recent reorganization of section 7A-27. The jurisdictional subsections at issue are N.C. Gen. Stat. §§ 7A-27(b)(2), and (b)(3). Plaintiff concedes the omission of the standard of review was an inadvertence and mistake on its part. Plaintiff's errors do not prejudice Defendant. Therefore, we allow Plaintiff's motion to amend and deny Defendant's motion to dismiss.

II. Jurisdiction

This action arises from a final judgment in a district court. Therefore, this Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2).

III. Standard of Review

Usually, our Court reviews a "trial court's ruling on a Rule 60(b) motion . . . for an abuse of discretion." *Yurek v. Shaffer*, 198 N.C. App. 67, 75, 678 S.E.2d 738, 743 (2009) (citing *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004)). However, the issue of "whether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Yurek*, 198 N.C. App. at 75, 678 S.E.2d at 744–45 (citations omitted).

IV. Analysis

[1] "In the literal sense of the word, no child support order entered in this state is 'permanent' because it may be modified or vacated at any time under N.C. Gen. Stat. § 50-13.7(a)." *Gray v. Peele*, ___ N.C. App. ___, ___, 761 S.E.2d 739, 741 (2014). Section 50-13.7(a) allows a child support order to be "modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C. Gen. Stat. § 50-13.7(a). This also applies to support agreements because they "have the same force and effect, retroactively and prospectively . . . as an order of support entered by the court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders

of the court in such cases." N.C. Gen. Stat. § 110-133. Therefore, we treat the 1999 voluntary support agreement, and its subsequent modification, the same as a child support order entered by the trial court.

Trial courts follow a two-step analysis for child support modification. *See McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995). First, the trial court must determine whether "a substantial change of circumstances has taken place; only then does it proceed [to the second step] to apply the North Carolina Child Support Guidelines to calculate the applicable amount of child support." *Armstrong v. Droessler*, 177 N.C. App. 673, 675, 630 S.E.2d 19, 21 (2006) (citation omitted).

The burden of proving "changed circumstances rests upon the party moving for modification of support." *Id.* This is unique to modifying permanent support orders because temporary support orders are designed to be in effect for a finite period of time, thereby making them inherently subject to modification. *See Gray*, ___ N.C. App. at ___, 761 S.E.2d at 742 ("A temporary order is not designed to remain in effect for extensive periods of time or indefinitely.") (citation omitted).

A child support order is temporary if it meets any of the following criteria: "(1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Peters v. Pennington*, 210 N.C. App. 1, 13–14, 707 S.E.2d 724, 734 (2011) (quoting *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003)). In contrast, an order is permanent if it "does not meet any of these criteria." *Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734.

Here, the 1999 Order is the original child support order. In it, the parties agreed, among other things, that Defendant would pay $0.00 per month in child support for his two children, with such support to continue after their 18th birthdays until they completed or ceased attending school. This child support period spans the maximum period of time allowed by statute. *See* N.C. Gen. Stat. § 50-13.4(c). Unlike a temporary support order, the 1999 Order does not set a clear and specific reconvening time. While the order allows for the possibility of modification in the first three years without a showing of changed circumstances, this window of time is not reasonably brief. *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000) ("We hold . . . the [one year] period between the [child custody] hearings was not reasonably brief."). Based on the record we cannot hold the trial court abused its discretion in

finding the 1999 Order failed to meet any of the three criteria for temporary orders. *See Peters*, 210 N.C. App. at 13–14, 707 S.E.2d at 734. Nonetheless, this determination is not dispositive of Defendant's Rule 60 Motion due to Plaintiff's procedural shortcomings.

The plain language of N.C. Gen. Stat. § 50-13.7(a) requires a "motion in the cause and a showing of changed circumstances" as a necessary condition for the trial court to modify an existing support order. N.C. Gen. Stat. § 50-13.7(a). Our Court has held a trial court is "without authority to *sua sponte* modify an existing support order." *Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 580 (1995) (citing *Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (trial court may modify custody only upon a motion by either party or anyone interested)) (citation omitted). Neither party contends the 1999 Order was not an "existing support order" in 2001, when the parties entered into a second voluntary support agreement.[4]

Therefore, the trial court that entered the 2001 Order did not have authority to enter the order. The 2001 Order is therefore void and "it is immaterial whether the judgment was or was not entered by consent. '[I]t is well settled that consent of the parties to an action does not confer jurisdiction upon a court to render a judgment which it would otherwise have no power or jurisdiction to render.' " *Allred v. Tucci*, 85 N.C. App. 138, 144, 354 S.E.2d 291, 295 (1987) (quoting *Saunderson v. Saunderson*, 195 N.C. 169, 172, 141 S.E. 572, 574 (1928)).

After *de novo* review of the trial court's jurisdiction, we note a need for improvement in the area of child support enforcement. Here, the parties entered into a 1999 voluntary support agreement for a permanent child support obligation of $0.00. The trial court accepted this agreement and entered the 1999 Order. Afterwards, the parties attempted to modify the agreement using the County's mediation services to increase the child support obligation to $419.00. The mediation process led the parties to execute another voluntary support agreement and order, and none of the County's forms in the mediation process contained language about changed circumstances. As discussed, this omission creates a

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4. We note that a domestic agreement, like the 1999 voluntary support agreement, is a contract. It "remains modifiable by traditional contract principles unless a party submits it to the court for approval . . . ." *Peters*, 210 N.C. App. 1, 14,707 S.E.2d 724, 734 (2011). In theory, the 1999 voluntary support agreement was modifiable until the parties submitted it to the trial court for approval. However, the parties submitted the 1999 agreement to the trial court, the court approved it and issued an order. Therefore, we need not analyze the 2001 Order and Defendant's consent to modify the 1999 Order in the context of contract modification principals.

jurisdictional shortcoming leaving the trial court without jurisdiction to modify the 1999 Order. More importantly, this makes it impossible to enforce the second voluntary support agreement and order because the trial court did not have jurisdiction to accept the second voluntary support agreement and enter the modified order. *See Whitworth v. Whitworth*, 222 N.C. App. 771, 731 S.E.2d 707 (2012) (reversing and vacating a *nunc pro tunc* order that a trial court entered, without jurisdiction, three years after a party's motion to intervene). Without improvement in the mediation process and appropriate revisions to the forms used in that process, our courts must bear cases like this, enforcing permanent child support orders of $0.00 but not modified agreements that reflect the intention of the North Carolina Child Support Guidelines.

[2] Lastly, Plaintiff contends Defendant is estopped from challenging the 2001 Order because he successfully moved to reduce the amount of support due under the order, from $419.00 to $247.00, before moving to set the order aside on jurisdictional grounds. We disagree. "A challenge to jurisdiction may be made at any time." *Hart v. Thomasville Motors*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citation omitted). "A judgment is void, when there is a want of jurisdiction by the court . . . ." *Id.* (citation omitted). A void judgment "is a nullity [and] [i]t may be attacked collaterally at any time [because] legal rights do not flow from it." *Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964) (citation omitted). Therefore, we must overrule Plaintiff's contention.

V. Conclusion

For the foregoing reasons we affirm the trial court.

AFFIRMED.

Judges STEPHENS and INMAN concur.

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF

v.

UNIVERSITY FINANCIAL PROPERTIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY F/K/A UNIVERSITY BANK PROPERTIES LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP, ET AL., DEFENDANTS

No. COA15-473

Filed 5 April 2016

1. Appeal and Error—interlocutory orders and appeals—takings claim

The Court of Appeals had jurisdiction over interlocutory orders concerning the scope of a taking for the building of a bridge.

2. Eminent Domain—takings—construction of bridge—loss of visibility

The loss in visibility of University Financial's property to passing traffic was not part of the taking for the construction of a bridge. Landowners have no constitutional right to have anyone pass their premises, so that landowners are not compensated for changes in traffic, and there is no meaningful distinction between a diminishment in value from a reduction in traffic and one based on reduced disability to passing traffic.

3. Eminent Domain—taking of land—loss of visibility—not compensable

Although plaintiff argued that it was entitled to compensation for the loss of visibility for its building as a taking for the building of a bridge where there was an actual physical taking of a portion of its land, the fact that a physical taking has occurred is not enough to render compensable injuries that do not arise from the condemnor's use of the land.

Appeal by plaintiff from orders entered 17 December 2014 by Judge John W. Bowers in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 November 2015.

Parker Poe Adams & Bernstein, LLP, by Jonathan E. Hall, Benjamin R. Sullivan, and Nicolas E. Tosco, for plaintiff-appellant.

Johnston, Allison & Hord, P.A., by Martin L. White, R. Susanne Todd, and David V. Brennan, for defendant-appellee.

DAVIS, Judge.

This appeal arises from the condemnation by the City of Charlotte ("the City") of a portion of property owned by University Financial Properties, LLC ("University Financial") in connection with the expansion of the City's light rail system. The primary issued raised by the City on appeal concerns the trial court's determination that the construction of an elevated bridge ("the Bridge") in connection with the light rail extension project "is part of the taking of University Financial's property in this action." After careful review, we reverse and remand for further proceedings.

Factual Background

University Financial owns property located at the intersection of North Tryon Street and W.T. Harris Boulevard in Charlotte, North Carolina. University Financial leases the property to Bank of America, which operates a retail banking services branch from this location.

On 30 April 2013, the City filed a complaint and declaration of taking in Mecklenburg County Superior Court to acquire by condemnation a portion of University Financial's property "in connection with the LYNX Blueline Extension, Northeast Corridor Lightrail Project." University Financial's tract of property comprises 75,079 total square feet, and the City's declaration of taking identified 5,135 square feet of the tract that would be taken in fee simple. The declaration of taking also set forth various easements the City would be acquiring with respect to University Financial's property. The property taken in fee simple was acquired in order to widen the travel lanes of North Tryon Street and accommodate vehicular traffic because the infrastructure for the new light rail line — specifically, the light rail track and the Bridge — will be located in the middle of the existing roadway so as to enable the light rail to travel down the center of North Tryon Street. University Financial filed its answer on 9 April 2014, seeking the trial court's determination of just compensation for the property taken and the diminution in value of the remaining tract as a result of the taking.

On 24 October 2014, the City filed a motion for the determination of all issues other than damages pursuant to N.C. Gen. Stat. § 136-108. In its motion, the City contended that University Financial was not entitled to compensation for any loss of visibility to its property resulting from the construction of the Bridge because the Bridge was not being built on the condemned property. Consequently, the City requested a hearing under § 136-108 so that the trial court could "determine whether any

impact from construction of the bridge within the existing public right-of-way is part of the taking in this action and is therefore compensable."

On 19 November 2014, the City filed a motion for partial summary judgment "on the question of whether an elevated bridge that the City plans to build at the intersection of North Tryon Street and W.T. Harris Boulevard is part of the taking in this case and is an element of the just compensation owed to University Financial." University Financial filed several exhibits with its response to the City's partial summary judgment motion, and the City moved to strike these documents, alleging that they were inadmissible on various grounds.

The trial court held a hearing on the City's motions on 1 December 2014. In three orders entered 17 December 2014, the trial court (1) determined that the construction of the Bridge "is part of the taking of University Financial's property in this action" and that University Financial is entitled to present evidence of "any and all damages resulting from the impact of the construction of the [light rail], including construction of the Bridge, on its remaining property"; (2) denied the City's motion for partial summary judgment; and (3) denied its motion to strike. The City gave timely notice of appeal.

Analysis

I. Appellate Jurisdiction

[1] All three of the trial court's orders that the City seeks to appeal are interlocutory orders. It is well established that interlocutory orders, which are made during the pendency of an action, are generally not immediately appealable. *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007). If, however, the order implicates a substantial right that will be lost absent our review prior to the entry of a final judgment, an immediate appeal is permissible. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An appeal does not lie . . . from an interlocutory order of the Superior Court, unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.").

In condemnation proceedings, our appellate courts have identified certain "vital preliminary issues," such as the trial court's determination of the title or area taken, which affect a substantial right and are subject to immediate appeal. *N.C. Dep't of Transp. v. Stagecoach Village*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (citation and quotation marks omitted); *see Dep't of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 66,

576 S.E.2d 341, 343 ("Because defendant's present appeal specifically contests the trial court's determination of the area affected by the taking, which is a 'vital preliminary issue,' such appeal is properly before this Court."), *appeal dismissed*, 357 N.C. 504, 587 S.E.2d 417 (2003). In its order pursuant to N.C. Gen. Stat. § 136-108, the trial court concluded that the City's construction of the Bridge was "part of the taking in this action." Because this ruling concerns the area encompassed by the taking, we have jurisdiction over the City's appeal with regard to the trial court's determination of this issue.[1]

II. Damages Due to Loss of Visibility

[2] In ruling on the issue of "whether any impact from construction of the bridge within the existing public right of way is part of the taking [in] this action and therefore compensable," the trial court concluded, in pertinent part, as follows: (1) "The construction of the BLE Project[2], including the construction of the Bridge, is part of the taking of University Financial's property in this action"; (2) "Any and all impact to University Financial's remaining property caused by the construction of the BLE Project, including construction of the Bridge, is compensable"; and (3) "Loss of visibility of University Financial's remaining property resulting from the Bridge is a factor that may be considered by a finder of fact in determining the fair market value of University Financial's remaining property."

Based on the above-quoted conclusions of law, the trial court ordered that University Financial be permitted to present evidence of "any and all damages resulting from the impact of the construction of the BLE Project, including construction of the Bridge, on its remaining property[.]" The City contends that the trial court's ruling is contrary to North Carolina law, and we agree.

When the State, an agency, or a municipality exercises its power of eminent domain to take private property for a public purpose, it must provide just compensation to the property owner for the taking. *Dare Cty. Bd. of Educ. v. Sakaria*, 118 N.C. App. 609, 614, 456 S.E.2d 842, 845 (1995), *aff'd per curiam*, 342 N.C. 648, 466 S.E.2d 717 (1996), *cert.*

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1. For the reasons explained herein, our ruling on the trial court's § 136-108 issue is dispositive of this entire appeal and grants the City the relief it sought in its motion for partial summary judgment. Moreover, our decision renders moot the City's appeal of the trial court's denial of its motion to strike.

2. The term "BLE Project" is an abbreviation of the project's full title, which is the LYNX Blue Line Extension Northeast Corridor Light Rail Project.

denied, 519 U.S. 976, 136 L.Ed.2d 325 (1997). When only a portion of the property is taken, "the owners of the land are entitled to receive the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remaining property after the taking, less any general and special benefits." *Dep't of Transp. v. Bragg*, 308 N.C. 367, 369-70, 302 S.E.2d 227, 229 (1983); *see also* N.C. Gen. Stat. § 136-112(1) (2015). "In determining the fair market value of the remaining land the owner is entitled to damage which is a consequence of the taking of a portion thereof, that is, for the injuries accruing to the residue from the taking, which includes damage resulting from the condemnor's use of the appropriated portion." *Bd. of Transp. v. Brown*, 34 N.C. App. 266, 268, 237 S.E.2d 854, 855 (1977), *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978). The fair market value of the remaining land after the taking "contemplates the project in its completed state and any damage to the remainder due to the use[ ] to which the part appropriated may, or probably will, be put." *Bragg*, 308 N.C. at 370, 302 S.E.2d at 229 (citation, quotation marks, and emphasis omitted).

> This rule of damages provides a landowner compensation only for damages arising from a taking of property and which flow directly from the use to which the land taken is put. *No compensation is awarded for damages which are shared by neighboring property owners and the public and which arise regardless of whether the landowner's property has been condemned.*

Bd. of Transp. v. Bryant, 59 N.C. App. 256, 261-62, 296 S.E.2d 814, 817-18 (1982) (emphasis added).

Here, the trial court concluded that the determination of the fair market value of the remainder of University Financial's property required consideration of the loss of visibility to that property resulting from the Bridge's construction. However, this ruling ignores the fact that (1) University Financial's loss of visibility argument is akin to a property owner's assertion of the right to compensation for a reduction in the flow of traffic past his property — an argument our appellate courts have repeatedly rejected; and (2) the loss of visibility from the Bridge does not "flow directly from the use to which the land taken is put," *id.*, given that the land taken from University Financial is being utilized for road-widening purposes and not as the location of the Bridge.

A property owner whose land abuts a public roadway — such as University Financial here — has a right of reasonable access to that roadway that cannot be taken without the payment of just compensation. *See*

Wofford v. N.C. State Highway Comm'n, 263 N.C. 677, 681, 140 S.E.2d 376, 380 ("The private right of the owner of land abutting a street or highway is an easement appurtenant to the land, consisting of the right of reasonable access to the particular street or highway which his property abuts."), *cert. denied*, 382 U.S. 822, 15 L.Ed.2d 67 (1965). However, so long as the landowner can still access his property (a concern not at issue here), any modifications to the roadway that may alter the flow of traffic are not takings. *See Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 516, 126 S.E.2d 732, 738-39 (1962) ("[Landowners] have no property right in the continuation or maintenance of the flow of traffic past their property. They still have free and unhampered ingress and egress to their property. . . . Re-routing and diversion of traffic are police power regulations. Circuity of route, resulting from an exercise of the police power, is an incidental result of a lawful act. It is not the taking or damaging of a property right." (citation and quotation marks omitted)).

Because a landowner "has no constitutional right to have anyone pass by his premises at all," *id.* at 515, 126 S.E.2d at 738 (citation and quotation marks omitted), the landowner is not owed compensation for any changes in traffic around his property that result from the municipality's actions. *See Moses v. State Highway Comm'n*, 261 N.C. 316, 320, 134 S.E.2d 664, 667 (rejecting petitioners' argument that they were entitled to compensation based on replacement of their direct access to the highway with service road access simply because less traffic passed by their property and noting that "[i]f petitioners could collect because of such diminution in travel by their property, so could every merchant in a town when the Highway Commission constructed a by-pass to expedite the flow of traffic"), *cert. denied*, 379 U.S. 930, 13 L.Ed.2d 342 (1964); *see also Wofford*, 263 N.C. at 684, 140 S.E.2d at 382 (explaining that "[t]he purchaser of a lot abutting a public street, whatever the origin of the street, takes title subject to the authority of the city to control and limit its use, and to abandon or close it under lawful procedure").

We are unable to discern a meaningful distinction between (1) the assertion that a landowner is entitled to compensation because its property has diminished in value due to the *reduction in traffic* caused by a municipality's actions; and (2) University Financial's contention here that it is entitled to compensation for the decreased value of its property based on the *reduced visibility to passing traffic* caused by the City's construction of the elevated light rail bridge.[3] Consequently, we hold

3. While University Financial argues that the reduction in traffic flow cases are distinguishable from the present case because they involve a governmental body's exercise of its police power to regulate traffic, it has not demonstrated that the City's decision to

that the loss in visibility of University Financial's property to passing traffic is not "part of the taking" and that the trial court's order holding otherwise must be reversed.

In arguing to the contrary, University Financial cites our decision in *N.C. State Highway Comm'n v. English*, 20 N.C. App. 20, 200 S.E.2d 429 (1973). However, its reliance on *English* is misplaced.

In *English*, the North Carolina Highway Commission condemned 1.38 acres of the defendants' 3.24-acre property in order to relocate a road and construct a controlled-access facility to Interstate 40. *Id.* at 21, 200 S.E.2d at 430. During the jury trial on just compensation, the defendants presented evidence that the loss of visibility to their remaining land caused by a "fill" that had been constructed so that the highway could pass over a road reduced the fair market value of their remaining property. *Id.* at 24, 200 S.E.2d at 432. University Financial argues that *English* "supports loss of visibility as a relevant factor affecting fair market value of a remainder" and contends that *English* "sanctioned the use of loss of visibility evidence as relevant to a determination of just compensation."

However, neither party in *English* contested on appeal the admissibility of the loss of visibility evidence. Instead, the issue before this Court concerned the trial court's instructions to the jury. We rejected the defendant landowners' argument that the trial court was required to instruct the jury that pursuant to N.C. Gen. Stat. § 136-89.52 "the Commission may acquire private or public property and property rights for controlled-access facilities . . . including rights of access, air, *view*, and light." *Id.* at 23, 200 S.E.2d at 431. We concluded that such an instruction was inapplicable because

> [t]his sentence of the statute does not create a right of view or sight distance in individual landowners to and from their land. Nor does it suggest that an individual landowner has a right of view or sight distance for which compensation must be paid.

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widen an existing public roadway and construct the Bridge over the W.T. Harris Boulevard intersection is not likewise a valid exercise of police power. *See generally Barnes*, 257 N.C. at 516, 126 S.E.2d at 738-39 ("Re-routing and diversion of traffic are police power regulations"); *Haymore v. N.C. State Highway Comm'n*, 14 N.C. App. 691, 695, 189 S.E.2d 611, 615 (regulations enacted "so as not to endanger travel upon the highway" constitute valid "exercise of the general police power"), *cert. denied*, 281 N.C. 757, 191 S.E.2d 355 (1972).

Id. Thus, *English* does not provide support for University Financial's position in the present case.

[3] University Financial next argues that because there was an actual physical taking of a portion of its land — namely, the 5,135 square foot tract abutting North Tryon Street taken to expand the roadway — it is entitled to "receive compensation for impacts to its remainder that might not be compensable had a physical taking not occurred." We are not persuaded.

As this Court explained in *Bryant*, "the fact that a taking occurs does not make all other damages automatically compensable." *Bryant*, 59 N.C. App. at 262, 296 S.E.2d at 818. In *Bryant*, the Board of Transportation condemned a portion of the defendants' land in order to make improvements to Interstate 40. *Id.* at 257, 296 S.E.2d at 815. There was a trial on the issue of just compensation, and on appeal, the defendants argued that the trial court had erred in failing to admit evidence that "following condemnation of a portion of their property, there was unreasonable interference with access to their remaining property during the resulting construction . . . . as an element to be considered by the jury in determining the difference between the fair market value of the property before and after the taking." *Id.* at 261, 296 S.E.2d at 817. We rejected this contention, explaining that

> [d]amages for unreasonable interference with access to defendants' remaining property during construction on a public road project do not arise from the taking of the right-of-way or from the use to which the taken property is put. These damages are noncompensable because they are not unique to defendants. They are shared by defendants in common with the public at large, and the fact that a taking occurs does not make all other damages automatically compensable.

Id. at 262, 296 S.E.2d at 818. Thus, the fact that a physical taking has occurred is not enough to render compensable injuries that are otherwise recognized as noncompensable that do not arise from the condemnor's use of the particular land taken.

As explained above, a landowner is entitled to compensation when a portion of his land is acquired by condemnation both for the land taken and for "any damage to the remainder due to the use[ ] to which the part appropriated may, or probably will, be put." *Bragg*, 308 N.C. at 370, 302 S.E.2d at 229.

> A use of lands of another which causes annoyance, inconvenience, or damage to the land of the defendant is not compensable. If the defendant were to claim damage from conduct of the condemnor, which conduct did not arise out of use of the defendant's land taken, such damage is suffered by all in the neighborhood generally, and is not the proper subject of compensation.

City of Kings Mountain v. Cline, 19 N.C. App. 9, 11, 198 S.E.2d 64, 66 (1973) (internal citation omitted).

Our Supreme Court's decision in *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964), is instructive. *Creasman* involved the condemnation of a small portion of the defendant landowners' property for the construction of a new steam plant. During the jury trial on just compensation, the defendant landowners were permitted to offer evidence that "the construction, maintenance and operation by petitioner of said steam plant, together with the dam, the lake, the railroad, etc., in a desirable rural residential community, seriously and adversely affected the fair market value of property in the community." *Id.* at 399, 137 S.E.2d at 504. Carolina Power & Light Company appealed from the jury's award of damages and sought a new trial on just compensation, arguing that this evidence had been improperly admitted by the trial court. *Id.* at 403, 137 S.E.2d at 506.

Our Supreme Court agreed, explaining that while the defendant landowners were entitled to "recover compensation both for the land actually taken and for the permanent injuries to their remaining property caused by the severance and the use to which the land taken may, or probably will, be put[,]" the evidence concerning the damage to the value of the remainder of the property from the steam plant's construction and operation "occur[s] without reference to whether any portion of [the] property is condemned. In short, [these damages] do not result from the taking of a portion of [the] property." *Id.* at 402, 137 S.E.2d at 506. The Court further held that

> consequential damages to be awarded the owner for a taking of a part of his lands are to be limited to the damages sustained by him by reason of the taking of the particular part and of the use to which such part is to be put by the acquiring agency. No additional compensation may be awarded to him by reason of proper public use of other lands located in proximity to but not part of the lands taken from the particular owner. The theory behind this

> denial of recovery is undoubtedly that such owner may not be considered as suffering legal damage over and above that suffered by his neighbors whose lands were not taken.

Id. at 402-03, 137 S.E.2d at 506 (citation and quotation marks omitted).

The same is true here. The property taken from University Financial is being used to widen North Tryon Street. The Bridge that will reduce the visibility of University Financial's remaining property to passing traffic is to be located over the existing roadway (not on the land taken from University Financial) and is likely to similarly reduce the visibility of other neighboring lots on North Tryon Street. As such, University Financial is not entitled to compensation from the City's use of land that is "not part of the lands taken from [University Financial]" and "may not be considered as suffering legal damage over and above that suffered by [its] neighbors whose lands were not taken." *Id.* (citation and quotation marks omitted). Therefore, for this reason as well, the trial court erred in ruling that University Financial is entitled to present evidence concerning "all damages resulting from the impact of the construction of the BLE Project, including construction of the Bridge, on its remaining property" during the trial on just compensation.

Conclusion

For the reasons stated above, we reverse the trial court's ruling that the Bridge's impact on University Financial's remaining property is compensable and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges STEPHENS and STROUD concur.

THOMAS A. E. DAVIS, Jr., Administrator of the Estate of LISA MARY DAVIS, (deceased), Plaintiff
v.
HULSING ENTERPRISES, LLC, HULSING HOTELS NC MANAGEMENT COMPANY, HULSING HOTELS NORTH CAROLINA, INC., HULSING HOTELS, INC., d/b/a CROWNE PLAZA TENNIS & GOLF RESORT ASHEVILLE and MULLIGAN'S, Defendants

No. COA15-368

Filed 5 April 2016

1. Appeal and Error—subject matter jurisdiction—notice of appeal—objection inherent to hearing—writ of certiorari

The Court of Appeals had subject matter jurisdiction over plaintiff's appeal from the dismissal of his common law dram shop claim. Plaintiff's objection was inherent to the hearing, and he identified the pertinent order in the Statement of Organization of Trial Tribunal and the proposed issues on appeal. Further, plaintiff's petition for writ of certiorari was granted.

2. Negligence—common law dram shop claim—improper dismissal at pleadings stage

The trial court erred by dismissing plaintiff's common law dram shop claim on the pleadings. Plaintiff sufficiently pled a negligence per se claim. Decedent's consumption of alcohol, without more alleged in the complaint, could not bar plaintiff's claim at the pleadings stage. However, plaintiff's complaint failed to raise facts sufficient to satisfy the doctrine of last clear chance.

Judge DILLON dissenting.

Appeal by Plaintiff from order entered 25 November 2013 by Judge Richard L. Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 2015.

Charles G. Monnett III & Associates, by Charles G. Monnett III, for Plaintiff-Appellant.

Northup McConnell & Sizemore, PLLC, by Katherine M. Pomroy and Isaac N. Northup, Jr., for Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Thomas A. E. Davis, Jr., ("Plaintiff") in his capacity as administrator of Lisa Mary Davis's ("Davis") estate, appeals from a 25 November 2013 order dismissing his common law dram shop and punitive damages claims against Defendants. We reverse the trial court.

I. Procedural History

On 15 July 2013, Plaintiff filed a complaint alleging the following causes of action: (1) common law dram shop; (2) negligent aid, rescue, or assistance; and (3) punitive damages. Plaintiff's dram shop claim alleged Defendants were negligent *per se* for violating N.C. Gen. Stat. § 18B-305 by selling and giving alcohol to Davis, an intoxicated person.

On 13 August 2013, Defendants filed a Rule 12(b)(6) motion to dismiss the complaint because it "fails to state a claim for which relief can be granted under the laws of [North Carolina]." Defendants filed their answer 8 November 2013 and raised defenses for contributory negligence, intervening and superseding negligence, and assumption of risk. Defendants asserted the following in their contributory negligence defense:

> [I]f Defendants were negligent, which is specifically denied, then the injuries and damages complained of were proximately caused by the contributory negligence of [Davis] in consuming the beverages complained of and/or of [Plaintiff] in failing to intervene in [Davis's] consumption of the beverages . . . and in failing to assist her and ensure her health and safety . . . which is a complete defense to Plaintiff's claim.

The court heard arguments on the motion to dismiss on 28 October 2013. Thereafter, the court issued an order on 25 November 2013 dismissing Plaintiff's common law dram shop and punitive damages claims. The parties proceeded to a jury trial on the negligent rescue claim. Following the jury's verdict, the court entered a 23 October 2014 judgment finding Defendants not liable.

Plaintiff filed his notice of appeal 10 November 2014, appealing "from the 23 October 2014 Judgment upon the jury's verdict . . . ." The parties settled the record by stipulation and filed their appellate briefs.

II. Appellate Jurisdiction

[1] On appeal, Plaintiff only contests the dismissal of his common law dram shop claim. Defendants contend Plaintiff did not properly appeal this issue under N.C. R. App. P. 3(d) because his notice of appeal does

not mention the 25 November 2013 order dismissing his dram shop claim. Plaintiff filed a petition for writ of *certiorari* on 28 July 2015. The Clerk of Court referred Plaintiff's petition to this panel on 7 August 2015.

To provide proper notice of appeal the appellant must "designate the judgment or order from which appeal is taken and the court to which appeal is taken . . . ." N.C. R. App. P. 3(d). "Without proper notice of appeal, this Court acquires no jurisdiction." *Dixon v. Hill*, 174 N.C. App. 252, 257, 620 S.E.2d 715, 718 (2005) (citation and quotation marks omitted). However, N.C. Gen. Stat. § 1-278 "provides a means by which an appellate court may obtain jurisdiction to review an order not included in a notice on [sic] appeal. It states: 'Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.' " *Id.* (citing N.C. Gen. Stat. § 1-278).

Appellate review under section 1-278 is proper when the following three conditions are met: "(1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment." *Dixon*, 174 N.C. App. at 257, 620 S.E.2d at 718. Defendants agree the second and third conditions are met.

The 25 November 2013 order states the trial court "heard arguments" and reviewed other materials "presented by the parties" regarding Defendants' Rule 12(b)(6) motion. Plaintiff's objection is inherent to the hearing, and he clearly identified the 25 November 2013 order in the Statement of Organization of Trial Tribunal and the proposed issues on appeal. Accordingly, this Court has subject matter jurisdiction over Plaintiff's appeal. In addition, we grant Plaintiff's petition for writ of certiorari.

III. Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "As a general proposition, a trial court's consideration of a motion brought under Rule 12(b)(6) is limited to examining the legal sufficiency of the allegations contained within the four corners of the complaint." *Khaja v. Husna*, ___ N.C. App. ___, ___, 777 S.E.2d 781, 786 (2015) (citing *Hillsboro Partners v. City of Fayetteville*, 226 N.C. App. 30, 32–33, 738 S.E.2d 819, 822 (2013), *disc. review denied*, 367 N.C. 236, 748 S.E.2d 544 (2013)).

IV. Factual History

We review the following facts in Plaintiff's complaint as true. *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615.

Plaintiff and Davis celebrated their wedding anniversary at the Crowne Plaza Resort on 5 October 2012. They checked into the resort around 5:00 p.m., and decided to have dinner at the resort's restaurant, "Mulligan's." Plaintiff and Davis sat in Mulligan's from 5:30 p.m. to 10:00 p.m. During that time, Defendants, and their employees, served Plaintiff and Davis twenty-four alcoholic liquor drinks, and Davis drank at least ten of the twenty-four drinks. Defendants' conduct was grossly negligent, willful, and wanton.

Davis consumed a sufficient amount of alcohol to appreciably and noticeably impair her mental and physical faculties. Her intoxicated state would have been apparent to a reasonable Alcoholic Beverage Control ("ABC") permittee, agent, or employee. Defendants knew, or in the exercise of reasonable care should have known, Davis was intoxicated, yet they continued serving her alcoholic drinks. Defendants knew, or should have known, that doing so would put Davis and others at risk.

Davis became so intoxicated she was unable to walk with Plaintiff from Mulligan's to their hotel room. While attempting to walk back, Davis fell on the floor and was unable to get up. Defendants placed Davis in a wheelchair and took her to the hotel room. Defendants left Davis with Plaintiff in the hotel room without appropriate assistance, supervision, or medical attention. The next morning, Plaintiff woke up and found Davis lying dead on the floor.

N.C. Gen. Stat. § 18B-305 was in effect at the time of these events, making it unlawful for an ABC permittee to knowingly sell or give alcoholic beverages to an intoxicated person. Defendants and their employees are ABC permittees, and they had a duty to not sell or give alcoholic beverages to Davis. Defendants breached that duty by continually serving Davis, failing to train their employees, enforce policies, or take other reasonable steps to prevent unlawful alcohol sales. Defendants should have reasonably foreseen the injuries caused by their conduct. Davis died from acute alcohol poisoning, the direct and proximate result of Defendants' negligence.

V. Analysis

[2] Relying upon, *inter alia*, *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992), Defendants contend "Plaintiff's Complaint facially discloses facts that demonstrate [Davis's]

contributory negligence, which is an affirmative bar to Plaintiff's claim." We disagree.

A. Contributory Negligence

"In this state, a plaintiff's [ordinary] contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, ___ N.C. App. ___, ___, 774 S.E.2d 421, 426 (2015) (citing *Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73–74). It is also well-established that "contributory negligence on the part of the plaintiff is available as a defense in an action which charges the defendant with the violation of a statute or negligence per se." *Brower v. Robert Chappell & Associates, Inc.*, 74 N.C. App. 317, 320, 328 S.E.2d 45, 47 (1985).

However, a plaintiff's ordinary contributory negligence is not a bar to recovery when a "defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries." *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001) (citation omitted); *see also Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73–74. "Only gross contributory negligence by a plaintiff precludes recovery by the plaintiff from a defendant who was grossly negligent." *McCauley*, ___ N.C. App. at ___, 774 S.E.2d at 426 (citation omitted).

Our Supreme Court considered these principles in *Sorrells*, a case in which the estate of a 21-year-old ("decedent") brought a negligence action against a bar for violating Chapter 18B of the North Carolina General Statutes. *Sorrells*, 332 N.C. at 647, 423 S.E.2d at 73. The estate alleged decedent was intoxicated at the bar with friends, and consumed alcohol to the point of becoming visibly intoxicated. *Id.* The bar served decedent more alcohol, knowing he would drive home, even against the advice of his friends. *Id.* Decedent attempted to drive home, lost control of his vehicle, and died when his vehicle struck a bridge abutment. *Id.* The trial court dismissed the estate's wrongful death claim because it was barred by decedent's contributory negligence. *Id.*

On appeal, the estate argued the claim should not be dismissed because the bar acted with willful and wanton negligence, "such that the decedent's contributory negligence would not act as a bar to recovery." *Id.* at 648, 423 S.E.2d at 74. Our Supreme Court recognized "the validity of [this] rule" but did "not find it applicable" because the decedent committed a misdemeanor by driving his vehicle while "highly intoxicated," establishing that his actions as alleged in the complaint rose to "a similarly high degree of contributory negligence." *Id.* at 648–49. In other words, the Court found that decedent's act of driving intoxicated,

as alleged in the complaint, established that decedent's gross contributory negligence was commensurate with defendant's gross negligence alleged in the complaint, therefore barring plaintiff's claim from proceeding beyond the pleading stage.

The Dissent acknowledges, but does not follow these principles in concluding "the complaint here fails to allege any facts which demonstrate that Defendants' negligence was any greater than [Davis's]" and "Plaintiff has simply failed to plead any facts that would make Defendant's behavior any worse than the facts alleged in [other dram shop cases]." The Dissent, agreeing with Defendants' speculation and overreach, believes Davis's contributory negligence rose to the level of Defendants' gross negligence. We cannot agree, however, that the allegations in the complaint establish Davis's gross or willful and wanton contributory negligence.

Plaintiff specifically alleged Defendants' acts constituted "gross negligence and . . . willful or wanton conduct which evidences a reckless disregard for the safety of others." In response, Defendants answered and alleged that Davis's ordinary contributory negligence barred Plaintiff's claim. The allegations in Defendants' answer are consistent with our decision in *Brower*, which holds that an individual's voluntary consumption of alcohol to the point of "approaching a comatose state" equates to " 'a want of ordinary care' which proximately caused plaintiff's injuries constituting contributory negligence as a matter of law." 74 N.C. App. 317, 320, 328 S.E.2d 45, 47 (1985). Based on *Brower*, we cannot say that voluntary consumption of alcohol, even to the point of "approaching a comatose state," without more, amounts as a matter of law to anything above ordinary contributory negligence.

Even if Defendants alleged Davis acted with gross contributory negligence, this case could not be appropriately resolved at the pleading stage with such a limited record. Rather, comparing Davis's gross contributory negligence to Defendants' gross negligence and willful, wanton conduct, would be appropriate upon a full development of the record. *See McCauley*, ___ N.C. App. at ___, 774 S.E.2d at 429 (reversing a directed verdict in favor of defendant and holding that plaintiff's alleged gross contributory negligence was a jury issue).[1]

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1. Our Court held in *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, ___ N.C. App. ___, 774 S.E.2d 421 (2015), that a plaintiff's alleged gross contributory negligence was an issue for the jury to decide. This issue was raised in the defendant's answer leading up to a jury trial. At trial, the defendant successfully moved for a directed verdict "on the ground that plaintiff was grossly contributorily negligent as a matter of law," citing to

Taking the allegations in Plaintiff's complaint as admitted, we cannot hold Davis's conduct rises to the level of gross contributory negligence. Unlike the decedent in S*orrells*, Davis did not engage in conduct that is grossly negligent as a matter of law. Davis's consumption of alcohol, without more alleged in the complaint, cannot bar Plaintiff's claim at the pleading stage.

B. Plaintiff's Complaint

To prevail on a negligence *per se* claim, a plaintiff must show the following:

> (1) a duty created by a statute or ordinance;
>
> (2) that the statute or ordinance was enacted to protect a class of persons which includes the plaintiff;
>
> (3) a breach of the statutory duty;
>
> (4) that the injury sustained was suffered by an interest which the statute protected;
>
> (5) that the injury was of the nature contemplated in the statute; and,
>
> (6) that the violation of the statute proximately caused the injury.

Birtha v. Stonemor, N. Carolina, LLC, 220 N.C. App. 286, 293-94, 727 S.E.2d 1, 8 (2012) (citation omitted). Plaintiff's negligence *per se* claim is based upon section 18B-305(a), which states, "[i]t shall be unlawful for a[n] [ABC] permittee or his employee or for an ABC store employee to knowingly sell or give alcoholic beverages to any person who is intoxicated." N.C. Gen. Stat. § 18B-305(a) (2013).

Under section 18B-305, ABC permittees, and their employees, have a duty to not sell alcoholic beverages to intoxicated persons. *Hutchens v. Hankins*, 63 N.C. App. 1, 4, n. 1, 303 S.E.2d 584, 588 (1983), *disc. review denied*, 309 N.C. 191, 305 S.E.2d 734 (discussing N.C. Gen. Stat. § 18A-34, the predecessor to section 18B-305). This duty "has existed in some form in North Carolina since enactment of the Beverage Control Act of 1939." *Id.* (citation omitted).

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portions of the plaintiff's testimony, and case law. *Id.* ___ N.C. App. at ___, 774 S.E.2d at 424. Reviewing a more complete record than the scant record in the case *sub judice*, our Court reversed the trial court and ordered a new trial, holding "the evidence in this case is not sufficient to determine as a matter of law that plaintiff's contributory negligence rose to the level of gross contributory negligence." *Id.* at ___, 774 S.E.2d at 429.

This statute exists for "(1) the protection of the customer from adverse consequences of intoxication and (2) the protection of the community at large from the injurious consequences of contact with an intoxicated person." *Hart v. Ivey*, 102 N.C. App. 583, 590, 403 S.E.2d 914, 919 (1991) (citing *Hutchens*, 63 N.C. App. at 16, 303 S.E.2d at 593). Viewing the allegations in Plaintiff's complaint as admitted, Defendants breached their duty by continuing to serve Davis while she was intoxicated, when they knew or should have known she was intoxicated. *See Hutchens*, 63 N.C. App. at 19, 303 S.E.2d at 595. As to the fourth and fifth elements, Davis's alcohol poisoning and death clearly embody the "adverse consequences of intoxication" that section 18B-305 contemplates and protects against. *See Hart*, 102 N.C. App. at 590, 403 S.E.2d at 919 (citation omitted). Accordingly, Plaintiff sufficiently pled a negligence *per se* claim in his complaint.

C. Last Clear Chance

Defendants raised contributory negligence as an affirmative defense in their 8 November 2013 answer. Therefore, Plaintiff was permitted to file a reply raising last clear chance under N.C. Gen. Stat. § 1A-1, Rule 7(a). Rule 7(a) states: "If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. . . . [T]he court may order a reply to an answer . . . ." *Id.* "While the recommended pleading practice is for the plaintiff to file a reply alleging last clear chance, it is not the exclusive pleading alternative." *Vernon v. Crist*, 291 N.C. 646, 652, 231 S.E.2d 591, 594 (1977).

Noting a need for flexibility in pleading last clear chance, our Supreme Court held a complaint's facts may raise last clear chance, as follows:

> It would be exceedingly technical to hold that, though the complaint . . . alleged facts giving rise to the doctrine of the last clear chance, the plaintiff may not receive the benefit of the doctrine . . . merely because . . . facts were alleged in the complaint rather than in a reply.

Vernon, 291 N.C. at 652, 231 S.E.2d at 594–95 (citing *Exum v. Boyles*, 272 N.C. 567, 579, 158 S.E.2d 845, 855 (1968)). We, therefore, review Plaintiff's complaint for allegations that, if held as true, could satisfy the elements of last clear chance.

Plaintiff's complaint does not contain the words "last clear chance," but this omission "is not fatal." *Vernon*, 291 N.C. at 652, 231 S.E.2d at 595.

Plaintiff's complaint alleges the following. Davis drank ten or more alcoholic drinks, diminishing her mental and physical faculties. At least one or more of these drinks was served to her in violation of North Carolina law. She was noticeably and visibly intoxicated, which would have been apparent to a reasonable ABC permittee; consequently, Defendants knew or should have known she was intoxicated. Defendants had a statutory duty to stop serving Davis under section 18B-305(a), and they failed to uphold their duty by continuing to serve Davis. Defendants left a grossly intoxicated Davis in her room without appropriate assistance, supervision, or medical attention, thereby "abandoning their prior undertaking to render assistance." As a direct and proximate result of Defendants' negligence, Davis died of acute alcohol poisoning.

The last clear chance doctrine "allows a contributorily negligent plaintiff to recover where the defendant's negligence in failing to avoid the accident introduces a new element into the case, which intervenes between the plaintiff's negligence and the injury and becomes the direct and proximate cause of the accident." *Outlaw v. Johnson*, 190 N.C. App. 233, 238, 660 S.E.2d 550, 556 (2008) (citation and quotation marks omitted). "Last clear chance mitigates the sometimes harsh effects of the contributory negligence rule." *Artis v. Wolfe*, 31 N.C. App. 227, 228, 228 S.E.2d 781, 782 (1976). "The doctrine contemplates that if liability is to be imposed the defendant must have a last 'clear' chance, not a last 'possible' chance to avoid injury." *Grant v. Greene*, 11 N.C. App. 537, 541, 181 S.E.2d 770, 772 (1971). "[I]t must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Battle v. Chavis*, 266 N.C. 778, 781, 147 S.E.2d 387, 390 (1966).

To prevail on a last clear chance theory, a plaintiff must prove the following:

> (1) that the plaintiff negligently placed himself in a position of helpless peril;
>
> (2) that the defendant knew or, by the exercise of reasonable care, *should have discovered the plaintiff's perilous position and his incapacity to escape from it*;
>
> (3) that the defendant had the time and ability to avoid the injury by the exercise of reasonable care;
>
> (4) that the defendant negligently failed to use available time and means to avoid injury to the plaintiff; and
>
> (5) as a result, the plaintiff was injured.

Id. (emphasis added) (citing *Parker v. Willis*, 167 N.C. App. 625, 627, 606 S.E.2d 184, 186 (2004), *disc. review denied*, 359 N.C. 411, 612 S.E.2d 322 (2005)).

As a matter of law, we cannot say the allegations in Plaintiff's complaint adequately raise last clear chance.[2] Although it is adequately alleged that Defendants negligently served Davis alcoholic beverages past the point of visible intoxication, there are no facts alleged allowing us to draw any inference in favor of Plaintiff that Defendant had the last clear chance to avoid Davis's death by acute alcohol poisoning.

Specifically, Plaintiff's complaint fails to satisfy the doctrine of last clear chance at the second element set out in *Outlaw* because, even taking Plaintiff's allegations as true, we cannot conclude that Defendants were aware of, or should have been aware of, Davis's "incapacity to escape" death. As alleged, Defendants left a grossly intoxicated Davis with her husband in a hotel room after negligently serving her past the point of intoxication. Under these facts, even drawing all inferences in favor of Plaintiff, we cannot say there was a clear moment in which Defendants realized, or should have realized, Davis was going to be injured as a result of Defendants' negligence and Davis's "insensitiv[ity] to danger." *Grant*, 11 N.C. App. at 540, 181 S.E.2d at 772.

Stated broadly, under circumstances such as this, it is possible to avoid injury or death to an intoxicated individual by ceasing service to them or calling for medical attention, but the allegations of Plaintiff's complaint do not establish that it was clear that Davis's level of intoxication had become so perilous that injury was inescapable. Each individual's tolerance for alcohol, and the point at which it becomes fatal, is different and the complaint does not include allegations that Defendants should have known that Davis's intoxication level had reached a perilous level. Thus, Plaintiff's allegations are not sufficient to allege that Defendants failed to recognize a clear chance to take action in avoidance of Davis's impending injury.

There is no doubt that, as pled, it was foreseeable that Davis could be injured or killed by consuming that much alcohol unlawfully furnished to her by Defendants. However, the complaint does not include allegations establishing that it was clear to Defendants that Davis could

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2. Normally, the question of whether a defendant had the last clear chance to avoid the plaintiff's injury is reserved for the jury. *See Grant*, 11 N.C. App. at 540, 181 S.E.2d at 772. Here, taking the facts as alleged in the complaint as true, we are able to make a conclusion as a matter of law that plaintiff has unsuccessfully established the elements necessary for last clear chance.

not escape injury at the moment she was left in her hotel room with her husband. As such, we find Plaintiff's complaint fails to raise facts sufficient to satisfy the doctrine of last clear chance.

V. Conclusion

For the foregoing reasons we reverse the trial court's 25 November 2013 order dismissing Plaintiff's claim on the pleadings.

REVERSED.

Judge GEER concurs.

Judge DILLON dissents.

DILLON, Judge, dissenting.

Plaintiff filed an action as administrator of his deceased wife's estate against Defendants alleging that their negligence contributed to his wife's death. The trial court granted Defendants' Rule 12(b)(6) motion to dismiss Plaintiff's common law Dram Shop and punitive damages claims. The majority has concluded that the trial court erred in granting Defendants' motion to dismiss. Because I believe the trial court ruled correctly, I respectfully dissent.

As the majority points out, in reviewing the trial court's Rule 12(b)(6) dismissal, we must assume that Plaintiff's allegations in the complaint are true. These allegations tend to show the following: Plaintiff and his wife were staying at the Crowne Plaza Resort celebrating their wedding anniversary. Over the course of four and a half hours, Plaintiff and his wife sat in a restaurant at the Resort and ordered twenty-four (24) alcoholic drinks. Plaintiff's wife consumed at least ten (10) of the drinks. She was served one or more drinks after becoming appreciably and noticeably impaired. She and Plaintiff left the restaurant and headed to their hotel room for the night. However, she was so intoxicated that she fell to the floor as they left the restaurant; whereupon Defendants' employee(s) assisted her by placing her in a wheelchair and escorting her and Plaintiff to their hotel room. The next morning, Plaintiff woke up and found his wife lying dead on the floor.

The death of Plaintiff's wife is certainly a tragedy. Moreover, Plaintiff succeeds in alleging facts – that Defendants' employee(s), served "one or more" alcoholic drinks to an intoxicated patron – which constitute negligence per se, and that this negligence was a proximate cause of

his wife's death. *See* N.C. Gen. Stat. § 18B-305 (2012) (Dram Shop Act prohibits an ABC permittee to "knowingly sell or give alcoholic beverages to any person who is intoxicated"). However, Plaintiff also alleges facts in his complaint which demonstrate that Plaintiff's wife also acted negligently in proximately causing her own death, namely by voluntarily consuming a large quantity of alcohol. As our Court has held,

> [a patron's] act of [voluntarily] consuming sufficient quantities of intoxicants to raise his blood level approaching comatose state amounts to 'a want of ordinary care' which proximately caused [the patron's] injuries constituting contributory negligence as a matter of law.

Brower v. Robert Chappell, 74 N.C. App. 317, 320, 328 S.E.2d 45, 47 (1985) (affirming summary judgment for the defendant-server in action brought by plaintiff-patron who was injured by shattering glass when opening a glass door after becoming intoxicated).

"It is a well-established precedent in this State that contributory negligence on the part of the plaintiff is available as a defense in an action which charges the defendant with the violation of a statute or negligence per se." *Id.* (following our Supreme Court's holdings in *Poultry Co. v. Thomas*, 289 N.C. 7, 220 S.E.2d 536 (1975) and *Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425 (1920)). Furthermore, as our Supreme Court has recognized, where one serving alcohol to an intoxicated person in violation of N.C. Gen. Stat. § 18B-305 may be liable to third parties who are injured by the intoxicated patron, a claim brought by the intoxicated patron herself against the server is subject to the defense of contributory negligence. *Sorrell v. M.Y.B. Hospitality*, 332 N.C. 645, 647-48, 423 S.E.2d 72, 73-74 (1992).

The majority correctly points out that a plaintiff's *ordinary* contributory negligence will not bar a recovery where the defendant's negligence (or negligence per se) rises to the level of *gross negligence or willful and wanton conduct*. However, our Supreme Court in *Sorrell*, *supra*, has instructed that a Rule 12(b)(6) dismissal is appropriate where the allegations in the complaint show that the patron's contributory negligence rose to the same level as the defendant's negligence. In *Sorrell*, a patron became visibly intoxicated; the patron's friend told the bar waitress not to serve the patron another drink because the patron would be driving; the waitress, nonetheless, served the patron another large alcoholic drink; the patron finished the drink, left the bar, and got into his car; and the patron lost control of his vehicle and was killed. *Id.* at 646-47, 423 S.E.2d at 73. On appeal, our Supreme Court recognized that both

the waitress and the patron acted negligently. *Id.* at 648, 423 S.E.2d at 74. The patron's estate, though, argued that the waitress' conduct in serving alcohol to an intoxicated patron whom she knew was going to drive, after being requested to refrain from serving him, rose *above* the level of ordinary negligence. *Id.* Our Supreme Court, however, affirmed the trial court's Rule 12(b)(6) dismissal because the "decedent's own actions, as alleged in the complaint, [] [rose] *to the same level of negligence* as that of [the waitress]." *Id.* at 648-49, 423 S.E.2d at 74 (further stating that the allegations concerning the patron's actions "establish a similarly high degree of contributory negligence on the part of the [patron]") (emphasis added).

As was the case in *Sorrell* and the other reported cases in our State involving *first-party* Dram Shop claims, the complaint here fails to allege any facts which demonstrate that Defendants' negligence was any greater than the negligence of Plaintiff's wife. *See id.* (affirming Rule 12(b)(6) dismissal); *Mohr v. Matthews*, ___ N.C. App. ___, ___, 768 S.E.2d 10, 14 (2014) (Rule 12(b)(6) dismissal); *Canady v. McLeod*, 116 N.C. App. 82, 87, 446 S.E.2d 879, 882 (1994) (affirming summary judgment). *See also Eason v. Cleveland Draft House*, 195 N.C. App. 785, 673 S.E.2d 883, 2009 N.C. App. LEXIS 291, *6 (2009) (unpublished opinion) (affirming Rule 12(b)(6) dismissal). Rather, here, the only allegation concerning Defendants' negligence is that the waiter(s) served "at least one and more likely, several intoxicating liquor drinks" after the decedent had become "noticeably impaired." Moreover, the allegations otherwise demonstrate that Plaintiff's wife consumed the alcohol voluntarily. Under our case law, a patron is barred from recovering from her server as a matter of law where her allegations fail to allege anything more than that the defendant served alcohol and the patron voluntarily consumed alcohol. The same rule applies even where the server knew the patron was going to drive *if* the patron also knew (s)he was going to be driving. Here, there is simply no allegation that Defendants were aware of any facts of which Plaintiff's wife was not aware or that Defendants had any special relationship or owed any special duty beyond that between a server to a patron.

That is not to say that there could not be a situation where the negligence of a server could exceed the contributory negligence of a patron. *See Sorrell*, 332 N.C. at 648, 423 S.E.2d at 74 (recognizing the validity of the rule that a patron's ordinary negligence would not defeat his claim against a waiter whose actions in serving alcohol rise to the level of gross or willful and wanton negligence). However, here, Plaintiff has simply failed to plead any facts that would make Defendants' behavior any worse than the facts alleged in the above-cited cases.

In conclusion, Plaintiff has alleged facts which demonstrate as a matter of law that he is not entitled to a recovery under our law, which is the majority view in this country. *See Bridges v. Park Place*, 860 So.2d 811, 816-818 (2003) (Mississippi Supreme Court–citing cases, including *Sorrell* from our Supreme Court).

WILLIAM BARRY FREEDMAN AND FREEDMAN FARMS, INC., PLAINTIFFS
v.
WAYNE JAMES PAYNE AND MICHAEL R. RAMOS, DEFENDANTS

No. COA15-858

Filed 5 April 2016

Attorneys—malpractice—in pari delicto doctrine—intentional wrongdoing

The trial court did not err by granting defendants' motions to dismiss with prejudice appellant's claim for legal malpractice based on *in pari delicto*. Appellant's intentional wrongdoing barred any recovery from defendants for losses that may have resulted from defendants' misconduct. Appellant lied under oath in order to benefit from an alleged side-deal in which he thought he could pay $1,500,000 to avoid going to prison. Although the underlying criminal prosecution may have been complex, appellant was able to ascertain the illegality of his actions.

Appeal by plaintiff from Order entered 19 March 2015 by Judge Robert H. Hobgood in New Hanover County Superior Court. Heard in the Court of Appeals 27 January 2016.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Melody J. Jolly and Patrick M. Mincey, for defendant-appellee Payne.

Dickie, McCamey & Chilcote, PC, by Joseph L. Nelson, for defendant Ramos-appellee.

ELMORE, Judge.

William Barry Freedman (appellant) appeals from the trial court's order dismissing with prejudice his legal malpractice claim. Freedman Farms, Inc. (Freedman Farms) does not appeal from the order. After careful review, we affirm.

I. Background

In December 2014, appellant and Freedman Farms filed a complaint against attorneys Wayne James Payne and Michael R. Ramos (defendants) in New Hanover County Superior Court following defendants' representation of appellant in federal district court. In the complaint, appellant alleged professional malpractice, breach of fiduciary duty, constructive fraud, breach of contract, and fraud. Freedman Farms alleged fraud and breach of contract by a third-party beneficiary. Defendants filed separate motions to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

The events preceding the complaint are as follows: Appellant and his parents manage Freedman Farms, a multi-county farming operation in which they harvest wheat, corn, and soybeans, and operate several hog farms. On or about 13 December 2007 through 19 December 2007, Freedman Farms discharged approximately 332,000 gallons of liquefied hog waste from one of its waste treatment lagoons into Browder's Branch, a water of the United States. Through a coordinated effort with state and federal authorities, approximately 169,000 gallons of the waste was pumped out of Browder's Branch. Subsequently, appellant and Freedman Farms were charged with intentionally violating the Clean Water Act. Appellant retained defendants to represent him.

The trial began on 28 June 2011, and the prosecution put on evidence for five days. In appellant's complaint, he alleges that prior to the resumption of trial on 6 July 2011, defendant Ramos told appellant that the Assistant United States Attorney (AUSA) had approached him with a plea deal. In reality, appellant states, defendant "Ramos asked AUSA Williams whether the government, in exchange for both [appellant] and Freedman Farms pleading guilty and agreeing to pay $1,000,000 in restitution and a $500,000 fine, would reduce the charges against [appellant] to a misdemeanor negligent violation of the Clean Water Act." After considering the plea deal, appellant claims that he asked defendant Ramos to negotiate the fines and restitution to $500,000, to take incarceration "completely off the table," and to make AUSA Williams agree that neither appellant nor Freedman Farms would be debarred from federal farm subsidies.

Appellant further states in his complaint that when defendant Ramos returned from negotiating, he told appellant the following: the government was not interested in active time, the prosecutor agreed to "stand silent" at sentencing, appellant and Freedman Farms would avoid debarment from federal farm subsidies, and these promises were "part of a side-deal with [the prosecutor]—a wink-wink, nudge-nudge—and that [appellant] must not disclose this side-deal to the court," as it "would cost [appellant] the chance to assure that he would not be incarcerated." Accordingly, Freedman Farms pleaded guilty to knowingly violating the Clean Water Act, and appellant pleaded guilty to negligently violating the Clean Water Act. On 6 July 2011, the district court approved both plea agreements. Contrary to the terms of the alleged side-deal, in appellant's plea agreement, "the government expressly reserve[d] the right to make a sentence recommendation . . . and made no representations as to the effects of the guilty plea on debarment from Federal farm subsidies."

On 13 February 2012, the district court held a sentencing hearing for appellant and Freedman Farms. Appellant was sentenced to six months in prison and six months of house arrest. Defendants apparently filed three motions to reconsider, which were all denied, and appellant began his sentence on 15 March 2013. Appellant obtained a new attorney who filed an Emergency Motion to Vacate, Set Aside, or Correct Sentence on 9 May 2013 pursuant to 28 U.S.C. § 2255 due to ineffective assistance of counsel. On 15 May 2013, appellant was released on bail to home detention pending the outcome of the § 2255 motion.

Subsequently, AUSA Bragdon filed a Consent Motion to resolve appellant's § 2255 motion. The district court held a resentencing hearing on 1 October 2013 in which it vacated appellant's previous conviction. Pursuant to a new plea agreement, appellant again pleaded guilty to negligently violating the Clean Water Act. The district court imposed a sentence of "five years of probation, during which [appellant] will serve two months of incarceration, this being credited with the two months previously served, and ten months going forward of home detention, subject to electronic monitoring[.]" Appellant was also required to pay the remaining restitution that Freedman Farms owed by 20 December 2013.

After appellant filed his complaint in New Hanover County Superior Court, appellant and defendants filed a joint motion to designate the case as exceptional. Chief Justice Mark Martin granted the motion and assigned Senior Resident Superior Court Judge Robert H. Hobgood to preside over its disposition. On 9 February 2015, the trial court held a hearing regarding defendants' motions to dismiss. It concluded,

"Defendants['] . . . motions to dismiss the First Claim for Relief (Legal Malpractice) should be allowed with prejudice based on *in pari delicto* as set forth in *Whiteheart v. Waller*, 199 N.C. App. 281 (2009)[.]" Pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the trial court certified that there is no just reason to delay appeal of its final order. Appellant appeals.

II. Analysis

"The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (citation omitted). "Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). "On appeal, we review the pleadings *de novo* 'to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.' " *Gilmore v. Gilmore*, 229 N.C. App. 347, 350, 748 S.E.2d 42, 45 (2013) (quoting *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006)).

Appellant argues that the trial court erred in granting defendants' motions to dismiss because the *in pari delicto* doctrine does not apply to defendants' representation of appellant in a complex federal criminal prosecution and appellant's complaint does not establish as a matter of law his intentional wrongdoing. Defendant Payne claims, "Based on [appellant's] own admissions, he lied to the Federal Court with full knowledge that he was lying, and did so with full intention to benefit from his lies[.]" Similarly, defendant Ramos argues that appellant "alleges a conspiracy, by which a *sub rosa* agreement was to be concealed from a federal judge so that [appellant] could reap the benefit of no jail time." Accordingly, defendants claim that the *in pari delicto* doctrine bars any redress because appellant is in the wrong about the same matter he complains of.

"In a professional malpractice case predicated upon a theory of an attorney's negligence, the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth by *Hodges*, 239 N.C. 517, 80 S.E.2d 144, and that this negligence (2) proximately caused (3) damage to the plaintiff."

Rorrer v. Cooke, 313 N.C. 338, 355, 329 S.E.2d 355, 365–66 (1985). " 'To establish that negligence is a proximate cause of the loss suffered, the plaintiff must establish that the loss would not have occurred but for the attorney's conduct.' " *Belk v. Cheshire*, 159 N.C. App. 325, 330, 583 S.E.2d 700, 704 (2003) (quoting *Rorrer*, 313 N.C. at 361, 329 S.E.2d at 369). This Court has previously concluded, "[T]he burden of proof required to show proximate cause in an action for legal malpractice arising in the context of a criminal proceeding is, for public policy reasons, necessarily a high one." *Id.* at 332, 583 S.E.2d at 706. We declined, however, to adopt a bright-line rule. *Id.*

Regarding the legal malpractice claim, appellant alleged nine duties that defendants owed him throughout their representation and seventeen different ways that defendants breached those duties. Appellant concluded, "Defendants' breach of these duties is a direct and proximate cause of damage to [appellant], in an amount in excess of $10,000." In response, defendants collectively asserted a number of affirmative defenses, including the *in pari delicto* doctrine.

"The common law defense by which the defendants seek to shield themselves from liability in the present case arises from the maxim *in pari delicto potior est conditio possidentis [defendentis]*" meaning "in a case of equal or mutual fault . . . the condition of the party in possession [or defending] is the better one." *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 239 (1985) (quoting Black's Law Dictionary 711 (rev. 5th ed. 1979)). The doctrine, well recognized in this State, "prevents the courts from redistributing losses among wrongdoers." *Whiteheart v. Waller*, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009). "The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains." *Byers v. Byers*, 223 N.C. 85, 90, 25 S.E.2d 466, 469–70 (1943). "No one is permitted to profit by his own fraud, or to take advantage of his own wrong, or to found a claim on his own iniquity, or to acquire any rights by his own crime." *Id.* at 90, 25 S.E.2d at 470.

In a case of first impression, this Court applied the *in pari delicto* doctrine to a legal malpractice claim in *Whiteheart v. Waller*. We stated, "When applying *in pari delicto* in legal malpractice actions, some courts have distinguished between wrongdoing that would be obvious to the plaintiff and 'legal matters so complex . . . that a client could follow an attorney's advice, do wrong and still maintain suit on the basis of not being equally at fault.' " *Whiteheart*, 199 N.C. App. at 285, 681 S.E.2d at 422 (quoting *Pantely v. Garris, Garris & Garris, P.C.*, 180 Mich. App. 768, 776, 447 N.W.2d 864, 868 (1989)). However, "Such a distinction is

proper for circumstances in which advice given by an attorney is sufficiently complex that a client would be unable to ascertain the illegality of following the advice." *Id.* at 285–86, 681 S.E.2d at 422 (citing *Pantely*, 180 Mich. App. at 776, 447 N.W.2d at 868). We concluded, "The instant case presents no such complexity. . . . Plaintiff is liable since he was well aware [his] actions were unethical. Regardless of the nature of the advice from [his attorney], plaintiff knew that the information [he presented to the courts] was incorrect." *Id.* at 286, 681 S.E.2d at 422–23. Accordingly, we held that "plaintiff's intentional wrongdoing barred any recovery from defendants for the losses that may have resulted from defendants' misconduct, under a theory of *in pari delicto*." *Id.* at 286–87, 681 S.E.2d at 423.

Here, treating the allegations in appellant's complaint as true as we must at this stage, defendants are at fault for striking a "side-deal" with the prosecutor regarding prison time and federal farm subsidies, and for instructing appellant that he must not disclose the side-deal to the court. Appellant is at fault for lying under oath in federal court by affirming that he was not pleading guilty based on promises not contained in the plea agreement. Appellant argues that this "is not a suit based on damage suffered as a result of being caught committing a crime Ramos and Payne recommended[,]" however, we fail to see how it is not.

Although appellant claims that his complaint does not establish his intentional wrongdoing, we agree with defendants that appellant's complaint shows otherwise. Appellant's complaint reveals the following:

> 34. Ramos returned and told [appellant] that AUSA Williams said the government was not interested in active time and that AUSA Williams had agreed to "stand silent" at sentencing and would not argue for an active sentence.
>
> . . . .
>
> 36. Ramos also told [appellant] that . . . AUSA Williams told him that the government did not want to pursue debarment [from federal farm subsidies].
>
> . . . .
>
> 38. Ramos then warned [appellant] that these promises from AUSA Williams were part of a side-deal with Williams—a wink-wink, nudge-nudge—and that [appellant] must not disclose this side-deal to the court, because this would upset Judge Flanagan and would cost

> [appellant] the chance to assure that he would not be incarcerated.
>
> . . . .
>
> 41. . . . [F]aced with the opportunity to avoid incarceration and debarment, . . . [appellant] agreed to plead guilty, on the terms as described by Ramos.
>
> . . . .
>
> 43. Ramos and Payne lied to [appellant] and Ms. Pearl about having an undisclosable side-deal, as a result of which [appellant] pled guilty, Ms. Pearl pled guilty on behalf of Freedman Farm[s], and both [appellant] and Freedman Farms became liable for $1,500,000 in fines and restitution.
>
> 44. The actual and only plea deal with AUSA Williams was precisely what appeared in the Plea Agreement itself that the government expressly reserve[d] the right to make a sentence recommendation (¶ 4(b)) and made no representations as to the effects of the guilty plea on debarment from Federal farm subsidies.

As in *Whiteheart*, we conclude that the trial court correctly decided that appellant's intentional wrongdoing bars any recovery from defendants for losses that may have resulted from defendants' misconduct. *See Whiteheart*, 199 N.C. App. at 286–87, 681 S.E.2d at 423. Appellant lied under oath in order to benefit from an alleged side-deal in which he thought he could pay $1,500,000 to avoid going to prison. When the deal unraveled and appellant was bound by the express terms of his plea agreement, appellant attempted to redistribute the loss, which the courts of this State will not do. *See id.* at 285, 681 S.E.2d at 422. Because appellant is in the wrong about the same matter he complains of, the law forbids redress. *Byers*, 223 N.C. at 90, 25 S.E.2d at 469–70. Although the underlying criminal prosecution of appellant may have been complex, appellant was able to ascertain the illegality of his actions during the sentencing hearing. *See Pantely*, 180 Mich. App. at 776, 447 N.W.2d at 868 ("A law degree does not add to one's awareness that perjury is immoral and illegal[.]").

> The allegations of the complaint are discreditable to both parties. They blacken the character of the plaintiff as well as soil the reputation of the defendant. As between

> them, the law refuses to lend a helping hand. The policy of the civil courts is not to paddle in muddy water, but to remit the parties, when *in pari delicto*, to their own folly. So, in the instant case, the plaintiff must fail in his suit.

Bean v. Detective Co., 206 N.C. 125, 126, 173 S.E. 5, 6 (1934).

III. Conclusion

In sum, we affirm the trial court's order granting defendants' motions to dismiss with prejudice appellant's claim for legal malpractice based on *in pari delicto*.

AFFIRMED.

Judges STROUD and DIETZ concur.

COREY SCOTT HART, Plaintiff
v.
JAMES PATRICK BRIENZA and GASTON COUNTY, Defendants

No. COA15-1078

Filed 5 April 2016

1. Police Officers—shooting by officer—issues of fact—reaching for shotgun

In a case arising from a shooting by an officer, the trial court did not err by denying the officer's motion for summary judgment on plaintiff's claims against him in his individual capacity. Conflicting evidence existed to create genuine issues of fact about whether plaintiff was complying with officers' commands or reaching for his shotgun, thereby justifying this officer's use of force, when the officers ordered him to "freeze" and "get on the ground."

2. Immunity—governmental—shooting by officer—insurance policy language

In a case arising from a shooting by an officer, the defense of governmental immunity barred plaintiff's claim against the County under respondeat superior as well as the claims against the officer in his official capacity. Unambiguous language in the County's liability insurance policy clearly preserved the defense of governmental immunity.

3. Damages and Remedies—punitive—shooting by officer

In a case arising from a shooting by an officer, the trial court correctly denied the officer's motion for summary judgment on punitive damages. Plaintiff's complaint forecast a genuine issue of material fact regarding the officer's conduct and the officer failed to carry his burden of showing that no reasonable issue of material fact existed.

Appeal by defendants from order entered 21 July 2015 by Judge Eric L. Levinson in Gaston County Superior Court. Heard in the Court of Appeals 10 March 2016.

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

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and Ryan L. Bostic, for defendants-appellants.

TYSON, Judge.

James Patrick Brienza ("Officer Brienza") and Gaston County (collectively, "Defendants") appeal from order granting in part and denying in part their motion for summary judgment. We affirm in part, reverse in part, and remand.

I. Factual Background

On 4 September 2010, Corey Scott Hart ("Plaintiff") attended a family gathering with his wife, Pamela Hart ("Mrs. Hart") and his cousin, Frances. Plaintiff consumed approximately twelve cans of beer before leaving shortly after midnight with Mrs. Hart and Frances. After Frances drove Plaintiff and Mrs. Hart to their residence, Plaintiff stated he had left his cell phone in Frances' vehicle and walked to her house to retrieve it. Mrs. Hart became concerned when Plaintiff did not return for some time, so she decided to go to Frances' house to check on him. Mrs. Hart walked through the open front door and discovered Plaintiff and Frances *in flagrante delicto* in Frances' bedroom. A domestic dispute ensued.

Mrs. Hart told Plaintiff not to return to their residence, and, upon her return home, locked Plaintiff out of the house. When Plaintiff discovered he was locked out of his house, he asked Mrs. Hart to give him the keys to his vehicle and his wallet, so he could leave the premises. Mrs. Hart yelled at Plaintiff through an open window, told Plaintiff to leave, and threatened him with a .357 handgun.

Plaintiff retrieved his shotgun from an outbuilding near the residence, fired a shot in the air, and continued to yell at Mrs. Hart to give him his keys and wallet. Plaintiff rested his shotgun on the side of the house and attempted to climb through an open window. Mrs. Hart called 911 and reported the situation.

Gaston County police officers Jimmy Reid Rollins, Jr. ("Officer Rollins"), Jeffrey Kaylor ("Officer Kaylor"), William Blair Hall ("Officer Hall"), and Officer Brienza responded to the call and were dispatched to Plaintiff's residence at approximately 2:41 a.m.

Upon arriving at the residence, which was surrounded by a wooded area, the officers believed they heard additional shots fired, and heard a banging noise on the side of the house. The officers decided this was an active shooter situation and began to advance on the residence. At his criminal trial, Plaintiff testified he was halfway through the window, with his feet approximately three feet off the ground, when he heard the officers exclaim: "Gaston County Police! Get out of the window and get on the ground!" Officer Brienza testified he yelled to Plaintiff: "Police, don't move!"

According to the officers' testimony, Plaintiff turned to face the officers, simultaneously lowered himself to the ground and reached for his shotgun. Plaintiff alleged in his complaint that "at no time did [he] reach for his shotgun or otherwise demonstrate disobedience to Officer Brienza's commands." Reacting, Officer Brienza discharged his weapon three times at close range and struck Plaintiff in the hip once. Officer Brienza advanced on Plaintiff, with his gun pointed at Plaintiff's head until he was handcuffed and secured.

Plaintiff filed a complaint against Officer Brienza and Gaston County on 29 August 2013. Plaintiff asserted claims against Officer Brienza, in both his official and individual capacities, for the following: (1) assault and battery; (2) intentional infliction of emotional distress; (3) ordinary negligence; (4) gross negligence; and, (5) punitive damages. Plaintiff asserted a claim against Gaston County under the doctrine of respondeat superior. Plaintiff alleged Gaston County had waived its governmental immunity through the purchase of a liability insurance policy pursuant to N.C. Gen. Stat. § 153A-435.

On 7 November 2013, Defendants answered Plaintiff's complaint and filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure, Rules 12(b)(1), (2), and (6). Defendants Gaston County and Officer Brienza alleged they were entitled to the defenses of

governmental immunity and public official immunity, respectively. The trial court denied Defendants' motions to dismiss on 18 September 2014.

After discovery, Defendants moved for summary judgment based upon governmental immunity and public official immunity. On 21 July 2015, the trial court entered an order granting in part and denying in part Defendants' motion for summary judgment. The trial court granted summary judgment in favor of all Defendants as to Plaintiff's claims for intentional infliction of emotional distress, ordinary negligence, and gross negligence. The trial court granted summary judgment in favor of Gaston County and Officer Brienza in his official capacity as to Plaintiff's claim for punitive damages. Plaintiff did not appeal from that ruling and that judgment is now final.

The trial court denied Defendants' motion for summary judgment on Plaintiff's claim for assault and battery against Officer Brienza in his individual and official capacities, and Plaintiff's claim against Gaston County under the doctrine of respondeat superior. The trial court also denied Defendants' motion for summary judgment on Plaintiff's claim for punitive damages against Officer Brienza in his individual capacity.

After the trial court entered its order, which granted in part and denied in part Defendants' motion for summary judgment, Plaintiff's remaining claims against Defendants were as follows: (1) assault and battery against Officer Brienza, in both his official and individual capacities; (2) punitive damages against Officer Brienza, in his individual capacity only; and (3) imputed liability to Gaston County under the doctrine of respondeat superior. Defendants gave notice of appeal to this Court.

II. Issues

Defendants argue the trial court erred by denying their motion for summary judgment as to Plaintiff's claims for: (1) assault and battery against Officer Brienza; (2) imputed liability under the doctrine of respondeat superior against Gaston County; and (3) punitive damages against Officer Brienza.

III. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015); *see Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citation omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

"In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citations omitted).

> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.
>
> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted). This Court reviews a trial court's summary judgment order *de novo*. *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

IV. Analysis

A. Jurisdiction

[1] "[T]he denial of a motion for summary judgment is a nonappealable interlocutory order." *Northwestern Fin. Grp. v. Cnty. of Gaston*, 110 N.C. App. 531, 535, 430 S.E.2d 689, 692 (citation omitted), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). This Court will only address the merits of such an appeal if "a substantial right of one of the parties would be lost if the appeal were not heard prior to the final judgment." *Id.* (citation omitted).

It is well-settled that "[o]rders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001) (citing *Corum*

v. Univ. of North Carolina, 97 N.C. App. 527, 389 S.E.2d 596 (1990), *aff'd in part, reversed in part, and remanded*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664 (1992). This Court has allowed immediate appeal in these cases because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (citations and quotation marks omitted), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Defendants' appeal is properly before this Court.

B. Public Official Immunity

The doctrine of public official immunity is a "derivative form" of governmental immunity. *Epps*, 122 N.C. App. at 203, 468 S.E.2d at 850. Public official immunity precludes suits against public officials in their individual capacities and protects them from liability "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted). "Actions that are malicious, corrupt or outside of the scope of official duties will pierce the cloak of official immunity[.]" *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citations omitted).

A malicious act is one which is: "(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 289, 730 S.E.2d 226, 230 (2012), *disc. review denied and appeal dismissed*, 366 N.C. 574, 738 S.E.2d 363 (2013). Our Supreme Court held "the intention to inflict injury may be constructive" where an individual's conduct "is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of wilfulness [sic] and wantonness equivalent in spirit to an actual intent." *Foster v. Hyman*, 197 N.C. 189, 192, 148 S.E.2d 36, 38 (1929) (citation omitted).

"[W]anton and reckless behavior may be equated with an intentional act" in the context of intentional tort claims, including assault and battery. *Pleasant v. Johnson*, 312 N.C. 710, 715, 325 S.E.2d 244, 248 (1985). This Court held "evidence of constructive intent to injure may be allowed to support the malice exception to [public official] immunity." *Wilcox*, 222 N.C. App. at 291, 730 S.E.2d at 232.

N.C. Gen. Stat. § 15A-401(d)(2) delineates the circumstances under which an officer's use of deadly force is justified. "Although undeterred

and vigorous enforcement of official duties is a generally laudable goal in this State, with respect to the use of deadly force in apprehending criminal suspects, our legislature has evinced a clear intent to hamper and deter officers performing that specific duty." *Wilcox*, 222 N.C. App. at 290-91, 730 S.E.2d at 231. N.C. Gen. Stat. § 15A-401(d)(2) states in pertinent part:

> A law-enforcement officer is justified in using deadly physical force upon another person . . . only when it is or appears to be reasonably necessary thereby . . . [t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force[.] . . . Nothing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

N.C. Gen. Stat. § 15A-401(d)(2) (2015).

Pursuant to this statute, a law enforcement officer may be subject to liability for "recklessness" or "heedless indifference to the safety and rights of others" when using deadly force. *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (citations and quotation marks omitted). The commentary to N.C. Gen. Stat. § 15A-401(d)(2) notes "the law-enforcement officer cannot act with indifference to the safety of others in the use of force." N.C. Gen. Stat. § 15A-401(d) official commentary. Implicit in this statute "is the notion that unjustified use of deadly force may lead to civil liability." *Wilcox*, 222 N.C. at 291, 730 S.E.2d at 231.

Here, conflicting evidence exists to create genuine issues of fact concerning whether Plaintiff was complying with the officers' commands or reaching for his shotgun, thereby justifying Officer Brienza's use of force, when the officers ordered him to "freeze" and "get on the ground." In his complaint, Plaintiff alleged he was "unarmed with arms raised" at the time Officer Brienza discharged his weapon three separate times. Viewing the evidence in the light most favorable to Plaintiff, the non-moving party, a triable issue of fact exists of whether Officer Brienza's actions were sufficient to "pierce the cloak of official immunity." *Moore*, 124 N.C. App. at 42, 476 S.E.2d at 421 (citation omitted). The trial court did not err by denying Officer Brienza's motion for summary judgment on Plaintiff's claims against him in his individual capacity. This argument is overruled.

C. Governmental Immunity

[2] Defendant Gaston County argues the trial court erred by denying its motion for summary judgment. This argument also applies to Plaintiff's claim against Officer Brienza in his official capacity. The county contends it was entitled to the defense of governmental immunity, and it did not waive this defense through the purchase of liability insurance.

> The general rule in North Carolina is that a municipality is immune from torts committed by an employee carrying out a governmental function. Law enforcement operations are clearly governmental activities for which a municipality is generally immune. A municipality may, however, waive its governmental immunity to the extent it has purchased liability insurance.

Turner v. City of Greenville, 197 N.C. App. 562, 565-66, 677 S.E.2d 480, 483 (2009) (citations and internal quotation marks omitted); *see* N.C. Gen. Stat. § 153A-435(a) (2015) ("Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function.").

> A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy. Further, waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed.

Patrick v. Wake Cnty. Dep't of Human Servs., 188 N.C. App. 592, 595-96, 655 S.E.2d 920, 923 (2008) (citations and internal quotation marks omitted) (holding defendants did not waive sovereign immunity through the purchase of liability insurance policy and properly asserted sovereign immunity as an affirmative defense in their answer to plaintiff's complaint).

In *Estate of Earley v. Haywood Cnty. Dep't of Soc. Servs*, 204 N.C. App. 338, 343, 694 S.E.2d 405, 409-10 (2010), this Court recognized

> the arguably circular nature of the logic employed in *Patrick*. The facts are that the legislature explicitly provided that governmental immunity is waived to the extent of insurance coverage, but the subject insurance contract eliminates any potential waiver by excluding from

> coverage claims that would be barred by sovereign immunity. Thus, the logic in *Patrick* boils down to: Defendant retains immunity because the policy doesn't cover [its] actions and the policy doesn't cover [its] actions because [it] explicitly retains immunity. Nonetheless in this case, as in *Patrick*, where the language of both the applicable statute and the exclusion clause in the insurance contract are clear, we must decline Plaintiff's invitation to implement "policy" in this matter. Any such policy implementation is best left to the wisdom of the legislature.

Here, Defendants acknowledge the purchase of liability insurance by Gaston County. Defendants argue the policy excludes Plaintiff's claims from coverage. Defendant Gaston County's liability insurance policy includes a provision entitled "Preservation of Governmental Immunity — North Carolina." This provision states:

> 1. The following is added to each Section that provides liability coverage: This insurance applies to the tort liability of any insured *only to the extent that such tort liability is not subject to any defense of governmental immunity* under North Carolina law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
>
> 2. . . . *Your purchase of this policy is not a waiver*, under North Carolina General Statute Section 160A-485 or any amendments to that section, *of any governmental immunity* that would be available to any insured had you not purchased this policy.

(emphasis supplied).

The insurance policy provision at issue here is "materially indistinguishable" from the provisions in *Patrick* and *Estate of Earley*. We are therefore bound by this Court's prior holdings. *Wright v. Gaston Cnty.*, 205 N.C. App. 600, 608, 698 S.E.2d 83, 89-90 (2010) (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). The unambiguous language in Gaston County's liability insurance policy clearly preserves the defense of governmental immunity. Defendant Gaston County did not waive its governmental immunity through the purchase of this policy and properly asserted this affirmative defense in its answer.

The defense of governmental immunity applies to bar Plaintiff's claim against Gaston County under the doctrine of respondeat superior,

as well as the claims against Officer Brienza in his official capacity. *Schlossberg v. Goins*, 141 N.C. App. 436, 439-40, 540 S.E.2d 49, 52 (2000) (citations omitted) ("In North Carolina, governmental immunity serves to protect a municipality, as well as its officers or employees who are sued in their official capacity, from suits arising from torts committed while the officers or employees are performing a governmental function. . . . That immunity is absolute unless the [county] has consented to being sued or otherwise waived its right to immunity."), *disc. review denied*, 355 N.C. 215, 560 S.E.2d 136 (2002). The portions of the trial court's order denying Defendants' motion for summary judgment on Plaintiff's claims against Gaston County under the doctrine of respondeat superior and against Officer Brienza in his official capacity are reversed, and this cause remanded on those issues.

D. Punitive Damages

[3] "Punitive damages may be awarded, in an appropriate case . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1 (2015); *see Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004). Recovery of punitive damages requires a claimant to prove by clear and convincing evidence that the defendant is liable for compensatory damages, and the presence of one of the following aggravating factors: (1) fraud; (2) malice; or (3) willful or wanton conduct. N.C. Gen. Stat. § 1D-15 (2015). "[P]laintiff's complaint *must* allege facts or elements showing the aggravating circumstances which would justify the award of punitive damages." *Shugar v. Guill*, 304 N.C. 332, 336, 283 S.E.2d 507, 509 (1981) (emphasis in original) (citing *Cook v. Lanier*, 267 N.C. 166, 172, 147 S.E.2d 910, 915-16 (1966)).

Our General Assembly has statutorily defined "willful or wanton conduct" as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7) (2015). Willful or wanton conduct requires more than a showing of gross negligence. *Id.* "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984) (citation omitted); *see also* N.C. Gen. Stat. § 1D-5(5) (" 'Malice' means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.").

In his claim for relief seeking punitive damages, Plaintiff alleged:

> 26. That, upon information and belief, at the aforementioned time and place, Defendant Brienza fired shots on the Plaintiff, who was unarmed with arms raised, on three separate occasions and intentionally did not give the Plaintiff the opportunity to follow his commands but, instead, fired three shots directly at the Plaintiff in an effort to seriously wound, maim or kill the Plaintiff.
>
> 27. . . . [A]fter Defendant Brienza fired the first shot at the Plaintiff, believing that he had failed to wound, maim, or kill the Plaintiff, intentionally, maliciously, wanton [sic] and willfully attempted to shoot the unarmed Plaintiff a second and a third time.
>
> 28. . . . Defendant Brienza, by his own admission, could not understand why the Plaintiff was not dead after he fired the shots at the Plaintiff, stating: "I can't believe you're not mother****ing dead" while pushing his assault rifle on the back of the Plaintiff's head.
>
> . . . .
>
> 42. That, at all times complained of herein, Defendant Brienza's willful and wanton conduct, consisting of his shooting the unarmed Plaintiff despite Plaintiff's compliance with his commands, was a conscious and intentional disregard of and/or indifference to the rights and safety of the Plaintiff, which Defendant Brienza knows or should know is reasonably likely to result in injury, damage, or other harm, and thus would support an award of punitive damages.

As the moving party for summary judgment, Officer Brienza had "the burden of showing that no material issues of fact exist, such as by demonstrating through discovery that the opposing party cannot produce evidence to support an essential element of his claim or defense." *Dixie Chem. Corp. v. Edwards*, 68 N.C. App. 714, 715, 315 S.E.2d 747, 749 (1984) (citation omitted). The allegations above, considered in conjunction with Plaintiff's other allegations and reviewed in the light most favorable to Plaintiff, as we must on a motion for summary judgment, are sufficiently egregious, if proved by the appropriate standard of evidence, to support a finding that Officer Brienza's conduct was willful and either intentionally or recklessly injurious. N.C. Gen. Stat. § 1D-5(5), (7).

Plaintiff's complaint forecasts a genuine issue of material fact regarding Officer Brienza's conduct. Officer Brienza failed to produce evidentiary materials at the summary judgment stage to show Plaintiff would be unable to produce evidence to support his allegations. Officer Brienza failed to carry his burden to show no genuine issue of material fact exists. This argument is overruled. The denial of Officer Brienza's motion for summary judgment regarding Plaintiff's claim for punitive damages is affirmed.

V. Conclusion

A triable issue of fact exists as to whether Officer Brienza exceeded the scope of his lawful authority to use deadly force under the circumstances, which would "pierce the cloak" of his public official immunity to which he is otherwise entitled. Moore, 124 N.C. App. at 42, 476 S.E.2d at 421 (citation omitted). The trial court did not err by denying Defendants' motion for summary judgment as to Plaintiff's claim for assault and battery against Officer Brienza in his individual capacity.

Gaston County did not waive its governmental immunity, and subject itself to suit, through its purchase of a liability insurance policy. The insurance policy contains a "Preservation of Governmental Immunity" provision, which explicitly states the policy is not a waiver of governmental immunity, and the claims asserted by Plaintiff are not covered. The trial court erred by denying Defendants' motion for summary judgment on Plaintiff's claim asserting Gaston County is liable under the doctrine of respondeat superior. Gaston County's governmental immunity also shields Officer Brienza from liability in his official capacity. *Schlossberg*, 141 N.C. App. at 439, 540 S.E.2d at 52. These portions of the trial court's summary judgment order are reversed.

Plaintiff's complaint forecasts genuine issues of material facts regarding whether Officer Brienza's conduct was sufficiently egregious to support an award of punitive damages. Officer Brienza failed to produce evidentiary materials at the summary judgment hearing to show Plaintiff would be unable to produce evidence to support his allegations. The trial court did not err by denying Defendants' motion for summary judgment as to Plaintiff's claim against Officer Brienza in his individual capacity for punitive damages.

The judgment appealed from is affirmed in part regarding the assault and battery and punitive damages claims against Officer Brienza in his individual capacity. The judgment appealed from is reversed in part

concerning Defendant Gaston County and Officer Brienza in his official capacity, and remanded for further proceedings.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges GEER and INMAN concur.

CHRISTOPHER HAYES, PLAINTIFF
v.
SCOTT WALTZ, DEFENDANT

No. COA15-605

Filed 5 April 2016

1. Alienation of Affections—compensatory damages—motion for judgment notwithstanding verdict

The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict ("JNOV") with regard to the compensatory damages award for alienation of affections. Plaintiff presented more than a scintilla of evidence that there was genuine love and affection between himself and his wife and that defendant proximately caused the alienation of that love and affection.

2. Criminal Law—closing argument—motion to dismiss—sequestration—truthfulness—credibility

The trial court did not abuse its discretion in an alienation of affection case by denying defendant's motions to dismiss based on portions of plaintiff's closing argument. Although the remarks concerning the wife's sequestration and her truthfulness constituted impermissible opinions as to her credibility, a review of plaintiff's closing argument in its entirety revealed these improper statements were not sufficiently egregious so as to entitle defendant to relief under Rule 59 or 60. Defendant failed to demonstrate that the amount of compensatory damages awarded was excessive.

3. Damages and Remedies—punitive damages—judgment notwithstanding verdict—specific reasons required

The trial court erred in an alienation of affections case by partially granting defendant's judgment notwithstanding the verdict motion and setting aside the jury's award of punitive damages. The

case was remanded to the trial court to issue a written opinion setting forth its specific reasons for granting the motion.

Appeal by defendant and cross-appeal by plaintiff from judgment entered 11 September 2014 and order entered 22 October 2014 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 16 November 2015.

Lott Law, PLLC, by Kimberly M. Lott and Andre Truth McDavid, for plaintiff.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Lynn Wilson McNally and Alicia Jurney, for defendant.

DAVIS, Judge.

This appeal arises from a jury award of compensatory and punitive damages in favor of Christopher Hayes ("Plaintiff") on his alienation of affections claim against Scott Waltz ("Defendant"). On appeal, Defendant's primary argument is that the trial court erred by denying his motion for judgment notwithstanding the verdict ("JNOV") with regard to the compensatory damages award. Plaintiff cross-appeals from the trial court's order granting Defendant's JNOV motion as to the jury's award of punitive damages. After careful review, we affirm in part and reverse and remand in part.

Factual Background

Plaintiff and Rebecca Lynn Hayes ("Ms. Hayes") were married on 30 December 2000. They had two children together during their marriage, and Plaintiff legally adopted Ms. Hayes' son from a prior relationship. In 2006, Plaintiff and Ms. Hayes moved their family from Florida to North Carolina.

In March 2009, Ms. Hayes began working for Bayer as a legal administrative assistant. In early 2011, Ms. Hayes was offered a position in Bayer's environmental sciences group. She accepted the position and began working with that group in February of 2011.

Approximately one week later, she attended a work-sponsored conference in Cancun, Mexico. At the conference, Ms. Hayes met Defendant, who also worked for Bayer and lived in Indiana. Defendant introduced himself and other members of his group to Ms. Hayes on the first evening of the conference, and they all went to a dance club together later that

night. Defendant danced with Ms. Hayes at the club and later walked her to her room. They talked for a while, and Defendant left.

On the second night of the conference, Defendant and Ms. Hayes again attended the dance club, and he walked her back to her room afterwards. They proceeded to engage in sexual intercourse. On the third night of the conference, Defendant and Ms. Hayes had sexual intercourse a second time. When the conference ended, Defendant returned to Indiana, and Ms. Hayes returned to North Carolina.

Between March 2011 and June 2011, Defendant and Ms. Hayes communicated frequently via email, telephone, and text messaging. They exchanged 423 text messages and phone calls during the month of March, 977 in April, 1,093 in May, and 894 in June. They spent a total of 26.07 hours on the telephone together during this time period.

On 27 June 2011, Plaintiff examined his family's phone bill and noticed that there were a large number of communications between his wife's cell phone number and a telephone number with a 412 area code that he did not recognize. Plaintiff dialed the number — which he later discovered belonged to Defendant — but Defendant did not answer. Instead, Defendant sent Ms. Hayes a text message to inform her that her husband had tried to contact him. Ms. Hayes then sent Plaintiff a text message stating, "You can stop calling that number. He's not going to answer." Plaintiff responded by asking her if "we need to talk?" Ms. Hayes asked him to read a letter she had written to him and placed in a drawer in her closet. The letter discussed several of her prior extramarital affairs. It further stated that she had "met someone" and did not want to hide that from Plaintiff.

Plaintiff drove to Ms. Hayes' workplace, followed her car when she left work, and pulled up next to her when she turned into a parking lot. Plaintiff and Ms. Hayes then talked for a few minutes about the letter at which point Plaintiff used her cell phone to call the last number that had been dialed from the phone, which was Defendant's number. Defendant answered his phone, and in response to questioning by Plaintiff, Defendant admitted that he and Ms. Hayes had engaged in sexual intercourse in Cancun. Plaintiff asked if Defendant knew that Ms. Hayes was married, and Defendant admitted that he was aware of that fact. Plaintiff then told Defendant to "[l]eave her alone. We're going to try and work this out."

Plaintiff suggested to Ms. Hayes that they both "cool off" for a while and then try marital counseling. Plaintiff testified that although their relationship felt "strain[ed]" after he learned of Ms. Hayes' affair in Cancun,

they still spent time together, went jogging together, and "enjoyed being around each other" over the next several days.

During that time period, Ms. Hayes spent a few nights at the residences of friends but also spent some nights in the marital home. Plaintiff and Ms. Hayes had been planning to pick up their children from Plaintiff's parents' home in Florida over the July 4 weekend where the children had been visiting. However, because Ms. Hayes decided she did not want to travel to Florida with Plaintiff under the circumstances, Plaintiff went to Florida without her.

While Plaintiff was in Florida, Defendant drove from Indiana to North Carolina to pick up his children from a prior marriage.[1] He intended to take them to his home in Indiana for a visit over the holiday weekend. After arriving in North Carolina, Defendant also picked up Ms. Hayes and took her with him and his children to Indiana. Defendant and Ms. Hayes spent the next six days and nights together. While traveling through North Carolina en route to Indiana, Defendant and Ms. Hayes stayed in a hotel and slept in the same bed together. They kissed and embraced while in North Carolina but did not have sexual intercourse again until they arrived in Indiana.

Upon her return to North Carolina, Ms. Hayes informed Plaintiff and their children that she and Plaintiff were getting a divorce. Plaintiff and Ms. Hayes entered into a separation agreement on 2 August 2011.

On 2 August 2013, Plaintiff filed a complaint against Defendant in Wake County Superior Court asserting causes of action for alienation of affections and criminal conversation. In his complaint, Plaintiff sought both compensatory and punitive damages. Defendant filed an answer on 2 October 2013 and an amended answer on 4 August 2014.

A jury trial was held beginning on 5 August 2014 before the Honorable Donald W. Stephens. The trial court bifurcated the compensatory damages and punitive damages phases of the trial.

The jury returned a verdict (1) finding Defendant liable for alienation of affections; (2) finding in favor of Defendant on the criminal conversation claim; and (3) determining that Plaintiff was entitled to recover $82,500.00 in compensatory damages. Following the punitive damages phase, the jury returned a verdict awarding Plaintiff $47,000.00 in punitive damages.

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1. The record is unclear as to whether Defendant's children resided in North Carolina at that time or simply happened to be visiting North Carolina.

On 19 September 2014, Defendant filed a motion for JNOV pursuant to Rule 50(b) of the North Carolina Rules of Civil Procedure. Defendant also requested that he be granted relief from the judgment under Rule 60(b) or that he receive a new trial based on Rule 59 as a result of prejudicial statements made by Plaintiff's counsel during closing arguments. In the alternative, Defendant contended that he was entitled to a remittitur, arguing that Plaintiff "presented no evidence of economic damages proximately caused by any wrongful act of Defendant" and that the trial court should therefore "reduce the damages awarded to Plaintiff to an amount substantiated by the evidence presented at trial."

On 22 October 2014, the trial court entered an order partially granting Defendant's JNOV motion by vacating the jury's award of punitive damages. However, the trial court denied Defendant's JNOV motion with regard to the compensatory damages award. The trial court also denied Defendant's remaining motions. Defendant filed a timely appeal, and Plaintiff, in turn, cross-appealed.

Analysis

I. Defendant's Appeal

A. Denial of JNOV Motion as to Award of Compensatory Damages

[1] Defendant's primary argument on appeal is that the trial court erred by denying his motion for JNOV with regard to Plaintiff's alienation of affections claim.

> The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.

Springs v. City of Charlotte, 209 N.C. App. 271, 274-75, 704 S.E.2d 319, 322-23 (2011) (citation and quotation marks omitted).

A motion for JNOV "should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009). "A scintilla of evidence is defined as very

slight evidence." *Pope v. Bridge Broom, Inc.*, ___ N.C. App. ___, ___, 770 S.E.2d 702, 715 (citation and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 775 S.E.2d 861 (2015).

In order to successfully bring a claim for alienation of affections, the plaintiff must present evidence demonstrating "(1) a marriage with genuine love and affection; (2) the alienation and destruction of the marriage's love and affection; and (3) a showing that defendant's wrongful and malicious acts brought about the alienation of such love and affection." *Heller v. Somdahl*, 206 N.C. App. 313, 315, 696 S.E.2d 857, 860 (2010). On appeal, Defendant contends that his motion for JNOV should have been granted because (1) the evidence at trial failed to show that he engaged in wrongful and malicious conduct that caused the loss of affections between Plaintiff and Ms. Hayes; and (2) all of the sexual conduct between Ms. Hayes and him occurred outside North Carolina.

> A claim for alienation of affections is a transitory tort because it is based on transactions that can take place anywhere and that harm the marital relationship. The substantive law applicable to a transitory tort is the law of the state where the tortious injury occurred, and not the substantive law of the forum state. The issue of where the tortious injury occurs . . . is based on where the alleged alienating conduct occurred, not the locus of the plaintiff's residence or marriage. Accordingly, where the defendant's involvement with the plaintiff's spouse spans multiple states, for North Carolina substantive law to apply, a plaintiff must show that the tortious injury occurred in North Carolina.

Jones v. Skelley, 195 N.C. App. 500, 506, 673 S.E.2d 385, 389-90 (2009) (internal citations, quotation marks, brackets, and ellipses omitted).

Establishing that the defendant's alienating conduct occurred within a state that still recognizes alienation of affections as a valid cause of action is essential to a successful claim since most jurisdictions have abolished the tort. *Darnell v. Rupplin*, 91 N.C. App. 349, 353-54, 371 S.E.2d 743, 746-47 (1988). However, as our Court explained in *Jones*, "even if it is difficult to discern where the tortious injury occurred, the issue is generally one for the jury[.]" *Jones*, 195 N.C. App. at 507, 673 S.E.2d at 390.

In the present case, Defendant asserts that because the evidence at trial demonstrated that the only instances of sexual intercourse between him and Ms. Hayes occurred neither in North Carolina nor in any other

jurisdiction that recognizes the cause of action, there was no remaining evidence "that Defendant engaged in actionable unlawful conduct." We disagree.

In the context of an alienation of affections claim, a wrongful and malicious act has been "loosely defined to include any intentional conduct that would probably affect the marital relationship." *Id.* at 508, 673 S.E.2d at 391 (citation and quotation marks omitted). Our Court has further described this element as encompassing any "unjustifiable conduct causing the injury complained of." *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E.2d 434, 436 (1980).

Here, Plaintiff offered into evidence cell phone records showing the voluminous number of text messages and telephone calls between Defendant and Ms. Hayes from March 2011 (which was shortly after the conference in Cancun) to June 2011 (when Plaintiff learned that the two of them had engaged in sexual intercourse during the Cancun trip). Ms. Hayes testified that these communications — many of which occurred on weekends or very late at night — were all work related. Defendant stated at trial that they had "talked about a lot of different things" during their phone calls and text messages. He testified that "we talked about work. We talked about personal lives. We talked about her trip to London. We talked about raising our kids." Because the contents of these communications were not introduced at trial — only the fact that the communications had occurred (as shown on the call and text message logs contained within Plaintiff's cell phone bills) — Defendant asserts that Plaintiff has failed to demonstrate that "any of the conversations between Defendant and Ms. Hayes were salacious or otherwise inappropriate" so as to satisfy the element of wrongful and malicious conduct.

As explained above, however, a motion for JNOV must be denied so long as there is more than a scintilla of evidence as to each essential element of the claim at issue. Here, Defendant and Ms. Hayes shared several thousand text messages and approximately 26 hours of telephone calls over the four-month period immediately following their sexual encounter in Cancun. Defendant's admission during his testimony that he decided not to answer the call from a North Carolina telephone number on 27 June 2011 because he "had an inclination that it was [Plaintiff]" and the fact that he then texted Ms. Hayes that Plaintiff was attempting to contact him allowed the jury to rationally infer that the communications between Ms. Hayes and himself were not, in fact, solely business related.

When Plaintiff discovered that Defendant and Ms. Hayes had engaged in sexual intercourse, he told Defendant to leave her alone so that he and Ms. Hayes could work on their marriage. Only a few days after this request (which Plaintiff made on 27 June 2011), Defendant came to North Carolina, picked up Ms. Hayes, and took her on a trip to Indiana that lasted for six days. Evidence was presented that during this trip Defendant and Ms. Hayes kissed and embraced each other and slept in the same bed in a North Carolina hotel.

The fact that this trip occurred less than a week after Plaintiff had directed Defendant to leave Ms. Hayes alone and that Plaintiff and Ms. Hayes permanently separated a few weeks later gave rise to a reasonable inference that there was wrongful and malicious conduct by Defendant that caused the loss of affection between Plaintiff and Ms. Hayes. *See Jones*, 195 N.C. App. at 507, 673 S.E.2d at 390 ("A claim for alienation of affections is comprised of wrongful acts which deprive a married person of the affections of his or her spouse — love, society, companionship and comfort of the other spouse." (citation and quotation marks omitted)).

Defendant contends that his acts occurring after 27 June 2011 cannot be legally considered in determining whether Plaintiff offered sufficient evidence of an alienation of affections claim because that was the date on which Plaintiff and Ms. Hayes separated. *See* N.C. Gen. Stat. § 52-13(a) (2015) ("No act of the defendant shall give rise to a cause of action for alienation of affection . . . that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or the plaintiff's spouse that the physical separation remain permanent.").

As an initial matter, this argument ignores the fact that virtually all of the text messages and phone calls between Defendant and Ms. Hayes occurred prior to 27 June 2011. In addition, however, the evidence presented at trial as to the date of separation was conflicting. Their separation agreement states that the date of separation was 18 July 2011. Ms. Hayes testified that 18 July 2011 was the day she moved into her new apartment and that 11 July 2011 was the last night she spent at the marital residence. While there was other evidence suggesting that Ms. Hayes left the marital home with the intent to permanently separate from Plaintiff on 28 June 2011, conflicts in the evidence on a motion for JNOV are resolved in favor of the nonmoving party. *See State Props., LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002) (noting existence of some evidence supporting defendants' argument on appeal but disregarding that evidence in reviewing trial court's ruling on defendants'

JNOV motion because "[a]ll conflicts in the evidence are to be resolved in the nonmovant's favor" (citation omitted)), *disc. review denied*, 356 N.C. 694, 577 S.E.2d 889 (2003). Therefore, because competent evidence was offered at trial supporting a finding that the parties' date of separation was *after* the trip Defendant and Ms. Hayes took to Indiana, the jury was able to properly consider evidence of acts that occurred after 27 June 2011.

Defendant also argues that his conduct did not proximately cause the loss of affection between Plaintiff and Ms. Hayes because Ms. Hayes' prior extramarital affairs — rather than Defendant's conduct — destroyed their marriage. Defendant contends that these prior affairs showed Ms. Hayes' discontent and lack of satisfaction with her marriage, and that as a result, Plaintiff cannot show that "Defendant was even the most probable cause of their marital separation."

However, it is well established that while the defendant's conduct must proximately cause the alienation of affections, this does not mean that the "defendant's acts [must] be the sole cause of alienation, as long as they were the controlling or effective cause." *Nunn v. Allen*, 154 N.C. App. 523, 533, 574 S.E.2d 35, 42 (2002) (citation an quotation marks omitted), *disc. review denied*, 356 N.C 675, 577 S.E.2d 630 (2003). "[T]he plaintiff need not prove that [his] spouse had no affection for anyone else or that the marriage was previously one of untroubled bliss." *McCutchen v. McCutchen*, 360 N.C. 280, 283, 624 S.E.2d 620, 623 (2006) (citation, quotation marks, and brackets omitted). Rather, a plaintiff "only has to prove that his spouse had *some* genuine love and affection for him and that love and affection was lost as a result of defendant's wrongdoing." *Brown v. Hurley*, 124 N.C. App. 377, 380-81, 477 S.E.2d 234, 237 (1996).

Plaintiff testified that there had been genuine love and affection between him and Ms. Hayes, explaining that

> [w]e had really fun times together. We did a lot of stuff together. And that never changed. We always had fun together. We always told each other we loved each other, continued to give each other a kiss before we went somewhere. You know, she would do certain sweet little things for me, and I'd do sweet little things for her.

Plaintiff also testified that at the time of their marriage, Ms. Hayes "was the love of my life. We had a great relationship."

Plaintiff acknowledged that they had experienced other problems in their marriage and referred in his testimony to the two prior occasions

of infidelity by Ms. Hayes. But he also testified that they had participated in marriage counseling and "moved on from there." Plaintiff and Ms. Hayes both testified that throughout their marriage they would hold hands and tell each other they loved one another and that they maintained an active sex life.

At trial, Plaintiff described the discovery of Ms. Hayes' affair with Defendant as being "different" from the prior affairs. Ms. Hayes told Plaintiff that she had "found someone" (referring to Defendant) and that she did not want to hide him from Plaintiff anymore. After returning from the Indiana trip, Ms. Hayes informed Plaintiff that their marriage was over.[2]

The fact that a jury could conceivably have drawn different inferences from this evidence did not warrant the granting of Defendant's JNOV motion with regard to the jury's award of compensatory damages. *See Jones v. Robbins*, 190 N.C. App. 405, 408, 660 S.E.2d 118, 120 ("In reviewing motions . . . for judgment notwithstanding the verdict, this Court examines the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable favorable inference, and determines whether there was sufficient evidence to submit the issue to the jury. . . . The reviewing court does not weigh the evidence or assess credibility, but takes the [nonmovant's] evidence as true, resolving any doubt in their favor." (internal citations and quotation marks omitted)), *disc. review denied*, 362 N.C. 472, 666 S.E.2d 120 (2008). Thus, applying — as we must — the well-settled standard for reviewing a trial court's ruling on a motion for JNOV, we conclude that Plaintiff presented more than a scintilla of evidence that there was genuine love and affection between himself and Ms. Hayes and that Defendant proximately caused the alienation of that love and affection. Therefore, the trial court did not err in denying Defendant's motion for JNOV.

B. Defendant's Motions under Rules 59 and 60

[2] Defendant next contends that the trial court erred by denying his alternative motions based on Rules 59 and 60. He first asserts that based on "the inappropriate statements of Plaintiff's counsel during his final closing argument" he was either entitled to relief from judgment pursuant to Rule 60 or entitled to a new trial under Rule 59. He then argues

2. Defendant testified that at the time of trial he and Ms. Hayes were in an exclusive romantic relationship.

that the jury's award of damages — which he claims was excessive and appears "to have been given under the influence of passion or prejudice" — requires a new trial pursuant to Rule 59(a)(6). We address each of Defendant's arguments in turn.

1. Plaintiff's Closing Argument

This Court reviews a trial court's rulings both on motions seeking a new trial under Rule 59 and motions for relief pursuant to Rule 60(b) for abuse of discretion. *See Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) ("It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. . . . As with Rule 59 motions, the standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." (citation and quotation marks omitted)).

In the present case, Defendant argues that various statements made by Plaintiff's counsel during closing arguments (1) "constitute[d] surprise within the meaning of Rule 60(b)(1)" because he did not have an opportunity to address the misstatements before the jury deliberated; (2) amounted to misconduct by an adverse party under Rule 60(b)(3); or (3) qualify as a ground justifying relief pursuant to Rule 60(b)(6). His request, in the alternative, for a new trial pursuant to Rule 59 is based on these same grounds. Consequently, we address simultaneously the trial court's rulings denying Defendant's motions under both Rule 59 and Rule 60.

In making a closing argument, "an attorney has latitude to argue all the evidence to the jury, with such inferences as may be drawn therefrom; but he may not travel outside the record and inject into his argument facts of his own knowledge or other facts not included in the evidence." *Smith v. Hamrick*, 159 N.C. App. 696, 698, 583 S.E.2d 676, 678 (citation and quotation marks omitted), *disc. review denied*, 357 N.C. 507, 587 S.E.2d 674 (2003). While attorneys are prohibited from expressing personal opinions during closing argument, they may argue to the jury why a witness should be believed or disbelieved. *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005), *cert. denied*, 548 U.S. 925, 165 L.Ed.2d 988 (2006). Challenged "statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Jaynes*, 353 N.C. 534,

559, 549 S.E.2d 179, 198 (2001) (citation omitted), *cert. denied*, 535 U.S. 933, 152 L.Ed.2d 220 (2002). When a party argues on appeal that remarks made during closing argument misrepresented the evidence offered at trial or the applicable law, he must also demonstrate that he was prejudiced by the alleged misrepresentations. *See State v. Trull*, 349 N.C. 428, 451-52, 509 S.E.2d 178, 193-94 (1998), *cert. denied*, 528 U.S. 835, 145 L.Ed.2d 80 (1999).

The portions of Plaintiff's closing argument challenged by Defendant on appeal fall into two general categories: (1) contentions regarding the credibility of Defendant's and Ms. Hayes' trial testimony; and (2) alleged factual inaccuracies or misrepresentations of the evidence. With regard to the statements concerning the credibility of Defendant and Ms. Hayes, Defendant asserts that Plaintiff's counsel's discussion of the sequestration of Ms. Hayes during trial, his questioning of her ability to testify truthfully, and his referral to Defendant as a "con man" were so egregious as to require relief from judgment or a new trial. Defendant also claims that Plaintiff's counsel's inaccurate remarks concerning the extent of Ms. Hayes' legal knowledge, Defendant's status as her supervisor at work, Defendant's perception of their affair, and several other topics covered during the trial were unfairly prejudicial and likewise entitled him to relief pursuant to Rules 59 or 60.

An attorney is permitted to argue to the jury that certain witnesses should be deemed credible. *Augustine*, 359 N.C. at 725, 616 S.E.2d at 528. "Similarly, a lawyer can argue to the jury that they should not believe a witness." *Id.* (citation and quotation marks omitted). However, "[i]t is improper for a lawyer to assert his opinion that a witness is lying." *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978).

Here, defense counsel stated during Defendant's closing argument that because Ms. Hayes was sequestered and not present in the courtroom during Defendant's testimony "[s]he didn't know what he said. There was no opportunity to collude. She was outside of this courtroom. Think about that as you consider the credibility of these witnesses."

In Plaintiff's closing argument, his counsel stated that "opposing counsel talks about the fact that Ms. Hayes was sequestered. Sequestration is a pretty important tool for lawyers. When lawyers are concerned that someone might have an issue or a loose relationship with the truth, you can set them into the hallway." In addition, Plaintiff's counsel later stated that "Ms. Hayes's ability to speak the truth is questionable at best."

While we take note of the fact that it was Defendant's counsel who initially raised the issue of Ms. Hayes' sequestration as a reason why the jury should believe her testimony and that Plaintiff's counsel was entitled to respond with arguments as to why the jury should not find her credible, we believe that the remarks by Plaintiff's counsel concerning Ms. Hayes' sequestration and her truthfulness constituted impermissible opinions as to her credibility and thus constituted improper argument. However, based on our review of Plaintiff's closing argument in its entirety, we do not believe that these improper statements were sufficiently egregious so as to entitle Defendant to relief under Rule 59 or 60. Consequently, the trial court did not abuse its discretion in denying Defendant's motions based on these portions of Plaintiff's closing argument.

Indeed, we note that Defendant's counsel did not object to these statements during Plaintiff's closing argument. *See generally State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265 (2008) (explaining that appellate courts will not conclude that trial court abused its discretion in failing to intervene regarding "an argument that defense counsel apparently did not believe was prejudicial when originally spoken" unless statement constituted an "extreme impropriety" (citation and quotation marks omitted)), *cert. denied*, 558 U.S. 851, 175 L.Ed.2d 84 (2009).

Likewise, while this Court does not condone "name-calling" during closing argument, we cannot agree that the characterization of Defendant by Plaintiff's counsel as a "con man" was sufficiently egregious when read contextually so as to warrant a new trial or relief from judgment. *See State v. Frink*, 158 N.C. App. 581, 591, 582 S.E.2d 617, 623 (2003) (noting that "name-calling" during closing remarks is improper but does not constitute prejudicial error unless appealing party can demonstrate that a different result probably would have been reached had the remark not been made), *appeal dismissed and disc. review denied*, 358 N.C. 547, 599 S.E.2d 565 (2004).

With regard to the alleged misrepresentations of testimony by Plaintiff's counsel, we believe that the bulk of the statements cited by Defendant on appeal were permissible inferences from the evidence — arguments by Plaintiff's counsel that certain evidence should be construed in a manner that would support the elements of Plaintiff's claim. Such arguments are proper during a closing argument. *See State v. Bates*, 343 N.C. 564, 590, 473 S.E.2d 269, 283 (1996) ("Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom."), *cert. denied*, 519 U.S. 1131, 136 L.Ed.2d 873 (1997).

After carefully reviewing the remaining challenged statements from Plaintiff's closing argument, we have found no remark that required the trial court to grant Defendant relief from judgment under Rule 60(b) or a new trial pursuant to Rule 59. Nor do we believe that the cumulative effect of any inaccuracies in the remarks of Plaintiff's counsel entitled Defendant to such relief.

We note that immediately following the arguments, the trial court properly instructed the jury that the statements of Plaintiff's and Defendant's counsel were merely comments on the evidence for the jurors to consider and that "[they] and [they] alone determine what the evidence shows or fails to show." We therefore overrule Defendant's argument that the trial court abused its discretion in denying Defendant's motions under Rules 59 and 60 based on the statements made during Plaintiff's closing argument.

2. Amount of Compensatory Damages

Finally, Defendant makes a cursory argument in his brief that "[t]he damages awarded by the jury are disproportionate to Defendant's conduct and any injury suffered by Plaintiff" such that "granting relief under N.C.R. Civ. P. 59(a)(6) is warranted." Rule 59(a)(6) permits the trial court to grant a new trial "on all or part of the issues" when "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice" were awarded. N.C.R. Civ. P. 59(a)(6).

Here, Defendant argues that Plaintiff failed to offer any evidence supporting an award of compensatory damages. In *Nunn*, the defendant made a similar argument, contending that the trial court had erred in denying his motion for a new trial based on the jury's allegedly unsupported award of compensatory damages. *Nunn*, 154 N.C. App. at 534, 574 S.E.2d at 42-43. We rejected the defendant's argument, stating that this Court will not reverse a trial court's discretionary ruling on a motion for a new trial absent a showing of an abuse of discretion resulting in a substantial miscarriage of justice. *Id.* at 535, 574 S.E.2d at 43. We explained that with regard to an alienation of affections claim

> the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by plaintiff through the defendant's wrong. In addition thereto, plaintiff may also recover for the wrong and injury done to plaintiff's health, feelings, or reputation.

Id. at 534, 574 S.E.2d at 43 (citation and brackets omitted).

In the present case, Plaintiff offered evidence that due to the alienation of affections between himself and Ms. Hayes, he suffered both emotionally and financially. Plaintiff testified that he lost the support of Ms. Hayes' income and that the marital home went into foreclosure because he could not afford the mortgage payments on his salary alone. He further testified that he was "devastated" emotionally by the loss of Ms. Hayes' affections and the dissolution of their marriage. Plaintiff described the emotional impact of spending less time with his children because they no longer lived with him full time. He also testified that friends viewed and treated him differently as did others in the general community due to the deterioration of his relationship with Ms. Hayes and that the loss of Ms. Hayes' affections impacted his relationships with others.

Thus, Plaintiff offered evidence that supported an award of compensatory damages, and the trial court did not manifestly abuse its discretion by denying Defendant a new trial. Moreover, Defendant has failed to demonstrate that the amount of compensatory damages awarded was excessive. Therefore, the trial court did not err in denying his motion under Rule 59(a)(6).

II. Plaintiff's Cross-Appeal

[3] In his cross-appeal, Plaintiff argues that the trial court erred in partially granting Defendant's JNOV motion and setting aside the jury's award of punitive damages. As explained below, we conclude that this portion of the trial court's order must be reversed and that a remand to the trial court is necessary.

In *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 693 S.E.2d 640 (2009), *cert. denied*, 563 U.S. 988, 179 L.Ed.2d 1211 (2011), our Supreme Court discussed the duties of a trial court when reviewing a jury's award of punitive damages on a defendant's JNOV motion. As the Court explained, "[o]ur General Assembly has set parameters for the recovery of punitive damages through the enactment of Chapter 1D of the North Carolina General Statutes." *Id.* at 720, 693 S.E.2d at 643. Chapter 1D allows punitive damages only if the claimant proves (1) that the defendant is liable for compensatory damages; and (2) the existence — by clear and convincing evidence — of an aggravating factor (fraud, malice, or willful or wanton conduct) related to the injury for which compensatory damages were awarded. *Id.* at 720-21, 693 S.E.2d at 643; *see also* N.C. Gen. Stat. § 1D-15 (2015).

Among the statutes contained in Chapter 1D is N.C. Gen. Stat. § 1D-50, which provides for judicial review of a punitive damages award and states as follows:

> When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter.

N.C. Gen. Stat. § 1D-50 (2015).

As our Supreme Court held in *Scarborough*, the trial court has a statutory "role in ascertaining whether the evidence presented was sufficient to support a jury's finding of [an aggravating] factor under the standard established by the legislature[,]" which it is required to fulfill by entering a written opinion addressing *with specificity* the evidence concerning punitive damages and the basis for its decision to either uphold or set aside an award of punitive damages. *Scarborough*, 363 N.C. at 721, 693 S.E.2d at 644.

> [T]he language of the statute does not require findings of fact, but rather that the trial court "shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages." N.C.G.S. § 1D-50. That the trial court utilizes findings to address with specificity the evidence bearing on liability for punitive damages is not improper; the "findings," however, merely provide a convenient format with which all trial judges are familiar to set out the evidence forming the basis of the judge's opinion. The trial judge does not determine the truth or falsity of the evidence or weigh the evidence, but simply recites the evidence, or lack thereof, forming the basis of the judge's opinion. As such, these findings are not binding on the appellate court even if unchallenged by the appellant. These findings do, however, provide valuable assistance to the appellate court in determining whether as a matter of law the evidence, when considered in the light most favorable to the nonmoving party, is sufficient to be considered by the jury as clear and convincing on the issue of punitive damages.

Id. at 722-23, 693 S.E.2d at 644-45.

In *Hudgins v. Wagoner*, 204 N.C. App. 480, 694 S.E.2d 436 (2010), *disc. review denied*, 365 N.C. 88, 706 S.E.2d 250 (2011), the defendants argued that the trial court erred in denying their JNOV motion concerning an award of punitive damages because insufficient evidence existed for the award of such damages. Citing *Scarborough*, we reversed the trial court's denial of the defendants' JNOV motion as to the punitive damages award because the trial court had failed to enter a written opinion stating its reasons for upholding the award. *Id.* at 495, 694 S.E.2d at 447-48. We concluded that it was necessary to "remand the matter to the trial court for entry of a written opinion with respect to the award of punitive damages as required by North Carolina General Statutes, section 1D-50 and explained by *Scarborough*[.]" *Id.* at 500, 694 S.E.2d at 450. In light of our holding that remand to the trial court was necessary, we did not address the parties' substantive arguments concerning the sufficiency of the evidence at trial to support a punitive damages award.

Likewise, in *Springs*, the trial court failed to comply with N.C. Gen. Stat. § 1D-50 in its order denying the defendant's motion for JNOV and upholding the jury's punitive damages award. On appeal, this Court noted that it was bound by both *Scarborough* and *Hudgins* and held that

> [s]ince the trial court's order addressing defendants' motion for JNOV simply stated that the motion was denied without complying with N.C. Gen. Stat. § 1D-50, we must remand to allow the trial court to enter a written opinion setting out its reasons for upholding the punitive damages award. We cannot address the merits of [defendant's] arguments regarding the sufficiency of the evidence in the absence of the required written opinion.

Id. at 281, 704 S.E.2d at 326-27.

Here, the trial court "disturb[ed]" the jury's award of punitive damages by vacating the award, but it did not "address with specificity" the evidence it found to be lacking on that issue. N.C. Gen. Stat. § 1D-50. Instead, the trial court merely stated in its order that the award of punitive damages must be set aside because the evidence was "insufficient." Consequently, as in *Springs* and *Hudgins*, we must remand to the trial court so that it may issue a written opinion setting forth its specific reasons for granting Defendant's JNOV motion regarding the punitive damages award and citing the evidence, or lack thereof, upon which it based its decision.

Conclusion

For the reasons stated above, we (1) affirm the portion of the trial court's 22 October 2014 order denying Defendant's motion for JNOV regarding the jury's award of compensatory damages on Plaintiff's alienation of affections claim; (2) reverse the portion of the trial court's 22 October 2014 order granting Defendant's JNOV motion and setting aside the award of punitive damages; and (3) remand for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge DILLON concur.

GLENN I. HODGE, JR., Plaintiff
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant

No. COA15-596

Filed 5 April 2016

1. Administrative Law—administration exhaustion—claims not raised in contested case hearing

The doctrine of administrative exhaustion did not bar whistleblower claims for discrimination and retaliation in the trial court where plaintiff's claims had been raised before an Administrative Law Judge and dismissed for lack of subject matter jurisdiction. Plaintiff did not timely raise the claims in the contested case hearing.

2. Employer and Employee—whistleblower claim—pretextual reasons for discipline and discharge—insufficient evidence

The trial court did not err by granting summary judgment for the Department of Transportation (DOT) on a whistleblower claim where plaintiff alleged that he was disciplined and terminated in retaliation for reporting that a DOT auditing reorganization violated the Internal Audit Act and earlier Supreme Court holdings in the case. DOT articulated several legitimate, non-retaliatory reasons for disciplining and eventually terminating plaintiff, while plaintiff made no express argument, and the record revealed, no competent evidence to support any finding of pretext.

Appeal by Plaintiff from order entered 6 February 2015 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 2 December 2015.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for Plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Allison Angell, for Defendant.

STEPHENS, Judge.

Plaintiff Glenn I. Hodge, Jr., appeals from the trial court's order granting summary judgment in favor of Defendant North Carolina Department of Transportation ("DOT") against his claim for violation of our State's Whistleblower Act. Hodge argues that he satisfied each element of his *prima facie* case by forecasting evidence that DOT took adverse employment actions against him in retaliation for engaging in activities protected by section 126-84 of our General Statutes, and that the trial court therefore erred in granting DOT's motion for summary judgment. We affirm the trial court's order.

I. Factual Background and Procedural History

Hodge first began working for the State of North Carolina in 1990 as an accountant in the Department of Human Resources, then transferred in January 1992 to work as an auditor for DOT. In May 1992, he was promoted to the position of Chief of DOT's Internal Audit Section ("IAS"). This is Hodge's fourth lawsuit against DOT to reach this Court.

A. Hodge's prior lawsuits

(1) Hodge I: Chief of IAS is not a policymaking exempt position

In May of 1993, Hodge's position was designated by the Governor as policymaking exempt pursuant to N.C. Gen. Stat. § 126-5(d)(1). *N.C. Dep't of Transp. v. Hodge*, 347 N.C. 602, 604, 499 S.E.2d 187, 188 (1998) ("*Hodge I*"). Before his eventual termination in December of 1993, Hodge filed for a contested case hearing in the Office of Administrative Hearings ("OAH") challenging this designation. *Id.* The evidence presented during the OAH hearing demonstrated that DOT's IAS Chief had: (1) "considerable independence to direct and supervise audits inside the DOT"; (2) "supervisory authority within the section over other auditors' work and assignments"; and (3) responsibility for "consult[ing] with the heads of units being audited and with higher-ranking DOT officials and ma[king] recommendations for changes based on the result of audits."

Id. at 604, 499 S.E.2d at 189. However, "the evidence also showed that the Chief of [IAS] had no inherent or delegated authority to implement recommendations or order action based on audit findings." *Id.* Based on this evidence, the presiding ALJ issued a decision recommending that the designation of Hodge's position as policymaking exempt be reversed, based in part on a factual finding that:

> As Chief of [IAS], the Petitioner [Hodge] exercised broad flexibility and independence. In addition to supervising other auditors, he could decide who, what, when, how, and why to audit within the Department. While he could not order implementation of any recommendations, he was free to contact the State Bureau of Investigation concerning his findings.

Id. After the State Personnel Commission adopted the ALJ's findings of fact and conclusions of law and ordered that the designation of the position as policymaking exempt be reversed, DOT appealed and the case eventually came before our Supreme Court, which ruled in Hodge's favor, holding that the position of DOT's Chief of IAS did not meet the statutory definition of policymaking provided in our General Statutes. *Id.* at 606-07, 499 S.E.2d at 190. Specifically, the Court held that although Hodge "could recommend action on audit findings," he had "no authority to impose a final decision as to a settled course of action within . . . DOT or any division of . . . DOT, and his authority at the section level did not rise to the level of authority required by [section] 126-5(b) to be considered policymaking." *Id.* at 606, 499 S.E.2d at 190.

(2) Hodge II: North Carolina Administrative Code requires reinstatement of dismissed employees to "same or similar" position

As a result of our Supreme Court's decision in *Hodge I*, Hodge was awarded back pay and reinstated to employment in May 1998 as an Internal Auditor in DOT's Single Audit Compliance Unit at the same paygrade he held as IAS Chief. *See Hodge v. N.C. Dep't of Transp.*, 137 N.C. App. 247, 249-50, 528 S.E.2d 22, 25, *reversed for the reasons stated in the dissent by* 352 N.C. 664, 535 S.E.2d 32 (2000) ("*Hodge II*"). In July 1998, Hodge sought reinstatement to his previous position by filing a motion in Wake County Superior Court pursuant to 25 N.C.A.C. 1B.0428, which defines reinstatement as "the return to employment of a dismissed employee, in the same or similar position, at the same pay grade and step which the employee enjoyed prior to dismissal." *Id.* at 250, 528 S.E.2d at 25. Hodge sought injunctive relief to compel DOT to reinstate him to the position of Chief of the Internal Audit Section and to bar DOT from filling the position with anyone other than himself. *Id.*

After granting Hodge's motion for a preliminary injunction, the trial court granted summary judgment in Hodge's favor and DOT appealed to this Court, where the majority of a divided panel held the trial court had erred in granting Hodge's request for injunctive relief because Hodge had "failed to show that he would suffer irreparable harm absent issuance of the injunction." *Id.* However, after comparing the duties of his new, reinstated position as an Internal Auditor with the description provided in *Hodge I* of Hodge's responsibilities as Chief of IAS, the dissent concluded that Hodge's reinstatement did not comply with the express requirement in 25 N.C.A.C. 1B.0428 that Hodge be returned to the "same or similar position." *Id.* at 255-56, 528 S.E.2d at 28-29 (Walker, J., dissenting). On appeal, our Supreme Court reversed this Court's decision for the reasons stated in the dissent. *Hodge v. N.C. Dep't of Transp.*, 352 N.C. 664, 535 S.E.2d 32 (2000). Thereafter, Hodge was reinstated to the position of Chief of IAS, effective 30 October 2000.

(3) Hodge III: Lawsuit for reinstatement is not protected activity under North Carolina's Whistleblower Act

On 4 June 2003, Hodge filed another complaint against DOT in Wake County Superior Court, alleging this time that DOT had violated our State's Whistleblower Act, codified at section 126-84 *et seq.* of our General Statutes, by unlawfully retaliating and discriminating against him due to his "reporting and litigating unlawful and improper actions[,]" specifically those at issue in *Hodge I & II*. *Hodge v. N.C. Dep't of Transp.*, 175 N.C. App. 110, 112-13, 622 S.E.2d 702, 704 (2005), *disc. review denied*, 360 N.C. 533, 633 S.E.2d 816 (2006) ("*Hodge III*"). Hodge's allegations included, *inter alia*, that after his 1998 reinstatement, DOT failed to provide him with "1) an adequate work space; 2) a computer with [updated] software; 3) training regarding either the procedures or computer equipment in the unit he was working in; and 4) an access number to the DOT database to gain information useful to complete assignments." *Id.* at 113, 622 S.E.2d at 704. Hodge alleged further that although he did not receive any indication that his work performance was unsatisfactory until after he filed for the injunction at issue in *Hodge II*, he thereafter began to receive negative evaluations from his superiors, which he viewed as evidence of an elaborate scheme to manufacture his termination. *See id.* Hodge responded by refusing to complete any auditing assignments until after the alleged adverse conditions were eliminated. *Id.* For its part, DOT contended that Hodge was provided with "office space, computer equipment, and training comparable to others in [his] division"; that Hodge did not notify his superiors of the allegedly adverse conditions he faced until after his job performance was criticized; and

that once notified, DOT worked to remedy the issues identified. *Id.* As a result of multiple poor performance evaluations and other written warnings spanning from fall 1998 into summer 2000, Hodge missed out on several increases to his salary and benefits, and he also alleged that after his original termination in 1993, DOT deliberately failed to increase the paygrade as scheduled for the Chief of the IAS in order to limit his back pay. *Id.* at 114, 622 S.E.2d at 705. The trial court granted summary judgment in DOT's favor based in pertinent part on its conclusions that:

> **First**, the [c]ourt finds and concludes as a matter of law that, the institution of civil actions by State Employees to secure their employment rights allegedly violated by a state agency such as [DOT], or the institution of administrative proceedings in [OAH], are **NOT** acts which trigger the right to sue for retaliation under The Whistleblower Act, particularly [section] 126-84. . . .
>
> **Second**, assuming ***arguendo*** that The Whistleblower Act would be triggered by the filing of a civil action or an administrative proceeding relating to the terms and conditions of employment under the State Personnel Act, the record does not support any of [Hodge's] alleged claims for retaliation in violation of [section] 126-84 *et seq.* . . .

Id. at 115, 622 S.E.2d at 705 (emphasis in original).

Hodge appealed to this Court, arguing that DOT had violated the Whistleblower Act by retaliating against him for filing his lawsuit for reinstatement in *Hodge II*, but we rejected this argument and affirmed the trial court's decision. *Id.* at 117, 622 S.E.2d at 707. In so holding, we examined the broad range of cases in which our State's appellate courts had previously found the protections afforded under the Whistleblower Act applicable—including cases involving State employees "who bring suit alleging sex discrimination, who allege retaliation after cooperating in investigations regarding misconduct by their superiors, and who allege police misconduct" as well as "alleged whistleblowing related to misappropriation of governmental resources"—and we recognized an important limitation on the scope of the Act's protections. *Id.* at 116-17, 622 S.E.2d at 706 (citations and internal quotation marks omitted). Specifically, as we explained, "[i]n all of these cases, the protected activities concerned reports of matters affecting general public policy," whereas Hodge's lawsuit "did not concern matters affecting general public policy" because "[his] 'report' was his 1998 lawsuit seeking reinstatement to his former position," the allegations of which "related only tangentially at best to a potential violation of the North Carolina

Administrative Code." *Id.* at 117, 622 S.E.2d at 707. Because we ultimately concluded that our General Assembly did not intend for the Whistleblower Act "to protect a State employee's right to institute a civil action concerning employee grievance matters," this Court "decline[d] to extend the definition of a protected activity [under the Whistleblower Act] to individual employment actions that do not implicate broader matters of public interest." *Id.* We also rejected Hodge's argument that the trial court erred in granting summary judgment to DOT when there was a genuine issue of material fact as to whether DOT's adverse actions toward him constituted intentional retaliation because, as we explained, "[a]ssuming *arguendo* that [Hodge] engaged in a protected activity, DOT presented legitimate, non-retaliatory reasons for all of the actions it has taken, and in his deposition testimony, [Hodge] acknowledged that there were legitimate explanations for the actions he alleged were retaliatory." *Id.* at 118, 622 S.E.2d at 707 (citation and internal quotation marks omitted).

B. Hodge's present lawsuit

Hodge continued to work as the Chief of IAS until 2008, when DOT implemented an agency-wide reorganization. Prior to the 2008 reorganization, DOT's auditing functions were divided between IAS, which had the "authority and responsibility to conduct information technology, investigative, and performance audits," and its External Audit Branch ("EAB"), which was divided into three units that focused on single audit compliance, railroad and utility audits, and consultant audits. Until the 2008 reorganization, IAS was housed separately from other DOT units in a leased office space in downtown Raleigh with free parking in an adjacent lot for Hodge, who was the only DOT supervisor in the building, and his small staff of auditors and support personnel. Hodge spent most of his time reviewing the work of his staff auditors, rather than conducting audits himself. Until May 2008, Hodge reported directly to DOT's Deputy Secretary of Administration and Business Development, Willie Riddick, who reported to DOT's Chief Deputy Secretary Dan DeVane, who reported in turn to DOT Secretary Lyndo Tippett. Riddick retired in May 2008 and was replaced as Deputy Secretary of Administration and Business Development by Anthony W. Roper. DOT's reporting chain of command remained otherwise unchanged.

In September 2006, the Office of State Auditor Performance Report, "Internal Auditing in North Carolina Agencies and Institutions," found that IAS was experiencing significant difficulties with completing audits and producing reports, resulting in a lack of productivity, compromised independence due to reporting levels, and the need for auditing

standards to be addressed in policy and procedures manuals. In 2007, DOT hired the global management consulting firm of McKinsey & Company to serve as an external consultant to "launch a three phase process to (1) diagnose the 'health' of the department, (2) design systems and processes to more efficiently support the organization, and (3) implement specific initiatives to create improvements in performance." In June 2007, McKinsey published a report recommending that DOT reorganize its structure to maximize collaboration and efficiency. Among numerous specific recommendations, the McKinsey report advocated for restructuring and unifying DOT's auditing functions into one unit, called the Office of Inspector General ("OIG"). Upon receiving the McKinsey report, DOT assembled a Transformation Management Team ("TMT") in order to "reassess DOT's vision, goals, and priorities, and to efficiently align its resources and activities with them."

In August 2007, our General Assembly enacted the State Governmental Accountability and Internal Control Act ("Accountability Act") and the Internal Audit Act ("IAA"). The Accountability Act, codified in chapter 143D of our General Statutes, provides that "[t]he State Controller, in consultation with the State Auditor, shall establish comprehensive standards, policies, and procedures to ensure a strong and effective system of internal control within State government," while also requiring "[t]he management of each State agency [to] bear[] full responsibility for establishing and maintaining a proper system of internal control within that agency." N.C. Gen. Stat. §§ 143D-6, -7 (2015). The IAA, codified in section 143-745 *et seq.* of our General Statutes, provides in pertinent part that each State agency "shall establish a program of internal auditing" that "[p]romotes an effective system of internal controls that safeguards public funds and assets and minimizes incidences of fraud, waste, and abuse" and ensures that agency operations are "in compliance with federal and state laws, regulations, and other requirements." N.C. Gen. Stat. § 143-746(a) (2015). As originally enacted, the IAA required that the head of each State agency "shall appoint a Director of Internal Auditing who shall report to the agency head and shall not report to any employee subordinate to the agency head." *See* 2007 N.C. Sess. Laws 424, § 1; N.C. Gen. Stat. § 143-746(d) (2007).[1] In addition, the

1. This subsection of the Act has since been amended, and now provides that, "The agency head shall appoint a Director of Internal Auditing who shall report to, as designated by the agency head, (i) the agency head, (ii) the chief deputy or chief administrative assistant, or (iii) the agency governing board, or subcommittee thereof, if such a governing board exists. The Director of Internal Auditing shall be organizationally situated to avoid impairments to independence as defined in the auditing standards referenced in subsection (b) of this section." N.C. Gen. Stat. § 143-746(d) (2015).

IAA established a Council of Internal Auditing—composed of the State Controller, the State Budget Officer, the Secretary of Administration, the Attorney General, the Secretary of Revenue, and the State Auditor—to "promulgate guidelines for the uniformity and quality of State agency internal audit activities." *See* 2007 N.C. Sess. Laws 424, § 1; N.C. Gen. Stat. § 143-747(a), (c)(3) (2007).

In December 2007, as TMT and several other DOT subcommittees tasked with implementing the structural changes recommended in the McKinsey Report continued their work, members of DOT's OIG Assessment Team consulted with counterparts from other states, including Florida's Inspector General Cecil Bragg and his staff. Members of the OIG Assessment Team later explained that they approached Bragg to learn more about Florida's "audit organization, independence, and structure" because Florida's DOT features an OIG "which is highly regarded in the auditing field." In February 2008, the OIG Assessment Team recommended that DOT adopt a model similar to the one used in Florida. On 12 March 2008, members of TMT attended a meeting of the Council of Internal Auditing and presented DOT's plan for creating an OIG with all audit functions reporting to an Inspector General who would act as the functional equivalent of the Director of Internal Auditing envisioned under the IAA. DOT's proposal won unanimous approval from the Council, which found that the restructuring met with both the intent and spirit of the IAA.

Hodge would later claim that around this time, his supervisor, Riddick, specifically asked what he thought about DOT's pending reorganization and the creation of the OIG. According to Hodge, he told Riddick that he believed the proposed OIG plan was a direct violation of the IAA as well as our Supreme Court's rulings in *Hodge I* and *II*. During his deposition for the present lawsuit, Hodge testified that he believed Riddick had asked for his opinion because "he wanted to know for [DOT's] management and wanted to see a reaction as to how I would react to it." Hodge also testified that he did not know for a fact whether Riddick ever shared his views with anyone else at DOT, but Hodge assumed that he had based on his "gut feeling." Hodge also claimed that he had a similar conversation with Roper after Riddick retired, explaining that he believed Roper was trying to gauge whether Hodge would initiate litigation in response to DOT's reorganization because, in Hodge's view, DOT's management "may have been a little gun-shy from [my] prior cases."

On 29 August 2008, DOT Secretary Tippett announced the creation of the OIG and named the former director of EAB, Bruce Dillard, as

Inspector General. DOT's new OIG consisted of three separate units: the External Audit Unit, which oversees external and compliance audits; the Investigations Unit, which oversees investigations and bid monitoring; and the Financial and Organizational Performance Audit ("FOPA") Unit, which was comprised of three sub-units including the Internal Audit Unit, the Information Technology Audit Unit, and the Performance Audit Unit. As part of the reorganization, DOT relocated IAS from its old offices, which were under a lease that cost approximately $4,000.00 per month and was due to expire, to the second floor of the Transportation Building, which had been remodeled so that all DOT audit units could be centrally located under one roof. Hodge remained as Chief Internal Auditor of his sub-unit and reported to Acting FOPA Director Willard Young, who reported in turn to Inspector General Dillard, who reported directly to the Secretary, thus leaving the same number of links between Hodge and DOT's Secretary—two—as existed before the agency-wide reorganization.

In 2008, pursuant to the requirements of the Accountability Act, the Office of the State Controller established a new internal control program called "EAGLE," which stands for "Enhancing Accountability in Government through Leadership and Education." DOT's OIG was tasked with creating templates and reports to test and assist in EAGLE's implementation. In October 2008, Inspector General Dillard assigned nine employees, including Hodge, to work on the EAGLE project. Hodge was the only DOT employee who failed to turn in his assignment on time. Throughout November and December, Hodge requested and received multiple extensions to complete his EAGLE assignment, ignored instructions from his superiors, Dillard and Young, to initially prioritize and then work exclusively on his EAGLE assignment, and repeatedly missed deadlines for completing the assignment. On 16 December 2008, Dillard and Young met with Hodge, issued him a written warning for unsatisfactory job performance due to his failure to complete a critical work assignment in a satisfactory and timely manner, and cautioned Hodge that if his performance did not improve immediately, he would be subject to further disciplinary action up to and including dismissal.

On 22 December 2008, Hodge filed a complaint against DOT in Wake County Superior Court alleging that DOT had taken adverse action against him in retaliation for engaging in activities protected by our State's Whistleblower Act. Specifically, Hodge alleged that he had "reported on multiple occasions" during 2008 that DOT had violated the IAA's requirement that the head of each State agency appoint a Director of Internal Auditing "who shall report to the agency head and shall not

report to any employee subordinate to the agency level" because Hodge, as Chief of IAS, did not report directly to DOT's Secretary.[2] Hodge alleged further that his superiors at DOT, including Dillard and Young, had illegally retaliated against him for making these reports by reducing his position within DOT and further distancing him in the reporting chain of command from DOT's Secretary; discriminating against Hodge and other members of IAS regarding pay raises; and taking disciplinary action against Hodge "that was not motivated by legitimate disciplinary concerns but rather out of a desire to retaliate against and harass [Hodge] and harm [Hodge's] career with DOT."[3]

Hodge remained employed at DOT through the first half of 2009 but, despite regular meetings during which Willard and Young urged him to complete his 2008 EAGLE assignment and additional EAGLE-related follow-up assignments, Hodge continued his pattern of failing to submit completed work assignments after requesting and receiving multiple extensions on deadlines. On 4 June 2009, Hodge received a "Does Not Meet Expectations" rating from Young on his annual performance evaluation. On 17 June 2009, Hodge was issued a Corrective Action Plan to remedy his performance deficiencies. However, during a follow-up meeting on 26 June 2009, Hodge informed Young that "on the advice of his lawyer" he would not be completing any of his EAGLE assignments and stated that he believed Dillard and others at DOT were out to get him because of his previous lawsuits against the agency. When Hodge was notified during a meeting with Dillard on 30 June 2009 that any further refusals to complete his work assignments would be considered insubordination, and thus potentially grounds for termination, Hodge confirmed that he would continue to refuse to complete his work assignments. Hodge's only comment during a pre-disciplinary conference held on 8 July 2009 was that he believed that DOT's newly created OIG was illegal and that any disciplinary actions taken against him by Dillard and Young would likewise be illegal. Hodge was notified by letter

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2. When asked to elaborate on this point during his deposition, Hodge testified that he believed he should have been named Director of Internal Auditing under the IAA because "[t]hat was my job title [in IAS before the 2008 reorganization]. On top of that, I spent thousands of dollars and [a] couple of trips to the Supreme Court to prove that."

3. These allegations come from the complaint Hodge refiled in September 2011 after voluntarily dismissing his original complaint in 2010. The original complaint does not appear in the record, but there is no dispute that Hodge's refiled 2011 complaint was substantially similar to his original 2008 complaint. Indeed, Hodge's deposition and the affidavits filed by DOT in support of its motion for summary judgment in the present lawsuit were initially collected during discovery for Hodge's original complaint prior to its voluntary dismissal.

dated 10 July 2009 that he would be terminated from DOT's employment as a result of his insubordination.

On 22 July 2009, Hodge filed a written request with DOT's Human Resources Division to appeal his termination, arguing that it had been without just cause. However, because Hodge thereafter failed to comply with the time limits and filing requirements of DOT's employee grievance policy and procedures, his case was administratively closed. On 19 January 2010, Hodge filed a petition for a contested case hearing in the OAH alleging he had been terminated without just cause. At some point thereafter, Hodge attempted to add a claim for retaliation in violation of the Whistleblower Act, and DOT filed a motion to dismiss Hodge's claims for lack of subject matter jurisdiction. On 14 June 2010, the presiding ALJ issued an Amended Final Decision, which concluded that OAH lacked subject matter jurisdiction to consider either of Hodge's claims because—given his noncompliance with DOT's filing requirements and the fact that he failed to file his claim under the Whistleblower Act within 30 days of his termination as required by 25 N.C.A.C. 01B .0350—Hodge failed to timely exhaust his administrative remedies. Consequently, the ALJ dismissed Hodge's claims with prejudice. On 25 June 2010, Hodge filed a petition for judicial review in Wake County Superior Court. On 31 October 2010, after a hearing, Superior Court Judge Paul C. Ridgeway entered an order affirming the ALJ's decision in favor of DOT, and Hodge did not pursue any appeal to this Court.

Meanwhile, on 25 October 2010, Hodge filed a voluntary dismissal of his pending Whistleblower Act claim in Wake County Superior Court. Hodge refiled a substantially similar complaint on 16 September 2011. On 13 June 2012, DOT filed an answer in which it denied Hodge's allegations of retaliation in violation of the Whistleblower Act, stated that any adverse actions taken against Hodge were for legitimate, non-retaliatory reasons, and raised the defense of lack of subject matter jurisdiction. On 23 December 2014, DOT filed a motion for summary judgment. In support of its motion, DOT provided affidavits from:

- Roberto Canales, who served as a TMT Project Leader in planning DOT's 2008 reorganization, described the process that led to the creation of the OIG, and explained how the reorganization had nothing to do with Hodge or his prior litigation against DOT;
- Riddick, who served as Hodge's superior until 1 May 2008 and who swore that he did not recall Hodge ever discussing his opinions about the IAA or the OIG and that even if they had discussed these matters, he would not have communicated Hodge's

objections to others in DOT's chain of command because "[t]he transformation recommendations and subsequent restructuring [were] a DOT management decision and did not involve [Hodge]";

- Roper, who served as Hodge's superior from May 2008 until the implementation of DOT's OIG several months later; he swore that he remembered Hodge approaching him at one point and stating his belief that OIG was created to "get back at him" for his previous cases against DOT but Roper "saw no reason to repeat [Hodge's] statement because the restructuring within DOT was an extensive and well-researched management decision and was not for the purpose of retaliating against [Hodge]"; he also recalled Hodge complaining on one occasion that there had been a pay disparity between IAS and EAB since his reinstatement in 1998, to which Roper responded by explaining that the two sections "were distinct business units with separate auditing functions" and that a review of employee salaries was not warranted;
- Dillard and Young, who both swore that they were unaware of Hodge's opinions regarding the IAA or DOT's creation of the OIG until counsel from the State Attorney General's office informed them in January 2009 that Hodge had filed a whistleblower action against them, and that the disciplinary actions taken against Hodge were solely the result of his insubordinate refusal to complete his EAGLE assignments.

In opposition to DOT's motion for summary judgment, Hodge submitted an affidavit specifying that his reports "were made to [Riddick and Roper] . . . . regarding the establishment of the DOT [OIG] together with another two layers of management between my position as Chief Internal Auditor, or Director of [IAS]. This, as noted, was a direct violation of the [IAA] which requires that I as Director of Internal Auditing report directly to the [DOT] Secretary." Hodge characterized the creation of OIG as a reduction in his position, "an alteration of the terms, conditions, and/or privileges of [his] employment" and "a *de facto* demotion." Hodge also stated that any claims by DOT officials that they did not remember or were unaware of Hodge's report were false, as were any claims that the adverse actions taken against Hodge were anything other than "successful efforts to engineer and obtain [his] dismissal from DOT" in retaliation for his report. Regarding the written warning he received in December 2008 for failing to complete his EAGLE assignment, Hodge averred that he "had repeatedly protested this assignment because it was work properly assigned to a staff auditor, a fact of which Dillard was aware" and further contended that Dillard "had no legal

authority to either act as my supervisor or to assign me the duties of a staff auditor." To support this assertion, Hodge noted that:

> In previous litigation with DOT involving my position, the [North Carolina] Supreme Court has established the duties and responsibilities of the Director or Chief of Internal Audit for DOT. As the Supreme Court stated in the relevant opinion, "As Chief of [IAS], [I] exercised broad flexibility and independence. In addition to supervising other auditors, [I] could decide who, what, when, how, and why to audit within [DOT]."
>
> This additionally constituted, I contend, a violation of the [IAA]. Especially given that my specific duties were established by the Supreme Court, DOT cannot *de facto* remove me as Chief Auditor under the guise of a "reorganization" or other such action.

At the conclusion of a hearing held on DOT's motion for summary judgment on 6 February 2015, the trial court announced that it would grant the motion and entered a written order to that effect the same day. Hodge gave notice of appeal to this Court on 27 February 2015.

II. Analysis

Hodge argues that the trial court erred in granting DOT's motion for summary judgment. We disagree.

A. Jurisdiction

[1] As a preliminary matter, we first address DOT's argument that Hodge's whistleblower claim is barred by lack of subject matter jurisdiction as a result of the OAH proceedings below. Specifically, DOT relies on our decision in *Swain v. Elfland*, 145 N.C. App. 383, 550 S.E.2d 530, *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001), for the proposition that although our General Statutes provide two possible avenues to redress violations of the Whistleblower Act—with jurisdiction in the OAH as provided by section 126-34.02(b)(6), or in superior court as provided by section 126-86—a plaintiff "may choose to pursue a [w]histleblower claim in either forum, but not both" in order to avoid "the possibility that different forums would reach opposite decisions, as well as engender needless litigation in violation of the principles of collateral estoppel." *Id.* at 389, 550 S.E.2d at 535. Thus, in DOT's view, the fact that the ALJ's Amended Final Decision in this matter dismissed Hodge's claims for both termination without just cause and retaliation in violation of the Whistleblower Act should prohibit Hodge's current lawsuit.

Our Supreme Court rejected a similar argument in *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 797-98, 618 S.E.2d 201, 211-13 (2005). There, the defendant State agency contended that the plaintiff's lawsuit in superior court should have been barred because he had already raised his whistleblower claim before the OAH. *Id.* at 797, 618 S.E.2d at 211. However, the only evidence in the record regarding the OAH proceedings was a copy of the plaintiff's petition for a contested case hearing, on which the plaintiff had checked two pre-printed boxes to indicate that the grounds for his request were (a) that he was discharged without cause and (b) that his termination was due to "discrimination and/or retaliation for opposition to alleged discrimination" on the basis of race. *Id.* at 798-99, 618 S.E.2d at 212. The only other pertinent information on the plaintiff's petition was his brief statement that he "was dismissed as a Highway Patrolman without just cause based upon a complete misinterpretation of [his] actions and statements re: a case of excessive force." *Id.* at 799, 618 S.E.2d at 212. Our Supreme Court noted that although the plaintiff's statement was "not inconsistent with the factual allegations in [the plaintiff's] subsequently filed whistleblower claim, the language in his petition in no way states a claim under the Whistleblower Act." *Id.* at 799, 618 S.E.2d at 213. Given the two grounds clearly indicated for his requested OAH hearing and the conspicuous absence of any allegation in his petition that his dismissal was the result of retaliation in violation of the Whistleblower Act, the Court held that "the doctrine of administrative exhaustion does not prevent [the] plaintiff from filing a whistleblower claim in superior court." *Id.*

In the present case, the record is similarly sparse when it comes to what the parties actually argued at the OAH level. However, the only basis stated on Hodge's petition for a contested case hearing is that he was discharged without just cause. DOT emphasizes the fact that the ALJ's Amended Final Order indicates Hodge subsequently attempted to raise claims for discrimination and retaliation before the OAH. Yet the Amended Final Order also makes clear that the ALJ dismissed those claims for lack of subject matter jurisdiction because Hodge failed to timely raise them within 30 days as required by the North Carolina Administrative Code. Moreover, by DOT's logic, our holding in *Swain* would have blocked Hodge from ever raising such claims before the OAH because he had already filed a lawsuit in superior court in December 2008, more than six months before he ever petitioned for administrative review of his termination in the OAH in July 2009. Although Hodge eventually took a voluntary dismissal of his superior court action in October 2010, he did not do so until after his claims before the OAH

were dismissed with prejudice. Thus, despite DOT's claims to the contrary, because the OAH never acquired subject matter jurisdiction over Hodge's claim that he suffered retaliation after engaging in activity protected under the Whistleblower Act, we conclude that here, as in *Newberne*, the doctrine of administrative exhaustion does not bar Hodge's current lawsuit.

B. Hodge's appeal

[2] Hodge argues that he was disciplined and eventually terminated from employment with DOT in retaliation for reporting his belief that the 2008 reorganization and creation of the OIG violated the IAA and our Supreme Court's holdings in *Hodge I & II*. Hodge argues further that the trial court erred by granting DOT's motion for summary judgment because he established each element of his *prima facie* claim under the Whistleblower Act. However, we conclude that irrespective of whether Hodge satisfied his *prima facie* burden, this argument fails.

As our Supreme Court has explained,

> [s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion. The standard of review for summary judgment is *de novo*.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations, internal quotation marks, and ellipsis omitted).

North Carolina's Whistleblower Act, codified at section 126-84 *et seq.* of our General Statutes, provides that:

> State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:
>
> (1) A violation of State or federal law, rule or regulation;
>
> (2) Fraud;
>
> (3) Misappropriation of State resources;

> (4) Substantial and specific danger to the public health and safety; or
>
> (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

N.C. Gen. Stat. § 126-84(a) (2015). Section 126-85 states that

> [n]o head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in [section] 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

N.C. Gen. Stat. § 126-85 (2015). In order to succeed on a claim for retaliatory termination,

> the Act requires plaintiffs to prove, by a preponderance of the evidence, the following three essential elements: (1) that the plaintiff engaged in a protected activity,[4] (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.

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4. DOT offers several arguments for why Hodge cannot satisfy the first element of his *prima facie* case, but none of them is availing. DOT argues that Hodge's report that the creation of OIG violated the IAA and our Supreme Court's holdings in *Hodge I & II* only amounts to a personal grievance relating to the terms and conditions of Hodge's own employment, and thus does not satisfy the first element of his *prima facie* case in light of this Court's holding in *Hodge III* that the scope of activities protected under the Whistleblower Act extends only to "matters affecting general public policy." 175 N.C. App. at 117, 622 S.E.2d at 707. While it is undoubtedly true that Hodge's current lawsuit emerges from the context of over a decade of acrimonious litigation between the parties over his employment at DOT, this argument misapprehends the procedural posture and holding of *Hodge III*. Our holding there was based not on the fact that Hodge's allegations of retaliation revolved around an employment-related grievance, but instead on the fact that, by his own admission, the only relevant, allegedly protected activity Hodge engaged in was the filing of his lawsuit in *Hodge II* for reinstatement to his previous position, which "related only tangentially at best to a potential violation of the North Carolina Administrative Code." *Id.* Here, by contrast, Hodge has alleged that DOT sought to circumvent State laws and court rulings designed to safeguard public funds and minimize fraud, waste, and abuse

Newberne, 359 N.C. at 788, 618 S.E.2d at 206. Regarding the third element for establishing a plaintiff's *prima facie* case under the Act,

> [t]here are at least three distinct ways for a plaintiff to establish a causal connection between the protected activity and the adverse employment action under the Whistleblower Act. First, a plaintiff may rely on the employer's admission that it took adverse action against the plaintiff solely because of the plaintiff's protected activity. . . .
>
> Second, a plaintiff may seek to establish by circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual. Cases in this category are commonly referred to as pretext cases. . . .
>
> . . . .
>
> Third, when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken.

Id. at 790-91, 618 S.E.2d at 207-08 (citations, internal quotation marks, and certain brackets omitted). Although he does not so state in his complaint, Hodge contends in his brief to this Court that the third element of his *prima facie* case can be established through circumstantial evidence.[5] Therefore, his claim falls within the second category described

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in State government. We disagree that such allegations do not address matters affecting general public policy. We likewise decline to hold that Hodge cannot satisfy the first element of his *prima facie* case based on DOT's argument that Hodge was wholly mistaken to conclude any violation of the IAA or any other law had occurred. This argument fails because the relevant inquiry at this stage is not the substantive accuracy of the violations a plaintiff alleges, but instead whether it can be shown that adverse employment action was taken against him in retaliation for his allegations. *See, e.g.*, *Newberne*, 359 N.C. at 795-96, 618 S.E.2d at 210-11.

5. Specifically, Hodge relies on this Court's prior holding in *Fatta v. M&M Props. Mgmt., Inc.*, 221 N.C. App. 369, 373, 727 S.E.2d 595, 599, *disc. review denied*, 366 N.C. 407, 735 S.E.2d 182 (2012), *and* 366 N.C. 601, 743 S.E.2d 182 (2013), to support his assertion that "[i]t is solid law that temporal causality between the protected activity and the adverse action, standing alone, is sufficient to satisfy the third [element]" of his *prima facie* burden. Although *Fatta* involved an alleged violation of the North Carolina Retaliatory Employment Discrimination Act, codified at section 95-241(a) of our General Statutes,

in *Newberne*, which means that to prevail, he must show that DOT's proffered reasons for taking adverse actions against him were merely pretextual. As our Supreme Court explained in *Newberne*,

> [pretext cases] are governed by the burden-shifting proof scheme developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* and *Texas Department of Community Affairs v. Burdine.*
>
> Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a *prima facie* case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Id. (citations omitted).

As noted *supra*, in the present case, Hodge argues that the trial court's order granting summary judgment in favor of DOT must be reversed because he has established each element of his *prima facie* case. However, this Court recently rejected a virtually identical argument in *Manickavasagar v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, 767 S.E.2d 652 (2014), where we held that the trial court did not err in granting the defendant State agency's motion for summary judgment against the plaintiff's claim under the Whistleblower Act that he had been terminated in retaliation for reporting fraud, misappropriation of

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rather than a claim under the Whistleblower Act, our State's appellate courts have consistently applied the same burden-shifting model derived from federal law for claims arising under both statutes. *See id.* at 371-72, 727 S.E.2d at 599. The evidence of temporal proximity found sufficient to satisfy the plaintiff's *prima facie* burden on the element of causation in *Fatta* was that "[the] plaintiff demonstrated that he was terminated from employment five days after informing [the] defendant of his work-related injury and of his intention to file a worker's compensation claim." *Id.* at 373, 727 S.E.2d at 599. Here, by contrast, Hodge purports to have reported a violation of State law a minimum of several months before any adverse actions were ever taken against him. However, we need not determine whether Hodge's argument extends beyond the point of what qualifies as "temporally proximate," because *Fatta* also makes clear that the burden-shifting inquiry does not end merely because a plaintiff has satisfied his *prima facie* case. Indeed, in *Fatta*, this Court ultimately upheld the trial court's decision granting summary judgment in favor of the defendant-employer based on our conclusion that the plaintiff failed to offer any evidence other than "conclusory allegations, improbable inferences and unsupported speculation" to show that the legitimate nondiscriminatory reasons offered by the defendant-employer for the adverse actions taken against the plaintiff were merely pretextual. *See id.* at 375, 727 S.E.2d at 601 (citation omitted).

State resources, and gross mismanagement. *See id.* at __, 767 S.E.2d at 660. Although the plaintiff in *Manickavasagar* insisted this Court should reverse the trial court's decision because he had satisfied each element of his *prima facie* case, we explained that

> [e]ven if we were to assume *arguendo* that [the p]laintiff has established a *prima facie* claim, his suit against [the d]efendants was still properly disposed of through summary judgment. [The d]efendants have articulated some legitimate, non-retaliatory reasons for terminating [the p]laintiff's employment . . . , specifically his reported clashes with . . . personnel and ongoing refusal to follow . . . protocol. Therefore, under the *McDonnell Douglas/Burdine* burden-shifting proof scheme, in order to survive summary judgment, [the p]laintiff would have to raise a factual issue regarding whether these proffered reasons for firing [the p]laintiff were pretextual. To raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's non-retaliatory motive.

Id. at __, 767 S.E.2d at 659 (citation and internal quotation marks omitted). Because the plaintiff failed to provide any "express argument that the [d]efendants' stated reasons for firing him were pretextual," we affirmed the trial court's decision. *Id.*

Similarly here, even assuming *arguendo* that Hodge has satisfied his *prima facie* burden, *Newberne* and *Manickavasagar* make clear that Hodge cannot prevail unless he is able to demonstrate that DOT's stated reasons for taking adverse employment actions against him were merely a pretext for unlawful retaliation. Setting aside the substantive flaws in Hodge's broader legal argument[6] to focus on the second prong of the

6. Apart from Hodge's own self-serving speculation, our review of the record discloses no evidence whatsoever to support the premise implicit in his argument that DOT's 2008 reorganization and creation of the OIG were engineered primarily as an attempt to circumvent our Supreme Court's holdings in *Hodge I & II* in order to "get back at" Hodge. Indeed, the evidence in the record indicates that one of the motivating factors behind DOT's decision to hire McKinsey was the deficient performance of Hodge's own IAS unit as described by the State Auditor. Moreover, we note that the alleged violation of the IAA that Hodge complains of was unanimously approved by the Council of Internal Auditing created by the IAA's enactment to enforce its provisions, and—despite Hodge's protestations to the contrary—did not have any effect on Hodge's reporting level, insofar as both before and after DOT's 2008 reorganization and creation of the OIG, Hodge remained two levels removed from the agency Secretary. Hodge's complaint that the IAA required that

burden-shifting approach our Supreme Court outlined in *Newberne*, it is clear from the record before us that throughout this litigation DOT has articulated several legitimate, non-retaliatory reasons for disciplining and eventually terminating Hodge—specifically, Hodge's prolonged, consistent, and extensively documented pattern of insubordinately refusing to complete his work assignments after DOT's 2008 reorganization. Thus, as we explained in *Manickavasagar*, "under the *McDonnell Douglas/Burdine* burden-shifting proof scheme, in order to survive summary judgment, [Hodge] would have to raise a factual issue regarding whether these proffered reasons for firing [him] were pretextual," which means Hodge must produce evidence "beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit [DOT's] non-retaliatory motive." *Id.* at __, 767 S.E.2d at 659 (citation omitted).

On this point, Hodge makes no express argument whatsoever, and our review of the record reveals no competent evidence to support any finding of pretext. Indeed, Hodge's deposition testimony and affidavit in opposition to summary judgment provide little more than conclusory allegations, improbable inferences, and unsupported speculation, rather than the sort of specific, non-speculative facts sufficient to show that the reasons DOT articulated for disciplining and terminating him from employment were merely pretextual. Given Hodge's failure to articulate any argument on the third prong of the burden-shifting analysis—and, in light of our Supreme Court's admonition that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005)—we hold that the trial court did not err in granting DOT's motion for summary judgment. Accordingly, the trial court's order is

AFFIRMED.

Judges HUNTER, JR., and INMAN concur.

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he personally should have been named DOT's Director of Internal Auditing is similarly misplaced, given that it depends upon accepting Hodge's related and wholly unpersuasive argument that he can never be removed from his position as Chief of IAS, and DOT is forever prohibited from reorganizing its auditing functions in a way that would do so, simply because our Supreme Court previously concluded that such position cannot properly be classified as policymaking exempt and that the North Carolina Administrative Code requires that a State employee who has been improperly discharged and then reinstated must be returned to the "same or similar" position.

APRIL R. HUNT (ROBBINS), Plaintiff
v.
JEFFREY H. HUNT, Defendant

No. COA15-900

Filed 5 April 2016

Child Custody and Support—child support enforcement agency—right to intervene—timeliness

The trial court did not err in a child support case by permitting the New Hanover Child Support Enforcement Agency (CSEA) to intervene as a matter of right. CSEA possessed an unconditional statutory right to intervene in the ongoing support dispute. Plaintiff applied for services from CSEA and paid the statutory fee, thus vesting in CSEA the right to collect support obligations on her behalf. Further CSEA's motion to intervene, filed one month later, was timely.

Appeal by defendant from order entered 1 April 2015 by Judge Lindsey M. Luther in New Hanover County District Court. Heard in the Court of Appeals 12 January 2016.

Johnson Lambeth & Brown, by Regan H. Rozier and Maynard M. Brown, for plaintiff-appellee.

Chris Kremer for defendant-appellant.

ZACHARY, Judge.

Where the New Hanover Child Support Enforcement Agency possessed an unconditional statutory right to intervene in the ongoing support dispute pending between plaintiff and defendant, the trial court did not err in permitting the agency to intervene as a matter of right.

I. Factual and Procedural Background

April R. Hunt (plaintiff) and Jeffrey H. Hunt (defendant) were married on 28 November 1992, had two children, and separated on 20 March 2010. Plaintiff initiated this action in New Hanover County District Court on 10 December 2010, seeking post-separation support and permanent alimony, an equitable distribution of the parties' marital assets with an unequal division in her favor, temporary and permanent primary custody of the parties' minor children, retroactive and prospective child support,

and attorney's fees. On 25 February 2011, defendant, then a resident of Texas, filed a responsive pleading in which he moved to dismiss plaintiff's complaint, generally denied the allegations of plaintiff's complaint, and in his counterclaim sought temporary and permanent custody of the children, and court costs. On 9 March 2011, plaintiff filed her reply to defendant's counterclaim. On 16 March 2011, the trial court entered an order denying defendant's motion to dismiss.[1] On 17 March 2011, the trial court adopted and approved the temporary consent order negotiated by the parties, which provided that defendant pay temporary child support and 80% of the minor children's uninsured medical expenses, together with the minor children's tuition, medical and dental coverage, orthodontia cost and cellular phone coverage. Defendant was also required to pay $3,000 in retroactive child support and $2,000 in plaintiff's attorney's fees.

The parties divorced on 26 August 2011. On 28 September 2011, plaintiff filed a motion to compel defendant to respond to interrogatories and to produce requested documents. On 6 October 2011, the trial entered a consent order, granting the parties joint legal custody of the minor children, with plaintiff having primary physical custody of the minor children and defendant having secondary physical custody of the minor children, setting forth a visitation schedule, providing that defendant pay $1,500 per month in child support, and requiring defendant to supply the documents requested in plaintiff's motion to compel. Plaintiff agreed to dismiss her motion to compel.

On 6 May 2013, the trial court entered its order granting an unequal division of the marital estate in favor of plaintiff. The trial court also ordered payment by defendant of, *inter alia*, $2,000 for plaintiff's attorney's fees, various medical and orthodontic bills, the children's school tuition and fees, permanent alimony in the amount of $800 per month, and $8,000 delinquent alimony. On 5 June 2013, defendant filed notice of appeal from this order.

On 6 May 2014, this Court entered an unpublished opinion on defendant's appeal from the trial court's 6 May 2013 order. We affirmed the portion of order of the trial court awarding alimony, but remanded the portion concerning equitable distribution and attorney's fees, with instructions to the trial court to make adequate findings on those issues.

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1. On 15 April 2011, defendant appealed the denial of his motion to dismiss to this Court. He has declined to include the result of that appeal in the record, and it is not relevant to the outcome of this case.

Hunt v. Hunt, ___ N.C. App. ___, 759 S.E.2d 712 (unpublished), *disc. review denied*, 367 N.C. 524, 762 S.E.2d 443 (2014). On 24 October 2014, the trial court entered an order on remand containing additional findings of fact on the equitable distribution claim and attorney's fees.

On 26 June 2013, defendant moved for a change of custody. On 30 September 2013, he withdrew this motion.

On 6 November 2013, the trial court entered an "Order on Contempt" (the 2013 contempt order), finding that defendant had "wilfully [sic] failed and refused, without justification or excuse, to abide by the terms of the May 6, 2013 Order" in that he failed to pay his monthly alimony obligations, delinquent alimony, and attorney's fees, despite having the ability to do so. On 3 December 2013, the trial court entered an order for defendant's arrest based upon the 2013 contempt order.

On 16 September 2014, this Court entered an unpublished opinion on defendant's appeal from the 2013 contempt order. We held that there was competent evidence to support the trial court's findings that defendant's failure to pay ongoing alimony payments was willful, but that there was not competent evidence to support the trial court's findings that defendant's failure to pay delinquent alimony or attorney's fees was willful. We also reaffirmed our previous ruling that the issue of attorney's fees was not properly before us. The Court therefore affirmed in part, remanded in part, and dismissed in part the trial court's order. *Robbins v. Hunt*, ___ N.C. App. ___, 765 S.E.2d 556 (2014) (unpublished). On 29 October 2014, the trial court entered an order on remand containing additional findings of fact with respect to defendant's ability to pay delinquent alimony and attorney's fees, finding defendant in contempt and requiring him to pay a total of $13,200 in delinquent alimony and attorney's fees.

On 12 September 2014, plaintiff filed a motion to show cause against defendant for his continuing failure to pay alimony and attorney's fees, and for the additional attorney's fees necessary to prosecute this contempt action. On 22 September 2014, plaintiff filed another motion to show cause. On 26 September 2014, the trial court issued a show cause order, requiring defendant to show cause as to why he should not be held in contempt of court. On 29 October 2014, the trial court entered another order, this one entitled "Order on Contempt" and "Order on Attorney's Fees" (the 2014 contempt order). This order found defendant in willful contempt of the 6 May 2013 order due to defendant's failure to pay alimony, and required him to pay $10,400 to purge himself of his contempt. It further required the payment of $750 in attorney's fees for

the prosecution of this issue, and $1,900 in attorney's fees in connection with the appeal.

On 2 November 2014, plaintiff applied for child support services from the New Hanover Child Support Enforcement Agency (CSEA). On 3 December 2014, CSEA filed a motion to intervene, determine support arrears, and redirect support payments. This motion alleged that plaintiff had applied for child support services, thereby entitling CSEA to intervene in the case as a matter of law, and asked that CSEA be allowed to intervene, that the trial court determine whether defendant was in arrears on his support payments, that North Carolina Child Support Centralized Collections be permitted to serve as designated payee for all support payments, and that defendant be subject to wage withholding of support payments, income tax refund intercept of any arrears, and credit bureau reporting of defendant's obligations. On 4 December 2014, CSEA filed its "Amended Motion to Intervene, Determine Arrears, and Redirect Payments." On 5 January 2015, defendant moved for a continuance in this matter in order to hire an attorney. On 14 January 2015, defendant, having secured counsel, requested another continuance. On 28 January 2015, defendant filed an affidavit in opposition to CSEA's motion to intervene, alleging only an inability to pay alimony.

On 28 January 2015, the trial court heard arguments on this motion. On 1 April 2015, the trial court entered its "Order in Civil Support Action," allowing CSEA to intervene, ordering defendant to pay $1,500 per month in ongoing child support and $800 per month in ongoing alimony, ordering defendant to pay $80 per month toward his alimony arrears of $25,600 until paid in full, and ordering wage withholding. The trial court also ordered, *inter alia*, that North Carolina Child Support Centralized Collections be permitted to serve as designated payee for all of defendant's support payments, and that defendant's income tax refunds be subject to intercept to satisfy support arrears.

Defendant appeals.

II. Preservation

In his affidavit in opposition to CSEA's motion to intervene, defendant did not challenge CSEA's right to intervene. Instead, defendant alleged only that he was unable to pay alimony. While the record demonstrates that a hearing was held on this motion, we do not have a transcript of this hearing. As such, there is no evidence that defendant preserved the issue of CSEA's right to intervene at trial.

Nonetheless, we choose to review this matter pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.

III. Standard of Review

"We review de novo the grant of intervention of right under Rule 24(a)." *Holly Ridge Assocs. v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 538, 648 S.E.2d 830, 835 (2007).

"The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999).

IV. Argument

In his sole argument on appeal, defendant contends that the trial court erred in allowing CSEA to intervene as a matter of right. We disagree.

Pursuant to the North Carolina Rules of Civil Procedure, a party may intervene as a matter of right:

> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. R. Civ. P. 24(a). To establish a non-statutory right to intervene, the intervenor must show "(1) an interest relating to the property or transaction; (2) practical impairment of the protection of that interest; and (3) inadequate representation of that interest by existing parties." *Hill v. Hill*, 121 N.C. App. 510, 511, 466 S.E.2d 322, 323 (1996) (quoting *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978)); *see also Virmani*, 350 N.C. at 459, 515 S.E.2d at 683.

A. Unconditional Right to Intervene

Defendant offers various arguments with respect to CSEA's right to intervene, specifically concerning Rule 24(a)(2), which applies to parties without an unconditional right to intervene. Defendant's arguments are without merit.

In 1975, Title IV-D of the Social Security Act was enacted as a joint federal and state program, establishing the "Child Support Enforcement" program. In order for a state plan to be approved, federal regulations require the states, including this State, to provide a "State plan for child and spousal support[,]" which must "provide services relating to the . . . establishment, modification, or enforcement of child support obligations[.]" 42 U.S.C. § 654 (2014). Such services include the enforcement of "any support obligation established with respect to – (i) a child with respect to whom the State provides services under the plan; or (ii) the custodial parent of such a child[.]" 42 U.S.C. § 654(4)(B). The Code of Federal Regulations further provides that "[a]n assignment of support rights, . . . constitutes an obligation owed to the State by the individual responsible for providing such support." 45 C.F.R. § 302.50(a).

Chapter 110, Article 9 of the North Carolina General Statutes, entitled "Child Support," lays out the framework for the "administration of a program of child support enforcement" in this State. This Article provides that "[a]ny county interested in the . . . support of a dependent child may institute civil or criminal proceedings . . . or may *take up and pursue* any . . . support action commenced by the mother, custodian or guardian of the child." N.C. Gen. Stat. § 110-130 (2015) (emphasis added). This statute's direction to "take up and pursue" an action clearly refers to intervention. In fact, upon receipt of an application for public assistance for a dependent child, the county department of social services has an affirmative *duty* to "notify the designated representative who shall take appropriate action under the Article . . . ." N.C. Gen. Stat. § 110-138 (2015). The Article further provides, as stated above, that when a person accepts public assistance on behalf of a dependent child, that person is deemed to have made an assignment to the State or county in the amount of any payments due for the support of such child "up to the amount of public assistance paid" for the support of that child. N.C. Gen. Stat. § 110-137 (2015). Persons not receiving public assistance may acquire child support collection services by submitting an application and paying the fee required by statute. N.C. Gen. Stat. § 110-130.1(a) (2015). Finally, "when a child support order is being enforced under this Article[]" and "there is an order establishing [spousal] support," then a child support enforcement agency may also enforce the existing spousal support obligation. N.C. Gen. Stat. § 110-130.2 (2015).

We hold that these statutes, taken together, demonstrate a clear objective by the federal government, taken up by our legislature and enacted in statute, to vest in child support enforcement agencies an unconditional statutory right of intervention where a person has

accepted public assistance on behalf of a dependent child, where that person applies for and pays a fee for child support collection services, or where that person with an order under which the person is entitled to collect spousal support is also receiving child support enforcement services for a child support obligation.

In the instant case, plaintiff applied for services from CSEA and paid the statutory fee, thus vesting in CSEA the right to collect support obligations on her behalf. Because this unconditional statutory right was vested in CSEA, our analysis concludes with Rule 24(a)(1). It is unnecessary to examine CSEA's interest, the impairment of that interest, or the ability of the parties to represent that interest, as these are elements of Rule 24(a)(2), which applies when the right to intervene is not unconditional.

B. Timeliness of Motion to Intervene

Defendant also contends that CSEA lacked the ability to intervene as a matter of right due to the untimeliness of its motion to intervene. Defendant notes that the motion to intervene was filed on 3 December 2014, more than three years after the entry of the initial child support order, and more than a year and a half after the entry of the alimony order.

Defendant relies upon *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985), for the principle that a motion to intervene after judgment has been rendered is disfavored and will only be granted after a showing of entitlement and justification. In the instant case, however, such entitlement is visible on the face of the record. Pursuant to statute, when a person accepts public assistance on behalf of a dependent child, that person is deemed to have made an assignment to the State or county in the amount of any payments due for the support of such child "up to the amount of public assistance paid" for the support of said child. N.C. Gen. Stat. § 110-137. Further, any person not receiving public assistance may nonetheless receive the benefits of the child support program outlined in Chapter 110 by applying to the appropriate agency and paying a $25 fee. N.C. Gen. Stat. § 110-130.1(a). On 2 November 2014, plaintiff contracted with CSEA for child support services in a document explicitly granting the right to intervene to the agency. CSEA could not have intervened prior to that date; subsequent to plaintiff's execution of the contract with CSEA, plaintiff had assigned her right to payment, authorizing intervention. CSEA was entitled to intervene, and its motion to intervene, filed one month later, was timely.

V. Conclusion

CSEA enjoyed an unconditional right to intervene, which it exercised in a timely manner. The trial court did not err in allowing CSEA to exercise that right.

AFFIRMED.

Judges BRYANT and DILLON concur.

IN THE MATTER OF THE APPEAL OF MICHELIN NORTH AMERICA, INC. FROM THE DECISION OF THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE DISCOVERY OF CERTAIN BUSINESS PERSONAL PROPERTY AND THE PROPOSED DISCOVERY VALUES FOR TAX YEARS 2006-2011

No. COA 15-415

Filed 5 April 2016

Taxation—airplane tires—excluded as inventory owned by manufacturer

The Property Tax Commission erred by determining that certain airplane tires held in Michelin's Mecklenburg facility were subject to taxation. The tires were excluded from taxation as inventory owned by a manufacturer pursuant to N.C.G.S. § 105-273(33).

Appeal by Michelin North America, Inc. from a Final Decision entered 12 December 2014 by Chairman William W. Peaslee in the North Carolina Property Tax Commission. Heard in the Court of Appeals 21 October 2015.

Nexsen Pruet, PLLC, by Alexander P. Sands, III, Jason C. Pfister, and David S. Pokela, for Appellant-Michelin North America, Inc.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson and Robert S. Adden, Jr., for Appellee-Mecklenburg County.

HUNTER, JR., Robert N., Judge.

Michelin North America, Inc. ("Michelin") appeals from a Final Decision of the North Carolina Property Tax Commission determining certain airplane tires held in Michelin's Mecklenburg facility are subject to taxation. Michelin contends the tires are statutorily excluded from

taxation as "inventories owned by manufacturers." We agree and therefore reverse the decision of the Property Tax Commission.

I. Factual and Procedural Background

On 4 November 2011, Michelin appealed the assessed value and penalty of the business's personal property assessed during a property tax audit to the Mecklenburg County Board of Equalization and Review. The audit spanned tax years 2006 through 2011. Michelin contested the valuation of aircraft tires at their facility in Mecklenburg County. Following a hearing, the Mecklenburg County Board of Equalization and Review decided the tires should be valued by using the retail cost of $488.18 per tire.

On 5 January 2012, Michelin appealed the decision to the North Carolina Property Tax Commission. Evidence presented at a hearing before the Property Tax Commission on 14 August 2014 tended to show the following.

Bradley McMillen, the technical director for the aircraft tire division at Michelin testified, describing Michelin's facility in Mecklenburg and the tires in question. Michelin's Mecklenburg facility is primarily a testing facility. Approximately half of the tires tested in the Mecklenburg facility are military tires that must meet military qualifications. The tires at issue fall into three categories, described below.

"Prototype tires," which are in the development phase, make up approximately 55 percent of the tires in the facility. The tires are completely constructed, but are not yet qualified to be put on an aircraft. The FAA must approve commercial tires and the military must approve military tires before an airworthiness certificate will be awarded, allowing the tires to go into production. Every tire that leaves the facility to be sold must have an airworthiness certificate attached to the tire. Prototype tires are either tires that Michelin is developing for new aircraft or tires Michelin is trying to improve. Prototype tires are destroyed during the testing process.

"Conformance production tires" are aircraft tires currently in production and qualified by the FAA or the military. Approximately 30 percent of the tires in the Mecklenburg facility are conformance production tires. These tires are pulled from inventory in Michelin factories, and sent to the Mecklenburg facility for testing. Conformance production tires do not have an airworthiness certificate attached to them because they will be destroyed in the testing process, and therefore cannot be sold.

"Returned goods," comprising approximately 15 percent of the Mecklenburg facility's tires, are used aircraft tires. These tires are used by consumers, and then returned to the facility to evaluate the tires' performance in the field. Damaged tires are returned to determine the cause of the damage. Tires classified as "returned goods" belong to the consumer. After testing, these tires go through a denaturing process, and are subsequently hauled away for disposal or recycling.

Barry Lindenman, the business personal property audit manager for Mecklenburg County testified at the hearing. He arrived at a valuation of the tires by multiplying their average retail value of $488.18 by the number of tires in the facility, 1,531. Based on Lindenman's calculations, the total value of the tires is $547,116 for each taxable year of the audit.

The Property Tax Commission issued a final decision on 12 December 2014. The Commission held the returned goods should not be taxed because they remain the property of the consumer, but the prototype tires and conformance production tires are subject to taxation. Based on the number of tires falling within those categories, the Commission concluded the total value of the prototype and conformance production tires to be $421,628.08 for each year at issue. Over six taxable years, the total value is $2,529,768.48. Michelin timely filed a Notice of Appeal challenging the Commission's conclusion as it related to the prototype tires and conformance production tires.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-29(a) which provides for an appeal as of right from any final order or decision of the Property Tax Commission. N.C. Gen. Stat. § 7A-29(a) (2015).

III. Standard of Review

This Court reviews appeals from the Property Tax Commission pursuant to N.C. Gen. Stat. § 105-345.2(b):

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings,

> inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2015).

We review Property Tax Commission decisions under the whole record test to determine whether a decision has a rational basis in the evidence or whether it was arbitrary or capricious. *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981). "The "whole record" test does not allow the reviewing court to replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *In re Parkdale America*, 212 N.C. App. at 194, 710 S.E.2d at 450–451 (quoting *In re McElwee*, 304 N.C. at 87–88, 283 S.E.2d at 127). If the Commission's decision, considered in light of the foregoing rules, is supported by substantial evidence, it cannot be overturned. *In re Philip Morris U.S.A.*, 130 N.C. App. 529, 533, 503 S.E.2d 679, 682 (1998).

IV. Analysis

Generally, all real and personal property is subject to taxation under The Revenue Act unless it is excluded from the tax base by statute or the North Carolina Constitution. N.C. Gen. Stat. § 105-274(a) (2015). A party claiming a statutory exemption bears the burden "of bringing [it]self within the exemption or exception." *Parkdale America, LLC v. Hinton*, 200 N.C. App. 275, 278, 684 S.E.2d 458, 461 (2009).

"Inventories owned by manufacturers" is one such category statutorily excluded from the tax base. N.C. Gen. Stat. § 105-275(33) (2015). "Inventory" and "manufacturer" are terms of art defined by statute. Inventory includes five different statutory definitions. At issue in this case is the third definition of inventory:

> As to manufacturers, raw materials, goods in process, finished goods, or other materials or supplies that are

> consumed in manufacturing or processing or that accompany and become a part of the sale of the property being sold. The term does not include fuel used in manufacturing or processing and materials or supplies not used directly in manufacturing or processing.

N.C. Gen. Stat. § 105-273(8a)(c) (2015). The meaning of "finished goods" within the definition of inventory is not currently defined by statute.[1] A manufacturer is a taxpayer "regularly engaged in the mechanical or chemical conversion or transformation of materials or substances into new products for sale or in the growth, breeding, raising, or other production of new products for sale." N.C. Gen. Stat. § 105-273(10b) (2015).

Here, Michelin's status as a manufacturer is not challenged on appeal. Because findings of fact not challenged on appeal are binding on this Court, we accept Michelin's status as a manufacturer. *See Ferreyra v. Cumberland County*, 175 N.C. App. 581, 582, 623 S.E.2d 825, 826 (2006).

During oral arguments on 21 October 2015, Michelin argued the tires used for testing are finished goods under the statutory definition of inventory because the tires have completed the manufacturing process. The tires are thus "finished" or completed goods before they are then used for testing. In response, Mecklenburg County conceded the tires in question are "finished goods."

Mecklenburg County contends the statutory phrase "consumed in manufacturing or processing or that accompany and become a part of the sale of the property being sold" refers to raw materials, goods in process, finished goods, or other materials or supplies. In other words, to fall within the statute, finished goods would need to be "consumed in manufacturing or processing or . . . accompany and become a part of the sale of the property being sold." To support its argument, Mecklenburg County argues that when interpreting a statute, "the legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant." *Peace River Electric Cooperative v. Ward Transformer Co.*, 116 N.C. App. 493, 502, 449 S.E.2d 202, 209 (1994).

In order to determine whether Mecklenburg County's interpretation is correct, we must interpret the statutory definition of inventory.

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1. In 1985, the legislature defined "finished goods" as "articles of tangible personal property that are ready for sale." N.C. Sess. Laws 1985-656. However, the legislature repealed the definition in 1991. N.C. Sess. Laws 1991-45.

> Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will. The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. This intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136–137 (1990) (internal citations and quotations omitted).

In 1985, the General Assembly amended The Revenue Act with House Bill 222, entitled An Act to Provide Broad-Based Tax Relief to North Carolina Citizens. N.C. Sess. Law 1985-656. In this bill, the legislature defined inventory as

> goods held for sale in the regular course of business, raw materials, goods in process of manufacture or processing, and other goods and materials that are used or consumed in the manufacture or processing of tangible personal property for sale or that accompany and become a part of the property as sold. The term does not include fuel used in manufacturing or processing.

N.C. Sess. Laws 1985-656. At this time, the definition of inventory did not include the term "finished goods."

The same year, the General Assembly enacted "clarifying" legislation amending The Revenue Act. N.C. Sess. Laws 1985-947. This bill amended the definition of inventory to include the term finished goods for the first time.

> 'Inventories' means goods held for sale in the regular course of business by manufacturers and retail and wholesale merchants. As to manufacturers, the term includes raw materials, goods in process, and finished goods, *as well as* other materials or supplies that are consumed in manufacturing or processing, or that accompany and become a part of the sale of the property being sold. . . .

N.C. Sess. Laws 1985-947 (emphasis added). The language "as well as" shows the legislature meant to include "other materials or supplies that

are consumed in manufacturing or processing" in addition to raw materials, goods in process, and finished goods within the definition of inventory. Accordingly, consumed in manufacturing or processing modifies only "materials or supplies" and not "finished goods."

On 16 July 1987, the General Assembly ratified House Bill 1155, including for the first time the tax exemption for "inventories owned by manufacturers." N.C. Sess. Laws 1987-622. In August 1987, the legislature amended the definition of inventories again, expanding it to include agricultural products by adding a sentence to the definition. N.C. Sess. Laws 1987-813. The language quoted above from the 1985 legislation remained unchanged. *Id.* Thus, after the legislature added an exemption for "inventories owned by manufacturers," it then expanded the definition of inventory. The legislature also retained the "as well as" language, separating "finished goods" from materials or supplies consumed in manufacturing.

In 1991, the General Assembly considered the definition of inventory again, making changes to other parts of the definition, but leaving intact the sentence at issue in this appeal: "As to manufacturers, the term includes raw materials, goods in process, and finished goods, *as well as* other materials or supplies that are consumed in manufacturing or processing, or that accompany and become a part of the sale of the property being sold." N.C. Sess. Laws 1991-975 (emphasis added).

The legislature reconsidered the definition of "inventory" again in 2008, bringing the statutory definition to its current version. At this time, the legislature broke down the definition into five subsections, including subsection c, relating to manufacturers which includes the sentence at issue here:

> As to manufacturers, ~~the term includes raw~~ raw materials, goods in process, and finished goods, ~~as well as~~ or other materials or supplies that are consumed in manufacturing or ~~processing,~~ processing or that accompany and become a part of the sale of the property being sold.

N.C. Sess. Laws 2008-35 (showing changes from 1991 definition). The changes do not evidence an intent to change the meaning of the definition of inventory. Instead, the changes show the legislature intended to clean-up the definition by breaking down one large definition into five subsections for ease of use. The change of "as well as" to "or" reflects the deletion of the phrase "the term includes," changing a conjunctive list to a disjunctive list while retaining the same meaning. Still, the statute is a list. Now joined by "or," the bill shows no evidence the legislature acted

to change "other materials or supplies consumed in manufacturing or processing" into a clause modifying finished goods. Instead, the legislature continued to include it as part of the list.

As a result, "finished goods" is not modified by materials or supplies consumed in manufacturing. Because the parties agree both the prototype tires and conformance production tires are finished goods within the meaning of the statute, the tires fall within the statutory definition of inventory. The parties also agree Michelin is a manufacturer under the applicable statute. Thus, the tires are "inventories owned by manufacturers" under N.C. Gen. Stat. § 105-275(33), and are excluded from taxation in North Carolina.

V. Conclusion

For the foregoing reasons, the Final Decision of the North Carolina Property Tax Commission is reversed. The airplane tires at issue are excluded from taxation as inventory owned by a manufacturer pursuant to N.C. Gen. Stat. § 105-273(33).

REVERSED.

Judges GEER and DILLON concur.

IN RE SKYBRIDGE TERRACE, LLC LITIGATION

No. COA15-810

Filed 5 April 2016

1. Real Estate—condominiums—withdrawal of property—"any portion"—legal sufficiency of description

On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' argument that the use of the term "any portion" in the Declaration failed to sufficiently describe the real estate to which the right of withdrawal was meant to apply. Because Phase I and Phase II were the only discrete and clearly identifiable "portions" of the Condominium depicted on the plat, the Court of Appeals construed Skybridge's right to withdraw "any portion" as

the right to withdraw either Phase I or Phase II. Skybridge's express reservation of the right to withdraw "any portion" provided a legally sufficient description of the real estate to which withdrawal rights applied.

2. Real Estate—condominiums—withdrawal of property—substantial compliance with Condominium Act

On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC, on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' arguments that Skybridge's Declaration failed to substantially comply with the Condominium Act and that its omissions from the Declaration were material. Because the same right of withdrawal applied to each of the two phases of the property that were actually part of the Condominium, the failure to explicitly state so on the plat was a not material omission. Likewise, Skybridge's omission from the Declaration of a time limit within which the right to withdraw could be exercised was not material because defendants purchased units without regard to this omission.

3. Real Estate—condominiums—withdrawal of property—public offering statement—inconsistent with declaration

On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC, on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' argument that they were misled by the language in the public offering statement providing that Skybridge had retained no option to withdraw real estate from the Condominium. The plain wording of the offering stated that the Declaration would control in the event of a conflict between the offering and the Declaration.

Appeal by defendants from order and judgment entered 25 March 2015 by Judge James L. Gale in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2016.

Randolph M. James, P.C., by Randolph M. James for plaintiff-appellee Skybridge Terrace, LLC.

Horack Talley Pharr & Lowndes, P.A., by Amy P. Hunt, for defendant Doyle Christopher Stone.

Erwin, Bishop, Capitano & Moss, PA, by Fenton T. Erwin, Jr. and Matthew M. Holtgrewe, for defendants-appellants.

DAVIS, Judge.

Christopher M. Allen and Harold K. Sublett, Jr. (collectively "Defendants") appeal from the trial court's 25 March 2015 order and judgment granting summary judgment in favor of Skybridge Terrace, LLC ("Skybridge") on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums ("the Condominium") in its capacity as the declarant. After careful review, we affirm the trial court's order and judgment.

Factual Background

Skybridge is a North Carolina limited liability company that was created to facilitate the development of a condominium complex on Calvert Street in Charlotte, North Carolina. Skybridge issued a public offering statement in September 2006 describing the planned features of the anticipated condominium complex. On 23 July 2008, Skybridge legally created the Condominium by recording the Declaration of Skybridge Terrace Condominiums ("the Declaration") in the Mecklenburg County Registry in Book 23980, Page 818 pursuant to N.C. Gen. Stat. § 47C-2-101 of the North Carolina Condominium Act ("the Condominium Act"). The Declaration submitted the property described therein to the provisions of the Condominium Act and incorporated a plat map illustrating the plans for the Condominium. In the Declaration, Skybridge reserved certain development rights and other special declarant rights, including the right

> to complete the improvements indicated on the Plans; to maintain sales offices, models and signs advertising the Condominium on the Property; to exercise any development right as defined in Section 47C-2-110 of the Act; to use easements over the Common Elements; to elect, appoint or remove members of the Board during the Declarant Control Period; to make the Condominium part of a larger condominium; and *to withdraw any portion of the Property from the Condominium*; and to add property to the Condominium, including but not limited to one additional phase, which is shown on the Plat as Phase Three. . . .

(Emphasis added.)

The Declaration stated that the Condominium would be divided into two phases and include 96 separately owned units. It further provided that "[e]ach phase shall contain 48 units and the phases are designated as Phase One and Phase Two, sometimes alternatively referred to as Phase I and Phase II. Phase I has been built and Phase II is planned but not yet built."

Skybridge began conveying units in Phase I of the Condominium to purchasers in 2009. Defendants purchased their respective units in Phase I in early 2011. Phase II of the Condominium has never been developed.

On 31 December 2012, Skybridge filed a complaint in Mecklenburg County Superior Court against Defendants, Sean M. Phelan ("Phelan"), Nexsen Pruet, PLLC ("Nexsen Pruet"), and various other unit owners of the Condominium. Skybridge's complaint asserted professional malpractice and constructive fraud claims against Phelan and Nexsen Pruet with regard to their representation of Skybridge during the development of the Condominium and their drafting of the Declaration.[1] In their claims against Defendants and the other unit owners, Skybridge sought (1) reformation of the Declaration so that it had the right of either developing or withdrawing the property encompassing Phase II of the Condominium; and (2) in the alternative, a declaratory judgment that Skybridge "has the right to develop and right to withdraw Phase II." The matter was designated a mandatory complex business case on 1 February 2013 and was subsequently assigned to the Honorable James L. Gale in the North Carolina Business Court.

Skybridge filed an amended complaint on 19 February 2013. On 25 October 2013, Defendants filed an answer, asserting that they "presently own and possess indefeasible property rights in and to the real estate described in Phase II on the plat" and that Skybridge was not entitled to its requested declaratory relief in its amended complaint. On 16 December 2013, Judge Gale entered an order severing Skybridge's claims against Phelan and Nexsen Pruet from its claims against the defendant unit owners pursuant to Rule 42 of the North Carolina Rules of Civil Procedure. The order further provided that the "claims against Nexsen Pruet and Sean Phelan are stayed and held in abeyance until the earlier of January 1, 2015 or resolution of [Skybridge's] claims against the remaining Defendants."

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1. The claims against Phelan and Nexsen Pruet are not at issue in the present appeal.

On 11 March 2014, Defendants filed a motion seeking summary judgment in their favor on Skybridge's claims. Skybridge filed a cross-motion for summary judgment on 12 March 2014. The trial court granted summary judgment in favor of Skybridge by order entered 25 March 2015. In its order, the trial court determined that Skybridge "properly reserved a right to withdraw the Phase II parcel from Skybridge Terrace Condominiums[.]" The trial court certified its order pursuant to Rule 54(b) as a final judgment as to all claims between Skybridge and the unit owner defendants. Defendants gave timely notice of appeal to this Court.

Analysis

The entry of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). We review an order granting summary judgment *de novo*. *Residences at Biltmore Condo. Owners' Ass'n, Inc. v. Power Dev., LLC*, ___ N.C. App. ___, 778 S.E.2d 467, 470 (2015).

Here, Defendants argue that the trial court erred in granting summary judgment in favor of Skybridge on its declaratory judgment claim because Skybridge failed to adequately reserve in the Declaration the right to withdraw Phase II from the Condominium. Defendants further contend that even if the right to withdraw property was adequately reserved in the Declaration, Skybridge was precluded from exercising withdrawal rights after it began conveying units in Phase I to purchasers.

The Condominium Act, codified in Chapter 47C of our General Statutes, "applies to all condominiums created within this State after October 1, 1986." N.C. Gen. Stat. § 47C-1-102(a) (2015). The Condominium Act allows a declarant to reserve certain development rights in the condominium if such a reservation is contained in the declaration creating the condominium. N.C. Gen. Stat. § 47C-2-105(8) (2015). "Development rights" are statutorily defined by the Condominium Act as encompassing "any right or combination of rights reserved by a declarant in the declaration to add real estate to a condominium; to create units, common elements, or limited common elements within a condominium; to subdivide units or convert units into common elements; or *to withdraw real estate from a condominium*." N.C. Gen. Stat. § 47C-1-103(11) (2015) (emphasis added).

In order to properly reserve development rights, "a declarant must specifically state in the declaration the rights it wishes to retain

'together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised.' " *Residences at Biltmore Condo. Owners' Ass'n*, ___ N.C. App. at ___, 778 S.E.2d at 472 (quoting N.C. Gen. Stat. § 47C-2-105(8)). With regard to the exercise of the development right of withdrawal, the Condominium Act expressly contemplates both the reservation of *all* of the real estate comprising the condominium and the reservation of *less than all* of said real estate, stating as follows:

> If the declaration provides pursuant to G.S. 47C-2-105(a)(8) that all or a portion of the real estate is subject to the development right of withdrawal:
>
> (1) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, no part of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and
>
> (2) If a portion or portions are subject to withdrawal, no part of a portion may be withdrawn after a unit in that portion has been conveyed to a purchaser.

N.C. Gen. Stat. § 47C-2-110(d) (2015).

In the present case, the Declaration provided that Skybridge, as the declarant, retained the right "to withdraw *any portion* of the Property from the Condominium." (Emphasis added.) Defendants contend that the use of the term "any portion" (1) failed to sufficiently describe the real estate to which the right of withdrawal was meant to apply; and (2) should be interpreted as meaning that "the Declaration reserve[d] the right to withdraw *all* Property from the Condominium." (Emphasis added.) We are not persuaded by either of these assertions.

[1] Under the Condominium Act, the plat showing the plans for the condominium "shall be considered a part of the declaration[.]" N.C. Gen. Stat. § 47C-2-109(a) (2015). In this case, the recorded plat shows separate and distinct phases of development of the Condominium: Phase I, Phase II, and Phase III. Phases I and II are illustrated on the plat, and as the trial court noted in its summary judgment order, there is "a surveyed line of demarcation between them."[2] Phase III is depicted using a dotted

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2. Phase III was not actually part of the Condominium property but was depicted on the plat as property that could later be added to the Condominium.

line and was labeled "NEED NOT BE BUILT." The boundaries of each phase are clearly depicted on the plat.

Thus, the surveyed boundaries set forth on the plat provide a legally sufficient description of the real estate included in each phase of the Condominium. Because, however, both the Declaration and the Condominium Act utilize the term "portion" rather than "phase" in discussing the right to withdraw, we must determine whether the two terms — as used here — are synonymous.

On this issue, the trial court concluded that Phase II constituted a "portion" of the Condominium such that it could be withdrawn pursuant to Skybridge's right to "withdraw any portion of the Property from the Condominium" as stated in the Declaration. The trial court explained its reasoning as follows:

> {51} The Act does not define "portion" or provide significant guidance on what constitutes a separate "portion" for purposes of reserving a right to withdraw. The undisputed facts of the case at hand, however, make clear that the Phase II parcel was and remains a separate and independent "portion" from Phase I. The recorded plat referenced in the Declaration labels separate phases and contains a surveyed phase line separating the Phase I and Phase II parcels. As noted, the Phase II real estate has a tax parcel identification number separate from Phase I and remains in [Skybridge's] name.
>
> {52} This separate identity was clear at the time the Declaration was recorded and when each Unit Owner Defendant purchased his or her interest in the condominium. Unit Owner Defendants could not reasonably conclude otherwise. They were on notice when they purchased their units that the Phase II real estate was considered a separate portion. . . .

(Internal citations omitted.)

We agree with the trial court's analysis on this issue. The recorded plat for the Condominium showed a condominium complex comprised of two defined parts: Phase I (which had been built) and Phase II (which was "planned"). The plat also provided for the possibility of adding Phase III, which was not yet part of the Condominium. Thus, because Phase I and Phase II are the only discrete and clearly identifiable "portions" of the Condominium depicted on the plat, Skybridge's right to withdraw

"any portion" must be construed as the right to withdraw either Phase I or Phase II.

In a related argument, Defendants contend that Skybridge's reservation of the right to "withdraw any portion of the Property" amounted to a reservation of the right to withdraw *all* of the Condominium property. Based on this contention, they assert that Skybridge was precluded from withdrawing Phase II because it had already conveyed to purchasers units in Phase I. *See* N.C. Gen. Stat. § 47C-2-110(d)(1) ("If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, no part of the real estate may be withdrawn after a unit has been conveyed to a purchaser . . . .").

However, subsection (2) of N.C. Gen. Stat. § 47C-2-110(d) contemplates scenarios where — as here — a declarant reserves the right to withdraw less than all of the condominium property, stating that "[i]f a portion or portions are subject to withdrawal, no part of a portion may be withdrawn after a unit *in that portion* has been conveyed to a purchaser." N.C. Gen. Stat. § 47C-2-110(d)(2) (emphasis added). Thus, N.C. Gen. Stat. § 47C-2-110(d) recognizes the ability of a declarant to reserve a right of withdrawal as to *either* (1) all of the condominium's real estate; *or* (2) any portion of the condominium's real estate.

Here, the Declaration does not refer to *all* of the Condominium's property in describing the declarant's withdrawal rights. Instead, to the contrary, it describes the right to withdraw any "portion" of the Condominium property. While not defined in the Condominium Act, the term "portion" necessarily means something less than all of the condominium property in its entirety. *See American Heritage Dictionary* 966 (2nd college ed. 1985) (defining "portion" as "[a] section or quantity within a larger thing; a part of a whole"); *see also Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 722, 670 S.E.2d 629, 634 ("Where a statute does not define a term, we must rely on the common and ordinary meaning of the word[ ] used."), *disc. review denied*, 363 N.C. 374, 678 S.E.2d 665 (2009).

Thus, under the Act, Skybridge was prohibited from withdrawing the Phase I property because it had already conveyed units in Phase I but was *not* precluded from withdrawing the Phase II property because no units in Phase II had been conveyed. Indeed, no units in Phase II were ever even built. While admittedly an explicit reservation in the Declaration of the right to withdraw "any *phase*" (as opposed to "any *portion*") would have been clearer and more precise, Skybridge's express

reservation of the right to withdraw "any portion" provided a legally sufficient description of the real estate to which withdrawal rights applied. Defendants' argument on this issue is therefore overruled.

[2] While we have concluded that the identification and demarcation of the separate phases on the plat constituted "a legally sufficient description of the real estate" to which the withdrawal rights applied, N.C. Gen. Stat. § 47C-2-105(a)(8), we agree with Defendants that there are two specific statutory requirements concerning the right of withdrawal with which Skybridge did not comply. First, the plat map does not note Skybridge's reservation of a right to withdraw property as required by N.C. Gen. Stat. § 47C-2-109(b)(3). *See* N.C. Gen. Stat. § 47C-2-109(b)(3) (requiring the recorded plat to show "[t]he location and dimensions of any real estate subject to development rights, labeled to identify the rights applicable to each parcel"). Second, the Declaration does not conform with N.C. Gen. Stat. § 47C-2-105(8) by listing the time limit within which the right to withdraw must be exercised.

Pursuant to N.C. Gen. Stat. § 47C-1-104(c), however, the Condominium Act "excuses nonmaterial noncompliance with [its] requirements where the declarant has substantially complied with the statute." *In re Williamson Vill. Condos.*, 187 N.C. App. 553, 557, 653 S.E.2d 900, 902 (2007), *aff'd per curiam*, 362 N.C. 671, 669 S.E.2d 310 (2008); *see* N.C. Gen. Stat. § 47C-1-104(c) (2015) ("If a declarant, in good faith, has attempted to comply with the requirements of this chapter and has substantially complied with the chapter, nonmaterial errors or omissions shall not be actionable."). Thus, in order to show its entitlement to summary judgment on its claim seeking declaratory relief, Skybridge was required to show that (1) it in good faith attempted to comply with the Condominium Act; (2) it did, in fact, substantially comply with the requirements contained therein; and (3) its errors or omissions were nonmaterial. *See Williamson Vill. Condos.*, 187 N.C. App. at 557, 653 S.E.2d at 902. Here, Defendants do not affirmatively argue that Skybridge acted in bad faith. Rather, they challenge the trial court's determinations that (1) Skybridge substantially complied with the Condominium Act; and (2) Skybridge's omissions were nonmaterial.

Our Court applied N.C. Gen. Stat. § 47C-1-104(c) in *Williamson Village Condominiums*. We explained that substantial compliance with the Condominium Act means "compliance which substantially, essentially, in the main, or for the most part, satisfies the statute's requirements." *Id.* (citation, quotation marks, and brackets omitted). In that case, the issue was whether the declarant had sufficiently reserved development rights in a condominium despite its failure to include a

time limit on its right to further develop the property. *Id.* at 556-57, 653 S.E.2d at 901-02. In determining whether the declarant had substantially complied with the Condominium Act, we observed that "[t]he Act contains numerous requirements for condominium creation and operation" and that "[m]any of the Act's requirements, both in N.C.G.S. § 47C-2-105 and elsewhere, deal with the contents of a condominium declaration." *Id.* at 557, 653 S.E.2d at 902. We then compared the contents of the declaration at issue with the mandatory provisions of the Condominium Act along with a number of the nonmandatory sections. *Id.* at 557-58, 653 S.E.2d at 902-03. We concluded that the declaration "essentially, in the main, and for the most part, satisfie[d] the Act's requirements." *Id.* at 558, 653 S.E.2d at 903 (citation, quotation marks, and brackets omitted).

In the present case, the trial court relied on our analysis in *Williamson Village Condominiums* and engaged in a similar analysis, correctly stating the following:

> {63} The Declaration, "for the most part, satisfies the [Act's requirements]." *Id.* at 557, 653 S.E.2d at 902 (quoting *N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 532, 256 S.E.2d 388, 393 (1979)). The Declaration is a forty-six-page document that includes the following: (1) the name of the condominium complex and condominium association, in compliance with section 47C-2-105(a)(1) of the Act; (2) the name of the county in which the real estate is located, in compliance with section 47C-2-105(a)(2) of the Act; (3) an adequate description of the real estate within the condominium, in accordance with section 47C-2-105(a)(3) of the Act; (4) the number of existing and potential future units in the condominium, pursuant to section 47C-2-105(a)(4) of the Act; (5) the boundaries and identifying number of each unit, in compliance with section 47C-2-105(a)(5) of the Act; (6) a description of limited common elements and areas, as required under section 47C-2-105(a)(6) of the Act; (7) a description of reserved development and declarant rights, including an explanation of which fixed portions are subject to those rights, in accordance with section 47C-2-105(a)(8) of the Act; (8) allocations for interests in the common elements, liability for common expenses, and voting rights, as required under sections 47C-2-105(a)(11) and -107 of the Act; (9) restrictions on the use and occupancy of the units, pursuant to section 47C-2-105(a)(12) of the Act; (10) a recitation of easements

> and licenses affecting the condominium, in compliance with section 47C-2-105(a)(13) of the Act; and (11) plans and a plat for the condominium, as required under section 47C-2-109. *See In re Williamson Vill. Condos.*, 187 N.C. App. at 557-58, 653 S.E.2d at 902-03 (noting declaration at issue complied with each of these provisions).
>
> {64} The Declaration also includes the following nonmandatory information: (1) rules regarding unit additions, alterations, and improvements, pursuant to section 47C-2-111 of the Act; (2) rules for amending the Declaration and bylaws, as provided under sections 47C-2-117 and 3-106 of the Act; (3) procedures for terminating the condominium, as delineated in section 47C-2-118 of the Act; (4) provisions regarding the condominium association and executive board, in accordance with sections 47C-2-101, -102, and -103 of the Act; (5) provisions governing an initial period of declarant control over the condominium association, as contemplated in section 47C-3-103(d) of the Act; (6) terms regarding upkeep and damages, pursuant to section 47C-3-107 of the Act; (7) provisions regarding insurance, as provided under section 47C-3-113 of the Act; (8) provisions regarding assessments for common expenses, as contemplated in section 47C-3-115 of the Act; and (9) provisions for levying against units for unpaid assessments, in accordance with section 47C-3-116 of the Act. *See id.* at 558, 653 S.E.2d at 903 (noting the declaration at issue complied with each of these nonmandatory provisions).

Once again, we agree with the trial court's analysis. The Declaration here is comprehensive and demonstrates Skybridge's substantial compliance with the Condominium Act. However, we must still determine whether Skybridge's (1) failure to include on the plat its reservation of withdrawal rights; and (2) omission in the Declaration of the time limit for the exercise of these rights, were material.

The official comment to N.C. Gen. Stat. § 47C-2-109 sheds light on the underlying purpose of the requirement in subsection (b)(3) that the reserved development rights be described on the plat, stating that "[s]ince different portions of the real estate may be subject to differing development rights — for example, only a portion of the total real estate may be added as well as withdrawn from the project — the plat must identify the rights applicable to each portion of that real estate." *Id.* cmt. 5.

Here, the concern identified in the official comment as the rationale behind subsection (b)(3) is not implicated because both of the only two existing phases of the Condominium were subject to the same right of withdrawal at the time the Declaration was recorded. The only other development right reserved by Skybridge in the Declaration was to add property to the Condominium, including a possible Phase III. However, the fact that Phase III was not presently part of the Condominium was identified on the plat by the hard line of demarcation and the label "NEED NOT BE BUILT." Thus, because the same right of withdrawal applied to each of the two phases of the property that were actually part of the Condominium, we are unable to conclude that the failure to explicitly state this on the plat was a material omission.

We reach the same result regarding the omission from the Declaration of a time limit within which the right to withdraw could be exercised that this Court addressed in *Williamson Village Condominium*. In holding that the omission of a time limit on the declarant's reserved development right was not material in that case, this Court examined the evidence of record and concluded that there was "no evidence in the record that the timing of the construction of Building Two was a disputed issue at any time during the business relationship of Plaintiff and Defendants." *Williamson Vill. Condos.*, 187 N.C. App. at 558, 653 S.E.2d at 903.

Likewise, here — as the trial court noted — Defendants "purchased units in Skybridge Terrace without regard to the omission of the time limit in the Declaration[.]" The trial court properly based this conclusion on the fact that Defendants "failed to present or forecast evidence that any of the current unit owners disputed or were concerned with the lack of time limit on Declarant's right to withdraw any portion of the condominium."

[3] Finally, Defendants assert that they were misled by the language in the public offering statement providing that "[t]he Declarant has retained no option to withdraw withdrawable real estate from the Condominium." However, this argument fails to take into account the following additional language included in the public offering statement.

> This Public Offering Statement consists of seven (7) separate parts, which together constitute the complete Public Offering Statement. This first part, entitled "Narrative", summarizes the significant features of the Condominium and presents additional information of interest to prospective purchasers. The other seven (7) parts contain respectively: schematic

> drawings of the Condominium site plan and unit layouts, the form Purchase Agreement for the individual Units (the "Purchase Agreement"), *the current versions of the proposed Declaration for the Condominium*, the Bylaws for the Condominium, (attached as Exhibit B to the Declaration), the Articles of Incorporation for the Condominium Association, and the projected Budget for the first year of operation of the Condominium.
>
> This Narrative is intended to provide only an introduction to the Condominium and not a complete or detailed discussion. Consequently, the other parts of this Public Offering Statement should be reviewed in depth, and *if there should be any inconsistency between information in this part of the Public Offering Statement and information in the other parts*, *the other parts will govern*. . . .

(Emphasis added.)

Thus, Defendants were on notice from the plain wording of the public offering statement that in the case of any conflict between it and the Declaration, the Declaration would control.[3] Accordingly, we reject Defendants' argument on this issue.

Conclusion

For the reasons stated above, we affirm the trial court's 25 March 2015 order and judgment.

AFFIRMED.

Judges CALABRIA and TYSON concur.

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3. The Condominium Act expressly provides that false and misleading statements made in a public offering statement are actionable under N.C. Gen. Stat. § 47C-4-117 and that "any person or class of person adversely affected . . . has a claim for appropriate relief." N.C. Gen. Stat. § 47C-4-117 (2015). Therefore, while a potential remedy exists for misrepresentations contained in a public offering statement, Defendants have not asserted any claim against Skybridge alleging a violation of § 47C-4-117.

STATE OF NORTH CAROLINA
V.
ROGER CHRISTOPHER OXENDINE, DEFENDANT

No. COA15-508

Filed 5 April 2016

1. Drugs—possession of methamphetamine precursors—sufficiency of indictment—failure to allege intent or knowledge

An indictment for possession of methamphetamine precursors was insufficient because it failed to allege either defendant's intent to use the precursors to manufacture methamphetamine or his knowledge that they would be used to manufacture methamphetamine. Judgment on defendant's conviction of possession of a precursor chemical in violation of N.C.G.S. § 90-95(d1)(2)(b) was arrested.

2. Drugs—manufacturing methamphetamine—sufficiency of indictment—specific form not required—not void for uncertainty

An indictment for manufacturing methamphetamine was sufficient. The State was not required to allege the specific form that the manufacturing activity took. The allegations in the indictment regarding possession of precursor chemicals were mere surplusage and could be disregarded. The indictment properly alleged a violation of N.C.G.S. § 90-95(a)(1). Further, the indictment was not void for uncertainty.

3. Drugs—manufacturing methamphetamine—jury instruction—failure to show manifest injustice

The trial court did not err by instructing the jury on the manufacturing methamphetamine charge. Although the instruction could have been more precisely worded, a jury would understand from the instruction that it was required to find not only that defendant possessed these chemicals, but also that he possessed the chemicals in order to combine them to create methamphetamine. Even if the instruction was imprecise, defendant did not show that a failure to suspend the Appellate Rules would result in manifest injustice.

Judge DILLON concurs in part and dissents in part in a separate opinion.

Appeal by defendant from judgments entered 6 November 2014 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 21 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Mariana M. DeWeese, for the State.

John R. Mills for defendant-appellant.

GEER, Judge.

Defendant Roger Christopher Oxendine appeals from his convictions of manufacturing methamphetamine and possessing precursors to methamphetamine. On appeal, defendant contends that the indictment's language was insufficient because (1) with respect to the possession of methamphetamine precursors count, it failed to allege defendant's intent to use the precursors to manufacture or his knowledge that they would be used to manufacture methamphetamine; and (2) with respect to the manufacturing methamphetamine count, the indictment relied on defendant's possessing precursors as the basis for the manufacturing charge. We hold, as to the possession count, that the indictment was insufficient and therefore arrest judgment on that count for possessing a precursor chemical to methamphetamine. As to the count for manufacturing methamphetamine, however, we hold that the indictment was sufficient.

Facts

The State's evidence tended to show the following facts. On 15 March 2011, Lieutenant Mendel Miles of the Union County Sheriff's Office received information causing him to go to a residence in Stallings, North Carolina, along with Detectives James Godwin and Mark Thomas, both of the Union County Sheriff's Office. When Lieutenant Miles and the other officers arrived, they observed a detached garage about 75 feet from the main residence. The officers approached the building using the public driveway and heard two different male voices inside of the building. They also smelled a strong odor of ammonia.

Lieutenant Miles stepped around to an open door where he initially saw Tony Sowards standing behind a drill press. To the right side of the open door, he saw defendant, who appeared to be condensing ammonia. After Lieutenant Miles announced his presence and identified himself, defendant attempted to hide. Lieutenant Miles ordered both individuals

to exit the building, but defendant had to be told twice before he complied. Defendant and Mr. Sowards were then placed in handcuffs.

After securing the location, Lieutenant Miles put on protective gear and entered the garage to perform a safety assessment. In the garage, the investigating team found materials used to manufacture methamphetamine, including, among other things: Coleman fuel, an ammonia condenser, cold packs, lye, Roebic Crystal Drain Cleaner, Liquid Fire, tubing, lithium batteries, pseudoephedrine tablets, and muriatic acid. The team also found a liquid solution in containers in the garage that was analyzed and samples of the solution revealed the presence of methamphetamine, as well as chemicals consistent with a clandestine manufacture of methamphetamine.

On 3 October 2011, defendant was indicted, in a superseding indictment, for manufacturing methamphetamine and for possessing a precursor chemical to methamphetamine. Defendant was found guilty of both charges, and the trial court sentenced defendant to a term of 86 to 113 months for manufacturing methamphetamine and a concurrent term of 17 to 21 months for possession of a precursor to methamphetamine. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the indictment for possession of methamphetamine precursors was insufficient because it failed to allege either defendant's intent to use the precursors to manufacture methamphetamine or his knowledge that they would be used to manufacture methamphetamine. We agree.

Although defendant did not object at trial to the facial inadequacy of the precursor indictment, "[a] challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal." *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010). "[W]e review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009).

To be valid, " 'an indictment must allege every essential element of the criminal offense it purports to charge.' " *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011) (quoting *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958)). However, " '[o]ur courts have recognized that[,] while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.' " *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (quoting *In re S.R.S.*, 180 N.C. App.

151, 153, 636 S.E.2d 277, 280 (2006)). " 'The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.' " *State v. Simpson*, ___ N.C. App. ___, ___, 763 S.E.2d 1, 3 (2014) (quoting *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953)).

Here, defendant was charged with violating N.C. Gen. Stat. § 90-95(d1)(2) (2013),[1] which makes it unlawful for any person to "[p]ossess an immediate precursor chemical with intent to manufacture methamphetamine" or to "[p]ossess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine." The indictment in this case alleged that defendant "unlawfully, willfully and feloniously did possess lithium batteries, ammonia nitrate, malonic acid, pseudoephedrine blister packs, coleman fuel, roebic drain cleaner, liquid fire, cold pack, household lye and tubing used in the manufacture of methamphetamine."

Defendant contends that this indictment failed to allege, as required by N.C. Gen. Stat. § 90-95(d1)(2), that he had the required specific intent: that he either possessed the precursor with intent himself to manufacture methamphetamine or he possessed the precursor knowing or having reasonable cause to believe that it would be used by someone else to manufacture methamphetamine. In support of his argument that the indictment was insufficient because of this omission, defendant relies on *State v. Miller*, 231 N.C. 419, 420, 57 S.E.2d 392, 394 (1950), in which our Supreme Court held "[w]hen a specific intent is a constituent element of the crime, it must be alleged in the indictment. The omission of such allegation is fatal."

We agree with defendant that the indictment is insufficient to allege the necessary specific intent or knowledge. While the indictment alleges that the identified materials possessed by defendant are used in the manufacture of methamphetamine, the indictment fails to allege that defendant, when he possessed those materials, intended to use them, knew they would be used, or had reasonable cause to believe they would be used to manufacture methamphetamine. The indictment contains

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1. N.C. Gen. Stat. § 90-95(d1) was amended by 2014 N.C. Sess. Ch. 115, § 41(b) and 2015 N.C. Sess. Ch. 32, § 3. Because defendant committed the charged offenses on 15 March 2011, well before the effective dates of these respective amendments, we cite to the 2013 version of N.C. Gen. Stat. § 90-95(d1), which is the most current version of this subsection applicable to defendant.

nothing about defendant's intent or knowledge about how the materials would be used.

The State, in arguing that the indictment is adequate, relies upon *Harris*. In *Harris*, however, this Court was not required to address the question presented by this case: whether an element of the crime relating to defendant's specific intent or knowledge or belief of someone else's intent was omitted. Instead, the statute at issue in *Harris* required the State to prove generally that a defendant was "knowingly" on school premises. *Id.* at 596, 724 S.E.2d at 637. The Court observed that the term "willfully" implies that an act was done "knowingly." *Id.* at 595, 724 S.E.2d at 637. Consequently, the Court concluded, the indictment's allegation that defendant was "willfully" on school premises "sufficed to allege the requisite 'knowing' conduct." *Id.* at 596, 724 S.E.2d at 638.

In this case, however, simple "knowing" possession of the materials specified in the indictment does not violate the law. Therefore, the fact that this Court has equated an allegation of willfulness with knowledge does not lead to the conclusion that the indictment is valid. The allegation that defendant "willfully" possessed the materials does not allege that he did so for any particular purpose or with knowledge or reasonable cause to believe that the materials would be used for any particular purpose. Therefore, *Harris* is inapplicable.

The dissent also relies upon this Court's unpublished opinion in *State v. Ricks*, 232 N.C. App. 186, 754 S.E.2d 259, *disc. review denied*, 367 N.C. 785, 766 S.E.2d 645 (2014), in which the Court addressed the sufficiency of an indictment charging the defendant with possession of a stolen firearm, an offense requiring that the defendant know that the firearm was stolen. This Court held: "[T]he indictment alleged that defendant 'unlawfully, willfully, and feloniously' possessed the stolen rifle. This allegation of willfulness was sufficient under . . . *Harris* to allege the knowledge element of the offense of possession of a stolen firearm." In other words, since the offense required mere knowledge that the firearm was stolen, an allegation that the defendant " 'willfully' " possessed the stolen gun was sufficient.

For this case to be analogous to *Ricks*, the criminal offense would have to make possession of the products specified in the indictment unlawful if the defendant knew that they could be used in the manufacture of methamphetamine. However, that knowledge is not what makes possession of precursor chemicals illegal. Even though much of the public knows that pseudoephedrine is used in the manufacture of methamphetamine, that knowledge does not make it unlawful to go to

the drugstore and buy the product when a person has a cold. The statute makes it unlawful to possess the precursors if the individual intends to use them in the manufacture of methamphetamine or knows or has cause to believe that someone else will do so. The issue is the defendant's knowledge of how the precursors will be used. Just as an indictment for possession of cocaine with intent to sell or deliver must allege the specific intent regarding why the defendant possesses the cocaine, so too the indictment in this case must have alleged why defendant possessed the precursors: for manufacture of methamphetamine by himself or someone else.

Without an allegation that defendant possessed the required intent, knowledge, or cause to believe, the indictment fails to allege an essential element of the crime. Accordingly, we must arrest judgment on defendant's conviction of possession of a precursor chemical in violation of N.C. Gen. Stat. § 90-95(d1)(2)(b).

II

[2] Next, defendant argues that the indictment was insufficient to allege the offense of manufacturing methamphetamine. The indictment alleged that defendant:

> unlawfully, willfully and feloniously did knowingly manufacture methamphetamine, a controlled substance listed in Schedule II of the North Carolina Controlled Substances Act. The manufacturing consisted of possessing lithium batteries, ammonia nitrate, malonic acid, pseudoephedrine blister packs, coleman fuel, roebic drain cleaner, liquid fire, cold pack, household lye and tubing in a garage at 4701 Stevens Mill Road, Stallings, North Carolina.

Defendant contends that possession of materials that can be used to manufacture methamphetamine is not the same as manufacturing the substance itself. Further, defendant argues that this count of the indictment essentially just alleges another count of possession of precursor chemicals.

Under N.C. Gen. Stat. § 90-95(a)(1) (2015), "it is unlawful for any person [t]o manufacture . . . a controlled substance[.]" The first sentence of the indictment precisely tracks the language of the statute. An indictment is only required to allege the essential elements of the crime sought to be charged. *Billinger*, 213 N.C. App. at 255, 714 S.E.2d at 206. " 'Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.' " *State*

v. White, 202 N.C. App. 524, 529, 689 S.E.2d 595, 598 (2010) (quoting *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008), *aff'd per curiam*, 363 N.C. 251, 675 S.E.2d 333 (2009)). Consequently, "[t]he use of superfluous words should be disregarded." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972).

The essential elements of the offense of manufacturing methamphetamine do not include *what form* the manufacturing took, but rather simply that the defendant (1) manufactured (2) a controlled substance. N.C. Gen. Stat. § 90-95(a)(1). Indeed, in *State v. Miranda*, ___ N.C. App. ___, ___, 762 S.E.2d 349, 353-54 (2014), this Court specifically rejected any contention that the State is required to allege in the indictment the type of manufacturing activity in which the defendant engaged:

> Although Defendant contends in his brief that the indictment purporting to charge him with trafficking in cocaine by manufacturing was fatally defective based upon the fact that it failed to specify the exact manner in which he allegedly manufactured cocaine or a cocaine-related mixture, Defendant has failed to cite any authority establishing the existence of such a requirement, and we have not identified any such authority in the course of our own research. On the contrary, the relevant count of the indictment that had been returned against Defendant in this case is clearly couched in the statutory language and alleges that Defendant's conduct encompassed each of the elements of the offense in question. Although Defendant is correct in noting that the indictment does not explicitly delineate the manner in which he manufactured cocaine or a cocaine-related mixture, the relevant statutory language creates a single offense consisting of the manufacturing of a controlled substance rather than multiple offenses depending on the exact manufacturing activity in which Defendant allegedly engaged.

Id. at ___, 762 S.E.2d at 353-54.

Because the State was not required to allege the specific form that the manufacturing activity took, the allegations in the indictment regarding possession of precursor chemicals is mere surplusage and may be disregarded. The indictment, therefore, properly alleges a violation of N.C. Gen. Stat. § 90-95(a)(1).

Defendant, however, further argues that our courts have held indictments "void for uncertainty" when more than one offense is charged

within a single count. Defendant points to *State v. Williams*, 210 N.C. 159, 160, 185 S.E. 661, 662 (1936), in which the Supreme Court held that the fact the State charged several separate offenses in one count rendered the indictment void for uncertainty. In *Williams*, the bill of indictment charged that the defendant " 'unlawfully, willfully, and feloniously did possess, manufacture, have under his control, sell, prescribe, administer, *or* dispense a narcotic drug, to-wit: Cannibis[.]' " *Id.* at 159-60, 185 S.E. at 661.

Here, unlike the indictment in *Williams*, the indictment included two separate and distinct counts. Count I charged defendant with manufacturing methamphetamine in violation of N.C. Gen. Stat. § 90-95(a)(1), while Count II charged defendant with possession of a methamphetamine precursor in violation of N.C. Gen. Stat. § 90-95(d1)(2). We, therefore, hold that the indictment was not void for uncertainty.

III

[3] Finally, defendant argues that the trial court erred in instructing the jury on the manufacturing methamphetamine charge. According to defendant, the court instructed the jury on a non-existent crime. Defendant did not, however, object at trial to the jury instructions.

While, ordinarily, we could review the instructions under a plain error standard, *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996), defendant has specifically asserted that "Mr. Oxendine has not requested plain error review." Defendant further notes our Supreme Court's holding that a defendant waives plain error review when he does not specifically argue plain error. *See State v. Wiley*, 355 N.C. 592, 607, 565 S.E.2d 22, 35 (2002). We, therefore, do not review the jury instructions in this case for plain error.

Defendant asks instead that this Court suspend the Rules of Appellate Procedure under Rule 2 of those Rules, apply a de novo review to the question whether the trial court erred in its instructions, and then conclude that this error amounts to manifest injustice as required under Rule 2. However, the analysis under "plain error" review is not more rigorous than that required if we were to act under Rule 2.

Our Supreme Court has held:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire

> record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted). The first step under plain error review is, therefore, to determine whether any error occurred at all. However, in the second step, the defendant must show that any error was fundamental by establishing that the error had a probable effect on the verdict.

Our Supreme Court has held with respect to Rule 2: "While an appellate court has the discretion to alter or suspend its rules, exercise of this discretion should only be undertaken with a view toward the greater object of the rules. This Court has tended to invoke Rule 2 for the prevention of manifest injustice in circumstances in which substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (internal quotation marks omitted). In other words, rather than deciding whether an error had a probable impact on the verdict, we must determine whether suspending the Appellate Rules is necessary to prevent manifest injustice.

Here, the jury was given the following instruction related to the offense of manufacturing methamphetamine:

> For you to find the defendant guilty of this offense, the state must prove beyond a reasonable doubt that the defendant manufactured methamphetamine. Knowingly possessing lithium batteries, ammonia nitrate, malonic acid, pseudoephedrine blister packs, Coleman fuel, Roebic drain cleaner, liquid fire, cold packs, household lye and tubing *for the purpose of combining which created methamphetamine* would be manufacture of a controlled substance.

(Emphasis added.)

The trial court further instructed the jury:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with other persons, knowingly possessed lithium batteries, ammonia

> nitrate, malonic acid, pseudoephedrine blister packs, Coleman fuel, Roebic drain cleaner, liquid fire, cold packs, household lye and tubing *for the purpose of combining which created methamphetamine*, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt, it would be your duty to return a verdict of not guilty.

(Emphasis added.)

While defendant argues that the trial court was instructing the jury that it could find manufacturing based on possession of precursor chemicals alone, we do not agree. Although the instruction could have been more precisely worded, we believe a jury would understand from this instruction that it was required to find not only that defendant possessed these chemicals, but also that he possessed the chemicals in order to combine them, and, upon doing so, he created methamphetamine.

Even if the instruction is imprecise, defendant has not shown that a failure to suspend the Appellate Rules would result in manifest injustice. The evidence at trial established that officers caught defendant in the actual act of manufacturing methamphetamine and, following a search of the garage where defendant was found, officers discovered numerous precursor chemicals used in manufacturing methamphetamine and containers that held liquid, which tested positive for methamphetamine and chemicals consistent with the clandestine manufacture of methamphetamine. Further, defendant claimed to Detective Godwin that "it was not his cook" and that he was just "helping someone out." The evidence against defendant was overwhelming and we can see no manifest injustice warranting application of Rule 2.

Conclusion

We arrest judgment on Count II of the indictment, alleging a violation of N.C. Gen. Stat. § 90-95(d1)(2). We have found no error, however, with respect to Count I of the indictment, charging defendant with manufacturing a controlled substance in violation of N.C. Gen. Stat. § 90-95(a)(1).

NO ERROR IN PART; JUDGMENT ARRESTED IN PART.

Judges HUNTER, JR. concurs.

Judge DILLON concurring in part and dissenting in part.

DILLON, Judge, concurring in part, dissenting in part.

I concur with Sections II and III of the majority's opinion. However, because I believe the indictment for possession of methamphetamine precursors was sufficient, I respectfully dissent from the majority's conclusion reached in Section I of its opinion.

Defendant was found with precursors used in the manufacturing of methamphetamine. He was convicted under N.C. Gen. Stat. § 90-95(d1)(2), which makes it unlawful for any person to possess "an immediate precursor chemical *knowing, or having reasonable cause to believe, that . . . [it] will be used to manufacture methamphetamine*." N.C. Gen. Stat. § 90-95(d1)(2) (2011) (emphasis added). Defendant argues (and the majority agrees) that the indictment charging him with the crime was fatally defective because it failed to allege that Defendant possessed the precursors "*knowing that they would be used in the manufacture of methamphetamine*."

The indictment, here, alleged that Defendant "*unlawfully, willfully, and feloniously* did possess . . . [precursors] used in the manufacture of methamphetamine." (Emphasis added.) The "knowing/intent" element would have been more clearly alleged had the pleader employed the phrase "knowing that said precursors would be used" rather than merely employing the word "used." However, by including the word "willfully" in the allegation, I believe that – based on our case law – the indictment is sufficient to allege that Defendant *knew*, not only that he possessed precursors, but also that said precursors would be "used to manufacture methamphetamine."

Our Supreme Court explained in *State v. Falkner*, 182 N.C. 793, 108 S.E. 756 (1921), that the term *willfully* "implies that the act is done knowingly[.]" *Id.* at 758, 108 S.E. at 758. Our Court applied *Falkner* in *State v. Ricks*, 232 N.C. App. 186, 754 S.E.2d 259, 2014 WL 217724 (2014) (unpublished opinion), which involved a situation almost identical to the case at bar. In *Ricks*, the defendant was charged under a statute which required that the State prove that the defendant knew that the rifle was, in fact, stolen. *Id.* The indictment itself, however, merely alleged that the defendant "willfully" possessed a "rifle," and that the rifle "was stolen property." *Id.* *3. The defendant argued that the indictment was defective because it did not explicitly state that the defendant *knew* that the rifle he possessed was, in fact, stolen. *Id.* We rejected the defendant's argument, explaining:

> [O]ur courts have held that the term "willfully," in the criminal context, "implies that the act is done knowingly and of stubborn purpose." . . . Here, the indictment alleged that defendant "unlawfully, willfully, and feloniously" possessed the stolen rifle. This allegation of willfulness was sufficient . . . to allege the knowledge element of the offense of possession of a stolen firearm.

Id. *3-4 (internal citations omitted). I see no meaningful difference between Ricks and the present case. That is, by alleging that Defendant "willfully" possessed precursors "used in the manufacture of methamphetamine," the pleader sufficiently alleged that Defendant knew that the precursors would be used in the manufacture of methamphetamine. This is not to say that the State is relieved from its burden of *proving* at trial that Defendant had the requisite knowledge, but rather that the allegations in the indictment are sufficient. Being one of the concurring judges in Ricks, I vote to find no error in the present case.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 5 April 2016)

Case	County / Trial No.	Disposition
ADAMS v. LEWIS No. 15-205	Beaufort (12CVD849)	Affirmed in part; vacated and remanded in part
ARMSTRONG v. PENTZ No. 15-718	Alamance (09CVD2886)	Dismissed
BENNETT v. STOKES CNTY. No. 15-520	N.C. Industrial Commission (Y00921)	Affirmed
EAGLE v. EAGLE No. 15-668	New Hanover (14CVD1196)	Affirm
EHP LAND CO. v. BOSHER No. 15-881	Perquimans (07CVS59)	Affirmed
GRAPHIC ARTS MUT. INS. CO. v. N.C. ASS'N OF CNTY. COMM'R'S LIAB. No. 15-377	Onslow (12CVS4956)	Affirmed
HUFF v. N.C. DEPT. OF COM. No. 15-889	Davidson (14CVS3292)	Affirmed
IN RE A.E. No. 15-790	Randolph (14JA150)	Reversed and Remanded
IN RE A.L.M. No. 15-809	Rowan (12JT146-147)	Affirmed
IN RE BLACKMON No. 15-920	N.C. Industrial Commission (U00443)	Affirmed in part; dismissed in part
IN RE COLVARD No. 15-923	N.C. Industrial Commission (U00556)	Affirmed in part; dismissed in part
IN RE CULLIFER No. 15-426	Onslow (12SP237)	Affirmed
IN RE D.B. No. 15-1023	Davie (11JT31-32)	Affirmed

IN RE D.J.D. No. 15-930	Union (13JT96) (13JT97) (13JT98)	Affirmed
IN RE G.J.J. No. 15-932	Pamlico (13JA12) (13JA13) (13JA14)	Affirmed
IN RE J.L. No. 15-1096	Robeson (12JT397-400)	Dismissed in part; Vacated and remanded in part
IN RE LUCKS No. 15-581	Buncombe (14SP196)	Reversed and Remanded
IN RE M.A.N. No. 15-1040	Mecklenburg (14JA505)	Affirmed
IN RE M.B.B. No. 15-983	Wilkes (14JT130)	Affirmed
IN RE N.S.W. No. 15-1048	Guilford (15JA141)	Affirmed in Part and Reversed in Part
IN RE S.N. No. 15-975	Durham (11J351) (11J352)	Affirmed
IN RE S.R.M.F. No. 15-968	Henderson (12JT89)	Affirmed
IN RE W.P.B. No. 15-818	Watauga (14JT12-15)	Vacated and Remanded
IN RE WARE No. 15-909	N.C. Industrial Commission (U00178)	Affirmed in part; dismissed in part
IN RE ZIMMERMAN No. 15-937	N.C. Industrial Commission (U00540)	Affirmed in part; dismissed in part
KEE v. WAFFLE HOUSE, INC. No. 15-646	N.C. Industrial Commission (13-709822)	Affirmed in part, Reversed and Remanded in part

LEDFORD v. INGLES MKTS., INC. No. 15-522	N.C. Industrial Commission (X52597)	Affirmed
MEJIA v. BOWMAN No. 15-777	Guilford (14CVS5163)	Reversed
MILLS INT'L, INC. v. HOLMES No. 15-720	Johnston (12CVD867)	AFFIRMED IN PART; REVERSED AND REMANDED IN PART.
OLD REPUBLIC NAT'L TITLE INS. CO. v. HARTFORD FIRE INS. CO. No. 15-444	Durham (13CVS3368)	AFFIRMED IN PART; REVERSED AND REMANDED IN PART
PROSPERITY-HEALTH, LLC v. CAPITAL BANK, N.A. No. 15-976	Mecklenburg (14CVS12773)	Dismissed
ROBERTS v. THOMPSON No. 15-704	Durham (13CVS4811)	Dismissed
STATE v. BEAVER No. 15-1179	Lincoln (14CRS337-340)	No plain error
STATE v. COX No. 15-244	Mecklenburg (11CRS252710-13)	Vacated and Remanded
STATE v. DAVIS No. 15-507	Edgecombe (12CRS2461)	Vacated and Remanded
STATE v. DRUMMER No. 15-671	Johnston (13CRS2609) (13CRS55183)	No Error
STATE v. FRADY No. 15-950	Wayne (13CRS51471) (13CRS51549) (13CRS52632)	Dismissed in part; no error in part; harmless error in part; vacated in part and remanded for resentencing
STATE v. LEWIS No. 15-191	Jones (11CRS50038)	No Error
STATE v. McCULLOUGH No. 15-353	Mecklenburg (12CRS232615)	No Error
STATE v. MOORE No. 15-498	Surry (13CRS52049) (13CRS52051) (13CRS52310)	Affirmed; No Error

STATE v. THOMAS No. 15-799	Union (14CRS54149-50) (14CRS54802)	No error in part; vacated and remanded for new sentencing hearing
STATE v. THORNE No. 15-404	Pasquotank (11CRS76)	No Error
STATE v. WATERS No. 15-686	Cleveland (14CRS52434-35) (14CRS52437-39) (14CRS52443-44) (14CRS52446-47) (14CRS52449)	No Error
STATE v. WILSON No. 15-664	New Hanover (08CRS16625)	Reversed and Remanded
STATE v. WOODS No. 15-915	Pitt (14CRS2604) (14CRS3990) (14CRS53121)	No Error
STEVENS v. U.S. COLD STORAGE, INC. No. 15-310	N.C. Industrial Commission (661260)	Affirmed
THOMPSON v. NATIONSTAR MORTG. No. 15-981	Iredell (14CVS1866)	Affirmed
YAMMY'S SAUCES, INC. v. PACKO BOTTLING, INC. No. 15-898	Pitt (14CVS2950)	Affirmed

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