246 N.C. App.—No. 4 Pages 518-801

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 9, 2018

MAILING ADDRESS: The Judicial Department
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OF
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COURT OF APPEALS

CASES REPORTED

FILED 5 APRIL 2016

Div. of Med. Assistance v. Parker Home Care, LLC 551
Lasecki v. Lasecki 518
Malone v. Hutchinson-Malone 544
N.C. Dep't of Health & Human Servs. v. Parker Home Care, LLC 551
People for the Ethical Treatment of Animals, Inc. v. Myers 571
Piazza v. Kirkbride 576
SED Holdings, LLC v. 3 Star Props., LLC 632
State v. Bonetsky 640
State v. Garrett 651
State v. Hallum 658
State v. Johnson 671
State v. Johnson 677
State v. Kpaeyeh 694
State v. Moultry 702
State v. Stimson 708
State v. Stith 714
State v. Watkins 725
State v. Watts 737
Stokes v. Crumpton 757
U.S. Cold Storage, Inc. v. Town of Warsaw 781
Whicker v. Compass Grp. USA, Inc. 791

HEADNOTE INDEX

ACCOMPLICES AND ACCESSORIES

Accomplices and Accessories—acting in concert—jury instruction—The trial court erred by instructing the jury on acting in concert. There was a complete lack of evidence that anyone but defendant committed the acts necessary to constitute the crime of obtaining property by false pretenses. However, the evidence was not prejudicial. **State v. Hallum, 658.**

APPEAL AND ERROR

Appeal and Error—interlocutory order—forum selection clause and preliminary injunction—appealable—Although the denial of a motion to dismiss was an interlocutory order in a case arising from the sale of pooled non-performing mortgages, issues involving forum selection clauses may be immediately appealed lest a substantial right be lost. Furthermore, a preliminary injunction in the case, though normally interlocutory, could be appealed lest control of the assets be lost. **SED Holdings, LLC v. 3 Star Props., LLC, 632.**

Appeal and Error—mootness—Possum Drop—An appeal involving the issuance wildlife licenses for opossums used in a New Year's Eve celebration was dismissed as moot where a statute directly addressed the substance of the appeal. **People for the Ethical Treatment of Animals, Inc. v. Myers, 571.**

Appeal and Error—interlocutory order—post-award discovery—Where plaintiff appealed from an order denying his motions seeking post-award discovery in an action resolved by voluntary arbitration under the Family Law Arbitration Act, the Court of Appeals dismissed plaintiff's appeal because he failed to demonstrate that the interlocutory order deprived him of a substantial right that would be jeopardized without review prior to a final determination on the merits of his motion to vacate the arbitration award and set aside the trial court's order confirming the arbitration award. **Stokes v. Crumpton, 757.**

APPEAL AND ERROR—Continued

Appeal and Error—remand for de novo sentencing hearing—general remand—Where the Court of Appeals had issued a general remand of defendant's case to the trial court for a de novo sentencing hearing and the trial court on remand reinstated the sentence without conducting a de novo sentencing hearing, the Court of Appeals again vacated defendant's sentence and remanded the case for a de novo resentencing. **State v. Watkins, 725.**

ATTORNEY FEES

Attorney Fees—past-due alimony—specific performance—no abuse of discretion—The trial court did not abuse its discretion by ordering the specific performance of attorney fees in an action for past-due alimony. The award did not rely upon or require any imputation of income to plaintiff. **Lasecki v. Lasecki, 518.**

CHILD CUSTODY AND SUPPORT

Child Custody and Support—findings—when plaintiff stopped paying—effective date of order—A child support case was reversed and remanded for further findings where the Court of Appeals was unable to discern when plaintiff stopped paying child support or the effective date of the trial court's order. **Malone v. Hutchinson-Malone, 544.**

Child Custody and Support—imputed income—no finding of bad faith—A child support order based on plaintiff's earning capacity was vacated and remanded where it was based on imputed income without a finding of bad faith. The rule requiring bad faith for the imputation of income applies throughout the entire child support determination. **Lasecki v. Lasecki, 518.**

Child Custody and Support—past-due child support—imputed income—finding that income not suppressed—The trial court erred in an action for past-due alimony and child support by imputing income to plaintiff while finding that he did not voluntarily suppress his income. **Lasecki v. Lasecki, 518.**

Child Custody and Support—past-due support—past expenditures—reasonable expenses—In an action for past-due child support that was reversed on other grounds, the case was remanded for additional evidence and findings on the children's actual past expenditures and present reasonable expenses. **Lasecki v. Lasecki, 518.**

Child Custody and Support—support—duration—statutory minimum—An order terminating child support obligations was reversed and remanded for additional findings where the trial court did not consider N.C.G.S. § 50-13.4(c)(2), which establishes a minimum duration for child support payments. Furthermore, the trial court failed to consider its statutory discretion. **Malone v. Hutchinson-Malone, 544.**

CITIES AND TOWNS

Cities and Towns—declaratory judgment—termination of sanitary sewer services—outside corporate limits—voluntary annexation—The trial court did not err in a declaratory judgment action by allowing the Town of Warsaw to terminate sanitary sewer services to plaintiff USCS's facility located outside the corporate limits of the town provided that the Town was not unfairly discriminating between plaintiff and other non-residents similarly situated who currently received

sewerage service. Further, the Town of Warsaw had the legal right to condition continued service to USCS's facility on the voluntary annexation of the facility into the Town's corporate limits, again provided that the Town was not unfairly discriminating. **U.S. Cold Storage, Inc. v. Town of Warsaw, 781.**

CONSTITUTIONAL LAW

Constitutional Law—effective assistance of counsel—premature claim— Defendant's ineffective assistance of counsel claim was dismissed without prejudice. The claim was premature and further development of the facts would be required before application of the *Strickland* test. **State v. Stimson, 708.**

Constitutional Law—right to speedy trial—three year delay—failure to show prejudice—The trial court did not err by denying defendant's motion to dismiss the charges of statutory rape and indecent liberties with a child based on an alleged speedy trial violation caused by the more than three-year delay between defendant's indictment and trial. The delay was not caused by the neglect or willfulness of the prosecution, nor was the delay the result of willful misconduct by the prosecution. The evidence showed that the changes in defendant's representation caused much of the delay. Further, defendant failed to prove prejudice beyond that normally associated with incarceration. **State v. Kpaeyeh, 694.**

CONTEMPT

Contempt—child support—underlying ruling erroneous—The denial of a motion for contempt and attorney fees in a child support action was reversed and remanded where the ruling was predicated on an erroneous underlying ruling. **Malone v. Hutchinson-Malone, 544.**

DIVORCE

Divorce—alimony—past-due amount—money judgement—not beyond pleadings—The trial court did not err in a case involving past due alimony and child support payments by awarding the unpaid amounts as money judgments, as well as an unpaid amount owed on a joint credit card. Although plaintiff contended that defendant requested only specific performance in her pleadings, the court did not grant relief that was not suggested or illuminated by the pleadings or justified by the evidence. **Lasecki v. Lasecki, 518.**

DRUGS

Drugs—amended indictment—same controlled substance—The trial court did not err by granting the State's request to strike through the phrase "Schedule II of" from defendant's indictment for drug trafficking offenses. Further, this indictment was sufficient to allow the jury to convict defendant of possessing hydrocodone under Schedule III and trafficking in an opium derivative. The change to the indictment reflected that the controlled substance was below a certain weight and mixed with a non-narcotic, to lower the punishment from a Class H felony to a Class I felony. **State v. Stith, 714.**

Drugs—conspiracy to sell methamphetamine—motion to dismiss—sufficiency of evidence—implied understanding—The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to sell methamphetamine

based on alleged insufficient evidence. There was substantial evidence of an implied understanding among defendant and two others to sell methamphetamine to the informants. **State v. Garrett, 651**.

Drugs—possession of drug paraphernalia—motion to dismiss—constructive possession—The trial court did not err by denying defendant's motion to dismiss the charge of possession of drug paraphernalia. Although defendant did not have exclusive control over the interior of the car where the glass pipe was found, the State presented sufficient evidence of other incriminating circumstances to support a finding of constructive possession. Because defendant's convictions for possession with intent to sell or deliver methamphetamine and possession of drug paraphernalia were consolidated for judgment and commitment, 12 CRS 050697 was remanded for new sentencing. **State v. Garrett, 651.**

Drugs—possession with intent to sell or deliver methamphetamine—motion to dismiss—constructive possession—The trial court erred by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine because the State failed to present substantial evidence of constructive possession. Defendant's conviction for this charge was reversed. **State v. Garrett, 651.**

EVIDENCE

Evidence—alleged prior sexual assault—prejudicial—In a prosecution for first-degree rape and first-degree sexual abuse of a child, there was prejudicial error in the admission of testimony about an alleged prior sexual assault involving defendant where there were significant differences between the incidents. The testimony was relevant only to show defendant's character or propensity to commit a sexual assault. **State v. Watts, 737.**

Evidence—alleged prior sexual assault—requested limiting instruction—In a prosecution for first-degree rape and first-degree sexual abuse of a child remanded on other grounds where the trial court did not give a limiting instruction upon the admission of Rule 404(b) evidence, counsel was cautioned to clearly state all requests (to avoid appellate waiver) and not to take for granted the routine nature of Rule 404 evidence and its limiting instruction. **State v. Watts 737.**

Evidence—child sexual abuse expert—not a comment on credibility—In a prosecution for first-degree rape and first-degree sexual abuse of a child remanded on other grounds, there was no error, plain or otherwise, where the trial court admitted testimony from the State's expert on child sexual abuse that the victim's injuries were consistent with blunt force trauma but refused to make a more specific characterization of the injuries and acknowledged that they could have come from a number of sources. In context, it was clear that the expert was not commenting on the victim's credibility. **State v. Watts, 737.**

Evidence—cumulative prejudice—no prejudicial error or no error—Although defendant contended that the cumulative prejudice from the trial court's errors in admitting evidence required a new trial, this argument was dismissed since no prejudicial error or no error was found in the evidence presented. **State v. Moultry, 702.**

Evidence—lay opinion testimony—same information from another witness—Although defendant contended the trial court abused its discretion in a hit and run, second-degree murder, and possession of cocaine case by admitting lay

opinion testimony of a lieutenant that damage to the rear quarter panel of defendant's car was not caused by the collision with the Ford truck, defendant's argument was overruled. Another officer testified to the same information without objection. **State v. Moultry, 702.**

Evidence—officer testimony—hearsay—limiting instruction—corroboration—The trial court did not abuse its discretion in a hit and run, second-degree murder, and possession of cocaine case by allowing an officer to provide a composite description of the car that struck a truck after interviewing three witnesses. The testimony was not hearsay and the jury was provided a limiting instruction explaining that the officer's testimony was to be used only for the purpose of corroborating the testimony of those witnesses. **State v. Moultry 702.**

Evidence—photographs—illustrative purposes—relevancy—The trial court did not err in a hit and run, second-degree murder, and possession of cocaine case by admitting five photographs into evidence. The photographs were relevant as a visual aid to an officer's expert testimony regarding how an accident occurred. The trial court provided a limiting instruction that the photos were used for illustrative purposes and defendant did not show any unfair prejudice. **State v. Moultry, 702.**

FALSE PRETENSE

False Pretense—obtaining property by false pretense—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the obtaining property by false pretense charge. When viewed in the light most favorable to the State, there was a reasonable inference of deception and defendant's guilt. **State v. Hallum, 658.**

FIREARMS AND OTHER WEAPONS

Firearms and Other Weapons—possession by a felon—as-applied challenge—On appeal from defendant's conviction of possession of a firearm by a felon, the Court of Appeals rejected defendant's argument that the North Carolina Firearms Act violated the North Carolina Constitution as applied to him. Even though the trial court erred by finding that defendant's 1995 Texas conviction involved a threat of violence and by examining defendant's conduct only after his release from his 1995 conviction, defendant's challenge nonetheless failed as a matter of law. Defendant had three prior felony convictions that occurred seventeen, eighteen, and thirty-six years before the offense at issue; it was unclear whether violence was involved in the prior offenses; there was no evidence defendant had engaged in unlawful activity in the seventeen years since his last conviction; there was no time period during which defendant could have lawfully possessed a firearm in North Carolina; and defendant made no effort to determine whether he was permitted to possess a firearm in North Carolina. This close case fell between *Britt* and *Whitaker*, and the Court of Appeals deferred to the presumption in favor of constitutionality of acts of the General Assembly. **State v. Bonetsky, 640.**

INDECENT LIBERTIES

Indecent Liberties—motion to dismiss—sufficiency of evidence—purpose of arousing or gratifying sexual desire—The trial court did not err by failing to dismiss the charge of taking indecent liberties with a child at the close of all evidence. The trial court properly allowed the jury to make the determination of

INDECENT LIBERTIES—Continued

whether the evidence of defendant's repeated sexual assaults of a minor child were for the purpose of arousing or gratifying sexual desire. **State v. Kpaeyeh, 694.**

INJUNCTIONS

Injunctions—preliminary—freezing assets—not an abuse of discretion—The trial court did not err by granting plaintiff's preliminary injunction in an action arising from the sale of pooled non-performing mortgages where prohibiting defendants from moving the assets for the pendency of litigation maintained the status quo and protected the monetary and injunctive relief plaintiff sought. **SED Holdings, LLC v. 3 Star Props., LLC, 632.**

JURISDICTION

Jurisdiction—forum selection clause-not enforceable—The trial court did not abuse its discretion by denying defendant's motion to dismiss and refusing to enforce a Texas forum selection clause where the clause was not in line with Texas or North Carolina law and was alleged to be the product of fraud. **SED Holdings, LLC v. 3 Star Props., LLC, 632.**

MOTOR VEHICLES

Motor Vehicles—driving while impaired—motion to suppress—lack of reasonable articulable suspicion—The trial court erred in a driving while impaired case by denying defendant's motion to suppress based on the officer lacking reasonable, articulable suspicion to stop him. The officer had no more than a hunch or generalized suspicion that defendant violated N.C.G.S. § 20-141(a) or any other traffic law. **State v. Johnson, 671.**

PUBLIC ASSISTANCE

Public Assistance—Health and Human Services—Medicare payments—audit by private contractor—"Tentative Notice of Overpayment"—authority to render decision—Where a private contractor of the N.C. Department of Health and Human Services (DHHS) sent a "Tentative Notice of Overpayment" (TNO) to Parker Home Care, LLC (petitioner) setting out the results of an audit and stating that petitioner owed DHHS hundreds of thousands of dollars from overpayments, the TNO did not constitute notice of a final decision by DHHS, and therefore the time limit for appealing did not begin upon petitioner's receipt of the TNO. A private company does not have the authority to substitute for DHHS by reviewing its own audit, choosing the most appropriate response to the situation, rendering DHHS's tentative decision, or determining on behalf of DHHS that DHHS will conduct no additional review of the private company's "tentative" audit results if a provider does not request an "informal reconsideration review." The trial court therefore had subject matter jurisdiction. **N.C. Dep't of Health & Human Servs. v. Parker Home Care, LLC, 551.**

SATELLITE-BASED MONITORING

Satellite-Based Monitoring—statutory rape occurring prior to December 2006—not a reportable conviction—The trial court erred by finding that a violation of N.C.G.S. § 14-27.7A was a reportable conviction under N.C.G.S. § 14-208.6(4)

where the offense occurred prior to December 1, 2006. Because defendant's conviction for statutory rape, based upon acts committed in 2005, could not be considered a "reportable conviction" for the purposes of N.C.G.S. § 14-208.40A(a), defendant was not eligible for satellite-based monitoring for this offense. **State v. Kpaeyeh, 694.**

SEARCH AND SEIZURE

Search and Seizure—extension of traffic stop—totality of circumstances— On appeal from the trial court's order denying defendant's motion to suppress evidence obtained pursuant to an officer safety frisk conducted during an investigatory detention, the Court of Appeals concluded that the extension of the traffic stop was reasonable under the totality of the circumstances. The driver could not answer basic questions and changed his story, the driver could not explain why he did not have his registration, the officer found a car engine component in the passenger compartment, and defendant (the passenger) appeared to be extremely nervous. **State v. Johnson, 677.**

Search and Seizure—safety frisk—findings of fact—On appeal from the trial court's order denying defendant's motion to suppress evidence obtained pursuant to an officer safety frisk conducted during an investigatory detention, the Court of Appeals rejected defendant's argument that portions of the trial court's findings of fact were erroneous and unsupported by the evidence. The trial court was permitted to make a logical inference from the officer's testimony. Defendant's challenge to in-court findings was without merit because he did not challenge the related findings in the written order. **State v. Johnson, 677.**

Search and Seizure—safety frisk—rectangular bulge in shorts—On appeal from the trial court's order denying defendant's motion to suppress evidence obtained pursuant to an officer safety frisk conducted during an investigatory detention, the Court of Appeals concluded that the *Terry* frisk performed on defendant did not violate the Fourth Amendment. Defendant's nervousness, evasiveness, and failure to identify the rectangular bulge in his shorts, along with the size and nature of the object, gave the officer a specific articulable basis for suspecting that defendant might be armed. **State v. Johnson, 677.**

SECURITIES

Securities—North Carolina Securities Act—attorney fees—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals held that, given the trial court's proper rulings, the trial court did not abuse its discretion in awarding attorney fees and costs to plaintiffs. **Piazza v. Kirkbride, 576.**

Securities—North Carolina Securities Act—Director Safe Harbor—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that he was entitled to the protection of the Director Safe Harbor statute of the North Carolina Business Corporation Act as a defense to liability under the NCSA. The Director Safe Harbor provision did not supersede, narrow, or aggrandize the statutory reasonable care defense available to "any person" under N.C.G.S. § 78A-56(a)(2). **Piazza v. Kirkbride, 576.**

Securities—North Carolina Securities Act—misleading statement in connection with security offer or sale—no scienter requirement—negligence standard—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals held that—in light of NCSA's plain language, legislative history, and comparison to federal section 12(a)(2) claims—N.C.G.S. § 78A-56(a)(2) civil plaintiffs did not need to prove scienter. Further, a materially false or misleading statement or omission made in connection with a security offer or sale was actionable even if the person making the statement or omission did not know it was false, so long as the person was negligent under N.C.G.S. § 78A-56(a)(2) in making the statement or omission. **Piazza v. Kirkbride, 576.**

Securities—North Carolina Securities Act—multiple defendants—different verdicts—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that it was inconsistent for him to be held liable under the NCSA when his co-defendants were not held liable. There was no evidence that one of the co-defendants, Kirkbride, relayed misleading statements to plaintiffs. As for the other co-defendant, Rice, he rectified his misleading statements by emailing one of the plaintiffs to keep him abreast of the ongoing challenges and deadlines. Brannon, on the other hand, chose not to testify and presented no evidence suggesting that he remedied or clarified his misleading statements. In the deposition read to the jury, Brannon admitted that he gave faulty information to plaintiffs without any personal knowledge and without attempting to contact anyone with firsthand knowledge to clarify the business opportunity. **Piazza v. Kirkbride, 576.**

Securities—North Carolina Securities Act—offeror or seller—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that he was not an offeror or seller of securities under the NCSA. The plain language of N.C.G.S. § 78A-56(a)(2) imposed liability on "any person" who was a seller or offeror, not just brokers and other securities professionals. **Piazza v. Kirkbride, 576.**

SENTENCING

Sentencing—improper resentencing—jurisdiction—motion for appropriate relief—The trial court lacked jurisdiction to resentence defendant for obtaining property by false pretense. Defendant's motion for appropriate relief only retained the trial court's jurisdiction to act regarding defendant's conviction for possession of stolen goods in case number 14 CRS 128. **State v. Hallum, 658.**

TAXATION

Taxation—unauthorized substance tax—subpoena quashed—The trial court did not abuse its discretion in an Unauthorized Substance Tax action by quashing defendant's subpoena to a North Carolina Department of Revenue employee. The trial court properly considered the relevancy and materiality of the items called for, and the right of the subpoenaed person to withhold production. **State v. Stimson, 708.**

WORKERS' COMPENSATION

Workers' Compensation—denial of benefits—no employment relationship— The Industrial Commission did not err by concluding that plaintiff was not entitled to workers' compensation benefits from defendant Novant Health, Inc. (Novant). Plaintiff failed to show she was a joint or lent employee of defendant Crothall Services Group (Crothall) and Novant. No express or implied employment contract existed between Novant and plaintiff. Crothall and Novant did not engage in similar work. Further, plaintiff's work was not under the control of or supervised by Novant. **Whicker v. Compass Grp. USA, Inc., 791.**

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.

LASECKI v. LASECKI

[246 N.C. App. 518 (2016)]

KEVIN S. LASECKI, Plaintiff
v.
STACEY M. LASECKI, Defendant

No. COA15-253

Filed 5 April 2016

1. Divorce—alimony—past-due amount—money judgement—not beyond pleadings

The trial court did not err in a case involving past due alimony and child support payments by awarding the unpaid amounts as money judgments, as well as an unpaid amount owed on a joint credit card. Although plaintiff contended that defendant requested only specific performance in her pleadings, the court did not grant relief that was not suggested or illuminated by the pleadings or justified by the evidence.

2. Child Custody and Support—imputed income—no finding of bad faith

A child support order based on plaintiff's earning capacity was vacated and remanded where it was based on imputed income without a finding of bad faith. The rule requiring bad faith for the imputation of income applies throughout the entire child support determination.

3. Child Custody and Support—past-due support—past expenditures—reasonable expenses

In an action for past-due child support that was reversed on other grounds, the case was remanded for additional evidence and findings on the children's actual past expenditures and present reasonable expenses.

4. Child Custody and Support—past-due child support—imputed income—finding that income not suppressed

The trial court erred in an action for past-due alimony and child support by imputing income to plaintiff while finding that he did not voluntarily suppress his income.

5. Attorney Fees—past-due alimony—specific performance—no abuse of discretion

The trial court did not abuse its discretion by ordering the specific performance of attorney fees in an action for past-due alimony. The award did not rely upon or require any imputation of income to plaintiff.

Appeal by plaintiff from order entered on 28 August 2014 by Judge Edward L. Hedrick, IV in District Court, Iredell County. Heard in the Court of Appeals on 9 September 2015.

Homesley, Gaines & Dudley, LLP, by Edmund L. Gaines and Christina Clodfelter, for plaintiff-appellant.

Katherine Freeman, PLLC, by Katherine Freeman, for defendant-appellee.

STROUD, Judge.

Kevin S. Lasecki ("plaintiff") appeals from an order in which the trial court ordered specific performance of his prospective support obligations under a separation agreement, requiring that he pay $2,900.00 monthly in child support, $1,385.00 monthly in alimony, and $9,592.50 in attorneys' fees. The trial court also entered money judgments of $54,432.31 for child support and alimony arrearages and $16,623.45 for an unpaid joint credit card debt. Plaintiff argues that (1) the trial court erred in awarding the two money judgments; (2) the trial court erred in ordering specific performance of $2,900.00 monthly in child support; (3) competent evidence does not support the trial court's findings as to the children's reasonable needs; (4) the trial court erred in ordering specific performance of $1,385.00 monthly in alimony; and (5) the trial court erred in awarding $9,592.50 in attorneys' fees. We affirm in part, vacate in part, and remand.

I. Background

Plaintiff and Stacey M. Lasecki ("defendant") married in 1993, and three children were born to the marriage. On 24 August 2012, plaintiff and defendant separated and executed a Separation Agreement, which resolved issues of child custody, equitable distribution, child support, alimony, and attorneys' fees. In the Separation Agreement, the parties agreed that plaintiff would pay defendant $2,900.00 per month in child support and $3,600.00 per month in alimony. The parties also agreed that plaintiff would pay a joint credit card debt. The parties further agreed that in the event that either party breached the Separation Agreement, that party would be liable for the other party's attorneys' fees.

On 1 August 2013, plaintiff filed a complaint alleging that his income had significantly decreased since the Separation Agreement's execution and requested that the trial court issue an order setting his child support obligation pursuant to the North Carolina Child Support Guidelines. On

19 September 2013, defendant answered and counterclaimed for specific performance of plaintiff's child support and alimony obligations under the Separation Agreement. Defendant also sought specific performance of payment of child support and alimony arrearages, payment of the unpaid joint credit card debt, attorneys' fees, and "such other and further relief as to the court may seem just, fit and proper."

On 1 May 2014, plaintiff's employer terminated his employment. On 17 and 18 July 2014, while plaintiff was still unemployed and seeking a new job, the trial court held a hearing on the pending claims. On or about 21 July 2014, Frontline Products, LLC ("Frontline") offered plaintiff a job in Arizona, which plaintiff immediately accepted. On 23 July 2014, plaintiff moved to reopen the case to allow additional testimony regarding his new employment and income. On 14 August 2014, the trial court denied plaintiff's motion. On 28 August 2014, the trial court entered an order concluding that the $2,900.00 monthly child support amount set forth in the Separation Agreement was reasonable and that plaintiff was able to pay the full $2,900.00 monthly amount in child support and a reduced amount of $1,385.00 monthly in alimony. The trial court ordered as specific performance that plaintiff pay these monthly amounts as well as $9,592.50 for defendant's attorneys' fees and awarded money judgments of $54,432.31 for the child support and alimony arrearages and $16,623.45 for the unpaid joint credit card debt.

On 3 September 2014, plaintiff moved for a new trial arguing that the trial court should consider his new employment and income and that it erred in imputing to him an annual income of $150,000.00. On 10 September 2014, the trial court denied plaintiff's motion. On 23 September 2014, plaintiff gave timely notice of appeal from the trial court's 28 August 2014 order.

II. Child Support and Alimony Arrearages and Joint Credit Card Debt

[1] Plaintiff first argues that the trial court erred in granting defendant two money judgments in its order: (1) $54,432.31 in damages for the child support and alimony arrearages; and (2) $16,623.45 in damages for failure to pay the unpaid joint credit card debt pursuant to the Separation Agreement. Relying exclusively on *NCNB v. Carter*, plaintiff contends that the trial court erred in awarding these money judgments, because in her pleadings, defendant requested only specific performance of these unpaid amounts. *See NCNB v. Carter*, 71 N.C. App. 118, 121-23, 322 S.E.2d 180, 183-84 (1984). We distinguish *Carter*.

In *Carter*, the defendants appealed from the trial court's ruling denying their post-verdict motion for treble damages and attorneys' fees

pursuant to the Unfair and Deceptive Trade Practices Act. *Id.* at 121, 322 S.E.2d at 183; *see also* N.C. Gen. Stat. ch. 75 (2013). This Court affirmed the trial court's ruling:

> [T]he relief granted must be consistent with the claims pleaded and embraced within the issues determined at trial, which presumably the opposing party had the opportunity to challenge. Simply put, the scope of a lawsuit is measured by the allegations of the pleadings and the evidence before the court and not by what is demanded. Hence, relief under [North Carolina Rule of Civil Procedure] 54(c) is always proper when it does not operate to the substantial prejudice of the opposing party. Such relief should, therefore, be denied when the relief demanded was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial.
>
> In the present case, neither the pleadings nor the evidence adduced at trial suggested that the defendants were proceeding on an unfair and deceptive trade practice claim. Defendants tried their case without reference to or reliance upon G.S. 75-1.1 *et seq*. Similarly, [the plaintiff] defended its case solely as a defense to common law fraud, and it did not litigate or assert any defenses to an unfair and deceptive trade practice claim. To permit defendants to change legal theories after the trial and verdict would not only deprive [the plaintiff] of a jury determination on that claim, but would subject [the plaintiff] to liability on a claim which it had no opportunity to evaluate or defend. Unquestionably proof of fraud necessarily constitutes a violation of G.S. 75-1.1, and under ordinary circumstances defendants would be entitled automatically to treble the damages fixed by the jury. However, fundamental fairness and due process required that [the plaintiff] be illuminated as to the substantive theory under which defendants were proceeding and to the possibility of the extraordinary relief sought prior to defendant's post-verdict motion for treble damages.

Carter, 71 N.C. App. at 121-22, 322 S.E.2d at 183 (citations, quotation marks, and brackets omitted). The defendants did not request or raise the issue of treble damages until after the verdict. *See id.*, 322 S.E.2d at 183.

In contrast, here, defendant specifically requested in her counterclaims that plaintiff pay the child support and alimony arrearages and the unpaid amount owed on the joint credit card. Although plaintiff requested an order for specific performance, she also requested "such other and further relief as to the court may seem just, fit and proper." In addition, at the hearing, defendant's counsel cross-examined plaintiff specifically on the issues of the child support and alimony arrearages and the unpaid amount owed on the joint credit card. By awarding these unpaid amounts as money judgments, the trial court did not grant relief which "was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial." *See id.* at 122, 322 S.E.2d at 183; N.C. Gen. Stat. § 1A-1, Rule 54(c) (2013) ("Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."). Accordingly, we hold that the trial court did not err in awarding these unpaid amounts as money judgments.

III. Child Support

[2] Plaintiff argues that the trial court erred in ordering specific performance of the Separation Agreement's entire child support obligation. Plaintiff specifically contends that the trial court erroneously imputed income to plaintiff in determining the proper child support amount.

A. Standard of Review

In *Pataky v. Pataky*, this Court established the following test for determining the appropriate amount of child support where the parties have executed an unincorporated separation agreement:

> [I]n an initial determination of child support where the parties have executed an unincorporated separation agreement that includes provision for child support, the court should first apply a rebuttable presumption that the amount in the agreement is reasonable and, therefore, that application of the guidelines would be inappropriate. The court should determine the actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement. If the presumption of reasonableness is not rebutted, the court should enter an order in the separation agreement amount and make a finding that application of the guidelines would be inappropriate. If, however, the court determines by the greater weight of the evidence that the presumption of reasonableness afforded

> the separation agreement allowance has been rebutted, *taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of G.S. § 50-13.4(c)*, the court then looks to the presumptive guidelines established through operation of G.S. § 50-13.4(c1) and the court may nonetheless deviate if, upon motion of either party or by the court *sua sponte*, it determines application of the guidelines would not meet or would exceed the needs of the child or would be otherwise unjust or inappropriate.

Pataky v. Pataky, 160 N.C. App. 289, 305, 585 S.E.2d 404, 414-15 (2003) (emphasis added and quotation marks, footnote, and ellipsis omitted), *aff'd per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004). The first sentence of N.C. Gen. Stat. § 50-13.4(c) provides:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, *earnings*, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2013) (emphasis added).

In conducting this two-part analysis, the trial court must make findings of fact and conclusions of law. *Pataky*, 160 N.C. App. at 305-06, 585 S.E.2d at 415. "[F]indings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding. Conclusions of law are, however, entirely reviewable on appeal." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citation omitted).

B. Imputation of Income

The trial court may impute income to a party only upon finding that the party has "deliberately depressed his income or deliberately acted in disregard of his obligation to provide support":

> Generally, a party's ability to pay child support is determined by that party's actual income at the time the award is made. A party's capacity to earn may, however, be the basis for an award where the party deliberately depressed his income or deliberately acted in disregard of his obligation to provide support.

> Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities. Yet, this showing may be met by a sufficient degree of indifference to the needs of a parent's children.

McKyer v. McKyer, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) (citations and quotation marks omitted), *disc. review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007); *see also Pataky*, 160 N.C. App. at 306-08, 585 S.E.2d at 415-16 (holding that the trial court had erroneously imputed the income that the defendant had made at his last job absent evidence of bad faith); *Bowers v. Bowers*, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001). In addition, in order to award the remedy of specific performance, the trial court generally must find that that "such relief is feasible":

> As a general proposition, the equitable remedy of specific performance may not be ordered unless such relief is feasible; therefore courts may not order specific performance where it does not appear that defendant can perform. In the absence of a finding that the defendant is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the defendant has deliberately depressed his income or dissipated his resources.
>
> In finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's "present ability to comply" as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the defendant possesses some amount of cash, or asset readily converted to cash[,] prior to ordering specific performance.

Condellone v. Condellone, 129 N.C. App. 675, 682-83, 501 S.E.2d 690, 695-96 (citations, quotation marks, and brackets omitted), *disc. review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998).

In sum, where the parties have executed an unincorporated separation agreement, the trial court must examine whether the presumption of reasonableness afforded the separation agreement has been rebutted, "taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of

G.S. § 50-13.4(c)[.]" *Pataky*, 160 N.C. App. at 305, 585 S.E.2d at 415. If the trial court concludes that the parties have not rebutted this presumption, the trial court should then determine to what extent the supporting parent "is able to perform" under the agreement. *Condellone*, 129 N.C. App. at 682-83, 501 S.E.2d at 695-96. The trial court may then order specific performance and require the supporting parent to pay that amount. *See id.*, 501 S.E.2d at 695-96. But the trial court may not impute income to the supporting parent absent a finding that the supporting parent "deliberately depressed his income or deliberately acted in disregard of his obligation to provide support." *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836 (citation omitted); *see also Pataky*, 160 N.C. App. at 306-07, 585 S.E.2d at 415-16; *Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510.

The trial court based its conclusion of law that the $2,900.00 monthly amount set forth in the Separation Agreement was reasonable on numerous detailed findings of fact:

> 7. Plaintiff remarried approximately two weeks before the hearing and lives with his Wife. His Wife is employed at Granger Corporation.
>
> 8. The [plaintiff] and his current Wife live in a 4 bedroom, 2.5 bath home in Morrison Plantation. The home is rented for $1,650.00 per month and Plaintiff's Wife pays the entire rent. The home is currently occupied by Plaintiff, Plaintiff's Wife, and her two children in addition to his three children when they visit. He desires more time with his children, closer to fifty percent (50%). The three children attend public school and those schools are close to Plaintiff's home.
>
> 9. Since the date of separation the Plaintiff has never been in town enough to exercise his 15 nights per month, until his recent unemployment. When employed, he generally visited every other weekend. His attempt to name the children's schools at trial was inaccurate. He exercised a week of visitation in July and took the children to the beach for his wedding.
>
> 10. During the marriage and after the date of separation the Defendant has been the primary caretaker for the minor children. During the marriage Plaintiff travelled extensively, while Defendant generally stayed home with the children. Near the date of separation, Defendant held a part-time job of approximately 8 hours per week.

. . . .

13. At the time the parties entered into the Separation Agreement the Plaintiff travelled with his work 75% to 80% of the time. He was employed with Bath Solutions, Inc. and was employed with that company for approximately 4 years. Prior to that employment, Plaintiff was employed with another company in sales for approximately 19 years. That company was named Dial and later Henkle. Plaintiff's job was also in sales and at the end of his career with that company he was earning $150,000.00 per year.

14. Pursuant to the Separation Agreement paragraph 16(e) the Plaintiff received an IRA with Davidson Wealth Management in the amount of $185,000.00 and he has maintained that asset, although he has taken some distributions since the division of property. Even after the distributions, the account has a current balance of approximately $180,000.00. He received two boats pursuant to the Separation Agreement and has sold both of them. A few months after the date of separation he received net proceeds of $2,000.00 for one of them and recently received $13,600.00 for the other.

15. On May 13, 2013, the [plaintiff] lost his job with BSI due to soft sales and the companies' hiring of a family member. Within one week he found a job with Phoenix Sales and Distribution. Although his travel was cut significantly, Plaintiff continued to travel frequently with his employment. His annual income with this employment was $160,000.00. In August 2013 Plaintiff was offered a position in sales with Frontline with an annual salary of $255,000.00. Plaintiff asked Defendant and the children to move to Arizona but she declined. Because he did not wish to move away from his children, he declined the position. In January 2014 Plaintiff's salary was cut with Phoenix Sales to $80,000.00. Plaintiff was terminated from Phoenix Sales on May 1, 2014. He continued to cover the children on his health insurance through a COBRA plan at a cost of $580.00 per month. As of the date of trial, the Plaintiff learned that he could add his children to a policy at his Wife's employment for an additional $250.00 per month. Plaintiff has applied for unemployment [benefits] but has yet to receive benefits. The expected benefits would be

$350.00 per week. Plaintiff has looked for employment through friends in the industry. He has contacted his previous employer, Henkle/Dial. He has also contacted Frontline and is hopeful that he can secure a position with that company. This job prospect is favorable and he has again asked Defendant to move with the children to Arizona. Defendant does not intend to move to Arizona.

16. In 2013 the parties were offered an early pension distribution from Henkle also known as Dial, a former employer of the Plaintiff. This pension had been divided by a QDRO pursuant to paragraph 16(h) of the Separation Agreement. Plaintiff accepted the offer and received $46,636.99. Defendant did not accept the offer and retains her interest in the pension plan.

17. The Defendant and the minor children lived in the marital home until it was sold by short sale in July of 2013.

18. When Plaintiff was employed he was paid every two weeks. He did not comply with his obligations under the Separation Agreement. He did send to Defendant [one half] of his net pay 2 times per month. The two extra pay checks Plaintiff received per year he kept for himself.

. . . .

22. In 2013 the Plaintiff had the following deposit accounts:

Account	**Balance 1/1/13**	**Balance 11/12/13**
[Checking account]	$29,794.65	$13,567.96
IRA [account 1]	$198,693.13	$187,919.44
IRA [account 2]	$20,526.69	$23,296.16
Roth IRA [account]	$3,886.75	$4,262.35
Total	$252,901.22	$229,045.91

23. In Plaintiff's [checking account], he had an ending balance during the following months as outlined below:

Date	**Ending Balance**
9/30/13	$18,862.12
10/23/13	$15,165.52
11/20/13	$15,827.20

Date	Ending Balance
12/20/13	$12,889.85
1/23/14	$49,692.19
2/20/14	$35,864.01
3/21/14	$31,774.86

The funds creating these balances included wages and early retirement distributions.

24. Defendant is employed with Hawthorns Holding Group and Davidson Pizza Company. She serves as a manager for Davidson Pizza Company and completes tasks associated with accounts payable with Hawthorns Holding Group. She earns $12.00 [per hour] and works approximately 30 hours per week. She has had this employment since August 27, 2013.

25. Defendant has taken three distributions from the IRA that she was distributed under the Separation Agreement. In 2013 she took $12,000.00 to $15,000.00 and in . . . 2014 she has taken $9,600.00. Her original division under paragraph 16(e) [of the Separation Agreement] was approximately $162,000.00.

26. In 2011 Plaintiff's wages, salaries and tips were $286,505.00; in 2012 $264,446.00; in 2013 $182,288.00 (in addition the Plaintiff took IRA distributions in the sum of $28,821.00 and a pension distribution in the sum of $46,637.00).

27. Plaintiff's reasonable monthly expenses excluding his support obligations under the Separation Agreement living separate and apart from the Defendant can be found in the following table:

Expense	Amount	Comment
Rent	$825.00	[one half] current amount [because] shared with Wife who is employed
Health Insurance	$250.00	Incremental addition to Wife's plan
Food Expense	$200.00	Plaintiff's 6/12/14 Affidavit
Truck Lease	$615.00	
Car Insurance	$150.00	No boats remain
Cell Phone	$50.00	Plaintiff's 6/2/14 Affidavit

Expense	Amount	Comment
Uninsured Medical Expenses	$75.00	Plaintiff's 6/12/14 Affidavit
Direct TV	$75.00	
Electricity	$135.00	
Life Insurance	$230.00	
Gasoline	$300.00	Higher of Plaintiff's Affidavits
Clothing and Household Goods	$150.00	
Dog food/ maintenance	$50.00	Lower of Plaintiff's Affidavits
Internet Service	$50.00	Lower of Plaintiff's Affidavits
Water	$85.00	Higher of Plaintiff's Affidavits
Entertainment	$300.00	
Lawn Maintenance	$150.00	
TOTAL	$3,690.00	

28. The parties presented little evidence regarding the past expenses or current actual needs of the minor children. The Separation Agreement reveals that each of the parties had an automobile at the date of separation and the parties had two boats. They had college savings plans for the two older children. They lived in a home which suffered the risk of foreclosure. Plaintiff communicates with the oldest daughter electronically. Within the Separation Agreement the parties agreed that the appropriate sum to be paid by Plaintiff to Defendant was $2,900.00 per month. The children attend public school. The Court is able to estimate some of the reasonable needs of the minor children by comparing them to the reasonable needs of the Plaintiff. The reasonable needs of the minor children living primarily with the Defendant can be found in the following table:

Expense	Amount	Comment
Rent	$825.00	[one half] of total similar fixe[d] expense of Plaintiff
Health Insurance	$0.00	Provided by Plaintiff
Food Expense	$600.00	3 x Plaintiff, assumes each teenage child eats as much as Plaintiff

Expense	Amount	Comment
Truck Lease	$615.00	Assumes [one half] total fixed expense similar to Plaintiff plus a car for 17 [year] old child [one half] value of Plaintiff
Car Insurance	$225.00	Assumes [one half] total fixed expense similar to Plaintiff plus a car for 17 [year] old child [one half] value of Plaintiff
Cell Phone	$100.00	Each teenage (2) child with same cell phone as Plaintiff
Uninsured Medical Expenses	$225.00	3 x Plaintiff
Direct TV	$37.50	[one half] fixed expense of Plaintiff attributed to children
Electricity	$67.50	[one half] fixed expense of Plaintiff attributed to children
Gasoline	$450.00	Assumes [one half] total fixed expense similar to Plaintiff plus a car for 17 [year] old child
Clothing and Household Goods	$450.00	3 x Plaintiff
Dog food/ maintenance	$25.00	[one half] fixed expense of Plaintiff attributed to children
Internet Service	$25.00	[one half] fixed expense of Plaintiff attributed to children
Water	$42.50	[one half] fixed expense of Plaintiff attributed to children
Entertainment	$900.00	3 x Plaintiff
Lawn Maintenance	$75.00	[one half] fixed expense of Plaintiff attributed to children
TOTAL	$4,662.50	

29. The children have generally been covered by medical insurance throughout their lives by policies provided by Plaintiff's employer. The parties' estates can be found above. Each is now renting a home. Their primary assets appear to be retirement [accounts] divided pursuant to the Separation Agreement. Plaintiff has continued to contribute to retirement plans after the date of separation. The Plaintiff has enjoyed high earnings and the children enjoyed the benefit of his earnings throughout the marriage and most of the separation. His payments to Defendant under the Separation Agreement can be found above. The accustomed standard of living of the parties

> and the children were high prior to the separation of the parties and it has been comfortable since the separation. Defendant contributed as a homemaker during the marriage. *Plaintiff's lowest salary was $80,000.00 just prior to his recent termination. Defendant is currently earning as much as she has since the date of separation, $18,720.00. It would therefore be reasonable for Plaintiff to provide for not less than 81% of the needs of the minor children.*[1] Pursuant to the Separation Agreement the Plaintiff [must] pay the Defendant $2,900.00 per month. Eighty-one percent of the reasonable needs found above are over $3,776.62 per month. *Considering these factors,* [*t*]*he Court cannot find that the amount of support provided for in the parties' Agreement is unreasonable.*

(Emphasis added.) The trial court concluded that plaintiff had failed to rebut the *Pataky* presumption and thus ordered that he pay $2,900.00 per month in child support in accordance with the Separation Agreement, as described in the following conclusions of law:

> 3. The legal obligation of married parents to support a minor child may be [e]stablished through execution and acknowledgement of a written Separation Agreement. No Agreement between the parents can fully deprive the Courts of their authority to protect the best interests of minor children. Either party to an unincorporated Separation Agreement may seek a Court Order to establish child support pursuant to N.C.G.S. [§] 50-13.4 in an amount, scope or duration different from that provided in the unincorporated Agreement. When a valid, unincorporated Separation Agreement determines a parent's child support obligations, in a subsequent action for child support, the court must base the parent's prospective child support obligation on the amount of support provided under the Separation Agreement rather than the amount of support payable under the child support guidelines unless the Court [d]etermines, by the greater weight of the evidence, taking into account the child's needs and factors

1. Plaintiff argues that the "record is devoid of any evidence of as to how it would be reasonable for Plaintiff to provide for not less than 81% of the needs of the minor children with no income." Because we are vacating the portion of the order in which the trial court ordered plaintiff to pay $2,900.00 monthly in child support, as discussed below, we do not address this issue.

> enumerated in the first . . . sentence of N.C.G.S. [§] 50-13.4(c), that the amount of support under the Separation Agreement is unreasonable. *Taking into account the children's needs and factors enumerated in the first sentence of N.C.G.S. [§] 50-13.4(c)*[,] *the parties have failed to prove that the amount of support under the Separation Agreement is unreasonable and the Plaintiff should pay Defendant child support in the amount of $2,900.00 per month.*
>
> 4. *The Court is not finding that Plaintiff is voluntarily suppressing his income in a bad faith attempt to avoid his child support obligation. The Court is not imputing income to the Plaintiff. The Court is setting child support pursuant to* [*N.C. Gen. Stat. §*] *50-13.4(c) and pursuant to those factors which include the needs of the children, the estate and earnings of Plaintiff and the presumption created by the Separation Agreement.*

(Emphasis added.)

In Finding of Fact 30, the trial court next examined plaintiff's current ability to comply with his contractual obligations under the Separation Agreement in determining what amounts of child support and alimony to order as specific performance:

> Plaintiff was regularly employed during the marriage earning $150,000.00. At and after the date of separation he was earning significantly more. At times during his four years with BSI he earned well in excess of $200,000.00 per year. Within a week of his severance he found a job earning $160,000.00 per year. While holding that job he turned down an offer of $255,000.00 per year and has a good prospect with a job with that employer. It is feasible for Plaintiff to earn $150,000.00 and with those earnings to support Defendant and their children. *Based upon his experience, contacts in the industry and prior job performance*[,] *he has the ability to quickly find employment earning at least $150,000.00 per year.*[2] *Earning $150,000.00*

2. Plaintiff also argues that the "trial court's finding that 'it is feasible for Plaintiff to earn $150,000 and with those earnings to support Defendant and their children' and that Plaintiff 'has the ability to quickly find employment earning at least $150,000' is not supported by the evidence and cannot stand." Because we are vacating the portions of the order in which the trial court ordered plaintiff to pay $2,900.00 monthly in child support and $1,385.00 monthly in alimony, as discussed below, we do not address this issue.

> *annually is $12,500.00 per month.* The following table outlines the Plaintiff's current ability to comply with his contractual obligations under the Separation Agreement.

Item	**Amount**	**Comments**
Likely potential gross income	*$12,500.00*	
Federal Tax obligation	($2,878.71)	IRS Publication 15
Social Security and Medicare	($956.25)	.0765
North Carolina Income Tax	($688.75)	Publication NC-30
Plaintiff's reasonable expenses	($3,690.00)	See above
Plaintiff's child support obligation	($2,900.00)	As ordered herein
Total Remaining	$1,386.29	

(Emphasis added.)

In determining what amounts of child support and alimony to order as specific performance, as a practical matter, the trial court imputed $150,000.00 in annual income to plaintiff despite its statement that "[t]he Court is not imputing income to the Plaintiff." It is undisputed that as of the date of trial, plaintiff was unemployed and had no income. The trial court concluded that plaintiff was unable to "comply with an order requiring specific performance of a payment of all of the remaining damages suffered by Defendant due to Plaintiff's breach of the [Separation] Agreement." Accordingly, the trial court ordered as specific performance that plaintiff pay $2,900.00 per month in child support and $1,385.00 per month in alimony, or $1,386.29 rounded down, rather than the full $3,600.00 monthly alimony amount, as set forth in the Separation Agreement.

On 3 September 2014, plaintiff moved for a new trial on the following two grounds: (1) "Newly discovered evidence based upon the Plaintiff having received a job offer which he has accepted and which will involve his moving to Arizona"; and (2) "Insufficiency of evidence to justify the verdict and the verdict is contrary to law in that the evidence presented did not justify the Court basing its verdict upon finding that the Plaintiff had the present capacity to earn $150,000 per year." On 10 September 2014, the trial court denied plaintiff's motion, noting the following:

> Since the court found that the presumption established by the agreement of the parties was not rebutted[,] the court never considered the North Carolina Child Support Guidelines. *Since the court did not use the*

> *Child Support Guidelines to establish* [*plaintiff's*] *obligation to pay child support*[,] *the court did not improperly use plaintiff's earning capacity or imputed income to establish child support.* The court considered his earnings of 0, but also considered all of the other factors outlined in N.C.G.S. [§] 50-13.4(c) and the needs of the children at the time of the hearing and the parties' unincorporated agreement.

(Emphasis added.)

It appears that the trial court divided its child support analysis into two parts: (1) whether plaintiff rebutted the *Pataky* presumption; and (2) what amount of child support plaintiff was "able to perform[.]" *See Pataky*, 160 N.C. App. at 305, 585 S.E.2d at 414-15; *Condellone*, 129 N.C. App. at 682-83, 501 S.E.2d at 695-96. The trial court ostensibly declined to impute income to plaintiff during the first part of its analysis, yet it did impute an annual income of $150,000.00 to plaintiff during the second part of its analysis even though it found that plaintiff was not "voluntarily suppressing his income in a bad faith attempt to avoid his child support obligation."

But nothing in *McKyer*, *Pataky*, or *Bowers* suggests that the rule that the trial court cannot impute income absent a finding of bad faith is limited to a particular part of the trial court's child support determination. *See McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836 ("Before earning capacity may be used as the basis of [a child support] award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities."); *Pataky*, 160 N.C. App. at 306-07, 585 S.E.2d at 415-16; *Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510. Rather, we hold that this rule applies throughout the entire child support determination.

We find it especially instructive that this Court in *Pataky*, even after it had held that the trial court had erred in failing to apply a presumption of reasonableness to the parties' separation agreement, decided to address the issue of imputation of income and held that the trial court had erred in imputing income to the supporting parent absent evidence of bad faith. *See Pataky*, 160 N.C. App. at 306-08, 585 S.E.2d at 415-16. In its discussion, this Court did not suggest that this rule would be inapplicable should the trial court on remand determine that the separation agreement amount was reasonable. *See id.*, 585 S.E.2d at 415-16. Accordingly, we hold that the trial court erred in basing its child support award upon plaintiff's earning capacity when it had found that plaintiff

was *not* "voluntarily suppressing his income in a bad faith attempt to avoid his child support obligation." *See id.* at 306-07, 585 S.E.2d at 415-16; *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836; *Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510.

Defendant emphasizes that the trial court did not violate the rule in *Condellone* that "[i]n the absence of a finding that the [supporting parent] is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the [supporting parent] 'has deliberately depressed his income or dissipated his resources.' " *See Condellone*, 129 N.C. App. at 682, 501 S.E.2d at 695-96 (quoting *Cavenaugh v. Cavenaug*h, 317 N.C. 652, 658, 347 S.E.2d 19, 23 (1986)). Defendant argues that the trial court did not need to find that plaintiff had deliberately depressed his income or dissipated his resources, because it did not order him to pay more than it found that he had the ability to pay. Although we agree that the trial court did not violate this particular rule in *Condellone* for the reason defendant gives, we note that nothing in *Condellone* or *Cavenaugh* vitiates the related yet distinct rule that in determining child support, the trial court cannot impute income absent a finding of bad faith, as held in *McKyer*, *Pataky*, and *Bowers*. *Compare Condellone*, 129 N.C. App. at 682-83, 501 S.E.2d at 695-96, *and Cavenaugh*, 317 N.C. at 658, 347 S.E.2d at 23, *with McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836, *Pataky*, 160 N.C. App. at 306-07, 585 S.E.2d at 415-16, *and Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510. In fact, our Supreme Court in *Cavenaugh* cited to *Quick v. Quick* for the companion rule to the *McKyer* rule that in determining the proper amount of *alimony*, the trial court cannot impute income absent a finding of bad faith. *See Cavenaugh*, 317 N.C. at 657, 347 S.E.2d at 23 ("*Cf. Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982) (if supporting spouse deliberately depresses income or dissipates resources, then capacity to earn rather than actual income may be the basis for an alimony award)."). In *Quick*, our Supreme Court stated this rule more strongly:

> [T]here are no findings to indicate whether the trial court believed that defendant was deliberately depressing his income or whether he was indulging in excessive spending in disregard of his marital obligation to support his dependent spouse. *Absent those factors, our law requires that the ability of defendant to pay alimony is ordinarily determined by his income at the time the award is made.*

Quick, 305 N.C. at 456-57, 290 S.E.2d at 660 (emphasis added). Therefore, because the trial court based its child support award on plaintiff's

earning capacity, we vacate that portion of the trial court's order and remand the case to the trial court for further proceedings.

We also note that on or about 21 July 2014, only three days after the close of the 17 and 18 July 2014 hearing, Frontline extended an offer to plaintiff to work as a salesman in Arizona, and plaintiff immediately accepted. The salary in Frontline's offer was one percent of all of plaintiff's sales, with a yearly guaranteed draw of $110,000.00. The trial court had taken the case under advisement at the close of the hearing on 18 July 2014 and had not yet announced a ruling. On 23 July 2014, plaintiff moved to reopen the case to allow testimony regarding this new employment and income, and although the trial court had still not entered an order, on 14 August 2014, the trial court denied plaintiff's motion. On 28 August 2014, the trial court entered the order which is on appeal, and on 3 September 2014, plaintiff moved for a new trial, again seeking to present evidence of plaintiff's actual income in his new job; the trial court denied this motion as well. Although plaintiff did not appeal from the orders on the post-trial motions and has not challenged them on appeal, we cannot help but note that if the trial court had allowed the evidence of plaintiff's actual income in his new job to be presented and considered, most of the issues addressed by this appeal would have been eliminated and there would have been no need for remand on those issues. Plaintiff accepted the new job only days after the hearing and even before the trial court had announced its rulings, and with newly available income information, the order could have been based upon plaintiff's actual income. We would also imagine that plaintiff's move to Arizona to begin the new employment would affect his visitation schedule with the children and travel costs associated with visitation, which are additional factors the trial court may need to consider when addressing the child support issue.

Defendant argues that the fact that plaintiff got a new job with Frontline after the trial renders plaintiff's argument as to the trial court's imputation of income moot. *See Ass'n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assistance*, 214 N.C. App. 522, 525, 715 S.E.2d 285, 287-88 (2011) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.") (citation omitted). If plaintiff's new job with Frontline paid him an annual salary of $150,000.00, the amount imputed by the trial court, there may have been no practical reason for plaintiff to raise this argument on appeal, although it still may not really be legally moot. But we do not know exactly what plaintiff's new salary is since the amount is based on his sales, with a yearly guaranteed minimum

of $110,000.00; his actual income could be substantially more depending upon sales, or it could be up to $40,000.00 annually less than the $150,000.00 used by the trial court. In addition, there may be changes to visitation and travel expenses for visitation associated with plaintiff's move to Arizona. Accordingly, this issue did not become moot because plaintiff accepted the job with Frontline.

C. Evidence of Children's Reasonable Needs

[3] Plaintiff next argues that competent evidence does not support the trial court's findings as to the children's reasonable needs. Although we are vacating the portion of the trial court's order awarding $2,900.00 per month in child support because the trial court's determination was based upon imputation of income to plaintiff, we address this issue as it likely to arise on remand.

In determining whether the child support amount in a separation agreement is reasonable, the trial court "should determine the actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement." *Pataky*, 160 N.C. App. at 305, 585 S.E.2d at 414. "In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses." *Atwell v. Atwell*, 74 N.C. App. 231, 236, 328 S.E.2d 47, 50 (1985). In *Atwell*, this Court vacated a child support award because the trial court had failed to make a finding as to the actual past expenditures of the child and the evidence did not support its finding as to the present reasonable expenses of the child:

> The record is devoid of any finding relating to the actual past expenditures of the minor child. Although there is a finding ostensibly relating to the present reasonable expenses of the child, *i.e.*, that the wife's needs for "maintenance" of the child are "no less than $500.00 per month," this finding is not supported by the evidence. The wife's affidavit sets the child's individual monthly needs at $308.63. There is no other evidence regarding the child's individual financial needs. Perhaps the trial court was estimating what portion of the fixed household expenses was attributable to the child. However, as discussed, there is no evidence apportioning the expenses, and factual findings must be supported by evidence, and not based on speculation.

Id. at. 236-37, 328 S.E.2d at 50-51. Similarly, in *Loosvelt*, this Court held that the trial court erred when it partially based its determination of the children's reasonable needs upon the supporting parent's "shared family expenses":

> The trial court's order seems to "divide the father's wealth" by basing child support upon a number calculated by adding one-third of plaintiff's "shared family expenses" to the child's historical individual expenses. The order also finds that plaintiff resided in Los Angeles, California, but fails to make any findings of fact as to how plaintiff's expenses incurred in California, which apparently do not include any child-related expenditures, relate to the expenses of raising a child, even the child of a wealthy parent, in Charlotte, North Carolina.

Loosvelt v. Brown, ___ N.C. App. ___, ___, 760 S.E.2d 351, 362 (2014) (citation omitted).

Like in *Loosvelt*, in Finding of Fact 28, as quoted above, the trial court estimated the children's reasonable needs "by comparing them to the reasonable needs" of plaintiff and indicated in its table that it was basing its estimations of the children's expenses upon assumptions related to plaintiff's expenses, not upon any competent evidence as to the children. *See id.*, 760 S.E.2d at 362. Plaintiff argues that this "calculation of the present reasonable needs of the children based on [p]laintiff's expenses is speculation[,]" especially given the trial court's finding that the children live primarily with defendant, not plaintiff. We agree and direct the trial court on remand to "hear evidence and make findings of specific fact on the [children's] actual past expenditures and present reasonable expenses." *See Atwell*, 74 N.C. App. at 236, 328 S.E.2d at 50.

IV. Alimony

A. Standard of Review

[4] Plaintiff next argues that the trial court erred in ordering specific performance of $1,385.00 monthly in alimony because it erred in imputing income to him as part of its determination that it was feasible for him to pay this amount in alimony. "[F]indings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding. Conclusions of law are, however, entirely reviewable on appeal." *Scott*, 336 N.C. at 291, 442 S.E.2d at 497 (citation omitted). "The remedy [of specific performance] rests in the sound discretion of the trial court[] and is conclusive on

appeal absent a showing of a palpable abuse of discretion." *Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 295, 551 S.E.2d 207, 210 (2001) (citation omitted), *appeal dismissed and disc. review denied*, 356 N.C. 301, 570 S.E.2d 505-07 (2002).

B. Analysis

Like in the context of child support, as discussed above, when establishing an alimony obligation, the trial court may not impute income to the supporting spouse unless it finds that "the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse":

> Consideration must be given to the needs of the dependent spouse, but the estates and earnings of both spouses must be considered. It is a question of fairness and justice to all parties. *Unless the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse, the ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made.* If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income, may be the basis of the award.
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> . . . .
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> [T]here are no findings to indicate whether the trial court believed that defendant was deliberately depressing his income or whether he was indulging in excessive spending in disregard of his marital obligation to support his dependent spouse. *Absent those factors, our law requires that the ability of defendant to pay alimony is ordinarily determined by his income at the time the award is made.*

Quick, 305 N.C. at 453-57, 290 S.E.2d at 658-60 (emphasis added and citation and quotation marks omitted); *see also Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) ("To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith."). Additionally, as discussed above, "the equitable remedy of specific performance may not be ordered unless such relief is feasible; therefore courts may not order specific performance where it does not appear that

defendant can perform." *Condellone*, 129 N.C. App. at 682, 501 S.E.2d at 695 (citation and quotation marks omitted).

In Finding of Fact 30, as quoted above, the trial court imputed an annual income of $150,000.00 to plaintiff and concluded that plaintiff had the ability to pay $1,385.00 monthly in alimony in addition to his child support obligation. But the trial court found that plaintiff was *not* voluntarily suppressing his income. Absent a finding that plaintiff was "deliberately depressing his income" or "indulging in excessive spending in disregard of his marital obligation to support his dependent spouse[,]" "our law requires that the ability of [plaintiff] to pay alimony is ordinarily determined by his income at the time the award is made." *See Quick*, 305 N.C. at 456-57, 290 S.E.2d at 660; *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. Although the parties in *Quick* and *Kowalick* had not executed a separation agreement, those cases do not suggest that the court should treat the determination of ability to pay for purposes of specific performance of a separation agreement any differently. *See Quick*, 305 N.C. at 453-57, 290 S.E.2d at 658-60; *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. Accordingly, we hold that the trial court erred in imputing income to plaintiff in determining the proper amount of alimony and therefore vacate that portion of the order.

V. Attorneys' Fees

A. Standard of Review

[5] "[Q]uestions of contract interpretation are reviewed as a matter of law and the standard of review is *de novo*." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008). "The remedy [of specific performance] rests in the sound discretion of the trial court[] and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Harborgate Prop. Owners*, 145 N.C. App. at 295, 551 S.E.2d at 210 (citation omitted).

B. Analysis

Plaintiff argues that the trial court erred in ordering specific performance of $9,592.50 in attorneys' fees. Plaintiff does not challenge the trial court's conclusion of law that defendant was *entitled* to attorneys' fees under the Separation Agreement; rather, plaintiff contends that the trial court erroneously imputed income to him in determining that it was "feasible" for him to pay this amount. *See Condellone*, 129 N.C. App. at 682, 501 S.E.2d at 695 (citation omitted). Accordingly, we review this issue for an abuse of discretion. *See Harborgate Prop. Owners*, 145 N.C. App. at 295, 551 S.E.2d at 210.

"[T]he public policy of this State encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements." *Bromhal v. Stott*, 341 N.C. 702, 705, 462 S.E.2d 219, 221 (1995). We revisit this Court's discussion in *Condellone* of the prerequisites of ordering specific performance of a separation agreement:

> As a general proposition, the equitable remedy of specific performance may not be ordered unless such relief is feasible; therefore courts may not order specific performance where it does not appear that defendant can perform. In the absence of a finding that the defendant is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the defendant has deliberately depressed his income or dissipated his resources.
>
> In finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's "present ability to comply" as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the defendant possesses some amount of cash, or asset readily converted to cash[,] prior to ordering specific performance.

Condellone, 129 N.C. App. at 682-83, 501 S.E.2d at 695-96 (citations, quotation marks, and brackets omitted).

In the Separation Agreement, the parties agreed: "If either party breaches any of the provisions of this Agreement, then the breaching party shall be required to pay reasonable attorney fees for the party whose contractual rights hereunder were violated by said breach."

The trial court made the following findings of fact and conclusions of law on this issue:

> 31. Plaintiff has breached the Agreement. Defendant has incurred reasonable attorney fees in response to that breach. Pursuant to the Separation Agreement Defendant is entitled to recover these fees. Five attorneys have worked for the Defendant in this litigation. . . . In light of the rates charged in the area and the complexity of the work[,] the rates charged by the attorneys are reasonable. Some of the time was devoted to the divorce of the parties which was not necessitated by Plaintiff's breach.

> The following table contains the reasonable attorney fees incurred by Defendant related to Plaintiff's breach of the agreement.[3]
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> . . . .
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> 32. Plaintiff has retained significant assets in the form of retirement savings which will make it difficult for Defendant to collect a money judgment. He rents his dwelling and leases his vehicle. While failing to comply with the terms of the contract he has chosen to buy jewelry for others, undertake the obligations of a new marriage and take vacations. He has continued since the date of separation to contribute to retirement savings plans in the sum of $231.00 per month according to his June 2, 2014 affidavit while refusing to perform under the contract. Excluding Defendant's claims for attorney fees, she is obtaining significant money judgments against the plaintiff as a result of this Order, which may also inhibit her ability to collect upon another judgment. *In light of Plaintiff's maintenance of a large checking account balance[,] he has the ability to comply with an Order for the payment of Defendant's attorney fees.*

(Emphasis added.) Based on these findings of fact and conclusions of law, the trial court ordered the specific performance of $9,592.50 in attorneys' fees.

Plaintiff argues that no evidence supported the trial court's finding that he had the ability to pay the attorneys' fees amount since he was unemployed at the time of the hearing and the trial court's finding of fact as to his checking account balance history only covered September 2013 to March 2014, or a few months before the July 2014 hearing. But the trial court made numerous detailed findings of fact regarding plaintiff's financial situation and employment history and prospects, as quoted above, in addition to its finding that plaintiff maintained a significant checking account balance (ranging from $12,889.85 to $49,692.19). The award of attorneys' fees did not rely upon or require any imputation of income to plaintiff, as the trial court clearly considered the plaintiff's financial assets and checking account balances. Payment of the attorneys' fees

3. For the sake of brevity, we omit the trial court's table and note that in it, the trial court made many detailed findings of fact regarding defendant's reasonable attorneys' fees, which neither party challenges on appeal, and calculated a total amount of $9,592.50.

is also a one-time expense, unlike the child support and alimony payments which are ongoing prospective obligations. In addition, we note that the trial court need not make a specific finding of a party's present ability to comply, as that phrase is used in the civil contempt context. *See id.* at 683, 501 S.E.2d at 696 ("In finding that the [supporting spouse] is able to perform a separation agreement, the trial court is not required to make a specific finding of the [supporting spouse's] 'present ability to comply' as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the [supporting spouse] possesses some amount of cash, or asset readily converted to cash[,] prior to ordering specific performance.") (citations, quotation marks, and brackets omitted). But despite the fact that the trial court was not required to find that plaintiff had assets available to pay the attorneys' fees as in a civil contempt order, the trial court nonetheless did make findings that plaintiff had assets available to pay the attorneys' fees. Accordingly, we hold that the trial court did not abuse its discretion in ordering the specific performance of attorneys' fees.

VI. Conclusion

For the foregoing reasons, we affirm in part and vacate in part the trial court's order. We affirm the portions of the order in which the trial court awarded money judgments for the child support and alimony arrearages and unpaid joint credit card debt and ordered specific performance of defendant's attorney's fees. We vacate the portions of the order in which the trial court ordered specific performance of $2,900.00 monthly in child support and $1,385.00 monthly in alimony. We therefore remand the case to the trial court for further proceedings consistent with this opinion and direct that if either party requests to present additional evidence for the trial court's consideration on remand as may be needed to address the issues discussed in this opinion, the trial court shall allow presentation of evidence, although the trial court may in its discretion set reasonable limitations on the extent of new evidence presented.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges CALABRIA and INMAN concur.

MALONE v. HUTCHINSON-MALONE

[246 N.C. App. 544 (2016)]

PATRICK MALONE, Plaintiff
v.
LEIGH HUTCHINSON–MALONE, Defendant

No. COA14-1400

Filed 5 April 2016

1. Child Custody and Support—findings—when plaintiff stopped paying—effective date of order

A child support case was reversed and remanded for further findings where the Court of Appeals was unable to discern when plaintiff stopped paying child support or the effective date of the trial court's order.

2. Child Custody and Support—support—duration—statutory minimum

An order terminating child support obligations was reversed and remanded for additional findings where the trial court did not consider N.C.G.S. § 50-13.4(c)(2), which establishes a minimum duration for child support payments. Furthermore, the trial court failed to consider its statutory discretion.

3. Contempt—child support—underlying ruling erroneous

The denial of a motion for contempt and attorney fees in a child support action was reversed and remanded where the ruling was predicated on an erroneous underlying ruling.

Appeal by defendant from order entered 26 June 2014 by Judge Doretta L. Walker in District Court, Durham County. Heard in the Court of Appeals 21 May 2015.

No brief filed, for plaintiff–appellee.

Leigh A. Hutchinson–Malone, pro se, defendant–appellant.

STROUD, Judge.

Defendant appeals from an order terminating plaintiff's child support obligations and denying her motion for contempt and attorney's fees. Because the trial court terminated plaintiff's child support obligation based solely upon the terms of the parties' incorporated agreement, which was less generous than North Carolina General Statute § 50-13.4 as to the terminating events for the child support obligation, we must

reverse and remand to the trial court for entry of a new order based upon North Carolina General Statute § 50-13.4.

I. Background

The parties were married on 6 June 1993, separated on or about 15 November 1999, and divorced on 22 December 2006. One child, Doug,[1] was born to the parties during the course of their marriage on 15 July 1994. On 22 March 2013, plaintiff filed a motion seeking to terminate his obligation to pay child support, which was established by the parties' separation agreement as incorporated into their divorce judgment. The separation agreement acknowledged "that [Doug] has been diagnosed as having an autism spectrum disorder and is thus a child with special needs who requires particular care." The separation agreement then provided for specific child support payments

> until such time as . . . [Doug] becomes emancipated under North Carolina law or turns age eighteen, unless he is still a full-time secondary school student in which case it will continue until he is no longer a full-time secondary school student or turns age twenty, whichever first occurs.

In plaintiff's motion to terminate child support, plaintiff alleged that Doug was no longer in a home school program or in a secondary school, that Doug turned eighteen in July 2012, and that "the only way for [Doug] to obtain a North Carolina Diploma is there [sic] enrollment in a GED or Community College High School Program."

On 14 May 2013, defendant responded to plaintiff's motion to terminate child support alleging that, contrary to plaintiff's allegations, Doug was "still making progress towards a NC high school diploma, not a GED, and [wa]s expected to finish the requirements for his diploma by the summer of 2013." On 14 May 2013, defendant filed a motion for contempt and attorney's fees, in which she alleged that plaintiff failed to pay his child support obligations from February 2013 and that such failure was "willful[] and without legal justification or excuse."

On 26 June 2014, the trial court entered an order in which it made numerous findings of fact and concluded that Doug "did not attend school full time after December 2012." Based upon its findings and conclusions, the trial court granted plaintiff's motion to terminate his child support obligation and denied defendant's motion for contempt and attorney's fees. Defendant appeals.

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1. A pseudonym is used to protect the identity of the parties' son.

II. Motion to Terminate

[1] Defendant first contends that "the trial court erred in granting the plaintiff's motion to terminate[.]" (Original in all caps.)

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

Romulus v. Romulus, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (citations and quotation marks omitted).

We must first seek to determine the effective date of the termination of child support according the trial court's order. The order states simply "[t]hat the motion to terminate child support is granted" but fails to include the date of termination. Defendant's own brief concedes that plaintiff paid child support until late February of 2013, and plaintiff's motion requested termination effective 1 March 2013, but it is not clear from the order when exactly plaintiff stopped making child support payments and for what, if any, remaining months defendant contended plaintiff should be required to further pay child support.[2] The order does find that Doug "did not attend school full time after December 2012[,]" but also includes a finding that he "returned to being homeschooled by defendant on January 21st 2013 and received a high school diploma" on 30 August 2013. Reading the order in its entirety and in conjunction with the other evidence, it appears that the trial court determined support should terminate as of January of 2013, although again, even defendant contends plaintiff made payments after this date, though perhaps the February 2013 payment was a late payment for a prior month. Overall, we are unable to discern when plaintiff stopped paying child support or the effective date of the trial court's order.

> What the evidence does in fact show is a matter the trial court is to resolve, and its determination should be stated in appropriate and adequate findings of fact. . . .

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2. Even assuming it is uncontroverted that plaintiff ceased paying child support on 28 February 2013, as defendant claims, that does not clarify for which month the final payment was made because a payment made in February could be support for the month of February or could be, for example, a payment in February intended to support the child for the month of March.

> Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Farmers Bank, Pilot Mountain v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 352-53, 298 S.E.2d 357, 363 (1983). Therefore, we reverse and remand for further findings of fact on this issue. But in addition to this relatively minor detail, we would still have to reverse and remand due to a legal error in this case.

[2] North Carolina General Statute § 50-13.4(c) provides, in relevant part, that child support payments

> shall terminate when the child reaches the age of 18 except:
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> . . . .
>
> (2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

N.C. Gen. Stat. § 50-13.4(c)(2) (2013). Thus, as a general rule, North Carolina General Statute 50-13.4(c)(2) establishes the minimum duration of the child support obligation under North Carolina law. *See id.* A supporting parent may enter into an enforceable agreement to pay more than would be required under the child support guidelines or to pay for

a longer period of time than required by North Carolina General Statute § 50-13.4(c)(2), but if the contractual child support amount or duration is less than required by statute, the child support obligee may still recover child support up to the amount and duration required under the statute.[3] *See*, *e.g.*, *Smith v. Smith*, 121 N.C. App. 334, 340, 465 S.E.2d 52, 56 (1996) ("The law of this State establishes that a parent can assume contractual obligations to his child greater than the law otherwise imposes." (citation and quotation marks omitted)); *see generally Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (providing an overview for agreements between the parties and deviation from child support guidelines), *aff'd in part and review improvidently allowed in part per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004). Although the provisions of North Carolina General Statute § 50-13.4(c)(2) as to time for termination are similar to those of the agreement, they are not exactly the same. Plaintiff agreed to pay child support

> until such time as . . . [Doug] becomes emancipated under North Carolina law or turns age eighteen, unless he is still a full-time secondary school student in which case it will continue until he is no longer a full-time secondary school student or turns age twenty, whichever first occurs.

The trial court found "[t]hat the incorporated agreement between the parties is enforceable by this court and that the agreement goes beyond what the guidelines provide" because the agreement "was a deviation from the child support guidelines and took into account the child's special needs and the family's circumstances." The separation agreement does go "beyond what the guidelines provide" as to the monthly obligation amounts but as to duration of the obligation, the statute is actually more generous since it does not require "full-time" school attendance for continued payments, and thus the statute controls. *See* N.C. Gen. Stat. § 50-13.4(c)(2); *see also Smith*, 121 N.C. App. at 340, 465 S.E.2d at 56.

The trial court made detailed findings of fact regarding Doug's school attendance over many years and course work for 2012 and 2013, and plaintiff does not challenge most of these findings of fact. The trial court ultimately determined that the course work after December 2012

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3. We recognize that a child support order may deviate from the amount required by the child support guidelines and require payment of either more or less than the guideline amount, but any deviation must still be based upon appropriate factors and supported by findings of fact. N.C. Gen. Stat. § 50-13.4(c).

was not enough to qualify Doug as a "full-time" student as required by the separation agreement. But this requirement of "full-time" attendance is the relevant difference between the terms of the agreement and the statute, since North Carolina General Statute § 50-13.4(c)(2) does not require "full time" school attendance of school but instead that the student "attend school on a regular basis" and "make satisfactory academic progress towards graduation[.]" N.C. Gen. Stat. § 50-13.4(c)(2). In other words, pursuant to North Carolina General Statute § 50-13.4(c)(2), if a student attends school regularly, albeit not on a full-time basis, and continues to make satisfactory academic progress towards graduation, child support would continue, unless the trial court were to order "in its discretion . . . that payments cease at age 18 or prior to high school graduation." *See id.*

Here, the trial court appears to have based its determination to grant plaintiff's motion to terminate solely on the basis that Doug was not a "full-time" student, based upon the language of the separation agreement, without consideration of the language in North Carolina General Statute § 50-13.4(c)(2). The findings of fact establish that Doug was being homeschooled after December 2012 and that Doug "received a high school diploma" in August of 2013. Since Doug was still being homeschooled, and he actually received a diploma in August of 2013, it would seem that he was likely regularly attending school and making "satisfactory academic progress towards graduation" from January 2013 until August 2013.[4] If that is true, based upon the findings before us, plaintiff's child support obligation would end as of August 2013, when Doug received his diploma. Because the trial court failed to consider the proper statutory terminating events for the child support obligation -- "otherwise cease[ing] to attend school on a regular basis" or "fail[ure] to make satisfactory academic progress towards graduation," "whichever comes first" -- we must remand for the trial court to make additional findings of fact and the necessary conclusions of law. *Id.*

Yet North Carolina General Statute § 50-13.4(c)(2) has additional relevant provisions, since it also grants the trial court discretion to order that child support payments "cease at age 18 or prior to high school

4. We say that this *seems* to be true, because in addition to the findings of Doug's continued home-schooling and ultimate graduation, the trial court also expressed concerns about the legitimacy of defendant's home-schooling efforts. All of these findings are also in the context of education of a child with "autism spectrum disorder" who had non-traditional education for much of his life. We are unable to reconcile all of these findings, but the question presented in this appeal is not the quality of Doug's education or the validity of his high school diploma.

graduation." *Id.* Thus, in addition, to the statutorily-mandated terminating events discussed above, the trial court may consider whether in its discretion the child support should cease at age 18 but "prior to high school graduation" under the particular circumstances presented by this case; again, this is a discretionary determination vested in the trial court. *See id.* Because the trial court also failed to consider the statute which gave it discretion to terminate or continue the child support obligation at age 18, depending upon the trial court's ultimate determination based upon the statute on remand, it may be necessary for the trial court to also make the discretionary ruling on remand. *See generally id.* We reverse and remand for the trial court to consider plaintiff's statutory obligation to Doug pursuant to North Carolina General Statute § 50-13.4(c)(2). While the trial court may ultimately come to the same result, it must be supported by the requisite findings of fact based upon the applicable law.

III. Motion for Contempt and Attorney's Fees

[3] Defendant next contends that "the trial court erred in denying the defendant's motion for contempt and attorney's fees[.]" (Original in all caps.) Because the denial of plaintiff's motion for contempt and attorney's fees is predicated on the erroneous determination that plaintiff was no longer obligated to pay child support as of December 2012 because Doug was no longer a full-time student, we also reverse and remand this portion of the trial court's order. Again, depending upon the termination date of the child support obligation as determined on remand, the trial court could reach the same result or would need to make additional findings and conclusions regarding child support arrears owed, as appropriate.

IV. Conclusion

For the foregoing reasons, we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges McCULLOUGH and INMAN concur.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, PETITIONER
v.
PARKER HOME CARE, LLC, RESPONDENT
and
DIVISION OF MEDICAL ASSISTANCE, N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER
v.
PARKER HOME CARE, LLC, RESPONDENT

Nos. COA15-1026 and 15-1033

Filed 5 April 2016

Public Assistance—Health and Human Services—Medicare payments—audit by private contractor—"Tentative Notice of Overpayment"—authority to render decision

Where a private contractor of the N.C. Department of Health and Human Services (DHHS) sent a "Tentative Notice of Overpayment" (TNO) to Parker Home Care, LLC (petitioner) setting out the results of an audit and stating that petitioner owed DHHS hundreds of thousands of dollars from overpayments, the TNO did not constitute notice of a final decision by DHHS, and therefore the time limit for appealing did not begin upon petitioner's receipt of the TNO. A private company does not have the authority to substitute for DHHS by reviewing its own audit, choosing the most appropriate response to the situation, rendering DHHS's tentative decision, or determining on behalf of DHHS that DHHS will conduct no additional review of the private company's "tentative" audit results if a provider does not request an "informal reconsideration review." The trial court therefore had subject matter jurisdiction.

Appeal by petitioner from orders entered 23 March 2015 by Judge Theodore S. Royster in Stanly County Superior Court. Heard in the Court of Appeals 9 February 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Michael T. Wood, for the State in Case No. COA 15-1026.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State in Case No. COA 15-1033.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe and Varsha D. Gadani, for respondent-appellee.

ZACHARY, Judge.

The North Carolina Department of Health and Human Services (appellant, hereafter "DHHS"), appeals from orders denying its petitions for judicial review of orders entered by the North Carolina Office of Administrative Hearings (OAH). Upon careful review, we conclude that the trial court's orders should be affirmed.

Introduction

"Medicaid is a federal program that subsidizes the States' provision of medical services to . . . 'individuals, whose income and resources are insufficient to meet the costs of necessary medical services.' [42 U.S.C.A.] §1396-1." *Armstrong v. Exceptional Child Ctr., Inc.*, __ U.S. __, __, 135 S. Ct. 1378, 1382, 191 L. Ed. 2d 471, 476 (2015). "Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Id.* Pursuant to certain federal requirements, discussed in detail below, DHHS entered into a contract with Public Consulting Group (PCG), a private company, for the purpose of having PCG conduct post-payment audits of Medicaid claims payments to health care providers. Parker Home Care, LLC (Parker) is a provider of health care services, including services for which it receives reimbursement from Medicaid funding. In both of the cases on appeal, PCG conducted an audit of a small fraction of Parker's Medicaid claims, found what it determined to be Medicaid overpayments to Parker, and mathematically extrapolated the results of its audit to reach the "tentative" determination that Parker "owed" DHHS a much larger sum. In each case, PCG sent Parker a letter (hereafter a "TNO") with the heading "TENTATIVE NOTICE OF OVERPAYMENT," setting out the results of its audit and informing Parker of its right to appeal the tentative results of PCG's audit. Several months later, DHHS suspended Parker's Medicaid reimbursement payments on unrelated claims in order to satisfy Parker's "debt" to DHHS as calculated by PCG based on the results of PCG's audit. Parker then sought a reconsideration review of DHHS's decision to suspend payments. DHHS refused to grant Parker a reconsideration review, on the grounds that Parker had failed to note an appeal from the TNO sent by PCG within the time limits applicable to contested case hearings before the OAH. Parker petitioned for a contested case hearing with the OAH, which ruled in favor of Parker. DHHS sought judicial review in Stanley County Superior Court, which also ruled for Parker.

During this litigation, DHHS has relied exclusively upon its argument that the TNO issued by PCG constituted notice of an adverse

determination or final decision by DHHS and, as such, triggered the time limits for noting an appeal to the OAH. DHHS contends that, because Parker did not note an appeal from the TNO sent by PCG, neither the OAH nor the superior court had subject matter jurisdiction over Parker's appeal. As a result, the dispositive question before this Court is whether the TNO mailed by PCG to Parker was notice of a final decision by DHHS, such that the time limits for appealing from an adverse determination by DHHS started to run when Parker received the TNO. After careful review of the applicable state and federal laws, regulations, and relevant jurisprudence, we conclude that the TNO did not constitute notice of a final decision by DHHS, that the OAH and the trial court had jurisdiction, and that the trial court's orders should be affirmed.

I. Background

A. Appellate Case No. COA 15-1026

On 16 May 2012, Parker received a TNO from PCG, informing it that PCG had conducted a post-payment review of a small number of Parker's past Medicaid claims and determined that Parker had been overpaid by $3,724.08. PCG mathematically extrapolated this finding and arrived at a "tentative overpayment amount" of $391,797.00. Parker did not respond to the TNO. In January 2014, DHHS suspended payment of all Medicaid claims from Parker in order to satisfy Parker's "debt" of $391,797.00. DHHS refused to grant Parker's request for a reconsideration review of the agency's decision to withhold payments to Parker, on the grounds that Parker had failed to "appeal" from the TNO in a timely manner.

On 31 January 2014, Parker filed a petition for a contested case hearing with the OAH. On 7 February 2014, Administrative Law Judge ("ALJ") Melissa Owens Lassiter granted Parker's motion for a temporary restraining order barring DHHS from "withholding or recouping funds from [Parker's] Medicaid payments." On 19 February 2014, DHHS made an oral motion to dismiss Parker's petition for lack of subject matter jurisdiction, which was denied by ALJ Lassiter in an order entered 17 March 2014.

On 30 July 2014, a contested case hearing on this case and the companion case discussed below was conducted before ALJ J. Randolph Ward. At this hearing, DHHS presented no evidence on the substantive issue of Parker's alleged receipt of overpayments from Medicaid, but relied exclusively on its defense that the OAH lacked subject matter jurisdiction to hear the matter. On 7 October 2014, ALJ Ward issued a final decision denying DHHS's motion to dismiss and holding that "PCG did not have authority to act in place of the agency in the context of

statutorily required steps towards a decision from which the Petitioner would need to contest with an appeal to OAH." In his order, ALJ Ward granted Parker's motion for directed verdict, ruling that because DHHS had offered no evidence, Parker was entitled to judgment as a matter of law. ALJ Ward ordered that "[DHHS's] decision to withhold funds alleged to be due in the "Tentative Notice of Overpayment" dated May 4, 2012, prepared by [DHHS's] contractor Public Consulting Group, . . . must be REVERSED" and that "[DHHS] is permanently enjoined from withholding any of the referenced funds[.]" On 9 October 2014, the OAH issued an amended final decision adding information about exhibits introduced at the hearing. DHHS filed a petition for judicial review of the OAH's final decision on 5 November 2014.

On 9 March 2015, the trial court conducted a combined hearing on DHHS's petitions for judicial review of the OAH's final decision in this case and in the companion case, discussed below. DHHS again relied solely on its defense of lack of subject matter jurisdiction, and did not offer evidence on any substantive issue. On 23 March 2015, the trial court entered an order affirming the OAH's final decision. DHHS entered timely notice of appeal to this Court.

B. Appellate Case No. COA 15-1033

On 15 December 2011, Parker was sent a TNO from PCG, informing Parker that PCG had conducted a post-payment review of a small percentage of Parker's past Medicaid claims and had tentatively identified improperly paid claims in the amount of $7,908.24. PCG extrapolated this result and reached a tentative determination that Parker owed a total of $594,741.00 to DHHS. Parker did not respond to the TNO. In October 2012, DHHS began withholding payment of all Medicaid claims to Parker in order to satisfy Parker's $594,741.00 "debt" to DHHS. On 17 October 2012, DHHS denied Parker's request for a reconsideration review of the alleged overpayment. On 3 December 2012, Parker filed a petition for a contested case hearing before the OAH. DHHS moved to dismiss Parker's petition for a contested case hearing, on the grounds that the OAH lacked subject matter jurisdiction over the matter because Parker had failed to appeal from the TNO within the time limits for appealing an adverse determination by DHHS.

On 14 December 2012, ALJ Beecher R. Gray entered an order denying DHHS's motion to dismiss Parker's petition and enjoining DHHS from further withholding of Parker's Medicaid claims payments. On 24 January 2013, DHHS filed a petition in superior court for "writs of *certiorari*, prohibition, and mandamus" to stay the effect of ALJ Gray's order. On

27 February 2013, Judge Reuben F. Young entered an order denying DHHS's petition. A contested case hearing on this case and the companion case discussed above was conducted before ALJ Ward on 30 July 2014. DHHS did not offer evidence on the substantive issues, but relied only on its defense of lack of subject matter jurisdiction. On 6 October 2014, ALJ Ward issued a final decision denying DHHS's motion to dismiss Parker's petition for lack of subject matter jurisdiction, entering a directed verdict for Parker, and ordering that "[DHHS's] decision to withhold funds alleged to be due in the "Tentative Notice of Overpayment" dated December 15, 2011, prepared by [DHHS's] contractor Public Consulting Group . . . must be REVERSED" and that "Respondent is permanently enjoined from withholding any of the referenced funds[.]"

DHHS sought judicial review of the OAH's final decision, and a hearing was conducted before the trial court in this case and the companion case on 9 March 2015. On 23 March 2015, the trial court entered an order affirming the OAH's final decision. DHHS has appealed to this Court.

II. Consolidation of Cases

In each of the two cases before us, DHHS is the appellant and Parker is the appellee. In each case, (1) Parker took no immediate action in response to a TNO it received from PCG; (2) when Parker learned, many months later, that DHHS was withholding payment of Parker's Medicaid claims in reliance upon the results of PCG's audit, Parker sought review of the decision to withhold funds; (3) DHHS refused to review or reconsider its decision and, (4) DHHS relied on the defense that neither the OAH nor the trial court had subject matter jurisdiction because Parker had not appealed from the TNO letter within the time limits set by the Administrative Procedure Act (APA) for appeal to the OAH. Both cases present the same fundamental issue, which is whether the TNO constituted notice of a final decision by DHHS that triggered the time limits for appeal to the OAH. The resolution of each case requires analysis of the same state and federal statutes and regulations, and neither case requires the resolution of disputed issues of fact. In addition, the cases were consolidated before the ALJ who issued the final decision in both cases, and also before the trial court. During the hearing before the trial court, DHHS acknowledged that in both cases "the underlying legal argument for the Court is the same." Because "both appeals involve common questions of law" the Court has consolidated "these appeals for the purpose of rendering a single opinion on all issues properly before the Court." *Putman v. Alexander*, 194 N.C. App. 578, 580, 670 S.E.2d 610, 613 (2009).

III. Standard of Review

"For questions of subject matter jurisdiction, the standard of review is *de novo*[.]" *Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003) (citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.' " *Fields v. H&E Equipment Services, LLC*, __ N.C. App. __, __, 771 S.E.2d 791, 793-94 (2015) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)). Moreover, "[w]here a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990) (citing *Shore v. Brown*, 324 N.C. 427, 378 S.E.2d 778 (1989), and *Sanitary District v. Lenoir*, 249 N.C. 96, 99, 105 S.E.2d 411, 413 (1958)) (other citation omitted). Thus, " 'a trial court's ruling must be upheld if it is correct upon any theory of law[,] and . . . should not be set aside merely because the court gives a wrong or insufficient reason for [it].' " *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (quoting *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 63, 344 S.E.2d 68, 73 (1986), *disc. review improvidently allowed*, 319 N.C. 222, 353 S.E.2d 400 (1987)). In this case, we conclude that the ALJs and the trial court correctly ruled that each had subject matter jurisdiction over this matter. Accordingly, we uphold the trial court's orders affirming the orders of the ALJs without regard to the merits of the reasons cited in the trial court's orders or the interlocutory orders issued by the ALJs.

IV. Legal Principles

A. Federal Statutes and Regulations

Federal law establishes certain requirements to which a state's Medicaid program must adhere. "The federal and state governments share the cost of Medicaid, but each state government administers its own Medicaid plan. State Medicaid plans must, however, comply with applicable federal law and regulations. See 42 U.S.C. § 1396c; 42 C.F.R. § 430.0." *Shakhnes v. Berlin*, 689 F.3d 244, 247 (2nd Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 1808, 185 L. Ed. 2d 812 (2013). For the purposes of this appeal, the most significant of these requirements are the regulations that (1) require a state to designate a single state agency to administer its Medicaid program, (2) limit the circumstances in which that single state agency may delegate its responsibility for administration of the state's Medicaid program, and (3) direct the states to establish a system to ensure the integrity of the state's Medicaid program.

1. Single State Agency

42 U.S.C.A. § 1396a(a)(5) states in relevant part that a state Medicaid program "must . . . provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan[.]"

> At the heart of our inquiry is Congress' pronouncement that each state must "provide for the establishment or designation of a single State agency to administer or to supervise the administration" of its Medicaid program, 42 U.S.C. § 1396a(a)(5), a command we shall refer to as the 'single state agency requirement.' . . . [T]he single state agency requirement . . . ensures that final authority to make the many complex decisions governing a state's Medicaid program is vested in one (and only one) agency. The requirement thereby avoids the disarray that would result if multiple state or even local entities were free to render conflicting determinations about the rights and obligations of beneficiaries and providers.

K.C. v. Shipman, 716 F.3d 107, 112 (4th Cir. 2013). In addition, 42 C.F.R. 431.10(b)(1) specifies that a "State plan must" "(1) Specify a single State agency established or designated to administer or supervise the administration of the plan[.]"

2. Limits on Delegation of Authority

Implicit in the single state agency rule is the corollary requirement that only that agency may administer a state's Medicaid program. In this regard, 42 C.F.R. 431.10(e) specifically provides that "[t]he Medicaid agency may not delegate, to other than its own officials, the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters."

> [T]he single state agency requirement represents Congress's recognition that in managing Medicaid, states should enjoy both an administrative benefit (the ability to designate a single agency to make Final decisions in the interest of efficiency) but also a corresponding burden (an accountability regime in which <u>that agency cannot evade federal requirements by deferring to the actions of other entities</u>). . . . In this case, there is no dispute that North Carolina law designates the NCDHHS as the agency responsible for operating the state's Medicaid plan. N.C.

> Gen. Stat. § 108A-54. . . . Federal and state law thus interlock, establishing the following propositions: the NCDHHS is the "single State agency" with the final responsibility to administer the state's Medicaid program under 42 U.S.C. § 1396a(a)(5)[.] (emphasis added).

Shipman, 716 F.3d at 112-13 (citing *San Lazaro Ass'n v. Connell*, 286 F.3d 1088, 1100-01 (9th Cir.), *cert. denied*, 537 U.S. 878, 123 S. Ct. 78, 154 L. Ed. 2d 133 (2002)).

3. Medicaid Integrity Program

42 U.S.C.A. § 1396u-6 establishes the Medicaid Integrity Program and provides, as relevant to this appeal, that:

> (a) There is hereby established the Medicaid Integrity Program . . . under which the Secretary shall promote the integrity of the program . . . by entering into contracts in accordance with this section with eligible entities to carry out the activities described in subsection (b).
>
> (b) [The] Activities described in this subsection are as follows:
>
> (1) Review of the actions of individuals or entities furnishing items or services . . . to determine whether fraud, waste, or abuse has occurred[.] . . .
>
> (2) Audit of claims for payment for items or services furnished, or administrative services rendered, under a State plan under this subchapter[.]
>
> (3) Identification of overpayments to individuals or entities receiving Federal funds under this subchapter[.]
>
> (4) Education or training, . . . (emphasis added).

42 U.S.C.A. § 1396(a)(42)(B)(i) directs each state to "establish a program under which the State contracts . . . with 1 or more recovery audit contractors for the purpose of identifying underpayments and overpayments and recouping overpayments under the State plan[.]" 42 U.S.C.A. § 1396(a)(42)(B)(ii) requires that a state's Medicaid integrity program must "provide assurances satisfactory to the Secretary that--

> (I) under such contracts, payment shall be made to such a contractor only from amounts recovered;

> (II) from such amounts recovered, payment. . . shall be made on a contingent basis for collecting overpayments; and . . .
>
> (III) the State has an adequate process for entities to appeal any adverse determination made by such contractors; and
>
> (IV) such program is carried out in accordance with such requirements as the Secretary shall specify[.] . . .

Similarly, 42 C.F.R. § 455.200(a) "implements section 1936 of the Social Security Act that establishes the Medicaid Integrity Program, under which the Secretary will promote the integrity of the program by entering into contracts with eligible entities to carry out the activities under this subpart[.]" 42 C.F.R. § 455.232 provides that:

> The contract between CMS and a Medicaid integrity audit program contractor specifies the functions the contractor will perform. The contract <u>may include any or all of the following</u> functions:
>
> (a) <u>Review</u> of the actions of individuals or entities furnishing items or services . . . to determine whether fraud, waste, or abuse has occurred, [or] is likely to occur[.]
>
> (b) <u>Auditing of claims</u> for payment for items or services furnished, or administrative services rendered, under a State Plan . . . to ensure proper payments were made. . . .
>
> (c) <u>Identifying if overpayments have been made</u> to individuals or entities receiving Federal funds[.] . . .
>
> (d) <u>Educating</u> providers of service, managed care entities, beneficiaries, and other individuals with respect to payment integrity and quality of care. (emphasis added).

These regulations establish that, notwithstanding the general rule that the single state agency may not delegate its "authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters," DHHS is expressly authorized to contract with private companies for the purpose of identification and recoupment of overpayments to health care providers. Consistent with the requirement that the state agency not delegate its discretionary authority, the enumerated purposes for which DHHS may contract with a private company do not include the authority for a private contractor to make discretionary policy decisions or discretionary decisions in individual cases

on behalf of the state agency administering a state's Medicaid program. "The designated state agency may not delegate to any other agency the authority to exercise discretion in administering the program. See 42 C.F.R. 431.10(e). However, the single state agency may subcontract certain functions that do not involve a delegation of discretionary authority." *Azer v. Connell*, 306 F.3d 930, 933 (9th Cir. 2002). This limitation is particularly appropriate, given that federal regulations specify that a private contractor such as PCG should be paid on a contingent fee basis from the funds that are recouped from health care providers pursuant to the contractor's audits, clearly giving the private contractor a conflict of interest in the matter.

B. North Carolina State Statutes and Regulations

1. Introduction

The North Carolina Medicaid program was established by N.C. Gen. Stat. § 108A-54(a), which states that DHHS "is authorized to establish a Medicaid Program in accordance with Title XIX of the federal Social Security Act. The Department may adopt rules to implement the Program." In recognition of the requirement that state Medicaid programs must comply with federal Medicaid regulations, N.C. Gen. Stat. § 108A-56 provides in relevant part that "[a]ll of the provisions of the federal Social Security Act providing grants to the states for medical assistance are accepted and adopted, and the provisions of this Part shall be liberally construed in relation to such act so that the intent to comply with it shall be made effectual."

2. Appeal from Medicaid Decisions

Judicial review of the final decision of an administrative agency in a contested case is governed by N.C. Gen. Stat. § 150B–51 (2013), which "governs both trial and appellate court review of administrative agency 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). Under N.C. Gen. Stat. § 150B-23(a) (2013), a "contested case shall be commenced by . . . filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office." § 150B-23(f) provides in relevant part that:

> (f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. <u>The time limitation</u>, whether established by another statute, federal statute, or federal regulation, or this section, <u>shall</u>

> commence when notice is given of the agency decision to all persons aggrieved who are known to the agency[.] . . . The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. . . . (emphasis added).

The APA applies to appeals by a Medicaid provider. N.C. Gen. Stat. § 108C-12 states in pertinent part that:

> (a) General Rule. -- Notwithstanding any provision of State law or rules to the contrary, this section shall govern the process used by a Medicaid provider or applicant to appeal an adverse determination made by the Department.
>
> (b) Appeals. -- Except as provided by this section, a request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes. (emphasis added)

The term "adverse determination" is defined in N.C. Gen. Stat. § 108C-2, which provides in pertinent part that "[t]he following definitions apply in this Chapter:

> (1) Adverse determination. A final decision by the Department to deny, terminate, suspend, reduce, or recoup a Medicaid payment[.] . . .
>
> . . .
>
> (3) Department.--[DHHS], its legally authorized agents, contractors, or vendors who acting within the scope of their authorized activities, assess, authorize, manage, review, audit, monitor, or provide services pursuant to Title XIX or XXI of the Social Security Act, [or] the North Carolina State Plan of Medical Assistance[.] . . . (emphasis added).

Thus, the deadline for noting an appeal to the OAH begins when a health care provider receives written notice of a "final decision" by DHHS exercising its discretion to "deny, terminate, suspend, reduce, or recoup a Medicaid payment[.]"

3. North Carolina Medicaid Integrity Program

N.C. Gen. Stat. § 108C-5(b) provides in relevant part that "[i]n addition to the procedures for suspending payment set forth at 42 C.F.R.

§ 455.23 [pertaining to fraud, which is not alleged in the instant case], the Department may also suspend payment to any provider that (i) owes a final overpayment, assessment, or fine to the Department[.]" N.C. Gen. Stat. § 108C-5(b)(i) further states that "[p]rior to extrapolating the results of any audits, the Department shall demonstrate and inform the provider that (i) the provider failed to substantially comply with the requirements of State or federal law or regulation[.]"

The specific rules governing North Carolina's Medicaid integrity program are set out in the North Carolina Administrative Code (N.C.A.C.). 10 N.C.A.C. 22F.0101 states that "[t]his Subchapter shall provide methods and procedures to ensure the integrity of the Medicaid program." 10A N.C.A.C. 22F.0102 provides that DHHS "shall perform the duties required by this Subchapter" and that DHHS "may enter into contracts with other persons for the purpose of performing these duties." We note, however, that under 42 C.F.R. 431.10(e), DHHS may not "enter into contracts with other persons for the purpose" of delegating to its contractors The responsibility of DHHS for administration and supervision of North Carolina's Medicaid program, including its responsibility for rendering discretionary decisions that require the application of department policy to specific facts. N.C.A.C. regulations also provide in relevant part that:

> 2. 10A N.C.A.C. 22F.0103.
>
> (a) [DHHS] shall develop, implement and maintain methods and procedures for preventing, detecting, investigating, reviewing, hearing, referring, reporting, and disposing of cases involving fraud, abuse, error, overutilization or the use of medically unnecessary or medically inappropriate services.
>
> (b) The Division shall institute methods and procedures to:
>
> . . .
>
> (2) perform preliminary and full investigations to collect facts, data, and information;
>
> (3) analyze and evaluate data and information to establish facts and conclusions concerning provider and recipient practices;

(4) make administrative decisions affecting providers, including but not limited to suspension from the Medicaid program;

(5) recoup improperly paid claims;

. . .

(7) conduct administrative review or, when legally necessary, hearings[.] . . .

3. 10A N.C.A.C. 22F.0302.

(a) Abusive practices shall be investigated according to the provisions of Rule .0202 of this Subchapter.

(b) A Provider Summary Report shall be prepared by the investigative unit furnishing the full investigative findings of fact, conclusions, and recommendations.

(c) <u>The Division shall review the findings, conclusions, and recommendations and make a tentative decision</u> for disposition of the case from among the following administrative actions:

(1) To place provider on probation with terms and conditions for continued participation in the program.

(2) To recover in full any improper provider payments.

(3) To negotiate a financial settlement with the provider.

(4) To impose remedial measures to include a monitoring program of the provider's Medicaid practice terminating with a "follow-up" review to ensure corrective measures have been introduced.

(5) To issue a warning letter notifying the provider that he must not continue his aberrant practices or he will be subject to further division actions.

(6) To recommend suspension or termination.

(d) <u>The tentative decision shall be subject to the review procedures described in Section .0400 of this Subchapter</u>.

4. 10A N.C.A.C. 22F.0402.

> (a) Upon notification of a tentative decision the provider will be offered, in writing, by certified mail, the opportunity for a reconsideration of the tentative decision and the reasons therefor.
>
> (b) The provider will be instructed to submit to the Division in writing his request for a Reconsideration Review within fifteen working days from the date of receipt of the notice. Failure to request a Reconsideration Review in the specified time shall result in the implementation of the tentative decision as the Division's final decision.
>
> . . .
>
> (e) The Reconsideration Review decision will be sent to the provider in writing by certified mail within five working days following the date of review. It will state . . . that if the Reconsideration Review decision is not acceptable to the provider, he may request a contested case hearing in accordance with the provisions found at 10A NCAC 01. Pursuant to G.S. 150B-23(f), the provider shall have 60 days from receipt of the Reconsideration Review decision to request a contested case hearing. Unless the request is received within the time provided, the Reconsideration Review decision shall become the Division's final decision. . . . (emphasis added)

Thus, notwithstanding the assistance of private companies such as PCG, under the relevant N.C.A.C. regulations, DHHS retains the authority for supervision of the Medicaid integrity program and for making the discretionary decisions in particular cases. For example, 10A N.C.A.C. 22F.0103(b)(4) expressly states that DHHS will "make administrative decisions affecting providers[.]" 10A N.C.A.C. 22F.0302 provides that after a report is submitted to DHHS setting out the contractor's "investigative findings of fact, conclusions, and recommendations," it is DHHS that "shall review the findings, conclusions, and recommendations and make a tentative decision for disposition of the case from among" six administrative actions. Selection of the appropriate "administrative action" to take in response to a specific investigative report is clearly a discretionary decision requiring the application of policies developed by DHHS. Further, it is DHHS's "tentative decision" that is reviewed prior to DHHS making a final decision that is subject to review by the OAH.

We note that the "informal" reconsideration review of PCG's "tentative" audit results is not included in the N.C.A.C.'s regulations governing the Medicaid integrity program. This is apparently an additional level of review provided by DHHS. Upon review of the relevant provisions of the N.C.A.C., construed in the context of the federal regulations discussed above, we conclude that the N.C.A.C. regulations expressly provide for the following steps in an investigation into possible overpayments for Medicaid claims:

> 1. Under 10A N.C.A.C. 22F.0102, DHHS may enter into contracts with private companies such as PCG for the purpose of auditing the Medicaid claims of health care providers.
>
> 2. Under 10A N.C.A.C. 22F.0103(b), a private company such as PCG may "perform preliminary and full investigations to collect facts, data, and information" and "analyze and evaluate data and information." The private contractor will then prepare a summary report for DHHS.
>
> 3. Under 10A N.C.A.C. 22F.0302(c), after PCG submits its report, DHHS "shall review the findings, conclusions, and recommendations" and shall exercise its discretion to reach "a tentative decision for disposition of the case" from among six options.
>
> 4. Under 10A N.C.A.C. 22F.0402(a), a health care provider will be notified of the "tentative decision" reached by DHHS, after its review of the data gathered by PCG, and its exercise of discretion regarding the appropriate response.
>
> 5. The health care provider may request a reconsideration review of DHHS's "tentative decision" within fifteen days. Failure to do so will result in DHHS's implementing its tentative decision as its final agency decision.
>
> 6. Pursuant to N.C. Gen. Stat. § 150B-23(f), the time for appeal begins to run when DHHS notifies the health care provider of DHHS's "final decision" and of the provider's right to appeal from the agency's final decision to the OAH.

As discussed above, N.C. Gen. Stat. § 108C-2(3) defines DHHS to include "its legally authorized agents, contractors, or vendors who acting within the scope of their authorized activities, assess, authorize, manage, review, audit, monitor, or provide services[.]" We agree with DHHS's contention that "PCG's auditing activities are considered an agency action taken by [DHHS] because PCG acted within the scope

of its authorized activities" in conducting an audit of Parker's Medicaid claims payments. We conclude, however, based upon review of (1) the rule stated in 42 C.F.R. 431.10(e), prohibiting DHHS from delegating to a private company the administrative supervision of its Medicaid program, (2) the federal regulations setting out the permissible purposes for which a private contractor may be hired as part of a state's Medicaid integrity program, and (3) the relevant provisions of the North Carolina statutes and the N.C.A.C., that both federal and state regulations clearly contemplate that the role of a private company will be limited to the performance of duties that do not include rendering a discretionary decision as to the most appropriate course of action in a particular case. We therefore hold that a private company such as PCG does not have the authority to substitute for DHHS by reviewing its own audit, choosing the most appropriate response to a given factual situation, rendering DHHS's "tentative decision, or determining on behalf of DHHS that, unless a provider requests what DHHS admits is an "informal reconsideration review" that DHHS will conduct no additional review of PCG's "tentative" audit results. Simply put, these are decisions that require the exercise of discretion and the application of DHHS's policy priorities and, as such, cannot be delegated to a private contractor such as PCG.

In apparent recognition of this restriction, we note that DHHS did not argue at the trial level or on appeal that PCG was authorized to render a "final decision" on behalf of DHHS. As a result, a TNO does not constitute notice of an "adverse determination" unless it informs the recipient of a "final decision" by DHHS to "deny, terminate, suspend, reduce, or recoup a Medicaid payment."

V. Legal Analysis

A. The TNO

The TNOs were sent on PCG's letterhead, with the heading, in all caps and underlined, of "TENTATIVE NOTICE OF OVERPAYMENT." The TNO's are essentially the same, except for the specific overpayments that are alleged. The body of the letter delivered by PCG in COA No. 15-1026 states that:

> Dear PARKER HOME CARE, LLC:
>
> > [DHHS] and its authorized agents periodically conduct announced and unannounced audits and post-payment reviews of Medicaid paid claims in order to identify program abuse and overpayment(s) in accordance with 42 U.S.C. § 1396a, Parts 455 and 456 of Title 42 of

the Code of Federal Regulations, N.C.G.S. 2011-399 and 10A NCAC Subchapter 22F. Public Consulting Group, Inc. (PCG) is a post-payment claims review contractor for DMA.

A post-payment review of a statistically valid random sample of your Medicaid paid claims for dates of service from 6/1/2010 to 9/30/2010 was recently completed. The results of the post-payment review revealed that your agency failed to substantially comply with the requirements of State and federal law or regulation including but not limited to the following:

. . .

DMA has tentatively identified the total amount of improperly paid claims in the sample to be $3,724.08. In accordance with 10A NCAC 22F.0606 and N.C. Session Law 2011-399, N.C.G.S. 108C-5, DMA or its agents are authorized to use a random sampling technique to calculate and extrapolate the total overpayment whenever a Medicaid provider fails to substantially comply with the requirements of State and federal law or regulation. You may challenge the determination of substantial non-compliance during the appeal process described below. In the event that you do not challenge this determination or your challenge is not successful, PCG has utilized random sampling and extrapolation in order to determine that your agency received a total Medicaid overpayment in the amount of $391,797.00. . . .

<u>You may request a reconsideration review of this tentative decision in accordance with 10A NCAC 22F .0402. The request for reconsideration review must be submitted within fifteen (15) working (business) days of receipt of this letter.</u> . . . (emphasis added).

. . .

If you are not challenging the extrapolation of result as described in N.C.G.S. §108C-5(n) and you do not request a reconsideration review within fifteen (15) working (business) days of receipt of this letter or if you disagree with the reconsideration review decision, you may file a petition for a contested case hearing

> with the Office of Administrative Hearings (OAH) in accordance with G.S. § 156B-23(a). You have sixty (60) calendar days from either the date of this letter (if you do not request a reconsideration review) or the date of the reconsideration review decision to file a contested case petition with the OAH. . . .
>
> In accordance with 10A NCAC 22F .0402(e), unless a request is filed at the [OAH] within the time provided, the reconsideration review decision shall become the Department's final decision. (emphasis added)

B. Discussion

The issue in this appeal is whether the TNO constituted written notice of an "adverse determination" by DHHS, defined as a "final decision" by DHHS. We conclude that the TNO does not inform Parker of a decision reached by DHHS.

We initially note that the TNO's heading, "Tentative Notice of Overpayment," does not suggest that the TNO constitutes a final decision by DHHS. The TNO discusses PCG's audit of a small fraction of Parker's Medicaid claims payments, PCG's "tentative" determination that Parker was overpaid, and PCG's mathematical extrapolation of the results of its audit. The TNO does not contain any reference to a review by DHHS, or to a tentative decision by DHHS regarding PCG's audit. To the extent that the TNO thereby suggests that the results of its own "tentative" determination of overpayment will, without any review by DHHS, automatically become a "final decision" by DHHS unless Parker seeks an informal "reconsideration review" of PCG's tentative determination, PCG has misstated the applicable law and has purported to have the prerogative to act outside the scope of its authority. As discussed above, the N.C.A.C. provisions explicitly require that DHHS review PCG's investigative results, choose the appropriate administrative action, and make its own "tentative decision" that may be reviewed before DHHS renders a final decision.

We conclude that the relevant statutes and regulations do not support the conclusion that a private contractor's preliminary review of a small percentage of a provider's Medicaid claims payments is sufficient to establish, without any review or exercise of discretion by DHHS, that the provider owes DHHS a debt of hundreds of thousands of dollars. Although both the TNO and N.C.A.C. employ the word "tentative," the TNO informed Parker of the results of PCG's audit, and did not inform Parker of a "tentative decision" reached by DHHS based upon its review

of the audit results, and its exercise of discretion to select the most appropriate response. As a result, the TNO appears to conflate the "tentative" results of PCG's audit with the tentative decision that can only be made by DHHS.

Moreover, the TNO itself states that unless Parker requests a reconsideration review, which DHHS concedes on appeal to be an "informal" review, PCG's preliminary audit results will become DHHS's final decision. Leaving aside the fact that the TNO thereby posits that DHHS will adopt PCG's "tentative" audit results as its own final decision without performing any of its required duties under the N.C.A.C., the TNO explicitly states that the "final decision" will be reached in the future. When this occurs, after DHHS reviews the results of PCG's audit, DHHS would then be required to notify Parker of its final decision.

We conclude that the TNO did not inform Parker of any "final decision" by DHHS. Because the TNO did not constitute notice of an adverse determination or final decision by DHHS, it did not trigger the time limits for Parker to note an appeal to the OAH. In reaching this conclusion, we have considered, but have ultimately rejected, DHHS's arguments for a contrary result.

N.C. Gen. Stat. § 108C-5 was amended effective 1 July 2014 to add N.C. Gen. Stat. § 108C-5(t), which provides that "[n]othing in this Chapter shall be construed to prohibit the Department from utilizing a contractor to send notices to providers on behalf of the Department." The parties have offered arguments on the question of whether PCG was authorized, prior to the amendment of N.C. Gen. Stat. § 108C-5, to communicate to Parker a final decision by DHHS. We conclude that this issue is not pertinent to the present case, because the TNO does not inform Parker of a "final decision" rendered by DHHS.

DHHS also argues that in COA No. 15-1026 ALJ Lassiter erred by ruling in an interlocutory order that DHHS was required to send Parker two separate letters informing Parker of DHHS's final decision. We agree with DHHS that there is no statutory or regulatory requirement that after DHHS has rendered its final decision, DHHS must send two separate letters informing the health care provider of this fact. However, in the present case the TNO did not constitute notice of DHHS's final decision. Therefore, the "second letter" to which ALJ Lassiter refers would be the letter that constituted notice of DHHS's final decision.

The Medicaid program consists of a complex web of federal and state statutes and regulations that address a variety of policy issues in an extensive array of detailed procedural mandates. It would be

unnecessary and inappropriate for our opinion to address issues that are outside the boundaries of the specific issues raised by this appeal. Accordingly, we note several issues that, although they may bear some relationship to audits performed under the Medicaid integrity program, are not addressed in this opinion.

We note, for example, that N.C. Gen. Stat. § 108C-5(b)(i) provides that "[p]rior to extrapolating the results of any audits, the Department shall demonstrate and inform the provider" that the "provider failed to substantially comply with the requirements of State or federal law or regulation[.]" The TNO makes the conclusory assertion that Parker had "failed to substantially comply" with the relevant legal requirements, thus entitling PCG to extrapolate the results of its audit of a small fraction of Parker's Medicaid claims. Because it is not necessary to the resolution of the issues raised by the question of subject matter jurisdiction, we express no opinion on the extent to which the determination that a provider has "substantially" failed to comply with state or federal regulations is an exercise of discretion properly undertaken by DHHS, or on whether the results of PCG's preliminary audit are sufficient to demonstrate Parker's substantial failure to comply with the regulations governing Medicaid claims.

In addition, the instant case raises the issue of whether a TNO that informs a health care provider of a private contractor's "tentative" determination of an overpayment constitutes notice of a "final decision" by DHHS. Given that the TNO, by its plain language, provides notice of PCG's audit results prior to the required review by DHHS, we have no need to address, and express no opinion on, the issue of what evidence might be adequate to demonstrate that DHHS had performed its required functions. Finally, because we conclude that the trial court reached the correct result in its ruling that the superior court had subject matter jurisdiction over this matter, we do not address the parties' arguments on the application of the doctrines of *res judicata* or collateral estoppel to the present case.

For the reasons discussed above, we conclude that the trial court did not err in ruling that it had subject matter jurisdiction, and that the trial court's orders should be

AFFIRMED.

Judge BRYANT and Judge DILLON concur.

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., JACOB MATTHEW NORRIS, AND JULIE COVELESKI, PLAINTIFFS/PETITIONERS

v.

GORDON S. MYERS, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION IN HIS OFFICIAL CAPACITY, DEFENDANT/RESPONDENT

No. COA15-366

Filed 5 April 2016

Appeal and Error—mootness—Possum Drop

An appeal involving the issuance wildlife licenses for opossums used in a New Year's Eve celebration was dismissed as moot where a statute directly addressed the substance of the appeal.

Appeal by defendant/respondent from order entered 10 December 2014 by Judge G. Bryan Collins in Superior Court, Wake County. Heard in the Court of Appeals 21 October 2015.

Ellis & Winters LLP, by Jonathan D. Sasser and Kelly Margolis Dagger and Gerber Animal Law Center, by Calley Gerber, for plaintiffs/petitioners-appellees.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Susannah P. Holloway and Tamara S. Zmuda, for defendant/respondent-appellant.

STROUD, Judge.

The Lorax speaks for the trees,[1] but the question presented by this case is whether anyone may speak for the opossums, particularly those Virginia opossums[2] ("opossum(s)") found in Clay County, North Carolina, during late December through early January each year, who may end up in captivity as the main attraction at the annual New Year's Eve Possum Drop event. Both plaintiff/petitioners and defendants/

1. *See* Dr. Seuss, The Lorax (1971), reprinted in Your Favorite Seuss 305-36 (compiled by Janet Schulman and Cathy Goldsmith, Random House) (2004).

2. The Virginia opossum (Didelphis virginiana) despite bearing the name of another state, is actually the "official marsupial of the State of North Carolina." N.C. Gen. Stat. § 145-44 (2013).

respondents[3] claim the right to speak for the opossums, but the General Assembly has passed a law which says, in effect, that no one may speak for Virginia opossums during the relevant time period. For this reason, we must dismiss this appeal as moot.

Defendant-respondent Gordon Myers appeals a trial court order denying his petition for judicial review of the final decision of the administrative law judge. The administrative law judge, in part, granted summary judgment in favor of petitioners because respondent North Carolina Wildlife Resources Commission ("WRC") had "acted erroneously and failed to follow proper procedure when granting two captivity licenses to Clay Logan[.]" Because there is now a statute directly addressing the substance of this entire case in such a way that no ruling by this Court can have any practical effect on the existing controversy, we dismiss this appeal as moot.

I. Background

In February of 2014, petitioners People for the Ethical Treatment of Animals, Inc., Jacob Matthew Norris, and Julie Coveleski filed petitions against WRC and Gordon Myers as Executive Director of WRC for a contested case hearing, challenging the WRC's issuance of certain captivity licenses to Mr. Clay Logan for 2013 and 2014 and its failure to revoke these licenses, arguing in part that

> Respondents exceeded their statutory authority and acted unlawfully by issuing Captivity Licenses (Permit Number 13CP-159) to Clay Logan for 2013 and 2014, to possess and exhibit a live opossum. The mandatory requirements for issuing a Captivity License, set forth in N.C.G.S. 113[-]272.5 and related regulations, were not met, since Respondents did not make the required determination – and could not have made the required determination, based on the evidence before the Respondents at the time the licenses were issued -- that (a) issuing the licenses was

3. We first note that the order being appealed from notes the parties as "Plaintiffs/Petitioners" and "Defendant/Respondent[.]" For ease of reading we refer to the parties hereafter as simply petitioners and respondent(s). We further note that our appeal is from respondents "North Carolina Wildlife Resources Commission and Gordon S. Myers, as Executive Director, North Carolina Wildlife Resources Commission[.]" However, the order on appeal only addresses respondent Myers as he is the only party who petitioned the trial court for judicial review. While at times it may be necessary to refer to *respondent*s, only Mr. Myers is a respondent party on appeal. However, none of these issues have any effect on the dismissal of this appeal.

> in the interests of the humane treatment of the animal; (b) Logan was qualified to keep an opossum; and (c) issuing the licenses was appropriate under the objectives of wildlife resources conservation. In addition, WRC issued the Captivity Licenses upon improper procedure, by failing to comply with inspection and verification requirements that must be met before the Captivity Licenses were issued.

In essence, petitioners argued that respondent WRC erred in issuing opossum licenses to Clay Logan because in violation of the captivity license Mr. Logan was treating the animals inhumanely by "dropping" an opossum in a box on New Year's Eve in a rural replication of the dropping of the crystal-festooned ball in New York City's famous Times Square New Year's Eve celebration. North Carolina General Statute § 113-272.5 governs captivity licenses and requires the "humane treatment of wild animals." N.C. Gen. Stat. § 113-272.5(a) (2013).

In August of 2014, after considering various pending motions, the administrative law judge ("ALJ") determined that summary judgment should be granted in favor of respondents as to the issue of revocation because (1) Mr. Clay's 2013 license had already expired and (2) Mr. Clay had surrendered the 2014 license which he no longer needed because the General Assembly ratified a law which "eradicated the effects of any violations at issue[.]" Yet the ALJ also ruled that, as to the propriety of the issuance of the licenses for 2013 and 2014, summary judgment should be granted in favor of petitioners as "the agency acted erroneously and failed to follow proper procedure when granting two captivity licenses to Clay Logan[.]"[4]

In August of 2014, respondent Myers requested judicial review of the ALJ's decision. On 10 December 2014, the trial court denied respondent Myers' petition for judicial review. Respondent Myers appeals the denial of his petition for judicial review.

II. Appeal

Respondent Myers argues that "the relief sought in the petitions is barred by sovereign immunity" and "petitioners are not a 'person aggrieved' " in order to avail them of the limited waiver of the sovereign immunity doctrine[.]" (Original in all caps.) Petitioners argue that

4. It is unclear why the ALJ did not consider the claims regarding issuance of the licenses moot based upon the newly enacted law, but the substance of the ALJ opinion is not before us on appeal.

respondent Myers is collaterally estopped from challenging whether they "are persons aggrieved[,]" and in the alternative, they indeed "are persons aggrieved[.]" (Original in all caps.) Both sides raise passionate and interesting legal arguments, particularly regarding standing, or who has the right to challenge the issuance of a wildlife captivity permit in this situation. But all of the issues raised in this appeal have been rendered moot.

The legislature enacted Session Laws 2014-7 which provides:

> AN ACT TO EXEMPT CLAY COUNTY FROM STATE WILDLIFE LAWS WITH RESPECT TO OPOSSUMS BETWEEN THE DATES OF DECEMBER 26 AND JANUARY 2.
>
> The General Assembly of North Carolina enacts:
>
> SECTION 1: No State statutes, rules, or regulations related to the capture, captivity, treatment, or release of wildlife shall apply to the Virginia opossum (Didelphis virginiana) between the dates of December 26 each year and January 2 of each subsequent year.
>
> SECTION 2: This act applies only to Clay County.
>
> SECTION 3: This act is effective on and after December 30, 2013.
>
> In the General Assembly read three times and ratified this the 12th day of June, 2014.

N.C. Sess. Laws 2014-7.

Session Laws 2014-7 was the law in effect when the ALJ made its August 2014 final decision and also when the trial court denied respondent Myers's petition for judicial review.[5] *See id.* This case arises from the 2013 and 2014 licenses, and Session Laws 2014-7 exempts Virginia opossums from the "rules[] or regulations" which would include captivity licenses and treatment of opossums for those years during the relevant dates in Clay County, so any questions as to licenses for those years are moot. *See Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when

5. Session Laws 2015-155 repealed Session Laws 2014-7 as of 20 July 2015; as of 11 June 2015, a similar exemption to Virginia opossums applies to the whole state and not just Clay County. *See* N.C. Gen. Stat. § 113-291.13, Editor's Note (2015).

a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.") In summary, Mr. Logan did not need to have a captivity license at all for the 2013 or 2014 Possum Drop events, and any defect or irregularity in the issuance of those captivity licenses is now irrelevant.

Of course, New Year's Eve comes every year, and with it comes the annual Possum Drop celebration and the specter of the capture of more opossums to star as the main attraction. But the issues presented are still moot because the North Carolina law continues to exempt opossums during this time period from the protections of any "rules[] or regulation[.]" N.C. Gen. Stat. § 113-291.13 (2015). This issue is not "capable of repetition yet evading review[,]" *Ballard v. Weast*, 121 N.C. App. 391, 394, 465 S.E.2d 565, 568 (citation and quotation marks omitted), *disc. review denied and appeal dismissed*, 343 N.C. 304, 471 S.E.2d 66 (1996), because a captivity license is no longer required statewide for the Virginia opossum "between the dates of December 29 of each year and January 2 of each subsequent year." N.C. Gen. Stat. § 113-291.13. North Carolina General Statute § 113-291.13 provides: "No State statutes, rules, or regulations related to the capture, captivity, treatment, or release of wildlife shall apply to the Virginia opossum (Didelphis virginiana) between the dates of December 29 each year and January 2 of each subsequent year." *Id.*

At oral argument, respondents contended that this case is not moot because the ALJ ruling in a similar dispute between these same parties regarding the 2012 captivity license would have precedential value in future cases, so this Court should address the issue now to ensure that the law is not misapplied in the future. Yet the ALJ's ruling in the 2012 case is not before us in this appeal, and the particular issue of a captivity license for an opossum for the New Year's Possum Drop event will not recur due to North Carolina General Statute § 113-291.13. *See id.* Respondents would like for us to issue a broad pronouncement that PETA does not have standing to address questions of the treatment of North Carolina's wildlife when proceeding in cases of this type under a theory of public trust rights, but we cannot decide this issue in this case because it is moot.

Furthermore, at oral argument, petitioners argued that this issue is not moot since someone may seek a captivity license for some other type of animal which is not exempted from the laws protecting wildlife for a similar "drop" event on New Year's Eve somewhere in North Carolina in the future, so this situation could then be repeated, and thus we should address it, lest it evade review. But there is no indication in

our record of any prospect of similar issues arising with other animals which are still protected by North Carolina's wildlife laws and regulations, and we find this possibility entirely too speculative. During this time period each year, Virginia opossums are simply not covered by any of the "statutes, rules, or regulations" of North Carolina "related to the capture, captivity, treatment, or release of wildlife[,]" *id.* so this particular controversy is over, so long as North Carolina General Statute § 113-291.13 remains in effect.

III. Conclusion

Since our ruling could not have any practical effect upon the existing controversy, it is moot, and we dismiss this appeal.

DISMISSED.

Judges DAVIS and DIETZ concur.

LAWRENCE PIAZZA AND SALVATORE LAMPURI, PLAINTIFFS
v.
DAVID KIRKBRIDE, GREGORY BRANNON, AND ROBERT RICE, DEFENDANTS

No. COA 15-48

Filed 5 April 2016

1. Securities—North Carolina Securities Act—misleading statement in connection with security offer or sale—no scienter requirement—negligence standard

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals held that—in light of NCSA's plain language, legislative history, and comparison to federal section 12(a)(2) claims—N.C.G.S. § 78A-56(a)(2) civil plaintiffs did not need to prove scienter. Further, a materially false or misleading statement or omission made in connection with a security offer or sale was actionable even if the person making the statement or omission did not know it was false, so long as the person was negligent under N.C.G.S. § 78A-56(a)(2) in making the statement or omission.

2. Securities—North Carolina Securities Act—offeror or seller

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that he was not an offeror or seller of securities under the NCSA. The plain language of N.C.G.S. § 78A-56(a)(2) imposed liability on "any person" who was a seller or offeror, not just brokers and other securities professionals.

3. Securities—North Carolina Securities Act—Director Safe Harbor

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that he was entitled to the protection of the Director Safe Harbor statute of the North Carolina Business Corporation Act as a defense to liability under the NCSA. The Director Safe Harbor provision did not supersede, narrow, or aggrandize the statutory reasonable care defense available to "any person" under N.C.G.S. § 78A-56(a)(2).

4. Securities—North Carolina Securities Act—multiple defendants—different verdicts

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that it was inconsistent for him to be held liable under the NCSA when his co-defendants were not held liable. There was no evidence that one of the co-defendants, Kirkbride, relayed misleading statements to plaintiffs. As for the other co-defendant, Rice, he rectified his misleading statements by emailing one of the plaintiffs to keep him abreast of the ongoing challenges and deadlines. Brannon, on the other hand, chose not to testify and presented no evidence suggesting that he remedied or clarified his misleading statements. In the deposition read to the jury, Brannon admitted that he gave faulty information to plaintiffs without any personal knowledge and without attempting to contact anyone with firsthand knowledge to clarify the business opportunity.

5. Securities—North Carolina Securities Act—attorney fees

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA)

for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals held that, given the trial court's proper rulings, the trial court did not abuse its discretion in awarding attorney fees and costs to plaintiffs.

Judge TYSON concurring in part, dissenting in part.

Following a trial by jury in Wake County Superior Court with Judge G. Bryan Collins presiding, Defendant-Appellant Gregory Brannon appeals from a 13 March 2014 final judgment awarding monetary damages and order awarding attorney fees and costs, and a 11 April 2014 order denying Brannon's motion for judgment notwithstanding the verdict or in the alternative a new trial. Heard in the Court of Appeals 12 August 2015.

Poyner Spruill LLP, by Steven B. Epstein & Andrew H. Erteschik Attorney for Plaintiff-Appellees.

Smith Moore Leatherwood, LLP, by Matthew Nis Leerberg & Mark A. Finkelstein, and The Law Office of Michael Lee Frazier, by Michael Lee Frazier, Attorneys for Defendant-Appellant Gregory Brannon and Defendant-Appellee David Kirkbride.

HUNTER, JR., Robert N., Judge.

Defendant Gregory Brannon ("Brannon") appeals following a jury verdict finding him liable to Plaintiffs Lawrence Piazza ("Piazza") and Salvatore Lampuri ("Lampuri") (together "Plaintiffs") under the North Carolina Securities Act ("NCSA"), N.C. Gen. Stat. § 78-56(a)(2). The court awarded monetary damages to Piazza for $150,000.00 and to Lampuri for $100,000.00 plus interest at the legal rate. To this amount the court also assessed attorney fees of $123,804.00 and court costs of $8,493.79. We affirm.

I. Standard of Review

On appeal, Brannon seeks review of the following legal issues: (1) Whether the Plaintiffs sufficiently pled and proved the statutory elements of NCSA section 78A-56(a)(2) securities fraud including a duty to prove *scienter*? (2) Whether the North Carolina Pattern Jury Instruction detailing the Director Safe Harbor provision, N.C. Gen. Stat. § 55-8-30(b) should have been given? (3) Whether the jury verdict was inconsistent? In the event that this Court reverses any of these legal issues, then

Brannon argues he is entitled to a new trial and to have this Court vacate the award of attorney fees and costs.

All Brannon's legal arguments are raised in the context of his Rule 50(a) motion for directed verdict, Rule 60 motion for judgment notwithstanding the verdict, and Rule 59(a) motion for new trial. Each motion is predicated upon similar facts and the similar legal premise that the verdict was "contrary to law." Brannon's appeal suggests that we review his first and second arguments under the *de novo* standard of review and review his third argument for an abuse of discretion. Brannon contends that all of his arguments should be reviewed under the abuse of discretion standard.

Our analysis of Brannon's appeal leads to the conclusion that all his arguments surround the issue of whether or not the trial court's decisions were "errors of law" which would entitle him to a new trial. We review questions of law *de novo* with the following caveat.

"While an order for new trial pursuant to Rule 59 which satisfies the procedural requirements of the Rule may ordinarily be reversed on appeal only in the event of 'a manifest abuse of discretion,' when the trial court grants or denies a new trial 'due to some error of law,' then its decision is fully reviewable." *Chiltoski v. Drum*, 121 N.C. App. 161, 164, 464 S.E.2d 701, 703 (1995) (quoting *Garrison v. Garrison*, 87 N.C. App. 591, 594, 361 S.E.2d 921, 923 (1987)), *disc. review denied*, 343 N.C. 121, 468 S.E.2d 777 (1996). Our Court has used a similar standard of review when addressing jury instruction issues. "On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006) (citations and quotation marks omitted).

With regard to the argument that the verdict was inconsistent, we review the issue under the abuse of discretion standard. When a jury returns a verdict answering several issues, and an irreconcilable repugnance among the issues makes them "so contradictory as to invalidate the judgment, the practice of the Court is to grant a new trial . . . ." *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947).

However, "[i]t is well settled that a verdict should be liberally and favorably construed with a view of sustaining it, if possible . . ." *Strum v. Greenville Timberline, LLC*, 186 N.C. App. 662, 665, 652 S.E.2d 307, 309 (2007) (quoting *Guy v. Gould*, 202 N.C. 727, 729, 164 S.E. 120, 121 (1932)). " 'The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, if no question of law or legal inference is involved in the motion, his action in so doing is no subject to review on appeal in the absence of a clear abuse of discretion.' " *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981) (quoting *Selph v. Selph*, 267 N.C. 635, 637, 148 S.E.2d 574, 575–76 (1996)).

II. Facts

A. Background

Brannon and Piazza first met at Chicago Medical School in 1986. Piazza went on to practice medicine as an ophthalmologist in Maine, and Brannon established his own practice as an OB/GYN in North Carolina. In the early 1990s, Brannon and Piazza invested in a start-up software company, Arckosian Entertainment. Arckosian produced a large online role-playing game, and was founded by Robert Rice ("Rice"), who also served as a president and director for the company. Arckosian closed in 1997, and Rice started several other businesses. During a stint at one company, Z Reality, Rice worked with David Kirkbride ("Kirkbride"), who previously practiced real estate and corporate law in Raleigh, North Carolina.

Brannon met John Cummings ("Cummings") during a medical appointment in 2006, when he served as the prenatal OB/GYN for Cummings's wife. Brannon and Cummings found that they had common interests in investment opportunities, as Cummings had previously worked at an investment group that Brannon had invested in. The two continued to be friends and business acquaintances after Cummings's wife gave birth.

In 2007 Rice and Kirkbride founded Neogence Enterprises ("Neogence"), which Rice described as his "brain child." Neogence developed augmented reality ("AR") applications for smartphones. Augmented reality is a method to display three-dimensional graphics over a video stream, like the yellow first-down line that appears on screen during a televised football game. The augmented reality application that Neogence developed was called Mirascape. Neogence developed Mirascape to allow smartphone owners to use their phone's camera to scan different areas around them, which would uncover social media

posts, photos, restaurant reviews, and other information that would appear on the smartphone's screen.

Rice served as the CEO of Neogence, and focused on developing technology and growing funding for the company. Kirkbride helped with fundraising efforts, investing $75,000.00 himself, and sharing multiple responsibilities as Neogence's co-founder. During Neogence's infancy, Rice talked to Brannon about various business challenges, and sought advice and encouragement. Rice talked to Kirkbride about adding Brannon to the Neogence board of directors, and they agreed to add Brannon. Together, Rice, Kirkbride, and Brannon formed Neogence's initial board of directors.

In 2009, Brannon hosted an event at his home to promote Neogence and introduced Cummings to Rice and Kirkbride. A few weeks after the introduction, Rice and Kirkbride talked to Cummings about joining Neogence as an executive, which he did, joining as the Chief Sales Officer.

Brannon raised money by introducing potential Neogence investors to Rice. Neogence received money from "angel investors," and in exchange, issued convertible promissory notes to the investors.[1] These notes set out a specific maturity date, at which time the investor could choose to either recoup his money with interest, or convert that value into a percentage of Neogence stock.

One such angel investor was Brannon's medical school friend, Piazza. Brannon called Piazza in January 2010, to tell him about investment opportunities in Neogence. Piazza invested in Neogence in two installments, a $13,900.00 investment on 5 February 2010, and a $36,100.00 investment on 26 February 2010. Piazza received convertible promissory notes for both investments, with each note set to mature on 30 September 2010.

Another angel investor, Lampuri, worked as the vice president of operations at his family-owned construction company. Lampuri and his wife, Kristen, became acquainted with Brannon through his services as an OB/GYN. The couple used Brannon as an OB/GYN during the birth of their first child, and again in February 2010 when Kristen was pregnant with their second child. During prenatal appointments on 17 February

1. Black's Law Dictionary defines an "angel investor" as an experienced and successful entrepreneur, professional, or entity, that provides start-up or growth financing to a promising company, often together with advice and contacts. *Black's Law Dictionary* (10th ed. 2014). For SEC purposes an angel investor is an "accredited investor" with a high net worth ($1,000,000.00 or more), who can invest with less disclosure than ordinary investors and regularly invests in higher-risk investments. *See* 17 C.F.R. § 230.501(a).

2010 and 16 March 2010, Lampuri accompanied his wife to Brannon's office, and into the examination room. During both examinations, Brannon discussed Neogence investment opportunities with Lampuri, telling him about the company's Mirascape software.

B. Cummings's 30 April 2010 Meeting in New York City

On 29 April 2010, Cummings attended a retirement party in New York City, celebrating a friend's career at McGarry Bowen, an advertising agency whose clients included Verizon Wireless. During the party, Cummings met Joe Roth, a McGarry Bowen account executive. Roth and Cummings set up a meeting for the following day to discuss a potential Neogence-Verizon relationship to make Mirascape Verizon's OEM[2] featured AR application or a potential Neogence-McGarry Bowen relationship to feature Mirascape in a Verizon advertising campaign. At 8:04 pm on 29 April 2010, Cummings emailed Rice telling him about the scheduled meeting. Rice responded that night at 10:19 pm, and sent Cummings presentation materials for the meeting.

The next day Cummings met with Joe Roth, McGarry Bowen account executives assigned to the Verizon account, and an unnamed Verizon marketing employee. Cummings gave a presentation about the Mirascape software and its ongoing development, but did not perform any software demonstrations. The McGarry Bowen account executives stated to Cummings that they would consider Mirascape as part of their upcoming Summer 2010 advertising campaign for Verizon Droid smartphones, if Neogence could develop Mirascape so that it could meet the account executives' expectations. The Verizon employee did not make any suggestions that Mirascape might become a featured or pre-installed application on Verizon smartphones. Afterwards, Cummings discussed the meeting with Rice, Brannon, and Kirkbride "many, many, many, many times." He described these communications as follows:

> I don't recall exactly what I said. I'm sure I explained to them that they were very excited. I was very excited. That if we could come back with a demo, that, you know, we would have a lot of possibilities of what we could do with the company and how great that would be for Neogence. But the priority was to get the app developed. But without the app, none of it would be possible.

2. The term "OEM" means that the application or software is factory installed on a smartphone, making it a default application.

The same day, at 4:14 pm, Rice emailed Brannon, Piazza, and others, reporting on Cummings's meeting at McGarry Bowen. At 5:56 pm, Brannon sent an email to Piazza, Rice, and others, stating the following:

> Guys John Cummings just had a meeting in NY with Verizon. We need $100–200K ASAP, in 3–4 weeks we go back to Verizon we have an oppurtnity [sic] to be their featured AR. Rob [Rice] is going to send out a summary later today. I know all of you are BUSY!!! I need you to give a few minutes to look at this potential. THANK YOU for your TRUST!! Greg John Cummings xxx-xxx-xxxx Rob Rice xxx-xxx-xxxx

Brannon contacted Rice and told him to call Cummings and to also update Neogence's investors about the Verizon opportunity. Rice called Cummings, and he told Rice about the New York meeting, stating a Verizon employee "fortuitously" sat in on the meeting, and the McGarry Bowen executives were excited about the presentation.

At 7:14 pm, Rice sent a follow-up email to the investors including Piazza, but not Lampuri. In the email Rice sought, "$200,000 in additional angel funding" and described "[t]he opportunity here, is to become the feature AR application for Verizon OEM'd [sic] on all of the Droid smart mobiles and leverage their marketing. . . ." Prior to sending the email, Rice did not speak with anybody from Verizon or McGarry Bowen.

C. Soliciting Investments

The month following Brannon's and Rice's 30 April 2010 emails, Piazza and Brannon talked on the phone about seventy times, according to Piazza's count. Brannon described the Verizon opportunity, according to Piazza, consistently with his email. During these calls Brannon urged Piazza to call Cummings, and on or about 1 May 2010, Piazza spoke with Cummings, who described to him the Verizon opportunity no differently than Brannon did. Piazza later phoned Kirkbride. According to Piazza, each phone call from Brannon, Kirkbride, and Cummings described the Verizon opportunity in identical terms.

On 3 May 2010, Rice forwarded an email to Piazza, which was originally an email sent from Rice to Cummings, Kirkbride, and Brannon. Rice wrote Piazza, "FYI, I meant to include you on this earlier today when I sent it out . . . ." The forwarded message read:

> This is going to be difficult and ambitious, but definitely doable, providing we secure funding this week. . . . Ideally, I'd like to schedule the presentation/demo on . . . [May]

> 26/27. . . . I've also got some people lined up that will be ready to go and jump into development, again, waiting on resources in the bank. . . . [W]e are working on getting all of our ducks in a row both for funding follow-ups, business development and setting the stage to rapidly execute and kick out a bad-ass live demo for Verizon that does the majority of what we are talking about launching in July. Again, provided a funding injection like now.

On 6 May 2010, Rice sent another email to Piazza, giving a rough timeline for developing Mirascape:

> The expectation is that the Verizon meeting will be around the 25th or 26th of May, although we are going to see about pushing it off to Friday, June 4th, which will give us a full four weeks. . . . So at the end of the day, I would like to close on $200,000 before the end of the month. . . . We are going to do this. Verizon won't know what hit them.

Following up with Piazza on 11 May 2010, Rice emailed:

> [W]e have targeted Friday, June 4th. Has John confirmed this, for meeting and presenting with Verizon . . . [s]o, John and I, or all of us can fly directly to New York City on the redeye Thursday night and present in the early afternoon and return to Raleigh . . . [on] the evening of the 4th.

On 18 May 2010, Rice emailed Kirkbride and Cummings, telling Cummings he needed a target date to present the Mirascape demonstration to Verizon. Rice wrote:

> As before, we will meet our goals and milestones but only if everyone stops playing chicken and tying my hands. I'm done arguing, cajoling and reassuring. Let's get some funds in the door today, and then everyone needs to get out of our way so we can release the damn product. I'd like an update this afternoon with Larry's [Piazza's] requested [investment] terms and a reasonable date for Verizon [sic] meeting.

Rice emailed Piazza on 25 May 2010, stating:

> I'll do whatever it takes to get you on board. At this point I can't move this company forward without you. Without you investing right now, we are going to lose our momentum. Development is going to stall, and we are likely going

> to lose some people that have to deal with economic realities of their own. If this does happen, I'll keep fighting and rebuild, but we will have lost our chance to be a player in the industry this year . . . . It will take me months to recover if we fall apart now. On the other hand, if you invest now, you are effectively breathing new life back into the company and empowering me and us to stop crawling along and start running the race. . . . I can do all of this with your investment this week, and I can deliver. Granted some of the timelines and milestones have shifted and will always continue to shift as we move forward. . . . You know I have been completely open and transparent with you from day one, even to my disadvantage in negotiating. And quite frankly, we're at a crossroads right now. We need your investment and we need it yesterday. Please believe in me and the team. We can't do this without you.

Afterwards, Rice told Kirkbride to "do what you feel is necessary to close" Piazza.

D. Piazza's and Lampuri's Investments at Issue

On 26 May 2010, Cummings and Kirkbride flew to Maine and met with Piazza. On 28 May 2010, Piazza made a third investment of $150,000.00, adding to his two previous investments of $13,900.00 and $36,100.00.

Contemporaneous with Piazza's $150,000.00 investment, Lampuri learned of the Verizon opportunity while at a prenatal exam with his wife on 25 May 2010. Lampuri described the visit:

> Well, [it was] just like any other prenatal visit, my wife was on the exam room table. I was sitting in the chair next to it . . . . And she was wearing the gown, if you want to say. . . . And then he [Brannon] proceeded to, you know, do an examination on my wife. Whether it's, you know, putting his hands on her stomach making sure everything looked good there, hearing the heartbeat. And as that was going we were having casual conversation . . . . Him and I, you know, how's the company going, such and such. And then . . . he sat down in the other chair. . . . [A]nd he proceeded to have a conversation with me about this exciting new opportunity that Neogence, his company had. . . . And at that moment, he said . . . we've got something really exciting going on, our director of sales just got back from New York City at a meeting. There were Verizon executives

> there, and they were absolutely blown away by our technology. . . Neogence needed to go back, create this demo, come back and show Verizon, you know, what they've been talking about, what they've been showing about this technology and they're going get OEMed. They're going pre-installed on all Verizon phones.

Lampuri's wife, Kristen, described the appointment the same, stating she was one-hundred-percent certain that Brannon said Neogence "had an opportunity to be featured on Verizon phones directly installed on the phone."

In mid-July 2010, Lampuri went to Neogence's headquarters and met with Cummings, Rice, and Kirkbride. At headquarters, Cummings presented to Lampuri and described the Verizon opportunity the same as Brannon, except for the difference that Brannon did not say the 30 April 2010 meeting took place at an advertising agency. At the meeting, Rice told Lampuri that the Verizon opportunity was real and the funds Neogence was seeking "were to get this demo up and . . . coming to show Verizon." The meeting ended and Lampuri did not invest right away. Instead, Lampuri went back to Neogence headquarters in August 2010, with his father, Tino Lampuri, and his cousin Anthony Lampuri. Cummings gave another presentation about the Verizon opportunity, and Rice reiterated the need for funding to create a Mirascape demonstration. Thereafter, Lampuri made a $100,000.00 investment on 24 September 2010, in exchange for a convertible promissory note.

E. The Decline of Neogence

Neogence's target date to have a Mirascape demonstration ready for Verizon was delayed several times. Growing frustrated in November 2010, Rice emailed Kirkbride, stating:

> I don't even know if there's any OEM opportunity here or not . . . I'll also say that John [Cummings] makes a lot of stuff up or makes large claims for effect or to make a point. I'm not the only one that has noticed this. So my level of trust for anything he says is minimal at best right now.

Neogence never had a follow-up meeting with Verizon after Cummings's 30 April 2010 meeting at McGarry Bowen. Neogence eventually ran out of money and stopped doing business in July 2011.

Subsequently, sometime in 2011, Piazza sued Neogence in an unrelated civil action, in which Cummings gave an affidavit dated 23 April

2012. In that affidavit, Cummings relates facts regarding his meeting with the marketing executives at McGarry Bowen in the following terms:

> During the [30 April 2010 New York] meeting, there was no discussion of Mirascape being bundled or OEM'd [sic] on to DROID smartphones, by me, Joe Roth or the Verizon employee. Similarly, there was no discussion of Mirascape becoming Verizon's feature AR. These topics simply did not come up. At no point in during my employment with Neogence did I discuss these topics with anyone associated with Verizon.

Piazza received the affidavit, and upon reviewing it, learned of the misrepresentations and omissions that based his investment. Shortly thereafter, in May 2012, Piazza called Lampuri and told him the Verizon opportunity was completely false, that in fact, "all Neogence ever had from the beginning was a possible marketing campaign" with McGarry Bowen. After this discovery, litigation followed.

III. Procedural History

On 10 October 2012, Plaintiffs filed a complaint against Kirkbride, Brannon, and Rice for securities fraud under N.C. Gen. Stat. §§ 78A-8, 78A-56(a) and (c). Plaintiffs' complaint alleged the following: (1) the notes issued to them were securities under the NCSA; (2) Defendants directly and indirectly employed devices, schemes, and artifices to defraud Plaintiffs; (3) Defendants made untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances, not misleading; (4) Defendants' false and misleading representations included the representation that Neogence had an existing opportunity with Verizon for Mirascape to become a featured AR application pre-installed on all Verizon Droid smartphones; (5) Defendants knowingly, intentionally, and/or recklessly engaged in fraud and made untrue statements of material fact; (6) Plaintiffs reasonably and justifiably relied upon Defendants' representations; (7) the false representations directly and proximately caused Piazza's $150,000.00 investment and Lampuri's $100,000.00 investment; and (8) Defendants violated N.C. Gen. Stat. §§ 78A-8, 78A-56(a) and (c).

Predicating these claims were the misrepresentations and omissions made by Brannon, contained in his 30 April 2010 email to Piazza and others, and his direct conversations with Lampuri, all of which claimed Neogence had an existing opportunity to "go back to Verizon . . . to be their featured AR . . . ." application pre-installed on all Verizon Droid

smartphones. In their prayer for relief, Plaintiffs sought $150,000.00 for Piazza, $100,000.00 for Lampuri, plus interest, attorney fees, and costs.

Defendants filed motions to dismiss and answers generally denying the allegations of the complaint, filed counterclaims and crossclaims, and asserted affirmative defenses including but not limited to contributory negligence, failure to mitigate damages, failure to show reasonable reliance, unclean hands, waiver and estoppel, and "reserve[ing] the right to serve other affirmative defenses or claims as the evidence in the action warrants." Discovery was conducted on these issues.

Subsequently, Defendants filed summary judgment motions and were heard by Judge Donald W. Stephens on 22 November 2013. Kirkbride asserted there was no material issue of fact, based on the following:

> I. The Representations Allegedly Made by John Cummings, Gregory Brannon and Robert Rice and Allegedly Repeated by Defendant Kirkbride Are Literally True, and Insufficiently Definite to be False or Reasonably Relied Upon.
>
> II. There Was No Legally Material Misrepresentation of Fact.
>
> III. Plaintiffs Failed to Make any Reasonable Inquiry as to the Basis or Meaning of the Representations.
>
> IV. Defendant Kirkbride Is Absolved as a Matter of Law Because He Repeated the Statements John Cummings Made to Plaintiffs and to Mr. Kirkbride.

Brannon and Rice argued for summary judgment, stating:

> 1. Plaintiff Piazza was equally or possibly a more sophisticated investor than was either of the Defendants and hence he could not have reasonably relied upon either of them; Plaintiff Lampuri invested long after the "opportunity with Verizon" complained of was an immediate and/or achievable goal and hence his reliance upon either of the Defendants with respect to emails months before his investment is unreasonable as a matter of law.
>
> 2. Further, the representations allegedly made by John Cummings, David Kirkbride, Gregory Brannon and Robert Rice were literally true and insufficiently definite to be false or reasonably relied upon as a matter of law.
>
> 3. There were no legally material misrepresentations of fact made by either Defendant to the Plaintiffs.

> 4. Plaintiffs failed to make any reasonable inquiry or perform even minimal due diligence as to the basis or meaning of any alleged representations made to them prior to investing in Neogence.

On 25 November 2013, Judge Stephens, after hearing arguments of counsel and considering the materials submitted to him arising from discovery, granted summary judgment for Kirkbride, dismissing the claims against him, but denied summary judgment for Brannon and Rice. Piazza initially appealed the order for summary judgment favoring Kirkbride, but later abandoned that appeal. Brannon included the order of summary judgment favoring Kirkbride in his notice of appeal but did not request that this Court reverse this decision. Therefore, lacking such a request on appeal, we are without jurisdiction to consider the summary judgment in favor of Kirkbride.

The case was called for trial on 10 February 2014, in Wake County Superior Court before Judge Collins. At trial, Plaintiffs called the following witnesses: Rice, Piazza, Lampuri, Lampuri's cousin Anthony, Lampuri's wife Kristen, and played Cummings's video deposition for the jury. Cummings's affidavit was also introduced, which stated the following:

> During the [30 April 2010 New York] meeting, there was no discussion of Mirascape being bundled or OEM'd [sic] on to DROID smartphones, by me, Joe Roth or the Verizon employee. Similarly, there was no discussion of Mirascape becoming Verizon's feature AR. These topics simply did not come up. At no point in during my employment with Neogence did I discuss these topics with anyone associated with Verizon.

When questioned about the affidavit, Rice testified that he believed it was false, and Piazza and Lampuri testified that it was inconsistent with the statements Cummings, Kirkbride, Rice, and Brannon made to them about the Verizon opportunity.

After Plaintiffs rested their case, defense counsel made a motion for directed verdict. To support the motion for directed verdict, defense counsel repeated some of the arguments advanced by Defendant's and Kirkbride's motions for summary judgment. First, Defendants argued that it is inequitable to hold Brannon and Rice liable as directors if Kirkbride, the other director, escapes liability. Second, because all Defendants were acting as directors, Brannon and Rice are entitled to a Safe Harbor defense.

Under this theory, defense counsel contends that Cummings told all of the directors that Mirascape would be pre-installed or "OEMed" on Verizon Droid smartphones. "It's my contention that Greg Brannon and Robert Rice did not succeed in their motion for summary judgment at the time because the defendants were arguing they said something different than what David Kirkbride and John Cummings had told them."

The court questioned defense counsel as follows:

> THE COURT: Do you think it's fair to say that Mr. Kirkbride was let out of the case because there was no evidence that he made any representation to either one of these plaintiffs? I haven't heard any evidence that he personally made any representations to anybody.
>
> [DEFENSE COUNSEL]: It's my contention that Mr. Kirkbride was let out of that case because the representations he made were consistent with those made by John Cummings.
>
> THE COURT: Okay. Go ahead.
>
> [DEFENSE COUNSEL]: Okay. And that's what's different about our case is that they allege that we said something different. What did we say different? We said that it was—we had the opportunity to be a featured AR, preinstalled and OEMed on all Verizon Droid smart phones. That's the only difference. But I think that's what—
>
> THE COURT: And your clients did not say that.
>
> [DEFENSE COUNSEL]: First off, we do deny saying that. . . . But then, ultimately we conclude by virtue of the deposition that you heard from John Cummings, it was definitely true that they did have that opportunity to. And that's what he believed, and that's what they believed. And that, under [N.C. Gen. Stat. §] 55-8-30, there're entitled to a directed verdict because they don't have liability because they reasonably relied on him.

Brannon and Rice argued they were shielded from liability as directors under the Director Safe Harbor statute, N.C. Gen. Stat. § 55-8-30(b), of the North Carolina Business Corporation Act ("Corporation Act") because they relied on Cummings as an officer of Neogence. Judge Collins found that there were factual issues needing jury resolution because Defendants' statutory defense under N.C. Gen. Stat. § 78A-56(a)

(2) required them to carry the burden of proof on their "reasonable care" defense to the jury. Then Judge Collins directly stated the following to defenses counsel:

> THE COURT: . . . . But it seems to me that your Chapter 55 defense, if I look at the pattern jury instructions about that defense, one of the elements is that the plaintiffs would have to prove that the defendant failed to act in a manner he reasonably believed to be in the best interest of the corporation, which leads me to believe that that defense is only as to derivative suits against the director by shareholders. How does it apply in this case?

After this discussion, the court denied the motion for directed verdict and the trial proceeded.

Defendants called Kirkbride as their sole witness, and Brannon did not testify. Unlike Rice and Plaintiffs, Kirkbride testified that Cummings's affidavit was consistent with what Cummings told him about the Verizon Opportunity. Kirkbride claimed he learned, "directly from Cummings," that the Verizon opportunity was really an opportunity to go back to McGarry Bowen with a Mirascape demo, which the agency would consider using in their Verizon advertising campaign. On cross-examination, Kirkbride testified that he could not think of any reason why Cummings would tell him one thing about the Verizon opportunity, but tell Brannon and Rice "something else." He further confirmed that Rice and Brannon could have learned what "the Verizon opportunity actually was" by contacting Cummings, like he did.

Defendants rested their case and Plaintiffs put on rebuttal evidence with Piazza, Lampuri, and deposition testimony from Rice and Brannon. Brannon's deposition was read aloud as follows:

> Question: Do you know whether John Cummings actually met with somebody at Verizon?
>
> Answer: He said he did.
>
> Questions: Okay. And you simply took his word for it?
>
> Answer: Yes.
>
> Question: And you took his word for the fact that your company, Neogence, had an opportunity to become the featured augmented reality on Verizon applications?

> Answer: Yes, I did. And that's why my e-mail said Robert [Rice] have [sic] all the details and John have [sic] all the details.
>
> Question: You have no personal idea as to whether any such representation was made to John Cummings by anyone from Verizon?
>
> Answer: No, sir.

The Plaintiffs rested their case and Defendants did not offer any surrebuttal. The court held the charge conference and the parties agreed to use a special verdict form, listing yes/no questions for each defendant. The questions relevant to Brannon were: (1) whether Brannon, in soliciting Piazza, to pay for a security, made a statement which was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where Piazza was unaware of the true or omitted facts; (2) whether Brannon, did not know, and in the exercise of reasonable care, could not have known of the untruth or omission in his offer or sale of a security to Piazza; (3) whether Brannon, in soliciting Lampuri, to pay for a security, made a statement which was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where Lampuri was unaware of the true or omitted facts; (4) whether Brannon, did not know, and in the exercise of reasonable care, could not have known of the untruth or omission in his offer or sale of a security to Lampuri.

In the way of jury instructions, defense counsel requested North Carolina Civil Pattern Jury Instruction 807.50, the analogous pattern jury instruction to the Director Safe Harbor statute, N.C. Gen. Stat. § 55-8-30. The court discussed differences between the Director Safe Harbor defense and the NCSA reasonable care defense stating, "Well, my reading of [section] 55[-8-30] will place the burden [of] proof on the plaintiff. And my reading of [section] 78[A-56(c)] puts the burden of proof on you [the Defendants]. . . ." Defense counsel offered to craft a special instruction for the NCSA reasonable care defense, and the court responded: "Well, it seems to me that what you've asked for in your Special Instruction[] . . . [it] is [an] accurate statement of the law as far as the defenses available to you under [section 78A-]56(a)(2). . . . Because it accurately states the burden of proof is on you [the Defendants]." The court denied Defendants' request for N.C.P.I.—Civil 807.50, and defense counsel preserved the issue for appeal. Next, the parties stipulated to a special jury instruction explaining the elements of section 78A-56(a)

(2) securities fraud, and the NCSA reasonable care defense available to Brannon—whether he did "not know and in the exercise of reasonable care could not have known of the untruth or omission in his offer or sale of a security to the [Plaintiffs]."

After closing arguments, Judge Collins charged the jury and deliberation began on 17 February 2014. The jury returned a unanimous verdict on 18 February 2014, finding Brannon liable for securities fraud and Rice not liable. Judge Collins read the verdict form, as follows:

> Issue 1: Did defendant Gregory Brannon in soliciting the plaintiff Lawrence Piazza to pay money for a security make a statement which is materially false or misleading or which under the circumstances was materially false or misleading because of the omission of other facts where the plaintiff Lawrence Piazza was unaware of the true or omitted facts? Answer: Yes.
>
> Issue 2. Did the defendant Gregory Brannon not know and in the exercise of reasonable care could not have known of the untruth or omission in his offer or sale of a security to plaintiff Lawrence Piazza? Answer: No.
>
> Issue 3. Did the defendant Gregory Brannon in soliciting the plaintiff Salvatore Lampuri to pay money for a security make a statement which was materially false or misleading or which under the circumstances was materially false or misleading because of the omission of other facts where the plaintiff Salvatore Lampuri was unaware of the true or omitted facts? Answer: Yes.
>
> Issue 4. Did the defendant Gregory Brannon not know and the exercise of reasonable care could not have known of the untruth or omission in his offer or sale of a security to the plaintiff Salvatore Lampuri? Answer: No.
>
> Issue 5. Did the defendant Robert Rice in soliciting the plaintiff Lawrence Piazza to pay money for security make a statement which was materially false or misleading or which under the circumstances was materially false or misleading because of the omission of other facts where the plaintiff Lawrence Piazza was unaware of the true or omitted facts? Answer: No.
>
> [Skip issue 6 since issue 5 was answered "No."]

> Issue 7. Did the defendant Robert Rice in soliciting the plaintiff Salvatore Lampuri to pay money for a security make a statement which was materially false or misleading or which under the circumstances was materially false or misleading because of the omission of other facts where the plaintiff Salvatore Lampuri was unaware of the true or omitted facts? Answer: No.
>
> [Skip issue 8 since issue 7 was answered "No."]

On 13 March 2014, Judge Collins entered a final judgment based on the jury's verdict, ordering Brannon to repay $150,000.00 to Piazza, and $100,000.00 to Lampuri. Judge Collins also awarded Plaintiffs $123,804.00 in attorney fees, $8,493.79 in court costs, and interest on the damages owed by Brannon.

On 17 March 2014, Brannon moved for judgment notwithstanding the verdict and in the alternative for a new trial, pursuant to N.C. R. Civ. Pro. 59. Brannon made the following contentions in his motion: (1) the verdict for Rice and against Brannon was internally inconsistent because Brannon repeated statements made by Rice; (2) the jury did not receive Brannon's requested instruction N.C.P.I.—Civil 807.50, which instructs on the content of N.C. Gen. Stat. § 55-8-30; (3) Brannon did not make a material representation as a matter of law; (4) the jury instructions did not require Plaintiffs to show reliance, causation, or *scienter*; (5) the judgment grants rescission for a security sale between a third-party director and an investor, not the actual entity who sold the security and received the money from the sale; (6) Brannon did not receive a fair trial as an active Republican Senatorial Candidate, since the jury contained eight Democrats and zero Republicans; and (7) the cumulative effect of the six previous issues denied Brannon a fair trial.

The parties were heard on Brannon's motion for a new trial on 26 March 2014, and Judge Collins denied the motion on 11 April 2014. Brannon filed his first written notice of appeal on 21 April 2014, and an amended notice of appeal on 5 May 2014. Brannon's amended notice of appeal contests the 13 March 2014 final judgment, the 13 March 2014 order for costs and attorney fees, the order setting the amount of undertaking required to stay execution of the judgment pending appeal, and the order denying Brannon's motion for judgment notwithstanding the verdict.

On appeal, the parties made oral arguments on 12 August 2015 and filed the following motions: Plaintiffs filed a memorandum of additional

authority on 27 August 2015; Brannon's counsel filed a motion for leave to submit a supplemental response on 31 August 2015; on 2 September 2015, Plaintiffs filed a response in opposition to Brannon's motion for leave; and lastly, on 14 September 2015, Brannon's counsel filed a memorandum of additional authority. We allow Plaintiffs' memorandum of additional authority, Brannon's supplemental response, and Brannon's memorandum of additional authority.

IV. Jurisdiction

This appeal arises from a final judgment. Accordingly, this Court has jurisdiction to consider this appeal under N.C. Gen. Stat. § 7A-27(b)(1), and jurisdiction to consider intermediate orders necessarily affecting the judgment under N.C. Gen. Stat. § 1-278. Brannon's notice of appeal was timely made.

We also have subject matter jurisdiction under the NCSA, N.C. Gen. Stat. § 78A-56. In some instances, federal law preempts state securities provisions, namely in antifraud class actions and governance laws for securities registration and reporting.[3] *See* Securities Litigation Uniform Standards Act of 1998 (generally prohibiting state securities fraud claims from being brought as class actions; *see also* National Securities Markets Improvements Act of 1996 (preempting state security registration and reporting requirements, but not preempting state antifraud laws).

The NCSA creates private rights of action that are complementary to federal securities schemes. Therefore, North Carolina courts have jurisdiction to adjudicate claims arising under the NCSA, and such claims are not preempted by federal law. *See Latta v. Rainey*, 202 N.C. App. 587, 689 S.E.2d 898 (2010). Accordingly, this Court has subject matter jurisdiction over this NCSA action.

As we discuss below, the NCSA parallels federal antifraud acts, and therefore, we use federal courts' interpretation of analogous federal actions as persuasive authority. *State v. Davidson*, 131 N.C. App. 276, 282–83, 506 S.E.2d 743, 748 (1998) ("Cases construing the federal rule are instructive when examining our statute.") Therefore, our use of federal case law should not be construed to impose a rule of federal preemption upon NCSA claims.

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3. Nonetheless, many states allow securities actions for breach of contract, fraud, and breach of fiduciary duty that are not preempted by federal law. *See* Thomas Lee Hazen, *Treatise on The Law of Securities Regulation* 428 § 8.1[1][E] (6th ed. 2009).

Currently, there is limited case law regarding the NCSA.[4] We analyze the NCSA and review Brannon's claims as follows: (A) NCSA liability; (B) primary liability basing the jury verdict; (C) defining NCSA securities offerors and sellers; (D) the applicability of the Director Safe Harbor provision of the North Carolina Business Corporation Act; (E) the allegedly inconsistent jury verdict; and (F) attorney fees.

A. NCSA Liability

Article 7 "Civil Liabilities and Criminal Penalties of The North Carolina Securities Act," imposes securities[5] liability that is "primary" or "secondary." N.C. Gen. Stat. § 78A-56(a)(1)–(2) (imposing primary liability); N.C. Gen. Stat. § 78A-56(c) (imposing secondary liability on "control persons" and persons that "materially aid" in the securities sale). The relevant sections of the NCSA state the following:

> (a) Any person who:
>
> (1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3), 78A-10(b), 78A-13, 78A-14, 78A-24, or 78A-36(a), or of any rule or order under G.S. 78A-49(d) which requires the affirmative approval of sales literature before it is used, or of any condition imposed under G.S. 78A-27(d) or 78A-28(g), or
>
> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if the purchaser no longer owns the security.

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4. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *8, ¶ 39.

5. Promissory notes that are convertible into stock, like the convertible notes given to Piazza and Lampuri, are securities under the NCSA. N.C. Gen. Stat. § 78A-2(11).

> Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate as provided by G.S. 24-1 from the date of disposition. . . .
>
> (c) (1) Every person who directly or indirectly controls a person liable under subsection (a), (b), or (b1) of this section, every partner, officer, or director of the person, every person occupying a similar status or performing similar functions, and every dealer or salesman who materially aids in the sale is also liable jointly and severally with and to the same extent as the person, unless able to sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.
>
> (2) Unless liable under subdivision (1) of this subsection, every employee of a person liable under subsection (a), (b), or (b1) of this section who materially aids in the transaction giving rise to the liability and every other person who materially aids in the transaction giving rise to the liability is also liable jointly and severally with and to the same extent as the person if the employee or other person actually knew of the existence of the facts by reason of which the liability is alleged to exist.
>
> (3) There is contribution among the several persons liable under subdivisions (1) and (2) of this subsection as provided among tort-feasors pursuant to Chapter 1B of the General Statutes.

N.C. Gen. Stat. §§ 78A-56(a), 78A-56(c).

The first subsection, N.C. Gen. Stat. § 78A-56(a), imposes primary liability on "any person" who offers or sells a security. If primary liability exists, then secondary liability may be imposed upon "control persons," enumerated in N.C. Gen. Stat. § 78A-56(c)(1), or upon persons not included in section 78A-56(c)(1) who "materially aid[]" in the transaction basing primary liability. N.C. Gen. Stat. § 78A-56(c)(2). The secondarily liable parties are "jointly and severally" liable "to the same extent" as the primarily liable person. N.C. Gen. Stat. § 78A-56(c)(1)–(2). This differentiation matters because a plaintiff bears a higher burden of proof

in proving secondary liability for a person outside of section 78A-56(c)(1) who "materially aids" in the transaction.[6]

B. Primary Liability

[1] The NCSA contains two antifraud provisions that impose primary liability on "any person" for (1) fraud, or (2) materially false statements or omissions made in connection with an offer or sale of a security. N.C. Gen. Stat. § 78A-56(a).

The first provision, N.C. Gen. Stat. § 78A-56(a)(1), imposes liability similar to common law fraud. N.C. Gen. Stat. § 78A-8 prohibits fraud "in connection with the offer, sale or purchase of any security, directly or indirectly." This prohibition is made actionable under N.C. Gen. Stat. § 78A-56(a)(1), which is comparable to federal actions based upon Rule 10b-5 of Section 10(b) of the Securities Act of 1934. *See* 17 C.F.R. 240.10b-5.

Under section 78A-56(a)(1), a plaintiff must include allegations and proof akin to common law fraud claims.[7] For example, a plaintiff must prove *scienter* and justifiable reliance.[8] Once the plaintiff satisfies its *prima facie* case, the defendant cannot raise an affirmative defense based on lack of knowledge.[9] *See* N.C. Gen. Stat. §§ 78A-8, 78A-56(a)(1). In the instant case, Plaintiffs alleged section 78A-56(a)(1) fraud in their complaint, but this subsection is irrelevant to the jury's verdict and our review.

The provision at issue, N.C. Gen. Stat. § 78A-56(a)(2), represents the second provision for primary liability. It provides the following in relevant part:

Any person who:

> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made,

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6. *See NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *11, ¶ 50.

7. *See NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *13, ¶ 61 ("The legislature's intent to follow traditional fraud procedures for claims under § 56(a)(1) is further evidenced by the fact that § 56(a)(1) does not include the affirmative defense allowed by § 56(a)(2) . . . . And, to the extent that § 56(a)(1) should be interpreted on federal precedent pursuant to Rule 10b-5, scienter and justifiable reliance are elements of 10b-5 claims.") (citation omitted).

8. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *13, ¶ 59.

9. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *11, ¶ 51.

> in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security . . . .

N.C. Gen. Stat. § 78A-56(a)(2). Unlike section 78A-56(a)(1) fraud claims, section 78A-56(a)(2) claims may proceed forward without proof of fraud, though section 78A-56(a)(2) liability must be based upon "any untrue statement of a material fact or any omission to state a material fact."[10] N.C. Gen. Stat. § 78A-56(a)(2).

Section 78A-56(a)(2) is the state equivalent of a federal section 12(a)(2) claim of the Securities Act of 1933. 15 U.S.C. § 77l(a)(2). The language of section 12(a)(2) was codified in section 410 of the Uniform Securities Act of 1956, which North Carolina first adopted in 1973.[11] An Act to Repeal Chapter 78 of the General Statutes and to Create a New Chapter 78 Concerning Securities Law, ch. 78, sec. 3, 1973 N.C. Sess. Laws 1973-1380. The federal 12(a)(2) action is different from NCSA 78A-56(a)(2) in that the federal action requires an interstate nexus,[12] and has been construed to impose liability for untrue statements contained in securities prospectuses. *See Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995).

When a plaintiff successfully proves a *prima facie* case under N.C. Gen. Stat. § 78A-56(a)(2), the burden of proof shifts to the defendant to prove that "he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission . . . ." N.C. Gen. Stat. § 78A-56(a)(2).[13] Therefore, if a plaintiff proves a *prima facie* case, a defendant will be liable unless he brings forward evidence to prove that

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10. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *11, ¶ 51.

11. The Uniform Securities Act of 1956 has been adopted in whole or part in 37 jurisdictions, including North Carolina. Since 1956, there have been other uniform securities acts, the Revised Uniform Securities Act of 1985 (only adopted by a small minority of states), and the Uniform Securities Act of 2002. The fraud provisions of Uniform Securities Act of 1956 § 410(a)(2), which are analogous to N.C. Gen. Stat. § 78A-56(a)(2) and federal section 12(a)(2) claims, appear in the Uniform Securities Act of 2002 § 509(b).

12. The interstate nexus requires "use of any means or instruments or transportation or communication in interstate commerce or of the mails . . . ." 15 U.S.C. § 77l(a)(2).

13. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *11, ¶ 51.

his statement or omission was made with reasonable care, as set out in N.C. Gen. Stat. § 78A-56(a)(2).

Brannon contends this interpretation of the NCSA and the Plaintiffs' theory of liability turn section 78A-56(a)(2) into a strict liability statute because there is no required finding that a defendant act with *scienter*. We disagree, and we need not characterize this statutory framework as "strict liability" to resolve this case.

First, in construing section 78A-56(a)(2), we read its plain meaning. *See Frye Regional Medical Center, Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) ("In interpreting a statute, we first look to the plain meaning of the statute."). The statute contains no language which a legislature would normally use to impose a *scienter* requirement on liability. A statute imposing a *scienter* requirement embraces knowledge and an intent to deceive, manipulate, or defraud. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988) (citations omitted); *see also Latta*, 202 N.C. App. at 600, 689 S.E.2d at 909 (citations omitted). A *scienter* requirement uses words like willfully, knowingly, intentionally, or recklessly. While there may be circumstances when a court would require *mens rea* to impose a criminal penalty, there is no reason to read such a requirement into the civil penalties of section 78A-56(a)(2). *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* 303 (1st ed. 2012). We also note the analogous federal section 12(a)(2) action does not impose a *scienter* requirement. 15 U.S.C. § 77l(a)(2); *see In re F&M Distributors, Inc. Securities Litigation*, 937 F. Supp. 647, 656 n. 5 (E.D. Mich. 1996) ("In addition, § 12(a)(2) of the 1933 Act does not require proof of scienter . . . ."); *Junker v. Crory*, 650 F.2d 1349, 1359 (5th Cir. 1981); *see also Heck v. Triche*, 775 F.3d 265, 280–81 (5th Cir. 2014) (citations omitted) (comparing a Louisiana state securities fraud claim to the analogous federal 12(a)(2) claim and differentiating it from a federal 10b-5 claim that requires *scienter*).

Historically, a section 78A-56(a)(2) defendant carried the burden of proof to show that he "did not know, and did not act in *reckless disregard* of the untruth or omission."[14] N.C. Gen. Stat. § 78A-56(a)(2) (1990) (emphasis added). During this era, "reckless disregard" was not defined by statute.[15] Nonetheless, this historic burden clearly

14. *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, 2012 NCBC 13, at *12, ¶ 47 (citing N.C. Gen. Stat. § 78A-56(a)(2) (1990)).

15. *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, 2012 NCBC 13, at *11, ¶ 47.

indicates the legislature intended to impose liability against defendants for less than intentional conduct.[16] Our Court upheld this fundamental NCSA principle in *Latta*, and held a defendant is not required to act intentionally to commit fraud. *Latta*, 202 N.C. App. 587, 689 S.E.2d 898.

In 1991, our legislature amended the NCSA and expanded section 78A-56(a)(2) liability by changing the defendant's burden of proof from "reckless disregard" to the modern "reasonable care" standard.[17] An Act to Enhance the Enforcement Provisions of the North Carolina Securities Act and the Investment Advisers Act, ch. 78A, sec. 56(a)(2), 1991 N.C. Sess. Laws 1991-456 (also changing the defensive burden against section 78A-56(c) secondary liability from "reckless disregard" to "reasonable care"). The current "reasonable care" standard appears to be more similar to a negligence standard than intentional fraud. Therefore, in light of the NCSA's plain language, legislative history, and comparison to federal section 12(a)(2) claims, we hold that a section 78A-56(a)(2) civil plaintiff need not prove *scienter*. Further, we hold a materially false or misleading statement or omission made in connection with a security offer or sale is actionable even if the person making the statement or omission did not know it was false, so long as the person was negligent under section 78A-56(a)(2) in making the statement or omission.[18]

C. Securities Offerors and Sellers

[2] On appeal, Brannon questions his legal status as an offeror or seller of securities. Because Brannon did not individually own the securities sold to Plaintiffs, did not transfer title to them, and did not receive payment for the securities, he claims is not an offeror or seller under the NCSA.

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16. *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, 2012 NCBC 13, at *12, ¶ 47.

17. *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, 2012 NCBC 13, at *12, ¶ 47 (citing 1991 N.C. Adv. Legis. Serv. 456 (LexisNexis)).

18. The approach in our holding has been adopted in NCSA cases before the North Carolina Business Court, and in federal actions before the Federal Circuit Courts of Appeals and the United States Supreme Court, requiring *scienter* in fraud claims but not claims for materially false or misleading statements or omissions. *See Skoog v. Harbert Private Equity Fund, II, LLC, 2013 NCBC 17; NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *63; *Associated Packaging v. Jackson Paper Mfg.*, 2012 NCBC 13; *Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 788 (E.D.N.C. 1992), *affirmed*, *Heritage Capital Corp. v. Deloitte, Haskins & Sells*, 993 F.2d 288 (4th Cir. 1993) (unpublished); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976); *see also* Hazen, *Treatise on The Law of Securities Regulation* 300 § 7.81[1] ("Section 12(a)(2)'s private right of action for material misrepresentations and omissions does not require *scienter* and thus is not truly based in fraud.").

The NCSA defines the terms "sale" and "sell" to include "every contract of sale, contract to sell, or disposition of, a security or interest in a security for value." N.C. Gen. Stat. § 78A-2(8)(a). The terms "offer" and "offer to sell" include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." N.C. Gen. Stat. § 78A-2(8)(b). Therefore, the NCSA imposes liability beyond[19] the owner of a security who holds and transfers title to the buyer. *State v. Williams*, 98 N.C. App. 274, 279, 390 S.E.2d 746, 749 (1990); *see also Pinter v. Dahl*, 486 U.S. 622, 642–643 (1988).

In *Williams*, the defendant signed the stock certificate at issue, but never solicited the buyer's investment or met the buyer prior to issuing the security. *Williams*, 98 N.C. App. at 279, 390 S.E.2d at 749. We disagreed with the State's contention that merely signing a stock certificate constitutes a sale under the NCSA. *Id.* at 278, 390 S.E.2d at 748. However, we agreed that the term "sale" should be broadly construed under the NCSA, and looked to the United States Supreme Court for its guidance in *Pinter*. *Id.* at 278-79, 390 S.E.2d at 748-49. As we noted, the *Pinter* Court "placed great emphasis on the *solicitation* of the buyer as the 'most critical stage of the selling transaction.' " *Id.* at 279, 390 S.E.2d at 749 (citing *Pinter*, 486 U.S. at 646) (emphasis in original). Applying principles from *Pinter*, we held that merely signing a stock certificate does not constitute a "sale" under the NCSA. *Id.* (citing *Pinter*, 486 U.S. at 647).

Our holding in *Williams* remains consistent with the NCSA, which defines "offer" to include a "solicitation of an offer to buy" a security. N.C. Gen. Stat. § 78A-2(8)(b). Therefore, a seller or offeror of a security may be liable under the NCSA even though he does not hold or transfer title to the buyer.

Building upon *Williams* and the principle that solicitation is a defining factor for offerors and sellers, we hold that a defendant does not have to be a securities professional to be liable under the NCSA.

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19. The NCSA also extends liability to securities purchasers under N.C. Gen. Stat. § 78A-56(b), although they, unlike sellers or offerors, are not liable for attorneys' fees in a NCSA suit. Therefore, the NCSA "extends liability to anyone who buys or sells securities without completely and accurately disclosing all material information of which he had knowledge or to which he had had reasonable access." *See* Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 15.04, at 15-10 (7th ed. 2014) (discussing the effect of the 1991 NCSA amendments). This includes "not only insiders such as directors and officers but also tippees and subtippees to whom inside or nonpublic information has been communicated." *Id.*

Federal courts have provided persuasive authority in section 12(a)(2) actions, holding that persons who are not securities professionals may be held liable. *See Craftmatic Sec. Litig. V. Kraftsow*, 890 F.2d 628 (3d Cir. 1989) ("We adopt the *Pinter* analysis and hold that liability under § 12[a](2) extends not only to those who pass title to the purchaser, but also to those who successfully solicit the purchase, motivated by their own or the securities owner's financial interests.") (citation omitted); *see also Pinter*, 486 U.S. at 645–46. The plain language of NCSA section 78A-56(a)(2) imposes liability on "any person" who is a seller or offeror, not just brokers and other securities professionals. Accordingly, a defendant may be liable as a seller or offeror under the NCSA, even though he did not act or solicit an investment as a securities professional or broker, and did not act with *scienter*.

D. Director Safe Harbor

[3] Brannon's next argument is that at the time of the securities sales he was a director of Neogence, and is therefore entitled to the protection of the Director Safe Harbor statute, N.C. Gen. Stat. § 55-8-30(b), of the North Carolina Business Corporation Act as a defense to liability under the NCSA. We disagree. We examine the Director Safe Harbor provision in the following ways: (i) statutory language and applicability to derivative actions; (ii) limitations of Safe Harbor; (iii) federal interpretation of Safe Harbor; and (iv) Brannon's burden as a defendant.

i. Statutory Language and Applicability to Derivative Actions

Our statutes (under "Article 8 Directors and Officers" of the Corporation Act) set out the general standard of conduct for directors, and the related Director Safe Harbor provision as follows:

> § 55-8-30 General standards for directors
>
> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.
>
> (b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including

> financial statements and other financial data, if prepared or presented by:
>
> (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
>
> (2) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence; or
>
> (3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.
>
> (c) A director is not entitled to the benefit of subsection (b) if he has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.
>
> (d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section. The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section.
>
> (e) A director's personal liability for monetary damages for breach of a duty as a director may be limited or eliminated only to the extent permitted in G.S. 55-2-02(b)(3), and a director may be entitled to indemnification against liability and expenses pursuant to Part 5 of Article 8 of this Chapter.

N.C. Gen. Stat. § 55-8-30.

Under this statute, "directors of a corporation are required to act in good faith, with due care, and in a manner they reasonably believe to be in the best interests of the corporation." *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013) (citing N.C. Gen. Stat. § 55-8-30). When a director breaches one or more of these fiduciary duties, a shareholder may bring a *derivative* action on behalf of the corporation for injury to the corporation. *Id.* at 141, 749 S.E.2d at 268 (citing N.C. Gen. Stat. § 55-7-40 (2011)) (emphasis added); *see also State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 602–03, 513 S.E.2d 812, 822 (1999). In *Green v. Freeman*, our Supreme Court discussed when a shareholder may bring a derivative action against directors for breach of fiduciary duties:

> The general rule is that '[s]hareholders, creditors or guarantors of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation.' *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660, 488 S.E.2d 215, 220–21 (1997) (citations and quotation marks omitted). Shareholders may, however, bring a derivative lawsuit against corporate officers and directors, in which case any damages flow back to the corporation, not to the individual shareholders bringing the action. *Rivers v. Wachovia Corp.*, 665 F.3d 610, 614–15 (4th Cir.2011) (citations omitted); see 2 James D. Cox & Thomas Lee Hazen, Cox & Hazen on Corporations § 15.02 (2d ed.2003) [hereinafter Cox & Hazen on Corporations]. Plaintiffs did not bring a derivative suit. Therefore, we examine two exceptions to the general rule: shareholders, creditors and guarantors may bring an individual action against a third party for breach of fiduciary duty when (1) 'the wrongdoer owed [them] a special duty' or (2) they suffered a personal injury 'distinct from the injury sustained by . . . the corporation itself.' *Barger*, 346 N.C. at 659, 661, 488 S.E.2d at 219, 221.

Id. at 67 N.C. at 142, 749 S.E.2d at 268. Here, the Plaintiffs' claim is not brought as a derivative action, but is brought because they suffered individual injury distinct from injury sustained by the corporation itself. Plaintiffs' individual injury is for the loss of their investments, resulting from untrue statements of material fact and omissions made in violation of the NCSA.

ii. Limitations of the Safe Harbor Provision

The Safe Harbor provision of the Corporation Act provides directors "*discharging [their] duties [as] director[s]*" with a defense against derivative claims, but the provision does provide an individual director Safe Harbor defense if he is not acting in his role as a director. N.C. Gen. Stat. § 55-8-30(b) (emphasis added). The plain language of the statute is clear and not ambiguous.

The record suggests Brannon shared fundraising responsibility with other Neogence employees. However, the jury found Brannon liable to Plaintiffs under section 78A-56(a)(2) for his individual representations, which were the product of his own acts, not his directorial responsibilities set out by the board. The Neogence board did not collectively or

formally approve a solicitation message and charge Brannon or any directors with the responsibility of repeating it. Nor did Neogence approve Brannon's actions or message before his solicitations. Therefore, even though Brannon was attempting to fundraise, a responsibility he may have shared with other Neogence employees, his acts are not a product of Neogence's collective approval and are not a "business judgment" of the entity.

iii. Federal Interpretation of the Safe Harbor Provision

Brannon and the Dissent reason the Safe Harbor provision should be applicable due to the Fourth Circuit's holding in *Dellastatious v. Williams*, 242 F.3d 191 (2001). We distinguish *Dellastatious* on several grounds.

In *Dellastatious*, the plaintiffs brought a securities fraud action against two defendants ("Williams" and "Kelly") as "control persons" under the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), and the Virginia Securities Act, Va. Code. § 13.1-522(C).[20] *Dellastatious*, at 192–93. Williams and Kelly were directors of a parent company, LaserVision Technologies, Inc. ("LaserVision"), which served as a managing member of the company at issue, Surround Vision Advanced Imaging, Inc. ("SAIL"). *Id.* at 193. Adrian Gluck ("Gluck"), served as president of LaserVision, and president, CEO, and director of SAIL. *Id.* Gluck invited the plaintiffs to invest in SAIL, and SAIL sent them "offering documents regarding the sale of the SAIL securities." *Id.* These documents were prepared by Gluck, SAIL's Executive Vice President, director, CFO, and LaserVision's attorney. *Id.* Thereafter, plaintiff Dellastatious invested in SAIL. *Id.* Several months later, the documents were revised and updated copies were mailed to Dellastatious. *Id.* Shortly thereafter, SAIL ceased doing business rendering Dellastatious's shares worthless. *Id.*

Dellastatious and another SAIL shareholder sued three of SAIL's officers, LaserVision, and Williams and Kelly as outside directors of LaserVision. *Id.* The alleged fraud centered on the offering documents and "Williams and Kelly, although perhaps not directly responsible for the securities fraud, were [allegedly] liable as 'control persons' under Section 20 of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a),

20. We note that Va. Code § 13.1-522(C) imposes a "reasonable care" defensive burden on control persons, like N.C. Gen. Stat. § 78A-56(c). However, Virginia, unlike North Carolina, has used this "reasonable care" language since it adopted the Uniform Securities Act of 1956. *See* Va. Code § 13.1-522(b) (1956); *Cf.* An Act to Enhance the Enforcement Provisions of the North Carolina Securities Act and the Investment Advisers Act, ch. 78A, sec. 56(a)(2), 1991 N.C. Sess. Laws 1991-456.

and the Virginia Securities Act, Va. Code. § 13.1-522(C)." *Id.* at 194. Williams and Kelly specifically pled the Virginia Safe Harbor statute Va. Code § 13.1-690(B) as an "affirmative defense" to liability. The trial court granted Williams's and Kelly's motion for summary judgment because "they were not control persons" and "they satisfied the statutes' good-faith defense." *Id.* at 193. On appeal, the Fourth Circuit affirmed the district court and held Williams and Kelly "are entitled to the good-faith affirmative defense under both federal law and Virginia's allegedly more-exacting [Safe Harbor] standard." *Id.* at 195.

The Fourth Circuit reasoned, "control persons may escape liability by proving that they acted in good faith with regard to the securities violation. *See* 15 U.S.C. § 78t(a). To determine whether the good-faith affirmative defense has been satisfied under section 20(a), defendants must show that they did not act recklessly." *Id.* at 194. Looking to the control person section of the Virginia Securities Act, the court held the state statute "allows control persons to avoid liability if they can prove that they 'did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.' " *Id.* (citing Va. Code § 13.1-522(C)). "*One way* to determine whether Williams and Kelly acted with 'reasonable care' pursuant to [the Virginia antifraud statute imposing liability upon control persons] is to consider whether they complied with the duties established for directors under state law." *Id.* at 195 (emphasis added). The court added the following footnote to this consideration:

> While Dellastatious brought several different claims against Williams and Kelly in their different capacities, *all of Dellastatious' claims revolve around Williams and Kelly's roles as directors of LaserVision. The key to Dellastatious' theory is that SAIL is a shell corporation and that LaserVision and its officers are the bad actors.* As a result, we assess the reasonableness of Williams and Kelly's conduct with an eye toward the duties owed by corporate directors.

Id. n. 3. (emphasis added).

Citing Virginia's Safe Harbor statute, Va. Code § 13.1-690(B),[21] the court reasoned "as long as directors have no knowledge that makes

21. The Virginia Safe Harbor provision provides the following: "A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation. Unless he has knowledge or information concerning the matter in question that makes

reliance unwarranted, they may rely on financial statements prepared by corporate officers, legal counsel, or public accountants." *Id.* at 196 (citation omitted). The court continued, "[i]n cases such as this, where shareholders allege that directors have insufficiently supervised the corporation's affairs, directors can avoid liability by showing that they attempted in good faith to ensure that an adequate corporate information-gathering and reporting system was in in place." *Id.* "It was reasonable for Williams and Kelly to delegate the creation and review of SAIL's offering documents to SAIL's officers . . . and their attorney." *Id.* Further, "SAIL's system for drafting and reviewing offering documents functioned properly." *Id.*

The court held Williams and Kelly were "entitled to the good-faith affirmative defense under both federal law and Virginia's . . . more-exacting standard [for Safe Harbor]" because they "complied with Virginia's standards for directorial duties, and they likewise acted with reasonable care." *Id.* at 195–96.

Despite Brannon's and the Dissent's comparison, *Dellastatious* is markedly different from the case *sub judice*. An affirmative defense, like the Safe Harbor defense pled by Williams and Kelly, may be granted at summary judgment if the record shows the directors had a process of corporate data collection that was reliable and insured verification of facts stated in a prospectus collected by corporate employees, such as accountants and lawyers, upon which a board could reasonably rely.

In this case, Brannon never pled the Safe Harbor affirmative defense in his answer or in his motion for summary judgment. After the evidence was submitted he did not move to amend his pleadings to assert this affirmative defense pursuant to North Carolina Rule of Civil Procedure 15. *See* N.C. Gen. Stat. § 1A-1, Rule 15. Rather, he raised the Safe Harbor affirmative defense only at directed verdict and again when instructions were to be given to the jury. Under North Carolina Rule of Civil Procedure 8(c), "a party shall affirmatively set forth any matter constituting an avoidance or affirmative defense." *Robinson v. Powell*, 348 N.C. 562, 567, 500 S.E.2d 714, 717 (1998) (citing N.C. Gen. Stat. § 1A-1, Rule 8(c)). "[I]t is well-established that failure to plead an affirmative

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reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by: one or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented; legal counsel, public accountants . . .; a committee of the board of directors . . . ." Va. Code 13.1-690(A)–(B). Virginia's safe harbor provision is nearly identical with North Carolina's provision under N.C. Gen. Stat. § 55-8-30(a)–(c).

defense constitutes a waiver of the defense." *Ellison v. Gambill Oil Co., Inc.*, 186 N.C. App. 167, 174, 650 S.E.2d 819, 823 (2007) (citations omitted). After careful review of the record, Brannon does not plead the Safe Harbor affirmative defense or cite to N.C. Gen. Stat. § 55-8-30 in any of his pretrial pleadings. Therefore, even if the defense were available, which it is not, he waived the Safe Harbor affirmative defense. Due to the notice requirement of Rule 8(c), it would offend equity to grant Brannon this waived affirmative defense. *See* N.C. Gen. Stat. § 1A-1, Rule 8(c) ("Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice . . . .").

After comparing the instant case to *Dellastatious*, we note the following distinctions. First, Williams and Kelly faced liability as control persons for failing to supervise corporate affairs, not primary liability as securities offerors or sellers like Brannon. Second, the misrepresentations in *Dellastatious* were contained in securities offering documents, provided by SAIL, and drafted and reviewed by SAIL's officers, directors, and legal counsel. In contrast, Brannon made direct misrepresentations to Plaintiffs while soliciting their investments through verbal and written means. Third, the control person claims in *Dellastatious* "revolve[d] around Williams and Kelly's roles as directors of LaserVision." *Id.* at 195, n. 3. In contrast, Brannon, or "*[a]ny person* who offers or sells a security by means of *any untrue statement* of a material fact or *any omission* to state a material fact . . ." faces liability under N.C. Gen. Stat. § 78A-56(a)(2) (emphasis added). Plaintiffs do not allege Neogence made materially false misrepresentations in offering documents or prospectuses, or that such misrepresentations were collectively and formally approved by Neogence's board. Rather, Plaintiffs allege Brannon's rogue solicitations were materially false, and he made the solicitations as a seller or offeror, thereby bringing him within the broad class of "any person" subject to primary liability under N.C. Gen. Stat. § 78A-56(a).

We also note that *Dellastatious* does not resolve the Uniform Model Securities Act of 1956 § 410(a)(2)[22] (which North Carolina adopted and codified verbatim in the modern version of N.C. Gen. Stat. § 78A-56(a)(2)) with Director Safe Harbor protection.[23] After careful review, we can

22. Or the equivalent under Uniform Securities Act of 2002 § 509(b).

23. *See Atocha Ltd. Partnership v. Witness Tree, LLC*, 65 Va. Cir. 213 (2004) (not reported in S.E.2d); *Premier Capital Management, LLC v. Cohen*, 2008 WL 4378300 (N.D. Ill. 2008) (not reported in F.Supp.2d); *Poth v. Russey*, 281 F.Supp.2d 814 (E.D.Va. 2003); *Frank v. Dana Corp.*, 646 F.3d 954 (6th Cir. 2011) (adopting the good faith defense in federal Section 20(a) claims, arising under 15 U.S.C. § 78t(a), for allegations against control persons).

identify no state case that affords Director Safe Harbor protection to a seller or offeror who is alleged to be primarily liable for his individual actions under a state antifraud statute.[24] The only cases that afford such protection are those in which defendants are alleged to be control persons, like Williams and Kelly in *Dellastatious*.[25] Even in control person cases, directors carry the burden in establishing their reasonable care.[26]

The Safe Harbor provision, as applied in control person cases, protects plural directors for their corporate mismanagement. As discussed, Brannon acted individually and touted securities based upon inside information. Therefore, the Director Safe Harbor provision cannot readily immunize Brannon from his individual actions.

iv. Brannon's Burden as a Defendant

In the way of attempting to carry a Safe Harbor burden, Brannon testified through his deposition, that he "simply took [Cummings']" word at face value. He offered no evidence that he reasonably believed Cummings was reliable and competent, he offered no evidence of good faith or reasonable inquiry, and he offered no evidence that he "actually

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24. *See Everts v. Holtmann*, 64 Or.App. 145, 155–56, 667 P.2d 1028, 1035 (1983) ("We conclude that [defendant's] statement in his affidavit that he relied on information received from [business's] accountant and active officer and directors is insufficient to immunize him as a matter of law. . . . [Defendant] contends finally, that as an "outside" director without notice of any suspicious activity, he should not be held liable for the acts of active officers and directors. Those factors go into the mix of facts to be presented to the trier of fact to determine what constitutes reasonable care here, but they do not, as a matter of law, support summary judgment for [defendant].").

25. *See* the following federal Section 20(a) cases: *Senior Management, Inc. v. Arnett Group, LLC*, 2013 WL 3245328 (E.D.N.C. 2013) ("As [defendant] has not provided any evidence that he acted in good faith, he may not escape derivative liability as a controlling person here." (citing *Dellastatious*, 242 F.3d at 194)); *Karmen v. Lindly*, 94 Cal. App. 4th 197, 114 Cal.Rptr.2d 127 (2001); *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir.2008); *In re Stone & Webster, Inc., Sec. Litig.*, 424 F.3d 24, 26 (1st Cir.2005); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 384 n. 19 (5th Cir.2004); *Donohoe v. Consol. Operating & Prod. Corp.*, 30 F.3d 907, 912 (7th Cir.1994).

26. *See Hines v. Data Line Systems, Inc.*, 114 Wash.2d 127, 146, 797 P.2d 8, 18 (1990) ("Defendants argue . . . [the Washington State Securities Act] does not impose upon directors a duty to investigate facts beyond their *actual* knowledge. However, the plain language of the affirmative defense provision requires something more than actual knowledge. The defense is available only if such person 'did not know' and 'could not have known' of the existence of the liability producing facts. Ignorance will be bliss only to the extent that the director can prove that even by the exercise of reasonable care he would have remained ignorant of the true state of affairs.") (citation omitted) (emphasis in original).

read and considered any material [from Cummings] . . . [and did] not ignore anything that would cause doubts about the reliance."[27]

More germane to his NCSA primary liability and statutory reasonable care defense, Brannon offered no evidence that he "did not know, and in the exercise of reasonable care could not have known, of the untruth or omission" contained in his solicitations. N.C. Gen. Stat. § 78A-56(a)(2). Brannon offered no evidence to show that his inaction following the solicitations was reasonable. Brannon's blind faith and willful ignorance is juxtaposed by Kirkbride's testimony and Rice's incredulity towards Cummings. As Kirkbride testified, Brannon could have contacted Cummings and learned the truth of the Verizon opportunity. Therefore, Brannon did not carry the burden[28] of his NCSA reasonable defense, nor any Safe Harbor defense he seeks on appeal.

We respectfully disagree with the Dissent and hold the Director Safe Harbor provision does not supersede, narrow, or aggrandize the statutory reasonable care defense available to "any person" under N.C. Gen. Stat. § 78A-56(a)(2). As such, we hold the trial court did not commit an error of law regarding the motion for directed verdict or jury instructions.

E. Inconsistent Jury Verdict

[4] Brannon next complains it is inconsistent for him to be held liable under the NCSA when Kirkbride and Rice were not held liable. Because a jury may apply the law to the facts, it is not illogical or inconsistent for two NCSA defendants to achieve different results in a single action. If one defendant carries his reasonable care burden of proof and the other does not, the jury's verdict can properly impose liability on the latter but not the former. The issue of a defendant's reasonable care is a factual question for the jury to consider. "It is the jury's function to weigh the evidence and to determine the credibility of witnesses . . . and the trial court should set aside a jury verdict only in those exceptional situations where the verdict . . . will result in a miscarriage of justice." *Strum*, 186 N.C. App. at 667, 652 S.E.2d at 310 (citations and quotation marks omitted). A jury verdict imposing liability on one of two defendants in an action is not a "miscarriage of justice" when one defendant testifies

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27. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.05, at 14-16 (7th ed. 2014).

28. We explicitly note the burden of proof shifted to Brannon to prove his reasonable care defense after Plaintiffs established their *prima facie* case for primary liability under N.C. Gen. Stat. § 78A-56(a)(2).

to the benefit of his reasonable care defense and the other defendant remains silent and fails to carry his burden. As such, the trial court did not abuse its discretion in refusing to set aside the jury verdict, enter a judgment notwithstanding the verdict, or grant a new trial.

In this case, Cummings was the only party present at the 30 April 2010 New York meeting. His account of the meeting roots all controversy among the Defendants, and the misleading information they relayed to investors. Cummings's testimony was presented to the jury through his 23 April 2012 affidavit and his 13 September 2013 deposition.

In his affidavit, Cummings testified as follows:

> The focus of the April 30, 2010 meeting . . . at McGarry Bowen was to discuss Mirascape's mobile phone technology and a forthcoming advertising campaign McGarry Bowen and Verizon were planning . . . . [Joe Roth] asked me to came [sic] back (in July [2010] if possible) when Mirascape had a demo, once I returned and demonstrated a functioning app, he would consider Mirascape being used in Verizon's forthcoming advertising campaign. During the above-described meeting, there was no discussion of Mirascape being bundled or OEM'd [sic] onto DROID smartphones, by me, Joe Roth, or the Verizon employee. Similarly, there was no discussion of Mirascape becoming Verizon's featured AR. These topics simply did not come up. At no point in time during my employment with Neogence did I discuss these topics with anyone associated with Verizon.

Rice, Piazza, and Lampuri testified that Cummings's affidavit was false and inconsistent with their communications with Cummings, Kirkbride, Rice, and Brannon. To the contrary, Kirkbride testified that Cummings's affidavit was consistent with his knowledge of the Verizon opportunity.

In his deposition, Cummings testified that during the New York meeting, "McGarry Bowen was in no position to make a relationship between Verizon and Neogence." He discussed an advertising campaign with one of the McGarry Bowen account managers, and brainstormed, but nothing "more serious than that." If Neogence could fully develop the Mirascape app in time, "they would consider it as part of" an advertising campaign. Pressed to define "they" as either McGarry Bowen or Verizon, Cummings testified "I would assume it would be both. I don't know that." According to Cummings, the Verizon employee at the meeting did not suggest "in any way, shape, or form . . . that Mirascape might

have an opportunity to become a featured application on Verizon smart phones [sic]" or "have an opportunity to become OEM or pre-installed on Verizon smart phones [sic]." Cummings confirmed "there was no specific opportunity presented to [him] that day, other than the opportunity to come back and show a functioning demo." The emails Rice and Brannon sent to investors certainly suggested a more promising opportunity, that Neogence would "go back to Verizon" to demonstrate Mirascape, and possibly become OEMed on Verizon smartphones as a featured AR application.

Cummings reviewed Brannon's email and testified that it "overstated" the Verizon opportunity because the opportunity was for Neogence to return to McGarry Bowen, not Verizon, to perform a demonstration and hopefully become part of an advertising campaign, not become Verizon's feature or OEM AR application. Cummings stated Rice's email "could be misleading" because it described the opportunity as Brannon described it, and such a "portrayal of the meeting" would not be accurate "without clarification."

The Plaintiffs contend Defendants made false and misleading representations about the Verizon opportunity, specifically citing "the representation that Neogence had an existing opportunity with Verizon for Mirascape to become a featured AR application pre-installed on all Verizon DROID smartphones." Defendants, excluding Kirkbride, contend they learned and relayed this misleading information from Cummings. Therefore, liability in this case depends upon the action defendants took to investigate the Verizon opportunity.

Kirkbride participated in soliciting investments, but there is no evidence that he relayed misleading statements about the Verizon opportunity to Plaintiffs. Kirkbride testified he exercised reasonable care by speaking to Cummings directly, and learned the Verizon opportunity was actually a McGarry Bowen advertising opportunity.

Rice relayed misleading information in his 30 April 2010 email to Piazza and other investors He also misled Lampuri in a July 2010 meeting, stating the Verizon opportunity was "very much real" and investment funds would be used to create a Mirascape demonstration for Verizon. However, Rice rectified his statements by emailing Piazza and keeping him abreast of ongoing challenges and deadlines. He also emailed Kirkbride, which stated the following for the jury:

> The problems are [sic] John [Cummings], who I have to keep covering for in phone calls, meetings, and e-mails. I've constantly had to go in behind him and clean things

> up, clarify things, or reset expectations. . . . Verizon is nice, but it turned into something that has almost cost us Larry [Piazza] because it was oversold on too short of a timeline . . . . do not breathe a word of this to Larry [Piazza]. It will show a total lack of confidence in the company and me . . . . If you decide you have to, to close him, then fine. . . . [I]f it comes to it, I'd rather you bring it up.
>
> I don't even know if there's any OEM opportunity here or not . . . I'll have to say that John [Cummings] makes a lot of stuff up or makes large claims for effect or to make a point. I'm not the only one that has noticed this. So my level of trust for anything he says is minimal at best right now.

In contrast, the evidence against Brannon appears one-sided. The jury considered Brannon's misleading solicitations in his 30 April 2010 email to Piazza and others, claiming that Cummings had a meeting "with Verizon" and "in 3–4 weeks we go back to Verizon we have an oppurtnity [sic] to be their featured AR." The jury heard these same misrepresentations repeated to Lampuri, when he was in the prenatal examination room with his wife Kristen. Brannon presented no evidence suggesting he remedied or clarified these solicitations. Rather, as Brannon sat silent, Plaintiffs read portions of Brannon's deposition to the jury. In these excerpts, Brannon admitted to relaying the faulty information to investors without any personal knowledge of the Verizon opportunity, and without contacting Cummings, McGarry Bowen, or Verizon to clarify the business opportunity. Due to this inaction, it was reasonable for the jury to find Brannon did not exercise reasonable care, and find him liable to Piazza and Lampuri. Therefore, the trial court's judgment and rulings are not based upon errors of law, and the trial did not abuse its discretion in not setting aside the jury verdict.

F. Attorney Fees

[5] Lastly, we review the issue of attorney fees and costs. A trial court's decision to award or deny attorney fees "will not be disturbed on appeal unless the trial court has abused its discretion." *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 528, 586 S.E.2d 507, 513 (2003). Given the trial court's proper rulings, we hold the court did not abuse its discretion in awarding attorney fees and costs to Plaintiffs.

V. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Chief Judge McGEE concurs.

Judge TYSON concurs in part, dissents in part.

TYSON, Judge, concurring in part, dissenting in part.

The statutory Director Safe Harbor set forth in N.C. Gen. Stat. § 55-8-30(d) is a necessary protection for directors due to "the growing complexity of business affairs," which makes it "necessary for [outside] directors to rely on other corporate personnel" and "outside experts in discharging their responsibilities." RUSSELL M. ROBINSON, II, ROBINSON ON NORTH CAROLINA CORPORATION LAW § 14.05 (7th ed. 2014). The "business judgment rule protects corporate directors from being judicially second-guessed when [directors] exercise reasonable care and business judgment." *HAJMM Co. v. House of Raeford Farms, Inc.* 94 N.C. App. 1, 10, 379 S.E.2d 868, 873, *modified and aff'd in part, rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). The trial court's rulings and the majority's opinion deny Brannon his legal entitlement to a Director Safe Harbor instruction to the jury where the evidence clearly supports it.

The trial court erred by failing to instruct the jury on the Director Safe Harbor provision as Brannon requested in light of the evidence presented. I vote to award Brannon a new trial based upon the trial court's failure to provide the jury with the requested instruction as supported by the evidence.

I also respectfully disagree with the portion of the majority's opinion, which holds the verdicts were not inconsistent with regard to the statements Brannon, Rice, and others made to Piazza. To deem Brannon's statements to Piazza as "securities fraud," while acquitting Rice, the Chief Executive, is extreme, legally unsound, and patently illogical. Brannon is entitled to a new trial because the verdict, which holds him liable to Piazza, is wholly inconsistent with the verdict absolving Rice from liability to Piazza upon identical conduct.

I respectfully dissent from the majority opinion's holdings that the Director Safe Harbor defense set forth in the North Carolina Business

Corporation Act, N.C. Gen. Stat. § 55-8-30(d), is inapplicable, and that the trial court properly denied Brannon's motion for a new trial for inconsistent jury verdicts regarding his liability to Piazza.

I. Director Safe Harbor Provision

Brannon is entitled to a new trial after the trial court failed to give the applicable jury instruction on the Director Safe Harbor provision set forth in N.C. Gen. Stat. § 55-8-30(d). Brannon's request is supported by the evidence in the record.

A. Standard of Review

> When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim. If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error. Thus, the appropriate inquiry here is whether evidence existed to support the request for an instruction.

Ellison v. Gambill Oil Co., Inc., 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) *aff'd*, 363 N.C. 364, 677 S.E.2d 452 (2009) (citations omitted). "[I]t is the duty of the trial court to charge the law applicable to the substantive features of the case arising on the evidence." *Blum v. Worley*, 121 N.C. App. 166, 168, 465 S.E.2d 16, 18 (1995) (emphasis deleted). "Once a party has aptly tendered a request for a specific instruction, correct in itself and supported by the evidence, failure of the trial court to render such instruction, in substance at least, is error." *Id.* (citations omitted).

B. Failure to Give Director Safe Harbor Jury Instruction

Rice testified that Brannon's role in Neogence, as an outside and non-officer director, was "[m]ostly as a friend and advisor, basically a cheerleader," and to "expos[e] th[e] company to friends that may want to invest in it." Brannon did not have a day-to-day or any hands-on executive officer role in the company, which was run by Cummings, the Chief Operating Officer, Kirkbride, the Chief Financial Officer and a licensed attorney, and Rice, the founder and Chief Executive Officer. According to Rice, Cummings was "part of [Neogence's] management team" and was "focused on sales and business development."

As Brannon asserted in his Answer, Piazza and Lampuri were both accredited, or "angel," investors. The Securities Exchange Act of 1933 defines the term "accredited investor" to include, among others, any person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000.00. 17 C.F.R. § 230.501(a). The Act further defines an "accredited investor" as any person who had an individual income in excess of $200,000.00 or a joint income in excess of $300,000.00 with that person's spouse, in each of the two most recent years. *Id.*

Black's Law Dictionary defines an "angel investor" as "an experienced and successful entrepreneur, professional, or entity that provides start-up or growth financing to a promising company, often together with advice and contacts." BLACK'S LAW DICTIONARY (9th ed. 2009). Both these sources describe an "accredited" or "angel investor" as a high net worth and high income individual, who understands, accepts, and undertakes high risks, which may result in high returns from highly speculative investments. This status provides investors with lower suitability requirements than non-accredited, or non-angel, investors. Brannon, an outside director of Neogence, was found liable to the accredited investors for repeating the first-hand information provided to him by Cummings, an executive officer of Neogence, about the Verizon opportunity.

The applicability of the Director Safe Harbor provision in the North Carolina Business Corporation Act to an outside director, who is alleged to be liable under the North Carolina Securities Act appears to be an issue of first impression in North Carolina. This Court looks to decisions of both the federal courts and sister jurisdictions for guidance on issues of first impression, particularly where dealing with Model or Uniform Acts. *See*, *e.g.*, *Cook v. Wake Cnty. Hosp. Sys.*, 125 N.C. App. 618, 623, 482 S.E.2d 546, 550 (1997).

The Fourth Circuit's analysis and holding in *Dellastatious v. Williams*, 242 F.3d 191 (2001) is together instructive and applicable to this case. In *Dellastatious*, the United States Court of Appeals for the Fourth Circuit applied Virginia's Director Safe Harbor statute to the Virginia Securities Act. The defendants were both outside directors of LaserVision Technologies, Inc. ("LaserVision"). The president of LaserVision invited the plaintiff, Dellastatious, to become an equity investor in Surround Vision Advanced Imaging, Inc. ("SAIL"), a limited liability company formed by LaserVision to finance the marketing of LaserVision's technology. *Id.* at 193.

In reaching his decision to invest, the plaintiff asserted he relied upon an Offering Memorandum prepared by the president of LaserVision, LaserVision's attorney, and two officers of SAIL. *Id.* SAIL ceased operations shortly thereafter.

Dellastatious and another shareholder included the two outside directors of LaserVision as defendants in a lawsuit and alleged the Offering Memorandum was materially misleading. *Id.* The plaintiff alleged the defendants, although not directly liable for the securities fraud, were liable as "control persons," and subject to liability under both the federal Securities Exchange Act of 1934 and the Virginia Securities Act. *Id.* at 194.

Dellastatious appealed to the United States Court of Appeals for the Fourth Circuit from the district court's grant of summary judgment in favor of and dismissing the defendant directors. *Id.* The Court of Appeals presumed, without deciding, the defendants were "control persons" under federal and Virginia law. *Id.* at 195 (citing 15 U.S.C. § 78t(a) (extending liability to "every person who, directly or indirectly, controls" one liable for securities violations); Va. Code § 13.1-522(C) (extending liability to "every person who directly or indirectly controls" one liable for securities violations, "including every partner, officer, or director of such a person")).

Similar to the provisions of the North Carolina Securities Act, a "control person" can avoid liability under the Virginia Securities Act by proving that he "did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist." *Id.* at 194 (quoting Va. Code § 13.1-522(C)); *compare* N.C. Gen. Stat. § 78A-56(a)(2).

The Court of Appeals explained:

> One way to determine whether [the defendants] acted with "reasonable care" pursuant to Va. Code § 13.1-522(C), *is to consider whether they complied with the duties established for directors under state law.* Virginia Code § 13.1-690 establishes "the standard by which to evaluate a director's discharge of duties in Virginia." *Willard v. Moneta Bldg. Supply, Inc.*, 258 Va. 140, 515 S.E.2d 277, 284 (Va. 1999). If a director acts in accordance with that standard, Va. Code § 13.1-690(C) provides a *"safe harbor" that shields a director from liability "for any action taken as a director, or any failure to take any action."* Va. Code § 13.1-690(C); *see also Willard*, 515 S.E.2d at 284 (discussing

> § 13.1-690(C)'s safe harbor provision); *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1183 (4th Cir. 1995) (same). Although the few cases interpreting section 13.1-690 have concerned protections afforded directors under the business judgment rule, *the statutory text is in no way limited to that.* In light of 13.1-690(C)'s expansive safe harbor provision, it seems unlikely that section 13.1-522(C) would hold directors to a higher standard of care than that set forth under section 13.1-690.

Id. at 195-96 (emphasis supplied).

Here, Brannon's counsel requested North Carolina Civil Pattern Jury Instruction 807.50, which tracks the language of the Director Safe Harbor statute, N.C. Gen. Stat. § 55-8-30. The statute reads:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.
>
> (b) In discharging his duties *a director is entitled to rely on information, opinions, reports, or statements*, including financial statements and other financial data, if prepared or presented by:
>
> (1) *One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;*
>
> (2) *Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence;* or
>
> (3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.
>
> (c) A director is not entitled to the benefit of subsection (b) if he has actual knowledge concerning the matter in

> question that makes reliance otherwise permitted by subsection (b) unwarranted.
>
> (d) A director is *not liable* for *any action taken as a director*, or any failure to take any action, if he performed the duties of his office in compliance with this section. The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section.

N.C. Gen. Stat. § 55-8-30 (emphasis supplied). This statute permits and encourages a director to serve the board for the corporation and communicate statements he received without fear of "being judicially second-guessed." *HAJMM*, 94 N.C. App. at 10, 379 S.E.2d at 873.

For comparison, the Virginia safe harbor statute interpreted by the Court of Appeals in *Dellastatious* reads:

> A. A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation.
>
> B. Unless he has knowledge or information concerning the matter in question that makes reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:
>
> 1. *One or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented*;
>
> 2. Legal counsel, public accountants, or other persons as to matters the director believes, in good faith, are within the person's professional or expert competence; or
>
> 3. A committee of the board of directors of which he is not a member if the director believes, in good faith, that the committee merits confidence.
>
> C. *A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.*
>
> D. A person alleging a violation of this section has the burden of proving the violation.

Va. Code § 13.1-690 (emphasis supplied). The statutory schemes in both states are almost identical.

The *Dellastatious* Court determined summary judgment was properly granted in favor of the defendant outside directors to be dismissed from the plaintiffs' claim under the anti-fraud statute. *Id.* at 197. The directors complied with Virginia's standards for directorial duties, and they likewise acted with reasonable care under § 13.1-690(B), the safe harbor provision. *Id.* They served as outside directors on LaserVision's board, because they had invested $2.2 million of their own money in LaserVision, as Brannon had invested his own money in Neogence. *Id.* at 196.

Also like Brannon, these outside directors were not experts on the LaserVision technology and had no role in SAIL's plan to market the technology. *Id.* at 196-97. It was reasonable for the directors to delegate the creation and review of SAIL's offering documents to SAIL's officers and attorney. *Id.* By virtue of their positions or areas of expertise, the officers, like the executive officers Rice, Kirkbride and Cummings for Neogence, were far more intimately involved with the production of the offering presentations, statements, and documents.

The majority's opinion offers the notion that Brannon has waived his right to assert the protections afforded to him under the Director Safe Harbor statute, because he failed to raise the issue as an "affirmative defense." The North Carolina Rules of Civil Procedure govern the pleading requirements for an affirmative defense.

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense.

N.C. Gen. Stat. § 1A-1, Rule 8(c) (2015).

The Director Safe Harbor provision is not included in the extensive list of affirmative defenses set forth in Rule 8(c). No authority shows a director's assertion of the protection he is afforded under N.C Gen. Stat. § 55-8-30 must be specifically pled as an affirmative defense, nor was this issue raised by Plaintiffs either at trial, or upon Brannon's request

for the instruction. The parties do not dispute that Brannon was an independent, outside director of Neogence and the statements he made to Plaintiffs were merely a repetition of what he was told by Cummings.

The requested jury instruction must be given whenever "more than a scintilla of evidence" is introduced in support. *Blum*, 121 N.C. App. at 169, 465 S.E.2d at 18 (reversing trial court for failure to issue punitive damages instruction that was supported by "more than a scintilla" of evidence).

Contrary to Plaintiffs' and the majority opinion's assertion, evidence was presented to the jury to show Brannon completely relied upon Cummings' statements about the meeting in New York in making the alleged representation. Plaintiffs' counsel read into evidence Brannon's deposition testimony, in which he explained that he relied on Cummings in repeating information about the Verizon opportunity to both Plaintiffs:

> Q: Okay. And you indicated that there was an opportunity to be the featured augmented reality on Verizon applications; is that correct?
>
> A: That's what John Cummings told David Kirkbride, myself, Robert Rice, and I think Larry [Piazza] as well.
>
> Q: Okay. You would not agree that these e-mails were made in the context of seeking an investment in the company?
>
> A: This is to show information to make a decision.
>
> Q: To make what decision?
>
> A: How we're going. How the place is going. Its first 50,000. How we're progressing. John [Cummings] was the marketer guy and the – again, he was the one that had the Verizon connection that had the meeting.
>
> Q: Do you know whether John Cummings actually met with somebody at Verizon?
>
> A: He said he did.
>
> Q: Okay. And you simply took his word for it?
>
> A: Yes.
>
> Q: And you took his word for the fact that your company, Neogence, had an opportunity to become the featured augmented reality on Verizon applications?

> A: Yes, I did. And that's why my e-mail said Robert [Rice] have [sic] all the details and John [Cummings] have all the details.
>
> Q: You have no personal idea as to whether any such representation was made to John Cummings by anyone from Verizon?
>
> A: No, sir.

Plaintiffs argue that even if the Safe Harbor provision applies, Brannon was acting unilaterally and not as a director. Plaintiffs argue an individual director has no legal authority to act on behalf of the corporation; rather, that authority resides exclusively in the entire board of directors, in whom the management of the affairs of the corporation is entrusted. N.C. Gen. Stat. § 55-8-01 (2015). This assertion is without merit.

Everyone agrees Neogence required additional funds immediately to capitalize on the Verizon opportunity, and that this was the sole reason for Brannon's efforts to secure financing. While Plaintiffs argue Brannon was not acting as a director when soliciting investments for Neogence, neither they nor the majority suggests *any reasonable explanation whatsoever* to show why Brannon would otherwise solicit equity angel investments for the company.

To require every communication a director has with a third party to be formally approved in advance by the Board or to be made by the Board as a whole is unreasonable. Like most high risk start-up companies, the mission of Neogence was to raise funds to develop a working model to meet the Verizon demonstration deadline. Every solicitation and communication (email, phone call, etc.) in furtherance of the company's stated goal cannot reasonably require prior formal approval by the Board. Contrary to Plaintiffs' assertion, Brannon was acting as a "director" when he made the statement to Plaintiffs and the evidence shows he is entitled to the Director Safe Harbor jury instruction.

The majority's unnecessarily restrictive reading of the Safe Harbor provision will discourage qualified persons from agreeing to serve as unpaid, independent outside directors for corporate governance. If a director, particularly an independent outsider, cannot rely upon the statements of company employees, officers, and consultants in soliciting funds without being subject to securities fraud liability the majority imposes here, there is little incentive to serve at all.

It is undisputed that one of Brannon's roles as a non-officer, outside, independent director in the company was to recruit investors. It is also

undisputed that his *sole* means of recruiting investors was to rely upon information provided by and statements made by Neogence employees, Cummings, Rice and Kirkbride, whose roles as executive officers were to create opportunities, disseminate information, and market the company. Brannon's requested Director Safe Harbor instruction is clearly supported by the evidence. The trial court committed reversible error by failing to provide the requested Director Safe Harbor instructions to the jury. *Blum*, 121 N.C. App. at 169, 465 S.E.2d at 18.

II. Inconsistent Verdicts

Brannon was found liable to both Piazza and Lampuri under the provision of the North Carolina Securities Act, which provides:

> (a) Any person who:
>
> . . . .
>
> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security . . . .

N.C. Gen. Stat. § 78A-56(a)(2) (2015).

A. Standard of Review

Whether Brannon should have been granted a new trial because the verdicts were inconsistent is reviewed for an abuse of discretion. *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981) (citation and quotation marks omitted).

B. Statements to Piazza

1. Brannon's Statements to Piazza

Brannon and Piazza had been personal and professional friends since they attended medical school as classmates in the 1980's. The record shows and Piazza considers himself to be a high risk and qualified "angel investor." Piazza was heavily involved in Neogence as an

investor/creditor prior to when the Verizon opportunity arose. Rice, founder and CEO of Neogence, had previously requested Piazza to serve the company as an "advisory board member" due to his "professional qualifications" and "expertise."

Piazza initially learned of Neogence from Brannon in January 2010. The following month, Piazza invested $50,000.00 in the company. Piazza raises no issues with regard to his initial $50,000.00 investment. Following Piazza's initial investment, Rice testified Piazza expressed interest in increasing his equity stake in the company.

According to Rice, Piazza wanted to be "kept up to date on what we were doing," "who we were talking to," and "what risks we were looking at." Because of Piazza's established investments, membership on the board, tolerance for risks, and interest in further investing in Neogence, he was often copied on internal communications within the company.

Brannon testified in his deposition that "[Piazza] and all these people want to know how the Verizon meeting went, and this is what I got back was this information [from Cummings]." From what Cummings told him, Brannon believed Neogence had the opportunity to become the featured alternate reality application on Verizon phones.

On 30 April 2010, Piazza received the email from Brannon that is the subject of this litigation. The email was also sent to Kirkbride, Rice, and others. Brannon did not send the email to Lampuri. The email states in its entirety:

> Guys John Cummings just had a meeting in NY with Verizon. We need $100-200K ASAP, in 3-4 weeks we go back to Verizon we have an oppurtnity [sic] to be their featured AR. Rob is going to send out a summary later today. I know all of you are BUSY!!! I need you to give a few minutes to look at this potential. THANK YOU for your TRUST!! Greg

Brannon immediately urged Piazza to speak with Cummings directly about the Verizon opportunity. On 1 May 2010, the following day, Piazza called Cummings. Cummings stated to Piazza that he had met with the Verizon executive of new technologies the day before and Neogence had "an amazing opportunity to be on every Verizon Droid phone." Piazza testified there was no differences between Brannon's and Cummings' statements to him. Piazza also independently spoke a few days later with David Kirkbride, the CFO and licensed attorney, who "described [the] identical situation" as Brannon and Cummings.

Brannon and Piazza spoke on the telephone numerous times between the time the April 30th email was sent and 28 May 2010, the day Piazza made his $150,000.00 additional investment. Evidence shows Brannon described the opportunity each time consistently with the initial email and Cummings' statements.

Cummings and Kirkbride traveled to Maine without Brannon to meet face-to-face with Piazza and further discuss the Verizon opportunity. Testimony shows they "reiterated the same opportunity." Piazza invested an additional $150,000.00 in Neogence two days after this meeting in Maine. Both Piazza and Lampuri made the investments at issue only after face-to-face meetings with Cummings, without Brannon's presence, during which Cummings specifically described the opportunity to be a featured application on Verizon phones.

2. Rice's Statements to Piazza

Piazza and Rice had met through Brannon about fifteen years before this controversy arose. Cummings told Rice about the Verizon meeting in New York. According to Rice, Cummings told him Neogence had the opportunity to "go back to Verizon" in three to four weeks, demonstrate their technology, and possibly become a featured alternate reality application on Verizon phones. Like Brannon, Rice understood that Verizon had invited Neogence to present a functioning demonstration of Mirascape's capabilities directly to Verizon.

Rice sent an email to Piazza, Brannon, and others on 30 April 2010 at 7:14 p.m., less than two hours after Brannon's email set out above was sent to Piazza. Rice testified his email was sent "in reference to Brannon's [earlier] email." Rice testified he communicated everything Cummings had told him about the meeting in New York in this email. Cummings was the only person to whom Rice had spoken about the meeting in New York. The record shows Rice's email contained "exactly" what Cummings told him, and explains Cummings' meeting with McGarry Bowen and the director of new technologies at Verizon in New York. The email states:

> Verizon responded extremely well to this and asked how we differentiate ourselves from others like Layar. The answer, simply put, is that we are focusing on empowering the user to create content, as well as building a vibrant virtual goods marketplace, again centered on the user.
>
> . . . .

> While we have been seeking $200k in additional angel funding to meet our milestones and deliverables June for Allied and July for a public beta launch), we now have an opportunity to go back to Verizon in about three weeks to blow their minds with a demo that shows everything we are doing with Allied, as well as all of the earthmark stuff (and some of the early social marketplace functionality). *The opportunity here is to become the featured AR application for Verizon, OEM'd on all of the DROID smartmobiles*, and leverage their marketing. Even bigger, if we can pull this off with Verizon, it puts us squarely in the limelight of catching the eyes of other Fortune 100 companies for marketing, promotions, and strategic partnerships.
>
> The challenge here, is that we have to jump to warp speed to accelerate development . . . not only to meet our milestones, but to WOW Verizon. This is a one-shot opportunity. As things currently are, we are crawling along to meeting the milestones, but there is no way we can deliver the perfect demo for Verizon without immediate funding. I need resources to bring on additional developers as a strike team to do this fast, hard, and well. Not only do we need to take the app and the website to the next level, but we need to make it look fantastic, as well as the actual demo/presentation . . . This is a huge chance and opportunity, but we can't do it alone. We need help finding additional angel capital that can make a decision and move quickly.

(emphasis supplied).

On 3 May 2010, Rice sent an email to Piazza, Cummings, Kirkbride, and Brannon, which discusses the timeline for preparation of the demo and the need for immediate additional funding. Rice sent another email to the identical group on 6 May 2010, which provides a breakdown of milestones for the development team and stated he would "like to close" $200,000.00 in funding before the end of the month. On 11 May 2010, Rice sent an email to Piazza stating a target date for the demo as 4 June 2010.

Rice emailed Piazza again on 25 May 2010, and stated, "I'll do whatever it takes to get you on board[,]" and "I can't move this company forward without you." According to Rice, Piazza asked him numerous times what would happen "if we don't do Verizon." Rice told Piazza there were many other opportunities and "Verizon is one path among many." All these communications and events occurred prior to Piazza's additional

investment in Neogence that is the subject of this litigation. There are no facts or evidence whatsoever to support a finding or conclusion that Brannon defrauded Piazza and Rice did not.

3. Jury Verdicts on Piazza's Claims

Both Rice and Brannon relied upon Cummings, the Chief Operating Officer of Neogence, as their source of first-hand information about the Verizon meeting and basis of the opportunity. It is undisputed from the testimony and transcript that Brannon and Rice repeated *exactly the same* information to the angel investors, which both had received from Cummings. It is also undisputed that statements Brannon made in follow-up conversations with Piazza were consistent with the statement in his original 30 April 2010 email to Piazza.

Issues 1 and 5 on the jury's completed verdict form state:

> ISSUE 1:
>
> Did Defendant, Gregory Brannon, in soliciting the Plaintiff Lawrence Piazza, to pay money for a security, make a statement which was materially false or misleading, or which under the circumstances was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where the Plaintiff, Lawrence Piazza, was unaware of the true or omitted facts?
>
> ANSWER: YES
>
> . . . .
>
> ISSUE 5:
>
> Did Defendant, Robert Rice, in soliciting the Plaintiff Lawrence Piazza, to pay money for a security, make a statement which was materially false or misleading, or which under the circumstances was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where the Plaintiff, Lawrence Piazza, was unaware of the true or omitted facts?
>
> ANSWER: NO

If Rice's 30 April 2010 email was not materially false or misleading, then Brannon's 30 April 2010 email, sent less than two hours earlier with statements entirely consistent with Rice's email and based upon the same

source, could not be materially false or misleading. Under Rule 59 of the Rules of Civil Procedure, a new trial may be granted based upon, *inter alia*, "[a]ny irregularity by which any party was prevented from having a fair trial," or "[a]ny other reason heretofore recognized as grounds for new trial." N.C. Gen. Stat. § 1A-1, Rule 59(a)(1) and (9) (2015). Where a jury's answers to issues "are so contradictory as to invalidate the judgment, the practice of the Court is to grant a new trial . . . because of the evident confusion." *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947) (citation omitted).

The majority's opinion focuses on Defendants' burden of proof, and states, "[a] jury verdict imposing liability on one of two defendants in an action is not a 'miscarriage of justice' when one defendant testifies to the benefit of his reasonable care defense and the other defendant remains silent and fails to carry his burden." However, issues 1 and 5 submitted to the jury do not concern Defendants' burden of proof. These issues pertain *solely* to whether the statements of Rice and Brannon to Piazza were materially false or misleading.

There is simply no evidence in the record and before the jury to support the verdict finding that "the Plaintiff, Lawrence Piazza, was unaware of the true or omitted facts(,)" to acquit Rice and convict Brannon of securities fraud. The trial court abused its discretion in denying Brannon a new trial, where the statements Brannon and Rice made to Piazza were identical and communicated to Piazza within two hours of each other. On this ground, I also vote to grant a new trial on Brannon's liability to Piazza.

B. Statements to Lampuri

1. Brannon's Statement's to Lampuri

The background and knowledge of Piazza and Lampuri are different. Lampuri first learned about Neogence from Brannon in February of 2010 during Lampuri's wife's prenatal visit to Brannon's medical office. Brannon did not send an email to Lampuri. Brannon allegedly made the statement to Lampuri on 25 May 2010, during another of his wife's prenatal visits to Brannon's office.

Lampuri testified Brannon told him, "our director of sales just got back from New York City at a meeting. There were Verizon executives there, and they were absolutely blown away by our technology" and Neogence needed to create a functioning demonstration of Mirascape to show Verizon. According to Lampuri, Brannon stated, "[t]hey're going [to be] pre-installed on all Verizon phones."

As with Piazza, Brannon urged Lampuri to call Robert Rice or John Cummings to discuss the opportunity. Lampuri met personally with Cummings, Kirkbride and Rice in July of 2010. The last time Brannon spoke with Lampuri about the Verizon opportunity was 25 May 2010. Lampuri did not invest in the company until September 2010, and *only* then after face-to-face meetings with the officers of Neogence without Brannon present.

2. Rice's Statements to Lampuri

During the July 2010 meeting, Cummings assumed the lead role in the presentation to Lampuri, and said the "exact same thing" that Brannon had told him about Verizon. According to Cummings, Neogence had the opportunity to be a pre-loaded application on all Verizon Droid phones. Rice reiterated "the deal was very much real. It was a real opportunity." Rice stated "the funds that they were seeking were to get this demo up and doing – up and coming to show Verizon." Lampuri met with Cummings and Rice again, without Brannon, on a later date. Cummings told him "the exact same thing" and Rice reiterated that "the deal was very much real."

3. Jury Verdicts on Lampuri's Claims

I concur with the majority opinion's holding that Brannon has failed to meet the high burden on appeal to show the trial court abused its discretion by denying Brannon a new trial based upon the inconsistent jury's verdicts on Lampuri's claims. While reasonable minds may differ and easily reach a contrary conclusion, Brannon has failed to show these inconsistencies between the verdicts against him and in favor of Rice on Lampuri's claims arise to show an abuse of discretion.

Unlike Brannon, the record does not show Rice made any direct statements to Lampuri, other than to reiterate Cummings' statements by declaring the opportunity was "very much real." The statements made by Brannon and Rice to Lampuri contain sufficient dissimilarities to preclude a finding of abuse of discretion to award a new trial on the ground of inconsistent verdicts on Lampuri's claims.

III. Conclusion

The trial court erred by refusing to provide Brannon's requested Director Safe Harbor jury instruction on both Plaintiffs' claims, which was supported by the evidence. Plaintiffs failed to offer any evidence to show Brannon was not acting as a director at all times he communicated with Plaintiffs and he was not otherwise entitled to the Director Safe Harbor instruction.

The instruction is warranted where evidence tends to show the director relied upon statements, presentations, and business data, even though the plaintiffs may have suffered investment losses. The director's reliance must be in good faith and reasonable. Here, there is no evidence to the contrary. Whether an outside, independent, and non-compensated director can rely upon corporate information received from the executive officers and be protected by N.C. Gen. Stat. § 55-8-30(d) is a question of fact, which must be supported by the evidence and found by the jury after a proper Director Safe Harbor instruction from the trial court.

"[I]t is the duty of the trial court to charge the law applicable to the substantive features of the case arising on the evidence." *Blum*, 121 N.C. App. at 168, 465 S.E.2d at 18. "Once a party has aptly tendered a request for a specific instruction, correct in itself and supported by the evidence, failure of the trial court to render such instruction, in substance at least, is error." *Id.* (citations omitted). Brannon is entitled to a new trial against both Plaintiffs due to the trial court's failure to provide the requested instruction.

The trial court also abused its discretion in denying Brannon a new trial, where the statements Brannon and Rice made to Piazza were identical in time and content, which renders the verdicts holding Brannon liable to Piazza and absolving Rice of liability "so contradictory as to invalidate the judgment." *Palmer*, 227 N.C. at 379, 42 S.E.2d at 347. I concur with the majority opinion's holding that Brannon failed to meet the high burden on appeal show the trial court abused its discretion by denying Brannon a new trial based upon the jury's apparently inconsistent verdicts on Lampuri's claims against Brannon and Rice.

As I vote to award a new trial on multiple and alternate grounds, the trial court's award of attorney fees and court costs must also be reversed. I respectfully concur in part and dissent in part.

SED HOLDING, LLC, PLAINTIFF
v.
3 STAR PROPERTIES, LLC, JAMES JOHNSON, TMPS LLC, MARK HYLAND AND HOME SERVICING, LLC, DEFENDANTS

No. COA15-747

Filed 5 April 2016

1. Appeal and Error—interlocutory order—forum selection clause and preliminary injunction—appealable

Although the denial of a motion to dismiss was an interlocutory order in a case arising from the sale of pooled non-performing mortgages, issues involving forum selection clauses may be immediately appealed lest a substantial right be lost. Furthermore, a preliminary injunction in the case, though normally interlocutory, could be appealed lest control of the assets be lost.

2. Jurisdiction—forum selection clause-not enforceable

The trial court did not abuse its discretion by denying defendant's motion to dismiss and refusing to enforce a Texas forum selection clause where the clause was not in line with Texas or North Carolina law and was alleged to be the product of fraud.

3. Injunctions—preliminary—freezing assets—not an abuse of discretion

The trial court did not err by granting plaintiff's preliminary injunction in an action arising from the sale of pooled non-performing mortgages where prohibiting defendants from moving the assets for the pendency of litigation maintained the status quo and protected the monetary and injunctive relief plaintiff sought.

Appeal by Defendants from two orders entered 13 February 2015 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 2 December 2015.

Graebe Hanna & Sullivan, PLLC, by Douglas W. Hanna and Mark R. Sigmon, for Plaintiff.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for Defendants-Appellants.

HUNTER, JR., Robert N., Judge.

Defendants appeal following two 13 February 2015 orders: (1) denying Defendants' Rule 12(b)(1) and (3) motion to dismiss for lack of subject matter jurisdiction and improper venue; and (2) granting SED Holding, LLC's ("Plaintiff") motion for preliminary injunction. Defendants contend the trial court erred in denying their motion to dismiss due to a mortgage loan sale agreement they executed with Plaintiff, which contained a forum selection clause for prosecution of the case in Harris County, Texas. In the alternative, Defendants contend the trial court erred by granting Plaintiff's motion for preliminary injunction because Plaintiff has not demonstrated a likelihood of success on the merits of its claim, and has not demonstrated it will suffer irreparable harm without a preliminary injunction. We affirm the trial court.

I. Factual and Procedural History

Plaintiff is a North Carolina corporation with its principal place of business in Durham County, North Carolina. Defendant 3 Star Properties, LLC ("3 Star") is a corporation organized under the laws of Nevada with its principal place of business in Buncombe County, North Carolina. Defendant James Johnson ("Johnson") is a managing member of 3 Star. He and two other 3 Star managing members reside in Buncombe County.

Plaintiff and 3 Star are in the business of buying and selling pools of residential mortgage loans. In May 2014, Plaintiff negotiated to buy 1,235 mortgages from 3 Star for $13,880,171.00. The total outstanding value of the mortgages was $71,180,364.00. Plaintiff made a $300,000.00 refundable deposit as earnest money for the sale.

On 3 June 2014, three of Plaintiff's principals met with Johnson in an Asheville, North Carolina hotel. Afterwards, Plaintiff's attorney drafted a "Mortgage Loan and Sale Agreement" ("LSA") and other documents for the sale. On 20 June 2014, the parties signed the LSA in North Carolina and Plaintiff contracted to buy the pooled mortgages from 3 Star. The parties agreed the $13,800,171.00 purchase price was to be paid as follows: (i) $2,000,000.00 at the closing, less the $300,000.00 earnest money; and (ii) the remaining $11,880,171.00 principal balance to be paid in accordance with a promissory note.

Under the promissory note, the parties agreed Plaintiff would pay the $2,000,000.00 closing money on or before 11 July 2014. They also agreed Plaintiff would pay the $11,880,171.00 principal balance by 31 December 2014 with six-percent interest. Further, the parties agreed the promissory note would be "construed . . . and governed by the laws of the State of Texas."

Pursuant to the LSA, the parties agreed to a forum selection clause, which states the following:

> This Agreement shall be construed in accordance with the laws of the Harris County, State of Texas, and its right and liabilities of the parties hereto, including any assignees, shall be determined in accordance with the laws of Harris County, State of Texas, except to the extent that it is mandatory that the laws of some other jurisdictions may apply. Any litigation arising from this transaction shall be filed in District Court in Harris County, Texas.

A dispute arose over the mortgage sale. Plaintiff claimed the entire sale was based on Defendants' representations that each mortgage was legitimate, secured by real property, and owned by 3 Star. Plaintiff contends these representations were false and 3 Star only owned a few of the mortgages. Defendants contend Plaintiff defaulted after the closing, and "never really attempted to sell" the non-performing mortgages it acquired in the mortgage pool.

On 1 December 2014, Plaintiff filed a verified complaint in Durham County Superior Court raising the following claims for relief: fraud in the inducement, "Declaratory Judgment of No Meeting of the Minds/ Mistake of Fact," breach of contract, fraud, negligent misrepresentation, and civil conspiracy. Additionally, Plaintiff's complaint contained a Rule 65 motion for a temporary restraining order and preliminary injunction, alleging "Plaintiff is reasonably likely to succeed on the merits of its claim," and "Defendants' conduct is causing [Plaintiff] immediate, irreparable harm in that the [mortgages] are being irrevocably foreclosed on, sold, or otherwise transferred or affected." In its prayer for relief, Plaintiff sought damages, a temporary restraining order, and preliminary injunctive relief.

On 10 December 2014, Defendants filed a motion to dismiss for lack of subject matter jurisdiction and improper venue under Rule 12(b)(1) and (3), and alleged the trial court lacked jurisdiction. The parties were heard 13 February 2015 on Defendants' motion to dismiss and Plaintiff's motion for preliminary injunctive relief. That same day, the trial court issued an order denying Defendants' motion to dismiss, and a second order granting Plaintiff's motion for preliminary injunctive relief. In the injunctive order, the trial court prohibited Defendants from "selling . . . or otherwise making any dispositions of any of the [mortgages] sold to SED." Further, the court ordered Defendant to place the monies from the sale in escrow pending case resolution, and ordered Plaintiff to post

a $100,000.00 bond to protect Defendants' rights. Defendants timely filed notice of appeal contesting both 13 February 2015 orders.

After settlement of the record, the parties filed their appellate briefs. On 23 November 2015, Defendants filed a motion for sanctions under Appellate Rule 34. Defendants contend Plaintiff "asserts argument in its brief which has no basis in fact or law" and ask our Court to vacate the preliminary injunction. On 30 November 2015, Plaintiff filed a response in opposition to Defendants' motion. We disagree with Defendants' contentions and deny their motion to dissolve the preliminary injunction or order sanctions for the following reasons.

II. Jurisdiction

[1] Although "a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right." *Hickox v. R&G Group Intern., Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003) (citation omitted). Our Court has jurisdiction to review Defendants' appeal from the 13 February 2015 order denying their motion to dismiss. N.C. Gen. Stat. §§ 1-277, 7A-27(b)(3)(a).

Second, "[a] preliminary injunction is interlocutory in nature . . . which restrains a party pending final determination on the merits." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). Therefore, an appellate court does not have jurisdiction to hear an appeal from a preliminary injunction ruling unless the trial court's ruling "deprives the appellant of a substantial right which he would lose absent a review prior to final determination." *Id.*; *see also Barnes v. St. Rose Church of Christ*, 160 N.C. App. 590, 591–92, 586 S.E.2d 548, 550 (2003). An appellant's right to use and control its assets is a substantial right that warrants immediate review when that right is prohibited during the pendency of case resolution. *See Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 184 N.C. App. 292, 294–95, 647 S.E.2d 102, 104 (2007) ("Given the large amount of money at issue [$30,000,000.00] . . . the fact that the trial court impinged appellant's right to the use and control of those assets, and the unavoidable and lengthy delays . . . we hold the appellant must be granted its appeal to preserve a substantial right."). Accordingly, Defendants' substantial right to control assets related to the mortgage sale is affected by the preliminary injunction, and this Court has jurisdiction to review Defendants' appeal from the preliminary injunction order.

III. Standard of Review

The disposition of a case involving a forum selection clause "is highly fact-specific." *Appliance Sales & Service, Inc. v. Command Electronics Corp.*, 115 N.C. App. 14, 21, 443 S.E.2d 784, 789 (1994). Our Court reviews an order denying a motion to dismiss for improper venue in such cases using the abuse of discretion standard. *Id.* (citation omitted). "The test for abuse of discretion requires the reviewing court to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 21–22, 443 S.E.2d at 789 (citations and internal quotation marks omitted).

"Our standard of review from a preliminary injunction is essentially *de novo*." *Wilson v. North Carolina Dept. of Commerce*, ___ N.C. App. ___, ___, 768 S.E.2d 360, 364 (2015) (citation and internal quotation marks omitted). An appellate court is not bound by the trial court's findings, and it may review and weigh the evidence and find facts for itself. *A.E.P. Industries, Inc.*, 308 N.C. at 402, 302 S.E.2d at 760 (citation omitted). However, "a trial court's ruling on a motion for a preliminary injunction is presumed to be correct and the party challenging the ruling bears the burden of showing it was erroneous." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 362 (2004) (citations omitted).

IV. Analysis

A. Forum Selection Clause

[2] Historically, North Carolina case law was unclear about the enforceability of forum selection clauses that fix venue in other states. In 1992, our Supreme Court held forum selection clauses are valid, enforceable, and consistent with public policy that also allowed choice of law and consent to jurisdiction provisions. *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 146, 423 S.E.2d 780, 784 (1992) (citing *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30 (1992)). The Court reasoned as follows:

> A plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of a forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable.

Perkins, 333 N.C. at 146, 423 S.E.2d at 784.

In 1993 our legislature enacted N.C. Gen. Stat. § 22B-3, under Chapter 22 "Contracts Against Public Policy," Article I "Invalid Agreements." Section 22B-3 generally prohibits forum selection clauses and states the following:

> Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.

N.C. Gen. Stat. § 22B-3. Therefore, forum selection clauses in North Carolina are generally disfavored, "against public policy," and "void and unenforceable" unless they appear in "non-consumer loan transactions." Our Court has defined a non-consumer loan transaction as "one that is *not* extended to a natural person, and *not* used for 'family, household, personal or agricultural purposes.' " *L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 502 S.E.2d 415 (1998) (citing Black's Law Dictionary 937 (6th ed. 1990)) (emphasis in original).

Here, both parties concede they are not natural persons. Defendants contend the mortgage sale is a non-consumer loan because it is a "conditional sale" that anticipates a secured loan. Conversely, Plaintiff contends the transaction is a "purchase sale," not a loan, and the forum selection clause is unenforceable because it and the LSA are the product of fraud.

A loan is "an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, credit card, line of credit, a lease or otherwise." *L.C. Williams Oil Co.*, 130 N.C. App. at 289, 502 S.E.2d at 417 (citing N.C. Gen. Stat § 66-106(2)). A sale is "[t]he transfer of property or title for a price." Black's Law Dictionary (10th ed. 2014). A sale is comprised of four elements: "(1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised." *Id.*

Here, the plain language of the LSA contemplates a "sale" of pooled mortgages, not a loan. Pursuant to the LSA and promissory note, Plaintiff paid money at closing, less earnest money, and promised to

pay the remaining principal plus interest within six months of the sale. Moreover, Plaintiff contends the forum selection clause is the product of fraud, which taken as true, invalidates the clause. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). These considerations and North Carolina law are in line with Texas law, which Defendants seek to apply through enforcement of the forum selection clause.

Like North Carolina, Texas uses an abuse of discretion standard in reviewing a trial court's refusal to enforce a forum selection clause. *In re Lyon Financial Services, Inc.*, 257 S.W.2d 228 (Tex. 2008) (per curiam). Based upon United States Supreme Court precedent, Texas and North Carolina will refuse to enforce a forum selection clause if a challenging party can "clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial." *Id.* at 231–232; *see M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 15; *see Parson v. Oasis Legal Finance, LLC*, 214 N.C. App. 125, 131–32, 715 S.E.2d 240, 244–45 (2011); *see also Perkins*, 333 N.C. at 143–44, 423 S.E.2d at 783.

The Texas forum selection clause which Defendants seek to enforce is unenforceable in Texas. It is a longstanding principle in Texas that "it is utterly against public policy to permit bargaining in [Texas] about depriving courts of jurisdiction, expressly conferred by statute, over particular causes of action and defenses." *International Travelers' Ass'n v. Branum*, 109 Tex. 543, 548, 212 S.W. 630, 632 (Tex. 1919). Texas law allows a plaintiff "to bring his action in the county of his own residence or in any county in which the defendant had an agent or representative." *Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972) (discussing *International Travlers' Ass'n* and Texas venue statues). A contract with a forum selection clause that selects a specific Texas county cannot override state statutory law that allows for suit in multiple counties. *See Id.* This longstanding principal is still good law in Texas. *See International Travlers' Ass'n*, 109 Tex. at 548, 212 S.W. at 632 ("It follows that the stipulation for exclusive venue in Dallas county will not be enforced"); *see e.g. Fidelity Union Life Ins. Co.*, 477 S.W.2d 535; *Leonard v. Paxson*, 654 S.W.2d 440 (Tex. 1983); *Ziegelmeyer v. Pelphrey*, 133 Tex. 73, 125 S.W.2d 1038 (Tex. 1939); *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004).

In light of these considerations, the record, and Plaintiff's showing of fraud in its verified complaint, we cannot hold the trial court abused

its discretion by refusing to enforce the forum selection clause, and denying Defendants' motion to dismiss.

B. Preliminary Injunction

[3] In the alternative, Defendants contend the trial court committed error by granting Plaintiff's preliminary injunction. We disagree.

A preliminary injunction is "an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). A trial court will only issue a preliminary injunction under the following circumstances:

> (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Id. (citations omitted).

Defendants, as the party challenging the preliminary injunction, bear the burden of overcoming our presumption that the trial court's ruling is correct, and must show the ruling was erroneous. *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362. However, this Court is "not bound by the trial court's findings" and it "review[s] and weigh[s] the evidence and find[s] facts for itself." *A.E.P. Industries, Inc.*, 308 N.C. at 402, 302 S.E.2d at 760.

Plaintiff's verified complaint contains numerous affidavits, emails from Defendants, and various representations that generally show 3 Star represented itself as the rightful owner and title holder of the pooled mortgages at issue. Defendants contend this record evidence does not amount to Plaintiff's showing of a likelihood of success on the merits, and contends the "LSA, by itself" binds Plaintiff to buy the mortgages "as-is." However, this lone clause in the LSA is not an absolute defense to Plaintiff's numerous claims, which are supported by what Defendants describe as "extensive documentary evidence."

Plaintiff claims it would incur irreparable harm if Defendants were able to liquidate the monies or mortgages arising from the mortgage sale. Prohibiting Defendants from moving these assets for the pendency of litigation maintains the status quo and protects the monetary and injunctive relief Plaintiff seeks. Moreover, Defendants' rights are protected by the $100,000.00 bond posted by Plaintiff. Therefore, Defendants

have failed to carry their burden of proving the trial court's ruling was erroneous.

V. Conclusion

For the foregoing reasons we affirm the trial court.

AFFIRMED.

Judges Stephens and Judge Inman concur.

STATE OF NORTH CAROLINA
v.
JOHN WAYNE BONETSKY

No. COA15-811

Filed 5 April 2016

Firearms and Other Weapons—possession by a felon—as-applied challenge

On appeal from defendant's conviction of possession of a firearm by a felon, the Court of Appeals rejected defendant's argument that the North Carolina Firearms Act violated the North Carolina Constitution as applied to him. Even though the trial court erred by finding that defendant's 1995 Texas conviction involved a threat of violence and by examining defendant's conduct only after his release from his 1995 conviction, defendant's challenge nonetheless failed as a matter of law. Defendant had three prior felony convictions that occurred seventeen, eighteen, and thirty-six years before the offense at issue; it was unclear whether violence was involved in the prior offenses; there was no evidence defendant had engaged in unlawful activity in the seventeen years since his last conviction; there was no time period during which defendant could have lawfully possessed a firearm in North Carolina; and defendant made no effort to determine whether he was permitted to possess a firearm in North Carolina. This close case fell between *Britt* and *Whitaker*, and the Court of Appeals deferred to the presumption in favor of constitutionality of acts of the General Assembly.

Appeal by Defendant from judgment entered 17 March 2015 by Judge Robert C. Ervin in Superior Court, Burke County. Heard in the Court of Appeals 11 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Sharon L. Smith for Defendant.

McGEE, Chief Judge.

John Wayne Bonetsky ("Defendant") appeals his conviction of possession of a firearm by a felon. Defendant contends that part of the North Carolina Firearms Act – specifically N.C. Gen. Stat § 14-415.1, which generally prohibits felons from possessing firearms – was unconstitutional as applied to him. We affirm.

I. Background

Officer Donny Dellinger ("Officer Dellinger"), a member of the Burke County Narcotics Task Force, obtained a search warrant and led a search of Defendant's home on 23 April 2013. Although the warrant was not included in the record on appeal, it appears the warrant may have been based, at least in part, on the statement of a confidential informant that Defendant was selling "large amounts" of marijuana. Officers did not find any drugs during their search of Defendant's home, but they did find a shotgun, inside a gun case, inside a closet.

Defendant was indicted for possession of a firearm by a felon on 9 September 2013, with Defendant's 1995 conviction for felony marijuana possession in Texas ("the 1995 Texas conviction") listed as the predicate felony. Defendant filed a "Verified Motion to Dismiss" the charge on 31 December 2014, alleging that N.C.G.S. § 14-415.1, "*as applied* to him[,] [was] a violation of the Constitution of the United States of America and the North Carolina Constitution." The trial court considered, and denied, Defendant's motion during a pretrial hearing on 15 January 2015 ("the pretrial hearing").

During the pretrial hearing, the trial court also found that the 1995 Texas conviction "equate[d] to a North Carolina trafficking in marijuana" conviction. Defendant does not dispute this finding. Defendant also acknowledged during the pretrial hearing that he had been convicted in 1977 of a felony armed robbery offense in Pennsylvania ("the 1977 Pennsylvania conviction"). He denied being armed during the robbery and also denied having been convicted of a firearm offense in connection with that crime. Defendant further acknowledged that he had been convicted in 1996 of a felony "controlled substance violation[ ]" in New York ("the 1996 New York conviction"). No further evidence relating to

the 1977 Pennsylvania and 1996 New York convictions were presented at the pretrial hearing.

Before Defendant's trial began, he waived his right to a jury trial and acknowledged to the trial court that his strategy was to have his case tried quickly so he could appeal the trial court's denial of his motion to dismiss. At trial, Officer Dellinger testified that Defendant arrived home during the 23 April 2013 search of Defendant's home. Officer Dellinger testified that he spoke to Defendant about the shotgun and that Defendant was "very cooperative" and indicated he "did not realize at the time that he was not supposed to have [the shotgun] at his residence." Defendant testified at trial that he thought his right to possess a firearm in North Carolina had been restored two months before police searched his home[1] and that he had the shotgun for "personal protection" for himself and his dogs. Defendant testified he lived in the woods and sometimes encountered "wildcat[s]" and bears. The trial court convicted Defendant of possession of a firearm by a felon, gave him a suspended sentence, and placed Defendant on eighteen months of supervised probation. Defendant appeals.

II. Standard of Review

"The standard of review for questions concerning constitutional rights is *de novo*." *State v. Whitaker*, 201 N.C. App. 190, 192, 689 S.E.2d 395, 396 (2009), *aff'd*, 364 N.C. 404, 700 S.E.2d 215 (2010). However, it is well-established that "when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and

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1. Defendant previously explained at the pretrial hearing that he believed his right to possess a firearm at home in North Carolina had been restored because, according to Defendant, his right to possess a firearm at home had been restored in Texas. Defendant testified he was released from prison for the 1995 Texas conviction in 2000 and released from post-release supervision in February 2008. Defendant's shotgun was confiscated in April 2013, approximately five years and two months after he was reportedly released from post-release supervision. Tex. Penal Code Ann. § 46.04(a) (West 2011) provides that

> [a] person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later; or
>
> (2) after the period described by Subdivision (1), at any location other than the premises at which the person lives.

all doubts must be resolved in favor of the act." *Id.*; *accord District of Columbia v. Heller*, 554 U.S. 570, 627–28 n.26, 171 L. Ed. 2d 637, 678 n.26 (2008) ("[P]rohibitions on the possession of firearms by felons . . . [are] presumptively lawful[.]"). Yet, "[o]nce error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009); *see* N.C. Gen. Stat. § 15A–1443(b) (2015).

III. Defendant's "As Applied" Challenge

A. Scope of Review

As a preliminary matter, we note that Defendant raised with the trial court "as applied" challenges to N.C.G.S. § 14-415.1 under both the United States and North Carolina Constitutions. Defendant's brief before this Court cites to the Second Amendment of the United States Constitution once, but he proceeds to argue only that "[a] defendant may challenge the application of [N.C.G.S. § 14-415.1] to him or her on grounds that it violates Article I, Section 30 of the North Carolina Constitution." "It is not the role of the appellate courts . . . to create an appeal for an appellant[,]" *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005), and we must limit our review of Defendant's case accordingly.

B. Defendant's Challenge

Defendant contends that N.C.G.S. § 14-415.1 is unconstitutional as applied to him under Article I, Section 30 of the North Carolina Constitution. N.C.G.S. § 14-415.1 imposes certain restrictions on the ability of felons to possess firearms. The General Assembly amended N.C.G.S. § 14-415.1 in 2004 ("the 2004 amendment") to prohibit felons from possessing firearms in their homes, whereas previously felons were allowed "to have possession of a firearm within his own house or on his lawful place of business." *See* 2004 N.C. Sess. Laws. 186, § 14.1.[2] Defendant contends that the restriction in the 2004 amendment, as applied to him, was unconstitutional.

The right to bear arms under Article I, Section 30 of the North Carolina Constitution "is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, [although] the regulation must be reasonable and not prohibitive, and must bear

2. N.C.G.S. § 14-415.1 was amended again in 2006 to provide that "[t]his section does not apply to an antique firearm, as defined in G.S. 14–409.11." *See* 2006 N.C. Sess. Laws. 259, § 7.(b).

a fair relation to the preservation of the public peace and safety." *See Whitaker*, 201 N.C. App. at 198, 689 S.E.2d at 399–400; *but see id.* at 197, 689 S.E.2d at 399 (citation omitted) (limiting the Court's review of that right to a felon's "as applied" challenge to N.C.G.S. § 14-415.1 and "not attempt[ing] to determine under *Heller*[, 554 U.S. 570, 171 L. Ed. 2d 637,] the full extent of the individual right under the Second Amendment to keep and bear arms"). Accordingly, this Court utilizes "rational basis" review for "as applied" challenges to N.C.G.S. § 14-415.1 under Article I, Section 30 of the North Carolina Constitution. *Id.*; *accord id.* at 191, 202, 689 S.E.2d at 395, 402 (holding that *Heller* had "no effect" upon the level of scrutiny for "as applied" challenges to N.C.G.S. § 14-415.1 under either the Second Amendment or Article I, Section 30); *but see Johnston v. State of N.C.*, 224 N.C. App. 282, 293–94, 297, 735 S.E.2d 859, 868–71 (2012) (relying on *Heller* and *U.S. v. Chester*, 628 F.3d 673 (4th Cir. 2010), to utilize "intermediate scrutiny" for an "as applied" challenge to N.C.G.S. § 14-415.1 under the Second Amendment; noting that "use of the rational basis standard may [no longer] be appropriate" for examining a defendant's "as applied" challenge to N.C.G.S. § 14-415.1 under Article I, Section 30; but also noting that the Court was "bound by precedent" to do so), *aff'd per curiam*, 367 N.C. 164, 749 S.E.2d 278 (2013).

When determining whether N.C.G.S. § 14-415.1 is unconstitutional as applied to a particular felon, this Court is required to examine five factors:

> (1) the type of felony convictions, particularly whether they involved violence or the threat of violence, (2) the remoteness in time of the felony convictions; (3) the felon's history of law-abiding conduct since the crime, (4) the felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited, and (5) the felon's assiduous and proactive compliance with the 2004 amendment.

Whitaker, 201 N.C. App. at 205, 689 S.E.2d at 404 (citing *Britt v. State*, 363 N.C. 546, 549–50, 681 S.E.2d 320, 322–23 (2009)) (quotation marks and brackets omitted). As offshoots of the last *Whitaker* factor, our appellate courts also have taken note of (a) whether a felon proactively initiated an action to challenge the constitutionality of N.C.G.S. § 14-415.1 or waited to bring his constitutional challenge after being charged with possession of a firearm by a felon, *see Baysden v. State of N.C.*, 217 N.C. App. 20, 26, 718 S.E.2d 699, 704 (2011), *aff'd per curiam*, 366 N.C. 370, 736 S.E.2d 173 (2013), and (b) whether the felon was, or should have been, on notice of the 2004 amendment, *see State v. Price*, 233 N.C. App.

386, 398, 757 S.E.2d 309, 317, *appeal dismissed*, 367 N.C. 508, 759 S.E.2d 90 (2014); *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405. However, as to the matter of notice, this Court has never held that a defendant's ignorance of the requirements of N.C.G.S. § 14-415.1 should weigh in his or her favor when this Court reviews an "as applied" challenge to that section. *Cf. Price*, 233 N.C. App. at 398, 757 S.E.2d at 317 (noting that the felon was in prison when the 2004 amendment was enacted and, "[t]herefore, he should have been on notice of the changes in legislation"); *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405 (noting that the felon was warned multiple times by law enforcement that he could not possess firearms and was "flagrantly" violating the statute).

1. Type of Felony Convictions

In the present case, as to the first *Whitaker* factor, regarding "the type of felony convictions" at issue and "whether they involved violence or the threat of violence," *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 (quotation marks and brackets omitted), the trial court found at the pretrial hearing that the nature of Defendant's 1977 Pennsylvania and 1996 New York convictions were "ambiguous[.]" Regarding the 1995 Texas conviction, the trial court found that "trafficking convictions, as drug offenses, at least involve a threat of violence." Defendant contends the trial court's finding regarding his 1995 Texas conviction was made in error. We agree.

Defendant directs this Court to *Baysden*, 217 N.C. App. at 28, 718 S.E.2d at 705, which held that trial courts must "focus on the litigant's *actual conduct* rather than upon the manner in which the General Assembly has categorized or defined certain offenses" for the purposes of "as applied" challenges to N.C.G.S. § 14-415.1. (emphasis added). Moreover, as Defendant correctly points out, N.C. Gen. Stat. § 90-95(h) (2015), which defines the felony of "trafficking in marijuana" under North Carolina law, does not even include violence or a threat of violence as an element of the offense. In the present case, the trial court was presented with no evidence that any violence or threat of violence was involved in the crime leading to Defendant's 1995 Texas conviction. Accordingly, the trial court erred by finding that Defendant's 1995 Texas conviction "involve[d] a threat of violence."

2. Remoteness in Time of the Felony Convictions and
3. History of Law-Abiding Conduct Since the Crimes

As to the second and third *Whitaker* factors, regarding "the remoteness in time of the felony convictions" and "the felon's history of

law-abiding conduct since the crime[s,]" *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 (quotation marks and brackets omitted), the trial court found that there was "no evidence of any other convictions" beyond those admitted to by Defendant and that the otherwise unfruitful search of Defendant's home by law enforcement did not "tend to indicate a lack of law-abiding conduct." The trial court made no findings regarding the remoteness of the 1977 Pennsylvania or 1996 New York convictions. It did make a finding regarding the 1995 Texas conviction and concluded that "you're really only judging [Defendant's] conduct from the point at which he was released" from prison. Accordingly, the trial court "gauge[d] . . . the remoteness" of the 1995 Texas conviction at thirteen years – instead of eighteen years, which was the number of years that had passed between the 1995 Texas conviction and when Defendant's shotgun had been confiscated. Defendant contends that finding was made in error. We agree.

Defendant correctly notes in his brief that *Britt*, 363 N.C. at 550, 681 S.E.2d at 323, and *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 404, specifically analyze the defendants' conduct in terms of their "law-abiding conduct[,]" or lack thereof, since their "crime[s]" or "conviction[s.]" Moreover, while it could be conceivable that a trial court might weigh less-heavily a defendant's "law-abiding conduct" while he was in prison, it also would be *highly* relevant to an "as applied" challenge to N.C.G.S. § 14-415.1 if that defendant engaged in criminal activity while incarcerated or somehow obtained a contraband firearm during that time. Accordingly, the trial court erred by finding the "remoteness" of Defendant's 1995 Texas conviction to be thirteen years and by examining Defendant's conduct only after the date of his release.

4. History of Responsible, Lawful Firearm Possession During a Time Period when Possession of Firearms was not Prohibited

As to the fourth *Whitaker* factor, regarding a "felon's history of responsible, *lawful* firearm possession during a time period when possession of firearms was *not prohibited*," *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 (emphasis added) (quotation marks omitted), the trial court found that this factor was not "particularly pertinent" in the present case. Defendant contends that finding was made in error on the ground that he was responsible with his firearm during the two months between when he thought his right to possess a firearm had been restored and when his shotgun was confiscated. However, the fact that Defendant's right to possess a firearm at his home may have been restored under Texas law does not mean that right was restored under North Carolina law. *See* N.C. Gen. Stat. § 14-415.4 (2015) (defining the procedure for

restoring certain felons' rights to possess firearms). In fact, Defendant does not contend on appeal that his right to possess a firearm in North Carolina was ever restored. Therefore, regardless of whether Defendant possessed his shotgun "responsibl[y]" during those two months, he had no relevant "history of responsible, *lawful* firearm possession during a time period when possession of firearms was *not prohibited*[.]" *See Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 (emphasis added) (quotation marks omitted). Accordingly, the trial court did not err by finding that the fourth *Whitaker* factor was not "particularly pertinent" in the present case. *See id.*

5. Assiduous and Proactive Compliance with the 2004 Amendment

As to the fifth *Whitaker* factor, regarding a "felon's assiduous and proactive compliance with the 2004 amendment[,]" *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404, the trial court found there was "no indication" that Defendant had taken any "affirmative action to comply with the statute." Defendant contends that finding was made in error because "there was no reason to believe that [Defendant] was on notice of the [2004] amendment."

However, as discussed above, this Court has never held that a defendant's ignorance of the requirements of N.C.G.S. § 14-415.1 should weigh in the defendant's favor when this Court reviews his or her "as applied" challenge to that section. *Cf. Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405; *Price*, 233 N.C. App. at 398, 757 S.E.2d at 317. We see no reason to deviate in the present case from the longstanding principle that a defendant's "ignorance of the law is no excuse" for his or her unlawful conduct. *State v. Bryant*, 359 N.C. 554, 566, 614 S.E.2d 479, 487 (2005), *superseded by statute on other grounds as stated in State v. Moore*, __ N.C. App. __, __, 770 S.E.2d 131, 141, *disc. review denied*, __ N.C. __, 776 S.E.2d 854 (2015).

Although there is no evidence that Defendant had "flagrantly" violated the 2004 amendment, *see Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405, nor is there "evidence to suggest that [D]efendant [had] misused firearms, there [also was] no evidence that [D]efendant [had] attempted to comply with the 2004 amendment to the statute[,]" *see Price*, 233 N.C. App. at 398, 757 S.E.2d at 317, or ascertain whether he was even allowed to possess a firearm in this state. Defendant's asserted ignorance of the requirements of N.C.G.S. § 14-415.1 does not weigh in his favor. *See Bryant*, 359 N.C. at 566, 614 S.E.2d at 487. Therefore, the trial court did not err by finding there was "no indication" that Defendant had taken any "affirmative action to comply with the statute." *See id.*

C. Prejudice

Because the trial court erred as to some of its findings regarding the *Whitaker* factors, this Court must determine whether "the error[s] [were] harmless beyond a reasonable doubt." *Graham*, 200 N.C. App. at 214, 683 S.E.2d at 444; *see* N.C. Gen. Stat. § 15A–1443(b) (2015). However, even taking those errors into account, we believe the State has established that Defendant's "as applied" challenge to N.C.G.S. § 14-415.1 under Article I, Section 30 of the North Carolina Constitution fails as a matter of law.

The State argues that the circumstances of Defendant's case are analogous to those in *Whitaker*. Defendant argues that his case is more like *Britt* than *Whitaker*. In *Britt*, 363 N.C. at 547, 681 S.E.2d at 321, the felon pleaded guilty in 1979 to felony possession with intent to sell and deliver a controlled substance. The crime "was nonviolent and did not involve the use of a firearm." *Id.* The felon's right to possess a firearm was restored under North Carolina law in 1987. *Id.* Following passage of the 2004 amendment to N.C.G.S. § 14-415.1, the felon had a discussion with the Sheriff of Wake County, who concluded that the felon would be in violation of the recently amended statute if he kept his guns. *Id.* at 548, 681 S.E.2d at 321–22.

The felon "thereafter divested himself of all firearms" and proactively brought an action challenging N.C.G.S. § 14-415.1 as applied to him. *Id.* at 548–49, 681 S.E.2d at 322. In the thirty years since the felon's conviction of a nonviolent felony, he had "not been charged with any other crime, nor [was] there any evidence that he had misused a firearm in any way." *Id.* at 548, 681 S.E.2d at 322. Furthermore, "no determination [had] been made by any agency or court that he [was] violent, potentially dangerous, or [was] more likely than the general public to commit a crime involving a firearm." *Id.* Our Supreme Court applied a rational basis test and concluded that N.C.G.S. § 14-415.1 was unconstitutional as applied to the felon. *Id.* at 549–50, 681 S.E.2d at 322–23. The Court noted that "it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety." *Id.* at 550, 681 S.E.2d at 323.

Conversely, in *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 404, the defendant had felony convictions in 1988 for selling and delivering cocaine, in 1989 for indecent liberties with a minor, and in 2005 for possessing cocaine. He also "demonstrated a blatant disregard for the law"

by committing numerous misdemeanors between 1984 and his trial in 2008, many of which involved drug possession or driving while impaired. *Id.* He further acquired numerous firearms after the 2004 amendment, even after twice being warned by law enforcement that he was prohibited from possessing firearms. *Id.* at 206, 689 S.E.2d at 405. During a subsequent search of the defendant's home in 2006, law enforcement found eleven rifles and shotguns, for which the defendant was indicted for possession of a firearm by a felon. *Id.* at 191–92, 689 S.E.2d at 396. Although the defendant raised an "as applied" challenge to N.C.G.S. § 14-415.1 after being indicted, this Court held that N.C.G.S. § 14-415.1 was a "reasonable regulation which [was] fairly related to the preservation of public peace and safety" as applied to the defendant. *Id.* at 206, 689 S.E.2d at 405.

The present case falls squarely between *Britt* and *Whitaker*. The *Britt* felon had a single felony conviction thirty years prior, whereas the *Whitaker* felon had numerous felony and misdemeanor convictions, and one of his felony convictions occurred the year before law enforcement found him in possession of numerous firearms. In the present case, Defendant had three prior felony convictions, coming in at seventeen, eighteen, and thirty-six years before the date of his alleged offense.

The *Britt* felon's only felony was nonviolent, and it was "uncontested" that he exhibited "lifelong nonviolence towards other citizens" and had "thirty years of law-abiding conduct since his crime[.]" *Britt*, 363 N.C. at 550, 681 S.E.2d at 323. The *Whitaker* felon, however, routinely broke the law and "flagrantly" violated the 2004 amendment by continuing to purchase firearms after twice being warned by law enforcement that he was not allowed to possess them. In the present case, there was no evidence the 1995 Texas conviction involved violence, and the trial court described the nature of Defendant's 1977 Pennsylvania and 1996 New York convictions as "ambiguous[.]" There was no evidence that Defendant had engaged in unlawful activity – notwithstanding his pending charge – for the approximately seventeen years since his last conviction.

Finally, the *Britt* felon proactively brought an action challenging the application of N.C.G.S. § 14-415.1 to him, whereas the *Whitaker* felon waited to bring his challenge until after he was arrested and indicted for being in possession of firearms as a felon. Although Defendant contends that he believed, incorrectly, that his right to possess a firearm in North Carolina had been restored in February 2013, there also is no indication he made any attempt to ascertain whether he was actually allowed to possess a firearm in this state. In short, Defendant's conduct, while not

"flagrant[,]" as it was in *Whitaker*, also was neither "assiduous" nor "proactive[,]" as it was in *Britt*.

Although this Court is presented with a close case, we cannot say Defendant has "affirmatively demonstrated that he [was] not among the class of citizens who pose a threat to public peace and safety" and that there was no rational basis under which N.C.G.S. § 14-415.1 could apply to him. *See Britt*, 363 N.C. at 550, 681 S.E.2d at 323. Defendant had three prior felony convictions, one of which was for armed robbery[3] and the other two occurred within the past two decades; there is no relevant time period in which he could have *lawfully* possessed a firearm in North Carolina; and, as a convicted felon, he did not take proactive steps to make sure he was complying with the laws of this state, specifically with the 2004 amendment to N.C.G.S. § 14-415.1. *See generally Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 Accordingly, this Court must defer to the "presumption in favor of constitutionality" for enactments of the General Assembly, and affirm the trial court's decision to deny Defendant's motion to dismiss. *See id.* at 192, 689 S.E.2d at 396.[4]

AFFIRMED.

Judges GEER and McCULLOUGH concur.

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3. Although Defendant denied being "armed" during the 1977 robbery, he did acknowledge at the pretrial hearing that he participated in the robbery. *See Baysden*, 217 N.C. App. at 28, 718 S.E.2d at 705 (holding that courts must "focus on the litigant's actual conduct rather than upon the manner in which the General Assembly has categorized or defined certain offenses.").

4. We also are unpersuaded by Defendant's contention that the trial court could not properly consider the 1977 Pennsylvania and 1996 New York convictions as part of Defendant's "as applied" challenge to N.C.G.S. § 14-415.1, on the ground that those "convictions were not included in [his] indictment" for possession of a firearm by a felon. At Defendant's trial, "the State need[ed] only [to] prove two elements to establish the crime of possession of a firearm by a felon: (1) [D]efendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *See State v. Wiggins*, 210 N.C. App. 128, 133, 707 S.E.2d 664, 669 (2011) (emphasis added)." As for Defendant's "as applied" challenge to N.C.G.S. § 14-415, *Defendant* bore the burden of overcoming the "presumption in favor of [the] constitutionality" of the statute, which necessarily required the trial court to examine the *Whitaker* factors in light of all of Defendant's relevant criminal history. *Accord Whitaker*, 201 N.C. App. at 206 n.6, 689 S.E.2d at 404 n.6 (noting that, while the defendant's "indictments for possession of a firearm by a felon were based upon his 1988 felony conviction, . . . we must consider the defendant's history of "law-abiding conduct," *Britt*, 363 N.C. at 550, 681 S.E.2d at 323, [and] we note his more recent felonies also for purposes of this constitutional analysis."); *State v. Yuckel*, 217 N.C. App. 198, 719 S.E.2d 254, slip op. at 13 (2011) (unpublished) (Beasley, J., concurring) ("[T]he legal principles governing as applied challenges to the Felony Firearms Act . . . make clear that the burden is on those challenging the law to prove it is unconstitutional."). Defendant's guilt of possession of a firearm by a felon and his "as applied" challenge to N.C.G.S. § 14-415.1 presented distinct inquiries for the trial court.

STATE OF NORTH CAROLINA
v.
SCOTTY J. GARRETT, DEFENDANT

No. COA15-845

Filed 5 April 2016

1. Drugs—possession with intent to sell or deliver methamphetamine—motion to dismiss—constructive possession

The trial court erred by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine because the State failed to present substantial evidence of constructive possession. Defendant's conviction for this charge was reversed.

2. Drugs—conspiracy to sell methamphetamine—motion to dismiss—sufficiency of evidence—implied understanding

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to sell methamphetamine based on alleged insufficient evidence. There was substantial evidence of an implied understanding among defendant and two others to sell methamphetamine to the informants.

3. Drugs—possession of drug paraphernalia—motion to dismiss—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charge of possession of drug paraphernalia. Although defendant did not have exclusive control over the interior of the car where the glass pipe was found, the State presented sufficient evidence of other incriminating circumstances to support a finding of constructive possession. Because defendant's convictions for possession with intent to sell or deliver methamphetamine and possession of drug paraphernalia were consolidated for judgment and commitment, 12 CRS 050697 was remanded for new sentencing.

Appeal by defendant from judgment entered 6 February 2015 by Judge Gary M. Gavenus in Madison County Superior Court. Heard in the Court of Appeals 16 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Ronald D. Williams, II, for the State.

James N. Freeman, Jr. for defendant.

ELMORE, Judge.

Scotty J. Garrett (defendant) was found guilty of conspiracy to sell methamphetamine, possession with intent to sell or deliver methamphetamine, and possession of drug paraphernalia. On appeal, defendant argues that the trial court erred in denying his motion to dismiss the charges against him. Because the State failed to present substantial evidence of constructive possession, we reverse defendant's conviction for possession with intent to sell or deliver methamphetamine. We leave defendant's two remaining convictions undisturbed and remand for resentencing in 12 CRS 050697.

I. Background

The State's evidence at trial tended to show the following: On 23 August 2012, Captain Coy Phillips of the Madison County Sheriff's Department arranged for a controlled drug buy in the town of Marshall. After receiving complaints of drug activity in the area, Captain Phillips contacted two paid confidential informants to purchase one gram of methamphetamine from Brian Fisher, an alleged dealer known by the informants. The sheriff's department provided the informants with an undercover vehicle equipped with audio and video surveillance. After meeting with Captain Phillips and Agent Mark Davis to obtain the "buy money," the informants arranged to meet Fisher at his residence.

Meanwhile, Fisher was making plans to purchase methamphetamine for himself. Before the informants arrived, Fisher called defendant and asked if he had any methamphetamine for sale. According to Fisher, defendant said that he had "half a gram." At some point thereafter, Fisher called one of the informants for a ride to defendant's residence. The informants asked Fisher for a gram in exchange, to which Fisher responded, "Well, I ain't got nothing. You'll have to get it from [defendant] when we get there." The informants then picked up Fisher in the undercover vehicle and proceeded toward defendant's residence.

Defendant met Fisher and the informants at the bottom of his driveway, where Fisher asked defendant for the methamphetamine. Defendant began fumbling around in his pockets but said he "didn't have any," he was "going to have to go get some." At that point, Matthew Adams, a friend of defendant and Fisher, arrived in a white Ford Explorer and pulled up behind the undercover vehicle in the driveway. Defendant and Fisher decided to ride with Adams in search of methamphetamine and rendezvous with the informants later in the night.

Defendant eventually led Fisher and Adams to a trailer park in Buncombe County. Fisher testified that when they arrived, he and Adams gave money to defendant to buy the methamphetamine. Fisher stayed in the car while defendant went inside the trailer, followed by Adams. Fisher noticed other people going in and out of the trailer and estimated that there were "probably six or seven people there." About ten minutes later, Adams returned to the car with the methamphetamine and handed it to Fisher, who placed it in his sock. According to the testimony of Chief Deputy Michael Garrison, however, defendant told him during interrogation that he never bought methamphetamine that night. Rather, Fisher arranged the deal, Fisher "was actually the one that did the transaction, he's actually the one that gave her the money and she gave him the drugs."

On the way back from Buncombe County, Fisher spoke with the informants on the phone and arranged to sell them some of the methamphetamine at Redmon Bridge. Fisher testified that

> on the way there [Adams]—me and [Adams] were up front, I was driving, I had secured the methamphetamines, because well one it was mine, it was my money, and two, I wanted to be able to get rid of it because I was in control of the vehicle. I had put it in my sock, got it out of my sock. Fumbling around trying to drive up Bear Creek wasn't easy. [Adams] held a cigarette cellophane, I dropped a little bit in there and I secured it and put it back in my boot, in my sock.

When they arrived at the bridge, the informants approached the driver's side window and handed Fisher the "buy money" in exchange for the methamphetamine in the cellophane wrapper. Fisher testified that he then gave some of the "buy money" to Adams and defendant because "[defendant] was upset about—the best I recall he was upset because [one of the informants] owed him some money anyway on a prior deal, and [Adams] was owed because for the use [sic] of the vehicle and all that."

Thereafter, the informants called Captain Phillips to confirm their purchase of the methamphetamine. Captain Phillips simultaneously radioed the patrolman to intercept the white Explorer. Officers found methamphetamine in Fisher's sock and a glass pipe in the rear floorboard where defendant had been sitting.

On 6 May 2013, defendant was indicted on charges of felonious selling of methamphetamine, felony conspiracy to sell methamphetamine,

possession of drug paraphernalia, and possession with intent to sell or deliver methamphetamine. A jury trial was held on 2 February 2015, before the Honorable Gary M. Gavenus in Madison County Superior Court. At the close of the evidence, defendant moved to dismiss all charges against him. The trial court denied defendant's motion, and the jury found defendant guilty on all charges except felonious selling of methamphetamine.

The trial court sentenced defendant to fourteen to twenty-six months imprisonment for conspiracy to sell methamphetamine. Defendant's two other convictions, possession with intent to sell or deliver methamphetamine and possession of drug paraphernalia, were consolidated for judgment, and the trial court sentenced defendant to eight to nineteen months imprisonment, set to begin at the expiration of the sentence for conspiracy to sell methamphetamine. Defendant timely appeals, arguing that the trial court erred in denying his motion to dismiss.

II. Discussion

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

A. Possession with Intent to Sell or Deliver Methamphetamine

[1] First, defendant argues that the trial court erred in denying his motion to dismiss the charge of possession with intent to sell or deliver methamphetamine because the State failed to present substantial evidence of constructive possession.

To sustain a conviction under N.C. Gen. Stat. § 90-95(a)(1), the State must prove that the defendant (1) possessed a controlled substance

(2) with the intent to manufacture, sell, or distribute it. N.C. Gen. Stat. § 90-95(a)(1) (2015); *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002) (citing *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 72–73 (1996)). "Possession" may be either actual or constructive. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 103, 587 S.E.2d 505, 510 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). A defendant has constructive possession of contraband where, "while not having actual possession, he has the intent and capability to maintain control and dominion over" it. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citing *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)). "The defendant may have the power to control either alone or jointly with others." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citing *State v. Fuqua*, 234 N.C. 168, 170–71, 66 S.E.2d 667, 668 (1951)). To establish constructive possession, it is not necessary to show that the defendant has exclusive control of the premises where the contraband is found. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). But unless the defendant has such exclusive control, "the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citing *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001)).

Whether sufficient incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry dependent upon the totality of the circumstances in each case. *Id.*; *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986). Although no single factor controls, our courts have considered, *inter alia*, the defendant's (1) proximity to the contraband, *Miller*, 363 N.C. at 100, 678 S.E.2d at 595, though mere presence is not enough, *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976), (2) ownership or control of the place where the contraband was found, *State v. Wiggins*, 185 N.C. App. 376, 385–88, 648 S.E.2d 865, 872–73 (2007), (3) opportunity to dispose of the contraband in the place it was found, *State v. Butler*, 356 N.C. 141, 148, 567 S.E.2d 137, 141 (2002), and (4) suspicious or unusual behavior, *id.* at 147–48, 567 S.E.2d at 141; *State v. Barron*, 202 N.C. App. 686, 692, 690 S.E.2d 22, 27 (2010).

This case does not fit neatly into a typical constructive possession fact pattern, where the contraband is not found on the defendant's person but the defendant's exclusive control of the area or other "incriminating circumstances" establishes a link between the defendant and the contraband. The State's evidence here shows that at nearly all relevant

times, Fisher and Adams were in actual possession of the methamphetamine. Adams emerged from the trailer with the methamphetamine and gave it to Fisher in the vehicle. Fisher secured the methamphetamine in his sock and, with Adams' help, transferred some of the methamphetamine to the cellophane wrapper. At the bridge, Fisher handed the methamphetamine to the informants. And after the traffic stop, police found the remaining methamphetamine in Fisher's sock.

As to defendant, the State's constructive possession theory relies on circumstantial evidence surrounding the transaction inside the trailer in Buncombe County. Fisher testified that defendant led Fisher and Adams to the trailer to purchase methamphetamine. Although defendant told Chief Deputy Garrison that Fisher actually arranged the deal and purchased the drugs, Fisher testified that he stayed in the vehicle while defendant and Adams went inside the trailer. Resolving this contradiction in favor of the State, the evidence shows that Fisher and Adams provided the money to purchase the drugs, that defendant entered the trailer with their money, followed by Adams, that other people were going in and out of the trailer, and that ten minutes later, Adams returned from the trailer with the methamphetamine and handed it to Fisher. Even in the light most favorable to the State, we conclude that no reasonable mind would accept these facts as adequate to support the conclusion that defendant had both the intent and capability to maintain control and dominion over the drugs inside the trailer. Because the possession element of N.C. Gen. Stat. § 90-95(a)(1) is not supported by substantial evidence, the trial court erred in denying defendant's motion to dismiss the charge of possession with intent to sell or deliver.

B. Conspiracy to Sell Methamphetamine

[2] Second, defendant argues that the trial court erred in denying his motion to dismiss the charge of conspiracy to sell methamphetamine based on insufficient evidence.

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975) (citing *State v. Littlejohn*, 264 N.C. 571, 142 S.E.2d 132 (1965)). A conspiracy does not require proof of an express agreement; rather, "proof of circumstances which point to a mutual implied understanding to commit the unlawful act is sufficient to prove conspiracy." *State v. Howell*, 169 N.C. App. 741, 748, 611 S.E.2d 200, 205 (2005) (citing *State v. Smith*, 237 N.C. 1, 16–17, 74 S.E.2d 291, 301–02 (1953)). "The crime is complete when the agreement is made; no overt act in furtherance of the

agreement is required." *Id.* (citing *State v. Gallimore*, 272 N.C. 528, 532, 158 S.E.2d 505, 508 (1968)).

Here, there is substantial evidence of an implied understanding among defendant, Fisher, and Adams to sell methamphetamine to the informants. Captain Phillips instructed the informants to buy a gram of methamphetamine from Fisher. Fisher testified that the informants picked him up and drove to defendant's house, where Fisher asked defendant for methamphetamine. Defendant said he "didn't have any," but he "could get some." One of the informants also asked defendant, "How much can you get me? Can you get me a gram?" Defendant responded, "Yes." Eventually, defendant led Fisher and Adams to the trailer park in Buncombe County, where Fisher and Adams supplied the money to purchase methamphetamine. We conclude, therefore, that the trial court did not err in denying defendant's motion to dismiss the conspiracy charge.

C. Possession of Drug Paraphernalia

[3] Third, defendant argues that the trial court erred in denying his motion to dismiss the charge of possession of drug paraphernalia based on insufficient evidence.

Pursuant to N.C. Gen. Stat. § 90-113.22(a) (2015), "[i]t is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia . . . to inject, inhale, or otherwise introduce into the body a controlled substance . . . ." The offense requires proof that the defendant possessed drug paraphernalia and had "the intent to use the [drug paraphernalia] in connection with the controlled substance." *State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d 777, 781 (1992).

Although defendant did not have exclusive control over the interior of the car where the glass pipe was found, the State presented sufficient evidence of other incriminating circumstances to support a finding of constructive possession. The arresting officer testified that, when he approached the vehicle, defendant was sitting in the back seat and did not immediately show his hands at the officer's request. Police subsequently searched the vehicle and found a glass pipe on the rear floorboard of the seat where defendant was sitting. Defendant admitted that he smoked methamphetamine out of the pipe with Adams and Fisher while they were in the car. Furthermore, Fisher testified that the pipe they used belonged to defendant and that defendant had been carrying it in his pocket. Based on this evidence, we conclude that the trial court did not err in denying defendant's motion to dismiss the charge of possession of drug paraphernalia.

III. Conclusion

The trial court erred in denying defendant's motion to dismiss the charge of possession with intent to sell or deliver because there was insufficient evidence that defendant had constructive possession of the methamphetamine. We reverse defendant's conviction for possession with intent to sell or deliver methamphetamine in 12 CRS 050698. We leave defendant's convictions for conspiracy to sell methamphetamine in 12 CRS 050694 and possession of drug paraphernalia in 12 CRS 050697 undisturbed. However, because defendant's convictions for possession with intent to sell or deliver methamphetamine and possession of drug paraphernalia were consolidated for judgment and commitment, we must also remand 12 CRS 050697 for new sentencing.

REVERSED IN PART; NO ERROR IN PART; REMANDED FOR NEW SENTENCING.

Judges CALABRIA and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER LYNN HALLUM

No. COA15-526

Filed 5 April 2016

1. False Pretense—obtaining property by false pretense—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the obtaining property by false pretense charge. When viewed in the light most favorable to the State, there was a reasonable inference of deception and defendant's guilt.

2. Accomplices and Accessories—acting in concert—jury instruction

The trial court erred by instructing the jury on acting in concert. There was a complete lack of evidence that anyone but defendant committed the acts necessary to constitute the crime of obtaining property by false pretenses. However, the evidence was not prejudicial.

3. Sentencing—improper resentencing—jurisdiction—motion for appropriate relief

The trial court lacked jurisdiction to resentence defendant for obtaining property by false pretense. Defendant's motion for appropriate relief only retained the trial court's jurisdiction to act regarding defendant's conviction for possession of stolen goods in case number 14 CRS 128.

Appeal by defendant from judgments entered 1 October 2014 and 27 February 2015 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 22 October 2015

Attorney General Roy Cooper, by Assistant Attorney General Susan Fountain, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

McCULLOUGH, Judge.

Christopher Lynn Hallum ("defendant") appeals from judgments entered upon his convictions for obtaining property by false pretenses, possession of stolen goods, and attaining habitual felon status. For the following reasons, we find no error in part and reverse in part.

I. Background

Defendant was arrested at Biltmore Iron & Metal Company "BIMCO" on 16 October 2013. In three separate indictments returned on 7 April 2014, a Buncombe County Grand Jury indicted defendant on one count of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100, one count of possession of stolen goods in violation of N.C. Gen. Stat. § 14-71.1, and for attaining the status of a habitual felon.[1] Defendant's cases were joined and called for trial in Buncombe County Superior Court on 30 September 2014, the Honorable Marvin P. Pope, Judge presiding.

1. Defendant was also indicted on one count of felony breaking and entering and one count of larceny after breaking and entering in a fourth indictment with file number 13 CRS 61816. Defendant, however, was found not guilty of those charges and, besides subtle references to the charges in the transcript and record, those charges are not mentioned in this appeal.

The State's evidence at trial tended to show that on the afternoon of 14 October 2013, defendant showed up at the Glenrock Hotel renovation site in Asheville in search of scrap metal that he could sell. Terry Christie, an electrician completing the electrical portion of the renovation, showed defendant some four-inch rigid-steel conduit that had been torn out of the building and other scrap metal that defendant could take from behind the building. Christie specifically told defendant he could not have a spool of MC cable, described as copper cables in an aluminum jacket and referred to at times as flexible aluminum conduit, that defendant inquired about. After being shown the scraps behind the building, defendant told Christie "[h]e was going to have to come back with his truck and trailer to get it[]" and then left.

When Christie later left the renovation site for the day, his work materials were locked in storage beneath the stairs and the doors to the building were locked.

The next morning when Christie returned to work, 15 October 2013, the spool of MC cable was nowhere to be found. Eight smaller rolls of cooper No. 12 wire were also missing. As Christie walked out the backdoor to look around, he noticed the four-inch rigid-steel conduit and other scraps he had shown defendant were gone. Christie testified that "[t]here was nothing out there. They had cleaned everything out there that day." Christie also testified that the spool of MC cable was "pretty heavy, and it looked like somebody had taken it and rolled it out across the ground. And the ground was wet, so it left an impression about a-half inch into the ground." There was also evidence that one of the backdoors to the building was ajar and appeared to have been jimmied open with a pry tool.

After informing his shop of the missing supplies, Christie called the police. Christie was able to give a vague description of defendant to the officers who responded and took the initial report.

At roughly two o'clock in the afternoon on 15 October 2013, defendant sold scrap metal to BIMCO. Blake Cloninger, Vice-President of BIMCO, testified about two separate transactions taking place on 15 October 2013. BIMCO's records show that defendant sold 960 pounds of steel in the first transaction. Cloninger more precisely described the steel as "pipes" based on a picture of the materials that was taken when the materials were weighed at BIMCO. BIMCO's records show that defendant sold "[s]ome insulated copper, insulated aluminum, MLC -- that's a grade of aluminum -- and some No. 1 copper[]" in the second

transaction. When shown a picture of what Christie referred to as MC cable, Cloninger testified that the MC cable would qualify as MLC.

Travis Barkley, a Detective with the Asheville Police Department, was assigned the case and conducted his investigation on 16 October 2013. On that morning, Barkley went to the renovation site, talked to Christie and other workers, and observed what Barkley referred to as "the crime scene." Because the police had very limited information and not enough for an identification, Barkley requested that Christie and other workers pay more attention if they saw defendant in order to get a better description.

Evidence was introduced at trial showing that defendant also sold materials to BIMCO in two transactions shortly after two o'clock in the afternoon on 16 October 2013. BIMCO's records showed that in the first transaction, defendant sold "insulated copper, stripped copper wire, and some aluminum." In the second transaction, defendant sold "[s]ome insulated copper."

That same afternoon, Christie spotted defendant going through the dumpster behind the renovation site and called Barkley. At that time, Christie was able to give a detailed description of a tattoo on defendant's neck and provide a license tag number for a green Explorer that defendant was driving. Barkley then began to call metal buyers in the area to see if they knew anyone matching the description. Barkley's first call was to BIMCO, where an employee was able to positively identify defendant by name and indicated defendant had been in several times in the last couple days. Barkley thought the description of the items defendant sold to BIMCO sounded similar to what was stolen and asked the BIMCO employee to give him a call if defendant returned.

A BIMCO employee called Barkley later that day and told Barkley that defendant had returned. Barkley, who at the time was tied up with a different investigation, had dispatch send uniformed officers to BIMCO to detain defendant until he was able to get there. When Barkley arrived, defendant was standing next to a green Explorer. A woman, who Barkley later learned was defendant's girlfriend, was in the driver's seat. Once at BIMCO, Barkley received an update from the responding officers and spoke to BIMCO employees about items defendant had recently brought in. Because Barkley was unfamiliar with the items, Barkley called Christie and requested that he come to BIMCO. When Christie arrived, Christie was able to identify defendant and the four-inch rigid-steel conduit and MC cable in pictures taken by BIMCO.

Barkley also spoke with defendant and defendant's girlfriend. Defendant initially denied anything about spools of wire. Yet, upon further questioning, defendant got upset and his story began to change. Defendant indicated he got a spool from a Mr. Daniel Atchley and figured it was probably stolen. Barkley was never able to determine if Mr. Atchley was involved. The spool was never recovered, but Cloninger testified that he remembered seeing a spool in the back of defendant's Explorer in the course of the 15 October 2013 transactions and believed there was still aluminum conduit on the spool.

Defendant moved to dismiss all the charges at the close of the State's evidence, and then renewed the motion after he decided not to put on further evidence in his defense. The trial court denied defendant's motions.

The jury was instructed on the charges and given the case on 1 October 2014. Within half an hour, the jury returned verdicts finding defendant guilty of attaining property by false pretenses and possession of stolen goods. Upon hearing further evidence from the State in the subsequent habitual felon stage, the jury returned an additional verdict finding defendant guilty of attaining habitual felon status. The trial court then entered a judgment sentencing defendant for obtaining property by false pretenses as a habitual felon to a term of 97 to 129 months imprisonment. The trial court entered a separate judgment sentencing defendant to a concurrent term of 10 to 21 months imprisonment for possession of stolen goods.

Defendant filed notice of appeal from the 1 October 2014 judgments on 6 October 2014 and then filed a motion for appropriate relief ("MAR") on 8 October 2014. In the MAR, defendant challenged his conviction for possession of stolen goods on the basis that the trial court instructed the jury on a theory of possession of stolen goods not supported by the indictment. Specifically, defendant asserted as follows:

> A defendant may not be convicted on a theory not supported by the indictment. In this case, the substance of the indictment alleged possession of stolen goods based on the value of the goods. *See* N.C. Gen. Stat. [§] 14-72(a). The court, however, instructed on possession of stolen goods pursuant to a breaking and or entering. *See* N.C. Gen. Stat. [§] 14-72(b)(2).

In the State's answer filed 30 October 2014, the State conceded a fatal variance in that "the instruction [given for felony possession of stolen

goods] did not match the indictment." The State then asked that the court allow defendant's MAR, adding that

> [d]efendant in 14CRS128 would be entitled to a new trial and the remaining convictions would remain undisturbed. Defendant in 13CRS61817 Obtaining Property by False Pretense and 14CRS129 Habitual Felon would need to be resentenced.

On 13 January 2015, the trial court issued an order granting defendant's MAR and setting aside the judgment for possession of stolen goods in favor of a new trial. The trial court further indicated that defendant "should be resentenced on the remaining matters."

Following a resentencing hearing on 27 February 2015, the trial court entered a new judgment sentencing defendant for obtaining property by false pretenses as a habitual felon to 97 to 129 months imprisonment. The judgment was nearly identical to the original judgment, except that the credit for days in confinement was increased to account for the time that elapsed between entry of the judgments. Defendant gave notice of appeal from the new judgment in open court.

II. Discussion

Now on appeal, defendant argues the trial court erred (1) by denying his motion to dismiss the obtaining property by false pretense charge, (2) instructing the jury on acting in concert, and (3) resentencing defendant for obtaining property by false pretenses. We address the issues in order.

1. Motion to Dismiss

[1] Defendant was indicted and convicted of obtaining property from BIMCO, specifically "U.S. Currency in the amount of $275.10[,]" by false pretenses. As provided in the indictment, "[t]he false pretense consisted of the following: . . . defendant sold electrical wire for scrap and represented that it was not stolen and was his to sell, when in fact, the electrical wire was stolen and . . . defendant was not entitled to sell it." Now on appeal, defendant argues the trial court erred in denying his motion to dismiss because the evidence was insufficient to sustain his conviction for obtaining property by false pretenses.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of

the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

N.C. Gen. Stat. § 14-100 provides in pertinent part as follows:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever . . . obtain or attempt to obtain from any person within this State any money . . . with intent to cheat or defraud any person of such money, . . . such person shall be guilty of a felony[.]. . .

N.C. Gen. Stat. § 14-100(a) (2015). Construing this statute, our Courts have held that the four essential elements to the offense are as follows: " '(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.' " *State v. Simpson*, 159 N.C. App. 435, 439, 583 S.E.2d 714, 716, (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)), *aff'd per curiam*, 357 N.C. 652, 588 S.E.2d 466 (2003).

Defendant only challenges the third element in this case. Specifically, defendant argues there was no evidence that anyone at BIMCO was deceived by defendant. Defendant asserts the BIMCO employee who purchased the items from defendant was never identified and, even if defendant's signature on the transaction records is sufficient to show a false representation, there is no evidence that BIMCO employees believed the representation. Defendant claims the evidence instead "described a regimen in which [BIMCO] and its employees were indifferent to the legal ownership of metal presented for sale as scrap." Defendant asserts the evidence "describes a 'nod and wink' system in which actual deception did not occur. It falls short of proof beyond a reasonable doubt that anyone at [BIMCO] was actually deceived by [defendant's] signature on a transaction form." Defendant specifically refers to Cloninger's testimony that when "[BIMCO] ask[s] where [the material] comes from, . . . everybody says 'from home,' and then they drop it off."

We first note that it is for the jury to determine whether the evidence proves beyond a reasonable doubt that defendant is guilty. As explained above, all that is required to survive a motion to dismiss is that there be substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (internal quotation marks, citation, and emphasis omitted).

Here, the evidence was that defendant signed paperwork representing he was the lawful owner of the materials he was selling. Cloninger specifically explained that "[o]n the signature it says that they are the lawful owner or legal person to sell that material." BIMCO then paid defendant for the materials that defendant represented were his to sell. At that point, the transaction was complete. When viewed in the light most favorable to the State, we hold a reasonable inference of deception and defendant's guilt may be drawn from these circumstances.

Although addressing a separate issue, the Court's reasoning in *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277 (1980), is informative in the present case. In arguing an indictment for obtaining property by false pretenses was defective because it failed to allege actual deception, the defendant in *Cronin* attempted to distinguish prior decisions that dealt with the causal connection between a false representation and the obtainment of something of value from cases concerned with the question of whether the false pretense in fact deceived the victim. *Id.* at 237-38, 262 S.E.2d at 283. Upon review, the Court overruled the defendant's argument holding that it was a "distinction without a difference[]" because "[i]f the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense." *Id.* at 238, 262 S.E.2d at 283.

Applying the same rationale, it can be reasonably inferred from the evidence in this case that defendant's false representation caused BIMCO to pay defendant. It then logically follows that BIMCO was in fact deceived.

Furthermore, although Cloninger did testify that everybody represents that materials they are selling come from home when BIMCO inquires, Cloninger's testimony does not establish that BIMCO was not deceived in the present case. At most, Cloninger's testimony shows BIMCO may have been suspicious of defendant's representation that he was the lawful owner of the items. Yet, it is clear from this Court's holding in *Simpson* that evidence that a victim is suspicious of a seller's representation as to ownership does not preclude the charge from surviving a motion to dismiss.

In *Simpson*, a jury found the defendant guilty of one count of misdemeanor possession of stolen goods and two counts of obtaining property by false pretenses based on evidence tending to show that the defendant sold three stolen cameras to a pawn shop upon representations that he owned the cameras. 159 N.C. App. at 436, 583 S.E.2d at 715. The defendant in *Simpson* appealed arguing the trial court erred in denying his motion to dismiss. This Court summarized the defendant's argument to the trial court in that case as follows:

> "I think one of the elements is that [the] defendant, in fact, does deceive the party listed as the victim. The victim in this case is . . . the [pawn shop]. However, by the testimony of [the pawn shop owner], the pawn shop owner was not deceived whatsoever. [The pawn shop owner] took the cameras[,] suspected they were stolen[,] called the Sheriff's Department[,] and didn't place the cameras out for sale. [The pawn shop owner] knew there was a problem or certainly suspected there was a problem. The element of actual deception . . . is not present."

Id. at 438, 583 S.E.2d at 716 (alterations in original omitted). Over a dissent, this Court upheld the trial court's denial of the defendant's motion to dismiss explaining as follows:

> [the d]efendant contends the State failed to present any evidence that the victim, [the pawn shop owner], was actually deceived by [the] defendant's false representations. As a basis for that contention, [the] defendant asserts that [the pawn shop owner's] suspicion that the cameras were stolen, coupled with the fact that the cameras were

> actually stolen, proves that the victim, [the pawn shop owner], was not, in fact, deceived. [The d]efendant's argument, however, relies on a retrospective interpretation of the facts. At the time of the transaction, [the pawn shop owner] did not know that the cameras were stolen. In fact, [the pawn shop owner] testified that he "called [the detective] and told him that he had some cameras there that he needed to look at." Although [the pawn shop owner] had a suspicion that the cameras were stolen, [the pawn shop owner]'s testimony, when viewed in the light most favorable to the State, reasonably permits a jury to make an inference that [the pawn shop owner] called [the detective] in order to confirm that the items were not stolen property. As this inference is reasonable, and adequate to support the conclusion that [the pawn shop owner] was, in fact, deceived, this assignment of error is overruled.

Id. at 439, 583 S.E.2d at 716-17 (footnote and alterations in original omitted). Our Supreme Court later affirmed this Court's majority opinion *per curiam*. 357 N.C. 652, 588 S.E.2d 466 (2003).

As in *Simpson*, the evidence in this case viewed in the light most favorable to the State was sufficient to support a reasonable inference of deception and defendant's guilt. Thus, the trial court did not err in denying defendant's motion to dismiss the obtaining property by false pretenses charge.

2. Acting In Concert Instruction

[2] Defendant objected to the proposed issuance of an acting in concert instruction during the charge conference. Following a discussion of the issue, the trial court determined the instruction was proper based on the evidence and proceeded to instruct the jury on acting in concert as to all offenses over defendant's objection. As an alternative to issue one, defendant argues that even if the trial court did not err in denying his motion to dismiss, the trial court erred by instructing the jury on the theory of acting in concert because there was no basis in the evidence to support the theory.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). Thus, "[i]t is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence."

State v. Shaw, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Cameron*, 284 N.C. at 171, 200 S.E.2d at 191. "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979). Thus, "[a]n instruction on . . . acting in concert is proper when the State presents evidence tending to show the defendant was present at the scene of the crime and acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Cody*, 135 N.C. App. 722, 728, 522 S.E.2d 777, 781 (1999) (internal quotation marks and citation omitted).

In this case, the only evidence indicating the involvement of someone other than defendant was testimony from Barkley that defendant "[s]tated that he got [the spool] from Mr. Atchley[]" and "[defendant] figured it was probably stolen." Although the evidence regarding Mr. Atchley may support the issuance of an acting in concert instruction as to offenses for which defendant was acquitted, the State's evidence was that defendant acted alone in obtaining property from BIMCO by false pretenses. There was no evidence that Mr. Atchley committed any of the acts necessary to constitute obtaining property from BIMCO by false pretenses. Furthermore, the presence of defendant's girlfriend at BIMCO at the time of defendant's arrest, without more, is not evidence of her involvement in a common plan or purpose to commit the crime. Because, there was a complete lack of evidence in this case that anyone but defendant committed the acts necessary to constitute the crime of obtaining property by false pretenses, it was error for the trial court to instruct the jury that it could find defendant guilty of the offense based on a theory of acting in concert.

"[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)). Although, "[i]t is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence[,]" *State v. Moore*, 315 N.C. 738, 749, 340 S.E.2d 401, 408 (1986), it is evident the error was not prejudicial in this case.

Unlike the cases cited by defendant, *see State v. Hargett*, 255 N.C. 412, 121 S.E.2d 589 (1961), *State v. Brown*, 80 N.C. App. 307, 342 S.E.2d 42 (1986), *State v. Windley*, 173 N.C. App. 187, 617 S.E.2d 682 (2005), where there was evidence that others were present with the defendants at the times, or just before or after the times the defendants were alleged to have committed the crimes from which it was plausible the jury could have erroneously convicted the defendants based on a theory of acting in concert, there is no such evidence in the present case. Defendant was the only one on trial for obtaining property from BIMCO by false pretenses and all the evidence was that defendant was the sole perpetrator of the offense – defendant signed the paperwork falsely representing he was the lawful owner of the materials and received payment from BIMCO for the materials. There was no evidence that anyone was with defendant during the transactions.

Based on the facts of this case, we hold the trial court's acting in concert instruction does not amount to prejudicial error because it is implausible the jury would have reached a different result absent the acting in concert instruction.

3. Resentencing

[3] Lastly, defendant contends the second judgment for obtaining property by false pretenses entered on 27 February 2015 is void for lack of jurisdiction and, therefore, the original judgment entered 1 October 2014 remains in full force and effect. Specifically, defendant contends the trial court did not retain jurisdiction to resentence defendant for obtaining property by false pretenses because the MAR only concerned his conviction for possession of stolen goods, which was entered on a separate judgment.

At the outset, it important to explain the context for defendant's challenge since the 27 February 2015 judgment is nearly identical to the 1 October 2014 judgment. Between the times the original judgment and second judgment were entered, defendant had prior suspended sentences activated because of probation violations. Therefore, while the sentence imposed in the original judgment began to run immediately upon entry on 1 October 2014, defendant contends that, pursuant to N.C. Gen. Stat. § 14-7.6, he is now forced to serve a longer term of imprisonment because the sentence imposed in the 27 February 2015 judgment does not begin to run until his activated sentences have been served.

We first note that it does not appear the trial judge intended to resentence defendant so that defendant was required to serve additional time. In fact, because the issue was never brought up during the resentencing

hearing, the trial judge may not even have been aware of the issue. The last sentence in N.C. Gen. Stat. § 14-7.6 provides that habitual felon sentences "shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section." N.C. Gen. Stat. § 14-7.6 (2015). Despite the mandate in N.C. Gen. Stat. § 14-7.6, the trial judge failed to indicate on the 27 February 2015 judgment that he was ordering the habitual felon sentence imposed for obtaining property by false pretenses to begin at the expiration of all sentences which defendant was presently obligated to serve. Thus, it appears the sentence imposed during resentencing began upon entry of the judgment on 27 February 2015, not upon the conclusion of the sentences activated upon revocation of defendant's probation.

Although the trial judge's failure to order the habitual felon sentence to begin at the expiration of all sentences which defendant is presently obligated to serve would be error, the failure to so order in this case is of no consequence because we agree with defendant that in this case the trial court did not retain jurisdiction to resentence defendant for obtaining property by false pretenses.

Pursuant to N.C. Gen. Stat. § 15A-1448, the trial court is divested of jurisdiction when notice of appeal has been given and the period for filing notice of appeal, fourteen days from entry of the judgment, *see* N.C. R. App. P. 4 (2016), has expired. N.C. Gen. Stat. § 15A-1448(a)(2) (2015). However, the trial court retains jurisdiction to act in a case when a MAR is made within ten days of entry of judgment, whether or not notice of appeal has been given. *See* N.C. Gen. Stat. § 15A-1414(a) and (c) (2015); N.C. Gen. Stat. § 15A-1448(a)(2).

As detailed above in the background, defendant filed notice of appeal from the 1 October 2014 judgments on 6 October 2014. Defendant then filed an MAR on 8 October 2014 within the ten day period to file such a motion. Although defendant's MAR listed the case numbers for all of the offenses for which he was indicted, defendant's MAR only challenged defendant's conviction for possession of stolen goods in case number 14 CRS 128. Because defendant's conviction for possession of stolen goods in case number 14 CRS 128 was not consolidated with any other offenses and entered on its own judgment, entirely separate from the judgment on defendant's convictions for obtaining property by false pretenses and attaining habitual felon status, we hold the MAR only retained the trial court's jurisdiction to act regarding defendant's conviction for possession of stolen goods in case number 14 CRS 128. Thus, the 27 February 2015 judgment entered upon resentencing is void for lack of jurisdiction.

There was no necessity or authority for the trial court to resentence defendant in this case to a sentence identical to the one previously imposed, and thereby change the date of the entry of judgment, when defendant successfully challenged a separate conviction that had no effect on the convictions for which he was resentenced.

III. Conclusion

For the reasons discussed, we hold the trial court did not error in denying defendant's motion to dismiss. Although the trial court did err in instructing the jury that it could find defendant guilty of obtaining property by false pretenses based on a theory of acting in concert, that instruction was not prejudicial. As to resentencing, the trial court lacked jurisdiction to resentence defendant for convictions entered on a judgment not challenged in defendant's MAR and not affected by the grant of defendant's MAR. Thus, the judgment entered in file number 13 CRS 61817 on 27 February 2015 is a nullity and vacated and the original judgment entered on 1 October 2014 remains in full force and effect.

NO ERROR IN PART AND REVERSED IN PART.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
JAMES L. JOHNSON

No. COA15-793

Filed 5 April 2016

Motor Vehicles—driving while impaired—motion to suppress—lack of reasonable articulable suspicion

The trial court erred in a driving while impaired case by denying defendant's motion to suppress based on the officer lacking reasonable, articulable suspicion to stop him. The officer had no more than a hunch or generalized suspicion that defendant violated N.C.G.S. § 20-141(a) or any other traffic law.

Appeal by Defendant from judgment entered 3 March 2015 and order entered 12 November 2014 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 2 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General J. Rick Brown, for the State.

Jeffrey William Gillette for Defendant.

INMAN, Judge.

James L. Johnson ("Defendant") appeals from an order denying his motion to suppress. On appeal, Defendant argues that the police officer who made the investigatory stop lacked sufficient reasonable suspicion to do so.

After careful review, we reverse the judgment below and remand for further proceedings.

Factual and Procedural Background

The evidence presented at Defendant's suppression hearing tended to establish the following: Around 10:00 p.m. on 16 February 2013, Officer Garrett Gardin ("Officer Gardin"), a patrol officer with the Hendersonville Police Department since 2011, was on duty in his patrol vehicle stopped at a red light at the intersection of King Street and Bearcat Boulevard when Defendant's black Chevy truck pulled beside him in the left-hand turning lane. It was snowing, and the snow was just beginning to stick to the ground. Defendant was "blaring" his music "really loud" and was "revving" his engine. The speed limit was 35 miles per hour.

When the light turned green, Defendant "revved his engine" and "immediately took a left turn onto Bearcat Boulevard, screeching the tires toward the back end, . . . and the tailgate went towards the corner." Defendant's car never made contact with the sidewalk, and Defendant was able to "correct[]" the car, all the while maintaining proper lane control. According to Officer Gardin, Defendant "sped down Bearcat [Boulevard]" and then stopped at the next red light without incident. Officer Gardin "immediately" initiated a traffic stop based on "unsafe movement for the conditions of the roadway." Officer Gardin testified that, in his opinion, Defendant was driving "too fast" down Bearcat Boulevard "for what was going on at the time as far as weather was concerned."

Defendant stopped his truck promptly after Officer Gardin initiated the stop. When Officer Gardin approached the truck, he observed that Defendant had red, glassy eyes and a red face. When Defendant spoke, his speech was slurred. Defendant admitted that he had consumed a

few beers that evening. After performing various field sobriety tests, Officer Gardin placed Defendant under arrest for driving while impaired ("DWI"). Defendant blew a .13 on the Intoxilyzer.

On cross-examination, Officer Gardin stated that he did not know how fast Defendant was driving down Bearcat Boulevard, noting only that he believed that it was "too fast" for the conditions given that Defendant "almost lost control making the left turn." Officer Gardin admitted that there were no other cars or pedestrians in the area and that he did not cite Defendant for any traffic violations.

Defendant filed a motion to suppress the traffic stop in District Court, which was granted by Judge Peter Knight on 5 June 2014. The State appealed to Superior Court for *de novo* review. Following an evidentiary hearing on Defendant's motion to suppress, Judge Powell denied the motion and remanded the matter back to District Court for entry of an order and further proceedings. Defendant pled guilty to DWI in District Court and appealed the judgment to Superior Court. Defendant refiled his motion to suppress, which was again denied. Pursuant to a plea agreement, Defendant again pled guilty but preserved his right to appeal the denial of his motion to suppress. Defendant received a suspended sentence of 12 months of unsupervised probation. Defendant timely appeals.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress because Officer Gardin lacked reasonable, articulable suspicion to stop him. We agree.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). We review the trial court's conclusions of law *de novo*. *Id.* at 168, 712 S.E.2d at 878.

Pursuant to *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968), an officer may conduct a traffic stop if he or she has reasonable suspicion that "criminal activity may be afoot." This includes investigatory stops made on the basis of a readily observed traffic violation or an officer's suspicion that a violation is being committed. *State v. Styles*, 362 N.C. 412, 415-16, 665 S.E.2d 438, 440-41 (2008). As our Supreme Court has explained, an officer "must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant the intrusion." *State v. Foreman*, 351 N.C. 627, 630, 527 S.E.2d 921, 923 (2000).

Based on the testimony of Officer Gardin, the trial court found that:

> 1. On February 16, 2013 Hendersonville Police Department Officer G. Gardin was on routine patrol in the City of Hendersonville, and was stopped at the intersection of King Street and Bearcat Boulevard. The Defendant was also operating a vehicle, a truck, which was also stopped at the intersection, in the lane of travel next to Officer Gardin. King Street is a one-way public street in the City of Hendersonville.
>
> 2. While waiting in his truck at the intersection for the light to change, the Defendant revved his truck engine, drawing the attention of Officer Gardin.
>
> 3. When the light changed to green for traffic traveling in the direction of Officer Gardin and the Defendant, the Defendant abruptly accelerated his vehicle into a left-hand turn, which left-hand turn was appropriate for his lane. His vehicle "fish tailed", but the Defendant regained control of his vehicle before the rear struck the curb or left his lane of travel. Officer Garden [sic] was unable to estimate the speed of the Defendant's vehicle.
>
> 4. Snow had begun falling at this time and slush was present on the roads and in the area in question.
>
> 5. Officer Gardin immediately initiated a stop of the Defendant's vehicle, as it was the Officer's opinion that the Defendant's operation of his vehicle was unsafe for road conditions. The Defendant stopped his vehicle promptly, in a public vehicular area suitable for stopping.

Based on these findings, the trial court denied Defendant's motion to suppress, concluding that:

> 1. As the Defendant was stopped because of a traffic violation observed by Officer Gardin, the standard for the stop is not reasonable suspicion but whether Officer Gardin had objective probable cause to believe that the Defendant had committed a traffic violation.[1]

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1. The trial court misstated the standard for determining whether the stop was constitutional. As explained by our Supreme Court, reasonable suspicion, not probable cause, is the appropriate standard in determining whether a traffic stop is appropriate. *State v. Styles*, 362 N.C. 412, 415-16, 665 S.E.2d 438, 440-41 (2008).

> 2. Although the actions of the Defendant might be categorized as de minimus, and although a charge of traveling too fast for conditions may be rarely charged absent an accident, the Defendant's actions nevertheless gave probable cause for Officer Gardin to stop the Defendant's vehicle for a traffic violation.

Although the trial court's findings of fact are supported by competent evidence, they do not support the conclusion that Officer Gardin had reasonable, articulable suspicion that Defendant had committed a violation of "unsafe movement" or "traveling too fast for conditions," the purported traffic offenses Officer Gardin claimed Defendant had committed.

Essentially, Officer Gardin stopped Defendant based on his belief that Defendant was engaging in the following "unsafe movements" given the winter weather conditions: (1) Defendant spun his tires when making the left-hand turn onto Bearcat Boulevard; (2) the back end of Defendant's truck swerved or "fish-tailed"; and (3) Officer Gardin's belief that Defendant was driving "too fast" down Bearcat Boulevard.

Generally, "unsafe movement" offenses are based on N.C. Gen. Stat. § 20-154(a), which provides:

> The driver of any vehicle upon a highway or public vehicular area before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.

Officer Gardin's concern that Defendant was not driving safely based on the weather conditions suggests that he suspected a violation of N.C. Gen. Stat. § 20-141(a), which provides that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." Subsection (m) explains that

> the fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from

> the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

Defendant's tires may have spun when he accelerated through the green light and the back end of Defendant's truck may have "fish tail[ed]" when he turned onto Bearcat Boulevard. However, Officer Gardin admitted that Defendant was able to maintain lane control the entire time. Defendant's truck did not make contact with the sidewalk nor did he fail to stay within his lane of travel. Consequently, there was nothing illegal about Defendant's left-hand turn onto Bearcat Boulevard.

As our Supreme Court has explained, "[a]lthough a legal turn, by itself, is not sufficient to establish a reasonable, articulable suspicion, a legal turn in conjunction with other circumstances, such as the time, place and manner in which it is made, may constitute a reasonable, articulable suspicion which could justify an investigatory stop." *State v. Foreman*, 351 N.C. 627, 631, 527 S.E.2d 921, 923 (2000). In this case, the trial court found no "other circumstances" that provided any justification for the stop. Despite Officer Gardin's allegation that Defendant was driving "too fast" after making the turn, he testified that he had no idea how fast Defendant was actually driving on Bearcat Boulevard, a road with a 35 mile per hour speed limit. Nor did he suggest that Defendant was speeding. Although it is undisputed that there was snow falling at the time of the stop, Officer Gardin admitted that he had no trouble driving around in "an older model Crown Vic." Nothing that Officer Gardin observed Defendant doing—and nothing that the trial court found that Defendant had done—constituted unsafe driving, as defined by our statutes, even factoring in the weather conditions.

Finally, we note that this Court has held that N.C. Gen. Stats. §§ 20-141(a) and 20-141(m)—subsections of the "unsafe movement" statute at issue—"establish a duty to drive with caution and circumspection and to reduce speed if necessary to avoid a collision, irrespective of the lawful speed limit or the speed actually driven." *State v. Stroud*, 78 N.C. App. 599, 603, 337 S.E.2d 873, 876 (1985). Similarly, violations for "unsafe movement" as provided for in N.C. Gen. Stat. § 20-154(a) involve a movement that "affect[s] the operation of another vehicle." *Cooley v. Baker*, 231 N.C. 533, 536, 58 S.E.2d 115, 117 (1950); *see also State v. Ivey*, 360 N.C. 562, 565, 633 S.E.2d 459, 461 (2006) *abrogated on other grounds by State v. Styles*, 362 N.C. 412, 415-16, 665 S.E.2d 438, 440-41 (2008) (holding that the standard for constitutional stops when an officer believes that a defendant has committed a criminal offense is

reasonable suspicion not probable cause). Here, Defendant's left-hand turn onto Bearcat Boulevard did not affect any other traffic or increase the risk of collision to any other motorists or pedestrians.

We cannot conclude that Officer Gardin had more than a hunch or generalized suspicion that Defendant violated N.C. Gen. Stat. § 20-141(a) or any other traffic law. Therefore, the trial court erred in denying Defendant's motion to suppress the evidence obtained as a result of the search.

Conclusion

Based on the foregoing reasons, we reverse the judgment below and remand for further proceedings.

REVERSED AND REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
TASEEN TYREE JOHNSON

No. COA15-29

Filed 5 April 2016

1. Search and Seizure—safety frisk—findings of fact

On appeal from the trial court's order denying defendant's motion to suppress evidence obtained pursuant to an officer safety frisk conducted during an investigatory detention, the Court of Appeals rejected defendant's argument that portions of the trial court's findings of fact were erroneous and unsupported by the evidence. The trial court was permitted to make a logical inference from the officer's testimony. Defendant's challenge to in-court findings was without merit because he did not challenge the related findings in the written order.

2. Search and Seizure—extension of traffic stop—totality of circumstances

On appeal from the trial court's order denying defendant's motion to suppress evidence obtained pursuant to an officer safety frisk conducted during an investigatory detention, the Court of

Appeals concluded that the extension of the traffic stop was reasonable under the totality of the circumstances. The driver could not answer basic questions and changed his story, the driver could not explain why he did not have his registration, the officer found a car engine component in the passenger compartment, and defendant (the passenger) appeared to be extremely nervous.

3. Search and Seizure—safety frisk—rectangular bulge in shorts

On appeal from the trial court's order denying defendant's motion to suppress evidence obtained pursuant to an officer safety frisk conducted during an investigatory detention, the Court of Appeals concluded that the *Terry* frisk performed on defendant did not violate the Fourth Amendment. Defendant's nervousness, evasiveness, and failure to identify the rectangular bulge in his shorts, along with the size and nature of the object, gave the officer a specific articulable basis for suspecting that defendant might be armed.

Appeal by defendant from an order entered 20 May 2014, by Judge Claire V. Hill in Brunswick County Superior Court. Heard in the Court of Appeals 6 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.

Blass Law PLLC, by Danielle Blass (as substitute appellate counsel, for Glenn Gerding[1]*), for defendant.*

CALABRIA, Judge.

Taseen Tyree Johnson ("defendant") appeals from an order denying his motion to suppress evidence that was recovered pursuant to an officer safety frisk conducted during an investigatory detention. We affirm.

I. *Background*

In August 2013, defendant was charged with two counts of trafficking opium or heroin, one count of possession with intent to sell and deliver heroin, and one count of possession of drug paraphernalia. At

1. Effective 1 November 2015, Glenn Gerding, defendant's private appellate counsel at the time his appeal was filed and heard, succeeded Staples S. Hughes as Appellate Defender. *See State v. McPhail*, No. COA15-965, 2016 WL 791301, at *1 (N.C. Ct. App. Mar. 1, 2016). On 20 October 2015, this Court granted a motion designating Danielle Blass as defendant's substitute appellate counsel.

the hearing on defendant's motion to suppress the drugs, the State presented testimony that detailed the following events.

During the afternoon of 28 May 2013, Officer Matthew Ward ("Officer Ward") of the North Carolina Division of Motor Vehicles Licensing and Theft Bureau was conducting a traffic enforcement patrol in Brunswick County. After Officer Ward spotted a tan Chevrolet Silverado with an expired license plate, he stopped the truck, approached the driver's side, and engaged the driver, Todd Waters ("Waters"), in conversation. As they talked, Officer Ward noticed several cell phones lying on the truck's center console and loose items scattered throughout the truck. In particular, Officer Ward noticed a box-shaped "PCM" device on the hump of the floorboard between the driver and passenger seats. A PCM is a computer system that controls a vehicle and is typically located in the engine compartment. Although it is not illegal to possess a PCM device or to keep it in the passenger compartment of a vehicle, Officer Ward found its placement there unusual.

As Officer Ward scanned the vehicle, both Waters and defendant, the passenger, appeared nervous and could not provide consistent answers to Officer Ward's basic questions regarding their travel destination and origin. Defendant's chest rose and fell rapidly as he breathed, and he mumbled vague responses to Officer Ward's questions. Even when Officer Ward asked defendant to speak up, defendant continued to mumble incoherently.

After speaking with Waters and defendant and observing the truck's interior, Officer Ward asked Waters for his license and registration. Waters could not produce his registration, but he did provide his license. Shortly thereafter, Brunswick County Deputy Sheriff Peter Arnold ("Deputy Arnold"), who was patrolling in the area, stopped to assist Officer Ward. Deputy Arnold approached the truck's passenger side while Officer Ward spoke with Waters. Deputy Arnold noticed defendant was "showing signs of extreme nervousness"—his neck veins were pulsing and he was breathing heavily. In addition, Officer Ward told Deputy Arnold that both Waters and defendant displayed erratic behavior, and that they were unable to state where they were going.

Officer Ward returned to his patrol car and checked the status of Waters' vehicle and license. He learned the truck was properly registered to Waters, but the license and inspection had expired. After citing Waters for an expired license plate and inspection, Officer Ward notified Waters of his court date. Although Officer Ward had completed the

original purpose of the stop, he asked Waters to step out of the truck and answer additional questions. Waters agreed. Officer Ward then walked Waters back to the patrol car, received consent to search him, and patted him down.

Meanwhile, Deputy Arnold returned to the passenger side of the truck and continued to speak with defendant through the open window. Deputy Arnold again noticed that defendant looked nervous. Throughout their conversation, defendant provided noncommittal answers to Deputy Arnold's questions regarding the parties' travel destination.

As he questioned defendant, Deputy Arnold noticed a rectangular bulge, measuring approximately five by seven inches, in defendant's crotch area underneath his loose-fitting basketball shorts. Deputy Arnold asked defendant to identify the bulge, and defendant responded that it was his testicles. Not reassured, Deputy Arnold had defendant step out of the vehicle, keeping his hands away from his crotch and waistline. Since he believed the bulge might be a handgun, Deputy Arnold began performing an officer-safety frisk on defendant. When Deputy Arnold reached for the bulge, he touched it, and a Ziploc bag containing a rectangular package of heroin fell from defendant's shorts. At the patrol car, Officer Ward heard Deputy Arnold shout "72," meaning "in custody." Ninety seconds had elapsed since Officer Ward asked Waters to step out of his vehicle, and the entire stop lasted approximately fifteen minutes. Waters and defendant were eventually arrested and transported to the Brunswick County jail.

After defendant was charged and indicted with, *inter alia*, trafficking heroin he moved to suppress the heroin evidence on the grounds that Deputy Arnold lacked reasonable suspicion to extend the detention and frisk him. At the suppression hearing, the trial court heard testimony from Officer Ward and Deputy Arnold, as well as narcotics agent Jared Zeller of the Brunswick County Sheriff's Office. Defendant did not offer any testimony or evidence to the court. At the conclusion of the hearing, the trial court denied defendant's motion, finding that the detention of Waters and defendant was not unreasonably prolonged and the totality of the circumstances supported a reasonable suspicion that Waters and defendant were criminally engaged. The court also found that Deputy Arnold's frisk of defendant was reasonable and justified in light of his safety concerns. Consequently, defendant entered a guilty plea and reserved his right to appeal.

II. *Analysis*

A. Factual Findings

[1] Defendant first argues that portions of the trial court's findings of fact are erroneous and unsupported by the evidence. This Court's review of a suppression order "is strictly limited to determining whether the trial court's underlying findings of fact are supported by competent evidence, and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Robinson*, 221 N.C. App. 509, 517, 729 S.E.2d 88, 96 (2012) (citation omitted).

Our Supreme Court has recognized a trial court's duty to "hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982). As a result, "[w]e accord great deference to the trial court's findings of fact," and any findings left unchallenged by defendant "on appeal are binding and deemed to be supported by competent evidence." *State v. Knudsen*, 229 N.C. App. 271, 275, 747 S.E.2d 641, 645 (2013) (citation omitted).

The trial court made the following findings of fact relevant to this appeal:

> 3. Officer Ward initiated a traffic stop and the vehicle stopped without incident. Officer Ward identified himself and asked the driver for his license and registration. The driver, . . . Waters, was unable to produce his registration but he did have his operator's license that listed his address in Raleigh, NC. Walters [sic] could not give a clear answer as to whether or not he resided in Brunswick County or Raleigh. Throughout the conversation Waters continued to change his story about where he currently resided;
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> 4. While speaking with Water's [sic], Officer Ward noted that Waters was speaking into one cell phone and had two additional cell phones on the center console of the vehicle[;][2]

2. Officer Ward testified that he "noticed a couple different cell phones on the console[,]" and that Waters was talking on a hands-free device when Officer Ward made his initial approach of the truck. The record does not reveal exactly how many cell phones were in the truck, but Officer Ward's testimony suggests that the truck contained more phones than occupants. Taken in context, it is reasonably clear that Officer Ward surmised that,

5. One of Officer Ward's duties is to investigate motor vehicle theft. Officer Ward noted that there was a vehicle power control module [(the PCM)] located on the floor of the vehicle, and that this would be unusual to possess;

6. Turning his attention to the passenger of the vehicle, Officer Ward attempted to question [defendant] but [he] would mumble his answers and could not be clearly understood. Officer Ward also noted that [defendant's] chest was rising and falling rapidly and he appeared to be very nervous, more so than one would be during a usual traffic stop;

7. Officer Ward determined that . . . Waters' operator's license was in fact inactive;

8. At this time Officer Ward advised Deputy Peter Arnold . . ., who was assisting him in the traffic stop, that both parties were acting extremely nervous;

9. Officer Ward issued . . . Waters a citation for the traffic violations and advised him he was free to go. Having terminated the traffic stop, Officer Ward asked . . . Waters if he would mind exiting the vehicle and answer a few questions;

10. Officer Ward asked . . . Waters if he could pat him down for his safety and . . . Waters indicated that "yes" he could. Before completing his pat down, Officer Ward heard Deputy Arnold state "72["] him, which signified to Officer Ward to take Mr. Waters into custody. Officer Ward stated he was told by Deputy Arnold that [defendant] had heroin in his crotch area;

11. Deputy Arnold testified that Officer Ward relayed his observations to him and while watching [defendant] he observed . . . two distinct corners of a rectangular shaped bulge underneath [defendant's] shorts in the crotch area. When he [i]nquired of [defendant] as to what it was, [defendant] responded "my balls";

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on some level, the existence of multiple phones might indicate that Waters and defendant were using some phones to conduct legitimate activity and others to conduct illegitimate or illegal activity. The trial court apparently made a similar inference, which we believe was permissible and supported by competent evidence.

> 12. Deputy Arnold then asked [defendant] to step out of the vehicle so that he could conduct a pat down for his safety. Before Deputy Arnold could complete his pat down, a zip lock back containing a large quantity of heroin fell from [defendant's] shorts. Deputy Arnold then yelled to Officer Ward to place [Waters] in custody[.]

Based on these findings, the court made two conclusions of law, one of which is relevant to the present discussion:

> 1. The pat down by Deputy Arnold of this defendant was conducted with reasonable suspicion and it was conducted without the benefit of a search warrant, it was a reasonable act, constitutional in nature taken [by] Deputy Arnold who had been advised of the conflicting and/or lack of information provided by both Waters and [defendant], both Officer Ward and Deputy Arnold's observation of the extreme nervousness of both parties, Officer Ward's [o]bservation of a device that in his experience is used in criminal activity, and Deputy Arnold's observation of an object under [defendant's] clothing that could have been a weapon and posed a danger to himself or Officer Ward.

Defendant's main contention is that an erroneous factual finding is mixed in with the trial court's first conclusion of law. He argues that the reference to "Officer Ward's [o]bservation of a device that in his experience is used in criminal activity" is actually a finding of fact. In context, the "device" to which the trial court refers is the PCM that was noted in Finding No. 5. We agree that this characterization of the PCM is a finding of fact mingled with a conclusion of law. However, we do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) ("Although labeled findings of fact, these quoted findings mingle findings of fact and conclusions of law. . . . While we give appropriate deference to the portions of Findings No. 37 and 39 that are findings of fact, we review *de novo* the portions of those findings that are conclusions of law."). Reading Finding No. 5 and the challenged portion of Conclusion No. 1 together and in context, it is apparent that given Officer Ward's responsibility to investigate motor vehicle theft, the trial court made a logical inference from his testimony that he believed the PCM's presence in the truck's cabin might be associated with criminal activity. Written Finding No. 5 takes note of this inference. Therefore, Finding No. 5 and the portion of Conclusion No. 1 that is a finding of fact, are supported by the evidence.

Defendant also argues that "[s]everal of the trial court's in-court findings of fact were not supported by competent evidence and should not be considered by this Court." However, while defendant challenges some of the trial court's oral statements during rendition of the order as being unsupported by the evidence, he does not challenge the related findings of fact in the written order. For example, the trial court stated that Waters and defendant would not say where they lived, were behaving erratically, and were very nervous after the traffic citation was issued. By contrast, written Findings Nos. 3 and 6 plainly convey that the erratic behavior occurred before the issuance of the citation. Officer Ward's testimony supports the trial court's written findings on this issue. Notably, since there was no material conflict in the evidence presented at defendant's suppression hearing, the trial court was not required to make specific findings at all. *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) ("A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. . . . [O]nly a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing."). Even if there is some conflict between oral findings and ones that are reduced to writing, the written order controls for purposes of appeal. *See Durham Hosiery Mill Ltd. P'ship v. Morris*, 217 N.C. App. 590, 593, 720 S.E.2d 426, 428 (2011) ("The general rule is that the trial court's written order controls over the trial judge's comments during the hearing.").

Here, the trial court both rendered its ruling from the bench and later entered a written order. There is no need for us to address the exact wording of the trial court's rendition where a written order was later entered. In addition, there was no material conflict in the evidence presented at the suppression hearing. Because defendant does not challenge the written findings of fact as unsupported by the evidence, his argument is without merit.

B. Reasonable Suspicion, Investigatory Detention (*Terry* Stop), and Officer Safety Pat Down (*Terry* Frisk)

Defendant next challenges Deputy Arnold's search of his person, contending it lacked the requisite constitutional justification. We disagree.

Based on the findings of fact, the trial court entered the following conclusions of law:

> 1. The pat down by Deputy Arnold of this defendant was conducted with reasonable suspicion and it was conducted without the benefit of a search warrant, it was a reasonable act, constitutional in nature taken [by] Deputy Arnold who had been advised of the conflicting and/or lack of information provided by Waters and Johnson, both Officer Ward and Deputy Arnold's observation of the extreme nervousness of both parties, Officer Ward's [o]bservation of a device that in his experience is used in criminal activity, and Deputy Arnold's observation of an object under [defendant's] clothing that could have been a weapon and posed a danger to himself or Officer Ward.
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> 2. The pat down was reasonable and was conducted by Deputy Arnold involving a passenger or passengers of said vehicle for the Officer's own protection and the Court determines that the search violates no constitutional or statutory rights of this defendant, State or federal, and that the defendant's Motion to Suppress and the same is hereby, denied.

"A trial court's conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court . . . . The conclusions of law 'must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *Knudsen*, 229 N.C. App. at 281, 747 S.E.2d at 649 (citations omitted).

The Fourth Amendment to the United States Constitution guarantees, *inter alia*, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. State officials' actions must comport with the Fourth Amendment, as its requirements are "enforceable against the States through the Due Process Clause" of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28, 93 L. Ed. 1782, 1785 (1949). When police officers stop an automobile—even for a brief and limited purpose—its occupants are seized within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979).

This case involved a rather fluid situation: Officer Ward stopped Waters for driving with an expired registration and inspection. With Deputy Arnold's assistance, Officer Ward extended the stop beyond its original justification by asking Waters to step out of his truck and answer additional questions. The extension prompted Deputy Arnold's further questioning of defendant, which culminated in the *Terry* frisk defendant now challenges.

In *Terry v. Ohio*, the United States Supreme Court held the Fourth Amendment requires that a brief investigatory stop of an individual be supported by reasonable suspicion. 392 U.S. 1, 20 L. Ed. 2d 889 (1968). Pursuant to *Terry*, Deputy Arnold's frisk of defendant may only be justified by two independent criteria. First, in order to conduct an investigatory detention—a "*Terry* stop"—in the first place, the police must have reasonable suspicion "that criminal activity may be afoot." *Id.* at 30, 20 L. Ed. 2d at 911. Second, the police must also have reasonable suspicion "that the persons with whom [they are] dealing may be armed and presently dangerous" in order to justify "a carefully limited search[—a "*Terry* frisk"—]of the outer clothing of such persons in an attempt to discover weapons which might be used to assault [them]." *Id.* at 30-31, 20 L. Ed. 2d at 911. The law has become well established that *Terry* principles apply to routine traffic stops.

On appeal, defendant concedes the lawfulness of both the initial traffic stop and Deputy Arnold's questions after the stop was completed. According to defendant, Deputy Arnold's further questioning of defendant and Officer Ward's further questioning of Waters constituted consensual police-citizen encounters. Defendant argues instead that when Deputy Arnold "command[ed]" him to exit the vehicle with his hands and arms raised, the consensual encounter suddenly became an investigatory detention that was unsupported by reasonable suspicion of criminal activity. As the argument goes, since Deputy Arnold lacked reasonable suspicion to support an investigatory detention in the first instance, he also lacked the authority to conduct a protective frisk. Defendant also contends that once Deputy Arnold gave that command, defendant was "seized . . . for purposes of the Fourth Amendment, and any consent given for a search [or frisk] afterwards was not voluntary . . . ."

The consequence of defendant's argument is that he skips over the traffic stop's extension and asks us to focus solely on the *Terry* frisk that Deputy Arnold performed on him. We reject defendant's characterization of the extension as a consensual encounter for two reasons. To begin, in contrast to his argument on appeal, defendant vigorously argued before

the trial court that *none* of his interactions with Deputy Arnold during the extension were consensual. Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *see also State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) ("no swapping horses" rule applied where the defendant relied on one theory at trial level as the basis for his written motion to suppress and then asserted another theory on appeal). In addition, and more importantly, the extension was an investigatory *Terry* stop supported by reasonable suspicion of criminal activity.[3]

Generally, when a lawful traffic stop has been made, "the scope of the detention must be carefully tailored to its underlying justification." *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009). Once the original purpose of the stop has been addressed and the police officer has issued the requisite warning or citation, a driver and his passengers must be allowed to continue on their way. *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (2008); *United States v. Rusher*, 966 F.2d 868, 876 (4th Cir. 1992). To prolong a traffic stop and justify further investigation, the detaining officer must either obtain the driver's consent or possess reasonable and articulable suspicion of other criminal activity. *Jackson*, 199 N.C. App. at 241-42, 681 S.E.2d at 496. Likewise, in order to lawfully detain a driver or passenger for further investigation, an officer's reasonable suspicion must be based on information obtained during the lawful detention of the vehicle's occupants up to the point that the stop's initial purpose has been fulfilled. *Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758. Although it is not possible to precisely articulate

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3. We note that the trial court's order appears to be based, in part, on the rationale that the stop's extension (i.e. the investigatory detention or *Terry* stop) was based on reasonable suspicion. Officer Ward stated that he asked Waters additional questions in order to "further his investigative stop." The trial court made an oral finding on the prolonged stop, but did not articulate a clear position on the extension in its written order. However, the trial court then made a rather muddled in-court conclusion, stating there "was reasonable articulable suspicion to ask for consent and prolong the stop in this case." As indicated below, an extension may be justified by either reasonable suspicion or consent; but such suspicion is not necessary to obtain consent. In any event, we cannot review the legality of Deputy Arnold's *Terry* frisk without first determining whether defendant was lawfully detained during the stop's extension. Furthermore, since there was no material conflict in the evidence, explicit findings regarding the existence of reasonable suspicion to prolong the stop were not necessary. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674; *State v. Johnston*, 115 N.C. App. 711, 714, 446 S.E.2d 135, 137 (1994) ("Where there is no material conflict in the evidence, findings and conclusions are not necessary . . . . ").

what constitutes "reasonable suspicion," our evaluation of the extended traffic stop in this case is animated by the following principles.

First, *Terry's* reasonable suspicion standard is "less demanding . . . than probable cause." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000). Only a minimal level of objective justification is required for a *Terry* stop: a police officer must simply point to "specific and articulable facts which, taken together with rational inferences from those facts," *Terry*, 392 U.S. at 21, 20 L. Ed. 2d. at 906, reveal "more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity." *Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576 (quoting *Terry*, 392 U.S. at 27, 20 L. Ed. 2d. at 909 (internal quotation marks omitted)). Thus, the evidentiary showing required to demonstrate reasonable suspicion is "considerably less than [a] preponderance of the evidence." *Id.* at 123, 145 L. Ed. 2d at 576.

Second, a police officer's decision to conduct an investigatory stop must be evaluated objectively. By its plain language, the Fourth Amendment proscribes only unreasonable searches, and to that end, the *Terry* Court emphasized that the term "reasonable" necessitates an objective search-and-seizure analysis. 392 U.S. at 21-22, 20 L. Ed. 2d at 906. "Whether a Fourth Amendment violation has occurred, [therefore,] 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' . . . and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71, 86 L. Ed. 2d 370, 378 (1985) (citations omitted). Accordingly, "if sufficient objective evidence exists to demonstrate reasonable suspicion, a *Terry* stop is justified regardless of a police officer's subjective intent." *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008).

Third, a reviewing court must make its reasonable-suspicion determination based on a commonsense approach. Since the "concept of reasonable suspicion is somewhat abstract[,]" and our nation's highest court has "deliberately avoided reducing it to a neat set of legal rules," *United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 751, 151 L. Ed. 2d 740, 750 (2002) (citations and internal quotations marks omitted), "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685, 84 L. Ed. 2d 605, 615 (1985). Indeed, reasonable suspicion is a "nontechnical conception[ ] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Ornelas v. United States*, 517 U.S. 690, 695, 134 L. Ed. 2d 911, 918 (1996) (citations omitted). In other words, "context matters: actions that may

appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *Branch*, 537 F.3d at 336-37. As such, courts should "credit[] the practical experience of officers who observe on a daily basis what transpires on the street[,]" *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993)), so as not to "indulge in unrealistic second-guessing" of the judgment calls law enforcement officials must invariably make. *Sharpe*, 470 U.S. at 686, 84 L. Ed. 2d 616; *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981) ("The process [by which reasonable suspicion is determined] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.").

Fourth, because reasonable suspicion analysis is necessarily holistic, it requires examination of "the entire mosaic . . ., not single tiles." *Branch*, 537 F.3d at 337 (citation omitted). Accordingly, to determine whether an officer had reasonable suspicion to conduct an investigatory stop, courts must consider "the totality of the circumstances—the whole picture." *Cortez*, 449 U.S. at 417, 66 L. Ed. 2d at 629. This means the legality of a *Terry* stop turns on "the cumulative information available" to the officer who conducted it. *Arvizu*, 534 U.S. at 273, 151 L. Ed. 2d at 750. Courts should therefore refuse to "find a stop unjustified based merely on a 'piecemeal refutation of each individual' fact and inference" that an officer produces to support his actions. *Branch*, 537 F.3d at 337 (citation omitted).

With these principles in mind, we turn to a reasonable suspicion analysis, considering two separate inquiries: the reasonableness of the stop's extension—the *Terry* stop—and the reasonableness of the *Terry* frisk.

1. *Terry* Stop

[2] As to the first inquiry, Officer Ward extended the traffic stop by asking Waters to step out of the truck and answer additional questions, and Deputy Arnold assisted by questioning defendant through the open passenger window. "In determining whether the further detention was reasonable," we must look at "the totality of the circumstances" to see if there was a particularized and objective basis for suspecting legal wrongdoing. *State v. Hernandez*, 170 N.C. App. 299, 308, 612 S.E.2d 420, 426 (2005).

This Court has recognized that "[f]acts giving rise to a reasonable suspicion include nervousness, sweating, failing to make eye contact, [and] conflicting statements[.]" *Id.* (citing *State v. McClendon*, 350 N.C. 630, 638-639, 517 S.E.2d 128, 133 (1999)). Our Supreme Court has clarified that "[n]ervousness, like all other facts, must be taken in light of the totality of the circumstances. It is true that many people do become nervous when stopped by an officer of the law. Nevertheless, nervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists." *McClendon*, 350 N.C. at 638-639, 517 S.E.2d at 134. The *McClendon* Court concluded that the defendant-driver's extreme nervousness combined with his inconsistent statements concerning who owned the car were sufficient to establish reasonable suspicion. *Id.* at 637, 517 S.E.2d at 133; *see also Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576 ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.").

In *State v. Euceda-Valle*, an officer stopped a speeding vehicle and approached the passenger side. 182 N.C. App. 268, 270, 641 S.E.2d 858, 860-61 (2007). In response to the officer's question regarding the vehicle's ownership, the defendant vaguely stated that it belonged to a "friend." *Id.* at 270, 641 S.E.2d at 861. The officer noted both the defendant and the driver avoided eye contact and appeared nervous. *Id.* In particular, the officer observed the defendant's carotid artery "beating profusely" in his neck. *Id.* Additionally, the officer noticed several empty Red Bull cans littering the interior of the vehicle and air freshener fumes emanating from inside. *Id.* After calling for support, the officer detained the defendant so as to permit a dog sniff of the vehicle's exterior. *Id.* The dog alerted at the driver's side and, upon further investigation, the officers discovered packages of controlled substances. *Id.* at 271, 641 S.E.2d at 861. In holding reasonable suspicion justified the detention and canine sniff, this Court considered the nervousness of the driver and passenger, the defendant's pronounced nervousness, both parties' refusal to make eye contact, the aroma of air freshener, and the vehicle's registration to someone other than its occupants. *Id.* at 274-75, 641 S.E.2d at 863-64. Similar, though not identical, factors exist in this case as those found in *McClendon* and *Euceda-Valle*.[4]

4. The United States Supreme Court has recently held that police officers may not prolong an otherwise-completed traffic stop in order to conduct a dog sniff for drugs if they lack reasonable suspicion that criminal activity is afoot beyond a traffic violation. *Rodriguez v. United States*, __ U.S. __, 191 L. Ed. 2d 492 (2015). "[P]rior to *Rodriguez*, many jurisdictions—including North Carolina—applied a *de minimis* rule, which allowed police officers to prolong a traffic stop 'for a very short period of time' to investigate for other criminal activity unrelated to the traffic stop—for example, to execute a dog sniff—though the officer[s] ha[d] no reasonable suspicion of other criminal activity." *State v. Warren*,

Indeed, several observations permitted Officer Ward to form reasonable suspicion that criminal activity was afoot: (1) Waters could not answer basic questions, such as where he was coming from and where he lived; (2) Waters "changed his story from one to the next"; (3) while it was eventually determined that Waters owned the truck, he could offer no explanation as to why he did not have his registration; (4) Officer Ward found the presence of the PCM in the truck's passenger compartment to be unusual based on his training and experience; and (5) when defendant—whose chest was rising and falling at a rapid rate, and who appeared "very nervous"—addressed the same basic questions that Officer Ward had asked Waters, defendant mumbled and gave vague answers.[5] Given the circumstances, Officer Ward was rightfully concerned about Waters and defendant's erratic behavior. We cannot say that Officer Ward was required to regard this behavior as innocuous.

Furthermore, Deputy Arnold's observations during the initial stop are also relevant here. When he first approached the truck, Deputy Arnold observed defendant's "extreme nervousness," his rapid breathing and elevated heart rate, and the pulsating vein in his neck. Upon his second approach, Deputy Arnold was surprised by defendant's continued, "extreme nervousness," especially since Waters "was [receiving] his citation and would be free to go." Significantly, Deputy Arnold further testified: "You could actually see [defendant's] entire stomach moving. I was – I mean, it was almost as if his whole body was jiggling. He was just so nervous, he was like in a shake."

Although some, or even all, of these factors can be construed as innocent conduct, "[i]t must be rare indeed that an officer observes behavior consistent [o]nly with guilt and incapable of innocent interpretation." *United States v. Price*, 599 F.2d 494, 502 (2d Cir. 1979) (citations

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__ N.C. App. __, __, 775 S.E.2d 362, 365 (2015) (citations omitted), *aff'd*, No. 312A15, 2016 WL 1090567 (N.C. Mar. 18, 2016). To the extent that the holdings in those cases apply the *de minimis* rule, they have been overruled by *Rodriguez*. Although *McClendon* and *Euceda-Valle* (which cited and relied on *McClendon*) involved prolonged traffic stops that culminated in dog sniffs, neither court applied the *de minimus* rule to reach their holding. Rather, the *McClendon* and *Euceda-Valle* Courts applied a classic reasonable suspicion analysis to the extended stops in each case. *See McClendon*, 350 N.C. at 636-37, 517 S.E.2d at 132-33; *Euceda-Valle*, 182 N.C. App. at 274-75, 641 S.E.2d at 863.

5. Although we do not explicitly rely on Finding No. 4 in the trial court's written order as a factor in our reasonable suspicion analysis, the presence of multiple cell phones appears to have played a role in Officer Ward's decision to conduct an investigatory detention. In the context of this case, Officer Ward's observations regarding the cell phones provided additional, legitimate support for that decision.

omitted). And while each factor may individually be insufficient to show reasonable suspicion, in concert they reveal an encounter filled with uncertainties and inconsistencies. *Terry* recognized that police officers are often required to make immediate, context-dependent judgments based on their training. Such was the case here. Given the conduct that Officer Waters and Deputy Arnold had observed—extreme nervousness, conflicting stories, evasive behavior, and the unusual placement of the PCM—we refuse to "unrealistic[ally] second-guess[]" their decisions to further investigate Waters and defendant. *Sharpe*, 470 U.S. at 686-87, 84 L. Ed. 2d at 616. Based on the totality of circumstances, reasonable suspicion existed to support a reasonable and cautious police officer's determination that criminal activity may have been afoot. Accordingly, defendant's detention beyond the traffic stop's initial purpose was constitutional.

2. *Terry* Frisk

[3] Having concluded that defendant was lawfully detained, we now turn to the lawfulness of the *Terry* frisk Deputy Arnold performed on defendant. During a lawful stop, "an officer may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, when the officer is justified in believing that the individual is armed and presently dangerous." *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993) (citing *Terry*, 392 U.S. at 24, 20 L. Ed. 2d at 908). As the *Terry* Court recognized: "[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." 392 U.S. at 27, 20 L. Ed. at 909.

A *Terry* frisk is justified by the " 'legitimate and weighty' interest in officer safety[.]" *Arizona v. Johnson*, 555 U.S. 323, 331, 172 L. Ed. 2d 694, 702 (2009) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 54 L. Ed. 2d 331, 336 (1977)). As such, the frisk "is limited to the person's outer clothing and to the search for weapons that may be used against the officer." *State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 376 (2005). But an officer "need not be absolutely certain that the individual is armed[.]" *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909. Rather, the police are "entitled to formulate 'common-sense conclusions' about 'the modes or patterns of operation of certain kinds of lawbreakers' " in reasoning that an individual may be armed. *State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992) (quoting *Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at

629). The crucial inquiry is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909 (citations omitted). Furthermore, "[e]vidence of contraband, plainly felt during a pat-down or frisk, may . . . be admissible," *State v. Robinson*, 189 N.C. App. 454, 458-59, 658 S.E.2d 501, 504 (2008), if its "contour or mass makes its identity immediately apparent[.]" *Sanders*, 112 N.C. App. at 482, 435 S.E.2d at 845 (citation omitted).

In the instant case, when Deputy Arnold saw the bulge in defendant's shorts, he was justified in questioning defendant about it. The fact that defendant was a passenger and not the driver of the truck makes no difference. *See Maryland v. Wilson*, 519 U.S. 408, 414, 137 L. Ed. 2d 41, 48 (1997) (recognizing that "the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver"). After defendant was asked about the rectangular bulge—which was located in his crotch area and measured approximately seven by five inches—he flippantly replied that it was his "balls." Deputy Arnold had no reason to believe that statement was truthful and, based on his training and experience, he believed the bulge could be a firearm. Defendant's nervousness, evasiveness, and failure to identify what was in his shorts, coupled with the size and nature of the object, gave Deputy Arnold a specific articulable basis for suspecting that defendant might be armed. *See Mimms*, 434 U.S. at 111-12, 54 L. Ed. 2d at 337-38 (finding reasonable suspicion that individual may be armed based solely on officer's observance of bulge in the defendant's jacket). Deputy Arnold then conducted a minimally intrusive frisk pursuant to *Terry*, justified at the time by a reasonable suspicion that he and Officer Ward were in a situation that could escalate and place both officers in danger. *See Sanders*, 112 N.C. App. at 482, 435 S.E.2d at 845 (*Terry* frisk of the driver, who was stopped at a roadblock by two state troopers, was justified when the driver provided no license or registration, admitted he was not the car's owner, and had a bulge in his front pocket the size of two fists).

In sum, the totality of circumstances supported a reasonable suspicion that defendant was armed and dangerous. And since the bulge—which was discovered to be heroin—immediately fell from defendant's shorts when Deputy Arnold attempted to grab it, the frisk was conducted within the bounds marked by *Terry*. Accordingly, we conclude that the trial court's findings support its conclusion that Deputy Arnold's *Terry* frisk of defendant's outer clothing did not violate the Fourth Amendment.

III. *Conclusion*

Officer Ward and Deputy Arnold's decision to prolong the traffic stop and detain Waters and defendant for investigative purposes was supported by reasonable suspicion of criminal activity. In addition, Deputy Arnold's *Terry* frisk of defendant, an allowable officer safety measure, was supported by reasonable suspicion that defendant might be armed. Consequently, we affirm the trial court's denial of defendant's motion to suppress.

AFFIRMED.

Judges STROUD and TYSON concur.

STATE OF NORTH CAROLINA
v.
MOSES N. KPAEYEH

No. COA15-391

Filed 5 April 2016

1. Constitutional Law—right to speedy trial—three year delay—failure to show prejudice

The trial court did not err by denying defendant's motion to dismiss the charges of statutory rape and indecent liberties with a child based on an alleged speedy trial violation caused by the more than three-year delay between defendant's indictment and trial. The delay was not caused by the neglect or willfulness of the prosecution, nor was the delay the result of willful misconduct by the prosecution. The evidence showed that the changes in defendant's representation caused much of the delay. Further, defendant failed to prove prejudice beyond that normally associated with incarceration.

2. Indecent Liberties—motion to dismiss—sufficiency of evidence—purpose of arousing or gratifying sexual desire

The trial court did not err by failing to dismiss the charge of taking indecent liberties with a child at the close of all evidence. The trial court properly allowed the jury to make the determination of whether the evidence of defendant's repeated sexual assaults of a minor child were for the purpose of arousing or gratifying sexual desire.

3. Satellite-Based Monitoring—statutory rape occurring prior to December 2006—not a reportable conviction

The trial court erred by finding that a violation of N.C.G.S. § 14-27.7A was a reportable conviction under N.C.G.S. § 14-208.6(4) where the offense occurred prior to December 1, 2006. Because defendant's conviction for statutory rape, based upon acts committed in 2005, could not be considered a "reportable conviction" for the purposes of N.C.G.S. § 14-208.40A(a), defendant was not eligible for satellite-based monitoring for this offense.

Appeal by Defendant from judgments entered 6 November 2014 by Judge R. Stuart Albright in Superior Court, Guilford County. Heard in the Court of Appeals 7 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

W. Michael Spivey for Defendant.

STROUD, Judge.

Moses N. Kpaeyeh ("Defendant") immigrated from Ivory Coast to Texas in early 2004 with his wife, their children, and a female child ("Mary"), the daughter of his wife's sister. Mary had fled from civil unrest in her home country of Liberia. According to the State's evidence, Defendant began sexually assaulting Mary that same year, when Mary was fourteen years old. The sexual assaults included vaginal intercourse. Defendant, his family, and Mary moved from Texas to Greensboro in 2005, when Mary was fifteen. The sexual assaults continued, and Mary became pregnant when she was fifteen years old.

According to Mary's testimony at trial, she first hid the fact that Defendant was the father of her child ("the child") because Defendant had threatened to hurt her and her family in Liberia if she ever reported the sexual assaults. The child was born in early 2006, and Mary's parental rights to the child were terminated in May 2008. Following the termination proceeding, Mary told a social worker that Defendant was the father of the child. DNA paternity testing, conducted in 2010, confirmed that Defendant was the father of the child, and the Greensboro Police Department was informed of the results of the DNA testing in December 2010. Defendant was arrested on 5 April 2011 and indicted on 16 May

2011 for one count each of statutory rape, N.C. Gen. Stat. § 14-27.7A(a),[1] and taking indecent liberties with a child, N.C. Gen. Stat. § 14-202.1(a)(1).

Defendant's trial commenced on 3 November 2014. Between his arrest and his trial, Defendant was represented by three different attorneys. The first, a court-appointed private attorney, represented Defendant until that attorney left private practice in April 2013. Defendant's second attorney was a public defender, and represented Defendant until August 2014, when Alvin Hudson II ("Hudson") was hired by Defendant and took over representation of Defendant. Beginning in July 2011, and continuing periodically until at least mid-September 2013, Defendant sent self-authored letters directly to the Guilford County Clerk of Superior Court requesting a "speedy trial," but Hudson was the first of Defendant's attorneys to move for a speedy trial. Hudson filed a motion on 30 October 2014 in which he argued that Defendant's right to a speedy trial had been violated and that the charges against Defendant should therefore be dismissed. Specifically, the motion stated that "as a result of the extensive delay in the arrest and prosecution of the . . . case, [D]efendant has been prejudiced by an inability to adequately assist his defense attorney in preparation for his trial. Nor has he been able to locate any possible witnesses for the defense."

Defendant's motion to dismiss was denied by order entered 6 November 2014, *nunc pro tunc* 3 November 2014. Defendant was brought to trial on 3 November 2014, and was found guilty on 5 November 2014 of one count each of statutory rape and taking indecent liberties with a child. Defendant was sentenced to an active term of 288 to 355 months for the statutory rape conviction, to follow an active sentence of 19 to 23 months for the conviction of taking indecent liberties with a child. The trial court also found, based solely upon the statutory rape conviction, that Defendant "must enroll in satellite-based monitoring for the rest of his natural life." Defendant appeals.

Defendant makes three arguments on appeal, which we will address in the following order: (1) the trial court erred in denying Defendant's motion to dismiss based upon the alleged violation of Defendant's right to a speedy trial, (2) the trial court erred in denying Defendant's motion to dismiss the charge of indecent liberties at the close of the evidence, and (3) the trial court erred in requiring Defendant to submit to lifetime satellite-based monitoring. Because Defendant failed to preserve

1. This section was recodified as N.C. Gen. Stat. § 14-27.25 by 2015 Sess. Laws 181, § 7(a), effective 1 December 2015.

the issue of satellite-based monitoring by filing a timely written notice of appeal, Defendant has petitioned this Court for writ of *certiorari*, requesting that we address this issue. We grant Defendant's petition, and address below his argument pertaining to satellite-based monitoring.

I. Speedy Trial

[1] Defendant argues the trial court erred in denying his motion to dismiss all charges against him because his right to a speedy trial had been violated, and he was prejudiced by the delay. We disagree.

Our Supreme Court has stated:

> [T]he United States Supreme Court identified four factors "which courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal Constitution. These factors are: (i) the length of delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant has suffered prejudice as a result of the delay. We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution.

State v. Grooms, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000) (citations omitted). As to the first factor, we hold that the more than three-year delay between Defendant's indictment and trial is sufficiently long to trigger analysis of the remaining factors. *Id.*

Concerning the second factor, the reason for the delay, a "defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution." *Id.* In its order denying Defendant's motion to dismiss, the trial court included the following findings relevant to the reasons for the delay: The State reasonably believed, based upon interactions with Defendant's first two attorneys and the DNA evidence proving that Defendant was the father of Mary's child, that negotiations would eventually end in a plea; Defendant's first two attorneys did not "indicate [they were] in a hurry to try this case to a jury or otherwise express concern . . . about the age of the case[;]" the State learned in December 2013 that Hudson was likely to take over Defendant's case and Hudson made a general appearance in the case on 1 August 2014; "[f]rom December of 2013 to 1 August 2014, Defendant's attorney representation was in question[;]" and finally, Hudson informed Defendant's second attorney in January 2014 that Hudson would be taking over Defendant's case and, therefore, Defendant's second attorney

"was unable to accept or reject any plea offer or otherwise set the case for trial." In addition, Defendant "formally rejected a plea offer from the State" on 25 August 2014, and was given a new court date of 3 November 2014. Defendant's trial did begin on 3 November 2014.

We hold that these findings were supported by competent evidence, and that they support the trial court's conclusion that the delay "was not caused by the neglect or willfulness of the prosecution, nor was the delay the result of willful misconduct by the prosecution." The evidence tends to show that the changes in defendant's representation caused much of the delay. Either miscommunication between Defendant and his first two attorneys, or neglect on the part of those attorneys, also seems to have contributed to the delay. Defendant was personally contacting the Guilford County Clerk of Superior Court and requesting that the matter be put on for trial. But Defendant was represented by counsel, and it was Defendant's counsel who should have been asserting Defendant's right to a speedy trial, if Defendant requested this. *Grooms*, 353 N.C. at 61, 540 S.E.2d at 721 (citations omitted) ("Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel.").

Concerning the third factor, Defendant was asserting his right to a speedy trial through his multiple letters to the Guilford County Clerk of Superior Court. As noted above, Defendant should have made his requests through his counsel, and not directly. Yet Defendant's failure of process does not equate to an absence of an intent to assert his constitutional right to a speedy trial.

Finally, concerning the fourth factor, Defendant must show that he "suffered significant prejudice as a result of the delay." *Id.* at 63, 540 S.E.2d at 722. Defendant argued in his motion to dismiss that he was prejudiced by "an inability to adequately assist his defense attorney in preparation for his trial" and an inability "to locate any possible witnesses for the defense." Defendant does not make this same argument on appeal, and we fail to see how additional time to prepare for trial limited Defendant's ability to assist in his defense. Further, there is no record evidence of any witness Defendant could have called for trial whose testimony was lost due to the delay. The argument that a delay in bringing Defendant's case to trial could have somehow hindered Defendant's ability to "locate" witnesses is not a strong one, as witnesses are generally, and preferably, located before trial. Indeed, Defendant had a longer time to "locate" witnesses because of the delay, and Defendant does not argue that any potential witnesses became unavailable due to the delay.

At the hearing on his motion to dismiss, Defendant argued that the delay hindered his ability to locate potential alibi witnesses. DNA testing confirmed that Defendant was the father of the child and Defendant has not challenged the reliability of the DNA evidence presented at trial. The word "alibi" is derived from Latin and literally means "elsewhere, somewhere else." An alibi witness normally provides evidence that a defendant was "somewhere else" when the alleged crime occurred. Considering the DNA evidence of paternity, Defendant does not explain how an alibi witness might be of assistance in this case.

During the hearing, Defendant's counsel also argued the following:

> [I]t has been an oppressive pretrial incarceration. His anxiety, for lack of a better word, is certainly through the roof. Any time I've spoken with [Defendant], he has always been anxious: When am I going to be able to go to court, when can I be heard on this matter. He's been unable to, you know, to be with his family, being held under a certainly high bond which he cannot afford to make.

On appeal, Defendant's only arguments related to prejudice are that Defendant had "expressed his concern about his health and the impact of jail conditions upon him after his first 100 days of incarceration[,]" and that he continued to express concerns about his health. Defendant was "also concerned about his inability to contact his lawyer or his relatives[,]" and he argued that "[t]hree and one-half years of sitting in a jail cell making repeatedly ignored requests to at least be brought into a courtroom [was] prejudicial." But Defendant did not make any arguments concerning his health in his motion to dismiss or at the hearing on that motion. Nor did Defendant argue that he was unable to communicate with his attorneys as a result of the time it took to bring this matter to trial. The only arguments Defendant made to the trial court, that he now makes on appeal, are that the delay in bringing the matter to trial interfered with his ability to be with his family and caused him anxiety. It is obvious that Defendant's pre-trial incarceration limited his freedom to interact with his family, and we do not doubt that it also caused Defendant more generalized anxiety. But these things happen to all defendants who are incarcerated prior to trial, and Defendant fails to prove prejudice beyond that normally associated with incarceration.

We hold that although the nearly three and one-half year delay between Defendant's indictment and his trial on these matters was long, and that Defendant's prolonged pre-trial incarceration necessarily caused him hardship, the delay was not caused by the prosecution's neglect or willful misconduct, so Defendant has failed to show that

this delay rises to the level of a violation of his constitutional rights, as required by *Grooms*. *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. This argument is without merit.

II. Motion to Dismiss Indecent Liberties Charge

[2] In Defendant's next argument, he contends the trial court erred in failing to dismiss the charge of taking indecent liberties with a child at the close of all the evidence because the State failed to introduce substantial evidence of that charge. We disagree.

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.

State v. Earnhardt, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citation omitted).

To survive a motion to dismiss, the State was required to present substantial evidence that Defendant "[w]illfully [took] or attempt[ed] to take any immoral, improper, or indecent liberties with [Mary, who was] under the age of 16 years[,] for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1(a)(1) (2013). Defendant specifically contends that the State failed to present sufficient "proof of a purpose to arouse or gratify sexual desire." Mary testified that Defendant repeatedly raped her while she was a child living in Defendant's house and under Defendant's protection. Defendant argues that evidence of "vaginal penetration" of a victim is, by itself, insufficient to prove a rape was "for the purpose of arousing or gratifying sexual desire[.]" *Id.* In support of this argument, Defendant cites the following footnote in *State v. Weaver*: "We also note, however, that recent scientific literature suggests that most rapists do not act 'for the purpose of arousing or gratifying sexual desire,' (as the indecent liberties statute requires) but to satisfy a powerful aggressive need." *State v. Weaver*, 306 N.C. 629, 636 n.2, 295 S.E.2d 375, 379 n.2 (1982), *disapproved of on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). This footnote was used in *Weaver* as additional explanatory information to the following sentence in the main body of that opinion: "We note that sexual purpose *may* be inherent in an act of rape." *Weaver*, 306 N.C. at 636, 295 S.E.2d at 379.

We first note that the motivation behind any particular rape may be difficult to determine with certainty and can be normally only be inferred

from circumstantial evidence. For example, the motivation behind the repeated statutory rape of a child living under the perpetrator's roof is likely different than the motivation for a violent assault and rape of an adult stranger. It is the province and duty of the trier of fact to make necessary determinations concerning motivation from the evidence before it. In any event, the above footnote in *Weaver* does not stand for the proposition that the State must always prove something more than vaginal penetration in order to satisfy the "purpose of arousing or gratifying sexual desire" element of taking indecent liberties with a child. This footnote, which is *dicta*, simply illustrates the fact that sexual desire cannot be *assumed* to be the motivation behind all sexual assaults.

In the case before us, the evidence presented a jury question. A jury would not be *required* to find that Defendant acted "for the purpose of arousing or gratifying sexual desire" based upon the evidence presented by the State. But the trial court was correct in allowing the jury to make the determination of whether the evidence of Defendant's repeated sexual assaults of Mary were "for the purpose of arousing or gratifying sexual desire[.]" The trial court did not err in denying Defendant's motion to dismiss the charge of taking indecent liberties with a child.

III. Satellite-Based Monitoring

[3] In Defendant's final argument, which we address in response to his petition for writ of *certiorari*, he contends that "the trial court erred by finding that a violation of N.C. Gen. Stat. § 14-27.7A was a reportable conviction under N.C. Gen. Stat. § 14-208.6(4) where the offense occurred prior to December 1, 2006[.]" We agree.

In order for Defendant to have been sentenced to any level of satellite-based monitoring, he had to have been "convicted of a reportable conviction as defined by G.S. 14-208.6(4)[.]" N.C. Gen. Stat. § 14-208.40A(a) (2013). For the purposes of the present case, N.C. Gen. Stat. § 14-208.6(4) defines "reportable conviction" as "[a] final conviction for an offense against a minor, [or] a sexually violent offense[.]" N.C. Gen. Stat. § 14-208.6(4)(a) (2013). Defendant was not convicted of "an offense against a minor" as that term is specifically defined by the applicable statutes.[2] The trial court indicated in its order imposing

2. " 'Offense against a minor' means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor's parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses." N.C. Gen. Stat. § 14-208.6(1m) (2013).

lifetime satellite-based monitoring for the statutory rape conviction that statutory rape was "a sexually violent offense under G.S. 14-208.6(5)[.]" Though statutory rape pursuant to N.C. Gen. Stat. § 14-27.7A would constitute a sexually violent offense for acts committed on or after 1 December 2006, violation of N.C. Gen. Stat. § 14-27.7A did not constitute a sexually violent offense for acts committed prior to 1 December 2006. N.C. Gen. Stat. § 14-208.6(5) (2005); 2006 Sess. Laws 247, § 1(b). It is undisputed that the acts for which Defendant was convicted occurred in 2005. Defendant's 2005 violation of N.C. Gen. Stat. § 14-27.7A cannot constitute a "sexually violent offense" for the purposes of N.C. Gen. Stat. § 14-208.6(5) and, therefore, cannot constitute a "reportable conviction" for the purposes of N.C. Gen. Stat. §§ 14-208.6(4) and 14-208.40A(a).

Because Defendant's conviction for statutory rape, based upon acts committed in 2005, cannot be considered a "reportable conviction" for the purposes of N.C. Gen. Stat. § 14-208.40A(a), Defendant was not eligible for satellite-based monitoring for this offense. We therefore vacate the 6 November 2014 Judicial Findings and Order for Sex Offenders (entered 10 November 2014) that was entered based upon Defendant's conviction for statutory rape pursuant to N.C. Gen. Stat. § 14-27.7A(a). *See State v. Oliver*, 210 N.C. App. 609, 621, 709 S.E.2d 503, 511 (2011).

NO ERROR IN PART, VACATED IN PART.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
VICTOR OLANDUS MOULTRY, DEFENDANT

No. COA15-267

Filed 5 April 2016

1. Evidence—photographs—illustrative purposes—relevancy

The trial court did not err in a hit and run, second-degree murder, and possession of cocaine case by admitting five photographs into evidence. The photographs were relevant as a visual aid to an officer's expert testimony regarding how an accident occurred. The trial court provided a limiting instruction that the photos were used for illustrative purposes and defendant did not show any unfair prejudice.

2. Evidence—officer testimony—hearsay—limiting instruction —corroboration

The trial court did not abuse its discretion in a hit and run, second-degree murder, and possession of cocaine case by allowing an officer to provide a composite description of the car that struck a truck after interviewing three witnesses. The testimony was not hearsay and the jury was provided a limiting instruction explaining that the officer's testimony was to be used only for the purpose of corroborating the testimony of those witnesses.

3. Evidence—lay opinion testimony—same information from another witness

Although defendant contended the trial court abused its discretion in a hit and run, second-degree murder, and possession of cocaine case by admitting lay opinion testimony of a lieutenant that damage to the rear quarter panel of defendant's car was not caused by the collision with the Ford truck, defendant's argument was overruled. Another officer testified to the same information without objection.

4. Evidence—cumulative prejudice—no prejudicial error or no error

Although defendant contended that the cumulative prejudice from the trial court's errors in admitting evidence required a new trial, this argument was dismissed since no prejudicial error or no error was found in the evidence presented.

Appeal by defendant from judgments entered on 4 April 2014 by Judge H. William Constangy in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 September 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Appellate Defender Staple Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

STROUD, Judge.

The trial court entered judgments against defendant for hit and run, second degree murder, and possession of cocaine. Defendant appeals. For the following reasons, we find no error.

I. Background

On 16 February 2012, Officer Tim Wilson of the Charlotte Mecklenburg Police Department was speaking with Ms. Marian Carpenter, the victim of a hit and run accident, and two witnesses to that accident when he heard over his radio that there had been another accident he believed might be related to the first "due to the time" and proximity. When Officer Wilson arrived at the scene of the second accident he saw a Ford and an Impala with damage consistent with Ms. Carpenter's and the witnesses' descriptions of the hit and run. Defendant, the driver of the Impala, and the driver of the Ford truck were taken to the hospital. Cocaine was found in defendant's car and, upon testing at the hospital, in his blood. The driver of the Ford died from his injuries sustained in the collision. Defendant was indicted for reckless driving, misdemeanor hit and run, murder, and possession of a Schedule II controlled substance. A jury found defendant guilty of second degree murder, misdemeanor hit and run, and possession of cocaine, and the trial court entered judgments.[1] Defendant appeals.

II. Photographs

[1] During defendant's trial the State introduced five photographs for illustrative purposes that showed the Impala behind the Ford lined up in the manner that Officer Nicolas Bruining of the Huntersville Police Department believed the accident had occurred. Defendant contends that

> the trial court erred by admitting irrelevant and unfairly prejudicial staged photographs of the Impala sedan and the Ford truck that were taken in a gravel parking lot years after the collision and under conditions that were not substantially similar to those existing at the time of the fatal automobile accident.

(Original in all caps.) Defendant argues that

> [b]ecause the vehicles were no longer at the scene of the accident and the pictures were made in a gravel parking lot over two years later, the attempt to replicate the moment of impact was an improper demonstration or experiment. [Defendant] . . . argued at trial that he did not act with malice. . . . The trial court's admission of the photographs was prejudicial error because the pictures were this evidence ([sic]) strengthened the state's proof of malice.

1. The trial court dismissed the charge of reckless driving at the close of the State's evidence.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C–1, Rule 401 (2013). "Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*. Defendant bears the burden of showing that the evidence was erroneously admitted and that he was prejudiced by the error." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C–1, Rule 403 (2013). "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995).

Officer Bruining testified as an expert witness of crash investigation and reconstruction and explained to the jury, without objection, that the Impala had struck the Ford from behind, and thus the photographs are relevant as they served as a visual aid to Officer Bruining's expert testimony regarding how the accident occurred. *See generally* N.C. Gen. Stat. § 8C-1, Rule 401. Furthermore, the trial court provided a limiting instruction to the jury explaining that the photographs were only allowed for the purpose of illustrating Officer Bruining's testimony, so defendant has not shown any unfair prejudice from the jury's viewing of the photographs. *See generally* N.C. Gen. Stat. § 8C-1, Rule 403. Therefore, this argument is overruled.

III. Officer's Testimony

[2] During defendant's trial, Ms. Carpenter testified that the vehicle that struck her vehicle was a silver four-door compact car; Mr. Frank Fusco, an eyewitness who saw Ms. Carpenter's vehicle get hit, described the offending vehicle as a sedan; and Ms. Lisa Henderson, an eyewitness who saw a vehicle driving the wrong way on the road at issue testified that the vehicle she saw was a light-colored sedan. Over objection, Officer Wilson testified that by taking the eyewitness accounts he came up with a description of the vehicle as a silver late 1990s car, "four-door and possibly a Chevy Malibu or Toyota Camry." Defendant contends that "the trial court erred by allowing an officer to provide a composite description of the car that struck Marian Carpenter's truck, where that description was based on hearsay statements that did not corroborate

the testimony of any of the witnesses who saw the accident." (Original in all caps.) Defendant further argues that the admission of the description was prejudicial as it "tended to link the two accidents, [and] supported the theory that . . . [defendant] acted with malice and was guilty of murder as well as the hit-and-run."

"When a defendant objects to the admission of evidence, we consider, whether the evidence was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Blackwell*, 207 N.C. App. 255, 257, 699 S.E.2d 474, 475 (2010) (citation, quotation marks, and brackets omitted). While defendant focuses on hearsay, Officer Wilson's testimony was not offered "to prove the truth of the matter asserted" but merely, as explained to the jury, for corroborative purposes, and thus any hearsay argument is inapplicable. *See generally* N.C. Gen. Stat. § 8C-1, Rule 801 (2011). As to corroboration,

> [t]his Court has long held that corroborative means to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence. It is not necessary that evidence prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible.
>
> The law does not require that Detective Grant's testimony about [the witness'] statements be in the exact words used by [the witness]. His testimony need only have tended to strengthen and confirm her testimony[.]

State v. Williamson, 146 N.C. App. 325, 338, 553 S.E.2d 54, 63 (2001) (citations, quotation marks, and brackets omitted), *disc. review denied*, 355 N.C. 222, 560 S.E.2d 366 (2002).

Here, Officer Wilson explained to the jury that he came up with a description of the offending vehicle after speaking with three different individuals, and the jury was provided a limiting instruction explaining that Officer Wilson's testimony was to be used "only for the purpose of corroborating the testimony of those other witnesses[.]" Indeed, Officer Wilson's description did corroborate the other witnesses' testimonies as it added "weight" to their testimonies. *Id.* This argument is overruled.

IV. Lay Opinion

[3] Lieutenant Andrew Dempski of the Huntersville Police Department testified over objection that the damage to the back of defendant's vehicle was not caused from the collision with the Ford truck; defendant

argues this implies the damage was caused by the earlier collision with Ms. Carpenter's vehicle. Defendant contends that

> the trial court erred by admitting lay opinion testimony of Lieutenant Andrew Dempski that damage to the rear quarter panel of . . . [defendant's] car was not caused by the collision with [the Ford] truck, as Dempski was not qualified to give an expert opinion and his testimony was not helpful to the jury.

(Original in all caps.) Again, "[w]hen a defendant objects to the admission of evidence, we consider, whether the evidence was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *Blackwell*, 207 N.C. App. at 257, 699 S.E.2d at 475.

Even assuming *arguendo*, that it was error for Lieutenant Dempski to testify that the collision with the Ford truck was not consistent with the damage on the rear of defendant's vehicle without first being accepted as an expert witness, Officer Wilson testified to the exact same information without objection or argument on appeal. In fact, Officer Wilson went a step further and testified that the damage to the rear of defendant's vehicle was consistent with the description he had been given regarding the accident with Ms. Carpenter. Since another officer testified to the same information without objection, we overrule defendant's argument. *See generally State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989) ("This Court frequently has held that when, as here, evidence is admitted over objection, but the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.")

V. Cumulative Effect

[4] Lastly, defendant contends that "the cumulative prejudice from the trial court's errors in admitting evidence requires a new trial." (Original in all caps.) Since we have found no prejudicial error or no error in the evidence presented, there cannot be any cumulative prejudicial effect, so this argument is without merit.

VI. Conclusion

For the reasons stated above, we find no error in the defendant's trial and convictions.

NO ERROR.

Judges CALABRIA and INMAN concur.

STATE OF NORTH CAROLINA
v.
TODD STIMSON, DEFENDANT

No. COA15-1001

Filed 5 April 2016

1. Taxation—unauthorized substance tax—subpoena quashed

The trial court did not abuse its discretion in an Unauthorized Substance Tax action by quashing defendant's subpoena to a North Carolina Department of Revenue employee. The trial court properly considered the relevancy and materiality of the items called for, and the right of the subpoenaed person to withhold production.

2. Constitutional Law—effective assistance of counsel—premature claim

Defendant's ineffective assistance of counsel claim was dismissed without prejudice. The claim was premature and further development of the facts would be required before application of the *Strickland* test.

Appeal by defendant from Order entered 26 March 2015 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Perry J. Pelaez, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant.

ELMORE, Judge.

Todd Stimson (defendant) was found guilty of trafficking in marijuana by possessing more than ten pounds and trafficking in marijuana by manufacturing more than ten pounds under N.C. Gen. Stat. § 90-95(h). On appeal, defendant argues that the trial court erred in quashing a subpoena he issued to a North Carolina Department of Revenue employee and that he received ineffective assistance of counsel (IAC). We conclude the trial court did not abuse its discretion in quashing the subpoena, and we therefore affirm. We dismiss without prejudice the IAC claim.

I. Background

The State's evidence tended to show the following: On 8 August 2011, the Fletcher Police Department received an anonymous call about illegal activity occurring at defendant's address. The next day, Fletcher police officers "conducted a garbage pull . . . to see if there was anything in the garbage that would indicate there was marijuana being grown or any illegal activity occurring based on the complaint." After not finding any incriminating evidence, officers did not continue to actively investigate defendant.

Nearly two years later, officers performed four garbage pulls in June 2013 and one in July 2013. They found "rolling papers," "roaches," and "trim waste." After the trim waste tested positive for marijuana, Erik Sumney, Chief of Police, and Detective Daniel Barale obtained a search warrant for defendant's property, which they executed on 11 July 2013. Officers seized seventy-five marijuana plants from defendant's barn, one container of marijuana from defendant's home, and two plastic bags of marijuana from defendant's freezer. Officers transported the evidence to the North Carolina State Crime Lab. Drug chemistry analyst Julie Gillette tested and weighed three of the ten items of evidence pursuant to the lab threshold sampling selection requirements. The lab report indicates that the three items analyzed tested positive for marijuana and weighed 5.31 kilograms or 11.7 pounds.

On 29 July 2013, defendant was indicted on one count of trafficking in marijuana by possessing more than ten pounds and one count of trafficking in marijuana by manufacturing more than ten pounds. The case came on for trial on 23 March 2015 in Henderson County Superior Court. That same day, defendant served North Carolina Department of Revenue employee George Valsame with a subpoena to testify at the trial and produce "[a]ll documents related to the Unauthorized Substance Tax action against [defendant]."

Valsame, through counsel from the North Carolina Attorney General's Office, moved to quash the subpoena claiming it required disclosure of protected matter and testimony that was prohibited by statute. The trial court allowed the motion and quashed the subpoena. Defendant did not put on any evidence and was found guilty of both charges. The Honorable Mark E. Powell sentenced defendant to twenty-five to thirty-nine months imprisonment and recommended work release. Defendant appeals.

II. Analysis

A. Quashed Subpoena

[1] Defendant argues the trial court's decision to quash the subpoena violated his right under the federal and state constitutions to call witnesses in his defense. Defendant, however, did not raise his constitutional argument in the trial court, and it may not be considered for the first time on appeal. *Fields v. McMahan*, 218 N.C. App. 417, 419, 722 S.E.2d 793, 794 (2012).

Defendant next argues that the "trial court abused its discretion by acting under a misapprehension of the law that led it to conclude that it had no discretion to exercise." He contends that N.C. Gen. Stat. § 105-113.112 only prevents the prosecutor, not a defendant, from calling a Department of Revenue employee to testify.

"A motion to quash a subpoena is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion." *State v. Hurt*, ___ N.C. App. ___, ___, 760 S.E.2d 341, 348 (July 15, 2014) (No. COA09-442-2) (citing *State v. Newell*, 82 N.C. App. 707, 709, 348 S.E.2d 158, 160 (1986)), *review denied*, 367 N.C. 807, 766 S.E.2d 679 (2014). "An abuse of discretion occurs only where a trial court's ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at ___. 760 S.E.2d at 348 (quoting *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998)). "In exercising that discretion, the trial judge should consider the relevancy and materiality of the items called for, the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against 'fishing expeditions.' " *Newell*, 82 N.C. App. at 709, 348 S.E.2d at 160.

Under N.C. Gen. Stat. § 105-113.107 (2011), titled, "Excise tax on unauthorized substances," an excise tax is levied on controlled substances possessed by dealers. The North Carolina Department of Revenue issues revenue stamps to affix to unauthorized substances to indicate payment of the tax, and dealers report the taxes paid via an unauthorized substance tax return. N.C. Gen. Stat. § 105-113.108 (2011). Dealers are not required to give their name, address, social security number, or other identifying information on the return. *Id.* Here, revenue stamps were affixed to some of the marijuana plants seized from defendant's property.

At issue here is N.C. Gen. Stat. § 105-113.112, titled, "Confidentiality of information." Both the State and defendant refer to the amended

version, which took effect on 23 August 2013,[1] and relevant to defendant's argument added the words, "by a prosecutor." However, because defendant was indicted on 29 July 2013, the amendments would not apply in his trial. *State v. Gamez*, 228 N.C. App. 329, 332, 745 S.E.2d 876, 878 (2013) ("A criminal action arises when the defendant is indicted.") (citing *State v. Williams*, 151 N.C. 660, 660, 65 S.E. 908, 909 (1909)); *see also State v. McGraw*, COA 15-6, 2015 WL 6163958, (N.C. Ct. App. Oct. 20, 2015) ("Therefore, because Defendant's indictment predated the effective date of the amendments to Rule 702, we must apply the former version of Rule 702.").

Accordingly, as of the date of defendant's indictment, N.C. Gen. Stat. § 105-113.112 (2011) stated,

> Information obtained by the Department in the course of administering the tax imposed by this Article, including information on whether the Department has issued a revenue stamp to a person, is confidential tax information and is subject to the following restrictions on disclosure:
>
> (1) G.S. 105-259 prohibits the disclosure of the information, except in the limited circumstances provided in that statute.
>
> (2) The information may not be used as evidence, as defined in G.S. 15A-971, in a criminal prosecution for an offense other than an offense under this Article or under Article 9 of this Chapter. Under this prohibition, no officer, employee, or agent of the Department may testify about the information in a criminal prosecution for an offense other than an offense under this Article or under Article 9 of this Chapter. This subdivision implements the protections against double jeopardy and self-incrimination set out in Amendment V of the United States Constitution and the restrictions in it apply regardless of whether information may be disclosed under G.S. 105-259. This subdivision does not apply to information obtained from a source other than an employee, officer, or agent of the

1. N.C. Gen. Stat. § 105-113.112 (2013) ("Information obtained by the Department from the taxpayer in the course of administering the tax imposed by this Article, including information on whether the Department has issued a revenue stamp to a person, may not be used as evidence, as defined in G.S. 15A-971, *by a prosecutor* in a criminal prosecution of the taxpayer for an offense related to the manufacturing, possession, transportation, distribution, or sale of the unauthorized substance.") (emphasis added).

> Department. This subdivision does not prohibit testimony by an officer, employee, or agent of the Department concerning an offense committed against that individual in the course of administering this Article. An officer, employee, or agent of the Department who provides evidence or testifies in violation of this subdivision is guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 105-113.112 (2011).

Here, defendant subpoenaed Valsame, a North Carolina Department of Revenue employee, to testify at the trial and produce "[a]ll documents related to the Unauthorized Substance Tax action against [defendant]." After hearing arguments from both the State and defendant on sections 105-259 and 105-113.112, the trial court allowed Valsame's motion to quash the subpoena. We cannot say that the trial court's decision to quash the subpoena was "manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *Hurt*, ___ N.C. App. at ___, 760 S.E.2d at 348.

N.C. Gen. Stat. § 105-113.112 (2011) clearly states that information obtained by the Department of Revenue in the course of administering the unauthorized substances tax is confidential tax information and cannot be used as evidence in a criminal prosecution. No employee of the Department may *testify* about the information in a criminal prosecution regardless of whether the information may be *disclosed* under N.C. Gen. Stat. § 105-259. *Id.* (emphasis added). We conclude that the trial court properly considered "the relevancy and materiality of the items called for, [and] the right of the subpoenaed person to withhold production," and, in its discretion, decided to quash the subpoena. *Newell*, 82 N.C. App. at 709, 348 S.E.2d at 160.

B. Ineffective Assistance of Counsel

[2] "The two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions." *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) (citing *State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985)). "A defendant must first show that his defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced his defense." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Id.* (citations and quotations omitted). "Generally, to establish prejudice, a

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citations and quotations omitted).

Defendant argues that his attorney's performance was deficient because he breached his duty to conduct an adequate pre-trial investigation. Defendant claims that this deficient performance prejudiced his defense because a "pre-trial investigation of the plant material would have enabled [defendant] to successfully keep State's Exhibit 1 out of evidence." The State argues that the cold record is insufficient to evaluate defendant's claim because a "review of the record and the transcript does not reveal whether the failure to examine the marijuana prior to trial was the result of trial tactics, strategy, lack of preparation or unfamiliarity with the legal issues."

"IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). However, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

Here, we determine that this claim has been brought prematurely and we dismiss it without prejudice. *See State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) ("[W]hen it appears to the appellate court further development of the facts would be required before application of the *Strickland* test, the proper course is for the Court to dismiss the defendant's assignments of error without prejudice.").

III. Conclusion

The trial court did not abuse its discretion in quashing defendant's subpoena. We dismiss without prejudice defendant's IAC claim.

AFFIRMED.

Judges STROUD and DIETZ concur.

STATE v. STITH

[246 N.C. App. 714 (2016)]

STATE OF NORTH CAROLINA
v.
MORRIS LEAVETT STITH, DEFENDANT

No. COA15-615

Filed 5 April 2016

Drugs—amended indictment—same controlled substance

The trial court did not err by granting the State's request to strike through the phrase "Schedule II of" from defendant's indictment for drug trafficking offenses. Further, this indictment was sufficient to allow the jury to convict defendant of possessing hydrocodone under Schedule III and trafficking in an opium derivative. The change to the indictment reflected that the controlled substance was below a certain weight and mixed with a non-narcotic, to lower the punishment from a Class H felony to a Class I felony.

Judge HUNTER, JR., dissenting.

Appeal by Defendant from judgment entered 24 September 2014 by Judge Claire V. Hill in Johnston County Superior Court. Heard in the Court of Appeals 4 November 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Charles G. Whitehead, for the State.

Kimberly P. Hoppin for the Defendant.

DILLON, Judge.

Morris Leavett Stith ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of (1) possession with intent to sell or deliver an opium derivative and (2) trafficking in an opium derivative by sale. For the following reasons, we find no error.

I. Background

On 21 November 2012, Defendant sold fifteen (15) pills containing a controlled substance (hydrocodone) combined with a non-controlled substance (acetaminophen) to a confidential police informant for $75.

Defendant was subsequently indicted by a Johnston County grand jury with (1) possession with intent to sell or deliver a Schedule II

controlled substance and (2) trafficking in an opium derivative by sale. The matter came on for a two-day trial in superior court.

The jury found Defendant guilty of (1) possession with intent to sell or deliver a Schedule *III* (as opposed to a Schedule II) controlled substance and (2) trafficking in an opium derivative by sale. Defendant stipulated to his status as an habitual felon. The trial court consolidated the charges for judgment, sentencing Defendant to prison for ninety (90) to 120 months based on certain mitigating factors. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes a number of arguments that the judgments should be vacated based on his contentions that the drug was misidentified in the indictments and that the trial court erred in allowing the prosecutor to amend the indictments. We address each conviction in turn.

A. Possession of Controlled Substance with Intent to Sell or Deliver

1. The Indictment

The original indictment returned by the grand jury charged Defendant the possession of the controlled substance "hydrocodone" (combined with a non-narcotic, acetaminophen) and stated that this substance was a Schedule II drug. Specifically, the indictment stated, in relevant part, as follows:

> Offense: Possession of a SCH II CS [Schedule II Controlled Substance] with Intent to Sell or Deliver
>
> . . . Defendant . . . did [feloniously] possess **acetaminophen and hydrocodone bitartrate**[.] Acetaminophen and hydrocodone bitartrate [] is a controlled substance **which is included in Schedule II of the North Carolina Controlled Substance Act**[.]

2. The Amendment to the Indictment and the Evidence at Trial

Hydrocodone is a drug listed in Schedule II, the possession of which (with the intent to sell or deliver) is a Class H felony. N.C. Gen. Stat. §§ 90-90(1)(a)(10), 90-95(b)(1) (2012). However, by the start of the trial, it became apparent to the State that its evidence would show that the hydrocodone possessed by Defendant was combined with a non-narcotic such that the hydrocodone is considered under our law to be a Schedule III controlled substance, the possession of which (with the intent to sell or deliver) is only a Class I felony. *Id.* §§ 90-91(d)(3)-(5),

90-95(b)(2). Accordingly, the State made a request that it be allowed to strike through the phrase "Schedule II of" in the indictment, which the trial court granted.

During the trial, the State's evidence tended to show that Defendant possessed pills containing hydrocodone bitartrate[1] combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. Defendant was convicted of possessing Schedule III hydrocodone with the intent to sell or deliver, a Class I felony.

3. Holding

We hold that the original indictment, as returned by the grand jury, was sufficient to charge the crime of possessing hydrocodone, a Schedule II controlled substance (and noting that the hydrocodone was combined with the non-narcotic, acetaminophen). We hold that the indictment was sufficient to allow the jury to convict Defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring it within Schedule III. That is, the jury did not convict Defendant of possessing an entirely different controlled substance than that which the *grand jury* had found Defendant to have possessed when it returned the original indictment. Finally, we hold that the strikethrough of the words "Schedule II of" from the indictment allowed at the start of trial was not reversible error and was not otherwise prejudicial to Defendant.

It is true that amending an indictment is statutorily prohibited. *See* N.C. Gen. Stat. § 15A-923(e) (2014). However, our Supreme Court has held that not all change to an indictment is error. Specifically, the Court interpreted the term "amendment" in the statute to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). Therefore, as our Court has held, while "amending an indictment to add an essential element to the allegations contained therein constitutes a substantial alteration[,] . . . an amendment that simply corrects an error unconnected and extraneous to the allegations of the essential elements . . . is not[.]" *State v. Williams*, ___ N.C. App. ___, ___, 774 S.E.2d 880, 883 (2015).

1. As stated in Defendant's brief, the term "bitartrate" in the indictment does not refer to any controlled substance but merely modifies "hydrocodone" as being in a certain salt form.

It is true that *the identity of the controlled substance* is an essential element of the crime of possession of a controlled substance with the intent to sell or deliver. *State v. Board*, 296 N.C. 652, 657, 252 S.E.2d 803, 806 (1979). However, as our Supreme Court has observed, the controlled substance need not be identified by the identical language used in the statute, but rather, the controlled substance may be identified "by whatever official name, common or usual name, chemical name, or trade name[.]"[2] *Id.* at 658, 252 S.E.2d at 807. *See also State v. Sullivan*, ___ N.C. App. ___, ___, 775 S.E.2d 23, 27 (2015) (holding that an indictment was fatal because the name employed to identify the controlled substance was not the name used in the statute nor was there evidence that the name was the trade name); *State v. Newton*, 21 N.C. App. 384, 386, 204 S.E.2d 724, 725 (1974) (holding that indictment was sufficient where the controlled substance was identified by its trade name rather than by the name used in the statutory language).

In the present case, the original indictment identified the controlled substance possessed by Defendant as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone. The "change" in the indictment did not change the identity of the controlled substance. It only eliminated one of the two references to Schedule II. (Even with the strikethrough, the face of the indictment still contained a reference to Schedule II in its heading, identifying the offense charged as "Possession of SCH II CS [Schedule II controlled substance] with Intent to Sell or Deliver.") In any case, even changing "Schedule II" to "Schedule III" would not have changed the identity of the controlled substance (hydrocodone) combined with acetaminophen in this case, but rather it would have merely changed *the maximum weight* of hydrocodone and ratio of hydrocodone with acetaminophen in each pill such that each pill would be considered a Schedule III drug.

4. Schedule II Hydrocodone vs. Schedule III Hydrocodone

The State's expert described the pills possessed by Defendant as Schedule III hydrocodone. Some clarification is necessary since "hydrocodone" is referred to by its synonym "dihydrocodeinone" in Schedule III of our statutes, which is provided below:

"Hydrocodone" is a controlled substance and is listed on Schedule II. N.C. Gen. Stat. § 90-90(1)(a)(10) (2012). However, hydrocodone can also

2. This quoted language is the same language used in each of the statutes which identifies the schedules of controlled substances. *Compare* N.C. Gen. Stat. § 90-90 *with id.* § 90-89.

be a Schedule III substance when it is *at or below a certain dosage weight* **and** *combined within a certain ratio with a "nonnarcotic ingredient*," such as acetaminophen. *Id.* § 90-91(d)(4). In other words, hydrocodone, whether by itself or combined with a non-narcotic, is a Schedule II drug *unless* it is *below a certain amount* and combined *within a certain ratio* with the non-narcotic, in which case it is considered a Schedule III drug, the possession of which carries a lighter punishment.

In Schedule III, "hydrocodone" is actually referred to by its synonym "dihydrocodeinone." *See id.* Our Court has observed that, as discussed above, Schedule III hydrocodone (or dihydrocodeinone) is differentiated from Schedule II hydrocodone "by the quantitative ratio of dihydrocodeinone to nonnarcotic ingredients [such as acetaminophen] *per dosage unit*." *State v. Johnson*, 214 N.C. App. 436, 441, 714 S.E.2d 502, 506 (2011) (emphasis in original). Our Supreme Court has referred to "dihydrocodeinone" as "dihydrocodeinone (hydrocodone)." *State v. Ward*, 364 N.C. 133, 138 n. 2, 694 S.E.2d 738, 741 n. 2 (2010). Other jurisdictions also recognize that hydrocodone and "dihydrocodeinone" are the same controlled substance. *See State v. Benedict*, 887 So.2d 649, 651 (2004) (observing that the substances are equivalent under Louisiana law); N.Y. CLS Pub. Health § 3306 (2015) (referring to hydrocodone as "hydrocodone (also known as dihydrocodeinone)" under Schedule II of New York's controlled substances law); *State v. Pewitte*, 2014 Tenn. Crim. App. LEXIS 261, *14, n. 3 (2014) (unpublished opinion) (noting the use of "hydrocodone" and "dihydrocodeinone" interchangeably); *State v. Pagan*, 2011 Wash. App. LEXIS 88, *6 n. 3 (2011) (unpublished opinion) (explaining that "hydrocodone" and "dihydrocodeinone" are synonyms, citing a number of medical sources); *United States v. McKinney*, 2009 U.S. Dist. LEXIS 35825, *13 (2009) (unpublished opinion) (citing 21 C.F.R. § 1308.13(e)(1)(iii)-(iv)).

Likewise, the term "dihydrocodeinone" does not appear in Schedule II, but is referred to by its synonym "hydrocodone," *but "dihydrocodeinone" is not to be confused with an entirely different Schedule II controlled substance*, *"dihydrocodeine"* referenced in N.C. Gen. Stat. § 90-90(2)(f).

5. <u>This Case is Distinguishable from Recent Cases Cited by Defendant</u>

Defendant argues that we are compelled to find that the indictment was insufficient to convict him of possessing Schedule III hydrocodone, citing a number of cases. *See, e.g.*, *State v. Ahmadi-Turshizi*, 175 N.C. App. 783, 784-85, 625 S.E.2d 604, 605 (2006) ("When a defendant has been charged with possession of a controlled substance, the identity of the

controlled substance that defendant allegedly possessed is considered to be an essential element which must be alleged properly in the indictment.”). Indeed, our Court has required that controlled substances be identified with precision, noting that “the legal definition of these [controlled] substance[s] is itself technical and requires precision.” *State v. Ledwell*, 171 N.C. App. 328, 332, 614 S.E.2d 412, 415 (2005). However, we hold that the present case is distinguishable.

In *Ledwell*, a 2005 case, our Court held that an indictment identifying the drug as “Methylenedioxyamphetamine (MDA)” was fatal because this term did not refer to the same substance as the controlled substance listed in our statutes as “*3,4* – Methylenedioxyamphetamine (MDA).” *Id.* at 331-33, 614 S.E.2d at 414-15. The next year, our Court relied on *Ledwell* to reach an identical holding. *Ahmadi-Turshizi*, 175 N.C. App. at 786, 625 S.E.2d at 605-06. These cases were based on the fact that MDA is not identical to 3,4-methylenedioxyamphetamine. *See Board*, 296 N.C. at 657-58, 252 S.E.2d at 806-07.

In 2010, our Court held that an indictment identifying the controlled substance as “Benzodiazepines, which is included in Schedule IV” was defective because “benzodiazepines” is not found in Schedule IV but refers to a category of drugs, some of which are named in Schedule IV. *State v. LePage*, 204 N.C. App. 37, 54, 693 S.E.2d 157, 168 (2010). The actual drug at issue was clonazepam, which is a Schedule IV drug. N.C. Gen. Stat. § 90-92(a)(1)(i) (2012). The *LePage* Court based its holding on the fact that “benzodiazepines,” (the term used in the indictment) is not the same controlled substance as “clonazepam” (the drug actually possessed), but rather clonazepam is a particular controlled substance *within* the benzodiazepines category of controlled substances. 204 N.C. App. at 54, 693 S.E.2d at 168. Accordingly, based on *LePage*, our Court is compelled to conclude that a drafter of an indictment has failed to use sufficient technical precision by identifying clonazepam as “benzodiazepines, a Schedule IV drug.” *See id.*

In 2015, our Court held that the trial court erred by allowing the State to amend an indictment by adding the prefix “4-” to the word “methylethcathinone.” *Williams*, ___ N.C. App. at ___, 774 S.E.2d at 885-87. The Court essentially held that adding the numeric prefix *changed* the identity of the controlled substance and therefore “added an essential element [to the indictment] that was previously absent, [] constitut[ing] a substantial alteration[.]” *Id.* at ___, 774 S.E.2d at 885-86.

However, unlike the above cases, in the present case the indictment was not changed such that the identity of the controlled substance was

changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identify of which was also contained in the indictment) to lower the punishment from a Class H felony to a Class I felony. The grand jury returning the indictment and the jury convicting Defendant both concluded that the controlled substance possessed by Defendant was hydrocodone.

Moreover, we believe that the indictment adequately apprised Defendant of the controlled substance that he possessed, hydrocodone. The indictment also alleged that the hydrocodone was combined with acetaminophen. The fact that the evidence at trial showed that *the ratio* of hydrocodone to acetaminophen and *the weight* of hydrocodone contained in each pill was sufficient to bring it within Schedule III did not render the indictment invalid, nor does it create a fatal variance.[3] Further, the amendment allowed by the trial court was not material because the strikethrough of certain language did not alter *the identity* of the controlled substance which Defendant was alleged to have possessed; and, in any case, even with the strikethrough, the face of the indictment still charged Defendant with possessing Schedule II hydrocodone.

Though not controlling, we find the case *Graham v. State of Mississippi*, 935 So.2d 1119 (2006), persuasive. In that case, the Mississippi intermediate appellate court held that an amendment to an indictment for the sale of hydrocodone which changed the Schedule from "II" to "III" did not prejudice the defendant. *Id.* at 1121-22. The Court specifically distinguished the case from another Mississippi opinion finding the omission of the numeric prefix from a drug name (similar to the omission which rendered the indictments fatal in *Ledwell* and *Ahmadi-Turshizi*) to be fatal. *Id.* at 1121. *See also State v. Toddy*, 2000 Ohio App. LEXIS 5736, *10-11 (2000) (unpublished opinion) (allowing amendment of indictment for trafficking in hydrocodone by changing Schedule III to Schedule II).

B. Trafficking in an Opium Derivative

Defendant was also indicted for trafficking an opium derivative, for selling the hydrocodone pills. The indictment identifies the controlled

3. The present situation is similar to a situation where a defendant is indicted with *felonious* larceny of certain tools valued at over $1,000 (a felony because the value of the tools is over $1,000). *See* N.C. Gen. Stat. § 14-72(a) (2012). There is no fatal variance merely because the jury determines that the value of the tools was under $1,000 and convicts the defendant of a misdemeanor. *See State v. Jones*, 275 N.C. 432, 437-38, 168 S.E.2d 380, 384 (1969).

substance using the same language as the language used in the indictment charging Defendant with possession with the intent to sell.

On appeal, Defendant makes the same arguments concerning the change to the indictment allowed by the trial court (namely, striking the words "Schedule II of" as was allowed with the other indictment). For the same reasons, we hold that the actions of the trial court did not constitute reversible error. Further, we hold that there was no fatal variance between the indictment and the evidence at trial. The indictment alleged that Defendant was trafficking in hydrocodone, and the evidence tended to show that Defendant was trafficking in hydrocodone. Accordingly, this argument is overruled.

NO ERROR.

Judge GEER concurs.

Judge HUNTER, JR., dissents by separate opinion.

HUNTER, JR., Robert N., Judge, Dissenting.

I dissent. An indictment is the *sine qua non* of criminal jurisdiction as required by Article I, Section 22 of the Constitution of North Carolina. To indict, twelve to eighteen persons sitting as a grand jury have to concur in the indictment. N.C. Gen. Stat. § 15A-621. The language of an indictment is presented to the grand jury by a District Attorney pursuant to N.C. Gen. Stat. § 15A-627. The purpose of Constitutional provisions for indictments is: "(1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or Nolo contendere, to pronounce sentence according to the rights of the case." *State v. Foster*, 10 N.C. App. 141, 142–43, 177 S.E.2d 756, 757 (1970) (citation omitted); *see also State v. Stokes*, 274 N.C. 409, 411, 163 S.E.2d 770, 772 (1968). In my view, the language of the indictment fails under our precedents to meet these standards.

On 1 April 2013, the grand jury indicted Morris Leavett Stith on two counts, as follows:

Count I

Offense: Possession of SCH II CS with Intent to Sell or Deliver

Date of Offense: November 21, 2012

In violation of: N.C.G.S. 90-95(a)(1)

I. The jurors for the State upon their oath present that on or about November 21, 2012, in the county of Johnston, the Defendant named above, unlawfully, willfully, and feloniously did possess acetaminophen and hydrocodone bitartrate (Percocet), with the intent to sell or deliver said acetaminophen and hydrocodone bitartrate (Percocet). Acetaminophen and hydrocodone bitartrate (Percocet) is a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act. The act is in violation of N.C.G.S. § 90-95(a)(1).

Count II

Offense: Trafficking in Opiates, Synthetic Opiates and Opiate Derivatives by Sale

Date of Offense: November 21, 2012

In violation of: N.C.G.S. 90-95(h)(4)(a)

II. The jurors for the State upon their oath further present that on or about November 21, 2012, in the county of Johnston, the Defendant named above intentionally, unlawfully, willfully, and feloniously did traffick in opium or opiates or a derivative or preparation of opium or opiate or any mixture containing such substances, by selling four (4) grams or more but less than fourteen (14) grams of Acetaminophen and Hydrocodone Bitartrate (Percocet), a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act, to Selma Jerome. This act was in violation of North Carolina General Statues Section 90-95(h)(4)(a).

Count One of this indictment is jurisdictionally deficient under settled law of this court consistently applied in *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (2005), *State v. Turshizi*, 175 N.C. App. 783, 625 S.E.2d 604 (2006), and S*tate v. Sullivan*, ___ N.C. App. ___, 775 S.E.2d 23 (2015). *See also State v. Barnes*, 213 N.C. App. 424, 714 S.E.2d 274 (2011) (unpublished). Count Two of the indictment is also jurisdictionally deficient because its language fails to meet all four of the standards set forth in *Foster* and *Stokes*.

Realizing under our holdings in *Ledwell*, *Turshizi*, and *Sullivan* that this indictment did not confer jurisdiction to the trial court, the State moved to "amend" the indictment, which the court granted, and the Assistant District Attorney struck through "Schedule II" in Counts I and II. It is apparent the State did this in an attempt to cure fatal defects in the indictment.

Because only a grand jury can indict a defendant, a court is prohibited by statute from amending an indictment in a material way. N.C. Gen. Stat. § 15A-923(e); *State v. White*, 202 N.C. App. 524, 527, 689 S.E.2d 595, 596–97 (2010) ("[O]ur appellate courts have interpreted [section 15A-923(e)] to mean that a bill of indictment may not be amended in a manner that substantially alters the charged offense.") (citations and quotation marks omitted). Because the original indictment was defective, one cannot tell whether the amended version would have been concurred by twelve grand jurors or not. The defects could have been cured in advance of the trial had the Assistant District Attorney sought a superseding indictment, but she did not. The court lacked jurisdiction to both hear the matter or to amend the indictment.

The trafficking statute charged in Count II, N.C. Gen. Stat. § 90-95(h)(4)(a), punishes "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more [but less than fourteen grams] of opium or opiate, or any salt, compound, derivative or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance . . . ." N.C. Gen. Stat. § 90-95(h)(4)(a). Count II alleges Defendant trafficked "a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act." Our statutes define a "controlled substance" as a "drug, substance, or immediate precursor included in Schedules I through VI" of the North Carolina Controlled Substances Act. N.C. Gen. Stat. § 90-87(5).

Reviewing the indictment, it is unclear whether the grand jury concurred in finding Defendant trafficked "opiates, synthetic opiates, or opiate derivatives," "Acetaminophen and Hyrdrocodone Bitartrate," "Percocet," or "a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act." Schedule II includes "opium and opiate, and any salt, compound, derivative, or preparation of opium and opiate," N.C. Gen. Stat. § 90-90(1)(a), and "Hydrocodone," N.C. Gen. Stat. § 90-90(1)(a)(10), but it does not enumerate Acetaminophen, Hydrocondone Bitartrate, Percocet, or the substance proven at trial, "Hydrocodeinone," which appears as "dihydrocodeinone" in Schedule III.

N.C. Gen. Stat. § 90-91(d)(3)–(4). This flaw poses jurisdictional problems for the trial court.

Under the long standing jurisprudence of this Court, and our Supreme Court, it is apparent the trial court did not have jurisdiction to act under the indictment. "It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citing *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719 (1981)). "An 'indictment must allege all of the essential elements of the crime sought to be charged.' " *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citing *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996)). "Identity of a controlled substance allegedly possessed is such an essential element." *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citation omitted). "An indictment is invalid where it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *Id.* (citations and quotation marks omitted).

Punishment for trafficking opiates depends upon drug weight, not drug scheduling. N.C. Gen. Stat. §§ 90-95(h)(4)(a)–(c). The State was not required to cite Schedule II, or any specific controlled substance schedule, when it indicted Defendant for violating N.C. Gen. Stat. § 90-95(h)(4)(a). Nonetheless, the State incorrectly identified the controlled substance, hydrocodeninone, with the "Schedule II" language. This identification is essential to the indictment, and it marks a fatal flaw that deprives the court of jurisdiction. *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citation omitted).

Further, the State changed the identity of the controlled substance alleged in Count II by striking the "Schedule II" language, which is an inherently statutory matter. Our statutes prevent trial courts from making these kinds of amendments precisely so only a grand jury can indict a defendant as provided in our Constitution. N.C. Gen. Stat. § 15A-923(e); N.C. Const. art. I, § 22. With a fatally flawed indictment and no jurisdiction to impose a felony judgment, the trial court should have dismissed the case. I am not persuaded by the majority's attempts to distinguish the controlling decisions. We are bound to follow these decisions. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Nor am I persuaded by the law of Louisiana in this matter. Believing that a certain result should obtain in this case does not follow the law. Therefore, I must respectfully dissent and I would vacate the judgment imposed on Counts I and II. *See Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412; *Turshizi*, 175 N.C. App. 783, 625 S.E.2d 604; *Sullivan*, ___ N.C. App. ___, 775 S.E.2d 23.

STATE v. WATKINS

[246 N.C. App. 725 (2016)]

STATE OF NORTH CAROLINA
v.
RAYMOND WATKINS

No. COA15-443

Filed 5 April 2016

Appeal and Error—remand for de novo sentencing hearing—general remand

Where the Court of Appeals had issued a general remand of defendant's case to the trial court for a de novo sentencing hearing and the trial court on remand reinstated the sentence without conducting a de novo sentencing hearing, the Court of Appeals again vacated defendant's sentence and remanded the case for a de novo resentencing.

Appeal by defendant by writ of certiorari from order entered 24 January 2014 by Judge Gary Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 6 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah H. Love and Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

CALABRIA, Judge.

Raymond Watkins ("defendant") appeals by writ of certiorari from an order entered upon remand after a decision of this Court reversing his first sentence. *See State v. Watkins*, 229 N.C. App. 628, 747 S.E.2d 907 (2013) ("*Watkins II*"). In *Watkins II*, this Court concluded that the record was inadequate to address defendant's threshold jurisdictional challenge, elected not to address defendant's remaining challenges, and remanded for a *de novo* sentencing hearing in accordance with this Court's holding in *State v. Degree*, 110 N.C. App. 638, 641, 430 S.E.2d 491, 493 (1993). On remand, after the trial court held an evidentiary hearing on the issue of jurisdiction, it concluded the court had jurisdiction to sentence defendant and reinstated the sentence this Court reversed in *Watkins II*. Because the trial court failed to conduct a *de novo* resentencing on remand, we vacate the sentence and remand for resentencing.

I. Background

The following procedural and factual history is taken from this Court's opinion in *Watkins II*:

> On 15 November 2004, defendant pled guilty to financial card theft and having attained habitual felon status. Pursuant to a plea agreement, prayer for judgment was continued to 24 January 2005; by consent of both parties it was continued again until 23 January 2006; and, for reasons that are unclear from the record, it was postponed and rescheduled no less than five more times in 2006. In the interim, defendant was dealing with several federal criminal matters: in April 2005 he was arrested for a federal probation violation and sentenced to a year in federal custody, and in June 2006 he was convicted for possession of a firearm by a felon and sentenced to sixty months in federal prison. Ultimately, defendant was not sentenced in this case until 5 February 2007, more than a year after the date to which sentencing was last continued.
>
> At the 5 February 2007 sentencing hearing, defendant contended the trial court was divested of jurisdiction to sentence him because of the lengthy delay. The State responded by speculating that the delay was caused by difficulties transferring defendant from the federal prison system to state court for a hearing. Without further discussion of the issue, the trial court found "in its discretion" that it did have jurisdiction to pronounce a sentence. It then sentenced defendant to a minimum of 64 and a maximum of 85 months imprisonment, the sentence to run concurrently with the federal sentence defendant was serving at the time.
>
> The State appealed, and in an opinion filed 3 March 2008 this Court held the sentence was erroneous because the penalty imposed fell below the statutory minimum and because the trial court imposed a concurrent sentence of imprisonment when a consecutive one was required by N.C. Gen. Stat. § 14–7.6. *See State v. Watkins*, 189 N.C. App. 784, 659 S.E.2d 58 (2008). While defendant again raised the issue of jurisdiction in his appellee's brief, he did not cross-appeal and this Court did not address the issue of jurisdiction in its opinion. *Id.*

> After the sentence was vacated and remanded by this Court, a re-sentencing hearing was held on 3 July 2008. Defendant again challenged the trial court's jurisdiction to pronounce a sentence, and the trial court again overruled defendant's objection-this time on grounds that the trial court was reluctant to contradict the original trial judge's finding on jurisdiction and that it was "clothed with jurisdiction by the appellate order." Because he was convicted of a class C felony[] with a prior record level IV, defendant was sentenced to imprisonment for a minimum term of 80 months and a maximum term of 105 months. Defendant gave oral notice of appeal at the close of the re-sentencing hearing.

Watkins II, 229 N.C. App. at 628–29, 747 S.E.2d at 908–09.

Although defendant gave oral notice of appeal on 3 July 2008,

> apparently due to an administrative oversight, the trial court did not complete defendant's appellate entries until more than four years later, on 13 September 2012.
>
> On 1 April 2013, defendant filed a petition for writ of certiorari in this Court "to permit appellate review of the July 3, 2008 Judgment and Commitment because [defendant] has lost his right to prosecute an appeal by failure to take timely action due to no fault of his own." The State responded on 9 April 2013 and filed a motion to dismiss the appeal pursuant to N.C.R. App. P. 25(a), arguing defendant failed to timely "take any action required to present the appeal for decision."

Id. at 630, 747 S.E.2d at 909.

The *Watkins II* Court allowed defendant's petition and denied the State's motion to dismiss on the grounds that "it would be inappropriate to punish defendant for what was clearly an oversight on the part of the trial court in failing to file the appellate entries despite defendant's notice of appeal." *Id.*

On appeal in *Watkins II*, defendant argued, *inter alia*, that the trial court "lacked jurisdiction to sentence defendant because the State failed to move for imposition of the sentence within a reasonable time after the last date to which prayer for judgment was continued." *Id.* This Court concluded that "the record in this case lacks the information necessary for this Court to properly consider defendant's objection to the trial court's jurisdiction." *Id.* at 634, 747 S.E.2d at 912. As a result,

the *Watkins II* Court reversed the trial court's judgment and "remanded for a *de novo* sentencing hearing so the trial court may have an opportunity to take evidence and make findings relevant to this issue." *Id.*

On remand from *Watkins II*, a hearing was held where the trial court accepted evidence and heard arguments of counsel regarding the issue of jurisdiction. After the hearing, the trial court determined: (1) the delay in sentencing was justified by defendant's incarceration in federal prison; (2) "[t]here is no evidence except pure conjecture" that if defendant were brought to Buncombe County in January 2006 and sentenced before the federal conviction, the federal government might have permitted his federal sentence to run concurrent with this State sentence; and (3) the trial court had jurisdiction to enter a judgment against defendant on 5 February 2007 and an amended judgment on 3 July 2008. Subsequently, the trial court elected not to conduct a resentencing hearing. Rather, in its written order the trial court concluded:

> [T]he sentence of not less than 80 months and not more than 105 months entered on July 3, 2008 by the Hon. James Baker is a legal sentence that the Court had jurisdiction to impose, and continues to be in force and effect.

Defendant appeals.

II. Jurisdiction

As an initial matter, defendant contends that he has a right to appeal the trial court's order pursuant to N.C. Gen. Stat. § 7A-27(b). We disagree.

N.C. Gen. Stat. § 7A–27(b) governs appeals of right. This Court has explained:

> [S]ection 7A–27(b) explicitly excludes from its right of appeal those cases where a final judgment is entered based on a guilty plea. *See* N.C. Gen. Stat. § 7A–27 (b)(1) (2013); *State v. Mungo*, 213 N.C. App. 400, 401, 713 S.E.2d 542, 543 (2011) ("N.C. Gen. Stat. § 7A–27(b) does not provide a route for appeals from guilty pleas.").

State v. Sale, 232 N.C. App. 662, 664–65, 754 S.E.2d 474, 477 (2014). However, a defendant who enters a guilty plea "may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2015).

In this case, defendant entered a guilty plea to a felony. In *Watkins II*, defendant argued, *inter alia*, the trial court lacked jurisdiction to sentence him based on the delay between his guilty plea and the entry of

judgment. This Court found the record insufficient to address defendant's jurisdictional challenge and, on this ground, reversed defendant's sentence and remanded for "a *de novo* sentencing hearing" without specifying the procedure to review the judgment. On remand, during the trial court's hearing, evidence was presented on the issue of jurisdiction. By order entered 23 January 2014, the trial court concluded it had jurisdiction to enter judgment and ruled the 3 July 2008 sentence was a legal sentence and continues to be in effect.

Because this Court did not state the procedure for review, because the trial court did not enter an appealable order, and because defendant did not seek entry of such an order by mandamus, it appears defendant is not entitled to appeal as a matter of right. However, defendant has petitioned this Court for review by certiorari. N.C. Gen. Stat. § 15A-1444(e). Furthermore, this Court has jurisdiction to issue extraordinary writs "to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]" N.C. Gen. Stat. § 7A-32(c) (2015).

In our discretion, we granted defendant's petition for writ of certiorari. For purposes of this appeal and to provide defendant with an avenue for further review, we conclude the trial court's 23 January 2014 order reinstating the 3 July 2008 judgment should be treated as a final judgment imposing a sentence of a minimum of 80 months to a maximum of 105 months, *nunc pro tunc*, as of 3 July 2008. Our review of the trial court's 23 January 2014 order will be treated as a final judgment entered against defendant from which he has a right to appeal as provided in N.C. Gen. Stat. § 15A-1444(e).

III. Analysis

A. The Mandate Rule and Scope of Remand

Defendant contends that the trial court erred by failing to follow the *Watkins II* Court's mandate and hold a resentencing hearing on remand after addressing defendant's jurisdictional challenge. Specifically, defendant argues the trial court "had a legal duty to make the required jurisdictional findings, and, if jurisdiction was found, to conduct a *de novo* sentencing hearing." The State contends that the trial court properly followed this Court's mandate, because the case was "remanded for an evidentiary hearing—which [the *Watkins II* Court] called 'a de novo hearing'—at which the trial court was directed to make certain findings regarding the *Degree* factors." According to the State, "[b]y conducting an evidentiary hearing and making the required findings, the trial court complied with this Court's mandate." We disagree.

Although this issue has never been answered directly, this Court's interpretation of its own mandate is properly considered an issue of law reviewable *de novo*. *See*, *e.g.*, *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950 (Fed. Cir. 1997) ("We give much weight to the uniform treatment of other types of decrees and judgments by trial courts as reviewed de novo. Since here we interpret our own, not a trial court's order, it seems all the clearer that no deference is due.") (citations omitted). " 'On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court.' " *Bodie v. Bodie*, __ N.C. App. __, __, 768 S.E.2d 879, 881 (2015) (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962)). "[I]t is well-established that in discerning a mandate's intent, the plain language of the mandate controls." *In re Parkdale Mills*, __ N.C. App. __, __, 770 S.E.2d 152, 156 (citation omitted), *disc. review denied*, 776 S.E.2d 200 (2015). " '[D]e novo' means fresh or anew; for a second time;" and a *de novo* hearing in a reviewing court is a new hearing, as if no action had been taken in the court below. *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964).

It is well established that remands may be general or limited in scope. In *Pepper v. United States*, 562 U.S. 476 (2011), the United States Supreme Court acknowledged the distinction made by federal courts of appeal between general and limited resentencing remands. Although resentencing remands in our State are typically *de novo* and are properly classified general remands, *see*, *e.g.*, *State v. Morston*, 221 N.C. App. 464, 469, 728 S.E.2d 400, 405 (2012) (citations omitted), decisions by our State's courts provide little guidance on interpreting mandates remanding cases for resentencing. However, limited and general remands for resentencing have been addressed in several federal courts of appeal. *See United States v. Quintieri*, 306 F.3d 1217, 1228 n.6 (2d Cir. 2002) (noting that "[t]he circuits are divided as to whether a remand for resentencing should be limited or *de novo* absent explicit direction from the remanding court. The Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits follow a *de novo* sentencing default rule." . . . "The D.C., First, Fifth, and Seventh Circuits follow a default rule of limited resentencing.") (citations omitted). We find it appropriate to look to these cases as persuasive authority in order to enlighten and guide our inquiry. *See*, *e.g.*, *Ellison v. Alexander*, 207 N.C. App. 401, 405, 700 S.E.2d 102, 106 (2010) (citations omitted) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive.").

In the context of resentencing remands, the Sixth Circuit explained:

> If a remand is general, the district court can resentence the defendant de novo, which means the district court may redo the entire sentencing process including considering new evidence and issues. When the remand is not general, the district court's resentencing authority is limited to the issue or issues remanded.

United States v. O'Dell, 320 F.3d 674, 679 (6th Cir. 2003) (citations, quotation marks, and brackets omitted). The Sixth Circuit's default rule guides this Court in interpreting resentencing remands:

> The key is to consider the specific language used in the context of the entire opinion or order. However, in the absence of an explicit limitation, the remand order is presumptively a general one.

United States v. Campbell, 168 F.3d 263, 267–68 (6th Cir. 1999) (citation omitted). The *de novo* sentencing default rule comports with well-established precedent of this State. *See*, *e.g.*, *State v. Paul*, 231 N.C. App. 448, 449, 752 S.E.2d 252, 253 (2013) ("Should this Court find a sentencing error and remand a case to the trial court for resentencing, that hearing shall generally be conducted *de novo*.") (citations omitted).

We further find the Sixth Circuit's logic underlying this presumption most persuasive:

> The goal of achieving judicial economy through the use of limited remands becomes futile if appellate court drafting imprecision too frequently results in parties appealing the scope of the remand itself. The purpose of the opinion and order is to inform and instruct the district court and the parties and to outline the future intended chain of events. It is the job of the appellate court adequately to articulate instructions to the district court in the remand.
>
> Consequently, to impose a limited remand, an appellate court must sufficiently outline the procedure the district court is to follow. The chain of intended events should be articulated with particularity. With sentencing issues, in light of the general principle of de novo consideration at resentencing, this court should leave no doubt in the district judge's or parties' minds as to the scope of

> the remand. The language used to limit the remand should be, in effect, unmistakable.

United States v. Campbell, 168 F.3d 263, 267–68 (6th Cir. 1999).

We agree that, especially in the context of resentencing remands, "[a] limited remand must convey clearly the intent to limit the scope of the district court's review." *Campbell*, 168 F.3d at 267. Indeed, limited remands by this Court typically follow this well-established principle. *See*, *e.g.*, *State v. Neal*, 210 N.C. App. 645, 709 S.E.2d 463, 464 (2011) ("We, therefore, remand to the trial court for the limited purpose of making the necessary findings of fact and reconsidering its conclusions of law in light of those findings."); *State v. McCormick*, 204 N.C. App. 105, 114, 693 S.E.2d 195, 200 (2010) ("We therefore remand the matter to the trial court for the limited purpose of correcting the file number on the judgment sentencing for the purposes of "making the record speak the truth.' ").

B. *Watkins II* Contained a General Resentencing Remand

It is well established in this State that "each sentencing hearing in a particular case is a *de novo* proceeding." *Abbott*, 90 N.C. App. at 751, 370 S.E.2d at 69 (citing *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985)); *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560 ("[T]he resentencing court must take its own look at the evidence[.]"), *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986); *State v. Mitchell*, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984) ("For all intents and purposes the resentencing hearing is *de novo* as to the appropriate sentence."). "A trial court's resentencing of a defendant to the same sentence as a prior sentencing court is not *ipso facto* evidence of any failure to exercise independent decision-making or conduct a *de novo* review." *Morston*, 221 N.C. App. at 470, 728 S.E.2d at 406 (citation omitted). However, when a trial court relies on a previous court's sentence determination and fails to conduct its own independent review of the evidence, a defendant is deprived of a *de novo* sentencing hearing. *Abbott*, 90 N.C. App. at 751–52, 370 S.E.2d at 69–70.

In *Watkins II*, defendant challenged the trial court's jurisdiction to sentence him in 2007 and again in 2008. This Court explained sentencing jurisdiction as follows:

> Once a guilty plea is accepted in a criminal case, a trial court may continue the case to a subsequent date for resentencing. A continuance of this type vests a trial judge presiding at a subsequent session of court with the

> jurisdiction to sentence a defendant for crimes previously adjudicated. . . . [W]e have held that the State's failure to [move for imposition of a sentence] within a reasonable time divests the trial court of jurisdiction to grant the motion. . . . We have previously noted several factors relevant to determining whether sentencing has been continued for "an unreasonable period," such as "the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay." *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493.

Watkins II at 631, 747 S.E.2d at 910 (some citations and quotation marks omitted). Because the *Watkins II* Court concluded that the record was insufficient to address defendant's threshold jurisdictional challenge in light of *Degree*, it reversed defendant's sentence and ordered the case be remanded for resentencing, without addressing defendant's remaining challenges.

On remand from *Watkins II*, after the trial court held an evidentiary hearing to address the *Degree* factors and concluded the trial court had jurisdiction to sentence defendant previously, the trial court elected not to conduct a *de novo* resentencing. Rather, the trial court reinstated the previously reversed sentence. The trial judge's own words clearly showed that he believed he was constrained by this Court's mandate in *Watkins II* from conducting a *de novo* sentencing hearing. After the trial court ruled on the jurisdictional issue, the prosecutor stated: "I believe we'll have to go through a resentencing now, your Honor. Looking at the appellate opinion, it talks about other issues that the defendant had raised at the time." The trial court disagreed:

> I'm not so sure about that. . . . I thought the Court of Appeals was just indicating that the only issues to be decided by this Court at this hearing were whether the delay in the sentencing of the defendant had any valid justification tied to his incarceration in federal prison in 2005 and 2006 and whether that incarceration hampered the State's ability to sentence the defendant in North Carolina court, whether he consented to the delay in sentencing by failing to request sentencing on or about January 23rd and whether he was, in fact, prejudiced.

The trial court's written order demonstrates he interpreted our remand as a limited one: "This matter came before the Court on remand

from the North Carolina Court of Appeals for determination whether the Court had jurisdiction to sentence Defendant." We interpret our mandate differently.

In its written opinion, the *Watkins II* Court ordered, on four separate occasions, that the case be remanded for resentencing due to its inability to address defendant's threshold jurisdictional challenge:

> Because we hold the trial court's findings on the threshold issue of jurisdiction were insufficient and *remand for a de novo re-sentencing hearing* to allow for findings on that issue, we do not address defendant's remaining arguments.
>
> . . . .
>
> Nevertheless, there are insufficient facts in the record for this Court to weigh the remaining three factors we considered in *Degree*. Thus, we must *remand for a de novo sentencing hearing*.
>
> . . . .
>
> We therefore *remand this case for a de novo sentencing hearing* in accordance with this Court's holding in *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493, so the trial court can properly consider the jurisdictional issue raised by defendant.
>
> . . . .
>
> Therefore, the trial court's judgment must be reversed and this case *remanded for a de novo sentencing hearing* so the trial court may have an opportunity to take evidence and make findings relevant to this issue.

Watkins II at 630–34, 747 S.E.2d at 909–12 (emphases added). In addition, we specifically ordered that the trial court take evidence on the *Degree* factors:

> [T]he trial court should take evidence and make findings on (1) whether the delay in sentencing defendant had any valid justification tied to defendant's incarceration in federal prison in 2005 and 2006—for instance, whether his federal incarceration hampered the State's efforts to sentence defendant in North Carolina court; (2) whether defendant consented to the delay in sentencing by failing to request sentencing on or around 23 January 2006,

> *compare Degree*, 110 N.C. App. at 641–42, 430 S.E.2d at 493 (stating that a defendant's failure to request sentencing on the last date to which prayer for judgment is continued is "tantamount to his consent to a continuation of the sentencing hearing beyond that date."), *with Lea*, 156 N.C. App. at 181, 576 S.E.2d at 133 ("a prayer for judgment may not be continued over the defendant's objection." (citation and quotation marks omitted)); and (3) whether defendant was in fact prejudiced. Without further factual findings from the trial court on these questions, any attempt by this Court to conclusively decide whether the trial court was stripped of jurisdiction due to an "unreasonable" delay in sentencing would be based on pure speculation.

Id. at 633–34, 747 S.E.2d at 911–12. However, we never explicitly limited the scope of remand to just the jurisdictional issue.

Turning to the plain language of our mandate, we ordered a *de novo* sentencing hearing four times and concluded "the trial court's judgment must be reversed." *Watkins II* at 634, 747 S.E.2d at 912. However, we recognize that the mandate must be construed in the context of the entire opinion and reasoning underlying the remand. We acknowledge that the jurisdictional issue was the sole reason we remanded the case and that our remand order referenced jurisdiction and the *Degree* factors three of the four times we ordered resentencing. In addition, we acknowledge that defendant's jurisdictional challenge was only one of four arguments he raised on appeal and, according to our mandate, the trial court was specifically instructed to take evidence for findings on the *Degree* factors without any other explicit instruction. However, neither the language of our previous order instructing the court to take evidence on the jurisdictional issue at resentencing nor the language remanding the case for resentencing in light of *Degree* expresses any limitation on the trial court's authority to conduct a *de novo* resentencing.

Furthermore, in *Watkins II*, defendant raised three additional arguments that went unaddressed. Having concluded the issue of jurisdiction required remand for resentencing, this Court elected to "not address defendant's remaining arguments[,]" presumably assuming those arguments might be resolved on remand. If certain issues defendant raised on appeal might be cured on remand, it is judicially inefficient to decide them. *See*, *e.g.*, *State v. English*, 171 N.C. App. 277, 281, 614 S.E.2d 405, 408 (2005) ("Defendant makes two additional arguments for resentencing." . . . "However, because we remand for resentencing on other

grounds, we do not reach the merits of these arguments."); *Gouldin v. Inter-Ocean Ins. Co.*, 248 N.C. 161, 170, 102 S.E.2d 846, 852 (1958) ("Since the questions raised by the plaintiff's other assignments of error may not recur on retrial, we refrain from discussing them.").

The language of the remand order taken in context of the entire opinion, this Court's precedent of issuing general remands for resentencing and reaching only necessary issues on appeal, and the lack of instructions clearly limiting the scope of the remand all point to the conclusion that the *Watkins II* Court intended that the remand be general and that defendant be entitled to a *de novo* resentencing. Therefore, the *Watkins II* mandate, properly interpreted, required the trial court on remand to first decide the jurisdictional issue and, if found, proceed *de novo* with resentencing. Because the trial court misinterpreted our mandate, we vacate defendant's sentence and remand for a *de novo* resentencing. Because Watkins raised three other objections in his prior appeal and these issues were left undecided by this Court, he was not barred from asserting them at resentencing following the remand as well as in this appeal. Therefore, the trial court erred in refusing to consider defendant's challenges following the remand for resentencing in light of *Degree*.

On remand, the trial court is to conduct resentencing *de novo*. We do not intend to limit the scope of this remand in any respect. We emphasize for clarity that the jurisdictional issue in light of *Degree* should also be reconsidered *de novo*. If the trial court concludes it has jurisdiction, the trial court is to proceed with a *de novo* resentencing, where defendant has the right to be present and right to assert any challenges to the legality of his sentence.

IV. Conclusion

This Court's decision in *Watkins II* is properly construed as a general remand rather than a limited remand. The trial court was required to address the jurisdictional issue and, if found, conduct a *de novo* resentencing. Although our mandate reversed defendant's sentence and remanded on jurisdictional grounds alone, as well as referenced the issue of jurisdiction when ordering remand for a new sentencing hearing, it never limited the scope of remand to only the issue of jurisdiction. Because the trial court misinterpreted this Court's mandate, we vacate its 23 January 2014 order and remand for a *de novo* resentencing.

Vacated and remanded for *de novo* resentencing.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
CALVIN SHERWOOD WATTS

No. COA15-358

Filed 5 April 2016

1. Evidence—alleged prior sexual assault—prejudicial

In a prosecution for first-degree rape and first-degree sexual abuse of a child, there was prejudicial error in the admission of testimony about an alleged prior sexual assault involving defendant where there were significant differences between the incidents. The testimony was relevant only to show defendant's character or propensity to commit a sexual assault.

2. Evidence—alleged prior sexual assault—requested limiting instruction

In a prosecution for first-degree rape and first-degree sexual abuse of a child remanded on other grounds where the trial court did not give a limiting instruction upon the admission of Rule 404(b) evidence, counsel was cautioned to clearly state all requests (to avoid appellate waiver) and not to take for granted the routine nature of Rule 404 evidence and its limiting instruction.

3. Evidence—child sexual abuse expert—not a comment on credibility

In a prosecution for first-degree rape and first-degree sexual abuse of a child remanded on other grounds, there was no error, plain or otherwise, where the trial court admitted testimony from the State's expert on child sexual abuse that the victim's injuries were consistent with blunt force trauma but refused to make a more specific characterization of the injuries and acknowledged that they could have come from a number of sources. In context, it was clear that the expert was not commenting on the victim's credibility.

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

Appeal by defendant from judgments entered 31 October 2014 by Judge James Gregory Bell in Columbus County Superior Court. Heard in the Court of Appeals 8 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Laura E. Crumpler, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

McCULLOUGH, Judge.

Calvin Sherwood Watts ("defendant") appeals from judgments entered on his convictions for attempted first-degree rape and three counts of first-degree sexual offense with a child. For the following reasons, we grant defendant a new trial.

I. Background

Based on allegations of sexual abuse by an eleven-year-old girl, Sally[1], arrest warrants were issued and defendant was arrested on 27 June 2011. Search warrants were thereafter issued and executed for a search of defendant's mobile home and to obtain samples of defendant's saliva on 27 and 29 June 2011 and 6 July 2011. On 8 July 2011, a Columbus County Grand Jury indicted defendant on one count of first-degree rape in violation of N.C. Gen. Stat. § 14-27.2(a)(1)[2], three counts of first-degree sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.4(a)(1), and one count of kidnapping in violation of N.C. Gen. Stat. § 14-39.

Numerous pretrial motions and petitions filed by both sides were heard and considered by various judges prior to this case coming on for trial in Columbus County Superior Court before the Honorable James Gregory Bell on 27 October 2014.

The State's evidence at trial tended to show defendant was the grandfather of Sally's cousins, but also like a grandfather to Sally. On 25 June 2011, Sally was eleven years old. That day, she spent the afternoon playing kickball in her aunt's front yard until it began getting late.

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1. A pseudonym used by both parties to protect the identity of the juvenile.

2. Effective 1 December 2015, Chapter 14 of the General Statutes was amended and the sexual offense statutes were reorganized, renamed, and renumbered in Article 7B of Chapter 14 in order to make them more easily distinguishable from one another as recommended in *State v. Hicks*, __ N.C. App. __, 768 S.E.2d 373, *disc. rev. denied*, __ N.C. __, 772 S.E.2d 731 (2015). *See* N.C. Sess. Laws 2015-181, eff. Dec. 1, 2015. Because defendant was indicted under the prior version of the statutes, for sake of clarity, all references and cites to sexual offense statutes in this opinion refer to the version of the statutes in effect prior to 1 December 2015.

At that time, Sally asked her mother if she could go stay with defendant. After Sally's mother and defendant agreed, defendant came to pick Sally up on a moped. Sally testified that "[defendant] was supposed to bring his sister's car so we could all go but [defendant] only brought the moped and nobody else really wanted to go, so I just went."

Defendant made one stop at a friend's house on the way to defendant's residence. Sally testified that while at the friend's house, defendant sat close to her on the couch and kept putting his hand on her thigh. Sally told defendant to stop and asked defendant to take her home, but defendant did neither. When defendant's friend told them they had to leave, they rode around on the moped for a while before going to defendant's mobile home. It was dark by the time they arrived at defendant's mobile home. Sally testified that she thought defendant was drunk because defendant could hardly make it up the stairs at his friend's house and because the moped was swerving as defendant was driving.

As Sally was sitting on defendant's couch watching television that night, defendant sat down on the couch with her and began grabbing her thigh again. Sally asked defendant to stop and tried to push defendant away, but defendant did not stop. Defendant then pulled Sally to the bedroom by her arm, pushed Sally onto the bed, and began to forcibly remove Sally's clothes. Sally attempted to get up but defendant kept pushing her back down on the bed. Sally began to scream and believes that she blacked out because the next thing she remembers is waking up on the living room floor. When she woke up, defendant was on top of her with his hands around her throat. Sally began to scream and defendant told her to be quiet or he would hurt her.

Defendant then forced Sally to watch a pornographic movie and "made [her] do what was on it." Sally described fellatio and cunnilingus. Sally testified defendant then attempted to rape her but "[h]e couldn't get in." Defendant then used a beer bottle. Sally testified that "[defendant] kept sticking [the beer bottle] in [her] and [she] told him to stop, it hurt, but [defendant] didn't listen." Sally also testified that defendant "kept sticking his finger in and out[.]" Sally could not remember exactly when, but testified that at some point during the sexual abuse, they moved back to the bedroom.

Sally tried to use a phone in the bedroom to call her mother and tried to escape out of a bedroom window at different points when defendant was not in the room with her, but her attempts were unsuccessful.

The next morning, while defendant was still asleep, Sally attempted to call her mother from defendant's sister's house, which was next door

to defendant's mobile home, and then attempted to run to her aunt's house. Those attempts to get help, like her prior attempts, were unsuccessful. As Sally was attempting to flee, defendant woke up, began calling for Sally, and then grabbed Sally and took her back to his mobile home. Later that morning, after receiving a call from Sally's mother, defendant took Sally home. Sally testified that "on the way home [defendant] kept saying he was sorry, that he was drunk and he didn't mean it, he didn't know what he was doing." Defendant threatened to hurt Sally and her family if she told anyone. Because Sally was scared, she lied to defendant and told him that "[she] wouldn't tell nobody."

Yet, upon repeated questioning from her mother and aunt concerning what was wrong, Sally told her aunt what happened. Sally's aunt then told Sally's mother that defendant had hurt Sally. Sally recalled that she was then taken to the hospital, followed by the police station.

At the close of the State's evidence, defendant moved to dismiss the first-degree rape charge. The trial court granted defendant's motion, but allowed the State to proceed on the lesser-included charge of attempted first-degree rape. Defendant then moved to dismiss the first-degree sexual offense charges and the kidnapping charge. The trial court denied those motions.

Defendant called various witnesses to testify in his defense and took the witness stand to refute Sally's testimony. Defendant acknowledged that Sally and Sally's mother called him to ask if Sally could stay with him on the night in question. Defendant also testified that he agreed Sally could stay with him, picked Sally up on a moped, stopped by his friend's house, and then took Sally to his mobile home where she stayed the night. But defendant denied being drunk and denied all accusations of sexual abuse.

On 31 October 2014, the jury returned verdicts finding defendant guilty on all charges – one count of attempted first-degree rape, three counts of first-degree sexual offense, and one count of first-degree kidnapping. In judgments entered 31 October 2014, the trial court sentenced defendant to a term of 180 to 225 months imprisonment for the attempted first-degree rape conviction, consolidated the three first-degree sexual offense convictions and sentenced defendant to a consecutive term of 317 to 390 months imprisonment, and arrested judgment on defendant's conviction for first-degree kidnapping. The trial court also entered an order concerning sex offender registration and satellite-based monitoring.

Following sentencing, defendant moved to set aside the verdict and to declare a mistrial, which the trial court denied. Defendant then gave notice of appeal in open court and in writing.

II. Discussion

Defendant raises three issues on appeal: whether the trial court (1) erred by admitting Rule 404(b) testimony, (2) erred by refusing his request for an instruction on the Rule 404(b) testimony, and (3) plainly erred by allowing testimony of a nurse practitioner who examined Sally.

A. Rule 404(b) Evidence

[1] Defendant first argues the trial court erred in admitting the testimony of Mattie Buffkin over his objection. We agree.

Among the many pretrial filings, on 23 October 2014, the State filed a notice of intent to offer Rule 404(b) evidence "in order to show proof of motive, opportunity, intent, preparation, plan and knowledge[.]" In response to the State's notice, defendant filed a motion in limine and an accompanying memorandum to prevent the admission of the State's purported Rule 404(b) evidence. Specifically, defendant contended the "Rule 404(b) evidence, about a second degree rape and felonious breaking or entering which allegedly took place in 2003, [was] inadmissible in the current trial[]" because "the said crimes with which . . . defendant was charged but never tried [were] to [sic] distant in time, to dissimilar in circumstances and its introduction [was] sought for purposes not provided for in . . . Rule 404(b)." Thus, defendant argued "the evidence fails to comply with Rule 404(b) and cannot meet the balancing test required for introduction under Rule 403."

After the jury was empaneled but before opening statements were made, the trial court heard arguments on the Rule 404(b) issue. It was revealed during the hearing that Buffkin made allegations in 2003 that resulted in defendant being charged with rape and breaking and entering. Those charges, however, were dismissed in 2005. Upon hearing both sides' arguments, the trial court took the issue under advisement, indicating it would conduct a *voir dire* hearing when the witness was called.

The following afternoon, during a break in the presentation of the State's evidence, the State informed the trial court that its next witness would offer the Rule 404(b) evidence. Then, before the jury returned from break, the State called Buffkin as a witness and the trial court conducted a *voir dire* hearing.

During *voir dire*, Buffkin identified defendant and explained that she knew defendant from when she lived with defendant's sister for approximately half a year. Buffkin testified that in 2003, when she was seventeen years old, she moved out of defendant's sister's house and into an apartment with her boyfriend, whom she later married and divorced. Buffkin recalled that she was alone in the apartment on the afternoon of 19 November 2003 when she heard a knock on her door. Buffkin asked who it was and heard a voice respond "your daddy." Buffkin then proceeded to open the door, at which time defendant forced his way into the apartment. Buffkin testified that defendant grabbed her and pushed her onto the bed. With a razor knife to Buffkin's throat, defendant took Buffkin's pants off, crawled on top of her, and proceeded to rape her. Buffkin testified that she cried and told defendant to stop; but defendant threatened to kill Buffkin if she did not shut up. Buffkin also recalled that before defendant left the apartment, he threatened that he would kill her and her family if she told anybody what happened. Defendant then left. Hours later when Buffkin's boyfriend returned home from work, Buffkin told him what happened and they reported the incident to the police. Buffkin testified that she completed a rape kit at the hospital and was told by the police that they would notify her if they needed her to do anything else, but Buffkin never heard anything further about the case.

Based on the *voir dire*, the State argued Buffkin's testimony was "more probative than prejudice [sic] to show that [defendant] ha[d] a motive, means, manner, opportunity, [and] intent[.]" The State also pointed to similarities in the alleged incidents – namely that defendant finds young girls alone, takes sexual advantage of them by force, and threatens to kill the victim and the victim's family if the victim tells anyone. In response, the defense distinguished the two alleged incidents and argued the prejudicial effect of Buffkin's testimony greatly outweighed its probative value given the limited evidence of defendant's guilt in the present case.

Following a conference in chambers, the trial court denied defendant's motion in limine and allowed Buffkin to testify in front of the jury over defendant's repeated objections. Thereafter, defendant "move[d] to strike [Buffkin's testimony, which closely mirrored her *voir dire* testimony,] and ask[ed] for an instruction and in the alternative ask[ed] for a mistrial." The trial court denied defendant's motions.

Now in the first issue on appeal, defendant asserts the trial court erred in admitting Buffkins' testimony over his objections. Defendant contends the testimony was admitted in violation of N.C. Gen. Stat. § 8C-1, Rules 404(b) and 403.

The pertinent portion of Rule 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). In *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), our Supreme Court recognized that Rule 404(b)

> state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. "Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also 'is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.' "

Id. at 278-79, 389 S.E.2d at 54 (quoting *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986))). Yet, "the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). Furthermore, even if admissible under Rule 404(b), Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

In *State v. Beckelheimer*, 366 N.C. 127, 726 S.E.2d 156 (2012), our Supreme Court clarified the appropriate standard of review for a trial court's decision to admit evidence under Rule 404(b).

> Though this Court has not used the term de novo to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to

> the subsequent balancing of probative value and unfair prejudice under Rule 403. For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

Id. at 130, 726 S.E.2d at 158-59 (internal citations omitted).

In this case, the trial court did not issue an order with explicit findings and conclusion, but did explain the denial of defendant's motion in limine as follows:

> The Court will find that under 404(b) that this other act is admissible and that it shows he acted for the purpose of showing opportunity and that in both instances the defendant found a minor child alone, sexually assaulted the minor child and that in both instances the defendant, Mr. Watts, told the minor child after the assaults, that he would kill the minor child and the minor child's family.
>
> In both instances it shows that the defendant had a plan to separate the minor child in each case from the child's family or boyfriend and the defendant used force for the sexual assault and threatened to kill the minor child and family members and was an acquaintance of both.
>
> The Court also finds that the probative value in this case and this testimony outweighs any prejudicial value that the testimony might have.

Defendant now argues the evidence was not relevant for the purposes identified by the trial court – to show an opportunity or a plan. Defendant further argues that the prior alleged incident was not sufficiently similar and/or was too far removed from the alleged incident in this case to be admissible under Rule 404(b). Lastly, defendant argues Buffkin's testimony was more prejudicial than probative and the trial court abused its discretion in performing the Rule 403 analysis.

At the outset, we recognize that "North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges." *State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994). Nevertheless, we hold the court erred in admitting Buffkin's testimony under Rule 404(b) in this case.

Although the purposes listed in Rule 404(b) for which evidence of other crimes, wrongs, or acts are admissible are not exhaustive, in this case the trial court specifically identified opportunity and plan. In response to defendant's contention that Buffkin's testimony was not relevant for those purposes, the State acknowledges the trial court's ruling was "perhaps inartfully worded[,]" but asserts Buffkin's testimony was admissible for purposes of showing defendant's *modus operandi*, motive, intent, and state of mind. We address the purposes identified by the trial court below in admitting the testimony into the evidence at trial.

We first hold the trial court erred in determining Buffkin's testimony was relevant to show opportunity. In *State v. McAbee*, 120 N.C. App. 674, 463 S.E.2d 281, (1995), *disc. rev. denied*, 342 N.C. 662, 467 S.E.2d 730 (1996), a defendant convicted of murdering his girlfriend's four-month old daughter by shaking challenged the admission of testimony concerning his unemployment on the basis that the testimony was character evidence admitted in violation of Rule 404. *Id.* at 680, 463 S.E.2d at 284. Although this Court held the defendant waived his earlier objection to the testimony when similar evidence was later admitted without objection, *id.* at 680, 463 S.E.2d at 285, this Court additionally noted the evidence of defendant's unemployment "was not character evidence used for the purpose of proving that [the] defendant acted in conformity therewith." *Id.* at 681, 463 S.E.2d at 285. This Court explained that the evidence "helped demonstrate access and opportunity for defendant to have committed the crime because he was frequently at home with the child." *Id.* Thus, the evidence in *McAbee* was proper under Rule 404(b). In contrast to *McAbee*, in the present case, there is no reasonable possibility that Buffkin's testimony concerning an alleged sexual assault eight years prior was relevant to show defendant's opportunity to commit the crimes now charged.

Concerning the trial court's determination that Buffkin's testimony was relevant to show defendant had a plan, it is clear from the trial court's explanation that the trial court was referring to defendant's use of a common plan, scheme, or, as the State suggests, a *modus operandi*. This Court has long recognized and routinely held that evidence of prior sexual misconduct is admissible to show a common plan or scheme. *See Jacob*, 113 N.C. App. 605, 439 S.E.2d 812, *Beckelheimer*, 366 N.C.

127, 726 S.E.2d 156. Yet, as with all Rule 404(b) evidence, "[i]n order to be admissible, evidence of prior sexual misconduct admitted to show a common plan or scheme must be sufficiently similar in nature and not too remote in time." *Jacob*, 113 N.C. App. at 610, 439 S.E.2d at 815; *see also Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123 ("[T]he rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity.").

In *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), our Supreme Court explained that

> [u]nder Rule 404(b) a prior act or crime is "similar" if there are some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both. However, it is not necessary that the similarities between the two situations rise to the level of the unique and bizarre.

Id. at 304, 406 S.E.2d at 890-91 (internal quotation marks, citations, and emphasis omitted). "Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered[,]" *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635, *disc. rev. denied and appeal dismissed*, 353 N.C. 269, 546 S.E.2d 114 (2000), and "generally goes to the weight of the evidence not its admissibility." *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907, *disc. rev. denied and appeal dismissed*, 360 N.C. 653, 637 S.E.2d 192 (2006).

On appeal of convictions for attempted robbery with a dangerous weapon and felony murder in *Al-Bayyinah*, *supra*, the defendant challenged the trial court's admission of testimony concerning two robberies which occurred approximately one month prior to the attempted robbery for which the defendant was on trial. In reviewing the admission of the testimony under Rule 404(b), our Supreme Court granted the defendant a new trial explaining as follows:

> Assuming, without deciding, that defendant committed the [prior] robberies, substantial evidence of similarity among the prior bad acts and the crimes charged is nonetheless lacking. The details of the [prior] robberies were generic to the act of robbery: The robber wore dark, nondescript clothing that obscured his face; carried a weapon; demanded money; and fled upon receiving it. . . .
>
> . . . .

> In essence, [the witness'] testimony described robberies that were factually dissimilar to the robbery and murder charged in the instant case. The [S]tate offered evidence showing that [the witness] was robbed and that defendant may have committed the offenses. The [S]tate failed to show, however, that sufficient similarities existed between the [prior] robberies and the present robbery and murder beyond those characteristics inherent to most armed robberies, i.e., use of a weapon, a demand for money, immediate flight.

Al–Bayyinah, 356 N.C. at 155, 567 S.E.2d at 123.

In this case, the trial court noted the following similarities in its explanation as to why it denied defendant's motion in limine: both instances involved the sexual assault of minors, the minors were alone at the time of the assaults, defendant was an acquaintance of the minors, defendant used force, and defendant threatened to kill each minor and the minors' families. Like our Supreme Court in *Al-Bayyinah*, we do not find these similarities unusual to the crimes charged. Moreover, we think the trial court's broad labelling of the similarities disguises significant differences in the sexual assaults.

First, Sally was eleven years old at the time of the alleged sexual assault in this case. In comparison, Buffkin was seventeen when she was allegedly sexually assaulted by defendant. Although both were minors in that they were under the age of eighteen, they were not that close in age. What is more, defendant was charged in the present case with first-degree rape and first-degree sexual offense with a child, both offenses that require that the victim be under the age of thirteen. *See* N.C. Gen. Stat. §§ 14-27.2(a)(1) and 14-27.4(a)(1). It is clear from those statutes concerning the sexual offenses charged in this case, *see also* N.C. Gen. Stat. § 14-27.7A (defining statutory rape of a person 13, 14, or 15 years old), that the law delineates differences in sexual offenses based on the age of a victim. It is also clear that Buffkin, at age seventeen at the time of the alleged sexual assault, was not within the same age range as Sally for the purposes of defining sexual offenses.

Second, while both Sally and Buffkin were alone at the time of the alleged sexual assaults, the circumstances were very different. Sally had requested to stay with defendant and was picked up and taken to defendant's mobile home with the consent of Sally's mother. Sally was then allegedly sexually assaulted by defendant while alone with defendant in the mobile home. Buffkin, on the other hand, shared an apartment

with her boyfriend. At the time Buffkin was allegedly sexually assaulted, Buffkin's boyfriend was at work, and Buffkin was alone in the apartment when defendant purportedly gained access into the apartment by trickery and force and then raped her.

Third, the relationships between defendant and the victims were dissimilar. Sally testified that defendant was the grandfather to her cousins and was like a grandfather to her. In contrast, Buffkin knew defendant from when she lived with Buffkin's sister, but there was no evidence of a close relationship.

Lastly, the trial court indicated that force was a common element in both alleged instances of sexual assault. The evidence in both instances was that defendant forced the victims to a bed at some point in each assault. However, Buffkin testified that defendant held a razor knife to her throat throughout the incident. While Sally did testify that defendant had his hands around her throat at one point, there is no evidence that a weapon was used in the present case.

Comparing the alleged prior sexual assault to the alleged sexual assault for which defendant is now on trial, we hold the above differences are significant and undermine the findings of similarity by the trial court. As a result of the lack of similarity, or the lack of adequate findings by the trial court to support a finding of similarity and proper purpose, we must further hold the trial court erred by admitting Buffkin's testimony under Rule 404(b) in the instant case. It appears Buffkin's testimony was relevant only to show defendant's character or propensity to commit a sexual assault. Additionally, because the trial court erred in finding Buffkin's testimony relevant for a valid purpose under Rule 404(b), the trial court could not have conducted a proper 403 analysis. Because there was a lack of physical evidence of defendant's guilt and the State's case was based largely on credibility, we cannot conclude the admission of Buffkin's testimony was harmless. Thus, defendant is entitled to a new trial.

Although this holding disposes of this case on appeal, we briefly address the remaining two issues because there is a chance they will recur.

B. Rule 404(b) Instruction

[2] Adding to the prejudicial nature of Buffkin's testimony is the fact that the trial court did not instruct the jury to consider the evidence for only those purposes under Rule 404(b) for which the trial court determined the evidence was relevant. In the second issue raised by defendant on appeal, defendant contends the trial court's refusal to issue such an instruction was error.

N.C. Gen. Stat. § 8C-1, Rule 105 provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." N.C. Gen. Stat. § 8C-1, Rule 105 (2015). Specifically in regards to Rule 404(b) evidence, this Court has stated that "[i]f . . . the trial court concludes that the 'other crimes, wrongs, or acts' evidence is admissible, the court must, upon request, instruct the jury that the evidence is to be considered only for the purposes for which it was admitted." *State v. Haskins*, 104 N.C. App. 675, 680, 411 S.E.2d 376, 381 (1991) (citing N.C. Gen. Stat. § 8C-1, Rule 105)).

The State does not dispute that the issuance of a limiting instruction would have been proper upon a request by defendant. Instead the State acknowledges "the almost routine nature of [Rule] 404(b) evidence and its accompanying limiting instruction" and asserts that "it seems inconceivable the trial judge would have denied such a request." Thus, the State contends the trial court likely misunderstood defendant's request for an instruction and it was defendant's error not to reiterate or repeat his request. The State then identifies various times defendant could have requested an instruction and argues that "[g]iven the failure . . . of [d]efendant to truly bring his request to the attention of the trial court, not withstanding [sic] countless opportunities to do so . . ., [defendant] should be deemed to have waived this argument."

As noted above, following Buffkin's testimony, defendant "move[d] to strike the testimony of the last witness and ask[ed] for an instruction and in the alternative ask[ed] for a mistrial." The trial court denied those requests.

Because defendant is entitled to a new trial based on the admission of Buffkin's testimony under Rule 404(b), we need not decide whether defendant's request "for an instruction" was clear from the context in which it was made. Instead, we caution defense counsel not to take the admittedly "almost routine nature of Rule 404(b) evidence and its accompanying limiting instruction" for granted and we emphasize that defense counsel should clearly state all requests in order to avoid conjecture and the potential waiver of the issue on appeal. *See* N.C. R. App. P. 10(a)(1) (2016) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

C. Vouching for the Victim

[3] In defendants' last issue on appeal, defendant contends the trial court erred in allowing expert witness Diane Guida to vouch for Sally's credibility when she opined that Sally's "disclosure support[ed] the physical findings."

Defendant did not object to the challenged testimony at trial. Consequently, this Court's review is limited to plain error, which defendant asserts. *See* N.C. R. App. P. 10(a)(4) (2016) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice-that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

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

"Our case law has long held that a witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd.*, 363 N.C. 826, 689 S.E.2d 858–59 (2010). Thus, "testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988).

Upon review of Guida's testimony in this case, it is clear that Guida did not vouch for Sally's credibility. Moreover, even if the wording of a single response by Guida pushed the bounds of impropriety, it did not amount to plain error.

As noted above, the challenged testimony in this case was that of Guida, a retired family nurse practitioner and former registered child medical examiner who worked at the Carousel Center, a child advocacy center in Wilmington. Guida was tendered by the State as an expert in child sexual abuse and the trial court accepted her as an expert.

Guida testified that she interviewed and examined Sally at the Carousel Center on 28 June 2011. Concerning the results of the physical examination, Guida testified "[she] found that [Sally] had diffusely bruised and swollen area at the base of her hymen and she also had a deep notch . . . ." While reproducing a diagram from her report on a blackboard in the courtroom, Guida further explained her findings and opined that the bruising and swelling were "consistent with blunt force trauma." Guida later reiterated her opinion that Sally's injuries were the result of blunt force trauma and testified during the defenses' cross-examination that her findings were consistent with blunt force trauma. Guida, however, agreed that blunt force trauma could come from a number of sources. On redirect, the State then asked Guida, "In your medical exam is what [Sally] told you consistent with the physical trauma that you found?" Guida responded, "In my opinion, yes, ma'am, [Sally's] disclosure supports the physical findings."

Although defendant concedes Guida's testimony that the findings from Sally's physical examination "[were] consistent with blunt force trauma" was permissible, defendant contends Guida's testimony that "[Sally's] disclosure supports the physical findings" improperly vouched for Sally's credibility in violation of Rules 405(a) and 608(a) and amounts to plain error. We disagree.

As described in detail above, Guida testified on various occasions that her findings were consistent with blunt force trauma. Guida, however, refused to make a more specific characterization of Sally's injuries and acknowledged that the blunt force trauma could have come from a number of sources. When Guida's statement that "[Sally's] disclosure supports the physical findings[]" is viewed in the context of the entirety of her testimony and in response to the question she was asked, it is clear Guida was not commenting on the believability or credibility of Sally's disclosure. Guida's statement is more accurately construed as an opinion that Sally's disclosure was not inconsistent with the physical findings or impossible given the physical findings. This testimony was not error and certainly does not amount to plain error.

III. Conclusion

Because the trial court erred in admitting evidence of a prior sexual assault by defendant pursuant to Rule 404(b), defendant is entitled to a new trial.

NEW TRIAL.

Judge DIETZ concurs.

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

TYSON, Judge, concurring in part, dissenting in part.

I concur with the majority's holding that the trial court did not err by allowing Guida's testimony about her interview with and examination of Sally. I respectfully dissent from the majority's conclusion to find prejudicial error to warrant and award a new trial in the admission of Mattie Buffkin's testimony.

Buffkin's testimony was properly admitted under the North Carolina Rules of Evidence, Rule 404(b). *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (holding Rule 404(b) is a rule of inclusion). Defendant has failed to show or argue unfair prejudice under Rule 403. *State v. Lanier*, 165 N.C. App. 337, 345, 598 S.E.2d 596, 602 (2004) (citation and internal quotation marks omitted) ("In each case, the burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted."). I find no error in the trial court's admission of Buffkin's testimony under Rule 404(b) to show opportunity, motive, and intent. I respectfully dissent from the majority's award of a new trial.

I. Standard of Review

Our Supreme Court held:

> [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

II. Analysis

A. Rule 404(b)

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). However, evidence of a defendant's prior crimes, statements, actions, and conduct is admissible, if relevant to any fact or issue other than the defendant's propensity for criminal conduct. *Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 159.

> Rule 404(b) provides that evidence of prior similar acts is properly admissible so long as it is used to prove something other than the defendant's propensity or disposition to engage in like conduct. The one exception to that general rule of admissibility applies when the *only* probative value of the evidence is to show the defendant's propensity or disposition to commit offenses of the type charged.

State v. Stager, 329 N.C. 278, 310, 406 S.E.2d 876, 894 (1991) (emphasis in original) (citation omitted).

Rule 404(b) is a rule of inclusion, not exclusion. *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

> The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue [at trial] . . . .

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159 (internal citations and quotation marks omitted).

The majority's opinion holds the trial court erroneously admitted Buffkin's testimony because of "significant differences" between the sexual assaults against Buffkin and Sally. The majority's opinion avers the two victims "were not that close in age[,]" and notes the different circumstances surrounding each victim being alone at the time of the sexual assault, and the different relationship between defendant and each victim. These slight variances do not rise to a level of sufficient dissimilarity so as to render Buffkin's testimony inadmissible under Rule 404(b) and to award a new trial to defendant.

"Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not require that the similarities rise to the level of the unique and bizarre." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citations and internal quotation marks omitted). In *Beckelheimer*, our Supreme Court noted:

> The trial court found that the age range of the 404(b) witness was close to the age range of the alleged victim, a finding supported by the evidence[.] . . . The trial court found similarities in the location of the occurrence, a finding also supported by the evidence[.] . . . Finally, the trial court found similarities in how the occurrences were brought about, a finding supported by the evidence[.] . . . We conclude that these similarities are sufficient to support the State's theory of modus operandi in this case.

Id. (internal quotation marks omitted).

In reversing this Court's decision, the *Beckelheimer* Court observed:

> Instead of reviewing these similarities noted by the trial court, the Court of Appeals focused on the differences between the incidents and determined they were significant. . . .
>
> . . . The Court of Appeals' analysis seems to require circumstances to be all but identical for evidence to be admissible under Rule 404(b). Our case law is clear that near identical circumstances are not required; rather, the incidents need only share "some unusual facts" that go to a purpose other than propensity for the evidence to be admissible.

Id. at 131-32, 726 S.E.2d at 159-160 (citations omitted).

Here, the trial court denied defendant's motion *in limine* and ruled Buffkin's testimony was admissible under Rule 404(b). The trial court determined this evidence was admissible for the purpose of showing opportunity and plan. The trial court based its ruling on the following findings:

> [I]n both instances the defendant found a minor child alone, sexually assaulted the minor child and that in both instances the defendant, Mr. Watts, told the minor child after the assaults, that he would kill the minor child and the minor child's family.

> In both instances, it shows that the defendant had a plan to separate the minor child in each case from the child's family or boyfriend and the defendant used force for the sexual assault and . . . was an acquaintance of both.

The majority's opinion asserts the trial court's "broad labeling of the similarities disguises significant differences in the sexual assaults." I disagree. The majority's analysis suffers from the same error for which our Supreme Court criticized and reversed this Court in *Beckelheimer*, 366 N.C. at 131-32, 726 S.E.2d at 159-60 (citations omitted). The trial court's factual findings regarding the substantial similarities between the two sexual assaults are more than sufficient to determine Buffkin's testimony supported a permissible purpose for admission under Rule 404(b), and to admit this testimony into evidence.

In both cases, defendant was acquainted with the victims, and presented himself to them as a paternal figure. Sally testified defendant was "like a grandfather" to her. Buffkin testified when defendant knocked on her door the night of the sexual assault, she asked who it was and defendant replied, "It's your daddy." In both cases, defendant sought and created opportunities to allow him to take advantage of the victim's trust in order to get her alone with him before committing the sexual assault.

The majority's opinion notes the difference in the victims' ages, as it pertains to chargeable sexual offenses under our General Statutes. I do not find this distinction to be meaningful. Both victims were minors under the age of eighteen.

Defendant also used force in both sexual assaults, specifically targeting the victim's neck. Both victims repeatedly told defendant to stop, resisted, and tried to escape from him. Defendant also threatened to kill both victims and members of their family if they told anyone about the sexual assault. The two sexual assaults were sufficiently similar to admit Buffkin's testimony into evidence under Rule 404(b) to show defendant's *modus operandi*.

Defendant also argues the prior alleged incident was too far removed in time from the incident at bar to be admissible under Rule 404(b). Our Supreme Court has held "remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Stager*, 329 N.C. at 307, 406 S.E.2d at 893 (citation omitted). *See also State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986) ("It is reasonable to think that a criminal who has

adopted a particular *modus operandi* will continue to use it notwithstanding a long lapse of time between crimes."). The lapse of approximately seven-and-one-half years between the two sexual assaults does not make Buffkin's testimony inadmissible. It was for the jury to determine what weight, if any, her testimony is to be given.

B. Rule 403 – Unfair Prejudice

The trial court's admission of Buffkin's testimony also did not violate Rule 403. "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citation omitted). The trial court determined the probative value of this evidence was not substantially outweighed by any prejudicial effect the admission of this evidence would have on defendant. Defendant failed to set out any arguments in his brief regarding the trial court's Rule 403 determination. It is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal. N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

The trial court admitted into evidence Buffkin's testimony for a permissible purpose under Rule 404(b). Defendant does not challenge this evidence under Rule 403 and has failed to establish the admission of this evidence was prejudicial error.

III. Conclusion

Defendant received a fair trial free from prejudicial errors he preserved and argued. Under the standard of review for the error argued, I vote to find no error in the jury's verdict and the judgment entered thereon. I respectfully dissent.

STOKES v. CRUMPTON

[246 N.C. App. 757 (2016)]

THOMAS A. STOKES, III, PLAINTIFF
v.
CATHERINE C. CRUMPTON (FORMERLY STOKES), DEFENDANT

No. COA14-1344

Filed 5 April 2016

Appeal and Error—interlocutory order—post-award discovery

Where plaintiff appealed from an order denying his motions seeking post-award discovery in an action resolved by voluntary arbitration under the Family Law Arbitration Act, the Court of Appeals dismissed plaintiff's appeal because he failed to demonstrate that the interlocutory order deprived him of a substantial right that would be jeopardized without review prior to a final determination on the merits of his motion to vacate the arbitration award and set aside the trial court's order confirming the arbitration award.

Judge CALABRIA dissenting.

Appeal by Plaintiff from order entered on 7 August 2014 by Judge Anna E. Worley in District Court, Wake County. Heard in the Court of Appeals on 22 April 2015.

Shanahan Law Group, PLLC, by Kieran J. Shanahan, Christopher S. Battles, and Kenzie M. Rakes, for Plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, K. Edward Greene, and Robert A. Ponton, Jr., for Defendant-appellee.

STROUD, Judge.

Thomas A. Stokes, III ("Plaintiff") appeals from an order denying Plaintiff's motions seeking post-award discovery in an action resolved by voluntary arbitration under the Family Law Arbitration Act. We dismiss Plaintiff's appeal because Plaintiff has not demonstrated that this interlocutory order deprives him of a substantial right which will be jeopardized without review prior to a final determination on the merits of his motion to vacate the arbitration award and set aside the trial court's order confirming the arbitration award.

I. Background

Plaintiff and Catherine C. Crumpton ("Defendant") were married in June 1989 and separated in April 2011. Plaintiff filed an action in July 2011 seeking equitable distribution of the parties' marital assets and child support. Plaintiff and Defendant entered into a written agreement on 13 July 2011 to resolve the action through arbitration under North Carolina's Family Law Arbitration Act ("the arbitration agreement"). The trial court entered a Consent Order to Arbitrate Equitable Distribution and Child Support on 18 August 2011.

The arbitration agreement outlined the scope of pre-arbitration discovery. Plaintiff, through counsel, deposed Defendant as part of this pre-arbitration discovery. During Defendant's deposition, Defendant testified she was the C.E.O. and majority shareholder of Drug Safety Alliance, Inc. ("DSA"), a company that managed adverse event reporting for pharmaceutical, biotech, animal health, and over-the-counter dietary supplement companies. Defendant testified she had "no intention of selling" DSA at that time, although many people had contacted her who were interested in purchasing DSA. Defendant also testified she had commissioned an appraisal of DSA, which valued the company at less than $3,500,000.00. There appears to be no dispute that Defendant's interest in DSA was a marital asset.

Plaintiff and Defendant entered into an Equitable Distribution Arbitration Award by Consent on 18 May 2012 ("the equitable distribution agreement"). The equitable distribution agreement provided, in part, that Defendant would pay Plaintiff $1,000,000.00 in a lump sum and then $650,000.00 over six years with interest. Moreover, in the event that Defendant sold her ownership interest in DSA, the entire balance owed to Plaintiff would become due. The trial court entered an Order and Judgment Confirming Equitable Distribution Arbitration Award by Consent on 18 May 2012.

Plaintiff filed a Verified Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery on 26 November 2012. In the motion, Plaintiff alleged that "Defendant signed a Letter of Intent on [5 July] 2012 to sell [all] of the shares of DSA" to another company and that DSA was sold in August 2012 for $28,000,000.00. Plaintiff also alleged that Defendant was planning on selling DSA for this large sum during arbitration and that she fraudulently induced Plaintiff to accept a distribution of only $1,650,000.00 based on her prior representations about the company. Plaintiff and Defendant then filed a number of competing motions to compel discovery and motions for protective orders

from discovery, respectively. In an order entered on 7 August 2014 ("the order"), the trial court concluded:

> 1. There is no pending action between Plaintiff and Defendant in which discovery may be propounded.[1]
>
> 2. Plaintiff's Verified Motion to Vacate Arbitration Award is not a claim within which discovery may be conducted. Plaintiff's [request for] written discovery is therefore inappropriate.
>
> 3. All of Plaintiff's Motions to Compel [Discovery] . . . should be denied.

Plaintiff appeals.

II. Interlocutory Appeal

Plaintiff appeals from the order of the trial court denying his motions seeking post-award discovery. The order does not rule on Plaintiff's motion to vacate the arbitration award. Accordingly, Plaintiff concedes that the order is interlocutory. *See Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.") (citation omitted). Interlocutory orders are generally not immediately appealable. *Id.*, 676 S.E.2d at 103.

> Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment [pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013)] that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent

1. The dissent states that the trial court erred in concluding that "[t]here is no pending action between Plaintiff and Defendant in which discovery may be propounded" because Plaintiff's motion to vacate is pending. It is correct that Plaintiff's *motion* to vacate was pending, but the trial court concluded, and we agree, that the *action*—the arbitration of the parties' equitable distribution action—had concluded, and the pending motion was "not a claim within which discovery may be conducted." The parties had already conducted discovery during the arbitration, which was governed by the arbitration agreement and N.C. Gen. Stat. § 50-49 (2011).

> a review prior to a final determination on the merits [pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2015) and N.C. Gen. Stat. § 1-277(a) (2015)]. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Id., 676 S.E.2d at 103 (citation omitted). The trial court did not certify this order as immediately appealable under Rule 54(b). On appeal, Plaintiff argues only that this Court should review his appeal because the order of the trial court "affect[ed] a substantial right."

As a preliminary matter, for actions litigated under the Family Law Arbitration Act ("FLAA"), N.C. Gen. Stat. § 50-60(a) (2015) provides that

> An appeal may be based on failure to comply with the procedural aspects of this Article. An appeal may be taken from any of the following:
>
> (1) An order denying an application to compel arbitration made under G.S. 50-43;
>
> (2) An order granting an application to stay arbitration made under G.S. 50-43(b);
>
> (3) An order confirming or denying confirmation of an award;
>
> (4) An order modifying or correcting an award;
>
> (5) An order vacating an award without directing a rehearing; or
>
> (6) A judgment entered pursuant to provisions of this Article.

Cf. Bullard, 196 N.C. App. at 638, 676 S.E.2d at 103 (noting similar limitations under N.C. Gen. Stat. § 1-569.28(a) (2005), which defines the appeals that may be taken in actions litigated under the Revised Uniform Arbitration Act ("RUAA")). Plaintiff does not identify any way in which the order on appeal raises any issue of a "failure to comply with the procedural aspects of" Chapter 50, Article 3, nor is it one of the rulings specifically listed under N.C. Gen. Stat. § 50-60(a). *See* N.C. Gen. Stat. § 50-60(a).

It would seem logically inconsistent that an order, which itself is non-appealable under the substantive statute that governs appeals of

such orders could be made appealable under another statute merely because it is interlocutory. The dissent cites *Bullard* for the proposition that "even when a specific order is not listed as one of the types of appeals permitted under the FLAA, an appeal of an interlocutory order may still be permitted if an appellant can demonstrate that absent immediate review, he would be deprived of a substantial right." *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103. But in *Bullard*, this Court held that "the list enumerated in N.C. Gen. Stat. § 1-569.28(a) includes the *only* possible routes for appeal under the Revised Uniform Arbitration Act":

> Therefore, we conclude that the list enumerated in N.C. Gen. Stat. § 1-569.28(a) includes the *only* possible routes for appeal under the Revised Uniform Arbitration Act. Furthermore, the statute reads that "an appeal *may* be taken . . . ." *See* N.C. Gen. Stat. § 1-569.28(a) (emphasis added). "Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (citations omitted). Thus, the orders and judgment enumerated in N.C. Gen. Stat. § 1-569.28(a) are the only situations where an appeal could possibly be taken under the RUAA, though one is not required. [*See New Hanover Child Support Enforcement v. Rains*, 193 N.C. App. 208, 212, 666 S.E.2d 800, 803 (2008)]; *In re Hardy* at 97, 240 S.E.2d at 372.

Id. at 635, 676 S.E.2d at 102 (emphasis added, citation and brackets omitted, and ellipsis in original).

The statutory language of the FLAA and the RUAA are substantively very similar and we interpret both the same way. *See* N.C. Gen. Stat. §§ 1-569.28(a), 50-60(a) (2015). In *Bullard*, we engaged in a substantial right analysis *only after* we had determined that the appellant had appealed "from an order which has *both* currently appealable and non-appealable issues" under the RUAA. *Id.* at 637, 676 S.E.2d at 103 (emphasis added). The other two cases on which the dissent relies also do not support the dissent's position. *See The Bluffs v. Wysocki*, 68 N.C. App. 284, 285-86, 314 S.E.2d 291, 292-93 (1984); *Laws v. Horizon Housing Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696-97 (2000).

We also disagree with the dissent's statement that N.C. Gen. Stat. § 50-60(a)(6) is a "catch-all" provision. Subsection (6) refers to "[a] judgment entered pursuant to provisions of this Article." N.C. Gen. Stat. § 50-60(a)(6). The dissent emphasizes that the RUAA refers to

"[a] *final* judgment entered pursuant to this Article." *See* N.C. Gen. Stat. § 1-569.28(a)(6) (emphasis added). The dissent argues that the absence of the word "final" in N.C. Gen. Stat. § 50-60(a)(6) indicates that a party can appeal any order so long as it affects a substantial right. But this slight difference in language is immaterial in this case. The order on appeal is neither a "judgment" nor final. Although the terms "order" and "judgment" are sometimes used interchangeably, the term "judgment" normally refers to a court's final ruling. *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103 ("A *final judgment* is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An *interlocutory order* is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.") (emphasis added).

In addition, the language, "[a] judgment entered *pursuant to provisions of this Article*[,]" suggests that we construe the term "judgment" *in pari materia* and identify other uses of the term "judgment" in the FLAA. *See* N.C. Gen. Stat. § 50-60(a)(6) (emphasis added). Only two other provisions in the FLAA use the term "judgment": N.C. Gen. Stat. § 50-57 (2015), which is entitled "Orders or judgments on award" and N.C. Gen. Stat. § 50-59 (2015). N.C. Gen. Stat. § 50-57 provides in pertinent part: "Upon granting an order confirming, modifying, or correcting an award, an order or judgment shall be entered in conformity with the order and docketed and enforced as any other order or judgment." N.C. Gen. Stat. § 50-57(a). N.C. Gen. Stat. § 50-59 provides in pertinent part that "[m]aking an agreement . . . confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award under the agreement." N.C. Gen. Stat. § 50-59(a). In both instances, "judgment" refers to a court's final ruling after confirmation, modification, or correction of the arbitration award. Accordingly, a "judgment entered pursuant to provisions of this Article" is a final judgment, similar to the RUAA's provision in N.C. Gen. Stat. § 1-569.28(a)(6). *See* N.C. Gen. Stat. § 50-60(a). The interlocutory order on appeal here is not a judgment.

Despite the clear language of the FLAA, Plaintiff seeks to rely upon N.C. Gen. Stat. § 7A-27(b)(3)(a) which provides that an "appeal lies of right directly to the Court of Appeals . . . . [f]rom *any* interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . . [a]ffects a substantial right." (Emphasis added.) Plaintiff argues that "an appellant may appeal <u>either</u> under N.C. Gen. Stat. § 50-60, if the type of order is specifically listed, <u>or</u> under

N.C. Gen. Stat. § 7A-27(b)(3)(a), if the order affects a substantial right." Even assuming, without deciding, that Plaintiff may seek to have the order reviewed under N.C. Gen. Stat. § 7A-27(b)(3)(a), Plaintiff has failed to demonstrate that he would be deprived of a substantial right without appellate review of the order before a final judgment has been entered.

Generally, the interlocutory denial of a motion to compel discovery "affect[s] a substantial right and is appealable" only when

> the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case[.]

Dworsky v. Insurance Co., 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980). In addition, "orders regarding discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Id.* at 448, 271 S.E.2d at 523.

Plaintiff contends that his "discovery requests [sought] 'highly material' information to help Plaintiff establish . . . that the arbitration award was procured by a multi-million dollar fraud[,]" and that the order denying him post-award discovery "foreclose[d] Plaintiff's ability to meaningfully prosecute" his motion to vacate the arbitration award. (Portion of original in caps.) In support of this contention, Plaintiff directs this Court to *Fashion Exhibitors* and *William C. Vick Construction Co.*, both of which stand for the proposition that "parties to [an] arbitration may depose the *arbitrators* relative to [their alleged] misconduct[] and that such depositions are admissible in a proceeding [arising from a motion] to vacate an award[,]" but only when "an objective basis exists for a reasonable belief" that the arbitrators engaged in misconduct during arbitration. *See Fashion Exhibitors v. Gunter*, 291 N.C. 208, 219, 230 S.E.2d 380, 388 (1976) (emphasis added); *William C. Vick Construction Co. v. N.C. Farm Bureau Federation*, 123 N.C. App. 97, 102, 472 S.E.2d 346, 349, *disc. review denied*, 344 N.C. 739, 478 S.E.2d 14 (1996). Without addressing whether the holdings in *Fashion Exhibitors* and *William C. Vick Construction Co.* might extend to allow post-award discovery in cases where one of the *parties* to the arbitration allegedly engaged in misconduct, we believe these cases are distinguishable from this case.

Specifically, the parties who lost at arbitration in *Fashion Exhibitors* and *William C. Vick Construction Co.* identified specific, "objective"

evidence of misconduct *prior* to seeking post-award discovery as part of a motion to vacate an arbitration award. *Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388; *William C. Vick Construction Co.*, 123 N.C. App. at 99, 472 S.E.2d at 347. In *Fashion Exhibitors*, the parties were engaged in a commercial property lease dispute. *Fashion Exhibitors*, 291 N.C. at 209, 230 S.E.2d at 382. After the litigants were notified of the arbitrators' final decision, the losing parties noticed there was an "obvious [mathematical] inconsistency [between] the award [and] the evidence presented *at the hearing*." *Id.* at 219, 230 S.E.2d at 388 (emphasis added). They deposed the arbitrators and confirmed that the inconsistency occurred because the arbitrators had conducted their own investigation into the matter before them. *See id.*, 230 S.E.2d at 388. In *William C. Vick Construction Co.*, the losing party learned, after an arbitration award had been entered, that the arbitrator "had been indicted for racketeering, mail fraud, bank fraud, and impeding the function of a United States government agency" and also that the arbitrator had "undisclosed relationships" with counsel for the other party in the arbitration. *William C. Vick Construction Co.*, 123 N.C. App. at 99, 472 S.E.2d at 347. A subsequent deposition of the arbitrator confirmed that the arbitrator had "significant business relationships and friendships" with counsel for the other party. *Id.* at 101-02, 472 S.E.2d at 348-49.

Here, Plaintiff and Defendant entered into the equitable distribution agreement in May 2012, in which Plaintiff agreed, in part, to a cash distribution of approximately $1,650,000.00. Prior to entering into this agreement, Defendant had DSA appraised for less than $3,500,000.00 and represented that she did not have specific plans to sell DSA. Less than two months after the award was entered, Defendant allegedly signed a letter of intent to sell DSA, and DSA was then sold for $28,000,000.00 a month after that. Although Plaintiff finds this sequence of events suspicious, he has not directed this Court to any specific, "objective" evidence of misconduct by Defendant that would necessitate post-award discovery. *See id.* at 102, 472 S.E.2d at 349; *Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388. In essence, Plaintiff believes that he "smells smoke," and he wants the courts to help him see if there is a fire. This is exactly the kind of "fishing expedition" expressly prohibited by *Fashion Exhibitors*. *See Fashion Exhibitors*, 291 N.C. at 216, 230 S.E.2d at 386 ("The requirement of an objective basis of misconduct . . . reflects the court's concern that 'fishing expeditions' might be encouraged without the objective evidence requirement.") (citation omitted).

Moreover, even if Plaintiff were properly positioned to engage in post-award discovery, Plaintiff has not articulated in his brief how he

would be prejudiced by waiting until *after* the trial court entered a final judgment to appeal the trial court's conclusion of law that his motion to vacate the arbitration award was "not a claim within which discovery may be conducted." *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103 ("[An] order deprives the appellant of a substantial right [when that right] would be jeopardized absent a review prior to a final determination on the merits.") (citation omitted). Accordingly, Plaintiff's interlocutory appeal is dismissed.

Although we dismiss the appeal as interlocutory, we stress that this opinion should not be construed as having any effect whatsoever upon the merits of Plaintiff's motion to vacate, which has yet to be decided by the trial court. The dissent appears to address the merits of the underlying motion to vacate by its extensive discussion of the evidence and in expressing concern that "[u]ntil plaintiff is permitted the ability to engage in the limited discovery he requests, plaintiff will not be able to establish the grounds that the award was procured by corruption, fraud, or other undue means to support vacating the award." (Citation and quotation marks omitted.) The trial court's ruling upon the discovery motion was discretionary, and even if another judge may have ruled differently, we find no abuse of discretion. On the substantive issues raised by Plaintiff's motion to vacate, we express no opinion since it is still pending and is not before us on appeal.

DISMISSED.

Judge TYSON concurs.

Judge CALABRIA dissents.

CALABRIA, Judge, dissenting.

Although the majority correctly cites *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980) regarding the substantial right justifying immediate appeal of an interlocutory order denying discovery, I do not believe the majority correctly applies the law to the facts of this case. Plaintiff has demonstrated he would be deprived of the substantial right contemplated by *Dworsky* sufficient to justify immediate review. Alternatively, I would allow plaintiff's petition for a *writ of certiorari* to address his appeal on the merits. Either way, the trial court erred by concluding there is no pending action within which discovery may be

propounded and abused its discretion by denying plaintiff's limited discovery requests. The trial court's ruling should be reversed and this case should be remanded. For these reasons, I respectfully dissent.

I. The Order's Appealability

The majority correctly states that pursuant to the Family Law Arbitration Act ("FLAA"), there is no statutory right to appeal from an order or judgment denying discovery, *see* N.C. Gen. Stat. § 50-60(a) (2015), and that a common canon of statutory construction is that statutes of general application yield to statutes of more specific application. However, the catch-all language of FLAA's subsection (a)(6) provides plaintiff a route to appeal this interlocutory order. *See* N.C. Gen. Stat. § 50-60(a)(6) (permitting appeal from "[a] judgment entered pursuant to provisions of this Article"). Notably absent from that provision is the requirement under the North Carolina Revised Uniform Arbitration Act ("RUAA") that this be a "final" judgment. *See* N.C. Gen. Stat. § 1-569.28(a)(6) (2015). Although the majority acknowledges that "order" and "judgment" are often used interchangeably, *see*, *e.g.*, *Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 636, 676 S.E.2d 96, 102 (2009) (interpreting the RUAA and concluding that "[a]s the order before us directs further arbitration, it is not a final judgment"), it asserts that judgments normally refer to a court's final ruling. Although this may be true, the majority's reasoning is conclusory: citing to a case for authority which quotes the familiar distinction made between a "*final* judgment" and an "*interlocutory* order," *see Veazey v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950) (emphases added), begs the question of whether judgments are typically final. That N.C. Gen. Stat. § 7A-27(b)(3)(a) (emphasis added) explicitly provides for appeal from "any *interlocutory judgment* or order" seems to indicate that even judgments may be interlocutory. The legislature acknowledged by statute that in drafting the FLAA, it considered certain provisions of the RUAA. *See* N.C. Gen. Stat. § 50-62(a) ("Certain provisions of this Article have been adapted from the Uniform Arbitration Act formerly in force in this State, the [RUAA] in force in this State, the North Carolina International Commercial Arbitration and Conciliation Act, and Chapters 50, 50A, 50B, 51, 52, and 52C of the General Statutes. This Article shall be construed to effect its general purpose to make uniform provisions of these Acts and Chapters[.]"). However, the majority appears to interpret the legislature's decision to exclude the term "final" from the FLAA, in contradiction to the RUAA, as evidence the legislature intended to include it.

Assuming that the legislature purposefully excluded "final," as the six subsections governing appeals pursuant to the RUAA and FLAA

are identical save for this lone difference, subsection (c) provides that "[t]he appeal shall be taken in the manner and *to the same extent* as from orders or judgments in a civil action." N.C. Gen. Stat. § 50-60(c) (emphasis added). N.C. Gen. Stat. § 7A-27(b)(3)(a), which provides for the extent of appeals in civil actions, permits a plaintiff the right to appeal an interlocutory order or judgment that affects a substantial right. *Id.* (permitting appeal from "*any* interlocutory order or judgment of a . . . district court in a civil action or proceeding that . . . [a]ffects a substantial right") (emphasis added).

Furthermore, this Court has considered whether an interlocutory order would deprive an appellant of a substantial right, even where there was no statutory right of appeal from arbitration. *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103 (engaging in a substantial right analysis of an interlocutory order specifically noted by this Court as nonappealable pursuant to the governing arbitration statute); *see also Laws v. Horizon Hous., Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696 (2000) (considering whether appeal from an order not listed in the governing arbitration statute affects a substantial right); *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 284, 314 S.E.2d 291, 292 (1984) (same). Therefore, even when a specific order or judgment is not listed as one of the types of appeal permitted under the FLAA, an appeal of an interlocutory order or judgment may still be permitted if an appellant can demonstrate that absent immediate review, he would be deprived of a substantial right.

II. Substantial Right Implicated

Orders denying or allowing discovery are generally interlocutory, and therefore, typically not appealable unless they affect a substantial right which would be lost if the ruling were not reviewed before final judgment. *Dworsky*, 49 N.C. App. at 447-48, 271 S.E.2d at 523 (citation omitted). Whether an interlocutory ruling affects a substantial right requires consideration of the facts of the case and the procedural context of the order on appeal. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999) (citation omitted). A party has a substantial right justifying immediate appeal of an order denying discovery if

> the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case[.]

Dworsky, 49 N.C. App. at 447-48, 271 S.E.2d at 523; *see also Tennessee-Carolina Transportation Inc. v. Strick Corp.*, 291 N.C. 618, 629, 231 S.E.2d 597, 603 (1977) (holding that a pretrial order denying discovery of evidence "highly material to the determination of the critical question to be resolved" in the pending action deprived appellant of a substantial right sufficient to justify immediate appeal); *Starmount Co. v. City of Greensboro*, 41 N.C. App. 591, 593, 255 S.E.2d 267, 268 (1979) (dismissing appeal of interlocutory order denying discovery in light of *Tennessee-Carolina Transportation*, because "the information denied the defendant in the case . . . [was not] crucial to its defense").

The majority does not attempt to distinguish this case from *Tennessee-Carolina Transportation* or *Dworsky* or even address those cases at all. Instead, the majority focuses its discussion on distinguishing two cases—*Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 219, 230 S.E.2d 380, 388 (1976) and *William C. Vick Constr. Co. v. N.C. Farm Bureau Fed'n*, 123 N.C. App. 97, 472 S.E.2d 346, *disc. review denied*, 344 N.C. 739, 478 S.E.2d 14 (1996)—that held the trial court was permitted to grant a party to an arbitration post-award discovery based on potential arbitrator misconduct, cases which plaintiff advanced to support his position that "the [d]istrict [c]ourt clearly *has authority to allow discovery* in the context of Plaintiff's Motion to Vacate." (emphasis added).

In light of the applicability of *Tennessee-Carolina Transportation* and *Dworsky* to plaintiff's appeal, I find it appropriate to address these cases. The substantial right claimed in the instant case originated from Tennessee-Carolina Transportation. As this Court recently explained:

> In *Tennessee-Carolina Transportation*, the defendant sold 150 trailers to the plaintiff, and the plaintiff subsequently sued the defendant for breach of an implied warranty of fitness based upon allegations that certain metal in the trailers did not "measure up to the proper degree of hardness." Prior to trial, the defendant appealed from the trial court's discovery order prohibiting the defendant from taking the deposition of an out-of-state expert witness who, at the plaintiff's request, had conducted tests on some of the trailers to determine the hardness of the relevant metal.
>
> The Supreme Court held that the appealed order affected a substantial right of the defendant because the order "*effectively preclude[d] the defendant from introducing*

> *evidence* of the 'readings' concerning the hardness of the metal obtained by the tests which [the expert] made"—evidence that was "*highly material to the determination of the critical question to be resolved*" at trial. The Court further noted that nothing in the record indicated that the taking of the expert's deposition would have delayed the trial or would have caused the plaintiff or the expert any unreasonable annoyance, embarrassment, oppression, or undue burden or expense.

Britt v. Cusick, 231 N.C. App. 528, 531-32, 753 S.E.2d 351, 354 (2014) (internal citations omitted) (emphasis added). In addition, the *Tennessee-Carolina Transportation* Court reasoned:

> It would be highly impractical to proceed with the third trial of this complex action and then let the defendant, if unsuccessful again before the jury, appeal for the reason that it was denied the right to offer evidence of the "readings" obtained by [the expert's] testing of a now undetermined number of the trailers. *The sensible thing to do is to determine this question* before the parties, their witnesses and the trial court are put to the expense and time consuming effort of a third trial on the merits.

Tennessee-Carolina Transportation, 291 N.C. at 625, 231 S.E.2d at 601-02 (emphasis added).

In *Dworsky*, the plaintiffs sought to recover hospital and medical expenses that the defendant-insurer refused to pay under an insurance policy. The plaintiffs appealed from the trial court's pretrial order denying a discovery request to inspect and copy the entire contents of a file maintained by the defendant in connection with the plaintiffs' claim under the insurance policy. This Court held that the pretrial order did not affect a substantial right when the plaintiffs had failed to identify, and the record failed to disclose, "what relevant and material information . . . sought [was] so crucial to the outcome of [the] case that it would deprive them of a substantial right and thus justify an immediate appeal." 49 N.C. App. at 448, 271 S.E.2d at 524.

Tennessee-Carolina Transportation and *Dworsky* illustrate the difference between a discovery order that affects a substantial right sufficient to justify immediate appeal and one that does not. *See*, *e.g.*, *Britt*, 231 N.C. App. at 532, 753 S.E.2d at 355 (distinguishing *Tennessee-Carolina Transportation* because the discovery order appealed from merely regulated the manner of discovery, but did not prohibit it, and

therefore did not "effectively preclude[] the defendant[s] from introducing evidence" that was "highly material to the determination of the critical question to be resolved"); *Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc.*, 206 N.C. App. 152, 161, 697 S.E.2d 439, 446 (2010) (distinguishing *Dworsky* because discovery order *granted* discovery and because the plaintiff failed to show the two-page memo in question was "highly material" to the "critical question to be resolved in the case"); *James v. Bledsoe*, 198 N.C. App. 339, 345-46, 679 S.E.2d 494, 498 (2009) (distinguishing *Dworsky* because the plaintiff failed to show the discovery sought was "highly material to a determination of whether [the defendants] published false statements with actual malice"). Unlike the cases seeking discovery of evidence that is not highly material to a critical issue in the pending action, the discovery order in the instant case precluded plaintiff from introducing evidence related to the communications, negotiations, and agreements to sell DSA to United Drug, evidence that is "highly material" to whether the arbitration award was "procured by corruption, fraud, or other undue means." N.C. Gen. Stat. § 50-54(a)(1). Plaintiff has sufficiently demonstrated that this discovery order affects the substantial right contemplated by *Tennessee-Carolina Transportation* and *Dworsky*.

In the instant case, the trial court concluded "[t]here is no pending action between Plaintiff and Defendant in which discovery may be propounded[.]" However, plaintiff's Motion to Vacate Arbitration Award and Set Aside Order based on allegations that the arbitration award was procured by fraud is pending. The "relevant and material information" plaintiff has identified would help the court to determine whether defendant concealed and omitted material facts regarding the eventual sale of DSA to United Drug. More specifically, the information would enlighten the court's inquiry as to "whether Defendant had begun negotiations with United Drug prior to settling Plaintiff's equitable distribution claim, and whether she withheld information supporting a higher valuation of her interest in DSA than what the parties had stipulated." The majority inaccurately describes plaintiff's investigation as a "fishing exhibition." This is an unfair characterization because plaintiff's discovery request is narrowly focused with a stated objective. *See Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 524 (noting that while some relevant and material evidence may be contained in the entire contents of the file the plaintiffs sought, "plaintiffs are not entitled to a fishing expedition to locate it").

Moreover, "[a]ppellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final

judgment." *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951) (citations omitted). The purpose of the rules limiting immediate appeal of interlocutory orders is "to prevent . . . appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (citations omitted).

In the instant case, dismissing plaintiff's appeal as interlocutory serves only to delay the administration of justice with regard to the pending action, as well as to burden both parties and the courts with unnecessary expense. The concern that the whole case is not presented for appeal is nonexistent when plaintiff is effectively precluded from discovering and introducing the "*clear* evidence[,]" *Pinnacle Grp., Inc. v. Shrader*, 105 N.C. App. 168, 171, 412 S.E.2d 117, 120 (1992), required to support the grounds under which he seeks to vacate the arbitration award. *See* N.C. Gen. Stat. § 50-54(a)(1) (providing for vacation of an arbitration award "procured by corruption, fraud, or other undue means").

The practical reasoning of the *Tennessee-Carolina Transportation* Court is particularly instructive: "It would be highly impractical" to proceed with plaintiff's motion to vacate without addressing the discovery order and let him, if unsuccessful, appeal again for the reason that he was denied his right to discover evidence regarding the timing of the sale. "The sensible thing to do is to determine this question" now. *Tennessee-Carolina Transportation*, 291 N.C. at 629, 231 S.E.2d at 603-04. Plaintiff's appeal should proceed.

III. Discovery Order

The majority correctly states that this Court reviews a trial court's discovery ruling under an abuse of discretion standard. *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 523. "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (internal citations omitted). The majority also correctly cites to *Fashion Exhibitors* and *William C. Vick Construction Co.* for the proposition that when "an objective basis exists for a reasonable belief" of arbitrator misconduct, parties may depose arbitrators as to that alleged misconduct and such evidence is admissible in a proceeding to vacate an award. However, I disagree with the majority's discussion and application of these cases to the instant case.

The majority determined that the trial court properly denied discovery by conflating "an objective *basis* . . . for a *reasonable belief*" with "specific, 'objective' evidence" of misconduct. It is a misinterpretation of significant magnitude to apply so broadly a holding that appears to be carefully narrowed. *See Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388 ("[W]e hold that *where an objective basis exists for a reasonable belief that misconduct has occurred*, the parties to the arbitration may depose the arbitrators relative to that misconduct[.]") (emphasis added). Discovery yields specific, objective evidence. Since "an objective basis . . . for a reasonable belief" precedes the "specific, 'objective' evidence" sought to be discovered, I do not believe the requirement under *Fashion Exhibitors* to show an "objective basis . . . for a reasonable belief [of misconduct]" equates with the majority's requirement to "identify specific, 'objective' evidence of misconduct."

Furthermore, I believe the holdings of these cases should extend beyond arbitrator misconduct and apply to the conduct of a party. The logical extension of the principle promulgated by *Fashion Exhibitors* is that if post-award discovery may be propounded to uncover evidence of arbitrator misconduct, it may also be propounded to uncover evidence that an award was "procured by corruption, fraud, or other undue means" of a party, as both are statutorily recognized as grounds to vacate an arbitration award. *Compare* N.C. Gen. Stat. § 1-569.23(a)(1) (specifying grounds to vacate under the RUAA), *with* N.C. Gen. Stat. § 50-54(a)(1) (specifying identical grounds to vacate under the FLAA). The majority's interpretation might effectively bar post-award discovery—discovery based on an "objective *basis* for a *reasonable belief*" of misconduct that is sought to identify the specific, objective evidence of misconduct required to vacate an arbitration award—unless the moving party can somehow first identify the specific, objective evidence of misconduct it seeks to discover. Declining to apply *Fashion Exhibitors* to the instant case, "would deprive the aggrieved party of its most effective means of ascertaining and proving the alleged misconduct." *Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388 (emphasis added).

IV. Specific, Objective Evidence of Misconduct

Even if *Fashion Exhibitors* and *William C. Vick Construction Co.* stand for the principle that the majority concludes—that a party must first identify "specific, 'objective' evidence of misconduct *prior* to seeking post-award discovery as part of a motion to vacate an arbitration award"—I conclude that plaintiff has carried his burden.

Plaintiff presented the following evidence: The trial court entered the Consent Order to Arbitrate Equitable Distribution and Child Support on 18 August 2011. The parties disagreed for months about the value of defendant's shares of stock in DSA. Both parties retained business appraisers to arrive at an agreeable valuation of the stock. Plaintiff's expert, A.E. Strange, based his valuation of defendant's shares with the understanding, based on his requests for the production of documents and interviews with defendant, that there were no written or oral offers to purchase DSA and defendant had no intent to sell any or all of DSA. Strange explained (emphasis added): "Information with respect to any written or oral offers to purchase DSA, or any plans to sell all or part of DSA, would have been material to my final valuation and conclusions, as information regarding a sale, potential sale, or plans to sell, is *critical* to any business valuation." In April 2012, plaintiff and defendant entered into a pre-arbitration agreement, which was submitted to the arbitrator in advance of the arbitration proceeding to settle equitable distribution. In this agreement, defendant contended her value of shares of stock in DSA ranged from $3,340,000 to $3,934,930, and plaintiff contended defendant's value of stock ranged from $3,750,000 to $4,275,000.

At arbitration, the parties stipulated that the value of defendant's ownership interest in DSA was worth $3,485,000. The parties entered into an Equitable Distribution Arbitration Award by Consent on 18 May 2012, which was judicially confirmed that same day. Only 48 days later, on 5 July 2012, defendant allegedly signed a letter of intent to sell DSA to United Drug for $28,000,000.[1] Nevertheless, the majority concluded that "[a]lthough Plaintiff finds this sequence of events suspicious, he has not directed this Court to any specific, 'objective' evidence of misconduct by Defendant that would necessitate post-award discovery." I disagree.

Plaintiff directed this Court to a series of e-mails beginning in November 2011 between Doug Townsend and Liam Logue discussing the potential sale of DSA to United Drug, which provided in pertinent part:

> Liam,
>
> Cathy Stokes asked me to follow up with you regarding yours and United Drug's interest in strengthening its US-based pharmacovigilence services.

1. Plaintiff indicates the exact ownership of defendant's shares at the time of sale was unknown but might have ranged between 67% to 86%.

My schedule the next couple of weeks is flexible. Are there a few times that would be convenient for you to discuss United Drug and DSA??

Thanks,

Doug Townsend

. . . .

Liam,

Enjoyed our discussion as well. I will see Cathy tomorrow to speak with her, but here's what we would like to do as next steps after executing a NDA [non-disclosure agreement]:

1. Conference Call. . . . The major agenda item for me would be to hear Mary Anne (and you as well) discuss thoughts about how DSA would strategically and operationally fit into the [United Drug] Alliance family. There is no "wrong" answer here. I am simply looking to see how Mary Anne thinks about acquisitions and operational integration which would include all thoughts about operating DSA as a standalone brand entity or simply merging its operations into the Alliance brand. . . .

. . . .

4. Delivery of Expression of Interest. Assuming the meeting in Durham does not derail interest levels, then we would ask that U-D/Alliance provide a written, non-binding expression of interest to DSA. . . .

From there, we can determine if there is good reason to consider moving forward with confirmatory diligence.

I will also reiterate that DSA is not necessarily for sale, but it is interested in examining unique strategic opportunities. I plan to recommend to Cathy that U-D/Alliance, based on a productive first discussion, appears to meet this test.

Let me know any additional thoughts you may have as I will be meeting with Cathy tomorrow afternoon.

Regards,

Doug

Plaintiff also directed this Court to Strange's affidavit, where Strange states that when he was retained by plaintiff in May 2011 to perform a valuation of defendant's ownership interest in DSA, Strange sent defendant a list of "Documents Requested for a Business Valuation," including "requests for copies of any buy-sell agreements and/or written offers to purchase or sell company stock," which defendant never produced nor later supplemented. Strange testified that when he interviewed defendant on 7 December 2011, he specifically asked defendant whether she had received any written or oral offers to purchase DSA over the past five years, and she responded that she had not. Strange stated that he asked defendant to describe any plans to sell all or part of DSA, and defendant replied that she had no such plans.

Plaintiff further directed this Court to defendant's testimony from depositions taken on 17 and 20 January 2012, which provided in pertinent part:

> Q. Have you discussed selling your business with anyone at any time?
>
> A. Yes.
>
> Q. Tell us about who that was with and the context of the conversation or offer or whatever it might be.
>
> . . . .
>
> A. There was no offer. We've had conversations throughout the course of DSA's existence as far as capital, structure, if it's buy-sell, if it's a merger opportunity, if it's a partnership opportunity. Whatever I can do best for the sake of the company is what I explore.
>
> Q. Tell me about all of those.
>
> A. The specifics of all of those?
>
> Q. Yes, ma'am.
>
> A. We have folks that send me emails every other day that I have no idea who they are or what they're all about, about opportunities to invest or to acquire or to partner, strategic alliances. I get those constantly and have been since we started.
>
> Q. Do you have those records?
>
> A. Most likely they'd be in my email.

> Q. Let's go back to the issue of selling. Has anyone ever made an offer to buy your business?
>
> A. No.
>
> . . . .
>
> Q. Doug Townsend. Have you discussed with him the subject of selling your business?
>
> A. Yes. I've discussed lots of topics with Doug.
>
> Q. And have you discussed any particular numbers that might be appropriate by which or for which you would sell your shares?
>
> A. No.
>
> Q. You've never discussed that?
>
> A. No.

It is undisputed that plaintiff's Motion to Vacate Arbitration Award and Set Aside Order is currently pending in district court. Indeed, the majority's decision to dismiss this appeal as interlocutory necessarily passes on this question and answers it in the affirmative. However, the majority states that plaintiff's motion to vacate is merely a "motion" and not an "action." Although it is clearly a motion, its filing constituted an action. *See*, *e.g.*, *Cortez Byrd Chips*, *Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 203 (2000) (labeling "motions to confirm, vacate, or modify [arbitration awards]" as "actions"); *see also* Black's Law Dictionary 83 (8th ed. 2004) ("An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong[.]" . . . "More accurately, it is . . . any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree . . . .").

The filing of this motion initiated an action, which is subject to the North Carolina Rules of Civil Procedure. Rule 26 provides that "[p]arties may obtain discovery regarding any matter . . . relevant to the subject matter involved in the pending action[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(1). Discovery is necessary for plaintiff to carry his evidentiary burden to demonstrate grounds to vacate the arbitration award. "[T]he party seeking to vacate [an arbitration award] must shoulder the burden of proving the grounds for attacking its validity[,]" *Pinnacle Grp.*, 105 N.C. App. at 171, 412 S.E.2d at 120 (citation omitted), and "[o]nly clear evidence will justify vacating an award." *Id.*

The information that plaintiff seeks pertains to the timing and circumstances of defendant's sale of her interest in DSA to United Drug. The interrogatories that plaintiff requested provided, in pertinent part:

> 3. Identify the date on which Defendant or anyone affiliated with DSA (including any third parties acting on behalf of DSA) first had any contact with United about a potential merger with, or purchase or acquisition of DSA by United or any of its affiliates. Identify all individuals who were involved in such contact and describe the method of such contact (whether email, phone, letter, or otherwise).
>
> . . . .
>
> 4. Identify the date on which United first presented DSA or Defendant with any Non-Disclosure Agreement ("NDA") or equivalent document regarding a potential merger with, or purchase or acquisition of DSA by United or any of its affiliates, and identify the date such NDA or equivalent document was signed by either party.
>
> . . . .
>
> 5. Identify the date on which United first presented DSA or Defendant with any Term Sheet or equivalent document, in draft form or otherwise, regarding a potential merger with, or purchase or acquisition of DSA by United or any of its affiliates.
>
> . . . .
>
> 6. Identify the date or dates on which United or any of its affiliates presented DSA or Defendant with any offer or proposal to purchase, acquire, or merge with DSA. Conversely, identify the date or dates on which DSA or Defendant presented United or any of its affiliates with any offer to be sold to, acquired by, or merged with United or any of its affiliates.
>
> . . . .
>
> 16. Identify the date on which you first discussed a potential merger with, or purchase or acquisition of DSA by United with any person or persons affiliated with DSA, including employees, and identify any such person or persons with whom you discussed the potential merger, purchase, or acquisition.

> . . . .
>
> 17. Identify the date on which DSA or Defendant first discussed a potential merger with, or purchase or acquisition of DSA by United with attorney Robert Ponton. . . .
>
> . . . .
>
> 18. Identify the date on which DSA or Defendant first discussed a potential merger with, or purchase or acquisition of DSA by United with attorney Theron "Tad" vanDusen. . . .
>
> . . . .
>
> 19. Identify the date on which DSA or Defendant first discussed a potential merger with, or purchase or acquisition of DSA by United with Robert McKenzie.
>
> . . . .
>
> 20. Identify the date on which DSA or United first commenced any due diligence activity, including requesting or providing documents and information, with respect to a merger with, or purchase or acquisition of DSA by United.
>
> . . . .
>
> 22. Identify the date of the first in-person meeting between DSA and Untied during which the parties discussed a potential merger with, or purchase or acquisition of DSA by United. . . .

Plaintiff also requested the production of documents pertaining to information relating to the sale of DSA to United and filed requests for admission with defendant. Subsequently, plaintiff filed motions to compel responses to plaintiff's first set of interrogatories, responses to plaintiff's request for production of documents, and responses to plaintiff's requests for admission with defendant. In his Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery, plaintiff requested from the trial court an order allowing the parties to engage in this "limited discovery."

It is well settled that

> parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions

> are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality.

Carolina-Virginia Fashion Exhibitors v. Gunter, 41 N.C. App. 407, 410-11, 255 S.E.2d 414, 417 (1979) (internal citations omitted). "Judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute." *Semon v. Semon*, 161 N.C. App. 137, 141, 587 S.E.2d 460, 463 (2003) (brackets omitted) (quoting *Fashion Exhibitors*, 41 N.C. App. at 410-11, 255 S.E.2d at 418).

As plaintiff explained in his Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery:

> A multi-million dollar corporate acquisition, particularly one involving a foreign company like Untied [sic] Drug, is a complex, multilayered process that can take months or even years to complete. It is highly unlikely, if not impossible, for DSA to have initiated negotiations with United Drug, arrived at mutually agreeable terms, performed sufficient due diligence, and executed a Letter of Intent in the span of about six (6) weeks. More likely, Defendant intentionally concealed the discussions and negotiations between DSA and United Drug during discovery and arbitration in an attempt to keep the apparent value of her ownership interest artificially low and convince Plaintiff to agree to an unfair settlement, thereby reaping a financial windfall by selling her ownership interest to United Drug months later. What is clear is that at the time of settlement, Plaintiff had been improperly led to believe, based on Defendant's failure to properly disclose material information, that Defendant had no intention or plans to sell her ownership interest in DSA, and Plaintiff decided to settle arbitration in reliance on that belief.

Until this Court decides whether plaintiff is permitted to engage in the limited discovery he requests, plaintiff will not be able to establish the grounds that the "award was procured by corruption, fraud or other undue means" to support vacating the award. N.C. Gen. Stat. § 50-54(a)(1).

V. Conclusion

Whether the evidence that plaintiff seeks would be favorable or unfavorable to his position is speculative. However, plaintiff has demonstrated the substantial right contemplated by *Carolina-Tennessee*

Transportation and *Dworsky* sufficient to justify immediate review. Plaintiff has identified, and the record discloses, "relevant and material information" that is "highly material" to the "critical question to be resolved" in his pending action: whether defendant concealed or otherwise failed to disclose the potential sale of DSA to United Drug during the parties' equitable distribution proceedings, thereby significantly diminishing the valuation of defendant's business. Furthermore, because the trial court denied plaintiff's Motion to Engage in Discovery and concluded that "[t]here is no pending action between Plaintiff and Defendant in which discovery may be propounded[,]" plaintiff has been "effectively precluded" from introducing additional evidence in his pending motion to vacate and set aside. However, plaintiff has presented an "objective basis . . . for a reasonable belief" of misconduct sufficient to justify the limited post-award discovery he now seeks. Because the discovery sought is limited to information related to the communications, negotiations, and agreements to sell DSA to United Drug, plaintiff's focused investigation is not a "fishing exhibition." Unless this Court reverses the trial court to allow discovery, plaintiff will be unable to introduce the "*clear* evidence[,]" required to prove the grounds that the "award was procured by corruption, fraud or other undue means" sufficient to vacate. N.C. Gen. Stat. § 50-54(a)(1).

For these reasons, I conclude plaintiff has a right to appeal the trial court's discovery order. In the alterative, I believe this Court should grant plaintiff's petition for *writ of certiorari* to address his appeal on the merits. The trial court abused its discretion by denying plaintiff's limited discovery request, and there is no just reason to delay plaintiff's appeal. The trial court's order should be reversed, and the case should be remanded.

UNITED STATES COLD STORAGE, INC., PLAINTIFF
v.
TOWN OF WARSAW, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT

No. COA 15-341

Filed 5 April 2016

Cities and Towns—declaratory judgment—termination of sanitary sewer services—outside corporate limits—voluntary annexation

The trial court did not err in a declaratory judgment action by allowing the Town of Warsaw to terminate sanitary sewer services to plaintiff USCS's facility located outside the corporate limits of the town provided that the Town was not unfairly discriminating between plaintiff and other non-residents similarly situated who currently received sewerage service. Further, the Town of Warsaw had the legal right to condition continued service to USCS's facility on the voluntary annexation of the facility into the Town's corporate limits, again provided that the Town was not unfairly discriminating.

Judge HUNTER, JR., dissenting.

Appeal by Plaintiff from order entered 24 October 2014 by Judge W. Douglas Parsons in Duplin County Superior Court. Heard in the Court of Appeals 24 September 2015.

The Brough Law Firm, PLLC, by Robert E. Hornik, Jr., for Plaintiff-Appellant.

Thompson & Thompson, P.C., by E.C. Thompson, III, for Defendant-Appellee.

DILLON, Judge.

United States Cold Storage ("USCS") appeals from a declaratory judgment allowing the Town of Warsaw to terminate sanitary sewer services to its facility, which is located outside the corporate limits of the Town of Warsaw. For the following reasons, we affirm.

I. Background

USCS owns a facility in Duplin County outside the corporate limits of the Town of Warsaw. USCS filed a complaint seeking a declaratory judgment alleging the following facts:

USCS operates cold storage and refrigeration facilities in a number of states. In 1995, USCS entered into an agreement with Duplin County to purchase a tract of land from the County on which to construct a large refrigerated warehouse facility. The agreement required Duplin County to pay for the extension of public water and sewer lines to the location where the facility would be built. The Town of Warsaw provided water and sewer services to the part of the county where the facility was to be located.

The 1995 agreement between USCS and Duplin County also contained a "no annexation provision" whereby Duplin County agreed to obtain a commitment from the Town of Warsaw *not* to seek annexation of the USCS facility for at least eight years. Specifically, the annexation provision stated as follows:

> [Duplin County] shall have obtained, at no cost to [USCS], an agreement with the City of Warsaw, North Carolina, that it will not, for a period of at least eight years following Closing, annex the Premises to the City of Warsaw. [Duplin County] shall, in connection with such Agreement, provide to [USCS] a certification or opinion from the solicitor of the City of Warsaw that the individual or individuals executing such agreement have the authority to do so.

In 1997, the USCS facility was completed, and the Town of Warsaw began providing public sanitary sewer service to the USCS facility in Duplin County. USCS pays the Town of Warsaw for this service.

In 2012, the General Assembly enacted annexation reform legislation which limits a municipality's ability to annex an area without the consent of the owners of the affected property.

In 2013, the attorney for the Town of Warsaw sent a letter to USCS requesting that USCS "voluntarily annex to the Town of Warsaw." The letter also stated that the Town of Warsaw was under no obligation to continue providing sewerage service to the USCS facility since the facility was located outside of its corporate limits.

USCS responded, notifying the Town of Warsaw that it did not desire to seek voluntary annexation of its facility into the Town's corporate

limits. (Agreeing to voluntary annexation would require USCS to incur approximately $88,000.00 in annual expenses in the form of property taxes paid to the Town.) The Town of Warsaw then responded, notifying USCS that it planned to cease providing sewerage service to the facility if USCS did not seek voluntary annexation.

In 2014, USCS commenced this declaratory judgment action. The trial court granted USCS's motion for a preliminary injunction, which restrained the Town of Warsaw from discontinuing sewerage service to the USCS facility.

In October 2014, following a hearing on the matter, the trial court entered an order dissolving the preliminary injunction, declaring that the Town of Warsaw was under no obligation to continue sewerage service to the USCS facility. Two days later, however, the trial court entered a temporary stay of this order pending appeal, thereby allowing USCS to continue receiving sewerage service at its facility from the Town of Warsaw until further court order. USCS has timely appealed the trial court's order declaring that the Town of Warsaw has no obligation to continue providing sewerage service to the USCS facility.

II. Standard of Review

This matter involves an action for declaratory relief, specifically seeking a court order which declares the rights of the parties concerning the provision of sewerage service by the Town to the USCS facility. Because this case is purely a question of law and a judgment will "settle and [] afford relief from uncertainty," we agree with the parties that a motion for declaratory judgment was properly heard in the trial court. *See* N.C. Gen. Stat. § 1-264 (2013). In the context of a declaratory judgment action, we review the trial court's findings of fact to determine whether they are supported by competent evidence, and we review the trial court's conclusions of law *de novo*. *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 596-97, 632 S.E.2d 563, 571 (2006).

III. Holding

We hold that the trial court correctly declared the rights of the parties. Specifically, we hold that the Town of Warsaw has the legal right to discontinue sewerage service to the USCS facility, *provided that* the Town is not unfairly discriminating between USCS and other non-residents similarly situated who currently receive sewerage service. Further, we hold that the Town of Warsaw has the legal right to condition continued service to USCS's facility on the voluntary annexation of the facility into the Town's corporate limits, again provided that the Town is not

unfairly discriminating between USCS and other non-residents similarly situated who currently receive sewerage service.

There may be some sympathy in USCS's contention that the Town is cutting off service to coerce USCS to seek voluntary annexation and that the effect of the trial court's order is that USCS will incur great expense, either in the form of the payment of annual property taxes to the Town or in the form of costs incurred to arrange for an alternate source of sewerage service to its facility. However, the town contends that it has been deprived of its ability to collect property taxes from a property owner who is enjoying Town services and that property taxes are a major source of the Town's total revenue. Wherever the sympathies may lie, however, we reach our holding by following the direction of our Supreme Court declared in *Fulghum v. Selma*, a factually similar case from the middle of the last century. In *Fulghum*, a property owner sued a municipality to enjoin the municipality from cutting off his water service, contending that the municipality had enacted an ordinance to coerce him to sell to the municipality certain water pipes he had built to supply water to non-residents. *Fulghum v. Selma*, 238 N.C. 100, 76 S.E.2d 368 (1953). The Court admitted that "there may be more than a modicum of truth in the assertion [regarding the municipality's] coercive purpose [in enacting the ordinance.]" *Id.* However, the Court recognized the function of the courts: "Be that as it may, we must remember that *hard cases are the quicksands of the law*[1] and confine ourselves to our appointed task of declaring the legal rights of the parties." *Id.* at 103, 76 S.E.2d at 370 (emphasis added).

IV. Analysis

Our General Assembly has authorized towns to own and operate water and sewer systems serving customers both *within and outside* their corporate limits. N.C. Gen. Stat. § 160A-312 (2014). And our Supreme Court has held that a town which chooses to provide such

1. This metaphor has been used on a number of occasions by our Supreme Court. An early use by that Court was in an opinion penned by Richmond Mumford Pearson, who would, in 1868, become the first Chief Justice in our State ever elected by the people. Specifically, in his first year on the Supreme Court, Justice Pearson reversed a decision he had made earlier that year while serving as a superior court judge, stating, with great humility: "After the argument in this Court, and by the assistance of the great learning and long experience of the *Chief Justice* and my brother [Frederick] *Nash*, I have satisfied myself that I was wrong. 'Hard cases are the quick-sands of the law[;]' in other words, a judge sometimes looks so much at the apparent hardship of the case as to overlook the law." *Lea v. Johnson*, 31 N.C. 15, 18-19 (1848).

service *to its inhabitants* has a duty, generally, "*to its inhabitants* to serve without discrimination." *Dale v. Morganton*, 270 N.C. 567, 571, 155 S.E.2d 136, 141 (1967) (emphasis added). *See also In re Annexation Ordinance*, 255 N.C. 633, 646, 122 S.E.2d 690, 700 (1961) (holding that when a town supplies water to its inhabitants, it "owes the duty of equal service to consumers *within its corporate limits*" (emphasis added)).

Our General Assembly has provided, however, that "in no case shall a [town] be held liable for damages to those *outside the corporate limits* for failure to furnish [water or sewer services]." N.C. Gen. Stat. § 160A-312(a) (emphasis added). In *Fulghum*, our Supreme Court held that a town has no obligation to furnish such services to non-residents. *Fulghum*, 238 N.C. at 104, 76 S.E.2d at 371 ("A municipality which operates its own water works is under no duty in the first instance to furnish water to persons outside its limits.").

When a town, however, seeks to provide water or sewer service *to non-residents*, our General Assembly has determined that said town may provide such services to non-residents "within reasonable limitations." N.C. Gen. Stat. § 160A-312(a). Our Supreme Court has described the nature of a town's authority in this respect as follows: "When a municipality exercises this discretionary power, it does not assume the obligations of a public service corporation toward nonresident consumers[,]" but rather, the town "*retains* the authority to specify the terms upon which nonresidents may obtain its water [or sewer service]." *Fulghum*, 238 N.C. at 104-05, 76 S.E.2d 371 (emphasis added).

Our Supreme Court has recognized that a town may obligate itself to non-residents *by contract* to provide services, stating:

> "The relationship existing between the [town and the non-resident who receives services] is contractual[.] The [town] has no legal right to compel residents living outside its corporate limits to avail themselves of the services[.] On the other hand, in the absence of a contract providing otherwise, such residents are not in position to compel the [town] to make such services available to them."

Atlantic Const. Co. v. City of Raleigh, 230 N.C. 365, 369, 53 S.E.2d 165, 168 (1949). The Supreme Court, though, has further stated that if there is nothing in the contract or inherent in the surrounding circumstances to indicate that the contractual obligation was to run in perpetuity or for some ascertainable period, "the contract is terminable at will by either party on reasonable notice to the other." *Fulgham*, at 104, 76 S.E.2d at 370.

In the present case, the evidence does not disclose that the Town of Warsaw has any contractual obligation to supply services to the USCS facility in perpetuity or for some ascertainable period beyond the initial eight (8) years. Further, there is no indication that any principles of estoppel compel the Town of Warsaw to continue providing such service. Rather, USCS constructed its facility in the 1990s with full knowledge that its facility could be subject to annexation by the Town after eight years. As such, the Town of Warsaw "retains the authority to specify the terms" by which USCS and others similarly situated may continue to receive sewer services.

USCS relies on our Supreme Court's opinion in *Dale v. City of Morganton* to argue that a municipality cannot deny service because of some controversy with the consumer "which is not related to the service sought." *Dale*, 270 N.C. at 572, 155 S.E.2d at 141. However, this principle is not applicable in the present case, since USCS is not an "inhabitant," *see id.* at 571, 155 S.E.2d at 141, and, unlike in *Dale*, the Town of Warsaw has no continuing duty (contractual or otherwise) to furnish services to USCS. Indeed, our Supreme Court has recognized a municipality's right to discriminate between its inhabitants and those customers outside its corporate limits by raising rates only on those existing customers outside the corporate limits. *See Fulghum*, *supra*.

While a municipality may discriminate between inhabitants as a class and non-inhabitants as a class in the provision of services, a municipality may not unlawfully discriminate *among non-inhabitants* in setting conditions for the provision of such services to said non-inhabitats. Here, though, the record demonstrates that the Town of Warsaw has *not* discriminated between USCS and its other commercial customers outside the Town's corporate limits. Rather, the record reflects that the Town made voluntary annexation a condition on all of them to continue receiving service.[2]

V. Conclusion

The Town has no right to compel USCS to annex into its corporate limits under the current statutory scheme. However, USCS's right to oppose annexation does not create a right of USCS to continue receiving sewerage service from the Town in perpetuity. The Town has no

2. USCS makes an argument that it has a vested property right in continued service and that, therefore, the Town of Warsaw's actions are in violation of USCS's due process rights. However, for the reasons stated in this opinion, there could have been no reasonable expectation on the part of USCS to have the right to sewerage service from the Town in perpetuity. Accordingly, we reject this argument.

contractual obligation to do so, nor does the Town have the obligation of a public service corporation to provide such service to USCS. *Id.*

AFFIRMED.

Judge STROUD concurs.

Judge HUNTER, JR., dissenting by separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

I agree with the majority that "hard cases are the quicksands of the law." *Fulghum v. Selma*, 238 N.C. 100, 103, 76 S.E.2d 268, 370 (1953). I dissent because I am not convinced it is proper for the Town of Warsaw to discontinue sewage services to USCS under the shadow of "voluntary" annexation.

North Carolina differentiates between the authority of a city operating a public utility within city limits and outside city limits. *See* N.C. Gen. Stat. § 160A-312 (2013). Generally, towns have no duty to furnish water and sewer services to persons outside the town limits. *Fulghum*, 238 N.C. at 104–105, 76 S.E.2d at 371. A town may, within its discretion, extend water and sewer services outside the city limits. *Id.* at 104–105, 76 S.E.2d at 371. However, this differentiation applies to the *initial decision* to extend a public utility outside city limits, not its operation once it is already in place.

"A public utility, *whether publicly or privately owned*, may not unreasonably discriminate in the distribution of its services or the establishment of rates." *Wall v. City of Durham*, 41 N.C. App. 649, 659, 255 S.E.2d 739, 745 (1979) (emphasis added). Reasonable classifications may be based upon cost of service, quantity received, time of use, etc. *Id.* If a city chooses to extend services outside city limits, it is reasonable to charge a different rate from that charged within the city limits. *Fulghum*, 238 N.C. at 104–105, 76 S.E.2d at 371. Our Courts have distinguished the aforementioned reasonable classifications from unreasonable classifications, including singling out a person due to an unrelated controversy.

Therefore, I disagree with the majority's reading of *Fulghum*. The majority quotes *Fulghum* as stating that the town "*retains* the authority to specify the terms upon which nonresidents may obtain its water [or sewer service]. *Id.* at 104, 76 S.E.2d at 371 (emphasis in majority).

However, a fuller reading paints a different picture: "[The town] retains the authority to specify the terms upon which nonresidents may obtain its water. *In exerting this authority, it may fix a different rate from that charged within the corporate limits*." *Id.* at 104, 76 S.E.2d at 371 (emphasis added). Additionally, any terms must be reasonable.

"It is well settled that a *privately* owned supplier of electric power, or other public service, may not lawfully refuse its service because of a controversy with the applicant concerning a matter which is not related to the service sought." *Dale v. City of Morganton*, 270 N.C. 567, 572, 155 S.E.2d 136, 141 (1967) (emphasis added). Our Supreme Court adopted this principle after noting it was accepted in other jurisdictions. *E.g.*, *Ten Broek v. Miller*, 240 Mich. 667, 216 N.W. 385 (1927), *Miller v. Roswell Gas & E. Co.*, 22 N.M 594, 166 P. 1177 (1917), *Seaton Mountain Electric Light v. Idaho Springs*, 49 Colo. 122, 111 P. 834 (1910), *Hicks v. City of Monroe Utilities Commission*, 237 La. 848, 112 So.2d 635 (1959); *see also* 55 A.L.R. 771.

In *Dale v. City of Morganton* the Court followed this principle and expanded it by applying it to a city.[1] In *Dale*, a house within the city limits became unfit for habitation and the city prohibited its occupancy. In response, the city refused to provide electricity to the house. Our Supreme Court said:

> Whatever may be the right of the city of Morganton, in the exercise of its governmental power, to forbid the occupancy of the plaintiff's house as a human habitation, that is a matter collateral to the duty of the city to supply electric power for use in this structure. A city may not deprive an inhabitant, otherwise entitled thereto, of light, water or other utility service as a means of compelling obedience to its police regulations, however valid and otherwise enforceable those regulations may be.

Dale, 270 N.C. 567, 572–573, 155 S.E.2d 136, 142 (1967). Thus, a provider of a public utility, whether privately or publicly owned may not discontinue its services solely on the basis of a collateral dispute. Additionally, the purpose given for termination of services may not be pretextual in nature. In contrast, service may be discontinued for non-payment or

1. I disagree with the Town of Warsaw's reading of *Dale* because the Court took a principle previously only applied to private utilities and *expanded* it to include municipally owned utilities. This requires an expansive reading of the principle instead of a narrow one as advocated by the town.

another non-discriminatory purpose related to the provision of the utility. *See Big Bear of North Carolina, Inc. v. City of High Point*, 294 N.C. 262, 268, 240 S.E.2d 422, 425 (1978).

The majority contends *Dale* is not applicable because USCS is not an "inhabitant." However, the majority misreads *Dale* as explicitly distinguishing between persons inside and persons outside municipal limits. The Court uses the term "inhabitant" because the facts of that case involve a person living within city limits. The term "inhabitant" was merely used to refer to the plaintiff, not to exclude any non-inhabitants from the general principle.

In *Dale*, the Court required the city to address the issue at hand by following the procedural requirements required in the housing code to declare a house unfit for habitation. *Dale*, 270 N.C. at 576, 155 S.E.2d at 144. The Court reasoned "substantial compliance with these procedures is a condition precedent to the authority of the city to forbid the use of a dwelling house for human habitation." *Id.* Therefore, the city had to follow the requirements in place to address the housing code violation instead of attempting to address the issue collaterally.

Here, the Town of Warsaw did not have a duty to extend sewer services to USCS. However, the Town of Warsaw elected to extend a public utility to an area outside the city. As a result of that decision, the town cannot unreasonably discriminate or discontinue services for a reason unrelated to the provision of the utility itself.

The principle that a discontinuance of service cannot be related to a collateral matter is a generally recognized principle that applies to all providers of public utilities without distinguishing between whether they are private, public, or inside or outside of the city limits. Thus, while the Town may discontinue sewer service for non-payment or other reasons related to the provision of sewer service, the town may not cut off service for a collateral dispute. The collateral annexation dispute is the only reason provided by the Town of Warsaw for discontinuing USCS's sanitary sewer services. I find no evidence in the record suggesting a proper purpose related to the provision of the utility for discontinuing the service.

As explained in *Dale*, another procedure exists to address the town's objective. While I understand annexation of the area including USCS would provide much needed tax revenue for the Town of Warsaw, the North Carolina General Statutes provide the proper procedures for annexation. The town must comply with these procedural requirements in order to annex the area including USCS. The town cannot condition

the provision of a public utility on voluntary annexation. It is improper to attempt to address this collateral issue by discontinuing a public utility to USCS.

Finally, conditioning the continued provision of utilities on "voluntary annexation" contravenes the purpose behind the legislature's annexation legislation in 2011. "[I]t is essential for citizens to have an effective voice in annexations initiated by municipalities." N.C. Gen. Stat. § 160A-58.50(6) (2015). The majority sets a dangerous precedent. The continued provision of water, sewer, and electric services should not be used to induce USCS or any other person to seek annexation or face termination of those vital utilities.

USCS also contends the Town of Warsaw violated its substantive due process rights. The North Carolina Supreme Court has long recognized:

> [I]f a case can be decided on either of two grounds, one involving a constitutional question, the other question of lesser moment, the latter alone will be determined. It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

State v. Lueders, 214 N.C. 558, 560-561, 200 S.E. 22, 23 (1938). Our appellate courts exercise judicial restraint in such cases. *See Martin v. Thornburg*, 320 N.C. 533, 548, 359 S.E.2d 472, 481 (1987).

However, since the majority addresses USCS's constitutional claim, I will address this issue. I am persuaded by USCS's argument that they have a protected property right in the continued provision of sanitary sewer service and that the Town of Warsaw arbitrarily or capriciously deprived them of that property right. *See Browning-Ferris v. Wake County*, 905 F.Supp. 312, 317–318 (E.D.N.C. 1995).

"The inquiry as to whether a party has acquired a vested property right under the common law of North Carolina centers on the party's reliance on a permit, the exercise of good faith, and the incurring of substantial expenditures prior to the revocation of a permit or the amendment to an ordinance. *Id.* at 318 (citing *Simpson v. City of Charlotte*, 115 N.C. App. 51, 443 S.E.2d 772 (1994)). USCS meets all of those requirements and therefore had a vested property right in the continued sewer service.

The next inquiry is whether that property right was deprived without due process of law. "The touchstone of due process is the protection of the individual against arbitrary action of government." *County of*

Sacramento v. Lewis, 523 U.S. 833, 845, 118 S.Ct. 1708 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974)). In other words, the purpose behind substantive due process is to prevent government abuse of power by "employing it as an instrument of oppression." *Id.* at 846, 94 S.Ct. at 1716. Here, the government is wielding its power to achieve its objective, violating the very purpose of due process protections. The government is forcing USCS to submit to "voluntary" annexation or lose access to vital utilities. Such arbitrary and capricious government action is in violation of constitutionally protected due process rights. I would reverse the court below.

CRYSTAL WHICKER, EMPLOYEE, PLAINTIFF
v.
COMPASS GROUP USA, INC./CROTHALL SERVICES GROUP, EMPLOYER, SELF-INSURED (GALLAGHER BASSETT SERVICES, INC., ADMINISTRATOR); AND NOVANT HEALTH, INC., ALLEGED JOINT EMPLOYER, SELF-INSURED, DEFENDANTS

No. COA15-1201

Filed 5 April 2016

Workers' Compensation—denial of benefits—no employment relationship

The Industrial Commission did not err by concluding that plaintiff was not entitled to workers' compensation benefits from defendant Novant Health, Inc. (Novant). Plaintiff failed to show she was a joint or lent employee of defendant Crothall Services Group (Crothall) and Novant. No express or implied employment contract existed between Novant and plaintiff. Crothall and Novant did not engage in similar work. Further, plaintiff's work was not under the control of or supervised by Novant.

Appeal by plaintiff from opinion and award entered 17 June 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 March 2016.

Law Offices of James Scott Farrin, by Michael F. Roessler, for plaintiff-appellant.

Young Moore and Henderson P.A., by Angela Farag Craddock, for defendant-appellee Compass Group USA, Inc./Crothall Services Group.

Orbock Ruark & Dillard, PC, by Barbara E. Ruark and Jessica E. Lyles, for defendant-appellee Novant Health, Inc.

TYSON, Judge.

Crystal Whicker ("Plaintiff") appeals from the Opinion and Award of the Industrial Commission, which concluded she is not entitled to workers' compensation benefits from Defendant Novant Health, Inc. ("Novant"). We affirm.

I. Background

Defendant Crothall Services Group ("Crothall") is a division of Defendant Compass Group USA, Inc. ("Compass Group"). Crothall contracts with healthcare organizations to provide standardized cleaning services of their facilities. In January 2013, Novant and Crothall entered into a contract, under which Crothall provided cleaning services to thirteen Novant healthcare facilities in North Carolina, including Forsyth Medical Center. Crothall provides 230 employees to clean Forsyth Medical Center's 1.8 million square foot facility.

The "Environmental Services and Supplies Agreement" between Crothall and Novant contains over fifty pages of Novant's specific expectations of Crothall's cleaning services. For example, Novant mandated that Crothall's housekeepers "[d]ust ledges over eye level including over bed lights," "spot clean interior of outside windows up to 6 feet," and "[d]ust all low ledges, furniture and equipment to a height of 6 feet from the floor."

Plaintiff was employed as an environmental services housekeeper by Crothall, and was assigned by Crothall to work at Forsyth Medical Center. On 2 June 2013, Plaintiff clocked out and left Forsyth Medical Center for her lunch break. Plaintiff fell, while walking in the parking lot of Forsyth Medical Center, and injured her left shoulder. She reported the injury to her supervisor at Crothall. Plaintiff was treated at the Forsyth Medical Center emergency room and diagnosed with a left shoulder fracture.

Compass Group filed a Form 19 (Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission) on 19 June 2013. On the same day, Compass Group filed a Form 61 (Denial of Workers' Compensation Claim), and alleged Plaintiff's injury "is not compensable as it is not causally related to her employment."

Plaintiff ultimately returned to her position as a housekeeper. On 4 November 2013, Plaintiff was observed by two other Crothall employees smoking an "e-cigarette" during an unauthorized break. Pursuant to Crothall policy, hourly employees must adhere to Novant's non-smoking policy, which prohibits smoking or the use of smokeless tobacco products while upon the hospital's premises. Plaintiff's employment was terminated later that day.

Plaintiff filed a Form 18 (Notice of Accident to Employer and Claim of Employee, Representative, or Dependent) on or about 11 November 2013, over five months after the accident. She listed both Crothall and Novant as employers on the Form 18. On or about 12 May 2014, Novant filed a Form 61 Denial of Plaintiff's claim.

Plaintiff's claim came for hearing before the Deputy Commissioner on 23 July 2014. The Deputy Commissioner concluded Plaintiff did not sustain an injury as the result of an accident during the course and scope of her employment. The Deputy Commissioner further concluded that Plaintiff was not a joint employee of Crothall and Novant, and denied her claim for workers' compensation benefits against Novant.

Plaintiff appealed the decision of the Deputy Commissioner to the Full Commission of the North Carolina Industrial Commission. The Full Commission made extensive and unchallenged findings to support its conclusion that no employment relationship existed between Plaintiff and Novant, including:

> 6. The [Environmental Services and Supplies] Agreement [between Novant and Crothall] provides that Crothall is responsible for furnishing all management, supervisory, and productive labor personnel required to accomplish the services for which they were contracted by Novant. It further states that these personnel shall be employees of Crothall. Novant did not specify how many employees were needed to accomplish the tasks of the EVS Agreement. Novant did not enter into any agreements with Crothall's hourly workers on an individual basis.
>
> 7. Novant is not involved in the hiring or firing of Crothall employees who work in Novant facilities. Crothall is solely responsible for hiring, training, managing, and directing the productive labor in the performance of their cleaning services in accordance with Crothall's policies and procedures.

8. When Crothall hires a new employee, they are offered employment benefits such as comprehensive medical insurance, dental insurance, vision plan, and a 401K account that are solely provided by Crothall. Crothall pays for workers' compensation coverage for all of its employees operating in Novant facilities. Novant does not offer Crothall employees salary, benefits, or insurance coverage.

9. Crothall is responsible for training employees and, per the EVS Agreement, Crothall is required to instruct its employees to comply with Novant's policies related to non-employed workers (those persons working in a Novant facility that are not considered employees of Novant) in order to ensure the health and safety of the hospital's patients and visitors, as well as ensuring compliance with all federal and state healthcare regulations.

10. Novant personnel are not allowed to control, direct, or supervise the work of Crothall employees. Novant personnel are not allowed to discipline or terminate Crothall employees for violation of a Novant policy. If a [sic] there is an issue with a Crothall employee at a Novant facility, Novant must request in writing that Crothall remove the employee from the account location.

11. Under the EVS Agreement, Crothall is also responsible for purchasing inventory and equipment that is necessary for them to provide cleaning services to Novant facilities. Crothall purchases these supplies from vendors at its sole discretion, without any input from Novant.

. . . .

14. Crothall maintains a supervisory structure consisting of a unit director, human resources manager, director of operations, three assistant directors, and nine operations managers in order to supervise and direct the labor of Crothall's hourly associates. Crothall's supervisors prepare duty sheets that outline the daily tasks the Crothall employees at FMC are supposed to undertake to perform the services that Novant contracted for in the EVS Agreement. Novant does not have any part in the creation of the duty sheets. They do not exercise any oversight into how Crothall determines how to clean the FMC facility.

> 15. Plaintiff was hired by Crothall to work as a housekeeper at [Forsyth Medical Center] in 2010. Upon hire, plaintiff was aware that Crothall could place her at any entity for which they provided services, but that they chose to place her at FMC. Plaintiff never entered into any contract of employment with any representative of Novant. At the time of her hiring, plaintiff was given a copy of the Crothall Hourly Employee Handbook. As part of her new-hire training, plaintiff was required to watch videos and take assessments on topics ranging from safety to how to clean a patient's room properly. Plaintiff's training was administered by Crothall personnel. Once plaintiff was assigned to work at FMC, Crothall personnel instructed plaintiff that she was expected to adhere to certain policies that Novant had in place at FMC.
>
> 16. Plaintiff testified that she knew she was an employee of Crothall while working as a housekeeper at FMC. Plaintiff testified that the way she was trained to interact with Novant personnel, and the reason she was required to adhere to certain Novant policies, was because Novant was a client and customer satisfaction was very important to Crothall.
>
> 17. During the course of her work day, plaintiff's labor was directed by her Crothall supervisors. If plaintiff was going to be tardy or absent on a day she was scheduled to work she was to notify her Crothall shift supervisors. Any disciplinary action was also administered to plaintiff by Crothall supervisors.

The Full Commission affirmed the holding of the Deputy Commissioner in an Opinion and Award entered 17 June 2015. Plaintiff appeals.

II. Issues

Plaintiff argues the Commission erred by concluding no employment relationship existed between Plaintiff and Novant, under either the joint employment doctrine or the lent employee doctrine.

III. Standard of Review

This Court reviews whether an employment relationship existed between Plaintiff and Novant under a *de novo* standard of review.

Morales-Rodriguez v. Carolina Quality Exteriors, Inc., 205 N.C. App. 712, 714, 698 S.E.2d 91, 93 (2010). "The issue of whether an employer-employee relationship existed at the time of the injury . . . is a jurisdictional fact." *Id.* (citing *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976)).

> [T]he finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

Id. (quoting *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261).

IV. Employment Relationship Between Plaintiff and Novant

Plaintiff argues the Commission erroneously concluded she was not an employee of Novant at the time of her injury. We disagree.

The Commission denied Plaintiff's claim for workers' compensation benefits from Novant and concluded Plaintiff failed to prove she was an "employee" of Novant under the Workers' Compensation Act. The Commission also denied Plaintiff's claim for workers' compensation benefits from Crothall, after it concluded Plaintiff failed to prove she had suffered an injury during the course and scope of her employment with Crothall.

The Commission's Opinion and Award does not address whether Plaintiff was injured during the course and scope of her alleged employment with Novant. Novant acknowledges in its brief that there is a general exception to the "going and coming" rule for injuries sustained by employees in parking lots owned and controlled by the employer. *See Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996) ("The general rule in this state is that an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment. . . . A limited exception to th[is] 'coming and going' rule applies when an employee is injured when going to or coming from work but is on the employer's premises." (citation omitted)). The parties stipulated the parking lot where Plaintiff fell was "under the exclusive control and management" of Novant. Plaintiff filed a claim against Novant after Crothall had denied her claim on the grounds that her injury was not in the course and scope of her employment with Crothall.

Under the Workers' Compensation Act, "[t]he term 'employee' means every person engaged in an employment under any appointment

or contract of hire or apprenticeship, express or implied, oral or written . . . .” N.C. Gen. Stat. § 97-2(2) (2015). Plaintiff bears the burden of proving the existence of an employer-employee relationship at the time of the injury by accident. *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261.

The parties agree Plaintiff was an employee of Crothall at the time of her injury. For Novant to be liable for Plaintiff’s injury, Plaintiff must initially prove Novant was a joint employer at the time of her fall. Under some circumstances, a person can be the employee of two different employers at the time of the injury. *See Leggette v. McCotter, Inc.*, 265 N.C. 617, 625, 144 S.E.2d 849, 855 (1965). As the Commission’s Opinion and Award explains, Plaintiff may rely upon two doctrines to prove she is an employee of two different employers at the same time: the joint employment doctrine and the lent employee doctrine. *Anderson v. Texas Gulf, Inc.*, 83 N.C. App. 634, 635-36, 351 S.E.2d 109, 109-110 (1986).

Joint employment occurs when

> a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for work[ers’] compensation.

Id. at 636, 351 S.E.2d at 110 (citation omitted) (emphasis deleted). Under the lent employee doctrine:

> When a general employer lends an employee to a special employer, the special employer becomes liable for work[er’s] compensation only if
>
> (a) the employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for work[er’s] compensation.

Id. at 635-36, 351 S.E.2d at 109-10 (citation and quotation marks omitted). The doctrines are similar. Under the joint employment doctrine,

the worker performs work at the same time in service to two employers. Under the lent employee doctrine, the "general employer" has temporarily "loaned" the employee to the "special employer." We agree with the Commission's conclusion that Plaintiff was not an employee of Novant under either of these doctrines.

A. Contract with Novant

Both of these doctrines require an employment contract to exist between Plaintiff and Novant. "[A]lthough there is a mutual business interest between the two employers, and perhaps even some element of control, joint employment as to one employer cannot be found in the absence of a contract with that employer." *Id.* at 638, 351 S.E.2d at 111. The lent employee doctrine requires the employee to have "made a contract of hire, express or implied, with the special employer." *Id.* at 635, 351 S.E.2d at 109. It is undisputed that Plaintiff and Crothall entered into an express employment contract. It is also undisputed that there was no express contract of hire between Plaintiff and Novant.

Plaintiff argues an implied contract existed, which was "created by a bundle of agreements" between Novant and Plaintiff. Specifically, Plaintiff asserts: (1) Novant permitted Plaintiff to work at Forsyth Medical Center, only if Plaintiff agreed to abide by a variety of Novant's policies and procedures; (2) Novant required Plaintiff to sign an agreement, which stated her ability to work at the hospital was "in consideration" for her agreement to abide by Novant's policies regarding confidentiality; (3) Plaintiff underwent various training sessions required by Novant, and took "tests that the hospital would give their employees," which pertained to Novant's mission, values, safety standards, privacy regulations, and infection prevention policies.

The relationship of employer-employee "is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied." *Hollowell v. N.C. Dep't of Conservation & Dev.*, 206 N.C. 206, 208, 173 S.E.2d 603, 604 (1934). The Workers' Compensation Act recognizes that employment contracts can be implied when it defines "employee" to include workers who labor under a contract that is either "express or implied." N.C. Gen. Stat. § 97-2(2).

"An implied contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 557, 548 S.E.2d 788, 793 (2001) (citations omitted). The agreement

between Crothall and Novant expressly states "[a]ll personnel required by [Crothall] to fulfill the requirements of any Agreement with [Novant] will be considered employees of [Crothall]."

In *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 677 S.E.2d 485, *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009), the plaintiff was employed by Drew, LLC ("Drew"), a company which contracted with other businesses to provide janitorial services. *Id.* at 407, 677 S.E.2d at 489. Drew entered into a contract with Steelcase, Inc. ("Steelcase") to clean a portion of Steelcase's facility. *Id.* An unhinged door fell onto plaintiff, while she was cleaning the Steelcase facility, and caused serious injuries. She sued Steelcase for negligence and obtained a favorable jury verdict. *Id.* at 409, 677 S.E.2d at 491. Steelcase argued on appeal the trial court erred in denying its motion for JNOV where the plaintiff was an employee of both Drew and Steelcase, and therefore subject to the exclusive remedy under the Workers' Compensation Act. *Id.*

As here, the contract between Drew and Steelcase stated that Drew's employees "will be employees of [Drew]." *Id.* at 412, 677 S.E.2d at 492. Drew paid the plaintiff's salary and benefits, withheld her taxes, and paid her workers' compensation insurance. *Id.* This Court held, "[s]ince Steelcase had by contract expressly provided that [the plaintiff's] employer would be responsible for the supervision and control of [the plaintiff's] work, Steelcase had not demonstrated its entitlement to a directed verdict or JNOV on that issue." *Id.* at 406, 677 S.E.2d at 489.

Here, Plaintiff was hired, paid, trained, and supervised by Crothall. The contract between Crothall and Novant expressly states she is an employee of Crothall. "It is a well[-]established principle that an express contract precludes an implied contract with reference to the same matter." *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (citations omitted).

Furthermore, Plaintiff's testimony shows she did not believe herself to be an employee of Novant. During her testimony Plaintiff agreed "that there was never any contract between [her] and Novant[.]" "It is essential to the formation of any contract that there be mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998) (citation and quotation marks omitted). Plaintiff fails to show mutual assent from both parties, because she denies the existence of a contract.

B. Nature of the Work

Under both the joint employment and lent employee doctrines, Plaintiff must show the work she was performing at the time of her injury was of the same nature as the work performed by Novant. Novant is in the business of operating hospitals. Plaintiff argues she was performing the work of both Crothall and Novant because the provision of cleaning services is an integral part of operating a hospital.

Under Plaintiff's rationale, virtually any contractor retained by Novant to upkeep its facilities could be deemed an employee of Novant. Novant provides medical services to the public and Crothall provides cleaning services to Novant. Novant provides medical services to patients in facilities it pays someone else to clean, but does not provide cleaning services to the general public. Likewise, Crothall provides cleaning services to facilities where healthcare services are provided to the public, but does not provide medical treatment to members of the general public.

Plaintiff has not cited and we find no authority to support her argument that the work she performed for Crothall was essentially the same as the work performed by Novant. Plaintiff has failed to prove this element of the joint employment and lent employee doctrines.

C. Control of Plaintiff's Work

Both doctrines also require Novant to have control over the manner and execution of Plaintiff's work. The agreement between Crothall and Novant explicitly provides that Crothall is solely responsible for hiring, training, managing and directing the personnel provided by Crothall to provide the contracted cleaning services "in accordance with [Crothall's] policies and procedures." "Employment, of course, is a matter of contract. Thus, where the parties have made an explicit agreement regarding the right of control, this agreement will be dispositive." *Harris v. Miller*, 335 N.C. 379, 387, 438 S.E.2d 731, 735 (1994).

Novant personnel lack authority to supervise, discipline, or terminate a Crothall employee for violation of a Novant policy. Plaintiff was terminated by two Crothall employees for violation of Novant's nonsmoking policy. Crothall has its own management structure present on site at Forsyth Medical Center.

Crothall's employees agree to Novant's "Non-Employed Worker" policies because they have been directed to so do by Crothall as a function of customer service. The agreement between Crothall and Novant states that Crothall is responsible for cleaning Novant's facilities in accordance

with their own policies and procedures. While the agreement requires all Crothall employees to comply with Novant's "Non-Employed Worker" policies, this is a condition precedent to any Crothall employee being assigned to a Novant facility. Novant requires the employees of any vendor working within their facilities to follow their policies to ensure the compliance with all federal and state healthcare regulations.

The supervision and control exercised by Novant was minimal, at best. The employee's necessary consent to the employment relationship "may be implied from the employee's acceptance of the special employer's control and direction. But what seems on the surface to be such acceptance may actually be only a continued obedience of the general employer's commands." *Collins*, 21 N.C. App. at 460, 204 S.E. 2d at 877 (citation omitted). Any direction Plaintiff may have been provided through Novant's policies was "continued obedience" to Crothall's own policies and obligations under its contract with Novant. *Id.* Plaintiff has failed to show Novant exercised control over Crothall's employees to render Plaintiff a joint or lent employee of Novant.

V. Conclusion

Plaintiff failed to show she was a joint or lent employee of Crothall and Novant. No express or implied employment contract existed between Novant and Plaintiff. Crothall and Novant do not engage in similar work. Plaintiff's work was not under the control of or supervised by Novant. The Commission's conclusion that Novant was not an employer of Plaintiff is affirmed.

AFFIRMED.

Judges GEER and INMAN concur.

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